Combating corruption in public procurement in developing countries: A legal analysis

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DEDICATION

To my Lord and Saviour Jesus Christ

To my lovely wife, Amanda, my children and family

Proverbs 13 v 11 (New King James Version)

"Wealth gained by dishonesty will be diminished,
But he who gathers by labour will increase".

The study reflects the legal position in Hong Kong-China, Botswana and South Africa as of 31 December 2016

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PUBLICATIONS AND CONFERENCE CONTRIBUTIONS EMANATING FROM THIS STUDY

- Corruption and Human Rights law in Africa (Book Review) Potchefstroom Electronic Law Journal 2018 (21).
- Self-cleaning in public procurement in Africa: Lessons from European Union (Juta 2017 forthcoming publication).
- Self-cleaning in public procurement under the new Namibia Public Procurement Act presented at the 2nd International Conference on Public Procurement Law Programme Africa (2016).
- Corruption in public procurement in South Africa: Is an anti-corruption clause in government contracts the panacea? (3rd Mercantile Law Conference 2015 University of Free State, South Africa).
- Culture of corruption in public procurement: Lessons from Nkandla (Humboldt Foundation North-West University, South Africa 2015).
- Fighting corruption in public procurement in Africa under the proposed International Anti-corruption Court: An African response (NWU Faculty of law celebrating 50 years conference North-West University, South Africa).
- Dependency of 'independent' anti-corruption agencies and fighting corruption in public procurement: The case of South Africa (University of Nottingham 28-29 April 2014).

ABSTRACT

This study was motivated by the quest to find new innovative and practical ways of combating public procurement corruption in developing countries to complement the existing measures. This was achieved by comparing three jurisdictions, Hong Kong-China, Botswana and South Africa. The focus was on how each jurisdiction uses the following four measures to curb public procurement corruption: criminal measures; administrative measures; institutional measures and civil activism measures.

It was established that Hong Kong uses what this study has classified as the traditional approach of combating public procurement corruption. The traditional approach is characterised by the use of a separate procurement legal framework and a separate corruption legal framework to curb public procurement corruption. Its strengths are in the strict enforcement of criminal measures that are anchored on a robust legal framework, a clear anti-corruption strategy, an independent anti-corruption agency (institutional measure), effective internal oversight and a strong political will. However, the following weaknesses of the traditional approach were identified: over reliance on criminal measures; excessive dependence on one enforcement institution; it neglects the development of administrative measures and has weak civil activism measures.

It was established that Botswana uses what this study has classified as the classical approach of combating public procurement corruption. The classical approach is characterised by a procurement legal framework that incorporates very minimum anti-corruption provisions. The anti-corruption provisions in the procurement legislation are enforced by an external institution (the DCEC in the case of Botswana) which relies heavily on the criminal measures. Its strengths are the following: a strong legal framework which provides for a clear anti-corruption strategy; it has anti-corruption units in each Ministry and it has a dedicated Corruption Court. However, the classical approach has the following weaknesses: the anti-corruption agency is not adequately independent as it under the control of the executive (the President in the case of Botswana); lacks effective internal oversight mechanisms; weak political will; neglects the development of administrative measures and civil activism measures are almost non-existent save for the media.

It was established that South Africa uses what this study has classified as the traditional cum silo approach of combating public procurement corruption. The traditional cum

approach is characterised by multiple procurement legislation which has certain but minimum anti-corruption provisions and a separate corruption legal framework. Multiple anti-corruption agencies are prone to political interference which renders them ineffective and unfit for purpose. Its strength is in the promotion and protection of civil activism measures (right to access information, right to freedom of speech and legal protection of whistle-blowers). Notable weaknesses of the traditional cum silo approach are: the poor enforcement of criminal measures; there is no lead anti-corruption agency that spearheads and coordinates all cases of public procurement corruption; there is no clear anti-corruption strategy; the administrative measures such as debarment are poorly enforced; it has multiple anti-corruption institutions that lack focus and professionalism which results in political manipulation.

The thesis concluded by suggesting a new approach, the contemporary approach to combating public procurement corruption which entails the enactment of a single procurement legislation (model law) the *Public Procurement and Combating of Public Procurement Corruption Act* (hereafter PPCPPC). The contemporary approach advocates for the regulation of public procurement and the combating of public procurement corruption in one legislation. This legislation (PPCPPC) takes into account, the current demands for public procurement as well as future developments of public procurement. These include but are not limited to self-cleaning, cyber-crime and public procurement corruption as well as the role of foreign convictions for debarment purposes. The envisaged PPCPPC will in addition to regulating public procurement, encompass the best criminal measures, administrative measures, institutional measures and civil activism measures. In addition, the contemporary approach through the PPCPPC proposes two new innovations: the corruption clearance certificate and a mandatory anti-corruption clause in all government contracts.

Keywords

Public procurement; combating corruption; procurement principles; transparency, accountability, competitiveness, fairness, equality, integrity, value for money, criminal measures; administrative measures, institutional measures, civil activism measures traditional approach, classical approach, contemporary approach, corruption clearance certificate, mandatory anti-corruption clause, self-cleaning, debarment, Hong Kong, Botswana, South Africa.

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LIST OF ABBREVIATIONS

AACSB	Architectural and Associated Consultant Selection Board
ACU	Anti-Corruption Units
ADB	Asia Development Bank
AFDB	African Development Bank
AfriMap	Africa Governance Monitoring and Advocacy Project
AGSA	Auditor General South Africa
ANC	African National Congress
APEC	Asia-Pacific Economic Forum
AU	African Union
AU Corruption Convention	African Union Convention on Preventing and Combating Corruption
BBC	British Broadcasting Corporation
BBBEE	Broad-Based Black Economic Empowerment Act 53 of 2003
BDP	Botswana Democratic Party
CCSB	Central Consultants Selection Board
CECA	Corruption and Economic Crime Act 13 of 1994
CIDB	Construction Industry Development Board Act 38 of 2000
CoEs	Commissions of Enquiry
COMESA	Common Market for East and Southern Africa
CPA	Criminal Procedure Act 51 of 1977
CSO	Civil Society Organisations
CTB	Central Tender Board
DA	Democratic Alliance
DATC	District Tender Committee
DCEC	Directorate on Economic Crime and Corruption
DPP	Directorate of Public Prosecutions
DTC	Departmental Tender Committees
EACSB	Engineering and Associated Consultant Selection Board

ECA	United Nations Economic Commission for Africa
ECJ	ECOWAS Court of Justice
ECOWAS	Economic Community of West African States
EEC	European Economic Community
EFF	Economic Freedom Fighters
ESKOM	Electricity Supply Commission
EU	European Union
FSTB	Financial Services and the Treasury Bureau
GDP	Gross Domestic Product
GLD	Government Logistics Department
GLDTB	Government Logistics Department Tender Board
GOPAC	Global Organisation for Parliamentarians Against Corruption
GPA	Government Procurement Agreement
HKC/CL FTA	Free Trade Agreement between Hong Kong, China and Chile
HKC/NZ CEPA	China/New Zealand Closer Economic Partnership on Government Procurement
HKSAR	Hong Kong Special Administrative Region
ICAC	Independent Commission Against Corruption
ICAC Ordinance	Independent Commission Against Corruption Ordinance Cap 204
ICRC	Independent Complaints Review Committee
IEC	Independent Electoral Commission
IMF	International Monetary Fund
InterpoI	International Criminal Police Organisation
IRC	Independent Review Committee
LCA	Local Authorities Procurement and Disposal Act 17 of 2008
LegCo	Legislative Council
MFMA	Local Government: Municipal Finance Management Act 56 of 2003
MSA	Local Government: Municipal Systems Act 32 of 2000

MTC	Ministerial Tender Committee
MTN	Mobile Telecommunications Company
NAFTA	North American Free Trade Agreement
NPA	National Prosecuting Authority
NT	National Treasury
NTR	National Treasury Regulation
OAG	Office of the Auditor General
OCPO	Office of the Chief Procurement Officer
OECD	Organisation for Economic Community and Development
OM	Operations Manual
PAJA	Promotion of Administrative Justice Act 3 of 2000
PBO	Prevention of Bribery Ordinance of 30 June 1997
PFMA	Public Finance Management Act 1 of 1999
PFO	Public Finance Ordinance Cap 2, L.N 109 of 1983
POCA	Prevention of Organised Crime Act 29 of 2004
PP	Office of the Public Protector
PPADB	Public Procurement Asset Disposal Board
PPPFA	Preferential Procurement Policy Framework Act 5 of 2000
PPR	Preferential Procurement Regulations
PSC	Public Service Commission
PwC	PricewaterhouseCoopers
PWTB	Public Works Tender Board
SACU	Southern Africa Customs Union
SADC	Southern African Development Community
SAPS	South African Police Service
SBP	Standard Bidding Packages
SCM	Supply Chain Management
SERAP	Socio-Economic Right Accountability Project
SIU	Special Investigations Unit
SPADC	Special Procurement and Asset Disposal Committee
SPR	Stores and Procurement Regulations

TI	Transparency International
UK	United Kingdom
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNCATOC	United Nations Convention against Transnational Crime
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL ML	United Nations Commission on International Trade Law Model Law on Procurement of Goods, Construction and Services
UNECA	United Nations Economic Community for Africa
UNEP	United Nations Environment Programme
UNODC	United Nations Office on Drugs and Crime
UNOPS	United Nations Office for Project Services
UNPAN	United Nations Public Administration Network
WTO	World Trade Organisation
WTO GPA	World Trade Organisation Plurilateral Government Procurement Agreement

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CHAPTER 1: INTRODUCTION

1.1 Background

The purpose of this chapter is to provide a broad outline of the subject matter of this study, which is a discussion of the measures of combating public procurement corruption in developing countries. The study focuses on four specific anti-corruption measures, which are: criminal measures; administrative measures; institutional measures; and civil activism measures.[1] To this end, this chapter proceeds as follows: first there is a broad introduction of public procurement, which includes the definition of public procurement and the problem statement setting out the context of the study; second, a brief introduction of public procurement corruption; third, a brief introduction of the measures for combating public procurement corruption; fourth, the scope and methodology of the study; and fifth, an outline of the chapters of the study.

1.2 Public procurement

Governments[2] in developing countries are faced with the challenge of providing quality basic services for their citizens and creating conducive environments for promoting economic investment and sustaining economic growth. Services such as roads, schools, hospitals, energy and other infrastructure are sourced and procured by governments as well as other organs of state[3] or state-owned enterprises and are supplied mainly from private suppliers.[4] These transactions can be classified into three main broad categories, namely goods, services and works. The supplying and regulation of these goods, services and works is known as public procurement.

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1 This study acknowledges that whilst there are other anti-corruption measures these four have been chosen because they best capture the generally accepted public procurement anti-corruption measures.

2 This study has attempted to state the law and the legal position as at 1 January 2017. However, some legal developments after 1 January 2017 have been considered but not entirely.

3 In the field of public procurement an organ of state is given a broader meaning to include parastatals or any other institution identified in legislation that has uses public funds to procure goods, services and works.

4 Government departments may also supply each other with such services. This is known as inter-departmental supply. It excludes the participation of the private sector. However, when considering inter-departmental supply, governments should not deliberately exclude the supplier but should engage in inter-departmental supply in a transparent and fair manner.

1.2.1 Definition

The process of purchasing of these goods, services and works by the government or an organ of state is called government procurement or public procurement.[5] The terms, government procurement or public procurement, will be used interchangeably in this study. Public procurement creates an interface between politicians,[6] citizens[7] and private suppliers[8] on the one hand, and government employees[9] and employees of organs of state (who are not necessarily government employees) on the other.[10]

1.3 Problem statement

Public procurement occupies the greatest percentage (15-25%) of total government expenditure in developing countries.[11] According to the World Bank 2016 Benchmarking Public Procurement Report,[12] an estimated US$9.5 trillion is spent on public procurement each year globally.[13] Of this amount, US$820 billion is spent by developing countries annually.[14] However, the inability to manage the public-private interface in public procurement, either intentionally or unintentionally, creates opportunities for public procurement corruption.

According to the United Nations Economic Commission for Africa, it is estimated that in Africa alone, approximately US$148 billion is lost annually due to public procurement corruption.[15] This is quite alarming and points to a need for an examination of the measures that are in place to control and minimise this corruption. For one thing, this suggests that existing domestic anti-corruption measures may be ineffective in combating public procurement corruption or that

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5 Arrowsmith *Public Procurement Regulation* 1.

6 They have the greatest influence on what needs to be procured. Also, they participate in the formulation of laws, regulations and policies on procurement.

7 They are the recipients of the greatest percentage of goods, services and works procured.

8 They are the major suppliers of the goods, services and works procured.

9 As a general rule they are responsible for the administration of the procurement process.

10 Some employees or workers are employed by state-owned enterprises or parastatals. These employees are not civil servants and they are not regarded as government employees. However, state-owned enterprises or parastatals engage in huge quantities of procurement. They are funded by public moneys.

11 Karangizi and Ndahiro *Public Procurement Reforms* 115.

12 World Bank Group Benchmarking Public Procurement 1.

13 Transparent International *Curbing Corruption in Public Procurement: A Practical Guide* 4.

14 Transparent International *Curbing Corruption in Public Procurement: A Practical Guide* 4

15 UNECA 2015 http://www.uneca.org/stories/corruption-public-procurement-case-infrastructure-africa.

other innovative measures should be considered to fortify the existing anti-corruption measures.

1.3.1 South Africa

South Africa which is the focus of this study has been chosen because it is a developing country and it has one of the highest rates of public procurement corruption in Africa.[16] According to Corruption Watch, South Africa loses an estimated R30 billion annually through corruption[17] and the greatest amount is undoubtedly from public procurement. Further, it has also been argued that with the advent of constitutional democracy in 1994, South Africa has lost an estimated R700 billion through corruption,[18] with public procurement contributing the largest amount. Numerous causes have been identified[19] but this study has identified two legal problems that may have contributed to these challenges, namely, the public procurement legal framework and the legal framework for combating public procurement which is mainly criminal.

1.3.1.1 Public procurement legal framework

South Africa's public procurement legal framework traces its genesis from section 217 of the *Constitution of the Republic of South Africa*, 1996 (hereafter Constitution).[20] In an attempt to give effect to section to section 217, South Africa has enacted over 10 pieces of legislation that have a direct bearing on public procurement.[21] In practice, this has created enormous challenges for the proper coordination, implementation and administration of public procurement in South Africa. These problems have been exacerbated by the fact that, the multiple procurement legislation creates different procurement departments at national level which seem to be weak in observing sound procurement principles. These procurement departments appear to implement procurement legislation

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16 *Economic Freedom Fighters* v *Speaker of the National Assembly and Others*; Democratic *Alliance* v *Speaker of the National Assembly and Others* 2016 ZACC 11 para 52.

17 Corruption Watch 2018 www.corruptionwatch.org.za/poor-hurt-most-by-dodgy-procurement/.

18 Section27 2016 section27.org.za/2015/10/an-open-letter-to-the-i-told-you-sos/.

19 Williams & Quinot 2008 South *African Law Journal* 248-258

20 A detailed discussion is done in paragraph 5.3.3.1.

21 A detailed discussion is done in paragraph 5.3.3.1.

inconsistently due to the seemingly lack of clarity in the interpretation of some of the procurement provisions.

In addition, procurement at provincial and local government is conducted through provincial departments and the relevant local government procurement departments.[22] The provinces and local government procurement departments have their own procurement legislation as well as policies which must conform with the primary procurement legislation, the *Public Finance Management Act* 1 of 1999 (hereafter PFMA).[23] This means that, South Africa does not have dedicated procurement legislation but has over 15 pieces of legislation that impact public procurement.[24] Further, the country does not have a single body that coordinates public procurement.[25]

Against this background, South Africa is in the process of promulgating a new procurement bill which is hoped to transform public procurement on South Africa.[26] One hopes that, the envisaged public procurement law will be tight enough to address the current loopholes that may have been caused by the multiple procurement legislation currently in place.

1.3.1.2 Measures of combating public procurement corruption

In light of the above discussion, the focus has also been on the legal measures of combating public procurement corruption in South Africa. In terms of the law, South Africa relies mostly on the criminal justice system to curb public procurement corruption. The primary legislation is the *Prevention and Combating of Corrupt Activities Act* 12 of 2004.

The criminal justice system in South Africa has over 10 institutions that have a mandate to curb public procurement corruption.[27] This has created a criminal justice system that is weak in that it seems to be a mechanism for cadre deployment in

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22 Quinot *An Institutional Legal Structure for Regulating Public Procurement* X.
23 Quinot *An Institutional Legal Structure for Regulating Public Procurement* X.
24 Quinot *An Institutional Legal Structure for Regulating Public Procurement* X.
25 Bolton "Public Procurement in South Africa" 187-189.
26 Sabinet 2017 www.sabinetlaw.co.za/finances/articles/draft-public-procurement-bill-under-construction.
27 Williams & Quinot 2008 South *African Law Journal* 248-258A detailed discussion is done in para 5.5.3.1.

influential posts. These cadre deployees may act as gate keepers for high ranking politicians that are alleged to be involved in public procurement corruption.

In addition to the criminal justice system, South Africa has put in place administrative measures to curb public procurement corruption.[28] In particular, South Africa uses debarment measures (mandatory and discretionary).[29] However, it seems that there is no consistency in the application of these measures at national, provincial and local government level.[30] The wide discretion that procurement officials have at all spheres of government, may be one of the major causes of public procurement corruption.

While, the country has corruption legislation, however, it does not have a properly defined anti-corruption strategy.[31] Also, South Africa does not a have a dedicated anti-corruption agency but has over 10 anti-corruption agencies.[32]

Furthermore, there are no clear legal rules that aggrieved suppliers who have been debarred can use to have the debarment period either reduced or eliminated.[33] Some aggrieved suppliers (those who can afford) opt for judicial review of administrative action in order to challenge debarment.[34] On the contrary, those affected by the debarment or threatened by debarment but are unable to afford legal costs may be faced an option either to pay a bribe to the procurement officials or lose their right to participate in the tender process.

Regrettably, these disconcertingly numerous instances of public procurement corruption are taking place in an environment where there is a relatively strong legal framework of international instruments, regional instruments and domestic legislation dealing with public procurement and combating corruption.[35] These adverse findings have triggered this study, especially the need to examine how public procurement principles and specific anti-corruption measures (criminal; administrative;

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28 Bolton *The Law of Government Procurement* 4.
29 Bolton 2010 *Potchefstroom Electronic Law Journal* 1-28.
30 Bolton "Public Procurement in South Africa" 182.
31 Madonsela "Corruption and its Challenges in Africa" 5, 8 and 10.
32 Madonsela "Corruption and its Challenges in Africa" 8-12.
33 Williams-Elegbe *Fighting Corruption in Public Procurement* 76
34 *Viva Engineering Project CC and Another v Minister of Water Affairs and Others* para 14.
35 Greenwood and Klotz "The Fight against Public procurement corruption" 115.

institutional; and civil activism) are being enforced to combat public procurement corruption.

One of the biggest concerns for developing countries and their international partners is to come up with a model that best addresses public procurement corruption.[36] Therefore, the question is: what are the most practical and effective measures that can be taken to combat public procurement corruption in developing countries?[37] To answer this question, this study focuses on criminal law measures, administrative measures, institutional measures and civil activism measures as legal mechanisms to combat public procurement corruption.

In doing so, the discussion examines three anti-corruption models used in combating public procurement corruption as they are implemented in three different jurisdictions with the aim of distilling the success factors underpinning each model. These are the public procurement anti-corruption models of Hong Kong-China,[38] Botswana and South Africa. These jurisdictions have been carefully selected for their individual uniqueness in the field of public procurement.[39]

The problem faced by South Africa, seems to resonate with most developing countries. It for this reason that this study has chosen Hong Kong which has arguably the best anti-corruption model and Botswana an African country which has one public procurement legislation and has adopted the Hong Kong's anti-corruption model. The result being that Botswana has consistently been ranked as the least corrupt African country by Transparency International.[40]

This study intends to develop an anti-corruption model that cannot only be used by South Africa but can also be adopted by other developing countries to curb public

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36 OECD *Preventing Corruption in Public Procurement* 7-9.

37 This study does not engage in the endless search for the "best" measures, because what has been described and recommended as the "best" public procurement anti-corruption measures have not been found to be practical in a number of developing countries. Instead, this study seeks to find the most practical public procurement anti-corruption measures, because "practical" measures are country-specific and not generic.

38 Hong Kong-China is not the Peoples Republic of China. In actual fact, Hong Kong-China is part of mainland China. However, Hong Kong-China exercises limited autonomy in terms of governance and administration. It has its own laws and its own parliament. The head of the administration is the governor. Further discussion will be found in Chapter Three.

39 See para 1.8.1 below.

40 Transparency International 2018 http://www.transparency.org/country/BWA.

procurement corruption. The envisaged model can be adjusted without much difficulty to suite the individual needs of each developing country.

1.4 Public procurement in context

Public procurement is a practice that has been in existence for decades,[41] yet its proper classification and recognition within the sphere of governance has been overlooked in many jurisdictions.[42] As a legal discipline, it has gained recognition over the last twenty years, especially in Europe.[43] In Africa, it is still in its infancy as a legal discipline, in comparison other disciplines in the public law domain. [44]

However, much of that scarce research on the subject in Africa has been undertaken in South Africa.[45] It is also worth mentioning that the world over, a few academic institutions have started to offer public procurement as a university course or module.[46]

In the sub-sections on public procurement that follow, the discussion turns to the public procurement process, the principles of public procurement and the place of public procurement in socio-economic development.

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41 Thai 2011 *Journal of Public Procurement* 9.

42 Bolton *The Law of Government Procurement* 4.

43 Arrowsmith *EU Public Procurement Law: An Introduction* 44; See also Arrowsmith "The Revised Agreement on Government Procurement" 285-337; Arrowsmith "The UNCITRAL Model Law on Procurement: Past, present and future" 1-93; Arrowsmith *The Law of Public and Utilities Procurement*; Arrowsmith "Reviewing the GPA: The Role and Development of the Plurilateral Agreement after Doha" 74-96; Arrowsmith "Transparency in Government Procurement: The Objectives of Regulation and the Boundaries of the World Trade Organisation" 96-126; Arrowsmith, Linarelli and Wallace Jr *Regulating Public Procurement National and International Perspectives* 20; Walker "Setting up a Public Procurement: The Six Step Method" 3-12.

44 Cook and Sarkin "Is Botswana the Miracle of Africa?" 458-489; Good "Corruption and Mismanagement in Botswana: A Best Case Example?" 499-521; Mbao and Komboni "Promotion of Good Governance and Combating Corruption and Maladministration: The Case of Botswana" 49-71; Kumar and Carbon "The Regulatory Framework for Public Procurement in Botswana" 25-45; Basheka "Public Procurement Reforms in Africa: A Tool for Effective Governance of the Public Sector and Poverty Reduction" 131-157.

45 Bolton 2010 *Potchefstroom Electronic Law Journal* 1-28; Bolton 2010 *Journal of South African Law* 101-117; Williams-Elegbe "A Perspective on Corruption and Public Procurement in Africa" 336-369; Quinot 2008 *Stellenbosch Law Review* 101-121; Quinot 2011 *Public Procurement Law Review* 193-207; Williams & Quinot 2008 South *African Law Journal* 248-258; Anthony *The Regulation of Construction Procurement in South Africa;* de la Harpe *Public Procurement Law: A Comparative Analysis*.

46 University of Nottingham *Executive LLM Programme in Public Procurement*; University of South Africa *Bachelor of Commerce in Public Procurement*; University of Turin Master in Public Procurement; Bangor University Public Procurement Law and Strategy LLM.

1.4.1 Procurement process

The procurement process or cycle can be defined as the different stages that a government or a procuring entity puts in place in order to purchase supplies, largely from the private sector.[47] These stages may relate firstly to the process of identifying if it is necessary to procure certain goods, services or construction works.[48] Secondly, it may also refer to the procurement method that is employed to secure such goods, services or construction works from suppliers.[49] Thirdly, the public procurement process may also refer to the successful management of the procurement contract.[50] Various procurement cycles have been recommended[51] and in this study the four-staged procurement cycle suggested by Bolton[52] is preferred. This procurement cycle consists of the following stages: (i) planning (pre-tendering);[53] (ii) the process of procurement (tendering);[54] (iii) the conclusion of the contract; and (iv) contract administration (post award).[55]

1.4.1.1 Planning

Planning generally refers to organising all the factors that must be taken into account, which will eventually influence the decision to procure.[56] In other words, it is at the planning stage that the political-economic fusion takes place. In a well-structured planning phase, the socio-economic benefits of a procurement decision should be favoured at the expense of political expediency. In most governments, it is the politicians or political appointees or political executives (minister, administrator, governor, senator or secretary) who may trigger the need for procurement, with the power to approve or reject procurement, depending on the jurisdiction.[57]

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47 Chartered Institute of Procurement and Supply "Procurement and Supply Cycle" 1.
48 Bolton *The Law of Government Procurement* 14.
49 Bolton *The Law of Government Procurement* 14-15.
50 UNPCDC *Public Procurement Manual* 16.
51 Ware et al "Corruption in Procurement" 81.
52 Bolton *The Law of Government Procurement* 13.
53 This stage involves needs assessment, planning and budgeting, definitions of requirements and choice of procedures.
54 This stage comprises of pre-qualification, invitation to tender, evaluation and the awarding of the tender.
55 This stage is made up of contract management as well order and payment.
56 Handfield *The Procurement Process – Creating a Sourcing Plan* 1.
57 Goldman, Rocholl and So *Political Connections* 3.

This is followed by the procurement itself, which entails, *inter alia*, ensuring that such procurement is legally sustained.[58] At this stage, too, procurement approvals should be obtained where necessary.[59] Budget determinations and allocations are also discussed at the planning stage.[60] In some cases, where it is discovered that the envisaged procurement is not legally provided for, then the necessary legal processes are effected to cater for that procurement.[61] Where existing legislation requires amendment to facilitate the procurement, then such amendments are made. Without proper planning, the government and other procurement stakeholders may incur unnecessary cost.[62]

1.4.1.2 Tendering

After the planning stage, the procuring entity must decide how it needs to procure the goods, services or works.[63] In other words, the procuring entity must decide the method of soliciting bids from potential suppliers. Other key elements of tendering include: evaluation methods; contract award phases and standstill periods. This is called the tendering phase.

Different procurement methods are at the disposal of the procuring entity, the most common of which are open tendering, restricted tendering, single sourcing, negotiated tendering and quotations.[64] The choice of the procurement method is influenced by a number of factors, such as whether or not it is a response to an emergency, whether or not the requisite legislation and government policy are in place, if it pertains to state security, if it is a sensitive matter, and the availability of the goods, services or works.[65]

However, it is generally accepted that open tendering is the most preferred method of tendering because it promotes transparency and value for money *inter alia*, and limits the opportunities for corruption.[66] Whatever the method opted for, the preferred

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58 Caldwell and Bakker "Procurement Process in the Public Sector" 430.
59 Caldwell and Bakker "Procurement Process in the Public Sector" 430.
60 Rhodd "Pricing Strategies and Cost Analysis in Public Procurement" 689.
61 UNCITRAL *Guide to Enactment of the UNCITRAL Model Law on Public Procurement* 16.
62 OECD *Integrity in Public Procurement: Good Practice* 14.
63 Bolton The Law of Government Procurement 14.
64 OECD *Public Procurement Rules, Procedures and Practice* 19.
65 OECD *Public Procurement Rules, Procedures and Practice* 19.
66 OECD *Public Procurement Rules, Procedures and Practice* 19.

bidder is selected and the stage that follows is the contract administration or contract management.

1.4.1.3 Contract administration

Once the preferred supplier has been awarded the contract, both the procuring entity and the preferred supplier enter into the contract administration phase.[67] The preferred supplier must perform the contract in compliance with the contractual terms.[68] In this process, the procuring entity should not make it impossible or too onerous for the supplier to perform the procurement contract, and vice-versa.[69] It is important to note that, there is also contract management and different types of procurement contracts which forms part of contract administration. However, these will not be discussed in detail in this study.

Depending on the nature of the procurement, contractual terms may be varied due to the economic, political and other circumstances of a jurisdiction.[70] For example, a supplier may ask for advance payment,[71] part payments, or adjustments to the initially agreed price in line with inflation.[72] The practice of advance or part payments is strongly discouraged due to the fact that it may be unfair to other suppliers or it may be used for corrupt purposes but in practice it is done.[73]

1.4.2 Procurement principles

At international level, the *United Nations Commission on International Trade Law Model Law on Public Procurement* (UNCITRAL ML),[74] the *World Trade Organisation Plurilateral Government Procurement Agreement* (1996) (hereafter WTO GPA)[75] a number of public procurement principles have been agreed. Developed and developing countries alike have incorporated most of these principles either in the

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67 Bolton 2009 *Stellenbosch Law Review* 266-304.
68 Bolton *The Law of Government Procurement* 30.
69 Bolton 2010 *Potchefstroom Electronic Law Journal* 1-28.
70 Lloyd "Bid Protests: Theory and Practice" 574.
71 A recent example in South Africa was the prepayment of an estimated US$40 million by the Electricity Supply Commission (hereafter Eskom, which is South Africa's power producer) to Tegeta Exploration & Resources Ltd for the supply of coal.
72 Lawther "Contract Negotiations" 564.
73 Burkhardt and Crowley 2016 https://www.bloomberg.com/news/articles/2016-06-13/eskom-paid-guptas-tegeta-in-advance-for-coal-to-ensure-supplies.
74 Arrowsmith and Nicholas "The UNCITRAL Model Law" 7.
75 WTO 2017 https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm.

form of procurement legislation or in terms of their procurement policies and methods.[76]

The most frequently agreed public procurement principles are transparency, integrity, accountability, equality, competitiveness, fairness and value of money.[77] This set of specific principles is not exhaustive, but it has become the foundation upon which modern procurement is anchored.[78] The characteristics of these principles will be dealt with in more detail in the subsequent chapters. Suffice it to state that "transparency" generally refers to the openness and availability of information at each stage of the procurement process.[79] "Integrity" usually denotes the moral fibre (attitude and behaviour) of the individual procurement officer and that of the supplier.[80] Another aspect of integrity has to do with the honesty with which the entire procurement process is managed.[81] "Accountability" generally refers to the giving of an honest explanation of why certain procurement decisions were taken.[82]

"Equality" generally refers to the treatment of all suppliers in the same manner, subject to legally permissible exceptions.[83] "Competitiveness" generally refers to the openness of the procurement method to allow as many suppliers as possible to compete for the tender.[84] "Fairness" generally refers to the procedure of identifying the needs, evaluation and awarding of tender, which should not prejudice any potential supplier.[85] "Value for money" generally refers to accessing quality goods at a price (not necessarily the lowest bid) which is most beneficial to the government.[86]

1.5 Procurement and socio-economic development

Most developing countries have put in place legal mechanisms and polices that enable them to use public procurement to advance the social and economic

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76 UNCITRAL *Guide to the Enactment of UNCITRAL ML* 31.
77 Lynch *Public Procurement: Principles, Categories and Methods* 8-9.
78 OECD *Principles of Integrity in Public Procurement* 21-22.
79 Lynch *Public Procurement: Principles, Categories and Methods* 9.
80 Lynch *Public Procurement: Principles, Categories and Methods* 10.
81 Lynch *Public Procurement: Principles, Categories and Methods* 10.
82 de la Harpe *Public Procurement Law: A Comparative Analysis* 587.
83 Helmrich 2015 *African Public Procurement Law Journal* 60.
84 Graells "Public Procurement and Competition: Some Challenges" 13.
85 Graells "Public Procurement and Competition: Some Challenges" 24.
86 Graells "Public Procurement and Competition: Some Challenges" 26.

development of their citizens (secondary objectives).[87] This manifests in the form of targeted procurement, where public procurement is designed to empower previously disadvantaged people.[88] This may include reserving certain forms of procurement for groups such as women, youth, physically challenged people or in some cases for specific races.[89]

For example, in South Africa the Constitution and legislation make provision for public procurement that largely favours the historically disadvantaged, mainly black people.[90] The model in South Africa takes into account the fact that black people were largely excluded from being awarded government contracts due to the inequities of apartheid.[91] Botswana, as will be revealed in Chapter Four, despite not having been affected by apartheid, has put in place procurement protectionist measures that favour the participation and promotion of the *Batswana* in the procurement intercourse.[92] However, Hong Kong does not widely use targeted procurement due to its membership of the WTO GPA, which limits the application of targeted procurement.

1.6 Corruption

This part briefly discusses corruption in general, to extrapolate the fundamentals of corruption and more specifically public procurement corruption. The discussion focuses briefly on the definition, types and forms of general corruption.[93] This will be followed by a brief discussion of public procurement corruption – its definition, types and forms - and the measures that have been recommended to combat it.

1.6.1 Definition

Numerous studies have been conducted with the aim of understanding corruption.[94] Some studies have focussed on the philosophical approach in order to define

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87 Quinot "Promotion of Social Policy Through Procurement" 380.
88 Quinot "Promotion of Social Policy Through Procurement" 380.
89 Quinot "Promotion of Social Policy Through Procurement" 380.
90 Quinot "Promotion of Social Policy Through Procurement" 380.
91 Bolton *The Law of Government Procurement* 59-61.
92 Kumar and Carbon "The Regulatory Framework for Public Procurement in Botswana" 27.
93 A detailed discussion of these and other definitions on corruption is done in para 2.8.2.
94 Williams 2007 *European Current Law* xi-xiv ; Williams & Quinot 2008 South *African Law Journal* 248-258; Robertson-Snap 1999 *Third World Quarterly* 589-602; Quansha 1994 *Journal of African Law* 191-196; de Speville B 2010 *Asia-Pacific Review* 1-26.

corruption,[95] while other studies have focussed on the theoretical foundations to define corruption.[96] There are also some studies that define corruption from a sociological point of view, others from a political point of view,[97] and others from an economic point of view.[98]

All of this has created varying and sometimes conflicting definitions of corruption.[99] It is clear from a scrutiny of these studies that there is no consensus on the definition of corruption.[100] The importance of defining corruption properly is that, the definition determines the anti-corruption strategy that governments should employ. This means that an incorrect definition of corruption may result in the adaption of an inappropriate or ineffective anti-corruption strategy which will be ineffective in combating this evil.

Two particular definitions, one by the World Bank and the other by Transparency International (hereafter TI), have been widely quoted by many scholars when defining corruption. The World Bank[101] defines corruption as the "misuse or abuse of public office for private gain", whereas, TI[102] defines corruption as the "abuse of entrusted power for private gain". Both definitions allude to the fact that the incentive for corruption is "private gain."

Nye's definition has become one of the most accepted definitions of corruption, as noted by Williams-Elegbe[103] and affirmed by Olaniyan.[104] It is that:

> Corruption is behaviour which deviates from the formal duties of a public role because of private-regarding (personal, close family, private clique) pecuniary or status gains; or violates rules against the exercise of certain types of private-regarding influence. This includes such behaviour as bribery (use of reward to pervert the judgment of a person in a position of trust); nepotism (bestowal of patronage by reason of ascriptive relationship rather than merit); and misappropriation (illegal appropriation of private or public resources for private-regarding uses).

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95 Charron Lapuente and Rothstein *Quality of Government and Corruption* 27.
96 Stachowicz-Stanusch "Corruption Immunity Based on Positive" 36.
97 Buchan and Hill *An Intellectual History of Political Corruption* 117.
98 Detzer *The Impact of Corruption on Development and Economic Performance* 3-4.
99 See para 2.8.2.
100 Bolton *The Law of Government Procurement* 57.
101 Olaniyan *Corruption and Human Rights Law in Africa* 45-46.
102 Olaniyan *Corruption and Human Rights Law in Africa* 45-46.
103 Williams-Elegbe *Fighting Public Procurement Corruption* 1.
104 Olaniyan *Corruption and Human Rights Law in Africa* 44.

This definition is favoured by a number of scholars, because it seems to embrace both public and private sector corruption. Aid agencies have their own preferred but varying definitions of corruption. An in-depth examination of these and other definitions is performed in Chapter Two as part of the study of the theoretical foundations of corruption.[105] It should be noted that whether it is in the private sector or public sector, corruption manifests itself in different forms, such as bribery and collusion, for instance.

1.6.2 Types and forms of corruption

There are various types of corruption.[106] These should not be confused with the forms of corruption. The distinction is that a form of corruption is a manifestation of the corrupt act while a type of corruption is the condition under which the corrupt act (the form of corruption) takes place.[107] The types of corruption include grand corruption, petty corruption, political corruption and systemic corruption, to list just a few.

Grand corruption can be defined as that type of corruption that takes place usually at the highest level of government with the sanction of the top-most political leadership of a particular government, regardless of whether it is a unitary, federal, provincial or local government.[108] Most scholars confuse grand corruption and political corruption. Grand corruption is not political corruption. The latter is defined as that type of corruption that is perpetrated by politicians, notwithstanding whether they are in the ruling party or not.[109] The purpose of being categorical about this distinction is to contradict the misconception that political corruption takes place only when the corrupt act is performed by the party which is in control of the government or is in control of the legislature.

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105 See para 2.8.2; Also see, Kolstad, Fritz and O'Neil *Corruption, Anti-corruption Efforts and Aid* 3.

106 ADB/OECD "Anti-Corruption Initiative" 1-12; Alilovic "E-Procurement impact on Corruption" 12-137.

107 ICAC date unknown "Conceptualising Corruption". http://www.icac.org.hk/newsl/issue30eng/button4.htm.

108 Ivory *Corruption, Asset Recovery and the Protection of Property* 22.

109 Heidenheimer "Terms, Concepts and Definitions" 3-5.

Petty corruption, as opposed to grand corruption, involves day-to-day corrupt acts that take place usually within the public service at large.[110] An example would be the payment of a bribe to a public official to facilitate the speedy processing of a passport, permit or licence. Systemic corruption occurs when the entire governance system, that is, the top political leadership, the economic system, the legislature, law enforcement and the judiciary is perverted by corruption.[111] Simply put, the act of corruption is, in this instance, perceived as "normal" and is therefore ignored or negligibly sanctioned. Furthermore, those who commit corruption in a context where systemic corruption prevails are actually rewarded, and those that decide to conduct transactions in the right way are "punished" by the corrupt system.[112]

1.6.3 Forms of corruption in general

As described above, the forms of corruption are the actual manifestations of the corrupt act. These involve the specific corrupt acts that are committed by the parties, that is, the corruptor and the corruptee.[113] The corruptor is defined as the party that is supplying or offering a benefit to another. The corruptee is the recipient of the benefit, whether directly or otherwise. According to the World Bank, the most notable forms of corruption are bribery, fraud, extortion, embezzlement and nepotism.[114] Of these, bribery is the most common. It is defined by the World Bank as the "offering of money, services or other valuables to persuade someone to do something in return".[115] This happens in both the public and the private sectors.

Private sector corruption is the abuse of private office for private gain, and takes place between two private sector entities to the exclusion of any public officer or entity.[116] In the current study, the focus is on public sector corruption. This happens when the procuring official or entity is offered a bribe or some undue advantage to

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110 Dahlstrom "Bureaucracy and Corruption" 111.
111 Sanchez "Criminal Entrepreneurship: A Political Economy of Corruption" 72.
112 Johnston "Fighting Systemic Corruption" 89.
113 Lawler *Frequently Asked Questions on Anti-Bribery and Corruption* 100.
114 World Bank *Corruption Assessment Handbook* 147.
115 Fjeldstad and Isaken "Anti-Corruption Reforms" 6.
116 Transparency International 2016 https://www.transparency.org/topic/detail/private_sector/.

influence the outcome of a government contract in order to favour the corruptor, who is the supplier, bidder or contractor.[117]

1.7 Public procurement corruption

Public procurement corruption is a subset of corruption, as noted above. It has so far not been precisely defined.[118] Further analysis of the challenges of defining public procurement corruption is provided in Chapter Two,[119] but in the interim it may be said that this study has adopted its own definition of public procurement corruption, which is that, it is the intentional abuse of entrusted public authority, devoid of any legal defence, by a procuring official for personal gain or other satisfaction (which includes but is not limited to emotional or psychological satisfaction) with or without the inducement of a contractor, a sub-contractor or an agent of the contractor or sub-contractor.

1.7.1 Forms of public procurement corruption

Although some forms of corruption, such as bribery, permeate both general corruption and public procurement corruption, there are some specific forms of corruption that are uniquely associated with public procurement corruption. Ware *et al*[120] identify these as collusion, bid rigging, kickback, bid suppression, complementary bidding, bid rotation, custom or market allocation, low balling, and the use of front or shell companies. These forms of public procurement corruption distinguish the measures that have been adapted and suggested to curb them from the measures to curb corruption in general.

1.8 Measures for combating public procurement corruption

Numerous measures for combating public procurement corruption have been discussed by different scholars.[121] These measures have been provided for in

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117 These words (supplier or bidder or contractor) will be used interchangeably in this study.
118 Soreide *Corruption in Public Procurement* 2-3.
119 See para 2.8.2.
120 Ware *et al* "Corruption in procurement" 69.
121 Beth "The OECD Checklist" 57-71; Ehlermann "Fighting bribery in public procurement 45-57; Madonsela "Corruption and Governance Challenges"; OECD *Specialised Anti-Corruption Institutions Review of Models* 18.

international instruments, regional instruments, and domestic anti-corruption instruments.[122]

1.8.1 International framework

At international level, the *United Nations Convention against Corruption* (2003) (hereafter UNCAC), which entered into force in 2005, specifically addresses corruption.[123] The UNCAC is a response to the challenge of corruption as an international problem, which transcends national boundaries.[124]

Of particular importance is article 9, which specifically deals with public procurement. Article 9, as will be shown in Chapter Two,[125] encourages State Parties to ensure that they "take necessary steps to establish appropriate systems of procurement".[126] These "appropriate procurement systems" should ensure that the procurement system is capable of resisting, detecting and punishing public procurement corruption. Furthermore, the UNCAC gives guidelines and legal principles that should be adhered to with regards to personnel administration (hiring, retention and promotion in the public sector).[127]

1.8.2 Regional framework

At a regional level several agreements have been signed which encompass measures for curbing public procurement corruption, namely the *Inter-American Convention against Corruption* (1996); the *Convention on the Fight against Corruption Involving Officials of the European Community or Officials of the Member States of the European Union* (1998); the *Criminal Law Convention on Corruption* (1999); the *Civil Law Convention on Corruption of the Council of Europe* (1999); the

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122 UNDOC *Corruption Compendium of International Legal Instruments on Corruption* 1-279. As at 18 January 2016 UNCAC had 140 signatories and 178 parties.

123 Joutsen "The United Nations Convention against Corruption" 306. Prior to the UNCAC, reliance on combating corruption at international level was placed on the United Nations Convention on Transnational Organized Crime, which is still in operation.

124 The UNCAC preamble states, *inter alia*, that the State Parties were concerned about the seriousness of the problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice, and jeopardizing sustainable development and the rule of law. The preamble further states that the State Parties were concerned about the links between corruption and other forms of crime - in particular organized crime and economic crime, including money laundering.

125 See para 2.10.1.

126 UNODC *UN Convention on Corruption* 12.

127 Article 7.

African Union Convention on Preventing and Combating Corruption (2003); and the *Southern African Development Community Protocol against Corruption* (2001). Some of these instruments will be discussed in Chapter Two.[128]

1.8.3 Domestic legislation

At domestic level, a number of developing countries have tried to follow the prescripts laid down in the international and regional instruments.[129] In addition, domestic legislation that combats corruption is influenced by the different legal systems, state administration and governance structure. Some countries have taken the traditional approach in which public procurement legislation is exclusively used for procurement purposes and does not include anti-corruption measures.[130] Countries that use the traditional method rely on separate anti-corruption legislation to combat public procurement corruption.[131] Other countries have separate procurement and corruption legislation but have in their procurement legislation express provisions to combat public procurement corruption.[132]

This study coins the fusion of regulating public procurement and combating public procurement corruption in the same legislation as the classical approach to combating public procurement corruption. The classical approach to combating public procurement corruption recognises the long-established tradition of separating procurement legislation from corruption legislation but at the same time has appreciated the gap that such separation has created which has resulted in the escalation of public procurement corruption in most developing countries.[133]

1.9 Scope and methodology

This study is a qualitative macro-comparison of Hong Kong, Botswana and South Africa, with respect to the manner in which these three jurisdictions use legislation (international instruments, regional instruments and domestic law) and other legal mechanisms in combating public procurement corruption. The principal focus of the

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128 See para 2.4.
129 Brunelle-Quraishi 2011 *Notre Dame Journal of International and Comparative Law* 101-166.
130 OECD *Bribery in Public Procurement* 17.
131 Manyathi 2013 *De Rebus* 1-3.
132 DB/OECD *Curbing Public Procurement Corruption* 11.
133 Further discussion of the classical approach is done Chapter 7 (see para 7.3.2.).

comparison is to examine how each jurisdiction uses criminal measures, administrative measures, institutional measures and civil activism to curb public procurement corruption.

Three jurisdictions have been selected instead of fewer or more in order to give the study focus, so that the challenges and successes that are associated with the subject matter are clearly ventilated. One of the advantages of this decision is that it should bring to the table "a much richer range of solutions",[134] thus enabling scholars and government policy makers the "opportunity to find a 'practical solutions'" to curbing public procurement corruption.[135]

The study makes use of primary and secondary legal sources. The following primary sources have been identified: international and regional instruments, as well as the domestic legislation of each of the jurisdictions under study. The secondary sources include scholarly writings and publications from international organisations such as the World Bank, TI, the European Union (hereafter EU), the Organisation for Economic Cooperation and Development (hereafter OECD), the Southern Africa Development Community (hereafter SADC), and the Common Market for East and Southern Africa (hereafter COMESA) to mention just a few.

1.9.1 Choice of jurisdictions

The jurisdictions under consideration have been *inter alia* under British occupation, have attributes of the common law legal system, adhere to judicial precedent, recognise subordinate legislation in particular legislative regulations that are used to create most administrative institutions in public procurement, and are all constitutional democracies.

1.9.1.1 Hong Kong

Hong Kong has been selected mainly because it has arguably the best anti-corruption model headed by a single anti-corruption agency, namely the Independent Commission Against Corruption (hereafter ICAC). In addition, it has a very strong component of civil participation within its anti-corruption strategy. Although Hong

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134 Zweitgert and Kotz *An Introduction to Comparative Law* 15.
135 Zweitgert and Kotz *An Introduction to Comparative Law* 15.

Kong has exclusive procurement legislation, it places more emphasis on enforcing criminal law by the ICAC as part of the anti-corruption strategy to combat public procurement corruption, rather than using procurement legislation to aid in the curbing of public procurement corruption, that is, the traditional approach to combating public procurement corruption. Also, it has two procurement bodies, namely the Government Logistics Department and the Development Bureau, which are responsible for the coordination of public procurement. Below is a brief discussion that further justifies why Hong Kong is a suitable jurisdiction in this study.

1.9.1.1.1 Public procurement system: an overview

In Hong Kong, the applicable law is the *Public Finance Ordinance* (hereafter PFO), which is the primary procurement legislation.[136] In addition to the PFO, the *Stores and Procurement Regulations* (hereafter SPR) and the Financial Circulars issued by the Treasury Bureau give further guidelines on procurement matters.[137] Furthermore, Hong Kong is a party to the WTO GPA. As such, its public procurement must comply with the provisions of the WTO GPA. Hong Kong subscribes to four public procurement principles[138] and four public procurement methods.[139] Built into the SPR is a review and complaint mechanism.[140]

Hong Kong's main procurement body is the Government Logistics Department (hereafter GLD).[141] It has wide-ranging procurement powers and a broad procurement mandate. For example, it has the mandate to purchase everything from aircraft and defence equipment to educational materials on behalf of the administration.[142] Construction procurement (works) is not performed by the GLD but by the Development Bureau, which has the legal power to administer the entire construction procurement process.[143] Various government departments procure their goods via the GLD.

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136 ADB/OECD *Curbing Corruption Initiative for Asia and the Pacific* 3.
137 ADB/OECD *Curbing Corruption Initiative for Asia and the Pacific* 3.
138 (i)Public accountability; (ii) Value for money (iii) Transparency and (iv) Open and fair competition.
139 (i)Open tendering (ii) Selective tendering (iii) Prequalified Tendering and (iv) Single or Restricted Tendering.
140 ADB/OECD *Curbing Corruption Initiative for Asia and the Pacific* 11.
141 FSTB 2013 http://www.fstb.gov.hk/tb/en/guide-to-procurement.htm#topic-2.
142 ADB/OECD *Curbing Corruption Initiative for Asia and the Pacific* 3.
143 FSTB 2013 http://www.fstb.gov.hk/tb/en/guide-to-procurement.htm#topic-2

In addition, there are procuring entities that support the work of the GLD. These are the Central Tender Board (hereafter CTB), the Government Logistics Department Tender Board (hereafter GLDTB), the Public Works Tender Board (hereafter PWTB) and the Departmental Tender Committees (hereafter DTC).[144] However, Hong Kong's strength in fighting corruption is not in its procurement framework but in its anti-corruption strategy.

1.9.1.1.2 Anti-corruption strategy

The *Independent Commission Against Corruption Ordinance* (hereafter ICAC Ordinance)[145] and the *Prevention of Bribery Ordinance* (hereafter PBO)[146] are the primary instruments for combating public procurement corruption.[147] Hong Kong has a single anti-corruption agency, the ICAC, which is autonomous, well-resourced and run by highly competent professionals - more than 1 300 people.[148] The ICAC has enormous powers (of investigation and prosecution) which are legally sanctioned, and has a monopoly over all corruption cases.[149] The mandate of the ICAC is not limited to curbing public procurement corruption only, but extends to combating all kinds of corruption in Hong Kong.[150]

In addition, the ICAC has one of the strongest civil programmes, which borders on civil activism, as one of its measures for combating public procurement corruption.[151] Four Advisory Committees have been established within the ICAC in terms of the ICAC Ordinance, namely the Advisory Committee on Corruption, the Operations Review Committee, the Corruption Prevention Advisory Committee, and the Citizens Advisory Committee.[152] All four committees are staffed by ordinary citizens who are not employed by the Hong Kong government in any capacity.

144 ADB/OECD *Curbing Corruption Initiative for Asia and the Pacific* 3.
145 Chapter 204 of 30June 1997.
146 Chapter 201 of 30 June 1997.
147 Scott "The Hong Kong ICAC's Approach to Corruption Control" 401.
148 ICAC *Annual Report 2015* 22.
149 ICAC *Annual Report 2015* 10-11.
150 ICAC *Annual Report* 2015 10-11.
151 ICAC *Annual Report* 2015 9.
152 ICAC *Annual Report* 2015 9.

The Operations Review Committee has access to all corruption cases and can trace the progress of each investigation at any time.[153] Furthermore, before each corruption case is closed for lack of evidence or for any other reason, the investigating officer refers each case to this Committee for approval of the closure.[154] Once this Committee is satisfied that the corruption case has been handled well enough, then the Committee endorses its closure.[155] This is one of the most remarkable models of transparency in existence in the fight against public procurement corruption.

1.9.1.2 Botswana

Botswana has been chosen because it is the developing country that has been ranked as the least corrupt African country by Transparency International for the last 16 consecutive years.[156] Part of this success has been attributed to the fact that Botswana adopted its version of the Hong Kong anti-corruption model by establishing the Directorate on Economic Crime and Corruption (hereafter DCEC) as part of its broader anti-corruption strategy. In addition, it has introduced Anti-Corruption Units in each government ministry,[157] as well as the Botswana Corruption Court, in 2012.[158]

Second, it has also introduced procurement reforms by enacting single procurement legislation that incorporates anti-corruption provisions (the classical approach).[159] Also, it has a single public procurement body, the Public Procurement Asset Disposal Board (hereafter PPADB), which coordinates public procurement in the country.[160] Below is a brief discussion that further justifies why Botswana is a suitable jurisdiction to select for consideration in this study.

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153 ICAC *Annual Report 2015* 33-34.
154 HK SAR ICAC *Operations Review Committee* LC Paper No. CB (2) 2049/01-02(03) 1.
155 HK SAR ICAC *Operations Review Committee* LC Paper No. CB (2) 2049/01-02(03) 1.
156 This ranking by Transparency International is generally accepted internationally as a true reflection of state of corruption in Botswana. There credible study has been able to prove that the ranking in undeserved. This study affirms the findings of Transparency International.
157 Mwamba *An Introduction to the Anti-Corruption Initiatives in Botswana* 78.
158 Shapi Botswana Daily News 1.
159 Kumar and Carborn "Public Procurement in Botswana" 27.
160 Kumar and Carborn "Public Procurement in Botswana" 26.

1.9.1.2.1 Public procurement system: an overview

Botswana has enacted a single procurement legislation, the PPAD Act.[161] This PPAD Act creates the PPADB, which is the central body responsible for procurement in Botswana.[162] Therefore, Botswana has a centralised procurement system. The PPAD Act has provisions that relate to combating corruption.[163] Botswana's legislation not only regulates procurement but also regulates corruption within the procurement process (the classical approach).

1.9.1.2.2 Anti-corruption strategy

In so far as the anti-corruption strategy is concerned, the applicable law is the *Corruption and Economic Crime Act,*[164] which is the primary anti-corruption legislation. Botswana adapted the Hong Kong model by establishing a single anti-corruption agency, the DCEC, with a few exceptions. The exceptions are *inter alia* that the DCEC operates from the Office of the President of Botswana, a situation which taints its independence.[165] This is in direct contrast to the situation of the ICAC, which is wholly independent of any political interference. Botswana's DCEC model does not include a committee that is made up of ordinary citizens, as is the case with Hong Kong,[166] and the DCEC has investigative but not prosecutorial powers.[167]

Botswana introduced Ant-Corruption Units in each ministry with the aim of reinforcing the existing anti-corruption efforts.[168] In 2012 Botswana established an anti-corruption Court as an added institutional anti-corruption measure.[169] Hong Kong and South Africa do not have anti-corruption Courts. Therefore, Botswana has adopted a classical approach; that is, it uses both procurement legislation and criminal law in fighting public procurement corruption.

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161 Act 10 of 2001.
162 Kumar and Carborn "Public Procurement in Botswana" 28-29.
163 Sections 83 and 128 of the PPAD Act 10 of 2001.
164 13 of 1994.
165 Sebudubudu 2003 *Botswana Notes and Records* 129.
166 S 110 of the *PPAD Act.*
167 Part III of the *CECA Act.*
168 Mwamba *An Evaluation of Anti-Corruption Initiatives in Botswana* 78.
169 Shone *Botswana Guardian* 1.

1.9.1.3 South Africa

South Africa uses a combination of the traditional approach of fighting public procurement corruption and the silo approach[170] of curbing public procurement corruption. This study has coined South Africa's approach as the traditional cum silo approach. The traditional cum silo approach to combating public procurement corruption is characterised *by inter alia* multiple anti-corruption institutions which are generally suspicious of each other mainly due to political influence and political manipulation and do not share corruption information. Each anti-corruption institution pursues its own investigation.

Below is a brief discussion that further justifies why South Africa is a suitable jurisdiction in this study.

1.9.1.3.1 Public procurement system: an overview

The current organisation of public procurement in South Africa has been influenced by the history of apartheid.[171] Briefly, procurement is streamlined according to national, provincial and local government.[172] South Africa does not have dedicated procurement legislation, in contrast to Botswana and Hong Kong. Notwithstanding, South Africa is the only one of the three jurisdictions that constitutionally provides for public procurement, which it does in section 217 of the Constitution.

At national level, the PFMA[173] is the primary procurement legislation. The PFMA is not exclusively procurement legislation but deals with all financial matters in the country, including procurement.

The PFMA is applicable at provincial level and is used in conjunction with provincial procurement policies.[174] Unlike Botswana and Hong Kong, South Africa has nine provinces that are clothed with quasi-governmental legislative and governance powers.[175] Each of the nine provinces has the power to regulate its procurement

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170 Korateng *Moving from Silo to Holistic* 39.
171 Bolton "Public Procurement in South Africa" 178.
172 Bolton "Public Procurement in South Africa" 180-181.
173 1of 1999.
174 Bolton "Public Procurement in South Africa" 182.
175 Chaskalson and Klaaren *Provincial Government* 1-3.

through provincial legislation and/or regulations that must be consistent with the Constitution and the PFMA.[176]

At local government level, the *Local Government: Municipal Finance Management Act*[177] regulates procurement by all municipalities. In addition, there is the *Local Government: Municipal Systems Act*[178] that is applicable at municipal level *inter alia* for procurement purposes.

Furthermore, the *Preferential Procurement Policy Framework Act* (hereafter Procurement Act)[179] and its Regulations affects the procurement process; that is, at national, provincial and local government level. The situation is further complicated by the existence of an additional 12 pieces of legislation that have a direct bearing on the manner in which procurement is conducted in South Africa.[180] This has created massive procurement gaps that seemingly are being exploited by the corrupt. In actual fact, South Africa's procurement legislation can be summed up in the words of Quinot,[181] who stated that "this dimension of public administration is now facing a crisis."

Recently, South Africa introduced the Office of the Chief Procurement Officer (hereafter OCPO) as an additional procurement institution.[182] The functions and the roles of this new office will be analysed herein to establish whether this office is necessary for combating public procurement corruption or whether it complicates the already crowded and congested procurement space.

1.9.1.3.2 Anti-corruption strategy

As far as combating corruption is concerned, South Africa possesses dedicated anti-corruption legislation, just like Hong Kong and Botswana. The applicable law is the *Prevention and Combating of Corrupt Practices Act* (hereafter Corruption Act).[183] However, the main difference is in the institutional arrangements that combat

176 Chaskalson and Klaaren *Provincial Government* 11-13.
177 56 of 2003.
178 32 of 2000.
179 5 of 2000.
180 Quinot *An Institutional Legal Structure for Regulating Public Procurement* X.
181 Quinot *An Institutional Legal Structure for Regulating Public Procurement* X.
182 National Treasury 2016 http://ocpo.treasury.gov.za/Pages/default.aspx.
183 12 of 2004.

corruption. Unlike Hong Kong and Botswana, which have single anti-corruption agencies, South Africa has more than 10 anti-corruption agencies.[184] There is no single body that investigates and coordinates all corruption cases, and this complicates and compromises cases of public procurement corruption.[185] This has resulted in the poor or absent investigation of some public procurement corruption cases, the duplication of roles and wastage of resources (financial and human), the loss of crucial evidence, and prolonged and often ineffective prosecution and conviction.[186]

This study seeks to *inter alia* establish if South Africa can learn anything from the public procurement anti-corruption models of Hong Kong and Botswana.

The study of each of the jurisdictions will focus on the (i) criminal measures; (ii) administrative measures; (iii) institutional measures; and (iv) civil activism measures in combating public procurement corruption. In doing so, the relevant international and regional instruments on public procurement and corruption will be considered.

1.9.2 Limitations of the study

The limitations of the study are mainly that this is a qualitative comparison which inherently excludes the first-hand practical experiences of those who are involved in public procurement as well as those responsible for curbing public procurement corruption. Furthermore, the limited funding available to the researcher prohibited travelling to Hong Kong, Botswana and internally in South Africa in order to gain more exposure in the critical aspects of the subject matter.

1.10 Structure of the thesis

This study has seven chapters. Chapter One has been an introduction of the study. Chapter Two deals with the theoretical foundations of both public procurement and corruption. The first part of Chapter Two discusses the theory of public procurement. The focus is on international and regional best-procurement practices, and the discussion includes international and regional conventions and the related principles.

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184 Camerer *Tackling the Multi-Headed Dragon* 6.
185 Tamukamoyo and Mofana *Is South Arica really Complying with Anti-Corruption Protocols* 1.
186 Mantzaris 2014 *AJPA* 71-72.

The second part of Chapter Two deals with the theory of public procurement corruption. This entails an in-depth discussion of the forms of public procurement corruption, the causes of corruption, and the measures that have been suggested at international and regional levels. The focus is on the criminal measures, administrative measures, institutional measures and civil activism measures at the international and regional levels.

Chapters Three, Four and Five discuss each jurisdiction: Hong Kong, Botswana and South Africa, in that order. They will be discussed in two main parts. Part One discusses the public procurement regime in each jurisdiction in terms of the applicable law, institutional arrangements, procurement procedures and procurement principles. Part Two discusses public procurement corruption in each jurisdiction by investigating the definition of public procurement, the types and forms of public procurement corruption, and the causes of public procurement corruption. The final section of Part Two examines the use of criminal measures, administrative measures, institutional measures and civil activism in combating such corruption.

Chapter Six is a comparative chapter. The main aim of Chapter Six is first, to compare briefly the public procurement regimes of the three jurisdictions and extract unique practical principles that may be used by other developing countries to fortify their own public procurement systems against public procurement corruption; second, is to compare the use of criminal measures, administrative measures, institutional measures and civil activism in combating public procurement corruption in the three jurisdictions. The emphasis will be on the strengths and weaknesses thereof. This will be followed by the formulation of a new model of combating public procurement corruption.

Chapter Seven summarises the findings of the study and identifies areas for further research.

CHAPTER 2: THEORETICAL FOUNDATIONS OF PUBLIC PROCUREMENT AND PUBLIC PROCUREMENT CORRUPTION

2.1 Introduction

It is important to recall that this study seeks in the main to answer the question: what are the most practical measures of combating public procurement corruption in developing countries with special focus on: criminal measures; administrative measures; institutional measures; and civil activism measures?

With this question in mind, the primary aim of this chapter is to give a broad overview of public procurement in order to extract the fundamentals that underpin public procurement corruption, as suggested at international and regional level as well as by renowned scholars. These public procurement fundamentals are key in understanding the approach of public procurement in Hong Kong, Botswana and South Africa.

This first part will briefly discuss the following: the historical development of public procurement; the philosophy of procurement and states; procurement and developing countries; public procurement theory; international and regional approaches to public procurement and the public procurement principles thereof.

The second part of this chapter discusses corruption in greater detail as a precursor to the discussion on public procurement corruption, and it is structured as follows: definition of corruption; philosophies of corruption; types of corruption; forms of corruption; and causes of public procurement corruption. This will be followed by a detailed discussion on the measures of combating public procurement corruption with specific focus on criminal measures, administrative measures, institutional measures and civil activism measures as provided for by international instruments, regional instruments and domestic legislation.

2.2 Historical development of public procurement

The importance of a brief discussion on the historical development of public procurement is to enable one to have a broader understanding of why the subject has

over the last twenty years evolved into a discipline that has attracted the interest *inter alia* of scholars, governments, international financers and international organisations.[1]

Historically, it is difficult to trace the foundations of public procurement for a number of reasons. Different scholars have identified different periods and events that have shaped public procurement today.[2] For example, it has been said that the construction of Egyptian pyramids that started as far back 3000 BC points to the early stages of procurement.[3] The Egyptians procured pyramid materials back then to construct pyramids (equivalent to works procurement).[4] The Egyptian Scribes (equivalent to procuring officials) were responsible for the procuring and the management of these materials and supervised the successful completion of these pyramids.[5]

Other scholars have stated that the development of public procurement was influenced by state formation particularly in Europe as far back as the 16th century.[6] State formation generally is the process of the creation of sovereign governments that are centralised or decentralised depending on each jurisdiction.[7] The concept of state formation is complex and this study will not delve into a discussion thereof, save to mention that political power was critical to state formation.[8]

This political power was used *inter alia* to advance the interests (political and economic) of those that were in authority.[9] It also involved the administration of territories that were run by powerful political people who in most cases were concerned with consolidating their political power through military prowess, as witnessed in the 19th century by events leading to World War I.[10] The strength of one's political power was measured by the size and sophistication of the military and other security apparatus that the political leader possessed.[11]

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1 Thai 2001 *Journal of Public Procurement* 9-11.
2 Callender, who says that for practical purposes it is safe to state that the first records of public procurement are 5000 years old. See Callender *A Short History of Procurement* 2.
3 Westfahl *Day in a Working Life*: *300 Trades and Professions Through History* 58.
4 Nicholson and Shaw "Ancient Egyptian Materials" 5.
5 Nicholson and Shaw "Ancient Egyptian Materials" 5.
6 Keeney "The Foundations of Government Contracting" 7-9.
7 Levy "State Transformations in Comparative Perspectives" 172.
8 Deng *Coinage and State Formation in Early Modern English Literature* 26.
9 Deng *Coinage and State Formation in Early Modern English Literature* 26.
10 Deng *Coinage and State Formation in Early Modern English Literature* 26.
11 Deng *Coinage and State Formation in Early Modern English Literature* 26.

This military power *inter alia* involved the purchasing of defence and military equipment.[12] State formation witnessed the beginning of organised governments and the streamlining of political and economic activities as western territories started to assert their influence over certain geographical locations through colonisation and the establishment of trade routes.[13] This was the birth of public administration, which was further propounded by Machiavelli in the 16th century.[14] As part of public administration, especially from the 16th century, the governments started to develop and improve the living conditions of their citizens.[15]

This involved two things, namely the collection of taxes and using these taxes to finance different needs of the citizens. In the same context Babbage,[16] one of the earliest writers on procurement in the 19th century, highlighted that the evolution of the mining sector created the need for purchasing railway tracks and other products that were necessary for mining. This had a huge influence on the development of public procurement. Still in the 19th century, at the time of the Industrial Revolution public procurement became more and more structured, and it has continued to be more structured to this day.[17]

Today modern states continue to collect taxes and use these taxes to finance *inter alia* infrastructure such as the construction of roads, schools, hospitals, ports, railways and equipment that is needed for use by citizens.[18] Public procurement globally is increasingly becoming more strategic, as evidenced by the creation of specialised procurement entities, and has been given constitutional status in some jurisdictions.[19] Therefore, the historical development of public procurement has influenced the use of public procurement in different states.

2.3 Philosophy of procurement and states

The philosophy of procurement in this study refers to the underlying reasons why states embark on public procurement and what they seek to achieve by using public

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12 Deng *Coinage and State Formation in Early Modern English Literature* 26.
13 Okafor "Re-Defining Legitimate Statehood" 70.
14 Naidu *Public Administration*: *Concepts and Theories* 36.
15 Suvaryan, Mirzoyan and Hayrapetyan *Public Administration* 10.
16 Babbage *On the Economy of Machinery and Manufacturers* 28.
17 Eliasson *Advanced Public Procurement as Industrial Policy* 208.
18 Hope and Somolekae "Public Administration and Policy in Botswana" 20.
19 OECD *Public Governance Reviews* 25-26.

procurement. The philosophy of public procurement is determined *inter alia* by each country's history, legal system, economic and political objectives.[20] There is also a distinction between developing and developed countries in their approaches to public procurement.

Most developed countries use procurement for the provision of services to their citizens, and in the process aim to use procurement legislation to attain value for money.[21] On the other hand, most developing countries, although they use public procurement primarily for the provisions of goods and services, also use public procurement for other purposes (as a socio-economic tool), as briefly described in Chapter One.[22] Depending on the procurement philosophy of each jurisdiction, states are at liberty to use public procurement for other reasons (secondary objectives) in addition to the provision of basic services and attaining value for money.[23] Therefore, it is useful to ask if the use of public procurement to achieve primary and secondary goals is based on a particular public procurement theory.

2.3.1 Public procurement theory

Literature on public procurement theory seems to be very scant.[24] For this reason, this study proposes that the theory of public procurement relates to the tacit contractual relationship between the citizens and its government. In democratic states, this relationship is created once elections are concluded. In this relationship the government collects taxes from the citizens and organised corporates.[25]

The government or its functionaries (as fiduciaries) then uses these taxes collected in the form of revenue, to buy goods, services and works on behalf of the citizens.[26] The government is the custodian of the revenue and must use this revenue prudently and

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20 This refers to the desired outcomes preferred by the government in power. The government in power then uses procurement as a tool to achieve these outcomes. This may include reforming the procurement system by using legislation to achieve the desired procurement reform.

21 U.S Government Accountability Office "Framework for Assessing the Acquisition" 29.

22 Arrowsmith "EC Regime on Public Procurement" 254-255.

23 Arrowsmith *Public Procurement an Introduction* 15.

24 Flynn and Davis 2014 *Journal of Public Procurement* 15.

25 Schick *Repairing the Budget Contract between Citizens and the State* 3.

26 Schick *Repairing the Budget Contract between Citizens and the State* 3-4.

should be able to account to the citizens (owners of the combined income) at any given time on how this revenue has been or is being used.[27]

It is for this reason that public procurement corruption is loosely defined as the abuse of public money for personal gain militates against the public procurement theory. An understanding of the public procurement theory as stated above lays the foundation for one to briefly discuss how developing countries have embraced this theory.

2.3.2 Procurement and developing countries

Developing countries in this study are defined as those countries that are characterised *inter alia* with high poverty, high unemployment and under-developed infrastructure, as observed by the United Nations.[28] Most developing countries use procurement primarily for the provision of goods and services such as schools, roads, railways, airports, health facilities, education facilities and so forth.[29]

The secondary objectives of public procurement in some developing countries include *inter alia* industrialisation, socio-economic development and economic empowerment.[30] Most developing countries have succeeded in the latter and use public procurement to promote and sustain their own citizens who are engaged in government contracts, even if this means failing to achieve value for money where foreign suppliers might have provided the same product at a much lower cost.[31]

Public procurement is critical in the development of economies in developing countries.[32] As stated in Chapter One, public procurement is *inter alia* the convergence of business, citizens and government.[33] The challenge for most developing countries is to have legal mechanisms that effectively manage this complex relationship.[34] For this reason, most developing countries have responded to this challenge by enacting procurement legislation to give clarity to this convergence as well as to direct the manner in which public procurement is conducted.

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27 Schick *Repairing the Budget Contract between Citizens and the State* 8.
28 Meagher *An International Redistribution of Wealth and Power* 37.
29 OECD *Public Governance Reviews Towards Efficient Public Procurement* 81.
30 Basheka "Public Procurement Reforms in Africa" 139-141.
31 Araujo *The EU Dep Trade Agenda Law and Policy* 208.
32 OECD *Public Procurement for Sustainable Growth* 4, 10.
33 See para 1.2.
34 Schiavo-Campo and McFerson *Public Management in a Global* Perspective 254.

However, some developing countries, despite having procurement legislation, still have enormous challenges in managing public procurement, which has resulted in massive public procurement corruption, as will be revealed below.[35] Of course, there are some developing countries that have made significant strides in the administration of public procurement, and these developing countries have relatively low levels of public procurement corruption.[36]

The use of public procurement to achieve both primary and secondary objectives by developing countries has not escaped the attention of the international community. It is important to briefly discuss how public procurement is provided for in international and regional instruments, beginning with the former.

2.4 International instruments on public procurement

There is no international instrument on public procurement.[37] In the absence of an international convention on public procurement, a brief discussion of the *United Nations Commission on International Trade Law Model Law on Procurement of Goods, Construction and Services* (hereafter UNCITRAL ML) and WTO GPA is done. Both the UNCITRAL ML and WTO GPA have attempted to provide guidelines that countries should adhere to when regulating public procurement, while at the same time ensuring that public procurement corruption is minimised.[38] From this discussion, the procurement principles that are most relevant to assist to curb public procurement corruption are identified.

2.4.1 UNCITRAL ML on procurement

The UNCITRAL ML on procurement, as the name suggests, is a model law. In other words, it is a framework on public procurement that is meant to assist governments worldwide to improve their procurement legal texts and policies.[39] It was produced and

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35 Schiavo-Campo and McFerson *Public Management in Global Perspective* 254.
36 World Bank 2015 http://www.worldbank.org.
37 World Bank *Comparison of the International Instruments on Public Procurement* 2-3.
38 European Parliament *Public Procurement in International Trade* 14.
39 UNCITRAL *Guide to Enactment of the UNCITRAL Model Law on Public Procurement* 3.

is administered by the UNCITRAL through consultation with various stakeholders.[40] The UNCITRAL ML has been revised and the current one is the 2011 UNCITRAL ML.[41]

2.4.1.1 Provisions of the 2011 UNCITRAL ML

The 2011 UNCITRAL ML defines procurement as "the acquisition of goods, construction or services by a procuring entity".[42] This resonates with the standard definitions of procurement that have been suggested by other scholars, as indicated in the previous chapter.

What is also important to note is that article 2 (n) of the 2011 UNCITRAL ML gives two guidelines on what constitutes a procuring entity.[43] This is critical, as different legal systems constitute their procurement systems differently, thereby defining procuring entities differently. The importance of correctly identifying the procuring entity is to ensure that the proper entity is held responsible and accountable for procurement purposes.

The preamble on the 2011 UNCITRAL ML makes it imperative for governments to ensure that their procurement regime aspires to realise at least the following six objectives:

(a) Maximising economy and efficiency in procurement;

(b) Fostering and encouraging participation in procurement proceedings by suppliers and contractors regardless of nationality, thereby promoting international trade;

(c) Promoting competition among suppliers and contractors for the supply of the subject matter of the procurement;

(d) Proving the fair, equal and equitable treatment of all suppliers and contractors;

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40 Its legislative framework is not binding on any state. It is up to the state to adopt it or modify the UNCITRAL model law to suit its needs, but without considerable deviation from the original model law proposed by the UNCITRAL.

41 UNCITRAL 2011 http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure /2011Model.html

42 Article 2 (j).

43 Option I (i) Any governmental department, agency, organ or other unit, or any subdivision or multiplicity thereof, that engages in procurement.
Option II (i) Any governmental department, agency, organ or other unit, or any subdivision or multiplicity thereof, of the Government other term used to refer to the national Government of the enacting State that engages in procurement.

(e) Promoting the integrity of, and fairness and public confidence in, the procurement process;

(f) Achieving transparency in the procedures relating to procurement.

From the above it may be concluded that the 2011 UNCITRAL ML does not have an express objective that addresses corruption within the procurement process.[44] However, the 2011 UNCITRAL ML uses the above mentioned objectives to curb public procurement corruption by ensuring that procurement systems adhere to certain minimum standards that *inter alia* encompass integrity, fairness, transparency and the equitable treatment of all suppliers.[45]

In the spirit of transparency and taking cognisance of the need to combat public procurement corruption, article 5 (1)[46] encourages the immediate publication of legal texts and procurement of regulations using a media vehicle that reaches as many people as possible. Included in this are the publications of judicial and administrative rulings[47] that impact on public procurement and the publication of information on possible forthcoming procurement.[48]

One of the most contentious issues and a possible cause of public procurement corruption has been the form and nature of the communication of tenders. Article 7 of the 2011 UNCITRAL ML attempts to provide possible communication guidelines that procuring entities must comply with in order to minimise public procurement corruption.[49]

In determining possible suppliers, it is incumbent upon the suppliers in terms of article 9[50] to demonstrate that they possess *inter alia* the necessary professional, technical and financial capabilities to execute the tender. Of particular importance is article 9 (2)

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44 Another observation is the implementation of objective (b) which encourages states to allow the participation of suppliers within the procurement system regardless of their nationality.

45 UNCITRAL *Guide to Enactment of the UNCITRAL Model Law on Public Procurement* 39-42.

46 This Law, the procurement regulations and another legal text of general application in connection with procurement covered by the Law, and all amendments thereto, shall promptly be made accessible to the public and systematically maintained.

47 Article 5 (2).

48 Article 6.

49 This has to include the form, classified information, and means of communication that are familiar with suppliers. In addition, there is a need for procuring entities to ensure that procurement information that is in their possession is not compromised.

50 Article (2) (a).

(b), which provides that the suppliers should demonstrate "that they meet ethical and other standards applicable." However, the 2011 UNCITRAL ML does not define what these ethical standards are.[51] It is up to each state to determine its own ethical standards.

This creates different standards or tests for ethical standards and opens the door to public procurement corruption, especially by multinational companies.[52] It is common cause that some multinational companies are involved in public procurement corruption.[53] The multinational companies involved in public procurement corruption take advantage of the lacuna in non-standardised ethical standards to commit public procurement corruption.[54]

The failure by UNCITRAL ML to have unified criteria of ethical standards that suppliers should comply with does not augur well for the development of public procurement in the light of the need to combat public procurement corruption.[55] However, ethical standards for procuring officials are meant to be clarified in codes of conduct. Article 26 provides that:

> A code of conduct for officers or employees of procuring entities shall be enacted. It shall address, *inter alia*, the prevention of conflict of interest in procurement and, where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declarations of interest in particular procurements, screening procedures and training requirements. The code of conduct so enacted shall be promptly made accessible to the public and systematically maintained.

Again the target of the code of conduct is the prevention and regulation of conflict of interest in public procurement. It is not clear why the code of conduct does not address corruption expressly. It would have been preferable, if in addition to the prevention of conflict of interest (a form of corruption), the code of conduct had dealt with the issue of corruption more pertinently.

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51 UNCITRAL 2011 http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2011Model.html.

52 OECD *Guidelines for Multinational Enterprises* 27-29.

53 Ware *et al* "The Expenditure Side: Public Procurement Corruption" 299.

54 OECD *Guidelines for Multinational Enterprises* 48-49.

55 Other relevant provisions in chapter I include the regulation of conditions of the procurement; rules concerning evaluation criteria and procedures; rules concerning the language of documents; rules for the time frame and place of submission for tender documents; clarifications and modifications of solicitation documents; clarifications of documents; tender securities; prequalification proceedings; the cancellation of the procurement; rejections of abnormally low submissions; the exclusion of suppliers; notice of the awarding of a contract; the confidentiality of information; and the recording of the procurement proceedings.

A significant contribution of the 2011 UNCITRAL ML is the regulation of conflict of procurement laws and the flexibility of international aid agencies to insist on using their own procurement system in projects funded by international aid agencies.[56] The international aid agencies are free to incorporate anti-corruption provisions of their choice in their procurement contracts.[57] International aid agencies are known to be stricter than governments when dealing with public procurement.[58] If international aid agencies are allowed to be in control of the procurement that they fund, which in most cases is of high value transactions, the timely completion of projects is realised, and in the process public procurement corruption is minimised.

The remaining chapters of the 2011 UNCITRAL ML in so far as they are relevant to combating public procurement corruption are summarised as follows: Chapter II consists of nine articles that provide for methods of procurement and the various conditions under which procurement can be done. Chapter III is dedicated to open tendering as the preferred tender default method.[59] Chapter IV deals with procedures for restricted tendering.[60] Chapter V deals with the procedures for the two-stage tendering, requests for proposals with dialogue, requests for proposals with consecutive negotiations, competitive negotiations and single source procurement.[61]

Chapter VIII provides for the procedures for challenging proceedings.[62] In order to fully appreciate the importance of the 2011 UNCITRAL ML, a Guide to Enactment of the UNCITRAL ML on Public Procurement was published.[63]

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56 Article 3.

57 Johnson *Anti-Corruption Strategies in Fragile States Agencies* 70.

58 Allen , Schiavo-Campo and Garrity *Assessing and Reforming Public Financial Management* 17.

59 The publication must bear the names of the procuring entity Article 37 (a); a concise version of the requirements and conditions of the tender Article 37 (b); the provision of tender documents to each supplier Article 38; instructions on how to prepare the tender documents as well as the criteria that will be used to evaluate the tenders; the presentation of tenders; the modification and evaluation of tenders; the opening of tenders; the evaluation of tenders; and the prohibition of negotiations with suppliers or contractors.

60 Some of the notable provisions are that once the supplier has submitted a quotation no changes are allowed on the price. Also, procuring entities are encouraged to award the contract to the lowest bid, provided that the bid satisfies the requirement of the procuring entity.

61 For instance, article 48 (2) expressly states that when soliciting tenders for the two-staged tendering process, the suppliers submit the first tender without including a price. During this first stage, negotiations between the procuring entities and suppliers (including those whose bids would have been rejected) are allowed.

62 The basis of challenging the award is a conviction by the supplier who might have suffered loss or injury due to the alleged non-compliance of a decision or action by the procuring entity. The challenge can be issued either by way of application to the procuring entity or a review application to

Against the above background, the 2011 UNCITRAL ML subscribes to the following principles that are relevant to curbing public procurement corruption, as stated in the preamble: competition; fairness; equality; integrity and transparency.[64] Some of these principles have already been discussed in Chapter One, and others will be discussed in subsequent chapters. With this in mind, and as already indicated, attention is now given to the WTO GPA.

2.4.2 World Trade Organisation Plurilateral Agreement Government Procurement Agreement

The WTO GPA is defined by the WTO as "a Plurilateral Agreement within the framework of the WTO".[65] It is not binding on all WTO member states.[66] The purpose of the WTO GPA "is to mutually open government procurement markets among its parties."[67] Currently of the 45 WTO member states only 17 are parties to the WTO GPA.[68] The discussion below focuses only on those provisions that relevant to combating public procurement corruption as defined in the subject matter.

Most of the developing countries participate as observers while others are in the process of acceding to the WTO GPA.[69] Of the jurisdictions under consideration, Hong Kong is a party to the WTO GPA, while Botswana and South Africa are neither in the process of acceding nor do they have observer status. The latest WTO GPA is the Revised GPA 2012.

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an independent body or a review application to the court. What will be reviewed is the administrative action of the procuring entity.

63 According to the Preface, the Guide provides background and explanatory information.

64 UNCITRAL *Guide to Enactment of the UNCITRAL Model Law on Public Procurement* 39-42.

65 WTO 2016 http://www.wto.org.

66 The WTO GPA is distinguished from the UNCITRAL ML in that the latter is just a framework and is not binding, whereas the former is binding on those who are party to it.

67 WTO 2016 http://www.wto.org.

68 All of the EU members (28) are parties to the WTO and the EU member states are counted "as one party." This means that other 16 parties come from different countries and none of them is from Africa.

69 WTO 2016 http://www.wto.org.

2.4.2.1 Revised GPA 2012

The current WTO GPA,[70] which is also known as the Revised GPA 2012, entered into force on 6 April 2014 following negotiations that started in 1997. Its history[71] can be traced to three earlier agreements[72] as well as the 2006 negotiations.[73] For the first time the WTO by enacting the Revised GPA of 2012 has an instrument that specifically addresses issues of public procurement corruption at international level. The preamble of the Revised GPA of 2012 provides that:

> The Agreement on Government Procurement (GPA) requires that open, fair and transparent conditions of competition be ensured in government procurement.

The Revised GPA of 2012 seeks *inter alia* to eliminate corruption in government procurement by insisting through its preamble that government procurement be done in line with procurement principles.[74] Although the preamble is not legally binding, it is trite law that it plays a crucial role as an interpreting aid when it comes to the interpretation of legal texts.[75] In the same context, article IV provides that:

> A procuring entity shall conduct covered procurement in a transparent and impartial manner that: (a) is consistent with this Agreement, using methods such as open tendering, selective tendering and limited tendering; (b) avoids conflicts of interest and (c) prevents corrupt practices.

It is clear from this provision that impartiality is imputed to the procuring official and not necessarily to the procurement process.[76] Put differently, the provision prohibits

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70 The WTO GPA has a dual approach in its implementation, namely the Text Agreement and the Schedules of Commitments. The former covers procurement rules while the later specifies procurement that is administered by the WTO GPA in line with each jurisdiction. This is critical because not all procurement is covered by the WTO GPA; hence the need to have the procurement schedules. Furthermore, the WTO GPA applies to procurement above a certain threshold only.

71 It is important to note that some initial work on the need to open government procurement had already been under taken by the OECD. As far back as 1962 the OECD had drafted a code at the insistence of the United States.

72 Tokyo Round Code on Government Procurement (1979); Revised Tokyo Round Code on Government Procurement of Uruguay Round (1986); and Agreement on Government Procurement (1994).

73 The rationale behind the Revised GPA of 2006 were the differences that arose during the Tokyo Round negotiations and others that emerged during the negotiations that led to the GPA of 1994.

74 The procurement principles that underpin the Revised GPA 2012 are the same principles that were in place in the GPA of 1994, and include the promotion of the liberalisation of public procurement; achieving transparency; the establishment of international procurement procedures; and the appreciation of the procurement needs of developing and least developed countries.

75 WTO 2016 http://www.wto.org.

76 OECD 2013 http://www.oecd.org/gov/ethics/meetingofleadingpractitionersonpublicprocurement.htm.

procuring officials from making corrupt decisions under the guise of preferential treatment between local and foreign suppliers.[77]

Furthermore, there is great emphasis under article IV(c) to ensure preventative measures of combating public procurement corruption are taken, as opposed to measures that seem to circumvent or punish corruption after the fact. Simply put, there is an obligation upon member states to take positive preventative steps in the fight against corruption. Other new articles which have a direct bearing on corruption are XV (1)[78] and XV (4).[79]

The WTO GPA principles that are relevant to public procurement corruption are *inter alia* non-discrimination, transparency and procedural fairness.[80] The WTO GPA further provides the manner in which these principles should be realised.[81] For example, the WTO GPA obliges state parties to eliminate all forms of discriminatory practices by promoting the equal treatment of foreign and domestic suppliers in order to realise the WTO GPA procurement principles.[82]

In the light of the above discussion, the WTO GPA has the potential of transforming itself into a fully-fledged public procurement international convention. However, as pointed out above, the WTO GPA has to be more flexible and accommodative to the needs of developing countries.[83] In actual fact, a more consultative approach with robust negotiations should result in a new WTO GPA that is inclusive of all WTO state parties. This approach can be achieved if all WTO member states are serious about elevating public procurement to international status with its own convention which has in-built anti-corruption measures.

This gap at international level has propelled some regional bodies to legislate public procurement at regional level.

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77 Anderson, Robert Müller, *The revised WTO Agreement on Government* 24.
78 Which provides for fairness and impartiality in the procurement process.
79 Which states that only compliant tenders should be awarded; and XVI, which encourages transparency of procurement information.
80 WTO 2012 http://www.wto.org.
81 Bovis "Judicial Activism and Public Procurement" 334.
82 Rickard and Kono *Think Globally, Buy Locally* 3-4.
83 Mavroidis *Trade in Goods* 802.

2.5 Regional instruments dealing with public procurement

The purpose of this part is to briefly discuss regional approaches to public procurement. This discussion should be understood in the light of the fact that developed and developing countries have made varying degrees of progress in developing regional procurement legislation. The following regional bodies have made strides in promoting public procurement: the OECD; the EU; the AU; the COMESA; and the NAFTA. These five regional blocs have been selected because they represent over 100 different countries that are at different levels of public procurement development. A summary of the regional bodies is tabulated below.

Table 1: Procurement approaches at regional level

Regional organisation	Summary of the procurement approach
EU	The EU was established in 2009 following the Treaty of Lisbon.[84] An estimated 2.3 Trillion Euros is spent annually by EU member states on procurement.[85] The EU's procurement policy is largely contained in the Treaty of the Functioning of the European Union (hereafter TFEU). Contained in the TFEU are procurement directives. The EU's procurement directives are numerous that have a bearing on procurement, namely Directive 2004/18/EC (Public Sector);[86] Directive 2004/17/EC (Utilities);[87] 89/665/EEC (Public Sector Remedies);[88] and Directive 92/13/EEC (Utilities Remedies).[89] The latest EU Procurement directives were passed in 2014.
AU	The AU seems not to have a comprehensive regulatory framework for its Member States in the area of procurement law, despite losing an estimated $US148 billion annually through public procurement corruption.[90] A Regional Anti-Corruption Programme for Africa 2011-2016 was introduced, working together with Pan-African Body of National Corruption Institutions, the African Forum on Fighting Corruption and the African Union Advisory Board on Corruption. To date the AU has failed to come up with any official position (or publication) on how to tackle public procurement corruption.

84 Europa *The EU in Brief* 1.

85 Saloni *Anti-Corruption Measures Under the New Public Procurement Directives* 3.

86 It deals with the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts. This regulates procedures for awarding most major contracts of public bodies (government departments, local authorities etc). For example, it requires major contracts to be advertised through the EU's Official Journal so that they are publicized to all interested parties and regulates the criteria that can be used for selecting firms to tender awarding contracts.

87 This regulates the procedures for awarding major contracts for bodies engaged in certain activities in the sectors of water, transport, energy and postal services (utilities) activities. It contains similar kinds of obligations to those in the Public Sector Directive.

88 It deals with the coordination of laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts. This deals with remedies for firms to ensure the application of the EU procurement rules to contracts governed by the Public Sector Drive.

89 It deals with the coordination of laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors. This deals with remedies for enforcing the EU procurement rules applying to contracts governed by the Utilities Directive.

90 Anti-Corruption for Development 2016 http://www.anti-corruption.org.

Regional organisation	Summary of the procurement approach
	This is unacceptable.
COMESA	The COMESA published in 2009 in its official Gazette its regulations for public procurement[91] in line with article 10(1)[92] of the COMESA Treaty. The COMESA public procurement regulations (hereafter the COMESA Regulations) are divided into eight chapters that deal with a wide range of procurement matters.[93] The scope of application of the COMESA Regulations states *inter alia* that the COMESA Regulations[94] apply to all regional competitive bidding.[95] Furthermore, the COMESA Regulations provide in article 2(2)[96] that where there is a conflict between the procurement rules of the donor and those of the host state, then the rules of that donor will prevail. The COMESA Regulations do not apply to defence and military procurement in terms of article 2(6).[97]
NAFTA[98]	NAFTA[99] is the world's largest free trade area, producing an estimated US$ 17 trillion worth of goods and services.[100] NAFTA member states have struggled

91 COMESA 2009 http://www.comesa.int.

92 The Council may, in accordance with the provisions of this Treaty, make regulations, issue directives, take decisions, make recommendations or deliver opinions.

93 COMESA 2009 http://www.comesa.int.
The rationale behind its formation was to establish a body that would foster economic development in these newly formed African states in accord with the spirit of pan-Africanism. In the same light, the United Nations Economic Commission for Africa (hereafter ECA) after a meeting in Lusaka, Zambia decided in 1978 to form a Preferential Trade Area. The result of the meeting was the Lusaka Declaration of the Intent and Commitment to the Establishment of a Preferential Trade Area for Eastern and Southern Africa (PTA), and the Treaty establishing the PTA came into force on 30 September 1982. The PTA was then transformed into the COMESA in Kampala, Uganda in 1993.

94 The COMESA Regulations establish the Committee of Governors of Central Banks, whose responsibility it is to develop programmes in the field of finance and monetary co-operation that have a bearing on procurement, as stated in article 13.

95 COMESA 2009 http://www.comesa.int.

96 Where any provision of these Regulations conflicts with the procurement rules of a donor or funding organization which is not a public body, the application of which is mandatory pursuant to an obligation entered into by a Member State under any treaty or other form of agreement, those rules shall prevail.

97 A Member State may, exclude from the application of these Regulations, or modify the rules and procedures provided for in the Member States' domestic legislation relating to public procurement, procurement for state security, military related production, defence or international relations of that Member State, to protect the public interest and shall notify Member States through the Secretary General of such exclusion.
It is imperative at this point to note that the EU in 2011 decided to abandon the exclusion of defence and military procurement from being conducted only in line with the domestic legislation of its Member States. The EU has decided that defence and military procurement should be held in accordance with the new EU Directives on procurement. This means that EU Member States should open their defence and security procurement to open tendering. The advantage is that any supplier or bidder from any EU Member State is free to bid for any defence and security procurement in any Member State. The importance of the EU stance, which COMESA is strongly recommended to follow, is that it closes potential gaps of corruption in defence and security procurement by allowing as many suppliers as possible to participate, and permits greater scrutiny. (Chantham House The EU Defence Procurement Directive 2; EU Defence and Security Procurement Directive 2009/81/EC).

98 The North American Free Trade Agreement.

99 NAFTA was established in 1994 as a trade agreement between the United States, Canada and Mexico, and successfully eliminated all trade duties and quantitative restrictions.

100 Executive Office of the President of the United States "North American Free Trade Agreement" 1.

Regional organisation	Summary of the procurement approach
	with public procurement corruption and have attempted to remedy that through various interventions.[101]

Public procurement flourishes when there are sound and well-grounded regional procurement instruments, and the OECD and the EU are perfect examples.[102]

The OECD has demonstrated great interest in public procurement.[103] In this regard, the OECD has published extensively on issues of procurement and in particular on combating public procurement corruption.[104] One of the most important publications[105] by the OECD relates to principles for sound public procurement.[106] The OECD has introduced a profound concept of "active waste" and "passive waste" in public procurement. The OECD defines the former as "direct or indirect benefit for public procurement officials (e.g corruption/fraud)."[107] The evidence of active waste in public procurement includes the intentional abuse of power by procuring officials.

Recently the OECD has published a Procurement Toolbox that deals with four main themes, namely the pre-tendering phase, the tendering phase, the post-award phase and the entire procurement cycle.[108] The Procurement Toolbox provides the benchmark test whether or not a gift given to a procuring official is free from any encumbrances.[109]

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101 Villarreal and Fergusson state that "NAFTA opened up a significant portion of federal government procurement in each country on a non-discriminatory basis to suppliers from other NAFTA countries for goods and services. It contains some limitations for procurement by state-owned enterprises."

102 AFDB *Summary on Literature on Harmonization in Public Procurement* 1.

103 The OECD is an organisation that was created in 1961 with the aim of improving government policies in various sectors. Currently it has a membership of 34 countries. None of the 34 members are from Africa or from any other developing country. The OECD seeks to ensure that government policies and laws promote the "social well-being of the people". Public procurement by its very nature fits in well with the objectives of the OECD.

104 Examples of its publications are the following: Procurement Toolbox*; Procurement Principles; Public Procurement for Sustainable and Inclusive Growth; Unclassified* GOV/PGC (2009) 8 GOV/PGC (2009); Procurement: Main Risk of Corruption; OECD Principles for Enhancing Integrity in Public Procurement; Public Procurement – OECD.

105 This publication deals with some key procurement issues which *inter alia* include active and passive waste in public procurement and how it can be addressed.

106 OECD *Principles for Enhancing Integrity in Public* Procurement 12.

107 OECD *G20 Anti-Corruption Action Plan* 4.

108 OECD *Procurement Toolbox* 1.

109 OECD *Procurement Toolbox* 1. **Genuine:** Is this gift genuine, in appreciation for something I have done in my role as a procurement practitioner, and not requested or encouraged by me? **Independent:** If I accept this gift, would a reasonable person have any doubt that I could be independent in doing my job in the future, especially if the person responsible for this gift is involved

Through its procurement directives the EU has managed to influence public procurement in its member states.[110]

In actual fact, the EU is the only regional body that has demonstrated that with political will and determination public procurement can be used as a major economic tool for regional integration, particularly in trade and development.[111] On the contrary, despite having 54 member states the AU has done very little in regulating and developing public procurement, not just to promote trade but to ensure that public procurement corruption is minimised.[112] COMESA, a sub-regional body, has made more progress in advancing public procurement than the AU.[113]

Another advantage of having a properly organised and well-coordinated regional procurement regime, as demonstrated by the EU and the OECD, is that *inter alia* it requires member states to periodically report on anti-corruption measures.[114] The periodic reports are a form of check as well as an accountability mechanism for member states. This is not the case in the AU.

What remains is for one to summarise the procurement principles that are relevant to curbing public procurement corruption as provided in the above international and regional instruments.

2.6 Principles of public procurement

The above discussion has reiterated the importance of procurement principles that are meant to promote clean public procurement. The main principles extracted from the international and regional instruments are the following: transparency; fairness; equality; competitiveness; integrity and equitable treatment. These principles are meant to achieve economic efficiency by allowing many players to participate in the public

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in or affected by a decision that I may make? **Free:** If I accept this gift, would I feel free of any obligation to do something in return for the person responsible for the gift, or for his/her family or friends/associates? **Transparent:** Am I prepared to declare this gift and its source, transparently, to my organisation and its clients, to my professional colleagues and to the media and public generally?

110 OECD *Public Procurement for Sustainable and Inclusive Growth* 5.

111 Bilal *Is the EU A Model of Regional Integration? Risks and Challenges* 3-4.

112 Williams-Elegbe "A Perspective on Corruption and Public Procurement in Africa" 364-365.

113 Quinot and Arrowsmith "Introduction" 3-4.

114 OECD *OECD Annual Report 2009* 16-17.

procurement process.[115] These principles have already been discussed by other scholars[116] and also briefly in chapter one of this study, and the discussion will not be repeated here.

2.7 Reflections

From the above discussion it can be seen that public procurement as it is known today did not emerge from a vacuum. It can be traced as far back as 3000BC. It is through the historical development of public procurement from that time that the philosophy of public procurement took shape in relation to state formation.

The primary purpose of public procurement has now been reaffirmed to be the purchasing of goods, services and works on behalf of their citizens by governments and government functionaries. The basis of this purchasing of goods, works[117] and services[118] is the tacit contract between citizens and their governments, as set out in the discussion of public procurement contract theory. It is this contract that proscribes the commission of corrupt acts within the procurement process.

It was further highlighted that in order to guard against the commission of public procurement corruption, a number of initiatives have been undertaken. At international level UNCITRAL ML and the WTO GPA have been enacted, while at regional level, the OECD, EU, COMESA and NAFTA have made significant progress in regulating public procurement while the AU has remained in the doldrums.

2.8 Public procurement corruption

2.8.1 Introduction

This section focuses on a brief exposition of public procurement corruption. The purpose of this brief exposition is to enable a proper identification of the issues that are

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115 OECD *OECD Principles for Integrity in Public Procurement* 21-24.

116 Arrowsmith "Transparency in Government Procurement 96-126; Bolton "Overview of the Government Procurement System in South Africa" 357-375; de la Harpe *Public Procurement Law: A Comparative Analysis;* Williams-Elegbe "A perspective on corruption in Africa" 336-369 and Quinot "Enforcement of Procurement Law" 193-207.

117 The construction and maintenance of buildings and other infrastructure such as roads, ports, railways and dams are the major works purchased by governments.

118 This includes the hiring of services. For example, a specific government department or ministry may have to hire a building to house its officers.

pertinent to public procurement corruption. As intimated earlier, public procurement corruption is an extension of corruption in general. It is not possible to discuss public procurement corruption without having an understanding of corruption in general. Once one has a sound understanding of both general corruption and public procurement corruption, only then can one discuss possible measures for the effective combating of public procurement.

This part of the argument is therefore structured as follows: revisit the definition of corruption; the theories philosophies of corruption; types and forms of public procurement corruption; the causes of public procurement corruption; measures for combating public procurement corruption; and a summation of the discussion.

2.8.2 Definition of Corruption

The importance of revisiting the definition is in order to help in prescribing the correct measures to curb such corruption.[119] Some measures seem to have been prescribed without clearly defining public procurement corruption.[120] This may have resulted in inappropriate anti-corruption measures being applied, and obviously relying on the wrong anti-corruption measures will be ineffective, resulting in the proliferation of public procurement corruption.[121]

Therefore, correctly defining public procurement corruption is like a correct diagnosis by a "medical practitioner" which equips the relevant jurisdiction to adopt specific measures that are suitable and unique to its environment. This part examines how international instruments; regional instruments; international bodies and scholars attempt to define corruption.

2.8.2.1 International instruments

There are numerous international instruments that deal with or make reference to corruption.[122] The UNCAC, which is the primary international instrument on the prevention and curbing of corruption, does not expressly define corruption.[123] According

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119 Hellman 2013 *Michigan Law Review* 1386-1387.
120 World Bank date unknown http://www1.worldbank.org/publicsector/anticorrupt/corruptn/cor02.htm.
121 Quah *Curbing Corruption in Asia? An Impossible Dream?* 3,7,8.
122 UNODC *International Legal Instruments on Corruption* 1.
123 UNODC *International Legal Instruments on Corruption* 21.

to Argandona,[124] the decision not to include an express definition of corruption in UNCAC was taken in order to accommodate the various interests of the Member States.[125]

The *United Nations Convention against Transnational Organised Crime* (2000) (hereafter UNCATOC), which is another international instrument that is relevant to curbing corruption, like the UNCAC does not define corruption.[126] Similarly, the United Nations Conventions Declaration against Corruption and Bribery in International Commercial Transactions (hereafter Corruption Declaration)[127] shies away from committing to a definition of corruption save that it says *inter alia* that issues of corruption and bribery should be kept under regular review.

The lack of a precise definition at international level may be viewed as retrogressive, taking into account the need to harmonise the elements of corruption. Due to its ever changing character, corruption requires an all-embracing, universally accepted definition.[128] Of course this definition cannot be rigid. It has to be flexible enough the capture the main elements of the crime, while at the same time anticipating the future characteristics of corruption.[129]

For example, the proceeds of corruption may be moved from one country to another and if there is no universally accepted definition then "cross-border" corruption may be difficult to police.[130] This is because what may be viewed as corruption in one state may not be classified as such in another country, thereby creating safe havens for the corrupt.[131] With the international instruments having failed to define corruption, what then is the position with regional instruments?

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124 Argandona "The United Nations Convention against Corruption" 5.

125 It was agreed during the negotiations of UNCAC that by giving an express definition this would give rise to different interpretations on the meaning of corruption with the effect of creating confusion in Member States instead of harmonisation. Hence, it was left to individual Member States to define corruption in line with their domestic legislation. However, the UNCAC makes reference to forms of corruption such as active and passive corruption and these have been discussed below under forms of corruption.

126 UNODC *International Legal Instruments on Corruption* 107.

127 Resolution 51/191 of 16 December 1996.

128 Olaniyan *Corruption and Human Rights Law in Africa* 67.

129 Olaniyan *Corruption and Human Rights Law in Africa* 67.

130 OECD *Illicit Financial Flows from Developing Countries* 12-13.

131 Rothstein and Torsello *Is corruption Understood Differently in Different Cultures?* 8-10.

2.8.2.2 Regional instruments

A number of regional instruments on combating corruption have been enacted by different regional bodies.[132] Some of the regional instruments have attempted to define corruption while others have given guidelines as to what should constitute the crime of corruption but without defining it. The discussion below examines some of these regional instruments.

The *African Union Convention on Preventing and Combating Corruption* (hereafter AU Corruption Convention), which is the primary regional instrument for the prevention of corruption in Africa, having been ratified by 37 of the 54 AU member states, does not define corruption.[133] The AU Corruption Convention attempts to construe a definition of corruption by stating *inter alia* that corruption is an act and practice including related offences as stated in the AU Corruption Convention.[134]

The SADC Protocol on Corruption goes a little further than the AU Corruption Convention in defining corruption.[135] Article 2 of the SADC Protocol on Corruption states that corruption is:

> Any act referred to in Article 3[136] and includes bribery or any other behaviours in relation to persons entrusted with responsibilities in the public and private sector which

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132 UNODC *International Legal Instruments on Corruption* 21, 72, 107, 112, 116, 131, 139, 155.

133 UNODC *International Legal Instruments on Corruption* 116.

134 On the basis of article 4 of the AU Corruption Convention, it is submitted that corruption can be defined as the solicitation or acceptance, or the offering or granting to a public official of any goods or advantage by any other person in order to influence the public official to act or omit to act with the result of favouring a particular person by diverting state resources into the hands of a third party.

135 UNODC *International Legal Instruments on Corruption* 259.

136 1. This Protocol is applicable to the following acts of corruption:
a) the solicitation or acceptance, directly or indirectly, by a public official, of any article of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions;
b) the offering or granting, directly or indirectly, by a public official, of any article of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions;
c) any act or omission in the discharge of his or her duties by a public official for the purpose of illicitly obtaining benefits for himself or herself or for a third party;
d) the diversion by a public official, for purposes unrelated to those for which they were intended, for his or her own benefit or that of a third party of any movable or immovable property, monies or securities belonging to the State, to an independent agency, or to an individual, that such official received by virtue of his or her position for purposes of administration, custody or for other reasons;
e) the offering or giving, promising, solicitation or acceptance, directly or indirectly, of any undue advantage to or by any person who directs or works for, in any capacity, a private sector entity, for

violates their duties as public officials, private employees, independent agents or other relationships of that kind and aimed at obtaining undue advantage of any kind of themselves or others.

This definition is more encompassing in its ambit in the sense that not only does it expressly refer to bribery as part of the definition of corruption but it goes further to define any deviant behaviour by a public official which is motivated by the desire for personal gain whether directly or indirectly having been induced by a third party as corruption.

The *ECOWAS Protocol against Corruption* does not expressly define corruption. According to Akena,[137] instead of defining corruption the *ECOWAS Protocol against Corruption* rather indicates acts that constitute corruption in article 6.[138]

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himself or herself or for anyone else, for him or her to act, or refrain from acting, in breach of his or her duties;

f) the offering, giving, solicitation or acceptance directly or indirectly, or promising of any undue advantage to or by any person who asserts or confirms that he or she is able to exert any improper influence over the decision making of any person performing functions in the public or private sector in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of the influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result;

g) the fraudulent use or concealment of property derived from any of the acts referred to in this Article; and

h) participation as a principal, co-principal, agent, instigator, accomplice or accessory after the fact, or in any other manner, in the commission or attempted commission of, in any collaboration or conspiracy to commit, any of the acts referred to in this Article.

2. This Protocol shall also be applicable by mutual agreement between or among two or more State Parties with respect to any other act of corruption not described in this Protocol.

137 Akena 2012 http://www.academia.edu.

138 1. This Protocol shall be applicable to the following acts of corruption:

a) a public official demanding or accepting, either directly or indirectly through a third party, any object of pecuniary value such as a gift, offer, a promise or an advantage of any nature, whether for himself or for another person, in exchange for an act or an omission in the discharge of his duties;

b) offering or giving a public official, either directly or indirectly, any object of pecuniary value such as a gift, a favour or an advantage, whether for himself or another person, in exchange for an act or an omission in the discharge of his duties;

c) Any person who promises to offer or to grant directly or indirectly any undue advantage to any person who declares or confirms that he can exercise some influence on decisions or actions of persons occupying positions in the public or private sector, whether or not this influence had been exercised or not, or whether the supposed influence had the desired result or not;

d) any person who declares or confirms that he can exercise some influence on decisions or actions of persons occupying positions in the public or private sector, whether the influence is used or not, and whether or not the supposed influence had the desired result; and asking for or accepting directly or indirectly any undue advantage from whatever quarters;

e) a public official diverting from its initial purpose, either for his own benefit or for the benefit of another person, any assets, whether moveable or immoveable, or deeds and securities belonging to the State, an independent agency or an individual, given to the public official by virtue of his position and for the needs of the State for safe-keeping and for other reasons.

The *Inter American Convention against Corruption* does not define corruption.[139] It is the first treaty that sets the foundation upon which other international conventions such as UNCAC and *OECD Bribery Convention* were modelled. Therefore, its failure to define corruption may be appreciated if regard is had to the fact that it was signed in 1996.

In Europe, two main instruments come to the fore, namely, the *Council of Europe: Criminal Law Convention on Corruption* (hereafter *Criminal Law Convention*) and the *Council of Europe: Civil Law Convention on Corruption*. The former does not define corruption but the latter does, in article 2, by stating that:

> Corruption means requesting, offering giving or accepting, directly or indirectly, a bribe or any other undue advantage or prospect thereof, which distorts the proper performance of any duty or behaviour required of the recipient of the bribe, the undue advantage or the prospect thereof.

According to the Council of Europe[140] even though the *Criminal Law Convention* does not provide for a definition, there is general consensus that certain political, social or commercial practices are corrupt. The Council of Europe goes on to justify that the absence of a definition by arguing that the said practices, which are morally reprehensible, vary from country to country.[141]

2.8.2.3 International institutions

International institutions have been financing a number of procurement projects in developing countries.[142] In so doing, they spent huge sums of money directly and indirectly in government procurement.[143] In order to cushion themselves against corruption, maladministration and irregular expenditure of their funds, international financiers have come up with their own definitions of corruption in an effort to curb corruption, as shown below:

Table 2: Definitions of public procurement corruption at institutional and organisational level

Organisation	Definition
World Bank	The abuse of public office for private gain. Public office is abused for private gain when

139 UNODC *International Legal Instruments on Corruption* 232.
140 Council of Europe 2016 http://conventions.coe.int.
141 Council of Europe 2016 http://conventions.coe.int.
142 Asia-Pacific Economic Cooperation *Anti-Corruption and Governance* 4-5.
143 UNDP *Official Development Assistance* 150.

Organisation	Definition
	an official accepts, solicits, or extorts a bribe. It is abused when private agents actively offer bribes to circumvent public policies and processes for competitive advantage and profit. Public office can also be abused for personal benefit even when no bribery occurs, through patronage and nepotism, the theft of state assets, or the diversion of state revenues.[144]
International Monetary Fund	The abuse of public power for private benefit. Corruption can exist within private sector activities. Especially in large private enterprises, this phenomenon clearly exists, as for example in procurement or even in hiring. It also exists in private activities regulated by the government. In several cases of corruption, the abuse of public power is not necessarily for one's private benefit but it can be for the benefit of one's party, class, tribe, friends, and family. In fact, in many countries some of the proceeds of corruption go to finance the political parties.[145]
Asia Development Bank	The abuse of public power or private office for personal gain. This means any behaviour in which people in the public or private sectors improperly and unlawfully enrich themselves or those close to them, or induce others to do so, by misusing their position.[146]
African Development Bank	The misappropriation of public assets or public office and trust for private gains.[147]
Transparency International	Corruption can be classified as grand, petty and political, depending on the amounts of money lost and the sector where it occurs. Grand corruption consists of acts committed at a high level of government that distort policies of the central functioning of the state, enabling leaders to benefit at the expense of the public good. Petty corruption refers to the everyday abuse of entrusted power by low- and mid-level public officials in their interactions with ordinary citizens, who often try to access basic goods or services in places like hospitals, schools, police departments and other agencies.[148]
EU Commission	Corruption in a broad sense is any abuse of power for private gain. It therefore covers specific acts of corruption and those measures that Member States take specifically to prevent or punish corrupt acts as defined by the law. [The text also lists a range of areas and measures which impact on the risk of corruption occurring and on the capacity to control it.][149]

Although the definitions of corruption by the international institutions contain almost all the same elements, the definition of TI requires more attention. The definition of TI differs from the definition of international institutions in the following ways: first, in addition to a formal and general definition of corruption as the abuse of public office for personal gain, TI includes in its definition the forms of corruption; second, it links the general definition of corruption with the classification of corruption. This approach, which

144 The World Bank *Group Helping Countries Combat Corruption* 1.
145 International Monetary Fund *Corruption Around the World: Causes, Consequences* 1.
146 Asia Development Bank *Anticorruption Policy* 9.
147 Africa Development Bank *Guidelines for Preventing & Combating Corruption* 2.
148 Transparency International 2016 http://www.transparency.org.
149 European Commission Report "EU Anti-Corruption Report" 1-41.

one may call the "classification definition approach", attempts to give a broad classification of behaviour which is deemed corrupt.[150]

Table 3: Scholarly definitions of public procurement corruption

Scholar	Definition
Heinrich and Hodess	The abuse of entrusted power for private gain. Corruption is by definition a clandestine activity, making it hard to measure. This has led researchers to seek proxies, most often now understood as perceptions of corruption, and to establish the presence of antidotes, those factors most likely to prevent corruption from occurring.[151]
Williams and Quinot	Corruption is the abuse of public office for private gain. Although corruption is characterized here from the view of the public official, this is not to deny that corruption occurs within the private sector.[152]
Klitgaard	C (Corruption) = M (Monopoly) + D (Discretion) – A (Accountability).[153]

Although the above definitions differ in some respects, one thing that is clear is that the following elements appear in all the definitions: (i) abuse; (ii) of public power; (iii) for private or personal gain. The above definitions are broad and susceptible to various interpretations, which may lead to a difficulty in distinguishing between actual corruption and perceived corruption.[154] In the same light, Williams-Elegbe[155] highlights six characteristics of corruption which emanate from the above definitions.[156] In as much these definitions are not precise in defining public procurement corruption, they can be

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150 In other words, the "classification definition approach" as espoused by Transparency International tries to create continuity between the general definition and actual acts of corruption. Thirdly, Transparency International is bold in its definition in that it refers to three forms of corruption as part of its definition, namely, grand, petty and political. The other definitions discussed earlier refrain from isolating specific forms of corruption in their definitions. The "classification definition approach" favoured by Transparency International is what The European Commission calls corruption in a broad sense in its definition. In the same context some leading scholars have also attempted to add to the discourse on the definition of corruption.

151 Heinrich and Hodess "Measuring Corruption" 18.

152 Williams and Quinot 2014 *The South African Law Journal* 340.

153 Klitgaard A Holistic Approach to the Fight against Corruption 3.

154 If the public, scholars, the government and the economic players do not know exactly what corruption is, the result might be that they may report an act which later turns out not to be an act of corruption. If no legal action is taken the public may assume that the government is complicit in the corruption, yet in actual fact the reported act was not corruption. The effect might be that the public may then be reluctant to report acts of actual corruption. Hence, it is important to have the correct legal definition of corruption and for the public to be educated on the elements of corruption so that no time is wasted barking up the wrong tree.

155 Williams-Elegbe *Fighting Corruption in Public Procurement* 8.

156 (a) Corruption is an activity that occurs when the public interest is subjected to private interests; (b) corruption violates local and universal rules and duties but includes an element of cultural specificity; (c) corruption can be trivial or monumental; (d) corruption covers a wide range of activities which may be defined as embezzlement, fraud, bribery or theft; (e) corruption is present in developed and developing countries, but occurs with varying degrees of severity; (f) the activity labelled corrupt need not be illegal, it is enough that it is considered unethical or immoral.

applauded for capturing the fundamental elements that underpin public procurement corruption as reflected in the theories of corruption.

2.8.3 Theories of corruption

Theories of corruption attempt to discuss the reasons for the manifestation of corruption through the application of logic and by questioning why corruption takes place.[157] A number of theories of corruption have been posited and a few of them are discussed below in order to assist in understanding public procurement corruption.

Fatton[158] argues that corruption is rampant in societies where there is class domination.[159] The class that dominates uses corruption to be awarded government contracts. Vorster[160] argues that the two most important theories of corruption are related to utilitarianism and deontology. Utilitarianism, as noted by Voytinsky,[161] is based on the ethical conduct of the individual who weighs the good (the happiness) that his actions may cause and the bad (the harm) it may cause, and chooses to act appropriately.[162]

Kant[163] explains corruption using the philosophy of deontology, which focuses on the action itself rather than other surrounding circumstances.[164] Two deductions from the philosophy of deontology are: (i) that human beings are capable of making rational decisions and (ii) that human beings have a will. One can understand from Kant that human beings are capable of controlling their decisions and actions and preventing them from being corrupt, and this is reflected by the reaction of society to their actions.

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157 Rothstein and Torsello *Is corruption Understood Differently in Different Cultures?* 8.

158 Fatton 2014 http://www.jstor.org.

159 In this case it is said that the dominant class controls both the economy and the state machinery, a situation which inevitably results in corruption.[159] Under such circumstances the dominant class supplies the government with its needs and those in government are either part of the dominant class or have close links with dominant class.[159] As a result, requests for unnecessary purchases or highly inflated quotations are approved with little or no accountability.

160 Vorster 2013 *IN DIE SKRIFLIG* 3.

161 Voytinsky *Utilitarianism as Virtue Ethics* 8.

162 If the good weighs more favourably than the harm, then one acts in a manner that makes one attain the benefits of the corruption. In the context of corruption, if the benefit of corruption brings happiness to the procuring official, then that official acts corruptly without giving due regard to the consequences or immorality of that action.

163 Voytinsky *Utilitarianism as Virtue Ethics* 6-8.

164 In other words, Kant states that morality is the conscience of every individual. It is the morality that is used as a yardstick to evaluate a particular action of an individual.

There is a school of thought that argues that corruption is a necessary evil and that it is one of the catalysts in economic development. According to Harrison,[165] corruption has been described as "beneficial grease", where an explanation is given that certain corrupt practices aid economic growth.[166] It is submitted that the cumulative negative effect of corruption outweighs its purported advantages.

Deficiencies in the definitions and theories of corruption are addressed to a large extent under types of corruption.

2.8.4 Types of Corruption

Identifying the types of corruption is important as a means of supplementing the definitional deficiencies of corruption. Describing the types of corruption is not in itself defining corruption, but rather giving guidance on the elements that constitute the crime of corruption. There are a number of types of corruption that have been identified by scholars and international institutions.[167]

This study has identified the following five types of corruption that manifest both in general corruption and in public procurement corruption: active corruption; passive corruption; political corruption; grand and petty corruption; and private corruption.[168] The table below summarises the five identified types of corruption with special focus on the definitions and characteristics of each type of corruption in order to convey a better sense of the types of public procurement corruption.

Table 4: Types of corruption

Type of corruption	Definition	Characteristics
Active corruption	OECD[169] defines active corruption as paying or promising to pay a bribe. In addition, it has also been defined as the offence by the person who promises or gives the bribe, and it occurs on the supply side.[170] The Council of Europe Criminal Law Convention on Corruption[171] defines active corruption as the promising, offering or giving by	The required elements of this offence are those of promising, offering or actually giving something to a public official. The offence must cover instances where it is not a gift of something tangible that is offered. The undue advantage does

165 Harrison "The Cancer of Corruption" 141.
166 OECD *Issues Paper on Corruption and Economic Growth* 1.
167 Khan "Determinants of Corruption in Developing Countries" 216.
168 Ware *et al* "Corruption in Procurement" 73.
169 OECD *2014 Glossary of Statistical Terms*.
170 International Centre for Asset for Recovery 2014 http://www.assetrecovery.org.
171 Council of Europe 2016 http://conventions.coe.int.

Type of corruption	Definition	Characteristics
	any person, directly and indirectly, of any undue advantage to any of its public officials, for himself or herself or for anyone else, for him or her to act or refrain from acting in the exercise of his or her functions.[172]	not have to be given immediately or directly to a public official of the State. It may be promised, offered or given directly or indirectly. A gift, concession or other advantage may be given to some other person, such as a relative or political organisation. The undue advantage or bribe must be linked to the official's duties. The required mental element for this is that the conduct must be intentional. In addition, some link must be established between the offer or advantage and inducing the official to act or refrain from acting in the course of his or her official duties.[173]
Passive Corruption	According to the UN-Anti-corruption Tool Kit,[174] passive corruption or passive bribery as it is sometimes called is defined as the receipt of a bribe by a public official. Another definition that has been put forward relates to the public official who solicits a bribe in return for an advantage.[175] This is the preferred definition in most international instruments.[176]	The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official should act or refrain from acting in the exercise of his or her official duties.[177]
Political corruption	Political corruption has been one of the most contentious issues in the fight against public procurement corruption. However, a number of	Political corruption causes public procurement corruption in a number of areas[180] such as conflict of

172 COE 2014 http://conventions.coe.int.

173 COE 2016 http://conventions.coe.int.

174 UNEP *UN Anti-corruption Tool Kit* 7-10.

175 Cassuto *Effective Legal and Practical Measures for Combating Corruption* 24.

176 Article 15(b) of the UNCAC provides for passive corruption, which it defines as "The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties".
This definition is to be found verbatim in article 8(1) (b) of the UNATOC as well article 2 of the Council of Europe Criminal Law Convention on Corruption. In the same vein, the definition is article 4(1) (a) of the AU Corruption Convention is: "The solicitation or acceptance, directly or indirectly, to a public official or any other person, of any goods of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions". The main element that can be deduced from the above definitions is that passive corruption is merely soliciting or accepting a bribe by a public official. In addition to the main element of accepting or soliciting a bribe, the USIP states that the following must also be present in order for the crime of passive corruption to be satisfied.
The link with the influence of official conduct must also be established. As with active corruption the undue advantage may be for the official or some other person or entity. The solicitation or acceptance must be by the public official or through an intermediary, that is, directly or indirectly. The mental element is only that of intending to solicit or accept the undue advantage for the purpose of altering one's conduct in the course of official duties.

177 UNEP *UN Anti-corruption Tool Kit* 7-10.

Type of corruption	Definition	Characteristics
	definitions have been put forward to try to define political corruption.[178] Amundsen[179] defines political corruption as: > Involving political decision makers. Political or grand corruption takes place at the high levels of the political system. It is when the politicians and the agents, who are entitled to make and enforce laws in the name of the people, are themselves corrupt. Political corruption is when political decision makers use the political power they are armed with, to sustain their power, status and wealth.	interest.[181] According to OECD[182] a number of high-ranking politicians or their families own companies or some shareholding in companies that do business with the state. Some countries have banned top-ranking politicians from doing business with government as a measure to curb political corruption.[183] While this may be viewed as a step in the right direction, it is difficult to implement due to the use of other evasive mechanisms such as fronting.[184]
Grand and petty corruption	Petty corruption means either specific acts of abuse of power by public officials for small bribes or relatively minor benefits, or more serious corruption at managerial levels.[185] Grand corruption is also used in two senses: it refers either to specific acts of corruption involving particularly large amounts of money, usually at senior levels of government, or to corrupt practices that result in the abuse of systems designed to ensure good and effective governance.[186] The sustained abuse of such systems can result in the entrenchment of the corrupt practices as part of the systems, at which point these practices are referred to as systemic corruption.[187]	The distinction between grand and petty corruption is often drawn by anti-corruption scholars in the field of public procurement in order for one to understand corruption that is performed by public officials in return for small bribes as against that kind of corruption which involves huge amounts of money and is performed mostly by politicians.
Private corruption	Private corruption has been aptly described by Ndikumana[188] as follows:	The private sector has maintained two positions in corruption. Firstly, it

180 In some countries in transition, particular politicians are in control of particular geographical areas in the country such as Provinces, Districts, Councils, or Federals, depending on the terminology of the country. These politicians might have the mandate to ensure development in terms for example of the construction of hospitals, dams, schools, roads and airports. In some such cases the politicians hold a lot of power and have the final say in a number of developmental projects, which usually involve huge contracts. In addition, they have first-hand access to information, and if they are corrupt may use this information to manipulate the procurement process. This they can do in a number of ways, such as by inflating the extent of the development. Where two offices are needed the political head could say instead that four or five offices are needed.

178 Harris *Political Corruption* 1; Morris and Blake "Corruption and Politics in Latin America" 2; Osei-Hwedie and Ose-Hwedie "The Political, Economic and Cultural Bases of Corruption in Africa" 41.

179 Amundsen *Political Corruption: An Introduction to the Issues* 3-4.

181 Mynhardt *Investigation of Misrepresentation in Tender Documents* 32-34.

182 OECD *Integrity in Public Procurement Good Practice from A to Z* 77.

183 OECD *Financing Democracy: Framework for Supporting Better Public Policies and Averting Policy Capture* 15-16.

184 Department of National Treasury South Africa *2015 Public Sector Supply Chain Management Review* 14.

185 OECD *Preventing Corruption in Public Procurement* 10.

186 OECD *Preventing Corruption in Public Procurement* 10.

187 ADB *Comprehensive Review of the AFDB Procurement Policies and Reforms* 6.

188 Ndikumana *The Private Sector as Culprit* 1.

Type of corruption	Definition	Characteristics
	Private sector corruption deserves as much attention as public sector corruption due to its equally debilitating effects on economic activity. Private sector corruption is typically facilitated by weakness in the regulatory and institutional framework that makes it difficult to monitor the enforcement of rules and fraud deterrent mechanisms. It operates through three key mechanisms. The first is the manipulation of pricing mechanisms to gain monopoly profits through mispricing in international trade and transfer pricing involving transactions within subsidiaries of the same corporation. Transfer pricing allows corporations to benefit from operations which may be legal in principle but are nonetheless illicit from a moral perspective. The second channel is exploitation of insider information, which is most prevalent in the financial sector. Here, private operators derive monopoly profits by welling or "banking" information gained from their privileged positions as decision makers or employees within a particular financial institution. The third channel is capital flight and money laundering.	has been a victim of corruption in bureaucratic governments.[189] Overregulated or weakly regulated systems whether in developing or developed countries are a breeding ground of private sector corruption.[190] Secondly, due to greed or a desire to make profits the private sector has been the perpetrator of public procurement corruption.[191]

It can be seen in the above table that corruption is a complex phenomenon. Responses to curbing public procurement corruption are *inter alia* informed by one's understanding of the types of corruption as highlighted above. Without this appreciation it may be difficult to tailor specific anti-corruption measures to target the improper actions of public officials, politicians and the private sector.

189 Ndikumana *The Private Sector as Culprit* 1.
190 Ndikumana *The Private Sector as Culprit* 2.
191 UNPAN *Causes of Corruption in Public Sector* 3.

2.8.5 Forms of public procurement corruption

Forms of public procurement corruption are manifestations of corruption within the procurement system, as observed by Ware *et al*.[192] Some of the forms that have been identified include but are not limited to bid suppression,[193] complementary bidding,[194] bid rotation,[195] low balling,[196] bribery, bid rigging and collusion. The following forms of public procurement corruption have been identified as the common in public procurement: bribery; bid rigging and collusion.

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192 Ware *et al* "Corruption in procurement" 73.

193 Bid suppression takes place when one or more competitors agree not to bid. In the context of public procurement the decision by the other competitors not to bid would have been influenced by the public official. The intention of the public official would be to justify the awarding of the contract to the sole bidder, who would have been deemed to have complied with the bid requirements. The other competitors may decide to withdraw their bids in order to ensure that the bid is awarded to the sole bidder. If bid suppression succeeds, then those competitors who would either not have bidded or those who would have withdrawn their bid will be rewarded as sub-contractors. In the same vein the public official is also paid a bribe for facilitating the contract.

194 Complementary bidding is when there is deliberate inflation or deflation of bids. In the context of public procurement corruption, it is meant to create an impression that bids have been submitted but they do not satisfy the bidding requirements. See Adache "The Seemingly Upstanding Citizen" 206.

195 Bid rotation is when there is an agreement between bidders that they tailor their bidding in order for a particular bidder to win. The arrangement is such that each of those bidders who is involved in the bid rotation will at some point be awarded the tender. See Ware *et al* 73.

196 Low balling takes place when "the designated company submits the lowest bid with the understanding of the public official responsible for awarding the contract that, once awarded, the contract will subsequently be amended and the contract price increased to enable the winning bidder to complete the work and to inflate his profit margin, part of which may be shared with the public official." See Ware *et al* 73.
This is one of the most common causes of public procurement corruption. Public officials have been accused of using their discretionary powers and influence to ensure that low bids are changed once the project has begun or just before the commencement of the contract. Ware *et al* observe that in some cases the procurement orders are altered upwards in order to accommodate the low bidder, who is part of the corrupt transaction.

Table 5: Forms of corruption

Form of corruption	Definition	Characteristics
Bribery	Bribery has been defined *inter alia* as undue advantage,[197] or a payment made by a third party to an agent of the principal.[198]	The offering, promising or giving of something in order to influence a public official in the execution of his/her official duties. Bribes can take the form of money, other pecuniary advantages, such as membership in an exclusive club or a promise of a scholarship for a child, or non-pecuniary advantages, such as favourable publicity. Every bribery transaction involves a supply side (the briber) and a demand side (the public official).[199]
Bid rigging	Bid rigging occurs when a competitive public tender, which has as its purpose open and fair competition between all interested bidders, is manipulated in such a way as to pre-determine the outcome of the tender in favour of a pre-selected bidder.[200]	Bid rigging in public procurement manifests itself as bid suppression, complementary bidding, bid rotation and low balling.[201]
Collusion	This occurs where there is a horizontal relationship between bidders in public procurement, who conspire to remove the element of competition from the process.[202]	Where corruption occurs in a public contract, collusion between bidders, for example in the form of compensatory payments for the granting of subcontracts, may be necessary to ensure that the losing bidders do not expose the illegal conduct to the public authorities. Equally, economic rents derived from collusion may foster corruption, while collusion is also facilitated by having an "insider" in the public agency that provides the bidders with information necessary to rig bids in a plausible manner, and may even operate as a cartel enforcement mechanism.[203]

Ware *et al*[204] summarise the above forms of corruption by providing thirteen steps[205] that appropriately capture the rationale behind forms of public procurement corruption.

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197 OECD 2014 http://www.oecd.org.

198 Soreide *Public Procurement Corruption Causes, Consequences and Curses* 4.

199 OECD 2014 http://www.oecd.org.

200 Ware *et al* "Corruption in Procurement" 73-74.

201 Ware *et al* "Corruption in Procurement" 73.

202 OECD *Bribery in Public Procurement: Methods, Actors and Counter Measures* 10.

203 OECD *Bribery in Public Procurement: Methods, Actors and Counter Measures* 70.

204 Ware *et al* "Corruption in Procurement" 74-75.

205 (i) Identical bids submitted by different bidders either with respect to individual line items in the bids, or to the total bid prices;
(ii) All bids submitted are substantially higher than the procuring entity's cost estimate of the contract, or substantially higher than comparable bids submitted by the same bidders for similar works or in other areas;

The purpose of the above exposition was to give an overview on the following: the need to properly define public procurement corruption; the need to understand types of public procurement corruption such as active and passive corruption; and the need to understand forms of public procurement corruption encompassing *inter alia* bribery, bid rigging and collusion.

Two questions remain to be answered, namely what causes the above types and forms of public procurement corruption, and what measures can be put in place to curb public procurement corruption? The former question will be discussed first.

2.9 Causes of public procurement corruption in developing countries

A lot of literature exists that discusses various and common causes of public procurement corruption in developing countries.[206] Some developed countries suffer from the same causes but not on the same scale as developing countries. Akomah and

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(iii) A winning bidder subcontracts the performance of part of the contracted works to one or more losing bidders with or without the client's knowledge;
(iv) There is an indication of a physical alteration of one or more bids, particularly at the last minute or after submission;
(v) The prices quoted by some bidders for particular line items are substantially higher than the prices quoted by other bidders for the same items and bear no relation to cost; this is a common technique for hiding excessive profits within a winning a bid, which is subsequently used to pay bribes to the awarding public officials;
(vi) The range of bid prices shows a wide gap between the winner and all other bidders: this may be an indicator that all bidders other than the winning one have been given instructions to price their bids above a certain pre-determined price;
(vii) The bid prices of all bidders vary from one another by the same increment, for example winning bid prices plus 1 per cent, plus 2 per cent etc;
(viii) A bidder submits different bid prices for the same line item on different contracts that are tenders close together in time;
(ix) There is physical evidence of collusion in the bids submitted, such as different bidders submitting bids with the same handwriting, or in the same type of envelope, or containing the same mathematical or spelling errors, or with the same contact information, such as telephone or fax numbers;
(x) Qualified bidders do not bid, especially if they initially took steps to bid, such as applying to pre-qualify; this may be a sign that they have been coerced by the procuring entity not to bid or have been induced by another bidder not to bid;
(xi) When a contract is re-bid, for example because all the bids submitted in the original tender were unacceptable, the prices of the bids submitted in the re-bid result in the same ranking order of the bidders or some bidders fail to submit bids in the re-bid;
(xii) Also in re-bidding, there are significant increases in the prices of bids submitted by most bidders over the prices which they previously submitted, when there has been no commensurate increase in the cost of the same items;
(xiii) Prices mysteriously drop when a new bidder begins participating in public tenders, which may indicate that the bidders were colluding among themselves to keep prices artificially high, in the absence of competition from a bidder who had not been part of the collusion.

206 Akomah and Nani *Determining the Causes of Public Procurement Corruption* 85-89.

Nani,[207] like most other scholars, identify some of the causes of public procurement corruption in developing countries such as greed, the weaknesses of institutions, a lack of the enforcement of laws, a lack of professionalism in procuring institutions, unskilled procuring officials, a lack of political will, the giving of unfettered discretion to procuring officials, government bureaucracy, ambiguous procurement legislation, and a limited accountability of both the procuring officials and the executive.[208]

Significant as these causes are, this study has grouped all these and many other causes into the following four classes that are peculiar to developing countries: the personal circumstances of the procuring official; the personal circumstances of the politicians; political transition; and economic transition.

2.9.1 Personal circumstances of the procuring official

The term "the personal circumstances of the procuring official" refers to the family life, aspirations (economic and political), education (skills), job security and remuneration of the corrupt procuring official. It has been observed by Andvig and Fjeldstad[209] that corruption takes place due to the fact that in some developing states there is no job security for public officials. In order to compensate for this, public officials engage in corrupt behaviour to cushion themselves from any job or economic loss.[210]

Whilst this may be true for some states, the trend seems to be changing if regard is had to the permanent positions of public servants being advocated in many developing countries.[211] As suggested by Rijckeghem and Weder,[212] if public officials receive fair wages and there is job security, then the chances of encountering corruption are less than where the wages are low and where there is no job security.[213]

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207 Akomah and Nani *Determining the Causes of Public Procurement Corruption* 85-89.

208 Soreide *Public Procurement Corruption Causes, Consequences and Curses* 4.

209 Andvig and Fjeldstad *Corruption A Review of Contemporary Research* 1-2.

210 Chene *Low Salaries, the Culture of Per Diems and Corruption* 2.

211 Procuring officials who are civil servants in most countries enjoy permanent posts, and this gives them job security. It seems nowadays that the issue of job security for civil servants and in particular procuring officials is not of concern. However, the low remuneration and government employment rotation may be some of the underlying reasons that may be contributing to public procurement corruption.

212 Rijckeghem and Weder *Corruption and the Rate of Temptation* 10.

213 It is submitted that whether the salaries are low or fair, if the benefits of corruption are more than the wages, then the official is likely to be persuaded to engage in corruption. Whilst there is sense in the argument that low wages may encourage corruption, the position is different with regards to those

On the same note, some procuring officials in developing countries intentionally do not disclose their interests (family, business and political) in the adjudication of government tenders that the procuring official is participating in.[214] The lack of disclosure taints the objectivity of the procuring official in awarding a particular government contract.[215] In some instances, the procuring officials may be conflicted in their political relations, and this may affect their awarding of the government contract.[216] Therefore, what role do the personal circumstances of the politicians play in the awarding of government contracts?

2.9.2 Personal circumstances of the politicians

In this study, the term "the personal circumstances of politicians" refers to the desire for consolidation of political power by the political elite.[217] The consolidation of political power in public procurement corruption manifests itself in instances where government tenders are awarded on the basis of political patronage.[218] In other words, government tenders are awarded to those individuals or entities that are willing to support financially, materially or otherwise, the government of the day and its political cronies.[219]

Some developing countries suffered from this kind of consolidation of political power to such an extent that the strategic state machinery such as the judiciary, which is crucial to combating public procurement corruption, is administered by a few individuals, resulting in systemic corruption.[220]

In the process of awarding tenders little or no regard is given to the ability of the supplier to perform the contract.[221] Even if the corrupt supplier can perform the contract it is the grounds upon which the contract is awarded that are frowned upon. The test is whether the awarding of the government contract was based on sound procurement principles or on political patronage.[222] This is the birth of political corruption as it is known today.

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public officials who earn high wages but still engage in corrupt activities. For the purposes of analysing corruption, "greed" can be defined as an insatiable appetite to amass wealth by manipulating the procurement process for personal aggrandisement.

214 European Commission *Identifying Conflict of Interest in Public Procurement* 10-12.
215 OECD *OECD Principles of Integrity in Public Procurement* 23.
216 OECD *OECD Principles of Integrity in Public Procurement* 24.
217 Johnston *Corruption and Democratic Consolidation* 2.
218 Heggstad, Froystad and Isaksen *The basics of Integrity* 8.
219 Magure "Party Funding For and Against Democracy in Zimbabwe" 58.
220 Asiedu and Freeman 2009 *Review of Development Economics* 201.
221 World Bank 2014 http://www1.worldbank.org.
222 World Bank 2014 http://www1.worldbank.org.

Related to the personal circumstances of politicians is the role of the political transition from colonialism that some developing countries went through, and how this political transition impacted on public procurement corruption.[223]

2.9.3 Political transition

In an attempt to find the causes of public procurement corruption in developing countries, studies have been carried out on the influence of political transitions on public procurement corruption.[224] The aim of these studies was to determine whether the current state of high public procurement corruption in developing countries can be attributed to the period when political power was transferred from the colonial masters to the newly established governments.[225] These studies also tried to investigate whether public procurement corruption existed in colonial governments and whether the current public procurement corruption in some developing countries is just an extension of the legacy of colonialism.[226]

In an attempt to answer the above questions, Dowdle[227] notes that the subsequent change of government in most developing countries (the political transition) fuelled public procurement corruption, as there was *inter alia* no public accountability. In the same vein, Chang[228] expresses the opinion that most new democracies emerging from colonialism lacked accountability in a number of key governmental areas. Naum[229] believes that the political conditions at the time of political transition (from colonialism to democratic governments) in developing countries were ripe for corruption because of the concentration of political power by the new governments.

This supports the notion that during political transition and even in the drafting of constitutions as a measure to manage the political transition, most developing countries lacked the foresight to create legal mechanisms to control corruption.[230]

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223 Chang *Political Transition, Corruption and Income Inequality* 1-2.
224 Nowak *Corruption and Transition Economies* 2-3.
225 Nowak *Corruption and Transition Economies* 2-3.
226 World Bank "The Economic and Social Consequences of Corruption in Countries in Transition". 1.
227 Dowdle "Public Accountability: Conceptual, Historical, and Epistemic Mappings" 3.
228 Chang *Political Transition, Corruption and Income Inequality* 1-2.
229 Naum *Developing Countries and Countries in Transition* 7-8.
230 Very few countries that emerged from colonialism were able to include specific constitutional provisions that address procurement and corruption. South Africa is the only country in Africa that has a specific constitutional provision (Section 217) that addresses procurement.

Nowak[231] is of the view that the situation of public procurement corruption could have worsened in cases where there was no clearly defined political authority due to the scramble for power amongst the factions in the country in transition, and in the process of the scramble for power, public procurement was neglected.[232] Some governments were able to create political institutions and neglected governance and administrative institutions that were responsible for public procurement, resulting in the proliferation of public procurement corruption.[233]

The political transition in developing countries and its effect on public procurement corruption is directly linked to the economic transition that also took place simultaneously with political transition.[234]

2.9.4 Economic transition

Economic transition has been defined and classified by different scholars and researchers.[235] In this study "economic transition" refers to the process where a once colonised territory became independent and assumed control of the treasury and management of public funds to foster economic growth. It does not refer to a country that practised nationalisation soon after political independence.[236]

For most developing countries the economic transition meant that the new government assumed key procurement activities via the treasury or equivalent ministry or

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231 Nowak *Corruption and Transition Economies* 2-3.

232 Countries that gained independence after the 1990s, like South Africa, were able to learn from other countries that gained independence before them, but were unable to regulate procurement constitutionally. However, some countries that have embarked on re-writing their constitutions, like Zimbabwe, have failed to include procurement provisions in their constitutions.

233 In support of this reasoning the World Bank has noted that: "Corruption in this setting has been facilitated by three factors: (i) the re-writing of unprecedented volume of laws, regulations and policies; (ii) the extraordinary redistribution of wealth from state to the private sector; (iii) the virtual absence of institutions either within or external to the public sector that could effectively check the abuse of public office during transition in many countries".
It is submitted that the above observation by the World Bank seems to give the correct synopsis of the causes of public procurement corruption in developing countries that faced political transition.

234 Rada and Taylor "Developing and Transition Economies in the Late 20th Century" 1.

235 Nowak *Corruption and Transition Economies* 2-3; Mbaku "Corruption in Africa: Causes, Consequences, and Cleanups" 27.

236 Wilson III 1990 *Comparative Politics* 402-403.

department.[237] However, the new government lacked the capacity to effectively administer procurement while at the same time controlling corruption.[238]

Most developing countries lacked the following capacities at the time of economic transition that are significant to combating public procurement corruption: procurement legislation; human capacity and resources; and procuring institutions.[239] This lack of procurement capacity meant that generally procurement was conducted in violation of procurement principles such as transparency, accountability, integrity, equitability and fairness.[240]

Some developing countries have made remarkable strides since the period of economic transition in redressing the above mentioned procurement incapacities, but the progress has been slow.[241] Effectively, economic transition as a cause of public procurement corruption has exposed deficiencies within their procurement systems which might be contributing to the escalation of public procurement corruption in a number of developing countries.[242] This has also affected the use and identification of the right measures and tools to combat public procurement corruption.

2.10 Measures of combating public procurement corruption

Public procurement corruption is not static and evidence has shown that it has been changing over time.[243] The discussion above has argued that public procurement in developing countries is affected *inter alia* by the personal circumstances of procuring officials; the personal circumstances of politicians; political transition and economic transition.

In light of the above discussion, other innovative public procurement corruption measures must be explored in order to optimise public procurement principles and without over-stretching their application.[244] The next part of this text will focus on four classes of measures: criminal measures, administrative measures, institutional

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237 Hermes and Lensink 2000 *Journal of Banking and Finance* 508-509.
238 UNOPS *Supplement to the 2009 Annual Statistical Report Supplement* 4-7.
239 UNOPS *Supplement to the 2009 Annual Statistical Report Supplement* 7.
240 OECD *Preventing Public Procurement Corruption* 6-7.
241 Dza, Fisher and Gapp *Procurement Reforms in Africa* 50.
242 Goel and Budak *Corruption in Transition Economies* 243.
243 Mbaku "Corruption in Africa: Causes, Consequences, and Cleanups" 27.
244 OECD *Preventing Public Procurement Corruption* 22.

measures and civil activism measures; as tools to curb public procurement corruption in developing countries, as illustrated below.

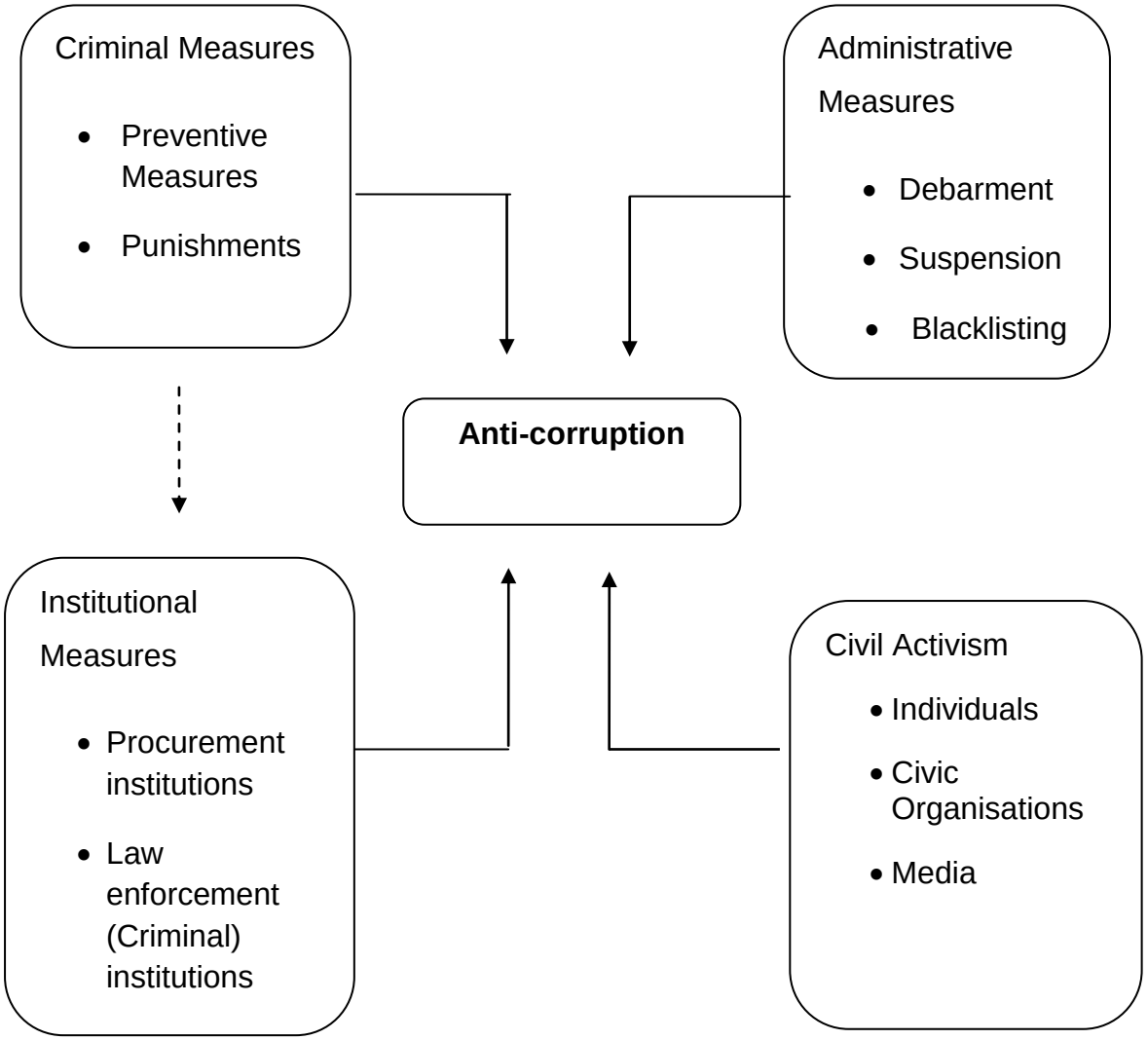

Figure 1: Measures of combating public procurement corruption

Before an in-depth discussion of these four public procurement anti-corruption measures occurs, a cursory look is taken at the key international and regional instruments in so far as fighting public procurement is concerned.[245] The reason for discussing international and regional instruments is that they express the international best practice of combating public procurement corruption. In the same context, international and regional instruments expose some fundamental gaps in the approach to curbing public procurement corruption at domestic level. Furthermore, the discussion

[245] UNODC *Guidebook on Anti-corruption in Public Procurement* 24-25.

on international and regional instruments sets the tone for discussing the four public procurement anti-corruption measures identified above.

2.10.1 International instruments

There are a number of international instruments that are in place and which can be used to combat corruption.[246] However, they deal with the issue of corruption from a general point of view and do not deal directly with public procurement corruption. The main international instrument for combating general corruption as already discussed is UNCAC. Article 9(1) of UNCAC makes special provision for public procurement and the management of public finances.[247] Further, article 9(1) advocates the classical approach to public procurement, which is the enactment of procurement legislation that provides adequately for criminalising public procurement corruption.[248]

Also, article 9(1) reiterates the use of the same procurement principles that have been discussed earlier as part of anti-corruption measures.[249] In addition to the use of the procurement principles, article 9(1) obliges state parties to observe the following: the distribution of procurement information; advance notification of the procurement method; fair procurement decisions; an effective system of domestic review; measures to hold corrupt procurement officials personally responsible; transparency and accountability in the management of public finances; effective oversight; risk management; and the use of civil and administrative measures in combating public procurement corruption.[250] In addition, article 9(2) further buttresses the need to curb public procurement corruption.[251] Article 9(2) has already been discussed briefly in Chapter One.[252]

Other UNCAC complementary provisions that are directly related to combating public procurement corruption are the following: Chapter III provides for the criminalisation of corruption. The criminalisation provided for in UNCAC is of general application and it is incumbent upon each jurisdiction to ensure that it has sufficient domestic criminal

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246 UNODC *International Legal Instruments on Corruption* 21, 72,07, 112, 116, 131, 139, 155, 163, 174, 183, 191 and 197.
247 UNODC *Guidebook on Anti-corruption in Public Procurement* 7.
248 UNODC *Guidebook on Anti-corruption in Public Procurement* 7.
249 UNODC *Guidebook on Anti-corruption in Public Procurement* 7.
250 UNODC *International Legal Instruments on Corruption* 30.
251 UNODC *Guidebook on Anti-corruption in Public Procurement* 29.
252 See para 1.8.1.

measures to combat public procurement corruption as an extension of combating general corruption.[253]

UNCAC creates the following criminal offences which extend to public procurement: the bribery of national public officials;[254] the bribery of foreign public officials and officials of public international organisations;[255] embezzlement, misappropriation or other diversion of property by a public official;[256] trading in influence;[257] the abuse of functions;[258] illicit enrichment;[259] bribery in the private sector;[260] the embezzlement of property in the private sector;[261] the laundering of the proceeds of crime;[262] concealment;[263] and the obstruction of justice.[264]

For the above mentioned criminal offences to be legally binding upon the perpetrators committing the offence, article 28 provides *inter alia* that there has to be knowledge, intent and purpose on the part of the perpetrators. Furthermore, parties to UNCAC are required to ensure *inter alia* that criminal sanctions should be proportionate to the corruption offence committed.[265] All of these are applicable to public procurement as already discussed.

Where public procurement corruption has been identified, UNCAC provides for freezing, seizure and confiscation.[266] Furthermore, UNCAC acknowledges the role of witnesses, experts and victims of public procurement corruption. For this reason, UNCAC encourages State Parties to ensure that there are adequate measures to protect the witnesses, experts and victims of public procurement corruption.[267]

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253 Article 15: Each State Party shall adopt such legislative and other measures as may be necessary to establish these as criminal offences, when committed intentionally.
254 Article 15.
255 Article 16.
256 Article 17.
257 Article 18.
258 Article 19.
259 Article 20.
260 Article 21.
261 Article 22.
262 Article 23.
263 Article 24.
264 Article 25.
265 Article 30.
266 Article 31.
267 Article 32.

Therefore, it is submitted that what is possible in practice is to ensure that existing criminal sanctions against public procurement corruption are enforced.[268] These existing laws have to be reinforced with adequate penalties.[269] This is a perennial challenge for developing countries, and has been discussed at various levels.[270] There are developing countries that are willing to enforce these criminal sanctions but they lack the expertise in criminal law to do so, or their human resources are inadequately trained,[271] thereby creating a gap in curbing public procurement corruption within the criminal justice system.[272]

Moreover, victims of public procurement corruption are entitled by UNCAC to claim damages in accordance with domestic law.[273] Furthermore, UNCAC encourages the use of experts in public procurement corruption to investigate and prosecute corruption matters.[274] In the event that two or more people are involved in the corrupt act, UNCAC in terms of article 37 encourages such culprits to cooperate with law enforcement agents in all aspects of the investigation with the intention of securing successful conviction.

UNCAC acknowledges that bank secrecy has been one the major obstacles to fighting public procurement corruption.[275] In order to overcome bank secrecy, UNCAC encourages parties to enact laws that allow banks to release information that aids in the investigation and conviction of suspects.[276]

Another anti-corruption measure provided by UNCAC is to impute criminal records to public procurement corruption offenders.[277] According to UNCAC, the criminal record of other criminal cases committed in other jurisdictions by the suspects or convicts should

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268 OECD *Fighting Corruption* 3.
269 Rose-Ackerman *Corruption and the Criminal Law* 5.
270 OECD *Fighting Corruption* 22.
271 Carr and Jago *Corruption, the United Nations Convention Against Corruption* 223.
272 OECD *Collusion and Public Procurement* 9.
273 Article 35.
274 Article 36.
275 Article 36(7).
276 Article 40.
277 Article 41.

be taken into account.[278] Obviously this requires cooperation between different countries that may be holding such information.[279]

It is submitted that there has to be an international data base that should be provided to the International Criminal Police Organisation (hereafter Interpol), which should be accessible to anyone seeking to ascertain the corruption criminal record of a particular person(s) or multi-national corporations outside the jurisdiction of the country soliciting for tenders. These criminal law measures at international level should be complemented by additional measures at regional level.

2.10.2 Regional instruments

At regional level,[280] emphasis is also on the use of criminal law measures to combat public procurement corruption, as discussed under UNCAC above. Some of the criminal law measures are similar, but not identical.[281] However, what is clear is that regardless of the approach in criminal measures, all of the regional instruments discussed herein have one aim, that is to combat corruption, and this extends to public procurement corruption. The following table summarises some of the criminal law measures envisaged at regional level:

278 Article 41.
279 Article 43.
280 It seems as if Asia does not have a regional instrument on fighting corruption.
281 Carr *Fighting Corruption through Regional and International Conventions* 12-13.

Table 6: Regional instruments on corruption

AU Convention	SADC Protocol on corruption	Inter-American Convention against corruption	EU[282] (Council of Europe: Criminal Law Convention on corruption)
Enactment of criminal legislative measures (article 5(1)).	Criminalises solicitation, offering, acts of omission or commission, diversion by a public official, corrupt acts by the private sector, concealment of corrupt proceeds, acts of agents and other related parties (article 3).	Creates institutional systems that prevent conflict of interest; conservation of resources (article III) (1). To ensure that government employees understand their responsibilities (article III (3)).	Legislative measures to criminalise active bribery of domestic public officials (article 2). Legislative measures to criminalise the passive bribery of domestic public officials (article 3).
Strict control of the operation of foreign companies (article 5(2)).	Adopting good systems of public procurement; protection of whistle-blowers; punishment of bribery; public education (article 4).	Disclosure of personal assets by government employees (article III (4)).	Criminalisation of bribery of members of domestic public assemblies (article 4).
Strong accounting and internal auditing (article 5(4).	Acts of corruption relating to an official of a foreign state (article 6).	Criminalises solicitation, offering, acts of omission, concealment, participation of other people in the corrupt act (article IV (1)).	Criminalisation of the bribery of foreign public officials (article 5).
Protection of whistle-blowers and other informants (article 5(5)).	Confiscation and seizure (article 8).	Criminalises transnational bribery (article VIII). Criminalises illicit enrichment (article IX).	Criminalisation of bribery of members of foreign public assemblies (article 6).
Education of citizens (article 5(8)).	Extradition (article 9).	Criminalises the improper use by government officials of classified or confidential information; property; diversion (article XI).	Criminalisation of active bribery in the private sector (article 7).
Laundering of the proceeds of corruption	Judicial cooperation and legal assistance (article	Extradition (article XIII).	Criminalisation of passive bribery in the

[282] The EU has many regional conventions that address corruption. However, this study has chosen one, namely, Council of Europe: Criminal Law Convention on Corruption. The reason for choosing this was the fact that it addresses the criminal law aspect of corruption, which fits well with this study. Some of the conventions include: Council of Europe: Model Code of Conduct for Public Officials; Resolution 99(5) of the Committee of the Council of Europe: Agreement Establishing the Group States against Corruption; Council of the European Union Framework decision on Combating Corruption; Council of the European Union: Convention on the Fight against Corruption involving Officials of the European Communities or officials Member States of the European Union; Council of the European Union Protocol to the Convention on the Protection of the European Communities Financial Interests.

AU Convention	SADC Protocol on corruption	Inter-American Convention against corruption	EU[282] (Council of Europe: Criminal Law Convention on corruption)
(article 6)).	10).		private sector (article 8).
Asset declaration by public officials (article 7).	Pursuance of corrupt acts committed before the coming into force of the Protocol (article 14).	Assistance and cooperation (article XIV).	Criminalisation of the bribery of officials of international organisations (article 9).
Punishment of illicit enrichment (article 8).		Bank secrecy shall not be used as a barrier to fighting corruption (article XVI).	Criminalisation of the bribery of judges and officials of international courts (article 11).
Ease of access to information (article 9).			Criminalisation of trading in influence (article 12).
Transparency in the funding of political parties (article 10).			Criminalisation of money laundering proceeds (article 13).
Private sector anti-corruption legislation (article 11).			Criminalisation of false accounting practices (article 14).
Promotion of extradition (article 15).			Criminalisation of corruption committed by multiple people (article 15).
Confiscation and seizure of the proceeds of corruption (article 16).			Proper application of the principle of immunity (article 16).
Bank secrecy (article 17).			Corporate liability of entities (article 18).
Cooperation and mutual legal assistance (article 18).			Cooperation with and between authorities (article 21).
International cooperation (article 19).			Whistle-blower protection (article 22).
			Gathering of evidence and confiscation of proceeds (article 23).
			Extradition of offenders of corruption (article 27).

The above table highlights the various efforts that regional bodies have made in order to combat corruption. All regional bodies concur on the need for regional cooperation as

well as the exchange of information relating to corrupt practices.[283] In the same light, all regional bodies agree that there is a need for the extradition of people accused of corruption. Furthermore, it has been observed by all regions that bank secrecy should not be used as an excuse to hide the proceeds of corruption.[284]

However, some regional efforts, like those of the EU, place more emphasis on combating private sector corruption, which inevitably reduces public procurement corruption, while others like the AU's focus more on general corruption offences. Moreover, the EU *Criminal Law Convention* is almost exclusively focussed on the criminalisation of bribery, while the other three regional conventions create various corruption offences of which bribery is a part.

What is missing in the international and regional conventions is the issue of public procurement corruption and cybercrime.[285] UNCAC and the above four regional instruments do not address cybercrime and public procurement corruption,[286] which is gaining momentum due to the increasing use of technology in the entire procurement process. This anomaly should be rectified as a matter of urgency.

The measures advocated by the international and regional instruments fits well with criminal measures, administrative measures, institutional measures and civil activism, as classified in this study. This classification makes it much easier for countries to focus on specific areas and avoid duplication in combating public procurement corruption.

2.10.3 Domestic measures

2.10.3.1 Criminal measures

Criminal measures have been defined by scholars differently, depending on the disposition of the scholars.[287] In this study criminal measures aimed at combating public procurement corruption are defined as measures either at common law or through

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283 Carr *Fighting Corruption through Regional and International Conventions* 21.

284 OECD *Bribery in Public Procurement Corruption* 29.

285 Tamarkin *The AU's cybercrime response: A Positive Start, but Substantial Challenges Ahead* 4.

286 One solution that has been suggested to counter cybercrime and public procurement corruption is to harmonise the criminal measures to curb public procurement corruption and create an International Criminal Statute on Corruption. This Statute would be of general application and would define the nature of corruption and the appropriate sanctions. For this to happen, corruption has to be elevated to become an international crime or a crime against humanity.

287 UNODC *Vienna Prevention: An Effective Tool to Reduce Corruption* 27.

legislation that are used to punish criminal conduct. Public procurement corruption as defined earlier fits under criminal conduct; hence the use of criminal measures to punish and prevent it.[288]The use of the criminal justice system to combat public procurement corruption has been a common practice for a very long time.[289]

In most jurisdictions, criminal measures are used mainly for punishment.[290] In the process of punishment, it is hoped that prevention will take place. Whether or not the use of the criminal justice system has been successful to fight public procurement corruption is difficult to measure, particularly in developing countries.[291] However, if the use of criminal measures as *de facto* anti-corruption measures was effective, one would have witnessed a decrease in the incidence of public procurement corruption in developing countries.[292]

The difficulty arises from the fact that international instruments make it incumbent upon States to ensure that national criminal penalties are extended to cases of public procurement corruption.[293] What this means is that individual countries have different criminal justice approaches and treat cases of public procurement corruption with varying degrees of severity, depending on the characteristics of the criminal justice system of a particular state.[294]

Another criticism that appears not to have been strongly dealt with by both international and regional instruments is the imputing of criminal liability to firms and multinational companies involved in public procurement corruption.[295] Strictly speaking under criminal law you cannot impute criminal liability to a corporation due to the legal definition of corruption and questions of culpability.[296] Generally, a corporation cannot be said to be culpable for the purposes of corruption and it may be difficult to apportion criminal

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288 ADB/OECD *Anti-Corruption Initiative for Asia* 77.
289 Kemboi "Criminal Justice System Response to the Problem of Corruption in Kenya" 233-234.
290 Williams-Elegbe "A Perspective on Corruption and Public Procurement in Africa" 49.
291 UNODC 2017 http://www.unodc.org/unodc/en/corruption/index2.html.
292 Appolloni and Nshombo 2013 *Rivista di Politica Economica* 18.
293 Cabarious *Corruption in the Control in the Criminal Justice of the Philippines* 177.
294 Cabarious *Corruption in the Control in the Criminal Justice of the Philippines* 177.
295 Pantzalis, Park and Sutton 2008 *Journal of Empirical Finance* 389-390.
296 Obidairo *Transnational Corruption and Corporations* 174.

liability to the employees of the corporation who may have committed the corrupt act for the benefit of the corporation, especially if the corrupt act is complicated.[297]

This is one of the reasons why this research is so pertinent, in that it seeks to explore other anti-corruption measures that may be used to hold *inter alia* corporations (the private sector) liable for public procurement corruption. In most developing countries[298] the culpability of corporations for public procurement corruption liability is still a vexatious issue.[299] This prompts one to consider other innovative anti-corruption measures that developing countries can use to hold private suppliers liable for public procurement corruption. One such kind of measure that has been identified in this study is administrative measures.

2.10.3.2 Administrative measures

Williams-Elegbe[300] defines the administrative measures used in fighting public procurement corruption as "measures permitted under the exercise of executive discretion." The procurement entities are governed by administrative law, which is part of the public law. According to Bolton:[301]

> It is particularly administrative law that applies to government procurement, defining the scope of the government's powers, the way in which such powers should be exercised, and the consequences that flow from the misuse of powers. In short, organs of state must act within the limits of their constitutional and statutory powers; organs of state may not fetter the discretion afforded to them, and persons affected by administrative decisions must be given an opportunity to be heard.

For the purposes of this study administrative measures for combating public procurement corruption are defined as control or punitive measures[302] that can be invoked by authorised procurement official(s) or bodies against acts of private suppliers in their individual capacity or as legal entities. It should be noted that there are

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297 Obidairo *Transnational Corruption and Corporations* 174.

298 In the United Kingdom there is the Corporate Manslaughter and Corporate Homicide Act of 2007. This was in response to ensuring the gap culpability created by common law in criminal liability can be closed. Therefore, countries can introduce legislation that introduces culpability of corporation in cases of public procurement corruption. There are some public procurement corruption cases where it is more expedient to hold the corporate liable rather than individual employees, directors shareholders etc.

299 Pop *Criminal Liability of Corporations – Comparative Jurisprudence* 2.

300 Williams-Elegbe *Fighting Corruption in Public Procurement* 27.

301 Bolton "Overview of the Government Procurement System in South Africa" 359.

302 Outside of the criminal law.

administrative measures that are targeted at corrupt procurement officials, and these will be referred to only where relevant.

Public procurement in most countries is a combination of both private law and public law.[303] The awarding of a public tender in essence means that the government (represented by the procuring entity) or by an organ of state which is a public body enters into a contract[304] with a bidder, who in most cases is a private party.[305] The procurement entities are governed by administrative law, which is part of the public law. According to Bolton:[306]

> It is particularly administrative law that applies to government procurement, defining the scope of the government's powers, the way in which such powers should be exercised, and the consequences that flow from the misuse of powers. In short, organs of state must act within the limits of their constitutional and statutory powers; organs of state may not fetter the discretion afforded to them, and persons affected by administrative decisions must be given an opportunity to be heard.

In most jurisdictions, there are administrative rules and regulations that are meant to punish those that are involved in public procurement corruption,[307] especially the private party.[308] Public officials are usually dealt with in terms of the public laws and in some cases criminal sanctions are imposed on the corrupt public officials.[309] However, this study discusses administrative measures that are targeted at suppliers or bidders, either (private suppliers) as individuals or as a legal entity.

There is no international or regional instrument that provides exclusively for a framework for administrative measures for public procurement. At international level only UNCAC makes reference to the use of administrative measures for combating public procurement corruption (in article 7 (2))[310] without specifying what these measures are.

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303 Bolton "Overview of the Government Procurement System in South Africa" 359.

304 Contract law is part of private law.

305 It must be noted that in some cases there are inter-governmental procurement agreements. However, procurement rules must still be adhered to, even though no private supplies are involved.

306 Bolton "Overview of the Government Procurement System in South Africa" 359.

307 GOPAC "Prosecuting Grand Corruption as an International Crime" 4.

308 Williams-Elegbe *Fighting Corruption in Public Procurement* 14-15.

309 Cecily *International Anti-Corruption Norms: Their Creation and Influence* 66.

310 Each State Party shall also consider taking appropriate legislative and administrative measures, consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties.

Three administrative measures targeted at the corrupt private suppliers (individuals or companies or corporate) are debarment, suspension and blacklisting, as tabulated below:

Table 7: Administrative measures

Forms of administrative measures	Definition	Characteristics
Debarment	The prohibition or exclusion of suppliers from participating in government contracts for fraudulent or corrupt or other legal reasons. Debarment can either be mandatory or discretionary. Mandatory debarment is automatic, while discretionary debarment is at the instance of procuring officials.	Debarment[311] is an administrative remedy that is implemented by government departments or procuring entities as a measure to exclude or prohibit certain conducts that are prejudicial to the interests of the state.[312] In the context of public procurement, the procuring entity or the public officials concerned using their discretionary powers decide to exclude or prevent a corrupt supplier from doing any business with the government[313] either temporarily or permanently.[314]
Suspension	It is an act of temporarily refusing the participation of a supplier in government contracts for a specified period of time.[315]	Suspension is usually used in cases where in the opinion of the procuring entity debarment may not be the best option in the circumstances of that particular case.[316] The legal entity or the individual supplier may be suspended on certain conditions, but temporarily.[317] Depending on the jurisdiction, the suspension may be limited to the main contractor or it may also extend to the sub-contractors.[318]

311 Williams-Elegbe believes that: "Administrative methods for combating corruption may often be more effective than criminal methods, especially as corrupt practices are often clandestine and can make meeting the burden of proof in a criminal trial difficult for prosecutors. As a result, countries are increasingly using non-criminal devices to combat corruption. One such mechanism for dealing with corrupt firms is to disqualify (or debar) them from bidding on government contracts."

312 Hjelmeng and Soreide "Debarment in Public Procurement" 1.

313 According to Arrowsmith, Prieb and Friton, during the period of debarment the contractor may be given an opportunity to "self-clean", depending on the jurisdiction. Self-cleaning generally is a public procurement concept where the once dishonest supplier is given an opportunity to "repent" and demonstrate that the supplier can be trusted again by the government. In the EU, self-cleaning after debarment is settled in law. Also, self-cleaning depends on the period of debarment balanced against the principle of proportionality.

314 Hjelmeng and Soreide "Debarment in Public Procurement" 1.

315 Williams-Elegbe *Fighting Corruption in Public Procurement* 60.

316 Verma *Debarment and Suspension in Public Procurement* 4.

317 Verma *Debarment and Suspension in Public Procurement* 5-6.

318 Verma *Debarment and Suspension in Public Procurement* 5-6.

Forms of administrative measures	Definition	Characteristics
Blacklisting	This is the process of imputing wrong-doing to suppliers and keeping a register of such wrong either permanently or for a fixed period of time.[319]	Blacklisting works perfectly in jurisdictions that a keep a register of tender defaulters which is accessible to all stakeholders. This register will then be consulted before any government contract is awarded.[320] However, most jurisdictions in developing countries either do not keep such registers or where they are kept they are poorly maintained to the point of being almost irrelevant.[321]

2.10.3.2.1 Debarment

It must be understood that the purpose of debarment is to prohibit private suppliers who may have violated procurement rules from contracting with the government. The private supplier may violate procurement rules *inter alia* through "corruption, fraud and some other offences". However, some pertinent questions that are raised by debarment include *inter alia*:

- Who is the target of debarment?
- What is the period of debarment?
- Is there a cure for debarment?

Target of debarment

The focus of this study is on debarment that is triggered by corrupt practices or other financial irregularities associated with dishonesty on the part of the supplier or his agency.[322] The target for debarment differs from jurisdiction to jurisdiction. In some jurisdictions if the private supplier (the firm) has committed corruption, then the entire firm is debarred from subsequent government contracts,[323] while in other jurisdictions

319 TI *Blacklisting in Public Procurement* 2.
320 TI *Blacklisting in Public Procurement* 2.
321 TI *Blacklisting in Public Procurement* 2.
322 Hjelmeng and Soreide "Debarment in Public Procurement" 5.
323 Hjelmeng and Soreide "Debarment in Public Procurement" 6.

only those individuals from that particular firm that were involved or ought to have known about the corrupt practice are debarred from subsequent government contracts.[324] In instances where the private supplier is an individual, it is obvious that the individual is debarred from subsequent government contracts.[325]

Period of debarment

The period of debarment generally depends on the legislative provisions in each member state, whether it is mandatory or discretionary debarment, and the nature of the corrupt act or irregularity in question.[326] Another factor that influences the debarment period is the role that the procuring official or the private supplier played in the commission of the corrupt act. It is generally accepted that the period of debarment should not exceed five years, again depending as stated on the circumstances of each case.[327]

For example, in the UK if the debarment period is not stipulated by the presiding officer or if it is not provided in legislation, the maximum period for mandatory debarment is five years, or three years for discretionary debarment.[328] In the United States it is generally accepted that the maximum period of debarment is at the instance of the procuring official, but should be reasonable, taking into account all relevant factors.[329] Other jurisdictions have set the maximum debarment period at 10 years.[330] Some international institutions such as the World Bank have set the debarment period at a maximum of three years and permanent debarment in a few exceptional cases.

The debarment period especially mandatory debarment is not a settled issue in public procurement. However, the debarment period should be reasonable, and should be set after a careful consideration of any aggravating or mitigating factors and the nature of the sentence of the offence by the convicting court.

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324 Hjelmeng and Soreide "Debarment in Public Procurement" 1-2.
325 Hjelmeng and Soreide "Debarment in Public Procurement" 1.
326 Hjelmeng and Soreide "Debarment in Public Procurement" 6.
327 Hjelmeng and Soreide "Debarment in Public Procurement" 7.
328 UK Gov 2014 https://www.gov.uk/guidance/transposing-eu-procurement-directives.
329 Williams-Elegbe *Fighting Corruption in Public Procurement* 134.
330 South Africa is good example as will be discussed in Chapter Five.

2.10.3.2.2 Cure for debarment - self-cleaning

In order to cure debarment, the concept of self-cleaning is generally accepted as a reasonable remedy. Punder, Prieβ and Arrowsmith [331] define self-cleaning as:

> The possibility that a firm that might otherwise be excluded from a public procurement for some kind of wrong doing should be admitted to the process, on the basis that it has taken all necessary measures to ensure that the wrong doing of the past will not occur again in future.

In order for self-cleaning to be realized, at least four general requirements must be satisfied:

(i) Clarification of the relevant facts and circumstances

(ii) Repair of the damage caused

(iii) Personnel measures

(iv) Structural and organizational measures[332]

Hjelmeng and Soreide[333] state that in order for the implementation of self-cleaning to be successful, the above four measures must be as clear as possible.

Clarification of facts

According to Punder, Prieβ and Arrowsmith the clarification of the facts that led to the supplier's conviction allows the procuring entity deciding on an application for the reduction of the debarment period or conditions to evaluate whether the measures used by the convicted supplier are appropriate and comprehensive.[334] In the absence of such clarification, it would be difficult for any procuring entity to ascertain whether or not the self-cleaning measures taken are sufficient to prevent a recurrence of the same offence.

In order to ensure a comprehensive clarification of facts, in the light of the objectives of self-cleaning, which are *inter alia* to ensure that the convicted supplier has taken all reasonable and practical steps to eradicate the causes of the offence(s), the convicted

331 Punder, Prieβ and Arrowsmith *Self-Cleaning Public Procurement Law* 5.
332 Punder, Prieβ and Arrowsmith *Self-Cleaning Public Procurement Law* 5-6.
333 Hjelmeng and Soreide "Debarment in Public Procurement" 3-4.
334 Hjelmeng and Soreide "Debarment in Public Procurement" 5.

supplier must work with the authorities responsible for the reduction of the debarment period.[335] In some cases it may be necessary for the convicted supplier or debarred supplier seeking clemency on debarment to work with legal personnel or audit firms as an additional tool to ensure compliance with the requirements of self-cleaning.[336]

Damage or compensation

In addition to the proper clarification of the facts or the taking of significant steps to address the fundamental causes of the debarment, if any damage was caused by the actions of the debarred supplier, that supplier must make right the damage caused.[337]

Staff clean-up

Further, before the procuring entity can re-admit the debarred supplier, there has to be evidence that everyone within the ranks of the debarred supplier, who was complicit in the offence that led to the debarment, must be fired, preferably immediately, but subject to the labour laws of that particular jurisdiction.[338] This is critical to achieving the primary objective of self-cleaning, which is to promote clean procurement. Punder, Prieβ and Arrowsmith[339] note that some of the measures of self-cleaning include but are not limited to the training of staff on procurement, corruption, good corporate governance and related matters.[340]

Organisational changes

In the same context, there may be a need for the organization to take structural and organizational measures that will impact on its future.[341] This is an important matter for the procuring entity to consider, because some of the causes of the offence may be weaknesses within the structure of the company which, if not addressed, may lead to the occurrence of another offence and then to the further debarment of the company.[342] If this were to happen, confidence in the concept of self-cleaning might be eroded in that particular jurisdiction.

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335 Punder, Prieβ and Arrowsmith *Self-Cleaning Public Procurement Law* 5-6.
336 Punder, Prieβ and Arrowsmith *Self-Cleaning Public Procurement Law* 5-6.
337 Punder, Prieβ and Arrowsmith *Self-Cleaning Public Procurement Law* 5.
338 FSTB *Applications for Review of the Debarment Period under the Review Mechanism* 1.
339 Punder, Prieβ and Arrowsmith *Self-Cleaning Public Procurement Law* 6
340 Punder, Prieβ and Arrowsmith *Self-Cleaning Public Procurement Law* 6.
341 Punder, Prieβ and Arrowsmith *Self-Cleaning Public Procurement Law* 6.
342 Punder, Prieβ and Arrowsmith *Self-Cleaning Public Procurement Law* 6.

Reliable contractor

The position in Austria, as stated by Reidlinger, Denk and Steinbach,[343] is that emphasis is placed on contracting with a reliable contractor. It is the use of the word "reliable" that is significant, because as stated by Reidlinger, Denk and Steinbach[344] reliability speaks to the integrity of those hoping to contract with the government. The procuring entity must ensure that shareholders of the debarred supplier who were involved in corrupt activities must first pass the reliability test before the supplier is considered for new government contracts.

The concept of self-cleaning is a welcome development, particularly for those private suppliers that would have violated procurement rules that have nothing to do with corruption. However, developing countries that are already reeling from unprecedented levels of public procurement corruption must be cautious when considering self-cleaning as a remedy to debarment particularly, where corruption or financial irregularity or dishonesty on the part of the supplier is involved.

2.10.3.2.3 Suspension and blacklisting

The use of suspension and blacklisting is not adequately addressed in comparison with debarment.[345] It is submitted that for developing countries, suspension and blacklisting must be used in tandem with debarment (discretionary and mandatory), especially in cases where it is not quite clear whether or not corruption or dishonest financial irregularity was committed by the supplier.

To sum up, of the administrative measures used in combating public procurement corruption, debarment remains the most widely used.[346] Challenges still remain in the proper implementation procedures of debarment in most jurisdictions with special reference to the period of the debarment.[347]

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343 EU *Self-cleaning under National Jurisdictions of EU Member States* 35.
344 EU *Self-cleaning under National Jurisdictions of EU Member States* 35.
345 Verma *Debarment and Suspension in Public Procurement* 123.
346 Further analysis of self-cleaning is performed in Chapter Six.
347 Williams-Elegbe *Fighting Corruption in Public Procurement* 136-137.

Although suspension and blacklisting are in use in some developing countries they are weakly enforced and are therefore less effective administrative measures.[348]

Having said this, it is important to consider institutional measures as another form of curbing public procurement corruption.

2.10.3.3 Institutional measures

Institutional measures referred to in this study are formal structured institutions that are established either by legislation or regulation to combat public procurement corruption.[349] This study has identified two groups of institutions to curb public procurement corruption, namely, those that are within the procurement system (procurement institutions) and those that are outside the procurement system (anti-corruption institutions).

2.10.3.3.1 Procurement institutions

Procurement institutions are bodies or agencies that are established by legislation that are meant to be the first port of call in disputes or grievances relating to public procurement corruption or other matters of public procurement.[350] Ideally, they are meant to operate independently.[351] In addition, procurement institutions are meant to be staffed by a combination of well-trained procurement practitioners as well as anti-corruption practitioners.[352] These procurement institutions are meant to review all complaints with regards to public procurement, including allegations or suspicions of public procurement corruption.[353]

However, in most jurisdictions these procurement dispute resolution institutions do not have prosecutorial powers and have only limited investigative powers.[354] They refer alleged corruption cases to the relevant anti-corruption bodies outside the procurement

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348 Auriol and Soreide *An Economic Analysis of Debarment* 2.
349 OECD *Specialised Anti-Corruption Institutions Review of Models* 43.
350 Europa *Identifying and Reducing Public Procurement Corruption in the EU* 20.
351 Europa *Identifying and Reducing Public Procurement Corruption in the EU* 36.
352 Leaon, de Mariz and Abeille *Public Procurement Reforms in Africa* 130-131.
353 Basheka "Public Procurement Reforms in Africa" 141.
354 For example, Uganda established the Public Procurement and Asset Disposal of Public Assets Authority in terms of the *Public Procurement and Disposal of Public Assets Authority Act* 1 of 2003. In terms of section 8 of the Act the Authority has powers to investigate all procurement disputes except corruption. Its investigative powers are thus limited. Public procurement corruption cases are investigated by the Inspector General of Government.

system for further action.[355] With this in mind, it is proposed in this study that developing countries should consider a hybrid procurement system model.

In this hybrid model the procurement system creates on the one hand procurement agencies that administer the actual procurement and on the other hand robust dispute resolution mechanisms (a procurement dispute and review body/agency) that *inter alia* has the power to investigate and prosecute public procurement corruption within the same procurement system.[356]

2.10.3.3.2 Anti-corruption institutions

Anti-corruption institutions encompass all investigative, prosecutorial and judicial bodies that are tasked with the mandate to fight public procurement corruption as part of general corruption.[357] The purpose of these three kinds of anti-corruption institutions includes the need to effectively prevent and punish corruption.[358] Ideally, they should operate like a tricycle in motion. Incapacitation of one wheel of a tricycle for whatever reason brings the tricycle to a halt. In the context of public procurement corruption, investigative, prosecutorial and judicial bodies should pull in one direction in fighting public procurement corruption. Incapacitation of any one of these three institutions will bring the fight against public procurement corruption to a halt, resulting in a perpetuation of public procurement corruption.

It has also been suggested that these anti-corruption units need to be run by procurement and anti-corruption professionals working in inseparable unison. These professionals are expected to employ relevant investigating techniques that are unique to combating public procurement corruption.[359] However, in countries where these anti-

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355 OECD *Specialised Anti-Corruption Institutions Review of Models* 43.

356 These two bodies will be independent of one another but managed under the procurement system. This may help to resolve not only procurement contract-related disputes but also may lead to the earlier identification of corruption or corruption prone areas. Research has shown that not many developing countries use procurement institutions to curb corruption, but rather seem to prefer the traditional approach of using anti-corruption institutions outside the procurement system. (OECD *Specialised Anti-Corruption Institutions Review of Models* 43).

357 OECD *Specialised Anti-Corruption Institutions Review of Models* 43.

358 Carson *Institutional Specialisation in the Battle against Corruption* 13-14.

359 Man-wai *National Anti-Corruption Strategy* 133.

corruption units are operational,[360] the question has been how much power should be conferred upon these anti-corruption units and what is the nature of this power?

2.10.3.3.3 Powers of anti-corruption institutions

Debate has been ongoing on the extent, nature and scope of powers that an investigative and prosecutorial anti-corruption unit should possess for effectively tackling public procurement corruption.[361] Various models have been suggested, which include powers to investigate, arrest, prosecute, intercept telecommunications, issue travel bans, and confiscate items, and to detain a suspect for a number of hours or days before releasing that suspect or bringing that suspect to court.[362] The powers of the anti-corruption institutions depend on the jurisdiction and whatever is legally permissible within that jurisdiction.[363]

For example, all countries have a police force whose general responsibility is to investigate crime and arrest those who are involved in crime. The traditional approach in a number of developing countries continues to be the use of the police as a default anti-corruption unit.[364] Problems with this arrangement have emerged in some developing countries where there is police corruption and where the police became a proxy for corrupt politicians or other corrupt high-ranking business and government officials.[365]

Therefore, it is suggested that for developing countries, anti-corruption institutions excluding the judiciary should at the minimum possess the following: investigative powers; arresting powers (preferably with arrest warrants were it is practical to obtain them); prosecuting powers; the power to intercept telecommunication; the power to issue travel bans; the power to access all financial records including the banking details of suspects; the power of confiscation and the power to detain suspects (for not more than 48 hours) before releasing that suspect or bringing that suspect to court.[366] Of course there have to be legal mechanisms to prevent the arbitrary abuse of such powers.

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360 OECD *Specialised Anti-Corruption Institutions Review of Models 1*.
361 Pope and Vogl *Making Anticorruption Agencies More Effective* 7.
362 Indonesia and Hong Kong have different models, but these models appear to be yielding the desired results.
363 TI 2014 http://www.transparency.org.
364 OECD *Specialised Anti-Corruption Institutions Review of Models 43*.
365 Mills *Causes of Corruption in Public Sector Institutions and its Impact on Development* 12.
366 OECD *Specialised Anti-Corruption Institutions Review of Models 27*.

2.10.3.3.4 Independence of anti-corruption agencies

There is no doubt that anti-corruption agencies need to be independent if they are to be successful in fighting public procurement corruption.[367] What has been a major talking point and an area that has not been settled is the extent of such independence.[368] Is structural or operational independence adequate? Should the anti-corruption agencies require the same independence as the judiciary? These questions were addressed at the Jakarta Conference in 2012,[369] where it was agreed that anti-corruption agencies should operate based on 16 principles that guarantee both structural and operational independence for the effective curbing of public procurement corruption.[370] Most developing countries rely on the judiciary as the final institution that aids in the combating of public procurement corruption, provided the judiciary itself has not been corrupted.

2.10.3.3.5 Judicial institutions

Judicial institutions comprise of independent courts and other legally appointed tribunals that enforce judicial measures in fighting public procurement corruption. Judicial measures are legal measures that are exercised by the judiciary as part of the administration of justice.[371] They consist *inter alia* of: (i) the enforcement of criminal sanctions; (ii) the upholding of civil claims and (iii) the judicial review of administrative action.[372] For the purposes of this study the latter is of the greater importance.

Judicial review is the power that is conferred upon a court in order to objectively examine the acts or conduct of the executive and any other executive functionary.[373] For judicial review to be triggered there must first be a decision or an act that amounts to administrative action.[374] In their simplest form, administrative actions are decisions that

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367 UNODC 2012 http://www.unodc.org.
368 UNODC 2012 http://www.unodc.org.
369 UNODC 2012 http://www.unodc.org.
370 (i) Mandate (ii) Collaboration (iii) Permanence (iv) Appointment (v) Continuity (vi) Removal (vii) Ethical Conduct (viii) Immunity (ix) Remuneration (x) Authority Over Human Resources (xi) Adequate and Reliable Resources (xii) Financial Autonomy (xiii) Internal Accountability (xiv) External Accountability (xv) Public Reporting (xvi) Public Communication and Engagement.
371 Williams-Elegbe *Fighting Corruption in Public Procurement* 15.
372 Europa *Evaluation of Governance, Rule of Law, Judiciary Reform* 6.
373 Williams-Elegbe *Fighting Corruption in Public Procurement* 278.
374 Knight *Common Law of Judicial Review* 74.

are made by officials in either the public or the private sector.[375] For the purpose of this study "administrative action" refers to a procurement decision taken by a government official or an official in an organ of state tasked with spending public money on behalf of the state.

In the context of public procurement, the objective of judicial review will be to examine whether administrative action with respect to the awarding of the bid(s) was procedurally or substantively fair.[376] It follows that at the core of the judicial review of administrative action lies the ability of the court or tribunal to determine whether the decision of the procuring entity was (i) legal; (ii) rational and (iii) procedurally fair.[377]

Judicial review of administrative action in this study is a remedy available to aggrieved suppliers or other stakeholders within the public procurement space. Other stakeholders may include private individuals, civil society organisations and the media, in so far as these parties are engaged in civil activism.

2.10.3.4 Civil activism

In this study civil activism is defined as the involvement of ordinary citizens as a group or in their individual capacity, of civil society organisations and of the media in holding government accountable for corrupt public procurement activities.[378] The role of civil activism in curbing public procurement corruption seems not to be clearly legally defined.[379] Most developing countries are parties to UNCAC, which provides in article 13 (1) *inter alia* that:

> Each State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organisations and community based organisations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes, and gravity of and the threat posed by corruption.

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375 Bolton *Public Procurement Regulation in South Africa* 17-20.

376 This may mean that the enquiry may start from the needs assessments, accessing of information, time lines of bidding, and equal treatment with regards to technical specifications. In addition, the enquiry may extend to whether the actual bid selection was free from external influences.

377 *Council of Civil Service Unions v Minister for Civil Service* 1985 A.C 374 410.

378 Wilson *Fighting Kleptocracy* 1.

379 Gumede *FPC Briefing: Corruption Fighting Efforts in Africa* 3.

It seems as if there is little compliance by developing countries with above provision.[380] In order to further understand civil activism, it is important to engage in a brief discussion of the fundamentals that must be in place for effective civil activism, beginning with individual activism.

2.10.3.4.1 Individual activism

Individual activism in this study refers to the legal right conferred upon an individual to sue the state or to be part of the litigation that involves corruption.[381] Generally, public procurement corruption, especially where it involves service delivery, is a violation of the individual rights accorded to citizens.[382]

Ideally, any citizen (legally recognised to be a litigant) should automatically be clothed with *locus standi* once there is alleged public procurement corruption.[383] The rationale for this is that it is the citizen that contributes to the government revenue directly or indirectly, mainly through paying taxes. This revenue is abused when corruption takes place.

In other words, the tacit contract between the citizens and the state would have been breached by the corrupt act. This should be the basis upon which *locus standi* should be founded in order to enable any private citizen to litigate against the government once public procurement corruption has been committed.

Locus standi on the basis of individual activism is still a contentious issue in most developing countries.[384] Nonetheless, in cases were *locus standi* has been legally addressed, public procurement corruption litigation may proceed, regardless of how remote the individual may be from the alleged corruption.[385] This was demonstrated in the South African case of *Hugh Glenister v The President of the Republic of South Africa and Others.*[386]

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380 OECD *Strategies for Business, Government and Civil Society to Fight Corruption* 69.
381 US Committee on Foreign Relations *Country Reports on Human Rights Practices* 312.
382 Hatchard *Combating Corruption: Legal Approaches* 113.
383 Quinot "Globalization, State Commercial Activity and the Transformation of Administrative Law" 196.
384 AfriMap *Effectiveness of Anti-Corruption Agencies in East Africa* 25.
385 Stephenson *Standing Doctrine and Anti-corruption Litigation* 1.
386 2011 3 SA 347 (CC) In this case Mr Hugh Glenister, an ordinary citizen without any particular affiliation, brought a legal action against the President of the Republic of South Africa at the Constitutional Court for allowing the disbandment of an anti-corruption unit and replacing it with

In cases where the individual feels that litigation may be too onerous or costly or that legal issues such as *locus standi* may be an issue, those individuals may approach civil society organisations to litigate.

2.10.3.4.2 Civil society organisations

Active participation by the CSOs to help in the fight against public procurement corruption requires the following: (i) the process of litigation by these groups should be simplified; (ii) the costs of litigation should be low; (iii) issues of *locus standi* must be relaxed; (iv) access to all the relevant procurement information should be made available;[387] (v) all relevant stakeholders must cooperate in a case brought by any CSO; (vi) the victimisation of individuals or CSOs should be stopped.[388]

In one rare Nigerian case, *SERAP v Nigeria*,[389] it was argued by SERAP[390] that unprecedented levels of public procurement corruption by officials of Nigeria's Universal Basic Education Department were a violation of the right to education. The case was heard before the ECOWAS Court of Justice (hereafter ECJ). In 2010 the ECJ concurred with the submissions of SERAP and ruled *inter alia* that: (i) corruption had taken place through embezzlement; (ii) ill-gotten gains had to be recovered; (iii) the culprits had to be prosecuted; and (iv) the Nigerian government should warrant that the right to

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another unit, arguing *inter alia* that this disbandment compromised the independence of the new anti-corruption unit. The court agreed with some of the submissions by Mr Glenister and ruled *inter alia* on the need for the establishment of an independent anti-corruption unit, particularly from an operational perspective. Further, the Court went on to define the characteristics of such a unit. This demonstrates the importance of civil activism in the fight against corruption. Further discussion of this case will be found in Chapter Five.

387 One of the challenges that hinder public participation has been a lack of access to information. Most developing countries have strict laws regarding the release of information that is in the possession of the state or any of its organs. The process of accessing that information may require court orders, which are done through the court process. The legal process of compelling the release of that information is costly and may consume time which is critical in combating corruption. In addition, access to executive information and that which concerns sensitive procurement can easily be declared classified. For example, research has shown that public procurement corruption takes place in defence procurement in most developing reasons.

388 In most developing countries, if an individual or non-governmental organisation brings litigation against the government based on corruption, the government is inclined to adopt the view that it is a challenge to its governance or that it can be viewed as the work of the opposition parties. In some cases, some governments in developing countries have gone to the extent of classifying such litigation as an attempt to effect regime change.

389 2010 (AHRLR) 145 (ECOWAS 2010) also cited as Community Court of Justice of the Economic Community of West African States (ECOWAS), suit EWC/CCJ/APP/12/12, judgment of 30 November 2010.

390 Socio-Economic Right Accountability Project.

education was respected by ensuring that it met all the expenses that were needed in the realisation of that right.[391]

The *SERAP-case* is a demonstration that public participation, if properly construed, is critical in the fight against public procurement corruption. Nonetheless, it is submitted that if there was proper administration of justice in Nigeria, this matter could have been heard and settled in Nigeria without resorting to the ECJ. Again this case highlights the costs and time needed to effect public procurement corruption litigation. The case was initiated with an investigation by SERAP after it had received information from a whistle-blower in 2007, and a ruling was passed by the ECJ in 2010. The judgment of the ECJ had to be recognised and enforced in Nigeria.[392] Effectively, this means that those who were directly affected by the corrupt acts went at least three years without a remedy. This could have been avoided if there were effective domestic remedies.

It is important to note that some public procurement corruption cases that individuals or CSOs take for litigation either emanate from the media or are followed up and reported by the media. This makes the media one of the pillars upon which civil activism is founded.

2.10.3.4.3 Media

The media are generally defined as the means of disseminating information.[393] This study focuses more on the independent or private media, which are distinguishable from propaganda media.[394] The media have always played an indispensable role in the fight against public procurement corruption.[395]

As observed by Camija,[396] truly independent media that enjoy media freedom constitute an important tool in controlling corruption. Such media are able to influence both vertical

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391 *SERAP v Nigeria* para 28.

392 The recognition and enforcement of foreign judgments in Nigeria takes place in terms of (i) Reciprocal Enforcement of Judgments Ordinance (1922); (ii) Reciprocal Enforcement of Judgments Ordinance Laws of the Federation of Nigeria and Lagos (1958) and (iii) Foreign Judgment (Reciprocal Enforcement Act, Chapter 38 Laws of the Federation of Nigeria (2004). Further reading on Enforcement of Foreign Judgments in Nigeria (See Olawoyin 2014 *Journal of Private Law* 129-156).

393 Fardigh *What is the Use of Free Media?* 7.

394 Fardigh *What is the Use of Free Media?* 26.

395 Nogara *Role of Media in Curbing Corruption* 2.

396 Camija 2013 *The International Journal of Press and Politics* 22.

and horizontal accountability. The media educate people on corruption matters and at the same time it report on the negative and positive efforts of government's efforts to fight corruption.[397]

In some cases governments have threatened the media to stop the publication of articles about corruption which they may find embarrassing,[398] and there are instances where the sitting government has accused the media of attempting to effect regime change through perceived malicious reporting of public procurement corruption cases.[399]

This may be true in some cases, but evidence has shown that the media have been and continue to be of use in the fight against public procurement corruption.[400] Today, more investigative journalism should be encouraged, and the use of social media should also be encouraged in order to spread the word that public procurement corruption has detrimental economic and social effects to a nation.[401]

In some extreme cases journalists have been maliciously prosecuted for reporting on public procurement corruption, in an effort to silence them.[402] However, reports show that due to the availability of multiple media channels it is no longer possible for corrupt governments in developing countries to silence journalists in the fight against public procurement corruption.[403] If anything, governments should be encouraged to allow the media to report on public procurement corruption matters and to offer journalists who do so adequate protection from harassment or illegal efforts to silence them.[404]

Reflections

The above discussion briefly centred on the role of civil activism in combating public procurement corruption. It has been revealed that individuals, CSOs and the media have cemented their place in the fight to combat public procurement corruption. Although all of them still suffer from challenges such as victimisation and onerous

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397 Arnold and Lal *Using the Media to Fight Corruption* 110.
398 Nogara *Role of Media in Curbing Corruption* 2.
399 Coronel 2008 http://www.hks.harvard.edu.
400 Uganwa *Nigeria Fourth Republic National Assembly* 26.
401 Arnold and Lal *Using the Media to Fight Corruption* 106-114.
402 BBC 2017 http://www.bbc.com/news/world-latin-america-39934676.
403 Bekri et al *Harnessing Social Media Tools to Fight Corruption* 6-7.
404 UNODC 2013 http://www.unodc.org.

litigation procedures involving difficulty with *locus standi*, there is hope that with concerted efforts by the international community and regional support, civil activism will emerge as an indispensable tool in combating public procurement corruption, as demonstrated in the *SERAP-case*.

2.11 Conclusion

The primary aim of this chapter was first to give a broad overview of public procurement from an international and regional perspective as it relates to historical development and public procurement theories. It was shown that although public procurement has developed historically, it is the tacit contract between the government and its citizens that makes public procurement unique. The obligation to curb public procurement corruption emanates from this contract.

The UNCITRAL Model Law and the WTO GPA were identified as the leading public procurement instruments at international level. At regional level it was discovered that only the EU, COMESA and NAFTA have made significant progress in developing public procurement regional instruments. The AU has made little or no progress in advancing the fight against public procurement.

It was further highlighted that although the primary aim of public procurement is the same in developed and developing countries, areas of emphasis are different. Developing countries use public procurement predominantly as a tool for socio-economic development and try to balance that with attaining value for money. The following public procurement principles were distilled, and their limited use in fighting public procurement corruption was highlighted: transparency; accountability; fairness; competitiveness; cost-effectiveness; value for money; integrity and equality.

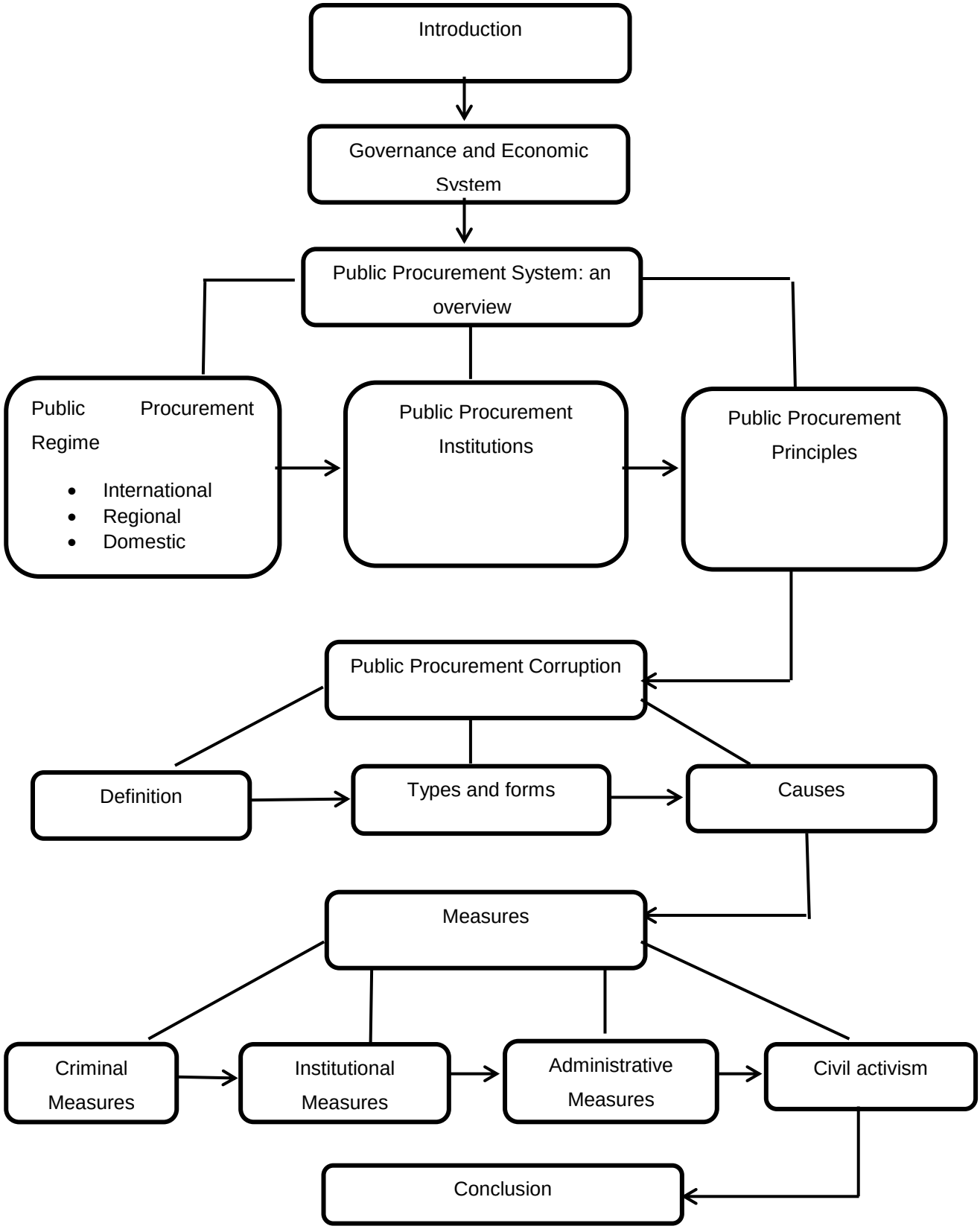
The second part of the chapter dealt in greater detail with public procurement corruption in developing countries in particular: the need for proper definition; the causes; the types; the forms; and how it can be curbed. It was emphasised that there was a need to properly define public procurement corruption. Types of public procurement corruption, the causes of public procurement corruption, and occurrences of public procurement corruption were discussed.

In determining measures of combating public procurement corruption, international and regional instruments place more emphasis on criminal measures. This is followed by institutional measures as the most important tool for use in curbing public procurement corruption. It was noted that although criminal measures remain the most popular in developing countries, these measures have not been as effective.

The use of administrative measures, in particular debarment, remains the most popular way of combating public procurement corruption. Self-cleaning as a concept, though it is progressive, should be used judiciously by developing countries. This approach is preferred in order to protect the integrity of the procurement system in developing countries, and its use should continue until such time that statistics begin to reflect that the incidence of public procurement corruption in developing countries has decreased. Suspension and blacklisting are not widely used.

It was observed that civil activism is the least frequent measure used to combat public procurement corruption, despite the fact that it can be very effective if properly used, as confirmed in the *SERAP-case.* The media, especially the independent media are the most widely used source of reporting public procurement corruption with the intention of influencing the control of public procurement corruption. CSOs and individual activism are the least used tools within the toolkit of civil activism. Notable challenges faced by civil activism that were identified in this chapter are access to information; being granted *locus standi;* dealing with bureaucratic legal processes; and overcoming the fact that the general population is ill informed.

This chapter has identified the key issues that must be used in the discussion of procurement corruption in Hong Kong, Botswana and South Africa. These issues are shown in the diagram below, which illustrates the structure that will be followed in discussing the jurisdictions under consideration, in order to give the study a definite focus.


Introduction
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CHAPTER 3: HONG KONG, CHINA

3.1 Introduction

The primary aim of this chapter is to give a broad overview of Hong Kong's public procurement and to extract the generally accepted procurement principles that underpin public procurement. It is also the aim of this chapter to discuss the causes of public procurement corruption in Hong Kong with specific focus on the four causes identified in Chapter Two.[1] Further, this chapter will also discuss how Hong Kong uses criminal measures, administrative measures, institutional measures and civil activism measures to combat public procurement corruption. It is important to note that Hong Kong's legal system is based on English common law as well as legislation.

This chapter begins by briefly discussing Hong Kong's governance and economic system. This will be followed by a discussion of Hong Kong's public procurement system, focussing on Hong Kong's public procurement legal regime, taking into account the WTO GPA, the separate bilateral agreements with Chile and New Zealand, the Basic Law of Hong Kong, the *Public Finance Ordinance*,[2] the *Stores and Procurement Regulations*,[3] the Financial Circulars and the Treasury Bureau Circulars.

As part of the procurement system, Hong Kong's public procurement institutions will be discussed.

Hong Kong's public procurement system can be described as semi-centralised in the sense that it has a central procurement unit, the Government Logistics Department (hereafter GLD),[4] whose work is complemented by other procurement departments such as the Development Bureau, which is responsible for construction works.[5] Furthermore, there other different procurement entities as well as tender boards that are mandated by the GLD to assist in procurement. Significant procurement

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1 See para 2.9 (i) The personal circumstances of procuring officials; (ii) The personal circumstances of politicians; (iii) Political transition and (iv) Economic transition.
2 109 of 1983.
3 3 June 2016.
4 GLD 2004 http://www.gld.gov.hk.
5 DEVB 2010 http://www.devb.gov.hk.

departments include the Government Logistics Department and Tender Board, the Marine Department Tender Board, the Public Works Tender Board, the Central Tender Board, the Architectural and Associated Consultant Selection Board, the Engineering and Associated Consultant Selection Board, and the Central Consultants Selection Board.[6]

The last part of this chapter discusses public procurement corruption in Hong Kong. It begins by discussing how public procurement corruption is defined in Hong Kong, and then briefly discusses the types of public procurement corruption. A discussion on the four causes of public procurement corruption that have already been identified in Chapter Two follows.[7] In the final analysis, the use of criminal measures, administrative measures, institutional measures and civil activism measures as public procurement anti-corruption measures will be discussed. For now, attention is given to Hong Kong's governance and economic system as a background to the jurisdiction under consideration.

3.2 Hong Kong's governance and economic system

Hong Kong is a semi-autonomous[8] jurisdiction situated in Eastern Asia. It is not a country on its own but has been politically part of mainland China since 1997, after having been under British administration for close to a century.[9] The island is established as a Special Administrative Region of the People's Republic of China.[10]

Hong Kong had been under British administration since the mid-1840s, in the aftermath of the first Opium War.[11]

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6 ABD/OECD *Anti-Corruption Policies in Asia and the Pacific* 2-3.

7 See para 2.9.

8 In terms of the Basic Law of Hong Kong, which is the constitutive document, it was agreed that the autonomy will last for 50 years, that is, from 1997-2047, after which China will assume full control of Hong Kong.

9 Carroll *A Concise History of Hong Kong* 9.

10 Carroll *A Concise History of Hong* Kong 9.

11 The nature of the period post 1842 can be traced to the Opium War between China and Britain. Britain defeated China in the war and occupied Hong Kong. The occupation was cemented by a 99 year agreement that entitled Britain to rule Hong Kong. Talks about returning Hong Kong to China started in the early 1980s and resulted in the official handover in 1997. Due to its century of occupancy by Britain, Hong Kong had developed into the most advanced capitalist economy in Asia, and it has continued to develop economically.

In terms of its governance system, modern Hong Kong has its own "Constitution", known as the Basic Law of Hong Kong.[12] According to the Basic Law, at the helm of the island is a Chief Executive,[13] an Executive Council (the legislative arm), a two-tier system of representative government, and an independent judiciary.[14]

Hong Kong's economy has evolved from farming and fishing into a service economy and has become one of the global leaders in financial services. According to the World Bank,[15] Hong Kong's Gross Domestic Product is US$263.3 billion and it has a population of 7.2 million. The economic growth of the island placed a demand on the government to procure more goods, services and works. Hence the need to briefly discuss Hong Kong's public procurement.

As a result of British occupation, Hong Kong's legal system is based on the common law. Other sources of law include the Basic Law, legislation, customary law and judicial precedent.[16]

3.3 Public procurement system: an overview

This section of the dissertation discusses the main characteristics of Hong Kong's public procurement system with special emphasis on the legal regime, the procurement institutions, the scope, and the methods and principles of procurement. Hong Kong has a well-established public procurement system influenced at international level by the WTO GPA, and separate bilateral procurement agreements with New Zealand and Chile, as well as its own home-grown public procurement law.[17]

In addition, Hong Kong has well-defined procurement institutions headed mainly by two units, namely the Government Logistics Department (the central procurement agent),[18] which is responsible for all general procurement, and the Development

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12 Davis "The Basic Law and Democratization in Hong Kong" 165.
13 The Chief Executive Officer is elected in Hong Kong but has to be approved by China, to confirm and complete the appointment.
14 Chapter IV Basic Law of Hong Kong.
15 World Bank 2013 http://data.worldbank.org.
16 Department of Justice *Hong Kong Legal System* 1.
17 Parsons et al *"Hong Kong"* 159.
18 Scott *The Public Sector of Hong Kong* 369.

Bureau,[19] which has the mandate to procure construction works. Hong Kong subscribes to four procuring methods, namely open tendering, selective tendering, prequalified tendering, and single or restricted tendering.[20]

3.3.1 Public procurement regime

As stated above, Hong Kong's public procurement regime can for practical purposes be divided into two main regimes: (i) international and regional procurement agreements and (ii) home-grown (domestic) procurement legislation. The reason for discussing these two separately is to ensure that there is no conflation of the applicable law, since they differ in terms of source, scope and thresholds. Both regimes form part of the entire Hong Kong's procurement law and must be understood within the right context. With this in mind, attention is now given to international and regional procurement regimes that form part of Hong Kong's domestic procurement law.

3.3.1.1 International and regional procurement agreements

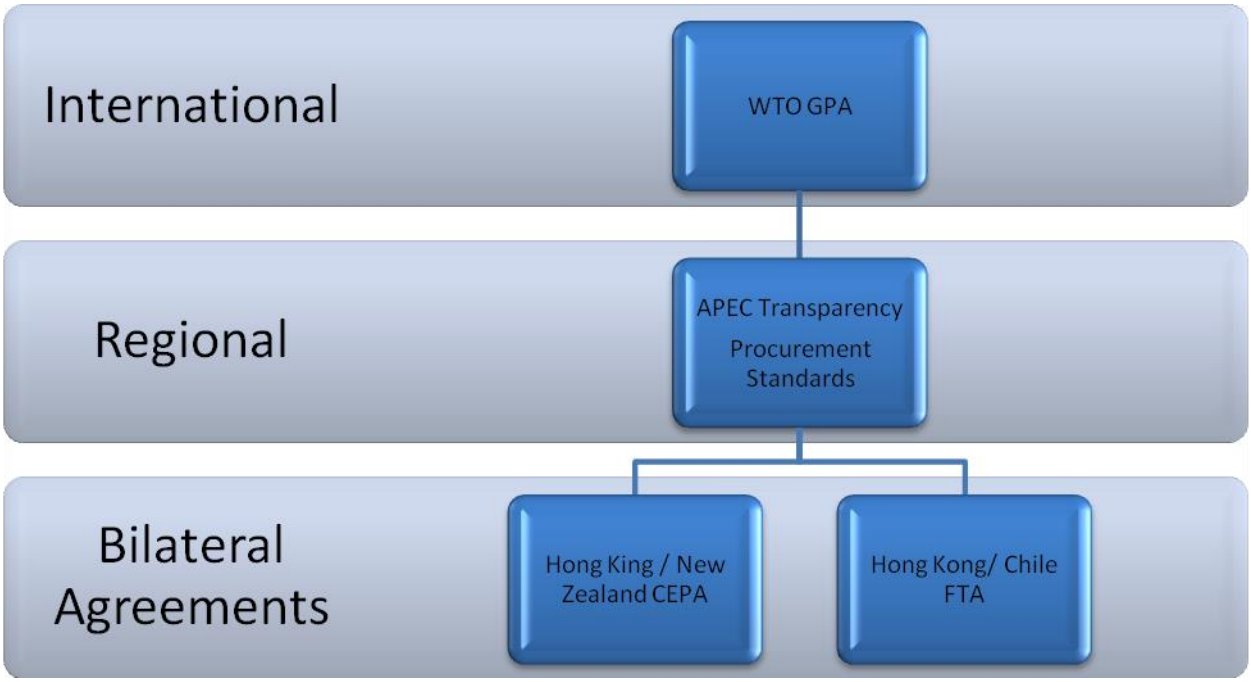

Figure 2: Hong Kong International and Regional Public Procurement Framework

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19 Scott *The Public Sector of Hong Kong* 351.
20 ADB/OECD *Anti-Corruption Initiative for Asia and the Pacific* 16.

3.3.1.1.1 WTO GPA

The figure above illustrates that Hong Kong is a party to the WTO GPA, which it joined on 20 May 1997. The effect of joining the WTO GPA is that Hong Kong's public procurement system must be conducted in the spirit of the WTO GPA.[21] As explained in Chapter Two, the purposes of the WTO GPA include opening public procurement to as many foreign suppliers as possible in any member state.[22]

In addition, the WTO GPA attempts to eliminate obstacles to international public procurement participation by strictly regulating the application of non-discriminatory measures.[23] This means that in Hong Kong procurement bids by foreign suppliers should be considered on an equal basis with suppliers from Hong Kong, provided that they fall within a certain threshold.[24] There is an obligation upon Hong Kong to ensure that its procurement processes do not unnecessarily hinder participation by foreign suppliers who are from countries that are party to the WTO GPA.[25] According to the Hong Kong Treasury:[26]

> The WTO GPA applies to the following procuring entities of Hong Kong, China for contracts meeting the value specified
>
> All government bureaux and departments for contracts of a value of not less than:
>
> - 130 000 SDR[27] for the procurement of goods and specified services;
> - 5 000 000 SDR for construction services; and
>
> Non-government public bodies including the Housing Authority and Housing Department, the Hospitality Authority, the Airport Authority, the MTR Corporation Limited and the Kowloon-Canton Railway Corporation for contracts of a value not less than:
>
> - 400 000 SDR for the procurement of goods and specified services;

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21 La Chimia *Tied Aid and Development Aid Procurement* 414.
22 La Chimia *Tied Aid and Development Aid Procurement* 414.
23 Muller "Special and Differential Treatment and Other Special Measures" 358.
24 WTO Agreement on Government Procurement Article XXIV (3). See the Appendices and Annexures to the GPA. These thresholds are measured in terms of Special Drawing Rights.
25 La Chimia *Tied Aid and Development Aid Procurement* 414.
26 FTSB 2013 http://www.fstb.gov.hk.
27 The SDR is an international reserve asset created by the IMF in 1969 to supplement its member countries' official reserves. As of March 2016, 204.1 billion SDRs (equivalent to about $285 billion) had been created and allocated to members. SDRs can be exchanged for freely usable currencies. The value of the SDR is based on a basket of five major currencies - the U.S. dollar, the euro, the Chinese renminbi (RMB), the Japanese yen, and the pound sterling - as of October 1, 2016. (See IMF - http://www.imf.org/external/np/exr/facts/sdr.htm).

- 5 000 000 SDR for construction services.

In practice, Hong Kong is serious about adhering to its commitment to the WTO GPA. This is reflected in a circular[28] issued by the Development Bureau[29] in 2014 to align its domestic procurement with the WTO GPA 2012, which entered into force on 6 April 2014. Paragraph 8 of the circular reiterates the spirit of the WTO GPA by stating that:

> Departments shall provide open, fair, consistent and non-discriminatory treatment to products, services and contractors irrespective of their country of origin. Local and overseas contractors should all be treated on an equal footing.

Furthermore, paragraph 9 of the circular provides *inter alia* for the use of international standards when designing technical specifications. In terms of procurement procedures, paragraph 10 emphasises open tendering, selective tendering and limited tendering. In the same context, tender notifications regardless of the preferred procurement method must be advertised, including prequalified tenders.[30]

In addition, there are two added requirements that Hong Kong must comply with because of being a party to the WTO GPA. This first one is the provision of dispute resolution mechanisms which come into operation when a supplier alleges a violation of the WTO GPA by any of the Hong Kong procuring entities.[31] Another additional requirement is that Hong Kong must submit "an annual statistical report on procurements to the WTO Committee on Government Procurement".[32]

This means that Hong Kong's public procurement is subject to added scrutiny not just at national level but also at international level. In addition to the international procurement obligations discussed above, Hong Kong has regional procurement agreements that it must comply with. These regional procurement obligations are briefly discussed below.

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28 DEVB (W) 920/30/01 *Technical Circular (Works)* No. 2/2014.
29 The Development Bureau, as said above, is responsible for all construction works procurement.
30 DEVB (W) 920/30/01 *Technical Circular (Works)* No. 2/2014. Paragraph 15.
31 WTO *Agreement on Government Procurement Article* XXIV (3) (d).
32 WTO *Agreement on Government Procurement Article* XXIV 7(a).

3.3.1.1.2 APEC's Transparency Standards on Government Procurement

At regional level, Hong Kong is a party to the APEC Transparency Standards on Government Procurement.[33] The purpose of the APEC Transparency Standards is to promote and encourage transparency, that is, openness in public procurement.[34] In order to achieve this, APEC encourages APEC member states to publish their procurement and administrative decisions.[35] As explained in Chapter Two, procurement decisions are administrative decisions.[36]

APEC encourages the publication of procurement laws, regulations and policies in the spirit of transparency.[37] The organisation aims *inter alia* to promote trade facilitation through promoting sound procurement practices amongst its member states.[38] Through entering into two bilateral agreements Hong Kong has attempted to reflect these international procurement obligations. The bilateral agreements are briefly discussed below.

3.3.1.2 Bilateral procurement approaches

In addition to the APEC regional agreement, Hong Kong has entered into two bilateral agreements that have a direct bearing on procurement. The first one is the Hong Kong, China/New Zealand Closer Economic Partnership on Government Procurement (hereafter HKC/NZ CEPA)[39] which entered into force on 1 January 2011. The second is the Free Trade Agreement between Hong Kong, China and Chile (hereafter HKC/CL FTA).[40] The HKC/CL FTA agreement covers a wide range of areas such as rules of origin, customs procedures, trade remedies, and competition among many sectors.[41]

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33 APEC *Report on the Implementation of APEC Transparency Standards* 1.
34 APEC *Report on the Implementation of APEC Transparency Standards* 1-2.
35 APEC *Report on the Implementation of APEC Transparency Standards* 1-3.
36 Eiro and Mealha "Damages under Public Procurement" 49.
37 Arrowsmith, Linarelli and Wallace *Regulation Public Procurement* 224.
38 Martin "The 2009 Asia Pacific Economic Cooperation" 1.
39 FTSB 2013 http://www.fstb.gov.hk.
40 FTSB 2013 http://www.fstb.gov.hk.
41 Of particular importance is chapter 12, which deals specifically with government procurement and is made up of 19 articles.

3.3.1.2.1 *Hong Kong, China/New Zealand Closer Economic Partnership on Government* Procurement

The objectives of the HKC/NZ CEPA are to ensure that procurement between the two countries takes place transparently in a competitive bidding environment, in an attempt to obtain value for money.[42] The scope and coverage of the HKC/NZ CEPA includes the usual procurement areas comprising of purchase, hire purchase, rental or lease, build operate transfer and public works.[43] The HKC/NZ CEPA does not apply to defence and security procurement, provided that there is legal justification for that exclusion and not necessarily to discriminate against suppliers from either country.[44] In respect of the treatment of goods and services, the principle of national treatment and non-discrimination applies.[45]

In the same context, both countries are prohibited from using the rules of origin as a measure to hinder procurement participation by suppliers from either country.[46] The HKC/NZ CEPA prohibits the disclosure of any procurement information submitted in confidence which may prejudice that supplier, unless it is in the interest of justice.[47] In short, the HKC/NZ CEPA promotes confidentiality in the treatment of procurement information. In the spirit of transparency and fairness there is an obligation on the immediate publication of any procurement information covered by the agreement, including any changes to the procurement information.[48]

Procurement procedures are mainly by open tendering and in justified cases by selective tendering.[49] Procurement covered by the HKC/NZ CEPA has to be done through a publication of notice of the intended procurement, which must be widely published in both countries, including electronically.[50] The information to be contained in the notice should include *inter alia* the description of the goods to be procured, the conditions, the time limits and the place where the tender documents

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42 Chapter 12 article 1.
43 Chapter 12 article 2 (Additional coverage and thresholds are provided in Annex I.).
44 Chapter 12 article 4.
45 Chapter 12 article 5.
46 Chapter 12 article 6.
47 Chapter 12 article 7.
48 Chapter 12 article 8.
49 Chapter 12 article 9.
50 Chapter 12 article 10 (2).

may be obtained.[51] In the event that a procurement entity requires pre-registration or pre-qualification for tender participation, then these conditions must also be widely published, detailing the specific conditions to be satisfied.[52]

In the same vein, procurement entities are allowed to maintain a list of registered and qualified suppliers, which can be used in the event of selective tendering.[53] These lists should be published annually and made available continuously and on demand.[54] In addition, procurement technical specifications should be as clear as possible in terms of the details and publication, in the promotion of transparency.[55] Article 14 provides details which must be contained in tender documents to enable suppliers to submit conforming or responsive tenders. If a supplier requests clarification over the tender, there is an obligation on the procuring entity to reply promptly but without giving the supplier an advantage.[56]

The process of awarding tenders should be done in order to promote fairness and impartiality.[57] Tenders that conform to the tender requirements are those that should be considered for the award.[58] When the contract is awarded, the winning tender must satisfy the requirements that (i) it offers the best value for money, (ii) it offers the lowest price, and (iii) is the most advantageous.[59]

In an attempt to discourage public procurement corruption, article 18 is titled "Ensuring Integrity in Procurement Practices". It encourages *inter alia* the use of criminal or administrative penalties as measures to combat corruption and curb conflict of interest.[60]

Dispute resolution should occur in accordance with the domestic laws of each member state.[61] The issue of dispute resolution in cases of public procurement corruption is handled by the ICAC in Hong Kong, instead of by other dispute

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51 Chapter 12 article 10 (3).
52 Chapter 12 article 11.
53 Chapter 12 article 12 (1).
54 Chapter 12 article 12 (2).
55 Chapter 12 article 13.
56 Chapter 12 article 14 (3).
57 Chapter 12 article 16 (1).
58 Chapter 12 article 16 (2).
59 Chapter 12 article 16 (3).
60 Chapter 12 article 18.
61 Chapter 12 article 19.

resolution mechanisms.[62] Apart from regulating dispute resolution, the HKC/NZ CEPA encourages the use of electronic communication by making use of a single electronic point that will empower suppliers with additional means to access the tender information.[63] Some of the above procurement provisions are also reflected in the Free Trade Agreement between Hong Kong and Chile, which is briefly discussed below.

3.3.1.2.2 Free Trade Agreement between Hong Kong and Chile

The Free Trade Agreement between Hong Kong and Chile (HKC/CL FTA) entered into force on 9 October 2014. Just like the HKC/NZ CEPA the HKC/CL FTA was concluded in the spirit of promoting trade between the two countries within the broader context of international trade.[64] The HKC/CL FTA recognises the role of public procurement and the need for public procurement processes to be insulated from corruption for the advancement of international trade.[65] Of particular importance is chapter 9, which deals with government procurement. Article 9.1 defines government procurement as:

> The process by which a government obtains the use of or acquires goods or services, or any combination thereof, for governmental purposes and not with a view to commercial sale or resale, or for use in the production or supply of goods or services for commercial sale or resale.

The scope of the HKC/CL FTA is that it applies to purchases, rentals or leases[66] with an estimated value that is determined in the annexures.[67] In order to determine whether a particular procurement is covered by the HKC/CL FTA there has to be a valuation. This valuation must include the:

> Estimated maximum total value of the procurement over its entire duration, taking into account all forms of remuneration provided for in such contracts, including options, premiums, feed, commissions and interest.[68]

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62 This is discussed further in below under criminal measures for combating public procurement corruption.
63 Chapter 12 article 20 (2).
64 FSTB Free Trade Agreement between Hong Kong, China and Chile 1.
65 Baark and Sharif *The Hong Kong Experience with Public Procurement Innovation* 177-178.
66 Article 9.2 (1) (a).
67 Article 9.2 (1) (b).
68 Article 9.

What this means is that the procuring entity is forced to be honest in budget planning or forecasts. The obvious exception is that of procurement that is security sensitive.[69] Other standard provisions are that of national treatment and non-discrimination,[70] non-disclosure of information,[71] the publication of information,[72] the notice of intended procurement,[73] conditions for participation,[74] lists of registered or qualified suppliers,[75] technical specifications,[76] tender documentation,[77] tendering procedures,[78] the treatment of tenders and awarding of contracts,[79] post-award information,[80] ensuring integrity in procurement practices,[81] the domestic review of supplier complaints,[82] electronic communications,[83] modifications and rectifications,[84] the committee on procurement,[85] and review.[86]

To sum up, by becoming a party to the WTO GPA, APEC's regional agreement, HKC/NZ CEPA and HKC/CL FTA, Hong Kong has demonstrated that it is open and committed to the development of its public procurement. This means that the level at which public procurement is conducted in Hong Kong has to satisfy the standards of best international practice as closely as possible.[87] The advantage that this brings to Hong Kong is that there is pressure on Hong Kong to conduct its domestic procurement with the utmost diligence by promoting *inter alia* transparency, accountability, fairness and equality. In the process, avenues for corruption are minimised.[88] Domestic procurement legislation and processes must reflect these international and regional public procurement practices.

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69 Article 9.4.
70 Article 9.5.
71 Article 9.6.
72 Article 9.7.
73 Article 9.8.
74 Article 9.9.
75 Article 9.10.
76 Article 9.11.
77 Article 9.12.
78 Article 9.13.
79 Article 9.14.
80 Article 9.15.
81 Article 9.16.
82 Article 9.17.
83 Article 9.18.
84 Article 9.19.
85 Article 9.20.
86 Article 9.21.
87 Baark and Sharif The Kong Experience with Public Procurement Innovation 17.
88 Baark and Sharif The Kong Experience with Public Procurement Innovation 17.

3.3.1.3 Domestic procurement regime

This part focuses on two main areas, namely the domestic public procurement regime and the procurement institutions.[89] The following legislation will be discussed: the *Basic Law of Hong Kong*, the *Public Finance Ordinance*, the *Stores and Procurement Regulations*, the Financial Circulars and the Treasury Bureau Circulars.

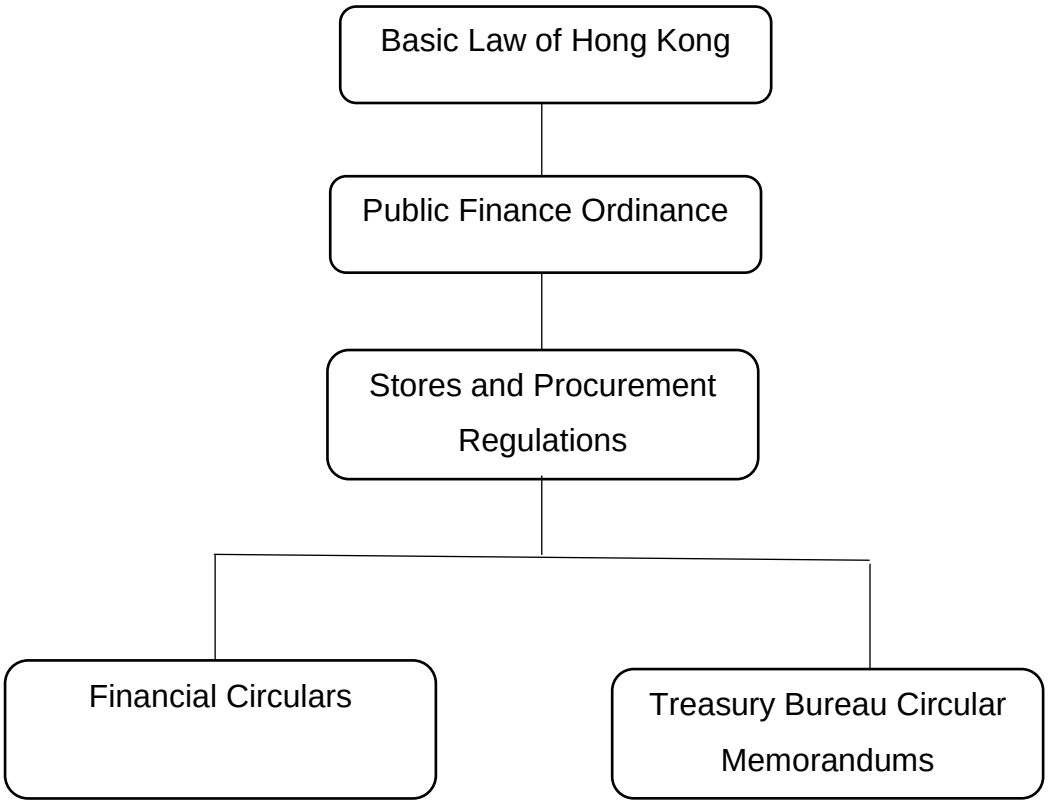

Figure 3: Domestic public procurement regime

From a legislative point of view the *Public Finance Ordinance* (hereafter PFO) of 30 June 1997 is the primary procurement legislation.[90] In addition, there are the Stores Procurement Regulations (hereafter SPR) issued in terms of the PFO and other procurement circulars (Financial and Treasury Bureau) that are issued from time to time by the Treasury which further provide for procurement procedures.[91] It is

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89 One must bear in mind that the WTO GPA, APEC's agreement, HKC/CL FTA and HKC/NZ CEPA form part of Hong Kong's public procurement system holistically. However, there are some procurements that do not meet the threshold for the WTO GPA, APEC's agreement, HKC/CL FTA and HKC/NZ CEPA. These procurements are regulated through a separate public procurement regime.

90 ABD/OECD *Anti-Corruption Initiative for Asia and the Pacific* 2.

91 ABD/OECD *Anti-Corruption Initiative for Asia and the Pacific* 2.

important to consider in more detail the procurement legislation beginning with the *Basic Law of Hong Kong*, followed by a discussion of the procurement institutions.

3.3.1.3.1 Basic Law of the Hong Kong Special Administrative Region

When the Hong Kong Special Administrative Region (hereafter HKSAR) was handed over to the People's Republic of China in July 1997, the Basic Law became the "Constitution" of HKSAR.[92] It is the document that governs all the operations of Hong Kong, how its institutions function, and the degree of independence these institutions exhibit in relation to mainland China.[93] The Basic Law is famous *inter alia* for its "One Country, Two systems" provision.[94] This means that although Hong Kong is not an independent country, the Basic Law allows it to administer its own affairs with a very high degree of autonomy, as provided in article 2.[95] The relevant provisions of the Basic Law in so far as public procurement is concerned will be discussed below.

Article 16 of the Basic Law provides that:

> The Hong Kong Special Administrative Region shall be vested with executive power. It shall, on its own, conduct the administrative affairs of the Region in accordance with the relevant provisions of this Law.

This means that in terms of this article Hong Kong has the legal mandate to independently manage its own procurement process by establishing structures it deems fit to effectively give life to the polices established by the executive.

Furthermore, article 62 states that:

> The Government of the Republic of Hong Kong Special Administrative Region shall exercise the following powers and functions:
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> (1) To formulate and implement policies;
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> (2) To conduct administrative affairs;
>
> (3) To conduct external affairs as authorized by the Central People's Government under this Law;

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92 Gittings *Introduction to the Hong Kong Basic Law* 37.

93 Gittings *Introduction to the Hong Kong Basic Law* 37.

94 Although Hong Kong is legally a part of mainland China, its government system is separate from that of mainland China. Hence the term "One country two systems".

95 The National People's Congress authorizes the Hong Kong Special Administrative Region to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provision of this Law.

(4) To draw up and introduce budgets;

(5) To draft and introduce bills, motions and subordinate legislation; and

(6) To designate officials to sit in on the meetings of the Legislative Council and speak on behalf of the government.

Pursuant to this article and in the area of public procurement, Hong Kong has established a procurement system that best suits its objectives.[96] As noted above, an array of institutions such as the Government Logistics Department (hereafter GLD), Marine Tender Board (hereafter MTB), Public Works Tender Board (hereafter PWTB and Central Tender Board (hereafter CTB) have been established as measures to enhance public procurement.[97] These bodies implement procurement policies and administer budgets that have been advanced by the government of Hong Kong.[98] In addition, public procurement in Hong Kong is performed either by employees of state owned enterprises or public servants. In so far as public servants are concerned, article 99 states *inter alia* that:

> Public servants must be dedicated to their duties and be responsible to the Government of the Hong Kong Special Administrative Region.

Article 99 makes it incumbent on public servants to be dedicated to their duties. There have been instances where corruption or irregularities in public procurement have been cited, which are symptomatic of the fact that some public officials are not dedicated to their duties in line with article 99.[99] The moment that a Hong Kong procurement official engages in graft or any such act that is contrary to sound procurement it is an indication that such procurement official has become reckless and irresponsible in the administration of procurement and is in violation of article 99.[100]

Public procurement corruption increases Hong Kong's government expenditure and makes the government deficit grow.[101] Government expenditure, in Hong Kong particularly in procurement, has to be controlled responsibly and in line with article 107 of the Basic Law of Hong Kong, which provides that:

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96 FTSB 2013 http://www.fstb.gov.hk.
97 The Treasury Branch *Guide to Procurement* 1.
98 FTSB *Categories of Government Procurement and Procuring Entities* 1.
99 McCue and Prier "The Procurement Process as a Safeguard against Corruption" 98.
100 ADB/OECD *Preventing Corruption in Public Administrations* 5-6.
101 Chen *Foresighted Leading: Theoretical Thinking and Practice of China* 134.

> The Hong Kong Special Administrative Region shall follow the principle of keeping the expenditure within the limits of revenues in drawing up its budget, and strive to achieve a fiscal balance, avoid deficits and keep the budget commensurate with the growth rate of its gross domestic product.

Therefore, the Basic Law of Hong Kong provides the general framework within which public procurement must be conducted. The PFO was enacted in response to these general provisions.

3.3.1.3.2 Public Finance Ordinance

Hong Kong's PFO is the primary legislation upon which all the directives with regards to public expenditure are regulated. According to the government of Hong Kong:[102]

> The Public Finance Ordinance (PFO) stipulates a system for the control and management of Hong Kong's public finances and defines the respective powers and functions of the legislature and the executive.

As already explained, the PFO sets the general legal framework on procurement regulation in Hong Kong. However, the procurement process, legal principles and parameters of Hong Kong's public procurement are detailed in the SPR.

3.3.1.3.3 Stores and Procurement Regulations

The SPR provides for the procedures under which goods and services are purchased by the HKSAR. These regulations are issued by the Financial Secretary as provided for in the PFO.[103] The scope and coverage of the tender procedures are stated in SPR 300(a).[104] The SPR takes into cognisance the fact that the Hong Kong

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102 Information Services Department Hong Kong 2014 http://www.gov.hk.

103 Treasury Branch, Financial Services and the Treasury Bureau 2014 http://www.fstb.gov.hk.

104 SPR 300 (a) The tender procedures set out in these Regulations shall be followed for procurement and the disposal of stores, services, construction/engineering works and other items as well as for revenue contracts, with the exception of the following for which separate procedures shall apply (i) procurement of stores, services and revenue contracts not exceeding the quotation limits specified in SPR 220 (i.e. $1.43 million for stores and services as well as revenue contracts, and $4 million for services for construction and engineering works. Quotation procedures are applicable; (ii) franchises, concessions, leases, licences, tenancies and others items procured and disposed of by public auction or a method laid down by statute, Government Regulations, or administrative procedure agreed by the PS(Tsy); (iii) private treaty grants, exchanges, extensions and short-term tenancies of land under approved "Abbreviated Tender System"; (iv) procurement of consultancy services through quotation and consultants selection procedures in Chapters II and IV respectively; (v) briefing out of legal work by the Secretary for Justice; and (v) the employment of individual persons.

is party to the WTO GPA, as stated in SPR 300(b).[105] All correspondence and information relating to tenders is classified as restricted until such time as a decision has been made in terms of SPR 305.[106]

The reason for this classification may be to prohibit any tampering with tender documents in order to minimize the opportunities for corruption or any other irregularity in the tender and procurement, for that matter. This classification applies to prequalification tendering as well as single tendering.[107] The SPR makes a distinction between the use of restricted and confidential information. In terms of SPR 300(b) the use of the word "confidential" is used in cases where there is a likelihood of prejudice to the HKSAR.[108]

Other than that, most correspondence regarding government tenders is treated as "restricted". Furthermore, in dealing with tenders, particularly in the area of the opening and administration of tenders as provided in SPR 305(c),[109] extra diligence is required. As noted earlier, the Financial Secretary appoints the CTB and Subsidiary Tender Boards for the effective administration of the tender procedures as provided in SPR 310(a).[110] The purpose of the CTB is *inter alia* to advise on the acceptance of tenders. Apart from this, these boards also decide on the acceptance of tenders in terms of SPR 300(b).[111]

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105 Where procurements are covered by WTO GPA and hence are subject to additional requirements, these are separately specified. Departments shall comply with the requirements of WTO GPA and related circulars/guidelines as may be updated from time to time.

106 (a) All communications regarding tenders, from the time tender documents are prepared until a decision is made on the acceptance or otherwise of the tenders, must be classified as Restricted Tenders.

107 Correspondence on prequalification and single/restricted tendering should also be classified as Restricted.

108 Contract documents and communications regarding contracts do not usually have a security classification. "Restricted" will be an adequate classification for sensitive information relating to contract disputes, litigation, claims, etc. Information should be classified as Confidential only if its disclosure would be prejudicial to the interest of the Government of the Hong Kong Special Administrative Region (HKSAR).

109 COs and Chairmen of Tender Boards shall appoint public officers to open and handle classified correspondence relating to tenders and contracts on a need-to-know basis. Detailed instructions on the procedures for handling such correspondence shall be made in accordance with the provisions of the Security Regulations.

110 The Financial Secretary appoints the Central Tender Board (CTB), and has authorized PS to appoint subsidiary tender boards, and COs to appoint DTCs, each comprising not less than three persons, to consider and decide on the acceptance of tenders or to advise on the acceptance of tenders.

111 The CTB advises the PS (Tsy) on the acceptance of all tenders exceeding the financial limits of the subsidiary tender boards. The CTB also advises or decides on matters concerning tenders,

As a check and balance in certain types of procurement, departments have to seek the approval of the CTB, and in doing so they have to send seven copies of the submission[112] to other departments for evaluation. Although this may sound cumbersome in that it may increase the burden of bureaucracy in the procurement process, in practice it may act as a measure to detect corruption in the procurement process. As stated above, the HKSAR has two subsidiary tender boards, namely the GLD and the PWTB. In the event that there is dispute between these two with regards to a tender, the matter should be referred to the CTB for determination in line with SPR 300(e).[113]

The SPR provides for five types of tendering, namely open tendering,[114] selective tendering,[115] single and restricted tendering,[116] prequalified tendering[117] and funding.[118] It is incumbent upon HKSAR procuring officials that when dealing with tenders and to allow more participation of the people in both the HKSAR and China the tenders have to be published in terms of SPR 340(a).[119] It must be borne in

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contracts and subsidiary tenders generally in accordance with its terms of reference. In the case of serious disagreement among members of the CTB on the award of a contract, the Chairman, in his discretion, may refer the matter to the Financial Secretary.

112 In seeking advice or approval of the CTB, departments shall send seven copies of the submission (for example, a tender report, an application for approval to use a marking scheme or conduct a prequalification exercise, an application for the approval of prequalified tenderers) including the original copy to the Secretary, CTB. Submissions to the CTB must be signed or endorsed by the respective CO or his representative at directorate level. The CO concerned or his representative at directorate level may be requested or may himself request to attend the CTB's meeting to present his recommendations or to answer any queries that the CTB may have.

113 There are currently two subsidiary tender boards, viz. the GLD Tender Board and the Public Works Tender Board. If there is a division of opinion on a contract award between members of a subsidiary tender board, the Chairman of the concerned subsidiary tender board should refer the matter to the CTB for advice. Subsidiary tender boards shall submit to the CTB at the end of the month concerned details of all contract awards where the lowest conforming offer (the highest in the case of a revenue contract), or the tender of the highest overall scorer in case a marking scheme is used in tender evaluation, has not been accepted and the reasons for making such awards.

114 SPR 316.

115 SPR 320.

116 SPR 325.

117 SPR 330.

118 SPR 335-336.

119 Departments wishing to publish tender notices in the Government Gazette (normally published on a Friday) shall follow the procedures set out in General Regulations 103-105, and forward three copies of the draft notice in Chinese and English by 3.30pm on a Tuesday to the Official Languages Division of the Civil Service Bureau, which will forward them to the Assistant Clerk to the Executive Council after vetting the Chinese translation. Departments should also send an additional copy of the notice to the DGL not later than 2.30pm on the Tuesday. A specimen Gazette tender notice is at Appendix III (E). Such notices should generally appear in two

mind that the HKSAR is not a sovereign state and therefore when soliciting for tenders this should be done in order to accommodate any interested tenderers from China.

These tender notices are not exclusively published in newspapers, but the SPR also makes room for internet advertisement in line with technological advancements as provided for in SPR 340(b).[120] One of the reasons for such wide advertisement is to allow prospective international suppliers that have acceded to the WTO GPA[121] to be accorded a fair and realistic chance to be considered for government tenders. The SPR 340(d) places a limit on the tender amount that should be advertised internationally.[122]

The nature of the content of the tender notices has been meticulously provided for in the SPR. The reason for this is that once a tender notice appears to have incorrect or purportedly misleading information in an advertisement, it can be a contentious legal issue. This is regardless of whether the error in the advertisement is genuine or not. With this in mind, the SPR has attempted to give guidelines on the content of the tender notice[123] as well as the time frames.[124] The SPR ensures that sufficient time

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consecutive issues of the Government Gazette but can be published in more than two issues, if the procuring department deems it appropriate.

120 Procuring departments may publish tender notices on the Internet or in the local or international press and journals in addition to the Government Gazette, if necessary. For placement of advertisements in the press, departments should make arrangements with the Director of Information Services direct.

121 SPR 340(b) for procurements covered by WTO GPA, procuring departments shall publish the tender notices and the notices of prequalification of tenderers in the Government Gazette and on the Internet. They should also consider notifying consulates and trade commissions in Hong Kong of the tender invitations, where appropriate.

122 For works contracts not exceeding $55 million and other procurements which are not subject to the WTO GPA, it would suffice to publish tender notices only on the Internet, as set out in FC Nos 3/2009 and 4/2013 respectively (as may be updated from time to time). Publication in the Government Gazette, and/or local and/or international press and journals is optional.

123 SPR 340(e) Tender invitations shall indicate clearly the address and telephone/fax number/e-mail address of the office from which forms of tender and further particulars may be obtained, the exact location of the tender box in which tenders are to be deposited, and the closing date and time for the receipt of tenders. For procurements covered by WTO GPA, departments will have to send to any interested tenderer a set of the tender documents upon receipt of a written request and may charge the tenderer for the cost of the delivery. Tender notices shall specify whether the intended procurement is covered by WTO GPA. Tenderers should be advised that no late tenders will be accepted. They should also be informed of the alternative tender closing date/time as advised by the controlling authority of the respective tender box in the event of a black rainstorm warning signal or a tropical cyclone signal No. 8 or above hoisted at the original tender closing date/time.

124 SPR 340(f) adequate time shall be provided to allow both local tenderers and tenderers outside Hong Kong to prepare and submit tenders. A minimum of three weeks is normally requires.

is given to tenderers that are outside Hong Kong, and it has set a minimum of three weeks, depending on the urgency and nature of the tender.

However, in cases where the tender does not exceed HK$55 million and is not covered by the WTO GPA, the three week period may be derogated from in terms of SPR 340(b).[125] In this case, the procuring departments are free to set their own time periods, provided the time frames are reasonable and do not show any bias on the part of the procuring departments. If the procurement is covered by the WTO GPA, a minimum of at least 40 days should be given in terms of SPR 340(b).[126]

In cases of urgent procurement the prescribed minimum periods may be derogated from. The process of derogation is by way of application by the procuring department to the authorizing entity in terms of SPR 340(f).[127] In addition, the procuring entity is encouraged to enforce compliance with tendering time frames in terms of SPR 340(g).[128] In addition, SPR 345(a) provides for standard contract forms when soliciting for tenders.[129] The SPR seems to be very prescriptive in the manner in which the terms of the tender should be accessed and processed by prospective suppliers, as stated in SPR 345(c).[130]

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125 As an exception, for works contracts not exceeding $55 million and other procurements which are not subject to WTO GPA, COs may allow less than three weeks for the preparation and submission of tenders as set out in FC Nos 3/2009 and 4/2013 respectively (as may be updated from time to time).

126 For procurements covered by WTO GPA, at least 40 days shall be allowed for the receipt of tenders and no less than 25 days for applications to be prequalified to tender.

127 In the case of extreme urgency, departments will have to seek the prior approval of the PS (Tsy) for reducing the period for the receipt of tenders. This authority has been delegated to the DGL in respect of GLD tenders and tenders for the supply of stores not exceeding $5 million.

128 Tenderers must submit the required number of copies of tenders in a sealed cover. Tenderers should be advised not to give any indication on the cover of their tenders which may relate them to a particular contractor/supplier/service provider. Pre-addressed envelopes or labels for the return of tenders should, as far as possible, be provided to tenderers.

129 Departments should normally use the following standard contract forms when inviting tenders (i) tender for the Supply of Goods (GF 230); (ii) Tender for Services (GF 231); (iii) Tender for the Purchase of Articles or Materials, from the Government of the HKSAR (GF 232) and (iv) Articles of Agreement and General Conditions of Contract for various types of works contracts.

130 Departments shall ensure that a complete set of tender documents covering the following is issued to all tenders: (i) Terms of Tender including the conditions which a tenderer has to observe when submitting a tender, the tender validity period, the currency to be used for the contract, etc; (ii) General Conditions of Contract covering the conditions which the contractor has to comply with in executing the contract; (iii) Special Conditions of Contract covering any conditions peculiar to the contract; (iv) Offer to be Bound or Forum of Tender to be signed and completed by the tenderer; (v) Tender specifications (vi) Bills of Quantities or quantities required of the contract where applicable; and (vii) Detailed price schedules or schedule of rates where applicable.

In the same vein, the SPR 345(d) prohibits the disclosure of the estimated cost of a contract when inviting for tenders.[131] The only exception is that once the estimated budget has been disclosed, every practical effort should be made to ensure that all prospective suppliers have been made aware of the budget.[132] It is submitted that most procuring entities do not usually disclose the contract budget as a measure of promoting fair competition.[133] In addition, one of the reasons for going to tender is to ensure that a government gets the best value for money by allowing competitive bidding but without compromising on the standard or quality of service.[134]

In order to cushion itself against inflated bids that try to cater for expected changes in foreign exchange rates, the SPR has uniquely provided for tenders in foreign currencies.[135] Generally, international or even local suppliers who source goods, especially those that are technical in nature outside Hong Kong, tend to quote in the local currency, but in doing so they factor in foreign currency fluctuations, and this results in inflated bids.[136]

Hong Kong is one of the few jurisdictions that has tried to provide for such an eventuality, as stated in SPR 355(a).[137] This approach appears to be very progressive in the sense that where goods are produced in a country that has a comparative advantage over Hong Kong, then it will be easy either for local or international suppliers to source the right products or services without inflating their

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131 Normally, departments should not disclose the estimated contract value to the tenderers as it may become a main guiding factor in the preparation of their tender proposals, which may be reduced or, of even more concern, expand unnecessarily, thus undermining the principles of competition and value for money.

132 If, however, the estimated contract value has been disclosed to the public, departments should, in all fairness, inform all potential tenderers of the estimated contract value.

133 ADB/OECD *Preventing Corruption in Public Administrations* 14.

134 Graells *Public Procurement and the EU Competition Rules* 105.

135 SPR 355 (a)-(c).

136 de Mariz Menard and Abeille *Public Procurement Reforms in Africa* 35.

137 In general, contract sums for government contracts should be quoted and paid in Hong Kong dollars. In order to avoid tenderers putting in an unreasonable amount of allowance in their quotations to cover exchange risks for the contract period, departments may allow tenderers to quote in foreign currencies subject to the following conditions (i) the goods or equipment offered are manufactured outside Hong Kong and form a significant part of the contract or the estimated total value of the "overseas" element exceeds HK$500 000; (ii) unless otherwise agreed by the department concerned, the foreign currency quoted must be of the country supplying the goods or equipment, and more than one currency may be quoted if more than one foreign country is involved; (iii) local materials and labour should be priced in Hong Kong dollars, which generally should include materials manufactured outside Hong Kong but which require a substantial amount of further processing in the HKSAR; and (iv) services provided by personnel based outside Hong Kong and salaried in a foreign currency may be quoted in that foreign currency.

prices, thereby enhancing transparency while simultaneously offering value for money.

In addition, this approach minimizes avenues of corruption in the sense that procuring officials will not subject the prospective supplier who has quoted in foreign currency to onerous and rigorous explanations with regards to exchange rates. In the same context, the SPR allows for the multiple use of foreign currency quotations.[138] In other words, some countries prefer to use only the United States Dollar (hereafter $US) as the preferred foreign currency to the exclusion of any other currency. However, this is not the case in Hong Kong, as quotations in foreign currency from the country where the supplier is based are allowed.[139]

In brief, the discussion above on Hong Kong's public procurement has shown that in addition to international and regional agreement, Hong Kong has an adequate quantity of home-grown procurement legislation. The PFO is the main procurement legislation, which is amplified by the SPR. However, the above procurement legislation is enforced by different procuring institutions, and these procuring institutions are the subject matter of the discussion below.

3.3.2 Procurement institutions

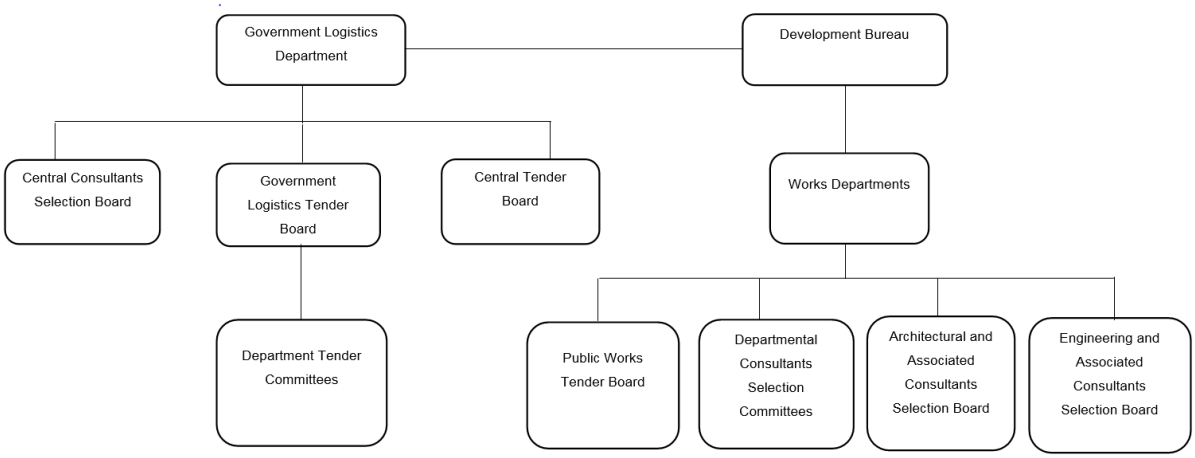

Figure 4: Hong Kong domestic procurement institutions

138 SPR 355(a)-(d).
139 SPR 355(a)-(d).

3.3.2.1 Government Logistics Department

The GLD was established in July 2003[140] as a body tasked with the responsibility of the entire public procurement. According to Hong Kong's Treasury Branch:[141]

> The Government Logistics Department is Government's central procurement agent. Equipped with a modern warehouse and delivery fleet, GLD maintains a number of essential items and controlled forms. GLD also purchases through allocated bulk contracts a wide range of items commonly used by government bureau/departments and non-government organisations. These include stationery and cleansing materials. The user departments can draw their requirements from the contractors direct against the allocated bulk contracts on an as and when required basis. GLD is the contracting party of these bulk contracts and provides contract administration service throughout the contractual period.

As observed by the Hong Kong Audit Commission[142] the importance of the GLD in the procurement process is demonstrated by the fact that in 2011 the GLD handled some 450 contracts with a total value of $5.385 million. The GLD is involved in the management and administration of a number of programmes such as the Procurement and Contract Management System,[143] the e-Tender Box,[144] the e-Procurement Programme,[145] the Forecast of Major Government Purchases,[146] the Application for Inclusion in the Supplier Lists of the Government Logistics Department,[147] the General Management Consultancy Services Portal,[148] and the

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140 It was established as a result of the amalgamation of three departments that operated independently of one another namely, the Government Land Transport Agency, the Government Supplies Department and the Printing Department.

141 The Treasury Branch, Financial Services and the Treasury Bureau 2014 http://www.fstb.gov.hk.

142 Hong Kong Audit Commission 2017 http://www.aud.gov.hk/eng/pubpr_arpt/rpt.htm.

143 The GLD maintains lists of suppliers of various goods-related services. One can log into the PCMS to apply for inclusion in the GLD Supplier Lists and to check out the online services provided for suppliers.

144 The GLD has introduced the ETB system to replace the Electronic Tendering System. GLD suppliers, GLD subscribers and applicants for inclusion in the GLD Suppliers Lists can make use of the ETB to download tender documents, submit tender offers and make enquiries by logging into the Procurement and Contract Management System.

145 The e-Procurement Programme covers departmental purchases of non-construction-related goods and services up to HK$1.43 million.

146 This webpage covers details such as description, estimated quantity, requisition date and the user bureau/department of the purchase requirement.

147 The GLD provides the government bureau or departments with logistics support in procurement and supplies, printing services, and transport operation and management.

148 Through the portal, consultants can apply for registration on the GMC list maintained by the Efficiency Unit and update their company profiles, scope of services, contact information, etc. The information provided by the registered consultants will be used by government departments for reference in connection with the procurement of management consultancy services.

Catalogue of Opportunities for Private Sector Participation.[149] It may be seen, here, that the GLD plays a crucial role in Hong Kong's public procurement process.

However, in the process of its operations, the GLD has a limitation on the nature of the procurement that it carries out. For instance, the GLD has no jurisdiction over the procurement of construction works. According to Hong Kong's Treasury Branch:[150]

> Construction services are procured by works departments, under the overall supervision of the Development Bureau. In addition to giving general guidance and technical advice on tendering procedures and contract administration matters in respect of works contracts, the Development Bureau maintains lists of public works contractors and a central performance reporting system of public works contractors and provides support for financial vetting where necessary.

It follows from the above that the GLD is tasked with a mammoth mandate and has to ensure that it is sufficiently resourced in order for it to be relevant to the procuring needs of various stakeholders it represents. It is also important to note that taking the responsibility of construction procurement away from the GLD makes the GLD more focused on its own procurement. In addition, it relieves the GLD of the pressure and the technicalities associated with construction procurement.

Furthermore, the removal of construction procurement from the GLD assists it to detect any anomalies or irregularities in its procurement much earlier and without being overburdened or strained in its capacity. In line with this, the GLD's mandate extends to the procurement of consultancy services.[151] Some of these consultancy services include cleaning, property management, the management of parking meters, and the operation of transport and waste management facilities as stated by Hong Kong's Treasury Branch.[152] It is important to recall that procurement functions as noted above are divided between the GLD and the Development Bureau. Attention is now briefly paid to the procurement functions of the Development Bureau.

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149 Selling to the Government 2015 http://www.gov.hk.
150 Treasury Branch, Financial Services and the Treasury Bureau 2013 http://www.fstb.gov.hk.
151 Treasury Branch, Financial Services and the Treasury Bureau 2013 http://www.fstb.gov.hk.
152 Treasury Branch, Financial Services and the Treasury Bureau 2013 http://www.fstb.gov.hk.

3.3.2.2 Development Bureau

The Development Bureau has the overall mandate to supervise all construction works and related procurement. In terms of its policy objectives the Development Bureau has a mandate:[153]

- To promote and ensure building safety and maintenance;
- To implement urban renewal in a holistic manner by improving the build of older urban areas and the living conditions of residents therein;
- To ensure the effective planning, management and implementation of public sector infrastructure development and works programmes in a safe, timely, and cost-effective manner and to maintain high quality and standards;
- To ensure the provision of a reliable, adequate and quality water supply and an efficient water supply service.

These objectives are at the heart of works procurement. As stated earlier, Hong Kong has an estimated population of 7 million. This means that the Development Bureau has to ensure its public works cater for the needs of its citizens.[154] In its 2016 Policy Address, the Development Bureau[155] stated *inter alia* that it had introduced a New Engineering Contract as a measure to reduce contractual risk and exposure to corruption.[156]

Another new development is works procurement, introduced in 2016, that allows the splitting of procurement contracts to allow "participation by more contractors".[157] In the same light, the Development Bureau has stated that it is going to:[158]

> Establish a dedicated office to draw up cost measures and cost reduction initiatives, and steer and monitor the related works departments. The measures include enhancing project management and cost estimation performance, trimming project requirements that are not fully justified without compromising technical and safety standards, and improving procurement methods to reduce the tender risk premium and the overall project costs.

The Development Bureau is quite strategic in the development of works procurement. It is constantly evaluating ways of increasing efficiency in construction

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153 Development Bureau 2010 http://www.devb.gov.hk.
154 Poon, Tang and Fong *Management and Economics of Construction Safety in Hong Kong* 80-81.
155 Poon, Tang and Fong *Management and Economics of Construction Safety in Hong* Kong 81.
156 Wong, Wong and Nadeem "Government Roles in Implementing BIS" 58.
157 Legislative Council *Panel on Development Initiatives of Development Bureau* para 11.
158 Development Bureau 2010 http://www.devb.gov.hk.

works and at the same time developing measures to fight and reduce corruption in works procurement.

In other words, the Development Bureau does not wait for the ICAC to come up with anti-corruption measures in construction procurement. The Development Bureau has taken the initiative to close the gaps against corruption and wasteful expenditure in works procurement. As noted above, a good example is the introduction of a New Engineering Contract.[159]

Apart from the Development Bureau, there are other procurement units, and these are summarised below.

Table 8: Other procurement institutions in Hong Kong

Procurement institution	Summary
Central Tender Board	The CTB is responsible for the procurement of services that exceed the limit of the GLD, MTB as well as the PWTB.[160] As stated above once the GLD has a procurement that exceeds HK$10 million, then such procurement has to be done by the CTB.[161] By the same token, if the MDTB has a procurement that is above HK$5 million then that procurement will be carried out by the CTB. Furthermore, if the PWTB has procurement that is in excess of its limit of HK$30 million, again such procurement has to be executed by the CTB. It is for this reason that the CTB may be construed as being at the apex of Hong Kong's public procurement.
Government Logistics Department Tender Board	The Government Logistics Department Tender Board (hereafter GLDTB) handles revenue procurement as well as goods and services procurement that does not exceed a threshold of HK$ 15 million. Excluded from the GLDTB is construction works as well as procurement that is done by DTCs. Any other procurement that does not fall within this ambit is done by the GLDTB.
Marine Department Tender Board	The MDTB does procurement for marine tenders comprising of procurement of government vessels.[162] Hong Kong's marine industry is one the biggest and busiest in the world.[163] Most of the work is conducted at the Port of Hong Kong.
Public Works Tender Board	The PWTB has the highest ceiling threshold of works procurement.[164] The PWTB can procure services up to HK$30 million, as provided in its terms of reference:[165]
Architectural and Associated	The Architectural and Associated Consultant Selection Board (hereafter AACSB) was established by Financial Circular 14/97[166] and has the mandate of procuring

159 Legislative Council Panel on Development Initiatives of Development Bureau 2.
160 Hong Kong Audit Commission *Government Logistics Department Procurement Supplies* 1.
161 ADB/OECD *Curbing Public Procurement* Corruption 14.
162 WTO Government Procurement WT/TPR/S/52 *Trade Policy Review* 46-47.
163 Lee and Lam "Container Port Competition and Competitiveness" 112.
164 The Board is chaired by the Deputy Director of Architectural Services; members include a Government Quantity Surveyor and an engineer of Directorate Grade 2 or above from the Highways Department, the Civil Engineering Department or the Drainage Services Department on a rotational bass.
165 FSTB 2013 http://www.fstb.gov.hk.
166 Issued by the Secretary for Financial Services and the Treasury.

Procurement institution	Summary
Consultant Selection Board	architectural and other services related to architecture. It can contract such services provided the architecture services exceed HK$1.3 million.[167] The good thing about the AACSB is that it comprises of experts in the field of architecture and they are able without much difficulty to evaluate tenders within their purview. This streamlining is pivotal in the procurement process in that it eliminates non-technical people from participating in architectural procurement.
Engineering and Associated Consultant Selection Board	The Engineering and Associated Consultant Selection Board (hereafter EACSB) has a more or less similar task to that of its counterpart discussed above. The major difference is the area of focus. The EACSB emphasis is on engineering consultancy whereas the AACSB concentrates on architecture services. The EACSB and the AACSB both procure on engineering and related services that are above HK$1.3 million. Just like the AACSB, the EACSB is comprised of expert engineers who are solely responsible for procuring engineering works and work associated with engineering.
Central Consultants Selection Board	The purpose of the Central Consultants Selection Board (hereafter CCSB) is to cover procurement that falls outside the ambit of both the AACSB and the EACSB. In terms of its terms of reference the CCSB has the duty:[168] To make recommendations to the Permanent Secretary for Financial Services and the Treasury on the selection and appointment of consultants, other than those selected and appointed by the Architectural and Associated Consultants Selection Board and departmental consultants selection committees. In other words, the CCSB acts as a buffer procurement entity that automatically fulfils any procurement not covered by the above two entities. It ensures that there is no lacuna in the procurement carried out by the AACSB and the EACSB.

All of the above procurement entities have contributed to an efficient and less corrupt procurement system by adhering to procurement regulations as well as upholding procuring principles. It is also important to note that the procuring institutions discussed above adhere to the procurement principles envisaged under the WTO GPA and the bilateral agreements already discussed. Below is a summation of the most important principles (excluding what has already been discussed).

3.3.3 Hong Kong's public procurement principles

It may be concluded from the above discussion that Hong Kong has an extraordinarily simplified public procurement regimes. The following principles anchor the procurement process (i) open and fair competition (ii) value for money (iii)

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167 Hong Kong Audit Commission *Architectural Services Department* 1.
168 HKSAR 2014 http://www.info.gov.hk.

transparency in procedures and practices and (iv) public accountability.[169] In order to achieve these principles public procurement system through the PFO and the SPR has attempted to ensure that public procurement information is not only available but also accessible.[170] Furthermore, the public procurement information must be presented in a manner that enables public procurement stakeholders to verify that information and to use that information to assess the circumstances that influenced procuring officials in arriving at a particular decision.[171]

3.3.4 Reflections

As noted above, Hong Kong is a party to the WTO GPA[172] and its procurement principles are also guided by the desire to ensure that the spirit of the WTO GPA permeates its procurement.[173] Hence, principles such as open and fair competition amongst domestic and foreign suppliers and service providers should be promoted.[174]

These principles are demonstrated in the open and fair tendering as practised by the procuring institutions described above. Adherence to these principles was demonstrated in one of the most major construction projects that Hong Kong has ever engaged in, that is, the construction of Hong Kong's International Airport at a cost of over US$20 billion.[175]

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169 Baark and Sharif "Hong Kong Special Administrative Region" 172-174.

170 Goergieva *Using Transparency Against Corruption in Public Procurement* 13.

171 Goergieva *Using Transparency Against Corruption in Public* Procurement 13.

172 Hong Kong has incorporated the WTO GPA in its domestic procurement legislation. This has enabled Hong Kong to ensure that its procurement regulations reflect procurement principles such as transparency, accountability and value for money. Another observation is that by participating in the WTO Committee on Government Procurement Hong Kong is exposed to best procurement practices much earlier at domestic level, which is progressive for the jurisdiction.

173 Although the SPR makes provision for tenderers who by virtue of the WTO GPA may wish to participate in the procurement process, there is a requirement that all such tenders should be advertised on the official website of the procuring entity and on the website of the state parties to the WTO GPA. If this is done, then the principle of open and fair competition will have been complied with. Furthermore, open and fair competition tendering is affected when inadequate time to submit tenders is given by the procuring entity. This has been dealt with in terms of *SPR* 340(f). However, the same provision creates an exception for tenders that exceed HK$55 million, which tenders are outside the ambit of the WTO GPA

174 According to the WTO GPA, for all public works contracts above the value of 5 000 000 Special Drawing Rights (SDR) (i.e about HK$55 109 000) the tendering has to be conducted within the provisions of the Agreement. SDR is an international currency unit set up by the International Monetary Fund.

175 Plant, Civil and Hughes "Hong Kong International Airport" 70.

The project was complex as it involved about 225 contracts, and it was streamlined into ten different projects with a multiplicity of main contractors and sub-contractors.[176] It also involved foreign and domestic suppliers.[177] The construction of the airport was finished within six years and within the allocated budget. Remarkably, no corruption was reported. The project tested Hong Kong's entire public procurement system and the procurement principles that have been discussed above proved resilient.

The enforcement of the procurement legislation takes place through a myriad of procurement institutions headed by the GLD and the Development Bureau. The procurement functions of these institutions are supplemented by the actions of other procurement institutions such as the CTB, MTB, as tabulated above. Having said this, what remains to be discussed is the extent to which Hong Kong's public procurement system is susceptible to corruption and how Hong Kong uses the four anti-corruption measures identified to combat public procurement corruption.

Hong Kong's procurement legislation does not expressly provide for the combating of public procurement corruption. This means that Hong Kong follows the traditional approach of separating procurement legislation from corruption legislation. This is distinguished from the classical approach that combines both, that is the regulation of public procurement and the combating of public procurement corruption, in the same procurement legislation.

The discussion below focuses on public procurement corruption in Hong Kong and how it is curbed.

3.4 Public procurement corruption in Hong Kong

This part of the dissertation focuses on public procurement corruption in Hong Kong. Whilst one appreciates that public procurement corruption is multifaceted, the focus is limited to the following: the definition of public procurement corruption in Hong Kong; the types and forms of public procurement corruption in Hong Kong; four

176 Plant, Civil and Hughes "Hong Kong International Airport" 70.
177 Plant, Civil and Hughes "Hong Kong International Airport" 70.

causes of public procurement corruption already identified in Chapter Two;[178] and lastly the use of criminal measures, administrative measures, institutional measures and civil activism to curb public procurement corruption.

3.4.1 Definition of public procurement corruption

It will be recalled that a new definition of public procurement corruption has been suggested in this study, which defines public procurement corruption as the intentional abuse of entrusted public authority by a procuring official who is devoid of any legal defence who engages in corruption for personal gain or other satisfaction (emotional or psychological) with or without the inducement of a supplier/contractor or an agent of the supplier/contractor.

In Hong Kong public procurement corruption is not defined. The *Prevention of Bribery Ordinance* (hereafter PBO),[179] which is the primary statute that regulates corruption and other related corrupt offences, does not define corruption, let alone public procurement corruption. Instead, the PBO mentions offences that relate to public procurement corruption and which manifest as types and forms of public procurement corruption. These have already been classified in this study in Chapter Two,[180] and are summarised below.

3.4.2 Types and forms of corruption

The types and forms of public procurement corruption in Hong Kong are created in part II of PBO. They are the following: official bribery, commercial bribery, conspiracy, soliciting an advantage, and offering an advantage.[181] They will be only briefly referred to under criminal measures of combating public procurement corruption if necessary, the brevity being occasioned by the attempt to avoid repetition.

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178 See para 2.9.
179 Chapter 201 of 30 June 1997, formerly 102 of 1970.
180 See paras 2.8.4 and 2.8.5.
181 Sections 3-10 of PBO.

3.4.3 Causes of public procurement corruption

3.4.3.1 Personal circumstances of procuring officials

It is important to recall that in this study personal circumstances of procuring officials refers *inter alia* to the personal ambitions of the procuring official as they relate *inter alia* to personal lifestyle, family, political affiliation and business relationships, which influence the awarding of a government contract corruptly by the procuring official. The procuring officials in Hong Kong were exposed to tremendous opportunities for corruption, particularly the period prior to 1974.[182] It has been stated that they were paid low wages, a fact which might have influenced them to partake in the corruption that permeated Hong Kong during this period.[183]

In the period prior to 1974, or even in the period from 1974 to the mid-1980s, corruption in general in Hong Kong was so rife that it could be said to have become institutionalised.[184] Some procurement officials became party to the corruption that had engulfed the island.[185] It is difficult to ascertain whether there were any peculiar personal circumstances that were specific to the procuring officials or if the opportunities to profit from corruption were blatant that anyone who was willing to engage in corruption was able to do so.

In recent years it has not been possible to ascertain how the personal circumstances of Hong Kong's procuring officials are affecting either positively or negatively the instances of their public procurement corruption.[186]

As noted earlier, one of the areas that exposes the personal circumstances of procuring officials and their susceptibility to public procurement corruption is conflict of interest.[187] Hong Kong has put in place laws and policies to regulate conflict of interest. According to Donald,[188] the enforcement of these laws has managed to create a "culture of anti-corruption" which has generally helped procuring officials in Hong Kong not prevent their personal circumstances from influencing their decision

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182 Shiu-Hing *The Politics of Democratization in Hong Kong* 53.
183 Wong *Policing in Hong Kong: History and Reforms* 203.
184 Lo *The Politics of Cross-Border Crime in Greater China* 124.
185 Manion *Corruption by Design* 31-32.
186 Quah "Curbing Corruption and Enhancing Trust in Government" 42.
187 World Bank *Income and Asset Disclosure Case Study Illustrations* 84.
188 Donald *Countering Corruption Conflict of Interest: The Example of Hong Kong* 4-6.

making. In addition, Chapter IA of the SPR provides *inter alia* that public officials involved in government public procurement must (i) avoid a conflict of interest or (ii) declare a conflict of interest. This dictum must be complied with, whether or not the conflict of interest arises from the personal circumstances of the procuring official.[189] However, what has been of interest in the commission of public procurement corruption in Hong Kong has been the personal circumstances of politicians.[190]

3.4.3.2 Personal circumstances of politicians

In Chapter Two this study identified the personal circumstances of politicians as contributing to public procurement corruption, in that politicians seem to have an unquenchable thirst to gain and consolidate their power.[191] They therefore use their political influence to commit public procurement corruption.[192] This was true in Hong Kong in the period prior to 1974, which witnessed the unparalleled wielding of political influence in Hong Kong's public procurement.[193]

After the establishment of ICAC, the influence of politicians in the commission of public procurement corruption reduced drastically, the reduction beginning in the late 1980s.[194] However, some politicians in Hong Kong continue to do business with the state, or their families continue to engage in government contracts on the basis of their political connection, contrary to the Hong Kong procurement laws.[195]

Most recently, two cases exposed how the personal circumstances of politicians may cause public procurement corruption. The first one involved the former Chief Secretary for Administration in Hong Kong, Rafael Hui Si-yan (hereafter Hui).[196] In this case it was alleged that Hui had (i) received an estimated HK$10 million from SHKP a company that was involved in construction works for the state and (ii) stayed free of charge in two flats owned by SHKP.[197]

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189 Donald *Countering Corruption Conflict of Interest: The Example of Hong Kong* 66-67.
190 Caroll *A Concise History of Hong Kong* 173.
191 See para 2.9.
192 Lethbridge *Hard Graft in Hong Kong: Scandal, Corruption* 106.
193 Lethbridge *Hard Graft in Hong Kong: Scandal, Corruption* 223.
194 McCourt "Efficiency, Integrity and capacity: An Expanded Agenda for Public Management" 49.
195 Ortmann *Politics and Change in Singapore and Hong Kong Containing Contention* 94.
196 Rotberg *The Corruption Cure: How Citizens and Leaders can Combat* Corruption 121.
197 Rotberg *The Corruption Cure: How Citizens and Leaders can Combat Corruption* 121.

These two benefits were meant to ensure *inter alia* that Hui kept SHKP informed of the construction works and other projects that were being conducted by the HKSAR at that time.[198] This would enable SHKP to be at an advantage over of its competitors. Hui refuted these allegations and the matter was eventually brought to court.[199] At the conclusion of the case, *HKSAR v Hui Rafael and Others,*[200] it was ruled *inter alia* that in return for monetary advantage Hui had indeed furnished SHKP with information that placed SHKP ahead of its competitors, and Hui was subsequently convicted and sentenced to seven years imprisonment.

Another case which, although it is not directly related to public procurement is very useful in highlighting the corrupt influence of the personal circumstances of politicians, involves the former ICAC Commissioner Timothy Tong Hin-ming (hereafter Tong).[201] It was alleged that Tong abused his privilege of hosting guests of his choice by extravagantly hosting Chinese politicians to consolidate his political power in Hong Kong by soliciting for favours from the powerful Chinese politicians.[202] After the termination of his tenure as the ICAC Commissioner, Tong was one of the guests at the Chinese People's Political Consultative Conference.[203] Although an investigation was undertaken and cleared him of any wrong-doing, the recommendations of the investigation resulted in the government of Hong Kong enacting new rules that govern gifts and entertainment for government departments.[204] Directly related to the desire for politicians to consolidate their political power through public procurement corruption is political transition.

3.4.3.3 Political transition

Hong Kong has gone through different political transitions, all of which have had a bearing on public procurement corruption. The most important periods are pre 1997 (the British occupation) and post 1997 (Chinese rule).[205] Under the British rule, particularly between 1950 and 1980, Hong Kong experienced high levels of public

198 Rotberg *The Corruption Cure: How Citizens and Leaders can Combat Corruption* 121.
199 Lo *Hong Kong's Indigenous Democracies* 92.
200 (CACC NO. 444 OF 2014) FAMC No. 11 of 2016**.**
201 Lo *Hong Kong's Indigenous Democracies* 92.
202 Lo *Hong Kong's Indigenous Democracies* 92.
203 This one of the most powerful political organs in China.
204 Lo *Hong Kong's Indigenous Democracies* 92.
205 Hampton *Hong Kong and British Culture* 66.

procurement corruption.[206] However, with the establishment of the ICAC and the spirited efforts that the ICAC exhibited the island began to witness reduced public procurement corruption.[207] As the British occupancy was coming to an end, and when negotiations to hand over Hong Kong to the Chinese were taking place, there were fears that the endemic corruption that was engulfing China would be exported to Hong Kong.[208] When Hong Kong was finally handed over to China in 1997 those fears were allayed, as Hong Kong remained resolute in fighting public procurement corruption.[209]

How did Hong Kong manage to prevent the public procurement corruption that was rife in mainland China from being imported? Three factors were key to this success:

(v) The political will of the Chief Executive and the Executive Council to guard its governance and administrative institutions were unshaken;

(vi) The HKSAR maintained and strengthened the procurement regime; and

(vii) Led by the ICAC, the HKSAR maintained and strengthened the public procurement anti-corruption strategy of all successive governments.

These three steps enabled Hong Kong's public procurement to be insulated from Chinese public procurement corruption throughout the political transition.

There is a third political transition on the horizon. It is being a led by a group of people in Hong Kong who are working to attain the right to self-determination, which would eventually give birth to Hong Kong as an independent country, when all ties with China would be severed.[210] Whether this transition eventually materialises or not, if the current procurement and anti-corruption systems remain in place, the transition is not likely to increase public procurement corruption or hamper the current efforts to combat it. As noted in Chapter Two, political transition cannot be

206 McCourt "Efficiency, Integrity and Capacity" 49.
207 Manion *Corruption by Design* 27.
208 Lam *Chinese Politics in the Hu Jintao Era* 316.
209 Manion *Corruption by Design* 36-37.
210 Preston *The Politics of China-Hong Kong Relations* 133.

divorced from economic transition when discussing the causes of public procurement corruption.[211]

3.4.3.4 Economic transition

Tracing Hong Kong's economic transition, Wong[212] describes it as being from an "entrepot trading centre for China to an export oriented economy in the 1970s" and since then to one of the most sophisticated financial markets in the world.[213] It is also a hub of technological advancement.[214] Hong Kong has responded well to the challenge of its proximity to China, which is the fastest growing economy in the world, and has seen its economic growth increasing.[215] It continues to diversify its economy and has become one of the leading service providers in Asia and in the world.[216] Obviously, this demands a professional procurement system and an ethical procurement staff supported by competent procurement institutions.[217]

The economic transition in the HKSAR, which is continuously evolving, has obliged the island to procure first class infrastructure (modern buildings for office space, airports, information technology infrastructure, roads, railways and ports).[218] With such massive procurement arising out of the economic transition, the opportunities for public procurement corruption have also increased.[219]

However, Hong Kong has not allowed the economic transition to collapse its procurement system by corruptly awarding government contracts.[220] It has continued to rely on the approach described above, namely the unwavering political will of the Chief Executive and the cooperation of the Executive Council in guarding its governance and administrative institutions, the maintenance and strengthening of the procurement regime and, under the guidance of the ICAC, the maintenance and strengthening of the public procurement anti-corruption strategy.[221] Of course, cases

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211 See para 2.9.3.
212 Wong "Hong Kong in Transition: Economic Transformation in the Eighties".
213 Chiu and Lui *Hong Kong Becoming a Chinese Global City* 158.
214 Yu *Entrepreneurship an Economic development in Hong Kong* 25.
215 Lu *Chinese Regional Development: Review and Prospect* 53.
216 Yu *Entrepreneurship an Economic development in Hong Kong* 25.
217 Gill and Kim *China's Arms Acquisition from Abroad A Quest for Superb* 109.
218 Tang "Hong Kong" 89.
219 Baark and Sharif "Hong Kong Special Administrative Region" 180.
220 Horlemann *Hong Kong's Transition to Chinese Rule* 29.
221 Quah *Curbing Corruption in Asian Countries: An Impossible Dream?* 449.

of public procurement corruption resulting from the rapidity of the economic growth are reported from time to time, but their prevalence has not reached a tipping point.[222] The cases are dealt with swiftly by ICAC and other law enforcement agencies to the general satisfaction of the public.[223]

To recapitulate, the discussion above has shown that Hong Kong is not immune to public procurement corruption. Even though it does not have a definition of public procurement corruption, it has managed to put legislation in place that creates offences that are related to public procurement corruption. These offences manifest *inter alia* as bribery, conspiracy and soliciting for an advantage. They are caused primarily by the personal circumstances of the procuring officials, the personal circumstances of politicians, political transition or economic transition.

It has already been shown that Hong Kong has put in place public procurement anti-corruption measures to address some of the corruption opportunities highlighted above. The discussion below focuses on these and other anti-corruption measures, with specific focus on (i) criminal measures; (ii) administrative measures; (iii) institutional measures; and (iv) civil activism measures as part of Hong Kong's anti-corruption strategy.

3.5 Measures for combating corruption

When it comes to fighting public procurement corruption in Hong Kong, most people think of the ICAC.[224] The purpose of this part of the dissertation is to explore three other anti-corruption measures that are less discussed, namely administrative measures, institutional measures and civil activism measures. These will be discussed in addition to the ICAC, which will be discussed under the umbrella of institutional measures. The discussion begins with criminal measures.

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222 OECD *Specialised Anti-Corruption Institutions* 11.
223 OECD *Specialised Anti-Corruption Institutions* 11.
224 OECD *Specialised Anti-Corruption Institutions* 11.

3.5.1 Criminal measures

Hong Kong uses criminal law as one of the measures to fight public procurement corruption.[225] Its anti-corruption legislation is provided in four main statutes, namely the PBO,[226] the *Independent Commission against Corruption Ordinance*,[227] the *Elections (Corrupt and Illegal Conduct)*,[228] and the *Banking Ordinance.*[229]

3.5.1.1 Prevention of Bribery Ordinance

The PBO creates the general offence of bribery in section 3. This offence extends to bribery in public procurement. The status of the PBO in Hong Kong's commercial intercourse was reaffirmed in *Ming Kee Shipping Service (Far East) v China Light and Power Co Ltd,*[230] where the parties had agreed that as part of their contractual terms any breach of the PBO would trigger the termination of the contract. One party was alleged to have breached that contractual provision and the matter went before the Court. It was stated and recognised by the Court that the PBO contractual provision had been violated and the immediate termination of the contract was therefore valid.[231]

Important provisions in the PBO that are relevant to public procurement corruption are the following sections: 4 and 4(1)-(2); 5 and 5(1); 6(1) and (2); 8(1); 9(1); 10(1); 11(1) and 12A (1). These sections are summarised in the table below.

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225 Cheung and Cheung "Counting Crime in Hong Kong" 41.

226 It must be noted that some authors prefer POBO to the abbreviation PBO. Therefore, where direct quotations are used and the abbreviation PBO is used, one must bear in mind that this refers to POBO.

227 (Cap 204) This Ordinance will not be discussed under criminal measures but under institutions. The reason for this is that the Ordinance is responsible for the creation of the ICAC. Therefore only three ordinances are discussed under criminal measures that is the PBO, the Banking Ordinance and the Elections Ordinance, to the extent that they are relevant to public procurement corruption.

228 (Cap 554) The Elections (Corrupt and Illegal Conduct) Ordinance does not deal directly with public procurement corruption. Its primary objective is to create specific offences for corrupt conduct in the course of public elections. Therefore, in as much as it deals with corruption, it is beyond the scope of this paper to discuss the provisions of this legislation since it has no direct relevance to combating public procurement corruption.

229 (Cap 155).

230 1998 HKCFI 496; HCA 9343/1995 para 2.

231 *Ming Kee Shipping Service (Far East) v China Light and Power Co Ltd* para 2.

Table 9: Provisions of the PBO

Section	Summary
3	Creates the crime of bribery by stating that: Any prescribed officer who, without the general or special permission of the Chief Executive, solicits or accepts any advantage shall be guilty of an offence. The PBO does not define soliciting. In practice it has been observed that soliciting takes place either by omission or commission or in certain circumstances by certain behaviour by the prescribed officer.[232]
4	Makes it a criminal offence for the person who offers any advantage to a public servant. The PBO uses the words "prescribed officer" or "public servant".[233]
4(1)	Provides that the crime of bribery is not committed only by the public servant but also by the person offering such an advantage to the public servant.[234] The fact that Hong Kong is party to the WTO GPA makes this section even more appealing in that it caters for instances where the briber commits the corrupt act outside Hong Kong, especially when he is bidding for a contract that is under the auspices of the WTO GPA.[235]
4(2)	Holds the public servant who may not be domiciled in Hong Kong criminally liable on the terms discussed in section 4(1) above. If that prescribed officer acts in a manner that is consistent with the above section irrespective of his domicile as held in *B v The Commissioner of the Independent Commissioner Against Corruption*.[236]
5	Acknowledges that public procurement corruption can be perpetrated not only by the public servant and the offering private person (the briber) but in certain instances a third party (who can be an agent for the briber or bribed public servant) may assist in the commission of public procurement corruption.[237]

232 A prescribed officer means any person holding an office of emolument, whether permanent or temporary, under the Government and the following persons; (i) any principal official of the government appointed in accordance with the Basic Law; (ii) the Monetary Authority appointed under section 5A of the Exchange Fund Ordinance (Cap 66)and any person appointed under section 5A(3) of that Ordinance; (iii) the Chairman of the Public Service Commission; (iv) any member of the staff of the Independent Commission Against Corruption and (v) any judicial officer holding a judicial office specified in Schedule 1 to the Judicial Officers Recommendation Commission Ordinance (Cap 92) and any judicial officer appointed by the Chief Justice, and any member of the staff of the judiciary.

233 ICAC staff members are not classified as public servants or civil servants. See Klitgard *Controlling Corruption* 109.

234 According to section 1: "Any person who, whether in Hong Kong or elsewhere, without lawful authority or reasonable excuse, offers any advantage to a public servant as an inducement to or reward for or otherwise on account of that public service (a) performing or abstaining from performing or having performed or abstained from performing any act in his capacity as a public servant; (b) expediting, delaying, hindering or preventing, having expedited, delayed, hindered or prevented, the performance of an act, whether by that public servant or by any other public servant in his or that other public servant's capacity as a public servant; or (c) assisting, favouring, hindering or delaying, or having assisted, favoured, hindered or delayed, any person in the transaction of any business with a public body, shall be guilty in offence". This section goes beyond the jurisdiction of Hong Kong in holding the person offering the advantage accountable. Simply put, the domicile of the perpetrator does not absolve him from criminal liability in so far as this offence is concerned.

235 ADB/OECD *Anti-Corruption Initiative for Asia* 44.

236 2010 HFKCA 4; paras 19-22.

237 *HKSAR v Chan Chi Wan Stephen* CACC 92/2013 at para 7.

Section	Summary
5(1)	Criminalises bribery for giving assistance in regard to a contract.[238]
6(1)	Criminalises corruptly withdrawing a tender[239] where there is no justification for such a withdrawal.[240]
8(1)	Extends the scope of criminal liability in public procurement corruption.[241]
9(1)	Criminal liability of agents in public procurement.[242]
10(1)	Criminalises an unexplained high standard of living of procuring officials.[243]
11(1)	Criminalises an inducement to commit public procurement corruption.[244]

[238] Any person who, without lawful authority or reasonable excuse, offers an advantage to a public servant as an inducement to or reward for or otherwise on account of such a public servant's giving assistance or using influence in, or having given assistance or used influence in (i) the promotion, execution, or procuring of any contract with a public body for the performance of any work, the providing of any service, the doing of anything of the supplying of an article, material or substance, or (ii) any subcontract to perform any work, the providing of any service, the doing of anything or the supplying of an article, material or substance required to be performed, provided, done or supplied under any contract with a public body or (iii) the payment of any price, consideration or other moneys stipulated or otherwise provided for in any such contract or subcontract as aforesaid.

[239] Any person who, without lawful authority or reasonable excuse, offers any advantage to any other person as an inducement to or reward for or otherwise on account of the withdrawal of tender, or the refraining from the making of a tender, for any contract with a public body for the performance of any work, the providing of any service, the doing of anything or the supplying of any article, material or substance, shall be guilty of an offence.

[240] In *City Polytechnic of Hong Kong* v *Blue Cross Insurance* (HCA010750/1993) it was held *inter alia* that withdrawal of tenders can be permitted where there are legal grounds to do so.

[241] Any person who without lawful authority or reasonable excuse, while having dealings of any kind with the Government through the department, office or establishment of the Government, offers any advantage to any prescribed officer employed in that department, office or establishment of the Government, shall be guilty of any offence.

The difference between section 8(1) and the other sections discussed above is that section 8(1) extends the scope of corrupt activities in public procurement that are criminally punishable. The PBO does not define the meaning of dealing or the kind or transaction covered by this act. The effect of this is that the Court will have a wide discretion to classify corrupt acts in public procurement that would not otherwise be covered by other provisions in the *PBO*.

[242] Any agent who, without lawful authority or reasonable excuse, solicits or accepts any advantage as an inducement to or reward for or otherwise on account of his (a) doing or forbearing to do, or having done or forborne to do, any act in relation to his principal's affairs; or (b) showing or forbearing to show, or having shown or forborne o show, favour or disfavour to any person in relation to his principal's affairs or business, shall be guilty of an offence.

In *HKSAR v Chan Chi Wan and Another* (CACC 92/2013) the High Court upheld the provisions of section 9 by holding *inter alia* that the respondents by accepting HK$112 000 for entertainment performance at an end year function held in 2009 had violated section 9.

[243] Any person who, being or having been the Chief Executive or a prescribed officer (a) maintains a standard of living above that which is commensurate with his present or past official emoluments; or (b) is in control of pecuniary resources or property disproportionate to his present or past official emoluments, shall, unless he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, be guilty of an offence.

This section creates the presumption that one is guilty of corruption if one has worked as a prescribed officer of the Chief Executive and is in possession of resources or property that is beyond one's financial means. In order to be absolved from this presumption, one has to give a satisfactory explanation of how such wealth or property was acquired.

[244] If, in any proceedings for an offence under any section in this Part, it is proved that the accused accepted any advantage, believing or suspecting or having grounds to believe or suspect that the

Section	Summary
12A	Creates the grounds for conviction for public procurement corruption.[245]
12(1)	Prescribes varying degrees of punishment[246] for public procurement corruption including confiscation.[247]
13(1)	Vests corruption investigating powers in the Commissioner of the ICAC or his Deputy.[248]

According to Smith[249] the consistent use of the above criminal measures, in particular the enforcement of the *PBO* by the ICAC, has been instrumental in combating corruption in Hong Kong. With this in mind, the discussion shifts to other legislation that supports the use of criminal sanctions in combating public procurement corruption.

3.5.1.2 Banking Ordinance Chapter 155

The *Banking Ordinance* was enacted in order to regulate banking business. It covers the entire scope of banking; that is, accepting deposits, facilitating withdrawals and regulating all banking activities, including the supervision of banks.[250] The relationship between public procurement corruption in Hong Kong and the *Banking*

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advantage was given as an inducement to or reward for or otherwise on account of his doing or forbearing to do, or having done or forborne to do, any act referred to in that section, it shall be no defence that (a) he did not actually have the power, right or opportunity so to do or forbear (b) he accepted the advantage without intending so to do or forbear or (c) he did not in fact so do or forbear.

245 Any person convicted of conspiracy to commit an offence under this Part shall be dealt with and punished in like manner as if convicted of such an offence and any rules of evidence which apply with respect to the proof of any such offence shall apply in like manner to the proof of conspiracy to commit such an offence. The section should be applauded if regard is had to the syndicates that seem to be operating particularly in the construction industry and sensitive defence procurement.

246 Section 12(1) prescribes a fine of HK$1 million and imprisonment for 10 years depending on the nature of the offence. In other cases a fine of HK$500 000 and imprisonment of 10 years is prescribed.

247 If the accused or another is of the opinion that the confiscation order was not lawful, the aggrieved party can appeal against the conviction order in terms of section 12AB (1). On appeal, the Court has two choices: either to confirm the order with or without the modification or to dismiss the application and confirm the order of the Court a quo in terms section 12AB (2), as confirmed in *HKSAR v Hui Rafael Junior and Others* (HCCC 98/2013).

248 In other jurisdictions the investigative powers lay with a different organ of state such as the Attorney General or the National Police or the National Prosecuting Authority, depending on the legal system of that particular jurisdiction. In Hong Kong the approach is different. The PBO clothes the ICAC with wide-ranging investigative powers. These powers include inspecting any books and bank accounts or any other books in order for the ICAC to ensure that it has sufficient information to decide whether or not an act of public procurement corruption has occurred.
Where the information that the ICAC or its Commissioner deems necessary for inspection is being held by the Department of Inland Revenue, the process is that the ICAC or its Commissioner has to bring an *ex-parte* application to the Court for those books to be released, as provided for in section 13A (1), to assist in the prosecution of public procurement corruption.

249 Smith *Guide to Anti-Corruption Regulation in Asia 2012/2013* 9.

250 Banking Ordinance Chapter 155.

Ordinance is that the monetary proceeds from public procurement corruption are usually deposited into banks either for local use or for onward transmission to offshore accounts.[251] The *Banking Ordinance* makes it imperative for bankers to cooperate with any investigation of public procurement corruption. In the light of the above Smith[252] notes that:

> The receipt of a commission offence under the *Banking Ordinance* occurs when an employee or a director of an unauthorised institution (i.e a bank/restricted licence bank/deposit taking company) asks for or receives an advantage in return for procuring an advantageous financial arrangement from the institution for any person.

The *Banking Ordinance* takes into account instances where gullible bankers can be swayed to conceal the gains emanating from public procurement corruption.[253] Furthermore, the *Banking Ordinance* goes so far as to include any company that takes or deals with finance both publicly and privately.[254] In addition to the *Banking Ordinance,* Hong Kong also uses the Civil Service Code in order to buttress the ethical behaviour of civil servants.

3.5.1.3 Civil Service Code

In an effort to instil and reaffirm the importance of a well-disciplined and committed civil service Hong Kong enacted the Civil Service Code (hereafter Code).[255] Although the Code cannot be classified as criminal legislation, its provisions complement the criminal measures. Public procurement officials are also guided by the provisions of the Code.[256] The Code reaffirms that the Civil Service is the backbone of Hong Kong, as stated in paragraph 1.1.[257] In the same context, the Code reaffirms Article

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251 The most recent demonstration of this is the publication by Panama newspapers on how top-ranking government and business leaders deposited money in Panama in order to circumvent domestic and other international conventions. See Harding *The Guardian* 2016 http://www.theguardian.com.

252 Smith Gifts and Entertainment Compliance with Anti Bribery Regulations in Asia 10.

253 Hong Kong Institute of Bankers Ethics in Practice: A Practical Guide for Bank Managers 14-18.

254 Section 120 Banking Ordinance (Cap 155).

255 CSB *Civil Service Code* 1.

256 CSB *Civil Service Code* 1.

257 The Civil Service is the backbone of the Government of the Hong Kong Special Administrative Region. It is responsible to the Chief Executive. It supports the Chief Executive and the Government of the day in formulating, explaining and implementing policies; conducting administrative affairs; delivering public services; and undertaking law enforcement and regulatory functions. It serves the community, and contributes to the effective governance and stability and prosperity of Hong Kong.

99[258] of the Basic Law of Hong Kong by emphasising that Hong Kong's civil servants must be dedicated to their duties and act responsibly. The Code states *inter alia* in paragraph 1.4:

> The Civil Service Code sets forth the core values and standards of conduct of civil servants. It also sets out the general duties and responsibilities of civil servants in relation to officials under the political appointment system. Civil servants should familiarise themselves with the contents of the Code.

The conduct of procuring officials should be free of blame if their actions are to be viewed favourably by the public. It is against this background that paragraph 2 states the following core values:

> The Civil Service is a permanent, honest, meritocratic, professional and politically neutral institution. The core values set out below are central to the integrity and probity of the Civil Service. They underpin good governance and help the Civil Service gain and retain the respect and confidence of the public. Civil servants are required to uphold the following core values, which are of equal importance: (a) commitment to the rule of law; (b) honesty and integrity; (c) objectivity and impartiality; (d) political neutrality; (e) accountability for decisions and actions and (f) dedication, professionalism and diligence.

In Hong Kong, once a procurement official transgresses and indulges in an act of corruption, such an official is in total violation of paragraph 2 of the Code.[259] Public procurement corruption by a government official is an act of dishonesty in the sense that the corrupt official creates a false impression that the transaction is above board, yet in actual fact the transaction is biased and fraudulent.[260]

3.5.2 Administrative measures

Hong Kong, like any other jurisdiction, uses administrative measures in combating public procurement corruption.[261] However, not much is reported on the use of these measures.[262] In actual fact, the literature on the use of administrative measures by Hong Kong is very scant.[263] This part of the dissertation focuses on the use of

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258 Public servants must be dedicated to their duties and be responsible to the Government of the Hong Kong Special Administrative Region.

259 *HKSAR v Hui Rafael Junior and Others* HCCC 98/2013 7.

260 *HKSAR v Chung Sim-ying Tracy* HCMA No 267 of 2001, where the accused was charged and convicted of awarding a government contract to her husband and her sister, who owned two different printing companies.

261 Chan "Administrative Law" 418.

262 Chan "Administrative Law" 418.

263 Quah 1999 *Asian Review of Public Administration* 71-70.

debarment, suspension and blacklisting as among the administrative measures used to combat public procurement corruption in Hong Kong.

3.5.2.1 Debarment, suspension and blacklisting

Hong Kong does not distinguish among the use of debarment, suspension and blacklisting as administrative measures to curb public procurement corruption.[264] It is mandatory for procuring entities to verify whether a potential supplier has been convicted not just of corruption but of any other offence committed in violation of the following legislation:

- Employment Ordinance (Cap. 57)
- Employees' Compensation Ordinance (Cap. 282)
- Section 171 (1) of the Immigration Ordinance (Cap.115)
- Section 89 of the Criminal Procedure Act (Cap.221)
- Section 41 of the Immigration Ordinance (Cap.115)
- Section 38A (4) of the Immigration Ordinance (Cap.115); and
- Sections 7, 7A and 43E of the Mandatory Provident Funds Schemes Ordinance (Cap.485)

In addition, convictions for debarment are not confined only to government contracts but extend also to private contracts.[265] Further, the conviction extends to any crime apart from the specific offences committed in violation of the above-mentioned legislation.[266]

Another interesting feature in Hong Kong's debarment procedures is that where the supplier is appealing a conviction or has applied for the review of a conviction, the appeal or review will not influence the negation of debarment.[267] In other words, the

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264 ADB/OECD *Curbing Corruption in Public Procurement in Asia and the Pacific* 22.
265 FSTB *Applications for Review of the Debarment Period under the Review Mechanism* 1.
266 FSTB *Applications for Review of the Debarment Period under the Review Mechanism* 1.
267 FSTB *Applications for Review of the Debarment Period under the Review Mechanism* 2-3.

debarred supplier remains debarred from government contracts until there is a final conclusion to the appeal or review. The maximum debarment period is five years.[268]

Another factor that requires serious consideration is whether the five-year maximum period is a sufficient deterrent sanction in the fight against public procurement corruption.[269] This query should be viewed in the light of the fact that regardless of the conviction or the seriousness of the offence, once the five years is over the contractor is given a new opportunity to contract with the government.[270]

The danger that this poses is that there may be contractors who commit such huge feats of public procurement corruption that the proceeds will cover them for the entire five year debarment period.[271] Once the five years are over, they can commit more public procurement corruption.

The above legislation provides *inter alia* that debarment may be triggered by a criminal conduct of the supplier. In addition, section 89 of the Hong Kong Criminal Procedure Act[272] extends the applicability of debarment through criminal liability not only to the supplier but also to "any person who aids, abets, counsels or procures the commission by another person of any offence".

A number of anti-corruption institutions enforce administrative sanctions such as debarment, suspension and blacklisting, and this results in a great deal of litigation, which is costly to the government.[273] In this realisation Hong Kong, has adopted a new approach of ensuring that procurement officers are well trained and conversant with their job to such an extent that their administrative sanctions are rarely challenged in courts.[274]

In effecting debarment, one of the rules is that if a contractor is convicted and has been sentenced to a maximum fine or has been convicted by the application of any

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268 FSTB *Applications for Review of the Debarment Period under the Review Mechanism* 2-3.
269 FTSB *Applications for Review of the Debarment Period under the Review Mechanism* 2-3.
270 FSTB *Applications for Review of the Debarment Period under the Review Mechanism* 1.
271 ADB/OECD *Anti-Corruption Initiative for Asia and the Pacific: Thematic Review* 40-41.
272 Cap 221.
273 FTSB 2013 http://www.fstb.gov.hk.
274 McCue and Prier "Local Government Procurement and Safeguards against Corruption" 69-103.

other law,[275] the contractor shall be debarred unless the contractor can show cause why debarment should not be used as an option.

In a Symposium Survey[276] it was agreed that private companies that are involved in bribery with government officials in Hong Kong should be debarred from doing any further business with the government. Furthermore, it was agreed that those firms should be published as a way of further exposing them.[277]

According to the Hong Kong government,[278] convictions for the purposes of debarment are not limited to the offences that are directly linked to government procurement, but convictions that are linked to private sector criminal activities are also considered for debarment purposes.[279] In the same vein, if a contractor whilst debarred is convicted, an additional five years is added to the remainder of the debarred period.[280]

3.5.2.2 Self-cleaning

Hong Kong provides for self-cleaning, that is, the process where a supplier who has been excluded from consideration for government contracts *inter alia* in reaction to a conviction for corruption can be considered again for a government contract before the expiry of the debarment period. In 2010, Hong Kong enacted the Applications for Review of the Debarment Period under the Review Mechanism (hereafter Review Mechanisms).[281]

The procedure is that the debarred contractor approaches the CTB by way of application.

For example, if a contractor has been debarred, the supplier can in terms of the Review Mechanisms, apply for either the reduction of the debarment period or its

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275 *Employment Ordinance* (Cap.57); ***Employee's Ordinance*** (CAP 282); section 171 (1) of the *Immigration Ordinance* (Cap 115); section 89 of the *Criminal Procedure Ordinance* (Cap 221); section 41 of the *Immigration Ordinance* (Cap 115); section 38A (4) of the *Immigration Ordinance* (Cap 115) and sections 7, 7A and 43E of the mandatory Provident Funds Schemes) Ordinance (Cap 485).

276 ICAC "Symposium Participant Views on Corruption, and on Anti-Corruption Survey" 1.

277 ICAC "Symposium Participant Views on Corruption, and on Anti-Corruption Survey" 1.

278 HKSAR 2013 http://www.fstb.

279 ADB/OECD *Curbing Corruption in Public Procurement* 22.

280 HKSAR 2013 http://www.fstb.

281 FSTB *Applications for Review of the Debarment Period under the Review Mechanism* 1.

complete cancellation.[282] Once the CTB has the application it will then make a determination as to whether the applicant has justifiable reasons to be rescued from debarment.[283]

The following grey areas have been identified in the implementation of the Review Mechanisms. Firstly, the CTB does not specify the type of offences or convictions that can be considered for cancellation.[284] In other words, are all cases of convictions liable for reconsideration regardless of the seriousness of the offence? The Review Mechanisms do not provide this information. Secondly, the CTB or the Review Mechanisms do not provide the criterion for determining who qualifies for a reduction or cancellation of the debarment period.

It seems as if the CTB uses its discretion to determine three possible scenarios that emanate from the Review Mechanism, namely: (i) who does not qualify for reduction or cancellation; (ii) who qualifies for reduction and; (iii) who qualifies for cancellation.

There is no provision that sanctions recidivists under the Review Mechanisms.

Another important issue that seems not to be covered by the Review Mechanisms or the CTB is the effect of conviction of corruption by foreign jurisdictions, especially in the light of the fact that Hong Kong also applies the WTO GPA as part of its procurement laws.[285]

Further, Hong Kong does not expressly provide for discretionary and mandatory debarment and its relationship with self-cleaning. This affects the application of the Review Mechanisms. More legal clarity is needed on the application of discretionary and mandatory measures and the role of self-cleaning as envisaged in the Review Mechanisms, in particular the nature of the offences that are targeted by these administrative measures.

The above discussion has centred on the use of debarment, suspension and blacklisting as administrative measures aimed at combating public procurement corruption in Hong Kong. It was observed that although debarment is part of Hong

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282 HKSAR 2013 http://www.fstb.
283 Legco *The Government of the HKSAR Tendering System for Public Work Contracts* 5.
284 ADB/OECD *Curbing Public procurement corruption in Asia and the Pacific* 22.
285 Kramer 2005 *Public Contract Law Journal American Bar Association* 543.

Kong procurement law, its status in terms of its target has to be reinforced. Further, it was noted that Hong Kong does not expressly provide for discretionary and mandatory debarment. It is submitted that this lack must be addressed to create legal certainty.

Another observation was that Hong Kong does not expressly provide for self-cleaning, although in practice it has attempted to do so with the introduction of Review Mechanisms. Having said this, administrative measures remain an integral part of curbing public procurement corruption in Hong Kong. These administrative measures are enforced by different institutions and this prompts one to discuss the role of institutional measures in fighting public procurement corruption in Hong Kong.

3.5.3 Institutional measures

Hong Kong does not rely only on the ICAC as an institution for combating public procurement, but has other law enforcement agencies that complement the work of the ICAC as shown in the diagram below:

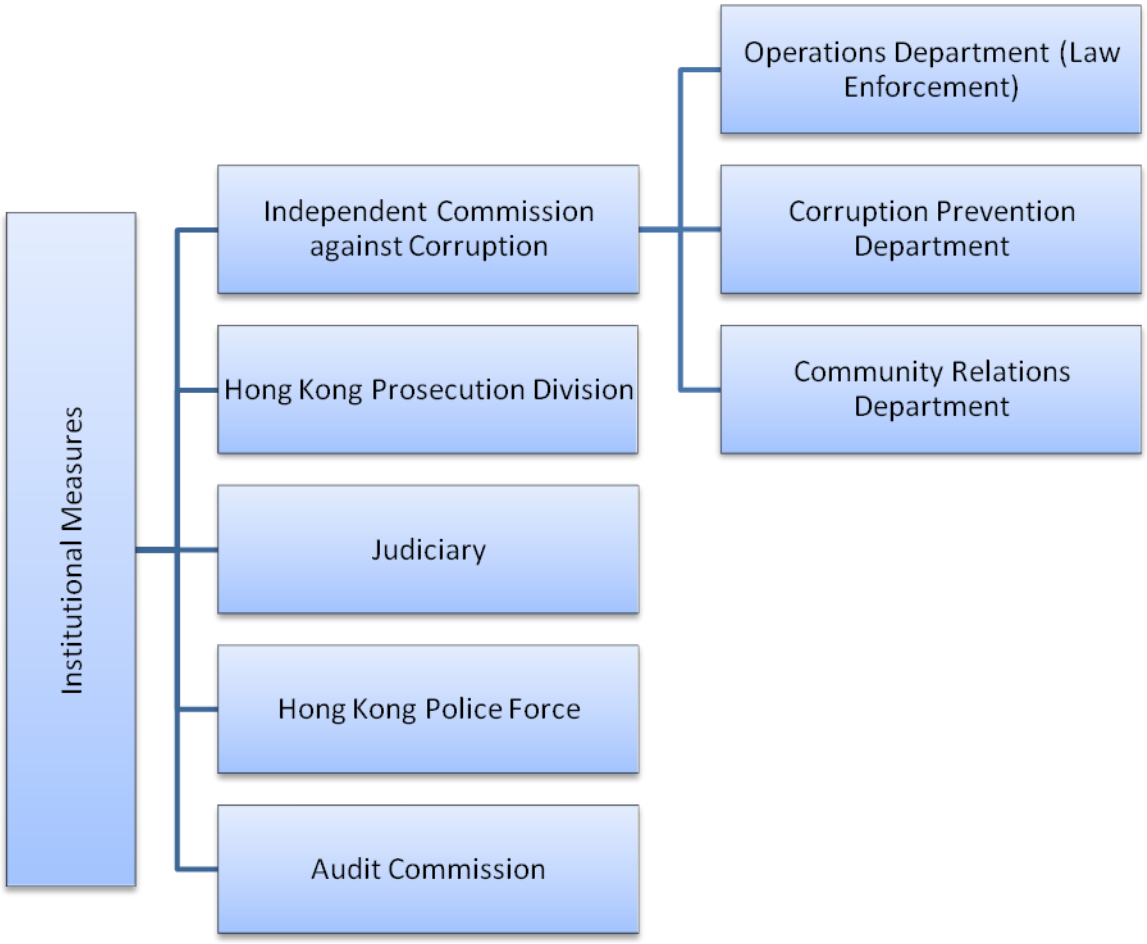

Figure 5: Institutional Measures

The next section of the dissertation will discuss the following anti-corruption institutions: (i) the ICAC; (ii) the judiciary; (iii) the Hong Kong police force; (iv) the Hong Kong prosecution division and (v) the Audit Commission.

3.5.3.1 Independent Commission against Corruption

The ICAC Ordinance[286] *inter alia* provides for the establishment of the ICAC and incidental matters thereto. The ICAC Ordinance in section 3 establishes the ICAC Commission. The budget of the ICAC comes from the general revenue.[287] The overall administration of the ICAC is vested in the Commissioner in terms of section

[286] Chapter 204 of 30 June 1997.
[287] Section 4 of the ICAC Ordinance.

5.[288] The Commissioner has limited independence as he is subject to the direction or control of the Chief Executive in terms section 5 (2). [289]

Generally, the Chief Executive does not interfere with the operations of the ICAC, though there is nothing that precludes him from interfering, as section 5(2) allows him to have control over the ICAC. Furthermore, the Commissioner's term of office is not fixed or indefinite but is determined by the Chief Executive in terms of section 5 (3). The Chief Executive has considerable power over the Commissioner. This is not helpful in the fight public procurement corruption as there remains a possibility of political interference by the Commissioner in matters relating to public procurement corruption.[290] It would be preferable for the tenure of the Commissioner to be established by law.

In addition, the Commissioner should report to the Legislative Council instead of reporting to the Chief Executive[291] and be subject only to the law and the Basic Law (the constitution) of Hong Kong. If this were so, the independence and impartiality of the Commissioner would be guaranteed. The Commissioner is assisted by the following personnel who are appointed in terms of the ICAC Ordinance: the Deputy Commissioner[292] and the officers.[293] Once appointed, the officers are given a warrant card as evidence that they work for the ICAC.[294]

3.5.3.1.1 Powers of the ICAC

The ICAC is clothed with the power of arrest in terms of section 10. Furthermore, ICAC officers have the power to arrest any suspect without a warrant.[295] In addition,

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288 Section 5(1) The Commissioner, subject to the orders and control of the Chief Executive, shall be responsible for the direction and administration of the Commission; (2) The Commissioner shall not be subject to the direction or control of any person other than the Chief Executive; (3) The Commissioner shall hold office on such terms and conditions as the Chief Executive may think fit; (4) The Commissioner shall not, while he holds the office of the Commissioner, discharge the duties of any other prescribed officer.

289 The Commissioner shall not be subject to the direction or control of any person other than the Chief Executive.

290 Young and Cullen *Electing of Hong Kong's Chief Executive Officer* 77.

291 Young and Cullen *Electing of Hong Kong's Chief Executive Officer* 89-90.

292 Section 7.

293 Section 8.

294 Section 9.

295 Section 10(1) An Officer authorized on behalf of the Commissioner may without warrant arrest any person if he reasonably suspects that such person is guilty of an offence under this

authorised ICAC officers are allowed to use reasonable force in order to effect an arrest,[296] as well as to enter any premises that may be suspected of being used for corrupt activities.[297]

In the same context, the ICAC officers have the power to grant bail[298] and determine bail conditions such as reporting to the ICAC offices at times determined by the ICAC officers.[299] However, any suspect arrested by the ICAC has to be brought before a magistrate at least within 48 hours if he has not already been released by the ICAC within 48 hours of his arrest.[300] Additional powers of ICAC include search and seizure,[301] the power to take finger-prints and photographs,[302] and the power to take samples for forensic analysis.[303] ICAC officers have the power to detain any arrested suspect at ICAC offices[304] and not at police stations.

3.5.3.1.2 Corruption offences under the ICAC Ordinance

In addition to the crimes discussed under the PBO above, the ICAC Ordinance recognises the following additional corruption offences which also extend to public procurement corruption: perverting or obstructing the course of justice; theft; blackmail; fraud; obtaining property by deception; obtaining pecuniary advantage by deception; obtaining services by deception; evading liability by deception; making off without payment; procuring a false entry in certain records; false accounting; assisting an offender; conspiring to defraud; and attempting to commit any corruption-related offence.[305]

Ordinance of the Prevention of Bribery Ordinance; or, being a prescribed officer, is guilty of an offence of blackmail committed by or through the misuse of office.

296 Section 10 (3) (a).
297 Section 10 (4).
298 Section 10(A) (2) (b) (i).
299 Section 10(A) (3) (a).
300 Section 10(A) (6).
301 Section 10(C).
302 Section 10(D).
303 Section 10(E).
304 Section 10(A) (1) (b).
305 Section 10 (5).

3.5.3.1.3 Penalties

The ICAC Ordinance prescribes a fine of HK$5 000 and 6 months imprisonment for any person convicted of resisting or obstructing of an investigation of corruption.[306] In addition, a person who reports falsely to ICAC officers on matters of corruption, including making false accusations, is liable after conviction to a fine of HK$ 20 000 and 12 months imprisonment.[307]

3.5.3.1.4 Other features of the ICAC

Among the necessary checks and balances, the Director of Audit has the power to access and audit the books and operations of the ICAC.[308] The Director of Audit's role includes *inter alia* ensuring accountability in the management of public finances in Hong Kong. Furthermore, the ICAC has to produce an annual report by the 31 March of each year, which is submitted to the Chief Executive Council and the Legislative Council.[309] Section 17A establishes a pool of financial resources known as the Independent Commission against Corruption Welfare Fund. The purpose of the funds is to assist in the remuneration and other financial needs of ICAC officers or former officers.[310] These funds are also given to the families of ICAC officers who are deceased.[311]

This feature is unique to the ICAC, as it seems to ensure that ICAC officers are adequately remunerated. Funding for the ICAC and its officers is not left only to the government; anyone, including companies, may donate money to this fund. The ICAC is empowered to invest these funds as a way of generating additional income. The Chief Executive, the Legislative Council and the Director of Audit provide oversight into the administration of this fund.[312] The Independent Review Committee has the final mandate to provide oversight of all the work of the ICAC, including procurement done by the ICAC.[313]

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306 Section 13A.
307 Section 13B and Section 13C.
308 Section 16.
309 Section 17.
310 Section 17A (3).
311 Section 17A (3) (C).
312 Section 17A (1) and (2).
313 IRC *Report of the Independent Review Committee on ICAC's Regulatory Systems* 1-5.

Having discussed the above, the next enquiry is to determine how the ICAC has structured its operations in line with the provisions of the ICAC Ordinance.

3.5.3.1.5 ICAC modus operandi

The ICAC has adopted a three-pronged approach to fighting corruption.[314] The legal basis of this approach, as noted above, is section 12 of the ICAC Ordinance. The three-pronged approach has been extended by the ICAC to curb public procurement corruption.[315] This approach comprises streamlining the operations of the ICAC into three main specialised departments, namely the Operations Department (Law Enforcement), the Corruption Prevention Department (Prevention), and the Community Relations Department (Education).[316] These three specialised departments have a combined estimated staff of 1200.[317] This makes the ICAC one of the most highly staffed anti-corruption institutions in the world. The work of these three departments are summarised below:

Table 10: ICAC anti-corruption strategy

Department	Summary
Operations Department (Law Enforcement)	The purpose of the Operations Department is to investigate and prosecute all cases of corruption that are reported, including public procurement corruption.[318] The Operations Department is the law enforcement arm of ICAC operations and finds its legal basis in section 12 (a) to (c). The Operations Department has its own strategy that fits into the framework of the ICAC. The strategy of the Operations Department is also threefold, namely (i) mutual assistance, (ii) international liaison, and (iii) advanced technology and specialisation.
Corruption Prevention Department (Prevention)	The purpose of the Corruption Prevention Department is to nip corruption in the bud, including public procurement corruption, by ensuring that practical, robust anti-corruption measures are put in place.[319] The strategy of the Corruption Prevention Department is to focus on "system safeguards and internal controls in organisations".[320] The work of the Corruption Prevention Department also caters for possible acts of public

314 Quah *Curbing Corruption in Asian Countries: an Impossible Dream?* 250-253.
315 Quah *Curbing Corruption in Asian Countries: an Impossible Dream?* 250-253.
316 ICAC *Annual Report 2014* 16, 18 and 20.
317 ICAC *Annual Report* 2014 25.
318 Mok *Corruption Prevention in Public Organizations: The Hong Kong Experience* 1.
319 Furthermore, the Corruption Prevention Department "has developed Best Practice Modules for private sector companies and public corporations" that can be used to curb public procurement corruption, *inter alia*. Of particular importance for public procurement purposes are the Building Management and Maintenance Modules comprising of the Financial Management Toolkit as well as the Management Toolkit. For example, section 1.5 of the Building Maintenance Toolkit promotes conformity in the maintenance of buildings by drawing contractors and their agents to the provisions of section 9 of the PBO, which *inter alia* seeks to curb corruption by agents.
320 Mok *Corruption Prevention in Public Organizations: The Hong Kong Experience* 1.

	procurement corruption that may arise from participation by WTO GPA members as well as the HKC/NZ CEPA[321] and the HKC/CL FTA.[322] As part of its operations, the Corruption Prevention Department conducts regular and impromptu audits in addition to the audits that are carried out by the Director of Audit.[323]
Community Relations Department (Education)	The Community Relations Department has two main functions, namely (i) to educate the public against the evils of corruption; and (ii) to enlist public support in combating corruption.[324]

3.5.3.1.6 Examples of cases handled by the ICAC

In the much-publicised Public Housing Blocks contract, three contractors were convicted for supplying defective building materials.[325] It was alleged and later confirmed that the three contractors paid a bribe and in return were rewarded with the tender of building 26 public housing blocks.[326] The ICAC stepped in and investigated the matter.[327] The ICAC investigation unveiled massive corruption, including that the three contractors had supplied cement of poor quality.[328] The financial conclusion of the investigation was the relocation of 78 000 people, and in the process the government lost US$103 million.[329] The perpetrators of the corrupt act were convicted of public procurement corruption.

Similarly, another construction case involving another housing project involved Short Piling.[330] Allegations of corruption were raised. The ICAC as usual took over the investigation and found out that some procuring officials had indeed been bribed. The suppliers had supplied below-par materials. According to Tong,[331] this resulted in the pulling down of the piles, and the damage was estimated at US$69 million. In

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321 Hong Kong, China and New Zealand *Closer Economic Partnership Agreement* 1.

322 Free Trade Agreement between Hong Kong, China and Chile.

323 Audit Commission *Prevention Education and Enlisting Public Support against Corruption* 1.

324 ICAC 2015 http://www.icac.org.

325 ICAC 2016 http://www.icac.org.hk/new_icac/eng/cases/26p/26p.htm.

326 It is reported that the winning contractor's bid was HK 1 million lower than all other bids. However, once the contract had been awarded the winning bidder was authorized to adjust the initial contract price by 30% and 50% within 1 year, having argued that inflation was affecting its bid price.

327 ICAC 2016 http://www.icac.org.hk/new_icac/eng/cases/26p/26p.htm.

328 ICAC 2016 http://www.icac.org.hk/new_icac/eng/cases/26p/26p.htm.

329 ICAC 2016 http://www.icac.org.hk/new_icac/eng/cases/26p/26p.htm.

330 According to the ICAC, a company by the name of Hui Hon was awarded a government contract by the Hong Kong Housing Department to construct the foundation for certain buildings. Hui Hon sub-contracted the work and below-par materials were used to construct the floor. Corruption was suspected and a report was lodged with the ICAC. The ICAC deployed 80 investigators and 21 search warrants were issued. Within two days eight people were arrested. The floors were demolished. Two directors of Hui Hon were sentenced to an effective 10 year imprisonment.

331 ICAC 2016 http://www.icac.org.hk/new_icac/eng/cases/26p/26p.htm.

the end, the ICAC was able to secure the convictions of the procuring officials and the suppliers.

The third case was that of the Government Property Manager, who awarded tenders to a company in return for a bribe.[332] The cost of the contracts was HK$100 million. Again, the ICAC embarked on an investigation and this resulted in the conviction of the procurement official, who was sentenced to30 months in prison, as noted by Lam.[333]

The most recent case involved the world's second largest property developer, Sun Hung Kai Properties. It had been alleged that the two brothers who run this company paid a bribe estimated to be US$ 4.5 million to a public official in return for lucrative government contracts.[334] The ICAC investigated this case and laid criminal charges against the alleged corruptors. The case was concluded in 2014 with the conviction of the government official[335] and one of the two brothers.[336] It was the biggest case of public procurement corruption that the ICAC had been involved in since its inception in 1974.

Four more institutions that complement the work of the ICAC in combating public procurement corruption are the judiciary, the Hong Kong police force, the Hong Kong prosecution division; and the Audit Commission. These are summarised below:

Table 11: Other institutional measures

Name of institution	Summary
Judiciary	Like any other modern jurisdiction Hong Kong subscribes to the legal principle of the judicial review of administrative action.[337] In Hong Kong this concept was developed from common law, as stated by Tai, and has been given statutory recognition and confirmed by the Courts. Articles 19 and 35(2) of the Basic Law of Hong Kong are the legal

332 ICAC 2016 http://www.icac.org.hk/new_icac/eng/cases/26p/26p.htm.

333 Lam *South China Morning Post* 1.

334 Li and Lee *Reuters* 1.

335 Rafael Hui was sentenced to seven-and-a-half years' imprisonment. In addition, he was ordered to pay back an estimated HK$12 million he had received as a bribe from Thomas Kwok.

336 Thomas Kwok, who was the co-Chairman of the company, was sentenced to five years' imprisonment and a fine of HK$500 00.
In the *Queen v Poon Yan-cheung* (HCMA 000158/1986) the court ruled that a decision by the Commissioner to include a "condition" that was not provided for in the statutes was illegal. Applying this principle to public procurement, if a procuring official adds other conditions in qualifying the tenders with the intention of favouring a particular supplier then, by importing the principle of the court in the *Poon-case,* the extra condition will be deemed illegal, which will inevitably affect the awarding of the contract.

Name of institution	Summary
	premises upon which the remedy of the judicial review of administrative action is based. In *Mohamed Yaqub Khan* v *Attorney General*,[338] the court ruled *inter alia* that an aggrieved party should be furnished with the reasons why a government official had reached a particular decision. In the context of public procurement, the furnishing of reasons for the decisions made by procuring entities is one of the essentials of fighting public procurement corruption.
Hong Kong Police Force	The role of the Hong Kong police force in combating public procurement corruption is generally the same like in other countries. It is the duty of the Hong Kong police force *inter alia*:[339] • To upholding the rule of law; • To maintain law and order; • To prevent and detect crime; • To working in partnership with the community and other agencies. Public procurement corruption runs counter to the above objectives of the Hong Kong Police Force.[340]
Hong Kong Prosecution Division	The Hong Kong Prosecution Division resorts under the Department of Justice and is headed by the Director of Public Prosecutions.[341] It is divided into four main sub-divisions.[342] Of particular significance to public procurement is Sub-Division II, which focuses on the Proceeds of Crime.[343] Then there is sub-division IV, which deals specifically with Commercial Crime.[344] Section I of the Commercial Crime Unit deals with Major Fraud; Section III deals with ICAC Public Sector Prosecution and Section IV deals with ICAC Private Sector Prosecution.[345] What is unique about the prosecution of public procurement corruption in Hong Kong is that although the ICAC is independent in its operations, the government of Hong Kong has created a specific division within the prosecution department that houses the operations of ICAC.[346] This eliminates any conflict or misunderstanding between the ICAC and the Prosecution Division.
Audit Commission	The Audit Commission is established by the Audit Ordinance Cap 122 of 30 June 1997. It is headed by a Director who is appointed in terms of section 3. The functions of the Director are stated in section 8 and include *inter alia* "examining all accounting officers in respect of public moneys".[347] This department is crucial for the purposes of public procurement in that it has unlimited access to all institutions that spend public money. The Audit department conducts audits which can at times be forensic, and produces reports that are furnished to the

338 HCA 000329/1980.
339 Hong Kong Police Force 2016 http://www.police.gov.hk.
340 Hong Kong Police "Ethics and Integrity in the Hong Kong Police Force" 1.
341 Department of Justice Organisation 2016 http://www.doj.gov.hk.
342 Department of Justice Organisation 2016 http://www.doj.gov.hk.
343 Department of Justice Organisation 2016 http://www.doj.gov.hk.
344 Department of Justice Organisation 2016 http://www.doj.gov.hk.
345 Department of Justice Organisation 2016 http://www.doj.gov.hk.
346 Lam *Tackling Corruption: The Hong Kong Experience* 108.
347 Director of Audit 2015 http://www.aud.gov.hk.

Name of institution	Summary
	Governor, the Legislative Council and the media. In addition, these reports are available to the public and are published on the Audit Department website.[348] One important report that speaks directly to public procurement is the Value for Money Audit Report.[349] This report is produced twice a year and is scrutinised by the Public Accounts Committee, which is added oversight of the operations of all government procurement agencies.

The above discussion centred on the role of institutions in combating public procurement. Attention is now given to civil activism as another tool for combating public procurement corruption.

3.5.4 Civil activism

This study has already established in Chapter Two that "civil activism" refers to the roles played by individuals, CSOs and the media in combating public procurement corruption.

3.5.4.1 Individual activism

There are no reported cases where individuals who were not directly affected by public procurement corruption have taken it upon themselves to litigate cases of public procurement corruption or any other related aspect.[350] However, if such individuals rise in the future there are enough legal mechanism that they can exploit in an effort to combat public procurement corruption such as whistleblowing as provided in section 30A of the PBO. Generally, the aggrieved individuals may approach the ICAC in order to pursue any suspected acts of public procurement corruption[351] and they can also become whistle-blowers or may approach the CSOs or the media.

348 Director of Audit 2015 http://www.aud.gov.hk.
349 Yu *Hong Kong's Legislature under China's Sovereignty* 136.
350 Chan "Corruption Prevention – The Hong Kong Experience".
351 Tsang *A Modern History of Hong Kong* 276.

3.5.4.2 Civil Society Organisations

Hong Kong's CSOs are not very active in the fight against public procurement corruption.[352] This can be attributed to the fact that most of the work of fighting public procurement corruption is done by the ICAC as discussed above. However, the CSOs have an opportunity to impact on public procurement corruption through the work of two committees, namely the Citizens Advisory Committee on Community Relations and the Corruption Prevention Advisory Committee. The former's terms of reference are threefold:[353]

- Advise the Commissioner of the Independent Commission Against Corruption of measures to be taken to foster public support in combating corruption and to educate the public against the evil of corruption;
- Receive and call for reports on action taken by the Community Relations Department of the Commission in pursuance of the above; and
- Monitor the community's response to the Commission's work, and public attitudes towards corruption in general.

From the above it is clear that there is an opportunity for CSOs to interact with the procurement community (citizens, the government and suppliers) as well as the Commissioner of the ICAC in all matters that relate to public procurement corruption.

As stated above, the CSOs may also cooperate with the Corruption Prevention Advisory Committee, the terms of reference of which are also threefold:[354]

- Receive and call for reports the from Commission about the practices and procedures of Government Departments, public bodies and the private sector which may conducive to corruption, and advise the Commissioner what areas should be examined and the degree of priority to be accorded to each;
- Consider recommendations arising from such examinations and advise the Commissioner on further action to be taken;

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352 UNODC *Prevention of Corruption: Civil Society and the Media* 2.
353 Mok *Corruption Prevention in Public Organisations-The Hong Kong Experience* 5.
354 Mok *Corruption Prevention in Public Organisations-The Hong Kong Experience* 5.

- Monitor action taken to implement the recommendations made on the advice of the Corruption Prevention Advisory Committee.

There are no reported cases where the Hong Kong CSOs have taken it solely upon themselves to pursue litigation related to public procurement corruption.[355] The above discussion has shown that there are enough measures and avenues in place to enable the CSOs to assist in the curbing of public procurement corruption.

3.5.4.3 Media

Hong Kong has independent and robust media that are actively involved in the fight against public procurement corruption.[356] The role of the media in fighting corruption can be traced to as far back as the 1970s, when the media reported extensively on the case of Peter Godber, which resulted *inter alia* in the creation of the ICAC and other anti-corruption reforms.[357] It is reported that:

> As of August 31, 2016 there were 52 daily newspapers and 644 periodicals (including a number of electronic newspapers), three free domestic television programme service licensees, 17 non-domestic television programme service broadcasters, and four sound broadcasting licensees.[358]

What has been contentious in Hong Kong is the extent of the reporting on pending or on-going public procurement corruption cases under ICAC investigation. The media can report on allegations of public procurement corruption. Once the ICAC decides to investigate an exposé, that it has picked from the media or on its own volition the law places a limitation on the extent of media reporting. This restriction is sanctioned by section 30 of the PBO, which states *inter alia* that:

> (1) Any person who knowing or suspecting that an investigation in respect of an offence alleged or suspected to have been committed under Part II is taking place, without lawful authority or reasonable excuse, discloses to:
>
> (a) The person who is the subject of the investigation (the "subject person") the fact that he is so subject or any details of such investigation; or
>
> (b) The public, a section of the public or any particular person the identity of the subject person or the fact that the subject person is so subject or any details of such investigation,

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355 ADB/OECD "Strategies for Business, Government and Civil Society Organisations" 1.
356 Wing-chi 2014 *Tsinghua China Law Review* 245.
357 Manion *Corruption by Design* 34.
358 HKSAR *Hong Kong The Facts: Media* 1.

> Shall be guilty of an offence and shall be liable on conviction to a fine of $20 000 and imprisonment for 1 year.

In *Ming Pao Newspapers Ltd and Others* v *Attorney General*,[359] section 30 was challenged in Court. This was after Ming's newspaper reported on collusion to manipulate prices.[360] The Court upheld the provisions of section 30, which has since been slightly amended to allow more press freedom.[361]

According to Weisenhaus,[362] the amendment of section 30 "offers greater protection to journalists than the previous version". It is submitted that the current form of section 30, although it has been amended to allow more press freedom, which is critical in fighting public procurement corruption, is insufficiently progressive to allow the media to report on public procurement corruption, and thus contribute to eradicating it.

The fear is that corrupt officials may use section 30 to suppress the media in cases involving public procurement corruption. Despite the existence of these provisions, the media in Hong Kong has remained steadfast in reporting cases of public procurement corruption.[363]

What remains to be discussed is the work of the Operations Review Committee, which work borders on civil activism to an extent.

3.5.5 Operations Review Committee

The Operations Review Committee is a body that is made up of civilians and is appointed by the Chief Executive of Hong Kong.[364] Despite this composition it does not fit the definition of a CSO. Due to its significance, one has to discuss it as a stand-alone anti-corruption measure. The following are the terms of reference of the Operations Review Committee:[365]

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359 1996 (6) HKPLR 103.
360 *Ming Pao Newspapers Ltd and Others v Attorney General* 103.
361 *Ming Pao Newspapers Ltd and Others v Attorney General* 103.
362 Weisenhaus *Hong Kong Media Law: A Guide for Journalists and the Media* 184.
363 Wing-chi 2014 *Tsinghua China Law Review* 255.
364 LegCo *Operations Review Committee* 1.
365 LegCo *Operations Review Committee* 1.

- To receive from the Commissioner information about all complaints of corruption made to the Commission and the manner in which the Commission is dealing with them.

- To receive from the Commissioner progress reports on all investigations lasting over a year or requiring substantial resources.

- To receive from the Commissioner reports on the number of, and justifications for, search warrants authorised by the Commissioner, and explanations as to the need for urgency, as soon afterwards as is practical.

- To receive from the Commissioner reports on all cases where suspects have been bailed by the ICAC for more than six months.

- To receive from the Commissioner reports on the investigations the Commission has completed and to advise on how those cases that on legal advice are not being subject to prosecution or caution should be pursued.

- To receive from the Commissioner reports on the results of prosecutions of offences within the commission's jurisdiction and of any subsequent appeals.

- To advise the Commissioner on what information revealed by investigations into offences within its jurisdiction shall be passed on to government departments or pubic bodies or other organisations and individuals, or where in exceptional cases it has been necessary to pass on such information in advance of a Committee meeting, to review such action at the first meeting thereafter.

- To advise on such other matters as the Commissioner may refer to the Committee or on which the Committee may wish to advise.

- To draw to the Chief Executive's attention any aspect of the work of the Operations Department or any problems encountered by the Committee.

- To submit annual reports to the Chief Executive, which should be published.

For the purposes of public procurement the Operations Review Committee is composed of ordinary members of the Hong Kong community.[366] Every case of public procurement corruption that is reported involves an input from the Operations Review Committee in terms of investigations, progress and whether or not it should proceed to prosecution.[367]

In cases of public procurement corruption, where the suspect has been out on bail for more than six months, there is a requirement that compels the Commissioner to explain those circumstances to the Operations Review Committee.[368] There is no case involving public procurement corruption that can either be ignored or abandoned without going through the approval of the Operations Review Committee.[369] According to Wu:[370]

> The Operations Review Committee monitors all ICAC investigations. No investigation may be terminated without its approval. It receives status reports on all cases and monitors investigations, people on bail and court cases. The Committee directs follow-up investigations and referrals of cases, which can include advice on internal disciplinary actions or administrative reform.

Cases involving public procurement that have been going on for more than a year without proper investigation, or which in the wisdom of the ICAC can no longer be pursued, cannot just be abandoned without the approval of the Operations Review Committee.[371] The Operations Review Committee therefore plays a huge role in curbing public procurement corruption in Hong Kong.

3.5.6 Reflections

The above discussion centred on the role of civil activism in Hong Kong as one of the measures for combating public procurement corruption. It was discovered that the media play an active role in combating public procurement corruption, despite some challenges that may potentially threaten the independence of such reporting. Although the CSOs are not very active, Hong Kong has legal mechanisms to encourage them to assist in curbing public procurement corruption. Similarly, there

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366 LegCo *Operations Review Committee* 1.
367 LegCo *Operations Review Committee* 1.
368 LegCo *Operations Review Committee* 1.
369 McWalters and Carver "Independent Commission against Corruption" 100.
370 Wu 2006 *Hong Kong Journal* 3.
371 Wu 2006 *Hong Kong Journal* 3.

are no reported cases where individuals who are not directly affected by public procurement corruption have litigated. However, the legal mechanisms that support such litigation are available, should they wish to do so.

A key organisation that has been described above is the Operations Review Committee, which is very active in curbing public procurement corruption in that it is involved in every case that involves public procurement corruption from the time of its investigation to its conclusion. This is an outstanding feature in Hong Kong's quest to quell public procurement corruption, and developing countries are encouraged to consider establishing such a body.

3.6 Conclusion

The aim of this chapter was firstly to present an overview of Hong Kong's public procurement system. It has been revealed that Hong Kong has a simplified system. At international level Hong Kong is a signatory to the WTO GPA. At regional level Hong Kong is a party to the APEC Transparency Procurement Standard, and it has bilateral agreements with Chile and New Zealand. At domestic level Hong Kong public procurement is regulated by the PFO and amplified by the SPR. Hong Kong uses five different types of procurement methods and the default is open tendering. The GLD and the DB are the main procurement institutions. Under them resort different procurement entities.

Secondly, it was the intention of this chapter to discuss the measures that Hong Kong has put in place to fight public procurement corruption, focussing on criminal measures, administrative measures, institutional measures and civil activism measures.

Hong Kong uses the traditional approach of combating public procurement that is, relying on criminal measures to combat this corruption. This means that procurement legislation in Hong Kong is used mainly for regulating public procurement. By using the traditional approach to combat public procurement corruption, Hong Kong has managed to create the conducive environment that makes the traditional approach succeed. The conducive environment is mainly the political will that was demonstrated as far back as 1974. ICAC is apolitical. This has enabled the closure

of any gaps that might be within the legal framework which might exist in the procurement legislation. If there is no political will it makes no difference if a country has the best international practice either in its procurement legislation or corruption legislation, it is the political will at the highest level that makes up for any gaps between the public procurement corruption legislation and that corruption legislation.

Through the ICAC Hong Kong uses criminal measures as a major tool in fighting public procurement corruption. In addition, it employs administrative measures such as debarment for a maximum of up to five years. With respect to institutional measures, the following institutions have been identified: the judiciary, the Hong Kong police force, the Hong Kong prosecution division, and the Audit Commission. These institutions complement the work of the ICAC. Hong Kong does not have a strong civil activism record aside from the reporting of the media. An outstanding feature of the system takes the form of the Operations Review Committee, which plays a crucial role in curbing public procurement corruption.

In the final analysis, the success that Hong Kong has enjoyed in fighting public procurement corruption cannot be attributed to the ICAC alone, but to the wiling cooperation amongst all anti-corruption institutions, as well as the enforcement of legal measures. It has been revealed that despite this success, Hong Kong continues to face public procurement corruption challenges and should remain innovative in curbing public procurement corruption.

CHAPTER 4: BOTSWANA

4.1 Introduction

The aim of this chapter is two-fold: first, to discuss the theory and practice of public procurement in Botswana; second to discuss the theory and practice of combating public procurement corruption in Botswana. The section that discusses Botswana's public procurement regime takes into account: the *Public Procurement and Asset Disposal Act* (hereafter PPAD Act);[1] the *Public Procurement and Asset Disposal Regulations* and the procurement institutions led by the Public Procurement and Asset Disposal Board and the statutory committees (the Management Tender Committee, and the Board Adjudication Committees such as the Special Procurement and Asset Disposal Committee, the Ministerial Tender Committees, the District Administration Tender Committees, the Suspension and Delisting Disciplinary Committee, and the Independent Complaints Review Committee).

The section that discusses the public procurement anti-corruption reforms that Botswana has adopted focuses on the public procurement anti-corruption legislation, mainly the *Corruption and Economic Crime Act*[2] enforced by the Directorate of Corruption and Economic Crime and modelled and inspired by Hong Kong's ICAC. Of particular importance is the use of criminal measures, administrative measures, institutional measures and civil activism measures for combating public procurement corruption.

Before one embarks on a discussion on the theory and practice of public procurement in Botswana, it is necessary to give a brief outline of Botswana's governance and economic system.

4.2 Botswana's governance and economic system

Botswana is a country situated in sub-Saharan Africa. It has an estimated population of 2.2 million people[3] and an estimated GDP of US$15.81 billion. The economy is sustained largely through mining, mainly of diamonds, and is supported by other

1 10 of 2001.
2 13 of 1994.
3 World Bank 2016 http://data.worldbank.org.

sectors such as tourism.[4] In terms of its political development, Botswana celebrated its independence from the United Kingdom in 1966.[5] The country is the oldest democracy in Africa, and has consistently held its democratic elections every five years in accordance with the requirements of the country's Constitution.[6]

The Botswana Democratic Party (hereafter BDP) has dominated the elections and has held the country's presidential seat ever since 1966.[7] Although there are opposition parties, so far they have not been able to dislodge the BDP from possession of the presidential seat.[8] The political and economic history, as will be shown later in this chapter, has shaped Botswana's public procurement system as it is known today.

Botswana is a constitutional democracy and its governance system is made up of three arms of government: the Executive, the Legislature and the Judiciary.[9] It has a dual legal system comprising of Roman Dutch common law as influenced by the English law, legislation and indigenous customary law.[10]

4.3 Public procurement system: an overview

This part of the chapter discusses the legal regime, the procurement institutions, the scope, the procurement methods and the procurement principles of Botswana's public procurement system. The discussion commences with Botswana's public procurement approach to international and regional instruments, which section is followed by a brief historical discussion of Botswana's public procurement system and the current procurement system.

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4 Malema 2012 *Botswana Journal of African Studies* 52.
5 Mwakikagile *Botswana Since Independence* 20.
6 Cook and Sarkin *Transnational Law and Contemporary Problems* 455.
7 Cook and Sarkin *Transnational Law and Contemporary Problems* 461.
8 Cook and Sarkin *Transnational Law and Contemporary Problems* 455
9 Dingake "Separation of Powers Botswana" 1.
10 Kumar and Caborn "The Regulatory Framework of Public Procurement in Botswana" 25.

4.3.1 Public procurement instruments

4.3.1.1 International and regional approaches

As explained in Chapter Two, there is no international instrument that applies to public procurement apart from the WTO GPA.[11] Botswana has been a member of the WTO since 31 May 1995. However, it is not a party to the WTO GPA and has not shown any intention of becoming a party to it soon. At regional level Botswana is a member of the following regional bodies: SADC;[12] and SACU.[13] It is not a member of COMESA.[14] Only the latter has a well-defined procurement system that is intended to be binding on member states.[15]

Some of Botswana's trading partners and some neighbouring countries such as Zimbabwe are member states of both SADC and COMESA, a fact which may affect issues of procurement and international trade in the long term.[16] As it is, there is no reason why Botswana should not be a member of COMESA and benefit from the envisaged expansion and benefits of the COMESA Procurement Regulations as discussed in Chapter Two.[17]

However, section 4 of the PPAD Act envisages a situation where certain procurement projects are funded by international donors or other international financers.[18] Should there be a clash between domestic procurement legislation and that of the international donors/financers, or a clash with other agreements, section 4 allows the procurement legislation/rules/policies of the international donors/financers/agreement to prevail over domestic legislation.[19] This provision is an indication of flexibility in Botswana's procurement regime, in that there is room for international, regional and bilateral procurement agreements.

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11 See para 2.4.
12 Signed the SADC Treaty on 17 August 1992.
13 Botswana was one of the founding members of SACU with its initial establishment in 1910.
14 COMESA 2016 http://www.comesa.int.
15 See para 2.5.
16 COMESA 2016 http://www.comesa.int.
17 See para 2.5.
18 de Mariz, Menard and Abeille *Public Procurement Reform in Africa* 58.
19 IBP *Botswana Investment and Business Guide* 49.

Botswana has remained involved in international procurement transactions.[20] However, international participation which is not supported by legislation is not sufficient. Either Botswana as one of the few African countries with specific procurement legislation spearheads a new regional procurement instrument or it should ratify the WTO GPA or at least push for the amendment of the WTO GPA to cater for the needs for African or developing countries.[21]

Botswana has not signed any bilateral agreements that specifically address public procurement, and therefore has no public procurement obligations apart from its domestic procurement expectations.

4.3.1.2 Domestic approaches

Three distinct periods: 1885-1966;[22] 1966-2001,[23] and 2001 onwards, have influenced the development of public procurement in Botswana. The period 1966-2001 had the most influence on Botswana's public procurement system.[24] Two major events took place, namely the attaining of independence (political transition) and the discovery of diamonds (economic transition).

4.3.1.2.1 Public procurement 1966-2001

The public procurement regime that was used to regulate procurement prior to 1966 was not immediately changed after independence.[25] The Supplies Regulations and Procedures of 1963 continued to be operational.[26] Two revisions of the Supplies

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20 OECD *Methodology for the Assessment of the Benchmarking Tool* 28.

21 McCrudden *Buying Social Justice: Equality, Government Procurement and Legal Change* 289.

22 In this period Botswana was a British Protectorate. The effect of this period on public procurement (although it was not officially called public procurement then) was that the procurement laws that are applied in Britain were generally applicable to Botswana (which was known as Bechuanaland then). Britain assumed jurisdiction over Botswana from 1885-1966. See Mogalakwe "How Britain Underdeveloped Bechuanaland Protectorate" 72.

23 This is the period when Botswana became independent from Britain and new laws began to be passed. It was also the period when diamonds were discovered, which discovery led to large-scale procurement.

24 Lionjanga "Joint WTO-World Bank Regional Workshop on Public Procurement Reforms" 4.

25 Lionjanga "Joint WTO-World Bank Regional Workshop on Public Procurement Reforms" 4.

26 Lionjanga "Joint WTO-World Bank Regional Workshop on Public Procurement Reforms" 4-5.

Regulations and Procedures were performed, in 1967 and in 1977.[27] According to Lionjanga:[28]

> The Supplies Regulations and Procedures were revised twice in ten years in 1967 and 1977 but interestingly, Chapter Four dealing with procurement remained untouched, except for Clause 11 which dealt with financial ceilings in relation to specific procurement methods and circumstances.

Therefore, the procurement legislation that was in place from 1966-2001 was as follows: Supplies Regulations and Procedures, of 1963; Supplies Regulations and Procedures, of 1967; Supplies Regulations and Procedures, of 1977 and Supplies Regulations and Procedures, of 1988.

4.3.1.2.2 Botswana public procurement reforms, 2001 onwards

Botswana's procurement legal framework traces its genesis from the Constitution and is given effect by procurement legislation. The primary procurement legislation is the PPAD Act, amplified by the *Public Procurement Regulations*[29] and the *Independent Complaints Review Regulations*[30] enacted in terms of the PPAD Act. At local government level the *Local Authorities Procurement and Disposal Act,*[31] which is subject to the PPAD Act, is applicable. In addition, there is also the Public Procurement Asset Disposal Board Operations Manual of 2014.[32] Periodically the government issues Government Circulars through the Ministry of Finance that further direct some aspects of procurement.[33]

4.3.1.2.3 Constitution of the Republic of Botswana

The Constitution of the Republic of Botswana that came into force in 1966[34] does not expressly provide for public procurement. However, it has general provisions which can be interpreted to advance and influence procurement. For instance, section 15 (2)[35] *inter alia* prohibits any discrimination. In the context of public procurement this

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27 Lionjanga "Joint WTO-World Bank Regional Workshop on Public Procurement Reforms"10.
28 Lionjanga "Joint WTO-World Bank Regional Workshop on Public Procurement Reforms" 10.
29 Section 130 of the PPAD Act.
30 Sections 95-109 of the PPAD Act.
31 17 of 2008.
32 For its status see para 1.3.1.2.7.
33 Ministry of Finance 2011 http://www.gov.bw.
34 L.N 83 0f 1966.
35 No person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

means that procurement legislation, policies and decisions that had been in place as from 1966 had to be free from any discrimination.[36] This was not the position prior to 1966, in the sense that procurement contracts were largely given to non-black contractors.[37]

It has already been pointed out that in all the Supplies Regulations and Procedures (1963, 1977 and 1988) provided for, various government departments were involved in the administration of procurement.[38] Procurement officers were compelled to make procurement decisions that were in compliance with the Constitution.[39] Any procurement decision that was contrary to the spirit of the Constitution was invalid and remains so to this day. The Constitution of the Republic of Botswana promotes just and fair administrative action.[40] Procurement in Botswana as far back as 1966 was being carried out as an administrative function and the procuring officials were obliged to comply with the Constitution.[41]

Although no reported procurement litigation took place in the first 10 years after the adoption of the Constitution, it is clear that the intention of the legislature was to protect procurement stakeholders from irrational and unreasonable procurement decisions.[42] In addition, the judiciary is another arm of state that enjoys Constitutional recognition.[43] In so far as procurement is concerned, the judiciary in Botswana plays a crucial role in aiding in the interpretation of procurement law, settling procurement disputes and in some instances influencing the enactment of new procurement provisions.[44] Therefore, the Constitution of the Botswana has since 1966 progressively impacted procurement legislation that resulted in 2002 in the enactment of the PPAD Act.

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36 Suleiman *Overview of Public Procurement Reforms* 16, 18.
37 Lionjanga "Joint WTO-World Bank Regional Workshop on Public Procurement Reforms" 7.
38 Suleiman *Overview of Public Procurement Reforms* 16, 18.
39 Lionjanga "Joint WTO-World Bank Regional Workshop on Public Procurement Reforms" 9.
40 This is discussed in detail below under "Measures for combating public procurement corruption".
41 Lionjanga "Joint WTO-World Bank Regional Workshop on Public Procurement Reforms" 9.
42 Lionjanga "Joint WTO-World Bank Regional Workshop on Public Procurement Reforms" 10.
43 There is further discussion below under "Measures of combating public procurement corruption".
44 Fombad and and Sebudubudu "The Framework for Curbing Corruption in Botswana"118.

4.3.1.2.4 *Public Procurement and Asset Disposal Act*

The PPAD Act is the primary procurement legislation and has five main core functions which are summed up in the preamble as follows: to establish the Public Procurement and Asset Disposal Board (hereafter PPADB); to establish committees; to provide for the procurement of works, supplies and services; to provide for the disposal of public assets; and lastly to provide for related matters.[45]

Section 2 defines public procurement as follows:

> The acquisition in the public interest by any means, including by purchase, rental, lease, hire-purchase, licences, tenancies, franchises, etc, of any type of works, services or supplies or any combination thereof, however classified and shall include management, maintenance and commissioning.

The PPAD Act applies to all entities of central government that are involved in public procurement whether they are located abroad or within Botswana.[46] Furthermore, it applies to the procurement done by all land boards,[47] all parastatals,[48] statutory organisations[49] and local authorities.[50] In addition, it applies to procurement done by any of the following means: purchase,[51] rental,[52] lease,[53] hire-purchase,[54] licences,[55] tenancies,[56] franchises,[57] auctions,[58] works, servicers, supplies, or any combination of these means.[59] Moreover, Botswana's PPAD Act makes provision for procurement through international treaties to which Botswana is a party.[60]

In addition, the PPAD Act encourages fair treatment[61] and frowns upon discrimination and under-pricing.[62] Preferential procurement is provided for in part

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45 Preamble of the PPAD Act.
46 Section 3(a).
47 Section 3(aa).
48 Section 3(ab).
49 Section 3(ab).
50 Section 3(ab).
51 Section 3(b) (i).
52 Section 3(b) (ii).
53 Section 3(b) (iii).
54 Section 3(b) (iv).
55 Section 3(b) (v0.
56 Section 3(b) (vi).
57 Section 3(b(vii)
58 Section 3(b) (viii).
59 Section 3(c).
60 Section 4.
61 Section 7.
62 Section 9.

VIII of the PPAD Act. As noted above, the PPAD Act is further amplified by the Procurement and Asset Disposal Regulations.

4.3.1.2.5 Public Procurement and Asset Disposal Regulations

The *Public Procurement and Asset Disposal Regulations* (hereafter Procurement Regulations) were enacted in 2006, and comprise of 12 parts.[63] Part 1 deals with the interpretation, definitions and application of regulations and international obligations. For instance, Part 1 defines Botswana's procurement process as:[64]

> The successive stages in the procurement cycle including planning, choice of procedure, measures to solicit offers from bidders, examination and evaluation of such offers, award of contract and contract management.

What is distinct in this definition is that it does not take the widely accepted approach of defining the procurement process with reference to pre-tendering, tendering, the awarding of the tender, tender management, and the final payment. Instead it mentions the "successive stages in the procurement cycle". This definition takes into account other forms of procurement without restricting the definition to the generally accepted methods of procurement.

Simply put, this is a broad approach to defining the procurement process, which seems to open the door to international bidding as part of the definition.

This is further supported by the fact that the Procurement Regulations make reference to open international bidding, which is defined as:[65]

> A procurement or disposal method open to competition and participation by all providers through advertisement of the procurement or disposal opportunity and which specifically seeks to attract foreign providers.

This is an indication that in as much as the PPAD Act provides for preference procurement for local people, it has also taken into account its international trade obligations of opening up its market to suppliers who may not be *Batswana*.[66] A proper construction of the two definitions may compel Botswana to clearly define the role of international bidders within its procurement system. It is important for

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63 Kumar and Carbon "The Regulatory Framework for Public Procurement in Botswana" 27.
64 PPADB *Public Procurement and Asset Disposal Regulations* reg 2.
65 PPADB *Public Procurement and Asset Disposal Regulations* reg 56.
66 Quinot "Promotion of Social Policy Through Public Procurement" 385.

Botswana's definition of the procurement process to be in line with international standards so that any vagueness or ambiguity in the process is eliminated. Ensuring this would mitigate against the likelihood of unnecessary litigation that may arise as a result of the current definition of the procurement process.[67]

Procurement Regulation 23(1) provides *inter alia* instances where certain principles in the PPAD Act may be derogated from.[68] Emergency procurement is one example. It is stated in the Procurement Regulations that when derogating from the PPAD Act for the sake of emergency procurement, a request to engage in such derogation must be made in writing and supported by the reasons justifying a departure from the provisions of the PPAD Act.[69] It is not clear why the PPAD Act uses the phrase "any person intending to use an emergency procurement" instead of the "procuring entity". This should be understood in the light of Procurement Regulation 6, which gives the procuring entity the responsibility over all procurement. This lack of consistency should be addressed, so that in the event of an irregularity it is possible to hold the procuring entity accountable in the first instance, followed by individuals who are liable - in that order.

Furthermore, in the administration of contracts the PPAD Act proscribes the splitting of procuring contracts.[70] A number of disputes have been adjudicated over the issue of the splitting of contracts.[71] Within the context of public procurement corruption, procurement contracts are split *inter alia* for corrupt motives, especially where sub-contractors are involved.[72] It is for this reason that Procurement Regulation 24(1) places emphasis on adherence to a single contract.[73] Further, there is a need to

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67 OECD *OECD Principles of Integrity in Public Procurement* 13.

68 Kumar and Carbon "The Regulatory Framework for Public Procurement in Botswana" 39.

69 Any person intending to engage in an emergency procurement shall make a request to the Board, in writing, stating the reasons for the emergency and justifying the departure from the established procedure.

70 PPADB 2009 http://www.ppadb.co.bw.

71 PPADB 2009 http://www.ppadb.co.bw.

72 PPADB 2009 http://www.ppadb.co.bw.

73 Any procuring entity shall not split up procurement requirements for works, services or supplies which could be produced on a single contract for the purposes of avoiding a method of procurement required in Part V.

adhere to the procurement method in terms of Procurement Regulation 24(2)[74] in order to limit the opportunities for public procurement corruption.

The PPAD Act recognises the pre-qualification process as a method of public procurement in terms of regulation 28(1).[75] In line with international standards, the PPAD Act encourages the use of pre-qualification in order to screen suppliers in procurements that are technical in nature, as stated in Procurement Regulation 23(2).[76] With regard to meeting the requirements for pre-qualification, Procurement Regulation 28(8) sets out the criteria which make a supplier qualify.[77]

With regard to preparing and requesting bidding documents, Procurement Regulation 30 specifies that the procuring entity shall state its procurement requirements in writing and in line with the procurement in question.[78] Details of procurement such as the date, time and conditions of bidding including any special conditions must be clarified in the spirit of transparency and fairness in terms of Procurement Regulation 30(2).[79]

In the event that suppliers require further clarification with regards to the bidding requirements, Procurement Regulation 31 allows for pre-bidding meetings between

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74 Each procurement entity shall ensure that for each procurement the method of procurement utilized is open unrestrictive competitive bidding, unless otherwise specified by the Board.

75 A prequalification process may be used under open international bidding or open domestic bidding to obtain a shortlist of bidders who have the proven capability and resources to perform the contract satisfactorily.

76 A prequalification process may be used where the supplies, works or services required are highly complex or specialized or require detailed design.

77 A provider shall qualify for the pre-qualification bid on the basis of having the highest capability and the resources for the particular procurement, taking into account (a) its experience and past performance on similar contracts; (b) its capability with respect to personnel, equipment and manufacturing or construction facilities; (c) its financial position; and (d) any other relevant criteria specified in the pre-qualification document.

78 Regulation 30(1)(a) A procuring entity shall state its procurement requirement for supplies, works or services in accordance with the type, value and relative complexity of the particular procurement requirement.

79 Any solicitation document issued by the procuring entity shall include (a) an invitation to bid and instructions on the (i) preparation and submission of the bid (ii) date, time and address for receipt of bids (iii) place and time of bid opening (b) a bid form (c) the general conditions of contract or a statement of the general conditions that will apply (c) special conditions of contract (d) special conditions of contract (e) a statement of requirements (f) a schedule of requirements and price schedule (g) a statement of the qualification documentation to be provided by the bidder (h) the contract form or a statement of the contract or order documents that will apply and (i) the format for securities, guarantees or other documents of security, where required.

the procuring entity and the suppliers in order to iron out the requirements.[80] Clarification of the procurement method to bidders shall not be hidden or done secretly by the procuring entity, but the bidders shall be made aware publicly of the method of procurement as stated in Procurement Regulation 32(1).[81] For the sake of transparency and efficiency and also to allow suppliers to know when to expect an answer, Procurement Regulations 33 (1)[82] and (2)[83] specify timeframes that must be adhered to.

Incidents of collusion and corruption have been observed in the procurement process, and one of the ways that this occurs is through the withdrawal of a bid.[84] One must bear in mind that not all bid withdrawals are linked to corruption or collusion, but some withdrawals can be triggered by a number of factors, which may include a lack of sufficient financial muscle by the bidder, or in some instances bidders could withdraw tenders on the grounds of liquidation.[85] Procurement Regulation 37 standardises the manner in which bids can be withdrawn. For instance, it says that a notice of withdrawal must be submitted to the Board and the withdrawal of the bid has to be approved by the Board.[86]

Procurement Regulation 38 prescribes the manner in which the bids should be opened. Procurement Regulation 38(6) states *inter alia* that when opening bids and if they are open bids the opening shall be done publicly.[87] The same Procurement

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80 A procuring entity may hold pre-bid meetings to (a) allow potential bidders to either seek clarification or (b) have access to project sites.

81 The method of the selection of the bidders to be invited to bid shall be in accordance with the provisions and shall be (a) by publication of a bid note (b) by development of a shortlist and (c) on a sole provider basis.

82 The bidding period shall be such length of time as is necessary to accommodate the (a) location of short-listed or potential bidders and the time required for delivery or transmission of their bids (b) level of detail required in a bid (c) anticipated duration of the procurement process.

83 Unless otherwise determined by the Board, the minimum bidding period specified shall be (a) six weeks, in the case of open international competitive bidding (b) four weeks, in the case of national competitive bidding and (c) two weeks, in the case of selective tendering on the basis of a shortlist.

84 OECD *OECD Principles of Integrity in Public Procurement* 90.

85 OECD *Bribery in Public Procurement: Methods, Actors and Counter Measures* 59.

86 Bidding documents shall contain instructions that a bidder may (a) withdraw his or her bid, in accordance with the provisions of the bidding documents, by giving notification, to the Board, of the withdrawal of the bid, which notification shall be authorized and submitted in the same manner the bid was submitted; (b) modify his or her bid; (c) replace his or her bid at any time before the deadline of submission.

87 The procedure for the opening of bids, which shall be in accordance with the provisions and the guidelines, shall require (a) a public bid opening to be witnessed by bidders' representatives who

Regulation also makes provisions for the internal opening of bids.[88] This takes into account the practicality of tendering, in that it may not always be possible to have bids opened in public, especially in the procurement of sensitive products such as defence or national intelligence supplies.[89]

However, it is submitted that the public opening of bids should be the norm rather than an exception, because it creates an atmosphere of transparency and it eliminates the suspicion of prejudice, mainly because the tenderers are free to be represented at the bid opening.[90] Procuring entities should desist from opening bids internally, because research has shown that such a process can be manipulated by corrupt procurement officials.[91]

It is submitted that derogation from public tender opening should be authorised only with stringent measures and accountability.[92] One observes that a hurdle may arise in electronic procurement (hereafter e-procurement) since the tenders are submitted to the procuring entity mostly as an electronic attachment. These electronic tenders are then printed, which defeats the desire for the public opening of bids.[93]

The rationale behind the public opening of bids is *inter alia* to have a measure against the abuse of confidential information by the procuring entity.[94] In addition, the public opening of bids is meant to ensure that everyone involved in the procuring process knows who has submitted the bids, the tender price of each supplier, and whether or not the bid complies with the technical specifications.[95]

On the other hand, it is inherent in e-procurement tender submission that some members of the procuring entity will be privy to those bids at the time they are printed or submitted to the computer system of the procuring entity.[96] The procuring

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choose to attend or; (b) an internal bid opening to be witnessed by at least three members of the procuring entity staff, which shall include at least one member of the Ministerial Committee.

88 PPADB 2015 http://www.ppadb.co.bw.

89 PPADB 2015 http://www.ppadb.co.bw.

90 PPADB 2015 http://www.ppadb.co.bw.

91 OECD *OECD Principles of Integrity in Public Procurement* 41.

92 OECD *OECD Principles of Integrity in Public Procurement* 41.

93 OECD *Guidelines for Fighting Bid Rigging in Public Procurement* 4.

94 OECD *Methodology for the Assessment for the Benchmarking Tool* 3.

95 OECD *OECD Principles of Integrity in Public Procurement* 90.

96 OECD *Guidelines for Fighting Bid Rigging in Public Procurement* 5-6.

officials may then abuse this information for corrupt purposes.[97] Further, it is much easier to move data that is electronically stored for the purposes of abusing the e-procurement system.[98] It is therefore imperative that if a procuring entity decides to use the e-procurement tendering system, it should ensure that its system has sufficient safeguards to curb misuse.[99]

Once the bidding process has been complied with and the deadline for submission has expired, the Procurement Regulations provide for the evaluation of bids as part of the procurement process. Procurement Regulation 40(1) states that it is the responsibility of the Accounting Officer to appoint an evaluation committee. The evaluation committee is made up of three or more members.[100]

In instances where the evaluation committee fails to agree on the winning bid, then the evaluation committee shall put this disagreement in writing in terms of Procurement Regulation 40(2).[101] What is not clear is whether the Accounting Officer can be part of the evaluation committee or whether he can fill the remaining post if there are only two members of the evaluation committee. Furthermore, the Procurement Regulations do not provide what the evaluation committee should do with the report outlining their disagreement.[102] In other words, in the event of a disagreement on the winning bid and the evaluation has complied with section 40(2) above, does the evaluation committee submit the disagreement report to the Accounting Officer or to the procuring entity or to the Ministerial Board or to the PPADB. It is submitted that the report should be submitted to the PPADB, because it has the mandate to oversee the entire procurement process and to make relevant determinations.

Furthermore, no course of action needs to be taken by whoever receives the report, and the period or timeframe during which the disagreement should be acted upon is

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97 Ware et al "Corruption in Public Procurement: A Perennial Challenge" 319.
98 Ware et al "Corruption in Public Procurement: A Perennial Challenge" 319.
99 Neupane *et al Role of Public E-Procurement Technology* 312-313.
100 The Accounting Officer shall appoint an Evaluation Committee which shall comprise not less than three members.
101 Where members of the Evaluation Committee disagree on the results of an evaluation, the findings and recommendations of the majority shall be stated in the evaluation report.
102 PPADB 2015 http://www.ppadb.co.bw.

not stipulated.[103] Moreover, it is not provided whether all the bidders should be notified of the disagreement for the sake of transparency and accountability or whether this disagreement is treated as an internal matter.[104]

The Procurement Regulations set out two main processes which the evaluation committee should take into account, and these are: (i) evaluation by quality and (ii) evaluation by cost, as stated in Procurement Regulation 43(1).[105] The distinction between quality based selection and cost based selection is that the former is rated purely on technical compliance[106] while the latter is rated squarely on the basis of the budget allocated.[107]

The Procurement Regulations discussed above provide guidance in terms of the scope, procurement methods and procurement principles that must permeate the procurement process.[108] In addition to the above Procurement Regulations, the PPAD Act provides for the Independent Complaints Review Committee Regulations for complaints and dispute resolution.

4.3.1.2.6 Independent Complaints Review Committee Regulations

The purpose of the *Independent Complaints Review Committee Regulations* (hereafter ICRC Regulations) is *inter alia* to establish a dispute resolution mechanism within the procurement framework and to avoid procurement related litigation as much as possible. This process is led by the Independent Complaints

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103 PPADB *Public Procurement and Asset Disposal Regulations* regs 2, 18 and 78.

104 PPADB *Public Procurement and Asset Disposal Regulations* regs 77-79.

105 The quality and cost based selection evaluation method shall be conducted as follows: (a) both the quality and the cost of bids shall be taken into account in a process under which technical bids are evaluated without access to financial bids and (b) the relative weight to be given to the quality and cost components of the evaluation shall depend on the nature of the assignment and shall be stated in the invitation to the bid.

106 Regulation 44(1) (a) Under the quality based selection evaluation method the evaluation of (a) a technical bid shall be conducted against set criteria on a merit system to determine the best technical bid without access to financial bids; (b) the quality of a bid shall be the primary factor to be considered and; (c) cost shall apply only to the best technical bid.

107 Regulation 45(1) Under the fixed budget selection evaluation method, the procuring entity shall indicate its available budget and evaluation shall be considered as follows: (a) a bidder shall be required to provide, within the stated budget, the best possible technical and financial bids, in separate envelopes; (b) the bidder with the evaluated technical bid of the highest quality, which is within the stated budget, shall be recommended to be awarded the contract.

108 Kumar and Caborn "Public Procurement Regulation Framework in Botswana" 27.

Review Committee (hereafter ICRC) which is established in terms of section 3 of the ICRC Regulations.[109]

ICRC Regulations 9 provides for the procedure of lodging a complaint before the ICRC. This regulation provides for three instances that the ICRC must first take into account before considering a complaint, and these are:

(a) The complaint had, before submission to the Independent Committee, been submitted and considered under review procedures of the Board and a decision of the Board had been made on the complaint;

(b) The complaint is lodged with the Independent Committee on application for review of the decision of the Board; and

(c) The complaint is lodged in the format set out in regulation 10.[110]

In terms of ICRC Regulation 3, the complainant has 14 days from the date he has become aware of the decision of the PPADB or procuring entity to lodge an appeal either with the PPADB or the ICRC as the case may be.

From the above, the first complaint must be lodged either with the procuring entity or the PPADB. A complainant cannot just approach the ICRC without first having laid a complaint with any of these two entities. Only when these two entities have failed to satisfactorily deal with the dispute can the complaint be escalated to the ICRC. In essence, the ICRC acts as an appeal body to any procurement dispute before the complainant can approach the High Court.[111] This is illustrated below.

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109 Further functions of the Board are discussed under procurement institutions in this chapter.

110 According to Regulation 10, the following must be attached when lodging a complaint (i) the decision of the Board; (ii) the set of disputed bidding documents; (iii) a description of the nature of the bidding process used; (iv) and any other supporting documents; (e) evidence supporting the contention that the procuring entity acted unlawfully, as well as (vi) evidence that the bid would have been awarded to the complainant but for the unlawful act.

111 Kumar and Caborn “The Regulatory Framework for Public Procurement in Botswana” 34.

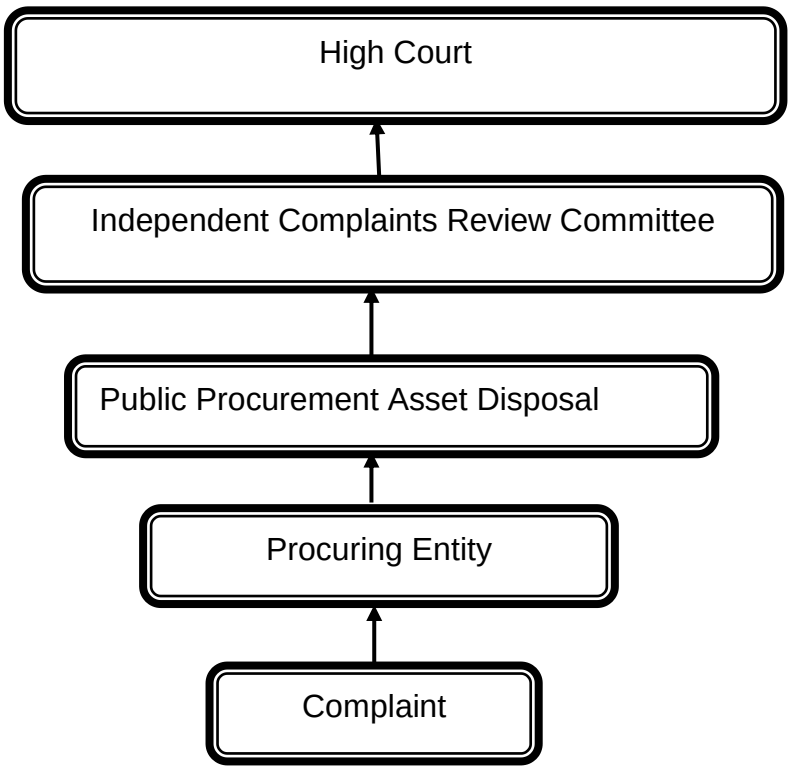

Figure 6: Complaint Procedure

In addition, a complaint fee which is one per cent of the estimated value of the tender, which cannot be less than P1 500 and shall not exceed P350 000, is payable to the ICRC to adjudicate over the matter.[112] This amount is refundable if there is merit in the substance of the case of the complainant. The complainant need not win the dispute; merit in the case is sufficient to warrant a refund.[113] The ICRC is mandated by ICRC Regulation 11 (2) to make its determination of the complaint within 30 days. Furthermore, legal representation is ousted in terms of ICRC Regulation 11 (3) and the method of appearance is in person.

In the process of adjudication, ICRC Regulation 12 allows the ICRC to issue interim orders that have an effect of suspending procurement until the matter is finalised. ICRC Regulation 13 prohibits the withdrawal of a complaint once it has been lodged. Withdrawal is allowed only after consulting the PPADB.

Furthermore, the decision of the ICRC is made public and shall be published in the Government Gazette, and in addition all the information used for the adjudication is

[112] PPADB *ICRC Regulations* 9 (4).
[113] PPADB *ICRC Regulations* 9 (5).

made available to the public upon request for a fee of P50. This further enhances the transparency and accountability in the procurement process.

The ICRC can make a wide range of decisions in terms of ICRC Regulation 14, which include:

(a) Upholding the decision of the Board[114] and dismissing the complaint;

(b) Rejecting the decision of the Board and ordering the procuring entity to:

(c) Make a finding in favour of the complainant and award costs to the complainant that shall not exceed the commercial outlay for the preparation of a bidding package when the dispute relates to an award decision and less if the dispute is in respect of other complaints.

(d) If any allegation of fraud or bias is proved, the ICRC shall pronounce that person guilty and exclude that person from the procurement process.

Although the ICRC Regulations do not expressly mention the word “companies” but prefer to use “persons”, it is implied that “persons” include legal persons such as companies, and that they are subject to the ICRC Regulations.

Another important aspect that is recognised in the ICRC Regulations is that the ICRC in its execution of its mandate works in tandem with the Attorney General and the Directorate on Corruption and Economic Crime.[115]

This synergy assists in cases of public procurement corruption, as will be discussed later in this chapter. It is also important to note, as illustrated above, that no procurement dispute should automatically go to the courts without being referred to the ICRC first for settlement.[116] The court system is used as a last resort, and it may be used as a way of appealing the decision of the ICRC.[117] What is not clear is whether the PPADB or a Procuring Unit can appeal to the court against a decision of the ICRC.

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114 This Board has been abbreviated as the PPADB in this study.
115 PPADB *Public Procurement and Asset Disposal Regulations* sec 15.
116 Kumar and Caborn “The Regulatory Framework for Public Procurement in Botswana” 30.
117 Kumar and Caborn “The Regulatory Framework for Public Procurement in Botswana” 34.

It is submitted that given the language of the ICRC Regulations it seems as if there is nothing that can preclude the PPADB or any of its procuring units from appealing to the Court against a decision of the ICRC. In the spirit of fairness and the development of procurement jurisprudence, the PPADB or any of its procuring units should be able to challenge the decision of the ICRC before the Court.[118]

4.3.1.2.7 Local Authorities Procurement and Disposal Act

The purpose of the *Local Authorities Procurement and Disposal Act* (hereafter LCA) is to regulate procurement by local authorities. The purpose of the LCA, as stated in its preamble, is:[119]

> To provide for the appointment of procuring and disposal committees in local authorities, the establishment of a Competent Authority to monitor procurement processes in local authorities and to provide for the procurement of works, supplies and services, for the disposal of public assets by local authorities and related matters.

Local authorities in Botswana are involved in procurement though with limited procurement powers.[120] The LCA establishes various procuring committees.[121] Each procuring entity is headed by an Accounting Officer who is responsible for the procurement process.[122] In instances where there is no such Accounting Officer, someone has to be appointed who will take charge of the procurement process and ensure compliance not only with PPAD Act but also with the LCA.[123]

The LCA provides for the establishment of the Evaluation Committee,[124] the Adjudication Committee,[125] the Performance Monitoring Committee,[126] the Appeals Board,[127] and the Competent Authority,[128] all of whom play different roles in the procurement processes engaged in by local authorities. The roles of the committees

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118 Kumar and Caborn "The Regulatory Framework for Public Procurement in Botswana" 34.
119 Preamble of the *Local Authorities Procurement and Disposal Act*.
120 Kumar and Caborn "The Regulatory Framework for Public Procurement in Botswana" 32.
121 Kumar and Caborn "The Regulatory Framework for Public Procurement in Botswana" 31.
122 LCA Section 2.
123 LCA Section 8.
124 LCA Section 8.
125 LCA Section 11.
126 LCA Section 22.
127 LCA Section 24.
128 LCA Section 25.

will be discussed below under “procurement institutions”. The LCA provides for the process of procurement that the local authorities should follow.[129]

However, a careful analysis of the LCA reveals that the procurement process of the LCA is not detailed. For instance, the LCA provides, and very briefly so, that all procurement documents must be included in the bidding notice, without giving further guidance as to exactly what is meant by procurement documents.[130]

The LCA provides for the inclusion of penalty clauses for non-compliance.[131] On a separate point, the LCA procurement procedure allows the intervention by the Evaluation Committee at any stage of the bidding process before the awarding of the bid.[132] One of the reasons that justifies the intervention is that if the bidding package fails to satisfy key aspects of the bid,[133] then intervention may take place in order to facilitate the procurement.

As a general rule, all contractors must be registered and the Adjudication Committee will award contracts to registered contractors only.[134] It is only in exceptional circumstances that non-registered contractors may be considered.[135] However, these exceptional circumstances are not described in the LCA.

Bids by joint ventures, consortia, or associations are strongly discouraged by the LCA.[136] Should it be necessary that joint ventures, consortia or associations be allowed in a particular bid, then written reasons must be provided in terms of section 31 (2).

The LCA mentions six procurement principles that must be complied with, and these are transparency, accountability, fairness, competitiveness, efficiency, and value for money.[137] These will be discussed below, together with other procurement principles. Lastly, the LCA recognises the use of procurement as an empowerment

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129 LCA Section 27-30.
130 LCA Section 27 (a).
131 LCA Section 27 (b).
132 LCA Section 8.
133 LCA Section 28 (a).
134 LCA Section 30.
135 LCA Section 30 (2).
136 LCA Section 31.
137 LCA Section 34.

tool for the *Batswana*. Most developing countries use procurement as empowerment tools, as discussed in Chapter Two.[138]

As already said, the PPADB has published an Operations Manual which further assists in the interpretation, administration and management of the procurement process.

4.3.1.2.8 Operations Manual

The Operations Manual (hereafter OM), which came into effect on 1 April 2014, is one of the leading procurement publications of the PPADB, and is used for easy reference by most procurement stakeholders and interested academics.[139] The OM's legal status is currently undefined and it has not been tested in Court.[140] However, the drafters of the OM intended the OM to be binding, as stated in the preamble of its chapter two.[141] The OM covers the entire procurement process and attempts to simplify the procurement procedures as much as possible.

One of the key provisions of the OM is the provision of Standard Bidding Packages (hereafter SBPs). Some of the provisions covered by the OM have been discussed above under domestic legislation, while some will be discussed below under procurement institutions and procurement principles. Attention is therefore now given to the SBPs.

4.3.1.2.9 Standard Bidding Packages

The SBPs are described in chapter one of the OM as:

> Standard bidding documents and templates and public assets disposal contracts approved by the Board which shall be used on mandatory basis by all procuring and disposing entities.

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138 See para 2.3.

139 Chapter Two of the Operations Manual states *inter alia* that the Operations Manual is designed to assist procurement staff in the management of procurement and asset disposal. It provides an essential knowledge base, which imparts a clear understanding of what is expected to be done and how it should be done

140 Kumar and Caborn "The Regulatory Framework for Public Procurement in Botswana" 32.

141 All civil servants, contractors, public enterprises and parastatals, local authorities, consultants or private sector firms, or suppliers involved in procurement activities will be bound by the policies, procedures and practices appearing in this manual, which may change from time to time in line with the provisions of the PPAD Act and Regulations.

Section 29 of the PPAD Act provides and encourages the use of the SBPs. The purpose of the SBPs is to ensure that all suppliers are given a simple format to follow, so that they are able to meaningfully participate in the tender process. The SBPs vary, depending on the nature of what is to be procured. The provision of services, supplies and works all are provided in different SBPs. The SBPs are found easily on the PPADB website.[142] While this technological advancement is welcome, it is submitted that not all potential suppliers have access to the internet in order for them to be able effectively to participate in the procurement process.

Further, it is submitted that the PPADB should find ways of balancing the interests of non-internet access suppliers and those that can easily access the internet. In other words, the use of the SBPs should not be viewed as a hindrance to promote competition in public procurement.[143] After all, Botswana uses procurement as a tool to empower its citizens to participate in the economic intercourse of the country.

Another challenge that has been identified in the use of SBPs is that it is the responsibility of the procuring entity to first select the SBP that it wishes to use for its procurement.[144] For example, under the works SBP there is a variety of different packages from which the procuring entity should select what best suits its procuring needs, as shown below:

- WOR 01- Building; Reserved; Small Value
- WOR 02- Building; Reserved; Small Value; Refurbishment
- WOR 03- Building; 30% Reserved; High Value; Refurbishment; No site visit
- WOR 04- Building; 30% Reserved; High Value; Refurbishment; Site visit
- WOR 05- Building; Not Reserved; High Value; Refurbishment; No Site visit
- WOR 06 - Building; Not Reserved; High Value; Refurbishment; Site visit
- WOR 07 - Civil; Reserved; Small Value; No Site visit
- WOR 08 - Civil; Reserved; Small Value; Site visit
  WOR 09 - Civil; Reserved; High Value; Site visit [145]

In practice, this means that if the procuring entity selects the wrong SBP then it will not be possible to attract competent bids, thereby failing in the objectives of procurement. Further, it is submitted that it will also be difficult for the suppliers to

142 PPADB 2008 http://www.ppadb.co.bw/sbpac.htm.
143 Bolton 2016 *Potchefstroom Electronic Law Journal* 25-26.
144 PPADB *Operations Manual* 33.
145 PPADB 2008 http://www.ppadb.co.bw/sbpac.htm.

detect that the procuring entity has selected the wrong SBP unless the suppliers have access to the pre-tender information.

The pre-tender information is not publicly available unless there is a challenge in the procurement process.[146] It is therefore submitted that the procuring officials have to be well trained to enable the procuring officials to select the most competent SBP for the attainment *inter alia* of value for money.

It should now be possible to engage in an informed discussion of the procurement institutions in Botswana and how they implement the above procurement laws and regulations.

4.3.2 Procurement institutions

As already mentioned, Botswana has simplified its procurement process by establishing a central procurement authority, the PPADB.[147] The PPADB delegates procuring authority to various procuring committees.[148] In addition, there are oversight bodies that ensure that procurement is conducted within the ambit of the law.[149] This is illustrated in the figure below:

146 Secs 27-30 of the LCA Act.
147 Sec 10 of the PPAD Act.
148 Sec 10 of the PPAD Act.
149 Kumar and Caborn "The Regulatory Framework for Public Procurement in Botswana" 36-37.

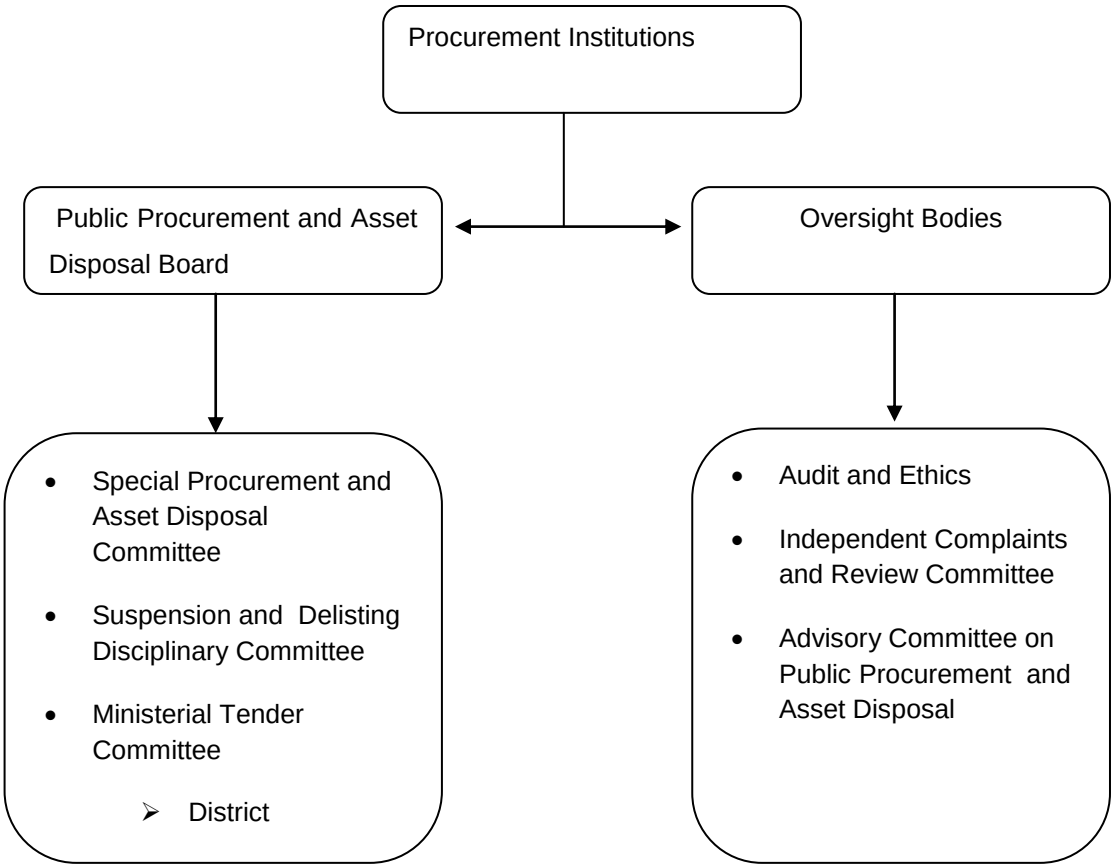

Figure 7: Botswana domestic procurement institutions

In the execution of its procurement functions, the PPADB is supported by the following procuring institutions: the Ministerial Tender Committee; the District Administration Tender Committees; the Independence Complaints Review Committee; the Advisory Committee on Public Procurement and Asset Disposal; the Special Procurement and Asset Disposal Committee; and Committees that operate under the auspices of local government. These are the subject of the discussion below.

4.3.2.1 Public Procurement and Public Asset Disposal Board

The PPADB is the most important entity in Botswana's public procurement process. It is established in terms of section 10 of the PPAD Act.[150] The PPADB is composed of seven members and comprises of a full-time Executive Chairperson,[151] three full-

[150] There is hereby established a body to be known as the Public Procurement and Public Asset Disposal Board, which shall be a body corporate with a common seal, capable of suing and being sued in its own name and, subject to the provisions of this Act, of doing or performing all such acts or things as bodies corporate may, by law, do or perform.

[151] Section 11(a).

time members[152] and three part-time members.[153] The PPADB is appointed by the Minister[154] and its tenure of office is limited to eight years, which are divided into two terms of four years each.[155] Extension to the second four-year term depends on whether or not, the Minister in exercising his powers chooses to reappoint any Board Member whose first initial four-year term would have expired.[156]

4.3.2.1.1 Functions and powers of the PPADB

In terms of section 26(a) of the PPAD Act,[157] the PPADB must ensure that all procurement takes into account *inter alia* the principles of open, competitive and changing external obligations.

Furthermore, the PPADB has the task of standardising procuring items,[158] the aggregation of procurement, and disposal activities.[159] The PPADB must ensure that in the process of procurement and in terms of the provisions of section 26(d), the principles of competition, competitive methods of procurement and the attainment of best value for money are adhered to.[160] In addition, there is a need for fair and equitable treatment of all contractors, as provided for in section 26(e).[161]

Compliance with key principles of accountability and transparency as per section 26(f),[162] as well as integrity in terms of section 26(g),[163] must be ensured. An added responsibility of the PPADB in terms section 27[164] is that it must ensure that all

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152 Section 11(b).
153 Section 11(c).
154 Section 12.
155 Section 14.
156 Section 14(b).
157 Unless otherwise provided for in this Act or any other enactment, the Board shall ensure that all public procurement and asset disposal entities, in making their decisions, take into account the principles of an open, competitive economy and changing external obligations in relation, generally to trade and specifically to procurement, which dynamically impact on a continual basis on domestic procurement policy and practice.
158 Section 26(b).
159 Section 26(c).
160 Competition among contractors by using the most efficient and competitive methods of procurement or disposal to achieve the best value for money.
161 Fair and equitable treatment of all contractors in the interest of efficiency and the maintenance of a level playing field.
162 Accountability and transparency in the management of public procurement and in the disposal of public assets in order to promote ownership of the system and minimize challenges thereto.
163 Integrity, fairness of and public confidence in the procurement, disposal process.
164 The Board shall ensure that all procuring and disposing entities comply fully with all the provisions of the Act, irrespective of the means of procurement, disposal, or the assets to be procured or to be disposed of.

procuring entities fully comply with the PPADB Act. Moreover, the PPADB has the task of drawing up SBPs in terms of section 29.[165]

The purpose of the SBPs, as discussed above, is to ensure that no one entity draws up its own bidding package which may be inconsistent with the objectives of the PPAD Act.[166] It makes it easier for aggrieved parties to identify any anomalies in the procurement process. This provision is a welcome development, as it minimises the chances of a tailor-made bidding process that may be used to favour particular suppliers. Adherence to the SBPs seems not to be cast in stone, as section 31 allows some derogations, coupled with acceptable reasons.[167]

The PPAD Act has elevated the legal status of the SBPs in that once a tender notice has been issued incorporating the SBPs, then the correspondence between the bidder and procuring entity shall be deemed to form part of the contract and thus has legal validity, as provided for in terms of section 34.[168] This approach taken by the PPAD Act seems to be a departure from the general principle of law of contract.[169] It is trite under law of contract that a notice of tender that is issued or published as envisaged in section 34 is analogous to an invitation to treat made to the whole world.[170] Under the general principles of law of contract, both the offeror and the offeree should have serious intention to be bound by the legal obligations that emanate from the proposed contract.[171]

It is widely accepted that once a tender notice has been issued, some tenderers who wish to try their fortune also bid for the same tender without the intention of creating

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165 The Board shall adopt and circulate, and amend where necessary, standardized bidding packages and public assets disposal contracts which shall be on a mandatory basis by all procuring and disposing entities.

166 Kumar and Caborn "The Regulatory Framework for Public Procurement in Botswana" 41.

167 In exceptional cases, the Board shall permit a procuring or disposing entity to depart from sections 29 and 30, based on prior written application to the Board detailing the variation being sought with supporting justifications, satisfactory to the Board.

168 From the time a Tender Notice is issued all (a) correspondence between the bidder and the procuring entity or the Board (including the bidding package) up to the point of adjudication by the Board; and (b) communications between a bid winner and procuring entity or the Board up to the point of signing of the contract and thereafter, throughout the period of the execution and completion of the contract, shall be deemed to form part of the contract and thus have legal validity.

169 van Huyssteen, van der Merwe and Maxwell *Contract Law in South Africa* 143-144.

170 van Huyssteen, van der Merwe and Maxwell *Contract Law in South Africa* 143-144.

171 Bhana *Constitutionalising Contract Law* 73.

legally binding obligations.[172] The effect of section 34 is that it binds even the non-serious bidders, which may create unnecessary litigation. It is submitted that the application of section 34 should take legal effect after the pre-qualification stage. This seems to be more logical in the sense that the PPADB or the procuring entity as the case may be will have evaluated the bids in an effort to eliminate pretenders and chancers from the procurement of a particular service.

Making section 34 applicable from the reception of all tenders may create a legal nightmare for the PPADB or the procuring entity. Furthermore, as intimated earlier, an invitation for tenders is an invitation to treat made to the entire world. In the leading case of *Bloom v American Swiss Company*[173] an offer made to the whole world regarding the reward of information that led to the arrest of thieves was held not to be legally binding. This should be balanced by the words of Blackburne J in *Smith v Hughes,*[174] where it was stated *inter alia* that:

> If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms of the proposal by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.

According to Thejane,[175] in the formation of a contract there must be a meeting of minds of the parties or subjective consensus. If the PPADB advertises a tender but one of the bidders is just taking a chance, surely there is no meeting of minds as envisaged by the general principles of offer and acceptance. This is typical of a tender that has been published. It is similar to an invitation to treaty.

The legal effect of an invitation to treaty has been discussed in a number of legal cases, the leading cases being *Carllil v Carbollic Smoke Ball*[176] and *Crawley v Rex,*[177] where it was held *inter alia* that advertisements do not constitute binding contracts. A tender notice issued in terms of section 34 falls within the ambit of an advertisement and should not have a legal effect, especially before the pre-qualification of the tenders. It is for this reason that most contracting authorities put a

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172 OECD *Guidelines for Fighting Bid Rigging in Public Procurement* 2-3.
173 1915 AD 100.
174 *Smith v Hughes* (1871) LR 6 QB 597 607.
175 Thejane 2012 *Potchefstroom Electronic Journal* 516.
176 1893 1 QB 256.
177 1909 TS 1105.

disclaimer that they have the right to cancel the tender especially before the pre-qualification stage in order to cushion themselves against unintended litigation.[178]

In the spirit of transparency and accountability there is an obligation on the PPADB to guarantee that the tender notice should expressly state the evaluation requirements that the bidders must comply with in terms of section 35(1).[179] Some of the requirements that must be contained in the advert include the procurement methods and information about how the bids will be qualified.[180]

Section 36,[181] prohibits the use of external factors other than those prescribed in the tender notice when determining the winning bid. The intention of the legislature in section 36 can be inferred to mean that there must always be a fair ground of competitive bidding and no outside information should be used to determine a bid if that information has the effect of prejudicing other bids.

One measure to curb tampering with bids by the procurement entity is that the PPAD Act proscribes any form of alteration to the advertised bid by the procuring entity without the approval of the PPADB, as stated in section 41.[182]

This prohibits bias and the manipulation of the procurement process by the procuring entity.[183] Research has shown that there are many cases where the initially advertised tender was later re-advertised with new conditions to the prejudice of those bidders who had tendered according to the first advertisement only.[184] In

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178 Hogg and Monahan *Liability of the Crown* 218.

179 The procuring and disposing entity shall (a) in all bid packages, provide for instructions, the criteria to be used in the evaluation process, the value and weights to be attached to each criterion, and the evaluation procedure or methodology to be followed in the conduct of the evaluation and (b) establish which procurement methods and procedures shall apply in each case and class of bids, except in emergencies, when either sole procurement or competitive negotiation methods and procedures may apply.

180 PPADB *Operations Manual* 74.

181 In the evaluation and adjudication of a bid, no factor outside those explicitly stated in the bidding package shall be taken into account by the evaluators or the adjudicators in arriving at a recommendation or in making an award, unless there are extenuating reasons to use additionally, an industry standard or best practice.

182 Any alteration to the conditions of an awarded bid either before or in the course of its implementation by a procuring entity, that in effect (a) could have impacted on the evaluation and adjudication ranking of the bid and thus the choice of contractor; (b) amends the nature of the awarded bid terms of contract cost, implementation schedule, components, aggregation or splitting, etc and (c) determines the awarded bid, shall require the prior written approval of the Board.

183 PPADB *Operations Manual* 115.

184 GIACC and Transparency International 2008 http://www.http://giaccentre.org.

instances where the intention of the re-advertised tender is to commit public procurement corruption, the invitation may be advertised with certain new requirements which the initial tenderers may not be privy to.[185] Another check that is provided in the PPAD Act is the requirement that all procuring entities in Botswana must submit to the PPADB an end-of-activity report detailing with the evaluation and adjudication of each bid, in compliance with section 46.[186]

The end-of-activity report must contain the following six detailed pieces of information: (i) estimated, awarded and final cost, or revenue;[187] (ii) any changes in scale, complexity, component and outputs during implementation vis-à-vis the awarded bid;[188] (iii) the achievement of performance indicators as per the specifications;[189] (iv) variations and sources;[190] (v) cost escalation and sources;[191] (vi) the contractor's performance record. These requirements help to facilitate performance evaluation and monitoring by the PPADB and the preparation of statistical records for management analyses and the Annual Performance Report.[192]

The end-of-activity report should be submitted to the PPADB before the final payment is made to contractor.

In terms as section 53(1)[193] the PPADB Act compels the PPADB to act upon complaints and to offer its good office to amicably resolve such disputes in terms of section 54.[194]

The PPAD Act further specifies the methods of procurement that are accepted in terms of section 55[195] such as electronic and paper forms of invitations to tender.

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185 GIACC and Transparency International 2008 http://www.http://giaccentre.org.

186 All procuring and disposing entities shall submit to the Board, in respect of each bid, an end-of-activity report not later than the date of final payment to the contractor, detailing the activity.

187 Section 46(a).

188 Section 46(b).

189 Section 46(c).

190 Section 46(d).

191 Section 46(f).

192 Section 46(g).

193 The Board shall act upon complaints by procuring and disposing entities, contractors, the media and the public in respect of any party to a procurement or disposal activity, against whom or which an allegation of impropriety is made.

194 In the event of a dispute amongst procuring or disposing entities or between such entities and the contractors, the Board shall, when requested by the parties to such a dispute, offer its good office to amicably resolve such disputes.

The PPAD Act makes special recognition of e-procurement in section 56.[196] E-procurement is a recent development for most developing countries, and the PPAD Act drafters had the insight to legislate for such an eventuality.[197]

In order to ensure the effective administration and implementation of the PPAD Act, the PPADB is mandated to establish different committees, and the PPADB shall delegate power to these committees as provided for in section 50(1).[198] Other procuring committees that assist in public procurement are summarised in the table below:

Table 12: Other procuring committees in Botswana

Procuring committee	Summary of functions
Special Procurement and Asset Disposal Committee	The Special Procurement and Asset Disposal Committee (hereafter SPADC) is provided for in terms of section 63 (1) of the PPAD Act.[199] The SPADC is comprised of five members. The main functions of the SPADC are to procure the most confidential works, supplies and services of the Botswana Defence Forces, the Directorate of Intelligence and Security, and the Botswana Police Service.[200]
Ministerial Tender Committee	The Ministerial Tender Committee (hereafter MTC) is established in terms of section 61 of the PPAD Act.[201] In terms of its composition, it is comprised of government officials from different ministries. Its main functions are to procure works, goods and services on behalf of the

195 Both electronic and paper forms of invitations to tender, the issuing of bidding packages, and the receipt of bid submissions shall have legal validity.

196 Where a procurement of disposal is by electronic means, the transmitter shall in each instance be responsible for the confidentiality, completeness, integrity and timeliness of the data and the document being transmitted.

197 Dza, Fisher and Gapp 2013 *Public Administration Research* 51.

198 The Board may establish Committees and Sub-committees to undertake responsibilities delegated to them by the Board under the Act.

199 The Board shall establish a Special Procurement and Asset Disposal Procurement Committee.

200 PPAD Act section 63(1) (a). In the 2012/2013 financial year of the SPADC it is reported that the SPADC approved 76% of the requests submitted to it by different procurement units. However, what is not disclosed is the nature and the value of the procurement or the departments that requested approval. 24% of the procurement was not approved in the same year: 20% was deferred and 4% was rejected. No reasons are given as to why such decisions were taken.

201 The Board shall establish Ministerial Procurement and Asset Disposal Committees and delegate authority in writing to them, for the management of aspects of the public procurement and the assets disposal process of the departments encompassed by each ministry.

Procuring committee	Summary of functions
	PPADB. The maximum threshold within which the MTC can procure is P25 million.[202]
District Administration Tender Committees	The District Administration Tender Committees (hereafter DATCs) exercise procurement authority delegated to them by the PPADB. Currently they are 24 in number and represent all the Districts in Botswana.[203] They have a threshold value of procurement to the maximum value of P2 million.
Suspension and Delisting Disciplinary Committee	The Suspension and Delisting Disciplinary Committee is established in terms of section 50 (1) of the PPAD Act.[204] It is a Committee established by the PPADB. Its main function is to investigate all procurement contract-related complaints.[205]
Audit and Ethics	In terms of section 77(1)[206] the PPAD Act compels the Auditor General to undertake an annual performance audit of the PPADB. The effect of the work of the Auditor General is that if the audit is properly done it is possible to pick up any anomalies of commission or omission by the PPADB in order to ensure that the aims and objectives of the PPAD Act are realised.[207]
Independent Complaints	The ICRC is established in terms of section 95 of the PPAD Act.[208] It is composed of five members,[209] and it is appointed by the Minister.[210]

202 In the 2013/2014 financial year the MTC received 4704 requests and approved procurement to the value of P2.5 billion.

203 PPADB 2016 http://www.ppadb.co.bw.

204 The Board may establish Committees and Sub-committees to undertake responsibilities delegated to them by the Board under the Act.

205 OAG *Report on the PPAD Board and its Committees' Performance and their Impact on the PPADB Mandate* (Performance Audit No 7 of 2011) 33; Pinielo "PPADB Cracks Whip on Contractors" Mmegi Online 9 January 2016 it was reported that "The Suspension and Delisting Committee has started cracking the whip on contractors who violate the Contractor's Code".

206 The Auditor General shall undertake an annual performance audit of the Board, its Committees, Sub-committees and procuring and disposing entities and submit his report to the Minster responsible for Finance.

207 Office of the Auditor General, The Performance Audit Report of the Public Procurement Asset Disposal Board 2006/2007.

208 There shall be established, for the purposes of this Act, a body, independent of the Public Procurement and Public Asset Disposal Board, to be known as the Independent Complaints Review Committee.

209 Section 96 The Independent Committee shall be composed of the Chairperson and four members.

Procuring committee	Summary of functions
Review Committee	The ICRC is autonomous of the PPADB. The ICRC is responsible for dealing with challenges that arise as a result of the violation of the PPAD Act and its regulations.[211]
Advisory Committee on Public Procurement and Asset Disposal	The Advisory Committee on Public Procurement and Asset Disposal (hereafter Advisory Committee) is established in terms section 110[212] and is made up 13 members.[213] The purpose of the Advisory Committee is to review the performance of the PPADB, its Committees,[214] the procuring and disposal entities and the ICRC in terms of section 112.[215]
Local authority procurement committees	The functions of the Evaluation Committee are stated in section 9 of the LCA. They include *inter alia* to evaluate the bids[216] submitted to the local authority and to ensure that the LCA has been complied with. This function extends to the evaluation of any pre-qualification where

[210] Section 97 The Chairperson and Members of the Independent Committee shall be appointed by the Minister.

[211] Section 103 outlines the modalities of who is supposed to bring matter before the Independent Committee and the nature of the dispute that should be brought before the Independent Committee.
In terms of section 103 if a contractor is not any satisfied with the manner in which a procurement contract has been awarded, that aggrieved contractor can bring that grievance to the Independent Committee in terms section 103(1)(a). The nature of the disputes that can be brought to the Independent Committee have been extended to include disputes that may occur at the registration of the tender or the tender award as provided for by section 103(1) (b) as well as 103(10(c). Furthermore, the bringing of disputes to the Independent Committee is not limited to the contractors and the procuring entity. Any members of the public can bring a procurement dispute before the Independent Committee in terms of section 103(1) (d). This means that the PPAD Act recognises the role of the public in dealing with procurement.
Public procurement by its very nature affects the public directly or indirectly, hence, it is important to clothe the public with the power to bring a dispute before the Independent Committee. It follows that if the public is not satisfied with the manner in which the Independent Committee has dealt with their complaint, the public can approach the Court. Therefore, section 103(1) (d) dispels the problematic issue of *locus standi* as it is normally the case in a number of jurisdictions. It has been observed that irregularities in public procurement affect the public. Most jurisdictions do not accord the same members of public the right to challenge such administrative anomalies in court, based on the fact the public lacks *locus standi*. As such, if civic organisations do not bring the dispute on behalf of the public, such a grievance may be left unchallenged, much to the dismay of the public.

[212] There shall be established an Advisory Committee on Public Procurement and Asset Disposal.

[213] Section 111.

[214] The distinction between the Independent Committee and the Advisory Committee is that the Independent Committee reviews disputes between, the contractors and the procuring entities, decisions of the Board, and public procurement irregularities brought by the public, whereas, the Advisory Committee has the overall mandate to oversee all the bodies under the PPAD Act and their functions with regards to their compliance to the PPAD Act.

[215] The Advisory Committee shall meet semi-annually and its functions shall be to review the performance of the Board, its Committees, the procuring and disposal entities and the Independent Committee.

[216] LCA Section 9 (a).

Procuring committee	Summary of functions
	necessary. The final function of the Evaluation Committee is to recommend the best bid to the Adjudication Committee.[217] The Adjudication Committee is headed by an Accounting Officer [218] and is comprised of 10 members.[219] It is responsible for the final awarding of the government contract.

The above discussion has revealed that Botswana has sound and legally constituted procuring institutions.[220] These procuring institutions are established in terms of the PPAD Act.[221] At the helm of procurement is the PPADB, which has the main task of administering the entire procurement process.[222] The PPADB delegates procurement functions to other procuring committees such as the MTC and DATC, each with its own procurement threshold.[223] Further, there are other procuring committees at local government level.

In addition, sensitive procurement is done by the SPADC.[224] Procurement complaints are administered by the ICRC.[225] Oversight of the entire procurement process is done by the Audit Committee and to a limited extent by the Advisory Committee.[226] All these procuring institutions must comply with procuring principles. The most important procuring principles have already been referred to in the above discussion.[227] Below is summation of these principles.

4.3.3 Procurement principles

Having discussed the above procurement legal framework and the procuring institutions, the following procurement principles can be deduced: transparency; fairness; accountability; competitiveness; value for money; integrity; and equality.[228] These principles are the foundation of Botswana's public procurement system and

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217 LCA Section 9 (2) (c).
218 LCA Section 11 (1).
219 LCA Section 11 (3).
220 Kumar and Caborn "The Regulatory Framework for Public Procurement in Botswana" 34-35.
221 Kumar and Caborn "The Regulatory Framework for Public Procurement in Botswana" 30-31.
222 Kumar and Caborn "The Regulatory Framework for Public Procurement in Botswana" 28-29.
223 Kumar and Caborn "The Regulatory Framework for Public Procurement in Botswana" 30.
224 Kumar and Caborn "The Regulatory Framework for Public Procurement in Botswana" 30.
225 Kumar and Caborn "The Regulatory Framework for Public Procurement in Botswana" 30.
226 Kumar and Caborn "The Regulatory Framework for Public Procurement in Botswana" 29.30.
227 Kumar and Caborn "The Regulatory Framework for Public Procurement in Botswana" 41-43.
228 PPADB *Operations Manual* 140.

have been reaffirmed, especially in the selection of procurement methods.[229] According to the OM, whether the tendering procedure is open, restricted, direct or emergency procurement, procuring units are to uphold the above principles.[230] These principles are consistent with the international procurement principles identified in Chapter Two.[231]

4.3.4 Reflections

The focus of the above discussion was to give an outline of Botswana's procurement process. It was discovered that Botswana reformed its procurement legislation in 2001 with the enactment of the PPAD Act. In addition, PPAD Regulations as well as ICRC Regulations were enacted to amplify the provisions of the PPAD Act. The procurement process is clarified in terms of the OM. Institutionally, the PPADB, MTC, DATC, ICRC and Audit Committees all play a pivotal role in the procurement process. When administering procurement, there is a legal obligation for Botswana to adhere to procurement principles such as transparency, accountability, fairness, competitiveness and integrity.

It is against this background that one has to discuss how the above procurement process is affected by corruption and the use of the criminal measures, administrative measures, institutional measures and civil activism measures to combating public procurement corruption in Botswana.

4.4 Public procurement corruption in Botswana

This part focuses on public procurement corruption in Botswana and how Botswana uses the four identified measures of combating public procurement corruption. This part proceeds as follows: a definition of public procurement corruption in Botswana; a description of the types and forms of public procurement corruption in Botswana; a description of four causes of public procurement corruption in Botswana; and lastly a discussion of the use criminal measures, administrative measures, institutional measures and civil activism measures to combating public procurement corruption in Botswana.

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229 PPADB *Operations Manual* 140.
230 PPADB *Operations Manual* 71-72.
231 See para 2.6.

4.4.1 Definition of public procurement corruption

One must recall that in this study a new definition of public procurement corruption has been suggested. This study defines public procurement corruption as the intentional abuse of entrusted public authority, devoid of any legal defence, by a procuring official for personal gain or other satisfaction (which includes but is not limited to emotional or psychological satisfaction) with or without the inducement of a contractor, a sub-contractor or an agent of the contractor or sub-contractor.[232]

Public procurement corruption is not defined in Botswana. The *Corruption and Economic Crime Prevention Act* (hereafter CECA),[233] in particular section 23, which is the primary statute that regulates corruption and other related corrupt offences, does define corruption, let alone public procurement corruption.

The CECA mentions offences that can be committed by a public officer and a supplier with respect to corruption. In particular, section 24 of the CECA makes reference to the receiving and offering of a gift by a public official for corrupt purposes as forming part of corruption. This extends to public procurement corruption. Although the CECA does not expressly define public procurement corruption, it lists offences related to public procurement corruption.[234] These offences can best be understood under the discussion on types and forms of public procurement corruption, as shown below.

4.4.2 Types and forms of public procurement corruption

The types and forms of public procurement corruption in Botswana are created in part IV of the CECA. They are the following: receiving of valuable consideration;[235] corruption by or of a public officer;[236] corruption in respect of an official transaction;[237] the acceptance of a bribe by a public officer after doing an act;[238] the promise of a bribe to a public officer after doing an act;[239] corrupt transactions by or

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232 See para 1.6.
233 Act 13 of 1994, also known as Chapter 08:05.
234 Part IV of the CECA Act.
235 Section 23 (a).
236 Section 24(1).
237 Section 28(1).
238 Section 26.
239 Section 27.

with agents;[240] bribery for giving assistance in regard to a contract;[241] bribery for procuring the withdrawal of a tender;[242] conflict of interest;[243] and the possession of unexplained property.[244]

In Chapters One and Two the types and forms of public procurement corruption have been identified *inter alia* as bribery, collusion, bid rigging, complementary bidding, and kick-backs.[245] Although Botswana does not classify the types and forms of public procurement as discussed in Chapters One and Two,[246] this is of no consequence because however a corrupt act manifests itself, if that particular act is identified as a criminal act that is sufficient for the purposes of combating public procurement corruption.[247] Therefore, what remains to be discussed are the causes of the above types and forms of public procurement corruption.

4.4.3 Causes of public procurement corruption

As indicated in Chapter Two, this study has classified the causes of public procurement corruption into the following four categories: (i) the personal circumstances of the procuring official; (ii) the personal circumstances of the politician; (iii) political transition; and (iv) economic transition.[248] The discussion below proceeds with the personal circumstances of the procuring official.

4.4.3.1 Personal circumstances of the procuring official

The procuring official's personal susceptibility to public procurement corruption did not emerge soon after the political independence in 1966. However, the period 1980-2001 saw an increase in occurrences of public procurement corruption. One of the leading cases that demonstrated this was the famous case of *Zakhem*[249].

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240 Section 28 (1).
241 Section 29 (1).
242 Section 30 (1).
243 Section 31 (1).
244 Section 34.
245 See para 2.8.5.
246 See para 2.10.3.2.2.
247 Sebudubudu *Combating Corruption in Southern Africa* 132.
248 See para 2.9.
249 Sebudubudu *Combating Corruption in Southern Africa* 132.

Zakhem case

The famous *Zakhem* case was one of the ground-breaking cases that exposed public procurement corruption in Botswana in the early 1990s and the susceptibility of procuring officials.[250] At the heart of this case was Zakhem Construction, which is a renowned international construction company that is involved in huge construction projects in African countries.[251] A bribe of P100 000 was paid to a Director of the Department of Roads.[252] This bribe was paid by Nicholas Zakhem in order to influence the awarding of a government construction tender for the construction of a public road in Monametsana-Rasesa.[253]

The awarding and receiving of this bribe was contrary to sections 384 and 385 of the *Penal Code*.[254] In the end, a conviction of corruption in violation of sections 384 and 385 of the *Penal Code* were meted out against the Director.[255] The Director was sentenced to an effective four-year jail term. Summing up this case, Sebudubudu[256] noted that Zakhem was a self-confessed fraudster, who had admitted to inflating government tenders.[257]

The conviction and sentencing of the Director was an achievement of the then newly established DCEC.[258] It demonstrated that even though the Director was highly remunerated, he could not resist the temptation of public procurement corruption. The *Zakhem* case shows that paying high salaries to procuring officials does not automatically reduce occurrences of public procurement corruption. It is the personal

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250 Sebudubudu *Combating Corruption in Southern Africa* 123.

251 Zakhem 2017 http://www.zakhem.co.uk/.

252 The Director was one of the most influential procuring officials involved in the awarding of this contract.

253 Sebudubudu *Combating Corruption in Southern Africa* 123.

254 Law No 2 of 1964.

255 Sebudubudu *Combating Corruption in Southern Africa* 123.

256 Sebudubudu *Combating Corruption in Southern Africa* 123.

257 Further, Sebudubudu states that "… during his bribery spree, Zakhem maintained strong contacts with cabinet ministers, government officials and some members of the ruling Botswana Democratic Party (BDP), trading money favours. It was also alleged that Nicholas Zakhem had links with cabinet ministers, as well senior officials at Attorney General's Chamber, Directorate on Corruption and Economic Crime and Administration of Justice. At one point during the court case, Zakhem claimed to have a list of influential people whom he had bribed. Nicholas Zakhem became a prosecution witness in the above case and was given immunity from prosecution". Sebudubudu *Combating Corruption in Southern Africa* 123-125.

258 Sebudubudu *Combating Corruption in Southern Africa* 123.

ethical conviction of the procuring official that eventually exacerbates or reduces public procurement corruption, as already discussed in Chapter Two.[259]

Surprisingly, Zakhem became a prosecution witness, which exempted him from criminal liability.[260] Zakhem had confessed and boasted publicly of having connections with government ministers and other high-ranking government officials.[261] He also boasted of having connections in the BDP, with whom he had clandestine deals.[262] Zakhem's public utterances about government and his political connections in the BDP highlighted the role that the personal circumstances of politicians in Botswana play in the commission of public procurement corruption.

4.4.3.2 Personal circumstances of the politicians

Text books scandal

In 1990 a tender to supply various teaching materials was awarded to a company called International Project Managers.[263] The value of the contract was estimated to be P27 million.[264] International Project Managers had subcontracted part of the greater part of this contract to a Botswana-based company.[265] The Botswana-based company was given P23 million in order to execute their part of the contract.[266] Following a very strong public outcry over alleged corruption in that particular contract, the then President established a Presidential Commission of Inquiry.[267] The Presidential Commission of Inquiry found *inter alia* that the tender for the supply of the textbooks had been corruptly concluded.[268]

The basis of its findings were that: (i) an open tender was not conducted and this was in violation of the tender procedure in terms of the Supplies and Regulation

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259 See para 2.9.1.
260 Sebudubudu *Combating Corruption in Southern Africa* 124.
261 Sebudubudu *Combating Corruption in Southern Africa* 124.
262 Sebudubudu *Combating Corruption in Southern Africa* 124.
263 Good 1994 *The Journal of Modern African Studies* 499.
264 Good 1994 *The Journal of Modern African Studies* 499.
265 Good 1994 *The Journal of Modern African Studies* 499.
266 Good 1994 *The Journal of Modern African Studies* 499.
267 Sebudubudu *Combating Corruption in Southern Africa* 118.
268 Sebudubudu *Combating Corruption in Southern Africa* 117.

Procedures; (ii) the Central Tender Board did not approve the tender; (iii) the head of the local company that was paid P27 million was an insolvent.[269]

Although no politician was arrested, the alleged involvement of high-ranking politicians influenced the creation of the DCEC.[270] Over the last five years a number of politicians have been implicated in various public procurement corruption cases.[271]

For instance, allegations of corruption in the awarding of lucrative defence and security procurement contracts to the twin brothers of the current President have been widely reported.[272] In addition, a number of politicians, particularly from the ruling BDP party, have been linked with public procurement corruption resulting *inter alia* from conflict of interest.[273] However, no high-ranking politician has been convicted in the last five years based on these allegations.[274] The government has not demonstrated the political will to pursue these allegations of public procurement corruption.

This unwillingness by the government to decisively intervene in cases of public procurement corruption fits well into the definition of the personal circumstances of politicians advanced in this study, which requires the use of public procurement corruption as a tool to consolidate political power (personal and that of the political party). In essence, the government is turning a blind eye to public procurement corruption allegedly committed by some of its high-ranking political figures in return for political patronage.[275] The government then uses this political patronage to consolidate its power.[276]

It is submitted that the lacklustre state reaction to these allegations of public procurement corruption is retrogressive. It has a negative impact, in the long run, as it undermines the rule of law, perpetuates poverty and also creates a bad perception amongst the international community, regional players, the *Batswana,* and other

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269 Sebudubudu *Combating Corruption in Southern Africa* 118.
270 A detailed discussion on the functions of the DCEC is conducted below.
271 Molomo, Molefe and Seabo *Amid Perceived Escalating Corruption, Batswana* 2.
272 Sunday Standard Khama *One of Beneficiaries of Elite Corruption* 1.
273 Molomo, Molefe and Seabo *Amid Perceived Escalating Corruption, Batswana* 3.
274 Molomo, Molefe and Seabo *Amid Perceived Escalating Corruption, Batswana* 2.
275 Seleke"In Botswana Corruption is now Worse than Prostitution" 1.
276 Diamond *In Search of Diamonds* 86.

public procurement stakeholders.[277] One cannot separate the negative impact of the personal circumstances of politicians on public procurement corruption from that of political transition.

4.4.3.3 Political transition

This study has defined political transition as the transfer of political power from a colonial master to a new government. Botswana, a former British protectorate, received independence in 1965, and formally celebrated its independence in 1966[278] with Seretse Khama as its first President. He was the leader of the BDP, which he had founded in 1962.[279] At the time of the political transition Botswana did not have any meaningful or well-coordinated political and economic systems.[280]

As noted by Sebududu[281] and affirmed by Fombad,[282] Botswana had a peaceful transition, and the opposition parties that existed then were not acrimonious against the BDP ruling party.[283] This can be attributed to a number of factors, some of which include the fact that Botswana did not have such extensive economic resources as to create conflict for their control.[284] The economy, as observed by de Jager and Taylor,[285] was based largely on traditional cattle farming, which was mostly in the control of peasant farmers.

It is common cause that there is a direct relationship between political transition and public procurement corruption.[286] Political transition can create an environment conducive to combating public procurement corruption on the one hand, while on the other it can create an environment that perpetuates public procurement corruption.[287] As far as Botswana is concerned, the country had to build its political and economic

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277 Matlhare *An Evaluation into the Role of Directorate of Corruption and Economic Crime* 1.
278 Sebudubudu "The Institutional Framework of the Developmental State in Botswana" 79.
279 This was formerly known as the Bechuanaland Democratic Party. It assumed the name Botswana Democratic Party after the country changed its name from Bechuanaland to Botswana.
280 Bauer and Taylor *Politics in Southern Africa: State and Society and Transition* 81.
281 Sebudubudu "The Institutional Framework of the Developmental State in Botswana" 79-80.
282 Fombad 2008 *Buffalo Law Review* 1022.
283 Fombad "Constitutional Reforms and Constitutionalism in Africa" 1027.
284 Fombad "Constitutional Reforms and Constitutionalism in Africa" 1058.
285 de Jager and Taylor "Democratic Contestation in Botswana" 27.
286 Rose-Ackerman *The Political Economy of Corruption* 32.
287 Rose-Ackerman *The Political Economy of Corruption* 32.

landscape from scratch at the time of the political transition.[288] Thus, one can safely conclude that the political transition that happened in 1965 did not have any influence on public procurement.

However, what has created opportunities for public procurement corruption in recent years in Botswana has been the change in government administration, although it occurred within the same political party.[289] This is further discussed below. For now, attention is given to economic transition.

4.4.3.4 Economic transition

4.4.3.4.1 Discovery of diamonds

Economic transition has been defined in this study as the transfer of economic power by the colonisers to the new government, in the sense that the new government takes control of all the relevant institutions such as the Treasury or Ministry of Finance, as the case may be. In this definition the government does not take over private business. The notion of economic transition preferred in this study leans more towards non-nationalisation.

The discovery of diamonds in Orapa in 1967 did not immediately open the door to corruption,[290] although it brought with it massive economic interest from all over the world.[291] Botswana was thrown out of obscurity into the limelight of global economic opportunity.[292] The economy of Botswana slowly began to grow. There was demand for proper infrastructure development in the form of roads, schools, hospitals, new government offices and other such related infrastructure.[293] Most if not all of the infrastructure was being funded from diamond revenue in these formative years, before the international and regional aid agencies became active in the region.[294]

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288 Mwakikagile *Botswana: Profile of a Nation* 21.
289 Jerven *Economic Growth and Measurement Reconsidered in Botswana, Kenya, Tanzania* 97.
290 Acemoglu, Johnson and Robinson "An African Success Story: Botswana" 2-3.
291 Hanson "Botswana: An African Success Story Shows Strains" 1.
292 Hanson "Botswana: An African Success Story Shows Strains" 1.
293 Jerven *Economic Growth and Measurement Reconsidered in Botswana* 168.
294 Lewin *Botswana's Success: Good Governance, Good Policies, and Good Luck* 81.

At that time of the discovery of diamonds Botswana did not have a well-trained public service to handle the huge procurements that the country required.[295] The demand for such momentous decisions to be taken by the officials of the poorly capacitated government created public procurement corruption opportunities in Botswana.[296] The country was just not ready to handle such procurements. Isolated incidents of public procurement corruption, especially in the form bribery, began to occur, and then they began to occur more frequently. Examples are the Textbook scandal and the IPM cases discussed above.[297]

One may safely conclude that the economic transition, especially the discovery of diamonds and the ensuing infrastructure development, exposed the lack of integrity in the politicians, procuring officials and the suppliers. The increase in public procurement corruption has worsened, especially in the last ten years, and has tainted the current administration in particular.[298]

However, the government has put in place legal measures try to combat public procurement corruption. These measures have been classified as (i) criminal measures; (ii) administrative measures; (iii) institutional measures and (iv) civil activism measures, and are the subject of the discussion below.

4.5 Measures for Combating Public Procurement Corruption

Botswana has been consistently ranked as the least corrupt African country by TI for the last sixteen consecutive years.[299] This does not mean that Botswana is free from public procurement corruption, as already described above.[300] In acknowledging that public procurement corruption does take place in Botswana, though not at unprecedented levels, and that it is confronted with the need to keep public procurement corruption under control, the country has put in place a number of anti-corruption initiatives as part of its general anti-corruption strategy.[301] Embedded in

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295 OECD *Methodology For The Assessment Of The Benchmarking Tool* 9.
296 OECD *Methodology For The Assessment Of The Benchmarking Tool* 9.
297 Sebudubudu *Combating Corruption in Southern Africa* 118.
298 Sebudubudu "The Evolving State of Corruption and Anti-Corruption Debates in Botswana" 5-6.
299 Transparency International 2015 http://www.transparency.org.
300 Ganahl *Corruption, Good Governance and the African State* 243.
301 Mwamba *An Evaluation into the Anti-Corruption Initiatives in Botswana* 14.

the general anti-corruption strategy are public procurement corruption criminal measures.

4.5.1 Criminal measures

Botswana's criminal law has been influenced by its colonial domination by the British, who treated it as an offshoot of the Cape Colony.[302] Botswana's legal system therefore developed as a derivative of the Roman Dutch Law, which was the basis of the law in the Cape, and the country's criminal law was no exception.[303] The use of Roman-Dutch criminal law principles largely influenced the codification of criminal law in Botswana in 1964 with the introduction of the *Penal Code*.[304]

Botswana's criminal law has since been further developed through the influence of the Constitution, judicial activism and other statutes as demonstrated below.[305]

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302 Nsereko *Criminal Law in Botswana* 22.

303 The British High Commissioner who was in charge of Bechuanaland (now Botswana) as far back as 1891, through section 19 of the General Proclamation of 10 June 1891 declared the use of Roman Dutch-Law in Botswana. Section 19 provided that: Subject to the foregoing provisions of this Proclamation in all suits, actions, or proceedings, civil or criminal, the law to be administered shall, as nearly as the circumstances of the country will permit, be the same as the law for the time being in force in the Colony of the Cape of Good Hope, provided that no Act passed after this date by Parliament of the Colony of the Cape of Good Hope shall be deemed to apply to the said territory.

304 Act 2 No of 1964.

305 Nsereko *Criminal Law in Botswana* 48-49.

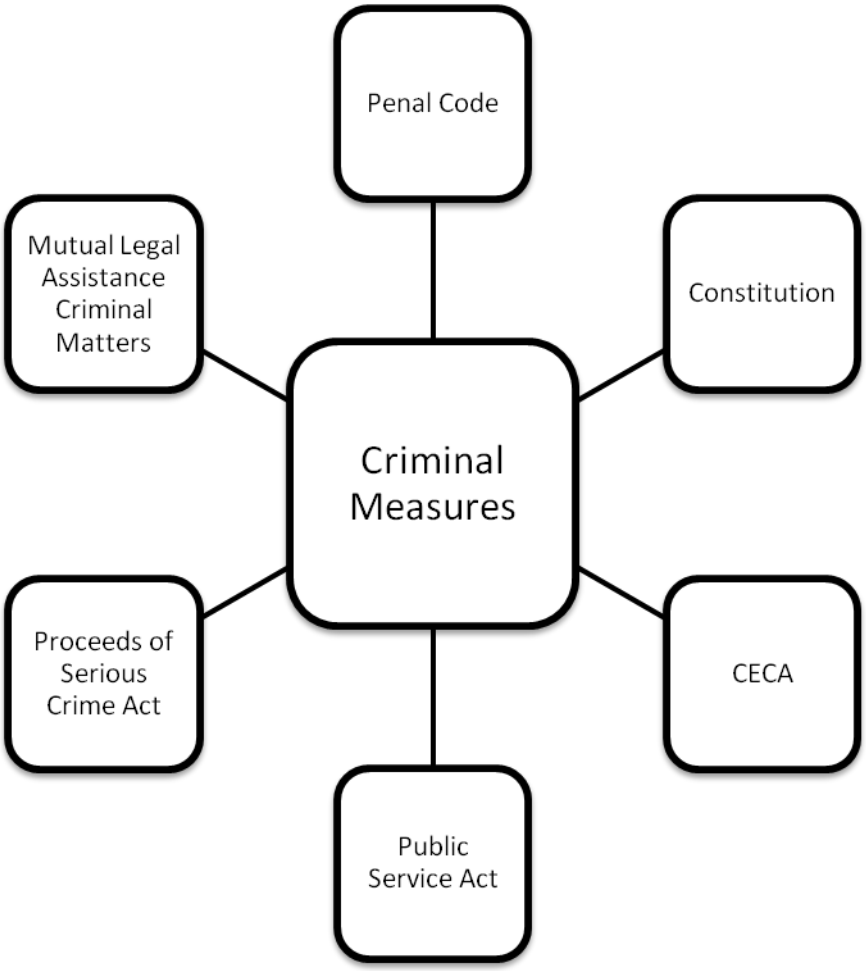

Figure 8: Botswana Criminal Measures

The sources of Botswana's criminal law today that are relevant to combating public procurement corruption are the following: (i) the Constitution;[306] (ii) the *Penal Code*;[307] (iii) the CECA;[308] (iv) the *Public Service Act*;[309] (v) the *Proceeds of Serious Crime Act*;[310] and (vi) the *Mutual Legal Assistance in Criminal Matters Act*.[311] This legislation is discussed below to the extent that it is relevant to curbing public procurement corruption. These laws are enforced through the following institutions: (i) the Directorate on Corruption and Economic Crime (hereafter DCEC); (ii) the

306 Law No 83 of 1966.
307 Law No 2 of 1964.
308 Act 13 of 1994.
309 Act 30 of 2008.
310 Act 19 of 1990.
311 Act 20 of 1990.

Judiciary; (iii) the Directorate of Public Prosecutions (hereafter DPP); (iv) the Botswana Police Force.[312]

4.5.1.1 Penal Code

Upon its enactment in 1964, the *Penal Code* was the main instrument that was used to criminalise acts of corruption.[313] Its provisions dealing with corruption were not tested in Court until after 1966, but it remained as the foundation legislation for punishing corruption. One of the first major reported cases of corruption that tested the *Penal Code* involved Engineer Kunz in 1975.[314] Although details of what actually transpired are sketchy, it is recorded that the corrupt engineer was convicted and sentenced to an effective nine-year jail term[315] as punishment for corruption.

The following sections of the *Penal Code* deal specifically with the issue of corruption and extend to public procurement corruption. Section 99 deals with official corruption and in the process attempts to define corruption.[316]

In the context of public procurement corruption, section 99 targets government employees but excludes employees in parastatals and other government organs which are involved in public procurement.[317] Furthermore, section 99 does not apply to the private sector. On a related note, section 100 punishes public procurement corruption that takes the form of extortion.[318]

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312 These Institutions are discussed below under "institutional measures".

313 Nsereko *Criminal Law in Botswana* 48.

314 Sebudubudu *Combating Corruption in Southern Africa* 116.

315 Sebudubudu *Combating Corruption in Southern Africa* 116.

316 Any person who "(a) being employed in the public service and being charged with the performance of any duty by virtue of such employment, corruptly solicits, receives, or contains, or agrees or attempts to receive or obtain any property or benefit of any kind for himself or any other person on account of anything already done or omitted to be done, or to be afterwards done or omitted to be done, by him in the discharge of the duties his office; or (b) corruptly gives, confers, or procures, or promises or offers to give or confer, or to produce or attempt to produce, to, upon, or for any person employed in the public service, or to, upon, or for any other person, any property or benefit of any kind on account of any such act or omission on the part of the person so employed, is guilty of an offence and is liable to imprisonment for a term not exceeding three years.

317 Nsereko *Criminal Law in Botswana* 282.

318 What is also significant is that section 99 limits the jail term to three years. For the purpose of public procurement corruption, another important aspect is that section 99 (b) attempts to define corruption. It does so by stating that corruption involves *inter alia* giving or receiving property or a benefit of any kind with the intention of influencing the actions of government employees, as held

Other offences related to public procurement corruption created by the *Penal Code* include *inter alia* the acquisition of private interest in a property as a result of corrupt practices;[319] false claims;[320] the abuse of office;[321] inducement;[322] exercising undue influence;[323] fraud;[324] the criminal liability of agents;[325] receiving a secret commission on government contracts;[326] and a presumption as to corrupt practices.[327] A number of lacunas in so far as corruption is concerned that were not properly dealt with in the *Penal Code* have to a certain extent been addressed by the enactment of the CECA in 1994.

4.5.1.2 Corruption and Economic Crime Act

As explained earlier, the CECA[328] is the primary legislation that is used to prosecute corruption in Botswana. It does not replace the *Penal Code* but was established as a response to the inadequacies that were found in the *Penal Code*, which was unable to cater for the complexities of the corruption that was taking place in Botswana between 1980 and 1993.[329]

The CECA is arranged from Part I to Part VII. It provides for various legal mechanisms to combat public procurement corruption, which include investigation, prevention, and educating the *Batswana* on the evils of corruption. Part I deals with preliminary provisions such as interpretations; part II establishes the DCEC directorate; part III sets out the functions of the directorate; part IV provides for offences; part V provides for the prosecution of offences; part VI regulates the treatment of evidence; and part VII provides for miscellaneous matters such as frivolous and false allegations. What follows is a discussion of those of the CECA's legal provisions that are relevant to public procurement corruption.

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in *Haffejee v The State 1994 BLR 336 HC*. This section is critical in holding government officials involved in public procurement corruption accountable.

319 Section 102.
320 Section 103.
321 Section 104.
322 Section 109.
323 Section 110.
324 Section 129.
325 Section 384.
326 Section 385.
327 Section 386.
328 Chapter 08:05.
329 Sebudubudu 2003 *Botswana Notes and Records* 126-127.

4.5.1.2.1 CECA legal provisions on corruption

The definition of corruption in Botswana is not precise. This is mainly because the CECA, which is the primary legislation for preventing, fighting and prosecuting corruption, does not define corruption. Section 23[330] lists offences that constitute corruption, which one may use to reconstruct the definition of corruption in Botswana. The DCEC[331] has attempted to define corruption by stating that:

> Simply put the definition of corruption entails "Abuse of one's official position for personal gain" or offering, accepting or soliciting a valuable consideration as an inducement or reward for doing or not doing an act which amounts to abusing one's official position.

The definition of corruption in Botswana is more descriptive than theoretical. This opinion is supported by Khan,[332] who states *inter alia* that Botswana does not have a definition of corruption but connects the actions identified in section 23 to infer a notion of corruption applicable to both the public and the private sectors. According to Khan,[333] what is important in defining corruption is whether or not the person accused of corruption has been given something of a considerable value. In Botswana it has not been settled as to what amounts to a valuable consideration.[334]

In addition, it may seem easier to identify corruption once it has been committed or about to be committed than first to define it and then to identify it. According to Fombad and Sebudubudu:[335]

> In a number of corruption cases the courts seem to be guided by the nature of the offence as stated in section 23 of the CECA rather than for the court to construct its own definition.[336]

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330 Section 23 For the purpose of this Part, "valuable consideration" means (a) Any gift, benefit, loan, fee, reward or commission consisting of money or of any valuable security or of other property (*b*) any office, employment or contract; (*c*) any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part; (*d*) any other service, or favour including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted; (*e*) the exercise or forbearance from the exercise of any right or any power or duty; and (*f*) any offer, undertaking or promise whether conditional or unconditional, of any valuable consideration within the meaning of the provisions of any of the preceding paragraphs

331 DCEC 2012 http://www.gov.bw.

332 Khan *Effective Legal and Practical Measures of Combating Corruption* 160.

333 Khan *Effective Legal and Practical Measures of Combating Corruption* 160.

334 International Business Publications USA *Botswana Country* 192.

335 Fombad and Sebudubudu "The Framework for Curbing Corruption in Botswana" 84-85.

336 UNODC *Review of Implementation of the United Nations Convention Against Corruption* 3.

Therefore, this study proposes the following definition of public procurement corruption for Botswana: public procurement corruption in Botswana is behaviour or action that is intentionally taken or omitted which is not legally authorised by a person whether in the private or public sector for personal gratification or for the gratification of another person or entity including a juristic person(s).[337]

The CECA creates corruption offences in Part IV. For example, part IV sets out that offering or receiving a valuable consideration results in corruption as defined in section 23.[338] Moreover, the CECA in Part IV creates active and passive corruption[339] and makes it a punishable criminal offence.[340] It further creates the presumption of guilt in sections 26[341] and 27.[342]

In addition, Part IV of the CECA ascribes guilt pertaining to corruption to agencies,[343] under the following actions: inducement;[344] misleading the principal;[345] influencing a corrupt decision;[346] influencing a withdrawal of a tender;[347] and the use of family member(s) by the procuring official or the private person to commit the corrupt act.[348]

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337 This definition takes into account that there are instances where the private sector may allow its employees to be given certain gifts, the giving and receiving of which should not be interpreted as corruption. This depends on the company in question and its policies. It is submitted that there is a need to have such awarding of gifts properly regulated so that it does not create any form of suspicion of corruption.

338 (a) Any gift, benefit, loan, fee, reward or commission consisting of money or of any valuable security or of other property or interest in property of any property; (b) any office, employment or contract; (c) any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part; (d) any other service, or favouring including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted; (e) the exercise or forbearance from the exercise of any right or any power or duty; and (f) any offer, undertaking or promise whether conditional or unconditional, of any valuable consideration within the meaning of the provisions of any of the preceding paragraphs.

339 Sections 24-25.

340 Section 25(2).

341 If, after a person has done any act as a public officer, he accepts, or agrees or offers to accept for himself or for any other person, any valuable consideration on account of such an act, he shall be presumed, until the contrary is shown, to have been guilty of corruption in respect of that act before the doing thereof.

342 If a public officer offers to give to or procure for any other of person any valuable consideration on account of such act, the person so agreeing or offering shall be presumed, until the contrary is shown, to have been guilty of having, before the doing of such act, corrupted the public officer in respect of such act.

343 Section 28(1).

344 Section 28(2).

345 Section 28(3).

346 Section 29(2).

347 Section 30(1).

348 Section 31(1).

However, if there is disclosure of interest in a public procurement transaction and that disclosure is put in writing, then the disclosure becomes an acceptable defence if one is charged with corruption, as provided for in terms of section 31(2).[349] Moreover, if the procurement official maintains a lifestyle above his known financial income[350] and fails to explain how he acquired that lifestyle, then that public official is guilty of corruption.[351]

One of the penalties that is prescribed when one is guilty of corruption is imprisonment not exceeding 10 years or a fine of P500 000 or both in terms of section 36.[352] In addition, confiscation is a penalty that can be invoked in terms of section 37.[353] The procedure for confiscation is by way of application to the court by the Director of Public Prosecutions.[354] The administration of the CECA has been vested in the DCEC.[355]

What follows is a summary of the other legislation that complements the CECA.

Table 13: Other public procurement corruption legislation in Botswana

Name of Act	Characteristics
Proceeds of Serious Crime Act[356]	It provides for key criminal sanctions that are employed not only in Botswana but also internationally in an attempt to discourage and punish public procurement corruption. These criminal sanctions include: confiscation orders;[357] restraining orders;[358] disposal of property that is encumbered by virtue of the confiscation order; punishment of the actual act of money laundering;[359] production orders;[360] mutual assistance between countries;[361]

349 It is a defence to a charge under this section if the person having an interest has first made in writing to the public body the fullest disclosure of the exact nature of his interest and has been permitted thereafter to take part in the proceedings relating to such dealing or decision.
350 Section 34(1) (a) and (b).
351 Section 34(2).
352 Any person who is guilty of corruption or cheating the revenue under this Part shall, upon conviction, be liable to imprisonment for a term not exceeding 10 years or to a fine not exceeding P500 000, or to both.
353 Where a person has been convicted of corruption or cheating the public revenue under this Part, the Director of Public Prosecutions may apply for a confiscation order under section 3 of the Proceeds of Serious Crime Act, 1990 and accordingly, the provisions of that Act shall have effect in respect of the application.
354 Section 3.
355 The DCEC is discussed below under Institutional measures.
356 Act No 19 of 1990.
357 Section 3.
358 Section 8.
359 Section 14
360 Section 17.
361 Section 19.

Name of Act	Characteristics
	search warrants;[362] and the right of an aggrieved party to appeal the confiscation or restraining orders.[363]
Mutual Legal Assistance in Criminal Matters Act	The purpose of the Mutual Legal Assistance in Criminal Matters Act[364] is to allow cooperation between Botswana and other jurisdictions where criminal matters including public procurement corruption are transboundary. As far as Botswana is concerned, if the perpetrators of public procurement corruption either physically move to another jurisdiction, or move property to another jurisdiction, Botswana through this Act may request for international assistance in order to bring those criminals to justice.[365]
Public Service Act	The Public Service Act (as amended) and read in conjunction with the Public Service Regulations of 2011 offers additional measures that supplement the above legislation. Section 19 of the Public Service Act prohibits the public official from receiving any fee or reward except for his emoluments.[366] Section 30[367] of the Public Service Act provides for misconduct, and this includes *inter alia* a failure by a public officer to act in a proper manner. Public procurement corruption is classified as a misconduct.
Public Service Charter	The Public Service Charter has eight principles[368] that are meant to guide the conduct of public officials.[369] These principles are meant to guide and regulate the conduct of public officials in the manner in which they relate to one another as well as to the public, and the manner in which they conduct their duties.[370] The importance of these principles is that: they attempt to encourage ethical behaviour amongst procuring officials so that they can shun public procurement corruption.

362 Section 20.
363 Section 21.
364 Act 20 of 1990.
365 Section 7.
366 No fee, reward or remuneration of any kind whatsoever, beyond his emoluments, shall be received and kept for his own use by a public officer for the performance of any service for the Government, unless specially authorized by law or by the terms of his appointment or by the Permanent Secretary to the President.
367 Any act done without reasonable excuse by a public officer which amounts to a failure to perform in a proper manner any duty imposed upon him as such, or which contravenes any enactment relating to the public service or which is otherwise prejudicial to the efficient conduct of the public service or tends to bring the public service into disrepute shall constitute misconduct.
368 The first principle states that the public officer should conduct his affairs with courtesy and humility and regard for the public interest. The second principle requires the public official to be neutral and to be fair to the public. The third is accountability and it requires every public officer including Cabinet Ministers and Permanent Secretaries to be accountable. The fourth principle is transparency. It states that "Members of the public are entitled to have access to non-confidential information on the operations of the Public Service". The fifth principle is freedom from corruption. It states *inter alia* that "Public confidence in the Public Service requires that the behaviour of all Officers must be above reproach. Corruption comes in many guises, and once it take root, it is extremely difficult to eradicate." The sixth principle deals with neutrality and *inter alia* requires reliability in the manner in which the decisions of public officials are made. The seventh principle deals with the duty to be informed. The last principle relates to due diligence. It requires public officials to subject themselves to higher standards of due diligence and simultaneously to operate efficiently.
369 Fombad and Sebudubudu "The Framework for Curbing Corruption in Botswana" 87.
370 Fombad and Sebudubudu "The Framework for Curbing Corruption in Botswana" 87.

4.5.2 Administrative measures

This study focuses on the following administrative measures: debarment, suspension and blacklisting. Williams-Elegbe[371] describes administrative measures as:

> Measures implemented under the exercise of official discretion. These may include restrictions on obtaining government patronage, licences, approvals and permits placed upon corrupt persons. An example is a denial of registration as a company, where the proposer has bankruptcies, criminal or fraudulent convictions against him. Administrative tools also include measures that deny corrupt suppliers access to government contracts.

Fombad and Sebudubudu[372] state that:

> The administrative measures that are provided to curb corrupt and other forms of abuse of public office in Botswana may take the form of either non-binding or binding administrative rules.

From these two submissions one can conclude that the administrative measures that are meant to combat corruption are twofold. Firstly there are administrative measures that are targeted at the procuring official,[373] and secondly there are those that are targeted at the supplier. This part is mainly concerned with the administrative measures in Botswana that are targeted at the supplier/bidder.

4.5.2.1 Debarment

The measures that are meted out against the supplier take different forms.[374] They can be permanent or temporary and can be targeted at the juristic person (the supplying entity) or individual members of the juristic person, such as directors or shareholders, who may be held personally liable for the corrupt act.[375]

There are a number of measures that can be taken, such as a refusal of government contracts, blacklisting, a refusal to contract as a main contractor or a sub-contractor, suspension and debarment.[376] The implementation of these administrative measures is the prerogative of the procuring entity or other body or tribunal that has been

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371 Williams-Elegbe *Fighting Corruption in Public Procurement* 14.
372 Williams-Elegbe *Fighting Corruption in Public Procurement* 87.
373 Measures targeted at the procuring official are discussed above under the Public Service Charter.
374 Williams-Elegbe *Fighting Corruption in Public Procurement* 14.
375 Williams-Elegbe *Fighting Corruption in Public Procurement* 168-169.
376 Williams-Elegbe *Fighting Corruption in Public Procurement* 14-15.

established for such purposes.[377] It relies on the discretion and the competence of the procuring officials mandated with that power.

Botswana's legal framework does not expressly provide for debarment. The legislation expressly provides for suspension and delisting.

4.5.2.2 Suspension and delisting

In March 2013 Botswana published the Contractor's Code of Conduct (hereafter Code).[378] The purpose of the Code is to ensure that all contractors adhere to the ethical conduct that is expected of those dealing with government contracts. In addition, Botswana has through the PPADB embarked on the compulsory registration of all contractors that intend to benefit from government tenders.[379] Failure to register on this database automatically disqualifies a supplier or tenderer from being considered for government contracts. In terms of the Code, a contractor is prohibited from obtaining any information from a procuring official with the intention of using that information to the advantage of the contractor.[380]

Furthermore, the Code goes on to prevent collusion and fronting, which are among the major vehicles that used to perpetrate public procurement corruption.[381] In addition, the Code makes it imperative for contractors to uphold high standards of ethics and integrity by prohibiting the submission of false information[382] with the intention of deceiving the procuring entity. Also, the Code promotes

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377 *Daisy Loo Botswana (Pty) Ltd v Gaborone City Council and Another* 2007 2 BLR 824 (CA) 2-3.

378 OECD *Investment Policy Reviews* 4.

379 PPADB 2008 http://www.ppadb.co.bw.

380 2.1 A contractor shall not disclose information acquired from or through its association or relationship with the Board or its Committees, or a Government department or agency, which has not been made public to the prejudice of other contractors.

381 3.1 A contractor shall not manipulate his or her true shareholding, directorship, management, employees or financial resources in order to be compliant with the requirements of section 121 of the Act regarding the categorization of contractors in terms of ownership.
3.2 A contractor shall not be involved in fronting, tokenism, window dressing and "rent a Motswana" practices during the tendering stage or when seeking registration in the register of contractors under section 116 of the Act. For the purposes of this Code, the terms "fronting", "tokenism", window dressing and rent a Motswana mean the misrepresentation of a material fact of ownership, management and control as well in the skilled and specialist positions: (core to the purpose of existence) of a contractor in order to appear compliant with the citizen reservation and citizen preferential treatment and for material gain, advancement or advantage in the procurement process.

382 Code para 4.1.

professionalism[383] during the procurement process. In the same vein, the Code proscribes the contractor from engaging in unfair and unethical practices in the contractor's dealings with sub-contractors.[384]

4.5.2.2.1 Suspension and Delisting Disciplinary Committee

Following the publication of the Code, the Suspension and Delisting Disciplinary Committee (hereafter Disciplinary Committee) was established in 2013 in terms of section 50 of the PPAD Act. This Disciplinary Committee is composed of two members from the private sector, one member from DCEC and three members from PPADB. The Disciplinary Committee is mandated with the implementation of suspension and delisting as stated in the PPADB 2013 Annual Report.[385] According to the PPADB 2013 Annual Report:[386]

> The Disciplinary Committee may be directed by the Board with respect to any aspect of its operations. When a complaint is lodged against a contractor with the Board, the latter forwards the complaint to the Disciplinary Committee for investigation. The investigations are conducted in reference to the requirements of the Code of Conduct for Contractors or the terms of the contract. Once the investigations are complete, the Disciplinary Committee submits recommendations to the Board for a decision. The decision may involve reprimanding the contractor, suspending the contractor for a specified period of time from participating in Government procurement and asset disposal or removing the concerned company from the PPADB registration system.

As noted above, the final decision on which administrative measure to invoke lies with the PPADB. It is important to note that among the measures available for use is the delisting of a corrupt contractor from the PPADB registration system.[387]

However, it is not clear whether there are any other acts of offences which the supplier may commit that may also trigger suspension and delisting, apart from the offences mentioned in the Code. This will be known only once the Disciplinary Committee becomes fully functional.[388] The Disciplinary Committee does most of the

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383 Code para 4.4.
384 Code para 4.6.
385 PPADB *2013 Annual Report* 15-16.
386 PPADB *2013 Annual Report* 20.
387 PPADB *Operations Manual Standard Operating Policies and Procedures* 153-154.
388 PPADB *Operations Manual Standard Operating Policies and Procedures* 154.

work, but it can only recommend to the PPADB which decision it prefers. The final, binding decision comes from the PPADB.[389]

It is submitted that the Disciplinary Committee should have been given the legal authority to make the final decision as to which administrative measures to enforce. This would avoid duplication. In the event that the supplier was not happy with the decision, the aggrieved supplier would still have the option of approaching the ICRC and, if still aggrieved thereafter, he could pursue the matter further using the conventional courts.[390]

In short, Botswana does not use debarment, but uses suspension and delisting instead.[391] The grounds for suspension and delisting are not clearly spelt out. Neither is the period. Issues of mandatory and discretionary suspension and delisting are not dealt with. Offences committed by the supplier outside the purview of procurement and those that are not provided in the Code, such as the violation of labour laws or financial dishonesty in other commercial transactions are not provided.[392]

Botswana is therefore encouraged to properly provide for debarment within its procurement regime. If the country decides to stick to suspension and delisting, then the areas highlighted above must be clearly provided for within its procurement regime.

4.5.2.3 Self-cleaning

As discussed in Chapter Two, self-cleaning is a relief measure that is accorded to debarred suppliers so that they may take practical steps to rectify the causes that triggered their debarment and be eligible for re-consideration for the awarding of government contracts.[393] Self-cleaning steps include *inter alia* the clarification of the facts that triggered the debarment; the paying of damages incurred as a result of the unsanctioned acts of the debarred supplier; changes to those aspects of the

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389 PPADB *Operations Manual Standard Operating Policies and Procedures* 154.
390 Fombad and Sebudubudu "The Framework for Curbing Corruption in Botswana 82.
391 PPADB *Operations Manual Standard Operating Policies and Procedures* 39, 125.
392 PPADB *Operations Manual Standard Operating Policies and Procedures* 144.
393 See para 2.10.3.2.2. Also see, Punder, Prieβ and Arrowsmith *Self-Cleaning in Public Procurement Law* 5.

organisation that were identified as having contributed to the conduct that caused the debarment; and a clean-up of the staff that caused the debarment.[394]

Self-cleaning is not provided for in Botswana's procurement legislation. The PPAD Act and the Code do not provide legal mechanisms that enable suppliers to remedy the faults that led to their suspension or delisting. It is submitted that this lacuna could be remedied if Botswana were to subscribe to the principle of self-cleaning in order to complete its suspension and delisting provision in accordance with international best practice.[395] Internationally, where there is debarment there is almost always an opportunity for self-cleaning. It follows that where there is suspension and delisting in the case of Botswana, there must be self-cleaning too.

4.5.3 Institutional measures

Curbing public procurement corruption in Botswana relies heavily on the institutions that are mandated to manage and enforce procurement law and criminal law. These are divided into law enforcement institutions and other institutions, as shown in the figure below:

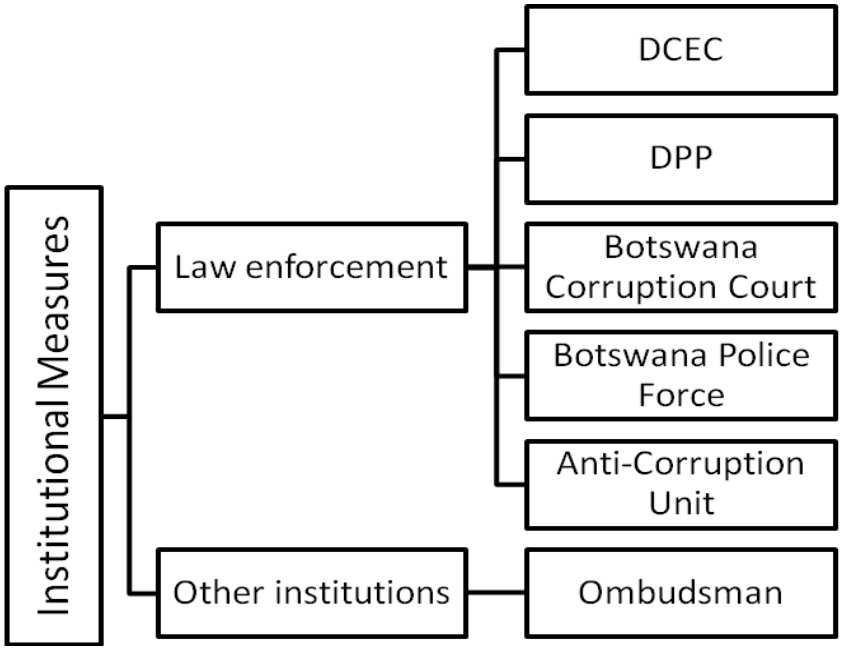

Figure 9: Botswana Institutional Measures

394 Punder, Prieβ and Arrowsmith *Self-Cleaning in Public Procurement Law* 5-6.
395 Punder, Prieβ and Arrowsmith *Self-Cleaning in Public Procurement Law* 5-6.

In Botswana, law enforcement institutions play a crucial role in curbing public procurement corruption, and in executing their mandate they work in unison with the procurement institutions as well other institutions outside the purview of law enforcement, such as the Auditor General and the Ombudsman.[396] Recently Botswana introduced the Botswana Corruption Court as an additional measure to curb corruption, and this court will be discussed below. Procurement institutions such as the PPADB and the ICRC have already been discussed above, therefore the discussion below will focus on law enforcement institutions as well as two other institutions, namely the Auditor General and Ombudsman.

4.5.3.1 Directorate on Corruption and Economic Crime

The DCEC is established in terms of section 3 of the CECA and is composed of the Director, Deputy Director and other officers.[397] The Director is appointed by the President[398] and his function is the administration of the DCEC.[399] The DCEC is tasked with 10 distinct functions and for the sake of completeness and clarity it is important quote them verbatim in terms of section 6 of CECA:

(a) To receive and investigate any complaints alleging corruption in any public body;

(b) To investigate any alleged or suspected offences under this Act, or any other offence disclosed during such an investigation;

(c) To investigate any alleged or suspected contravention of any of the provisions of the fiscal and revenue laws of the country;

(d) To investigate any conduct of any person, which in the opinion of the Director, may be connected with or conducive to corruption;

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396 Mwamba *An Evaluation of the Anti-Corruption Initiatives in Botswana* 28, 33.

397 Section 3(1) There is hereby established a Directorate to be known as the Directorate on Corruption and Economic Crime which shall consist of a Director, Deputy Director and such other officers of the Directorate as may be appointed.

398 Section 4(1) The President may appoint a Director on such terms and conditions as he thinks fit.

399 Section 4(2) The Director shall be responsible for the direction and administration of the Directorate.

(e) To assist any law enforcement agency of the Government in the investigation of offences involving dishonesty or cheating of the public revenue;

(f) To examine the practices and procedures of public bodies in order to facilitate the discovery of corrupt practices and to secure the revision of methods of work or procedures which, in the opinion of the Director, may be conducive to corrupt practices;

(g) To instruct, advise and assist any person, on the latter's request, on ways in which corrupt practices may be eliminated by such person;

(h) To advise heads of public bodies of changes in practices or procedures compatible with the effective discharge of the duties of such public bodies which the Director thinks necessary to reduce the likelihood of the occurrence of corrupt practices;

(i) To educate the public against the evils of corruption;

(j) To enlist and foster public support in combating corruption.

These functions were necessitated by the historical events that led to the establishment of DCEC.[400] As explained earlier, prior to the establishment of the DCEC, as Sebudubudu[401] states, major scandals of public procurement corruption rocked Botswana, and the public outcry that ensued against public procurement corruption demanded a proactive approach from the government of Botswana. Other key sections that empower the operations of the DCEC in its role of combating public procurement corruption are the following:

Table 14: Other provisions under the CECA

Section	Characteristics
7	Clothes the Director with the following powers: authorising investigations;[402] requiring the production of books, reports and electronic data.[403]

400 Sebudubudu *Combating Corruption in Southern Africa* 118.
401 Sebudubudu *Combating Corruption in Southern Africa* 116.
402 7(1)(a) For the performance of the functions of the Directorate, the Director may authorize any officer of the Directorate to conduct an inquiry or investigation into any alleged or suspected offences under this Act

Section	Characteristics
8(b)[404]	Power to direct suspects to disclose information.[405]
8(d)	Power to compel banks to disclose any relevant information in public procurement investigations.[406]
10[407]	Clothes the DCEC with the powers of arrest.[408]
16(1)	Power to order surrendering of travel documents by suspected public procurement corruption offenders.
18	Criminalises obstruction of public procurement officers.[409]
23	Criminalises receiving valuable considerations for public procurement corruption purposes.[410]

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403 7(1)(b) Require any person in writing to produce, within a specified time, all books, records, returns, reports, data stored electronically on computer or otherwise and any other documents relating to the functions of any public or private body.

404 8(d) Any other person with whom the Director believes that the suspected person had any financial transactions or other business dealing, relating to an offence to furnish a statement in writing enumerating all movable or immovable property acquired in Botswana and elsewhere or belonging to or possessed by such other person at the material time.

405 The power of the Director goes as far as requesting a person under investigation or being subject to an investigation to disclose in detail movable or immovable property in line with section 8(1) (a) (i).

406 The way that this section is couched is a clear demonstration that banks cannot raise defences such client/bank privilege. Banks have been known to have strict secrecy policies that prohibit disclosure in order to protect their bank's reputation yet at the same time they are harbouring moneys that have been obtained illegally. If, in the course of any investigation into any offence, the Director is satisfied that it would assist or expedite such an investigation, he may, by notice in writing, require any suspected person to furnish a statement in writing enumerating all movable or immovable property belonging to or possessed by him in Botswana or elsewhere or held in trust for him in Botswana or elsewhere, and specifying the date on which every such property was acquired and the consideration paid therefore, and explaining whether it was acquired by way of purchase, gift, bequest, inheritance or otherwise; (ii) specifying any moneys or other property acquired in Botswana or elsewhere or sent out of Botswana by him or on his behalf during such a period as may be specified in such a notice.

407 An officer authorised in that behalf by the Director may, without warrant, arrest a person if he reasonably suspects that that person has committed or is about to commit an offence under this Act.

408 In most countries, even in developing countries, anti-corruption agencies do not have the power of arrest. This power is usually vested with the police or some other law enforcement agents. The generally accepted procedure in a number of countries is that the anti-corruption agency, once it has identified actual or perceived acts of public procurement corruption, informs the police, who will then arrest the suspect.

409 Section 18(1) (i) Any person who resists or obstructs an officer in the execution of his duty shall be guilty of an offence punishable by either a fine or imprisonment.

409 Section 18(1) Any person guilty of an offence under this section shall be liable on conviction to imprisonment for a term not exceeding five years, or to a fine not exceeding P10 000 or to both.
(a) Any gift, benefit, loan, fee, reward or commission consisting of money or of any valuable security or of other property or interest in property of any description;
(b) Any office, employment or contract;
(c)Any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;
(d) Any other service, or favour including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted;
(e)The exercise or forbearance from the exercise of any right or any power or duty; and

Section	Characteristics
24(1)	Specifically provides that any government employee who acts corruptly shall be guilty of the offence of corruption.[411]
25(1)	Criminalises public procurement corruption in respect of an official transaction.
26	Criminalises the act of a bribe *inter alia* in public procurement corruption.[412]
27	Regulates valuable gratification and promises.[413]
28(1)	Imposes criminal liability on agents in the commission of public procurement corruption.[414]
29(1)	Recognises that a procuring entity or its members may assist someone else in the commission of public procurement corruption. 29(1).[415]
31(1)[416]	Criminalises a conflict of interest in public procurement.
34(1)(a)[417]	The DCEC may conduct lifestyle audits to curb public procurement corruption.[418]
32	Prescribes penalties.[419]

(f) Any offer, undertaking or promise whether conditional or unconditional, of any valuable consideration within the meaning of the provisions of any of the preceding paragraphs.

411 A public officer is guilty of corruption in respect of the duties of his office if he directly or indirectly agrees or offers to permit his conduct as a public officer to be influenced by the gift, promise, or prospect of any valuable consideration to be received by him, or by any other person, from any person.

412 If, after a person has done any act as a public officer, he accepts, or agrees or offers to accept for himself or for any other person, any valuable consideration on account of such act, he shall be presumed, until the contrary is shown, to have been guilty of corruption in respect of that act before the doing thereof

413 If, after a public officer has done any act as such officer, any other person agrees or offers to give or procure for him or for any other person any valuable consideration on account of such act, the person so agreeing or offering shall be presumed, until the contrary is shown, to have been guilty of having, before the doing of such act, corrupted the public officer in respect in respect of such act

414 However, section 28(1) if read properly appears not to be applicable in instances where the agent was coerced or was contracted or acted on behalf of either the government official or the supplier but the agent does not have the intention of committing public procurement corruption. It is clear that intention to commit public procurement corruption is paramount, as stated in section 28(3).

415 A public officer is guilty of corruption if he directly or indirectly accepts or agrees or offers to accept for himself or for any other person any valuable consideration as an inducement or reward for or otherwise on account of his giving assistance or using influence in, or having given assistance or used influence in, promoting, administering, executing or procuring (including any amendment, suspension or cancellation) of any contract (including a subcontract) with a public body.

416 A member or an employee of a public body is guilty of corruption if he or an immediate member of his family has direct or indirect interest in any company or undertaking with which such body proposes to deal, or he has a personal interest in any decision which such body is to make, and he, knowingly, fails to disclose the nature of such interest, or votes or participates in the proceedings of such body relating to such dealing or decision.

417 The Director or any officer of the Directorate authorized in writing by the Director may investigate any person where there are reasonable grounds to suspect that that person maintains a standard of living above that which is commensurate with his present or past known sources of income or assets.

418 A person is guilty of corruption if he fails to give a satisfactory explanation to the Director or the officer conducting the investigation under section (1) as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control.

Other factors that have been noted in Botswana to have enhanced the curbing of public procurement corruption include the building of strong criminal justice institutions.[420] In addition, Botswana's political leadership has arguably demonstrated to a limited extent its willingness to support the work of these criminal justice institutions.[421] The political leadership does so by ensuring that the criminal justice institutions that are mandated with the task of fighting public procurement corruption are adequately capacitated.[422] These institutions continue to receive government funding to ensure that their operations are not foiled as a result of a lack of capacity.[423]

Another additional feature of the DCEC is the establishment of the Anti-Corruption Units.

4.5.3.2 Anti-Corruption Units

The Anti-Corruption Units are innovations of the DCEC, and were established in 2011. These Anti-corruption Units are staffed by DCEC personnel.[424] Each ministry has an Anti-Corruption Unit whose purpose is to ensure that no corrupt activities take place when public money is spent.[425] Furthermore, these Anti-Corruption Units are found in each local authority. According to the OECD:[426]

> Working alongside PPADB, these Units enforce guidelines to prevent abuses in procurement. Anti-Corruption Committees have been put in place alongside these Units in all line Ministries as of 2012.

The Anti-Corruption Units and the Anti-Corruption Committee are an outstanding feature of Botswana's efforts to fight public procurement corruption.[427] Even some

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419 Any person who is guilty of corruption or cheating the revenue under this Part shall, upon conviction, be liable to imprisonment for a tem not exceeding 10 years or to a fine not exceeding P500 000, or to both.

420 Kumar and Caborn "The Regulatory Framework for Public Procurement in Botswana" 25.

421 Mwamba *An Evaluation of the Anti-Corruption Initiatives in Botswana* 14.

422 Mwamba *An Evaluation of the Anti-Corruption Initiatives in Botswana* 14.

423 Sebudubudu 2010 *Africa Journal of Political Science and International Relations* 249.

424 Mwamba *An Evaluation of the Anti-Corruption Initiatives in Botswana* 78.

425 Mwamba *An Evaluation of the Anti-Corruption Initiatives in Botswana* 78.

426 OECD *Investment Policy Reviews* 142.

427 Mwamba *An Evaluation of the Anti-Corruption Initiatives in Botswana* 78.

developed countries do not have such a focused anti-corruption measure. The Anti-Corruption Units work in unison with the PPADB.[428]

In practice this means that if they are fully supported the Anti-Corruption Units will be able to monitor any public procurement process for any possible corruption risks. For now, the Anti-Corruption Units are still in their infancy and it will be prudent to evaluate their effectiveness once they have been fully operational.[429] With this in mind, it is important to ensure that the Anti-Corruption Units together with the Anti-Corruption Committees are themselves not corrupt.[430]

As intimated earlier, there is room for improvement and constant review of both the CECA and the operations of the DCEC in order to meet the challenges of public procurement corruption posed by modern development as well as technological advancements such as e-procurement.

Having said this, the discussion now focuses on the judiciary and its role in combating public procurement corruption.

4.5.3.3 Judiciary

The judiciary in Botswana was established in terms of sections 95 and 99 of the Constitution. The Court of Appeal is the highest court, and may be equivalent to a Supreme Court or Constitutional Court in other jurisdictions.[431] Below the Court of Appeal there is the High Court, which has original jurisdiction in all criminal matters.[432] Below the High Court is the Magistrates Court.[433] In addition, Botswana has Customary Courts.[434] In similar fashion, the country has a Court Martial which is established to adjudicate cases involving the Botswana Defence Forces.[435] Of greater importance is the independence and impartiality of the judiciary in Botswana in adjudicating over criminal matters involving public procurement corruption.

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428 Mwamba *An Evaluation of the Anti-Corruption Initiatives in Botswana* 78.
429 Mwamba *An Evaluation of the Anti-Corruption Initiatives in Botswana* 131.
430 OECD *Investment Policy Reviews* 4.
431 Nsereko *Criminal Law in Botswana* 29-31.
432 Mwamba *An Evaluation of the Anti-Corruption Initiatives in Botswana* 30.
433 Mwamba *An Evaluation of the Anti-Corruption Initiatives in Botswana* 30.
434 Mwamba *An Evaluation of the Anti-Corruption Initiatives in Botswana* 30.
435 Mwamba *An Evaluation of the Anti-Corruption Initiatives in Botswana* 31.

The judiciary in Botswana is responsible for analysing the evidence placed before it regarding public procurement corruption.[436] After consideration of such evidence it is the role of the judiciary to determine whether or not a case of public procurement corruption has been made.[437] In the event that a case of public procurement corruption has been established, the judiciary will convict and sentence the perpetrator of public procurement corruption.[438] Sentencing of perpetrators of public procurement corruption is one the most important elements of the criminal justice system.[439]

The severity of the sentencing of public procurement corruption should send a strong message that public procurement corruption is unprofitable in Botswana.[440] Again, low sentences in cases of public procurement corruption should be discouraged as much as possible, so that there is enough deterrence to would-be offenders.[441] However, balancing the rights of the accused and the nature of the public procurement corruption should not be overlooked in sentencing.[442]

4.5.3.3.1 Judicial review

Another important tool used by the judiciary in Botswana is the judicial review of administrative action.[443] Procurement decisions, as said earlier, are part of administrative action, a relationship which has been affirmed by the courts in Botswana.[444] Awarding a public procurement contract in Botswana is an exercise of an administrative action by the procuring entity, and is therefore subject to review by the court.[445]

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436 Afzal and Considine *Democratic Accountability and International Human Development* 159.
437 Nsereko *Criminal Law in Botswana* 341.
438 Fombad and Sebudubudu "The Framework for Curbing Corruption in Botswana" 88-89.
439 *Lionjanga v The State* 2012 BLR 110 HC 118-119.
440 *Kemokgatla v The State* 2000 2 BLR 413 HC 415-416.
441 Good 1994 *The Journal of African Studies* 500-502.
442 *Kemokgatla v The State* 422.
443 *TKM Engineering Pty Ltd v The Public Procurement and Asset Disposal Board and Others* 2012 BLR 1.
444 *Sinohydro CMC NSC2 Joint Venture v The Public Procurement and Asset Disposal Board and Others* 2012 2 BLR 314 HC; *TKM Engineering Pty Ltd v The Public Procurement and Asset Disposal Board and Others* 2012 BLR 1 Hcm; *Bergstan Pty Ltd v Botswana Development Corporation Limited and Others* 2012 2 BLR 858 CA; *Mmile Mhutswa ampamp Associates Pty Ltd and Another v Botswana Development Corporation and Others* 2012 1 BLR 613 HC.
445 *TKM Engineering Pty Ltd v The Public Procurement and Asset Disposal Board and Others* 2012 BLR 1.

The judicial review of a procurement decision is a legal remedy that can be used if an aggrieved supplier challenges a decision of the procuring entity, as held in *WBHO Construction (Pty) Ltd v The PPADB*.[446] It has often been stated that most developing countries do not offer effective remedies to deal with the complaints of aggrieved suppliers, and Botswana is no exception.[447] However, in Botswana the judicial review of administration action in public procurement is relatively frequent.

In *Raphethela v Attorney General*[448] it was stated *inter alia* that judicial review allows the Court to restrain the abuse of additional powers that are conferred upon public officials via statutes. In *Ralekgobo v Matome and Another*[449] it was held that judicial review seeks to investigate how an administrative organ has reached its decisions. In *Mokgare v Chairman, Public Service Commission and Another*[450] it was ruled *inter alia* that the judicial review of administrative actions is concerned with the reasons and circumstances surrounding decisions.

In the context of public procurement, once the Court is satisfied that the administrator has been influenced by extraneous circumstances, then the Court will not hesitate to overturn the decision of the administrator, as ruled in the celebrated English case of *Council of Civil Service Unions v Minister for the Civil Service.*[451]

In *Attorney General and Another v Kgalagadi Resources Development Company*[452] it was held that:

> The decision of the Central Tender Board, which was a government body, to refuse a tender affected the rights of the person tendering, and was therefore the kind of matter which should be subject to the supervision of the courts.

Public procurement corruption has the effect of affecting the constitutional rights of other suppliers as well as the general public.[453] Procuring entities in Botswana are a

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446 2006 2 BLR 361 (HC) at 362. In this case the applicant was denied a construction contract by the respondent, despite having been the lowest bidder (P79 325 877.36 and having been recommended by an engineer chosen by the respondent. The respondent disregarded the engineer's recommendation and awarded the contract to the second lowest bidder (P80 457 591.72). The applicant challenged the decision of the PPADB in court. Nganunu CJ ordered that the PPADB had erred in disregarding the bid of the applicant.

447 Quinot "A Comparative Perspective on Supplier Remedies" 308.

448 2003 (1) B.L.R 591.

449 2010 (2) B.L.R 513 (HC).

450 2007 (2) B.L.R 90 (HC).

451 1984 (3) All ER 935.

452 1995 B.L.R 234 CA.

proxy of the executive and they are clothed with the power to make decisions on behalf of the government.[454] It is the exercise of this power that judicial review seeks to test - whether it was judiciously exercised or not.[455]

Once a decision has been made with the intention of committing corruption, such a decision becomes unfair, illegal and irrational, and this is what judicial review seeks to correct.[456] Irrationality refers to unreasonableness, where the procuring entity's decision has been influenced by irrelevant considerations such as the gratification or personal gain that will accrue to him after the corrupt deal.[457]

4.5.3.4 Botswana Corruption Court

In order to give further impetus to the fight against corruption, Botswana established a dedicated specialised Corruption Court in 2013.[458] As of December 2014 a total of 21 cases had been registered with the Corruption Court.[459] This figure signifies an embracement of the Court and an appreciation of the additional measures that the government of Botswana is putting in place to further curb corruption. The Corruption Court has the same status as the High Court, meaning that it is a superior Court.[460] However, at its inception the Court experienced some teething troubles related to the lack of prosecutors with a specialised anti-corruption background, which may have contributed to the frequent postponement of cases.[461]

The approach taken by Botswana is similar to that taken by Indonesia.[462] Having been subjected to astronomical levels of general corruption, and more particularly in public procurement, Indonesia established the Indonesia Corruption Eradication Commission[463] and a specialised anti-corruption court called Indonesia's Anti-Corruption Court.[464] According to Butt,[465] as of February 2011 the Corruption

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453 KAS and NANHRI "Stakeholder's Conference on Corruption and Human Rights".
454 *Nyoni v The Chairman, Air Botswana Disciplinary Committee and Another* 1999 2 BLR 15 (HC).
455 Ramadhani "Judicial Review of Administrative Action".
456 Ramadhani "Judicial Review of Administrative Action".
457 Ramadhani "Judicial Review of Administrative Action".
458 Morula *Sunday Standard* 1.
459 Shapi "Botswana: Corruption Court Completes Two Cases" 1.
460 Rotberg *The Corruption Cure: How Citizens and Leaders can Combat Graft* 134.
461 Piet "Corruption Court Worsens Judicial Delays" 1.
462 Butt 2011 *Bulletin of Indonesian Economic Studies* 381.
463 Bolongaita "An Exception to the Rule?" 34.
464 Schutte 2012 *Public Administration Development* 41.
465 Butt 2011 *Bulletin of Indonesian Economic Studies* 381

Eradication Court had successfully convicted all 250 cases brought before it, which is a 100% success rate. Botswana is therefore headed in the right direction and should be applauded for engaging in such a positive endeavour.

Below is a summation of some of the complementary anti-corruption institutions established in Botswana.

Table 15: Other anti-corruption mechanisms in Botswana

Name of Institution	Characteristics
Directorate of Public Prosecution[466]	The Directorate of Public Prosecutions (hereafter DPP) was created in 2005 through a Constitutional amendment (51A).[467] It is the principal arm responsible for all public prosecutions in Botswana. In the context of public procurement corruption, the creation of the DPP created renewed public confidence in the sense that prosecutions were now being handled by a body that was structurally independent of the executive. The importance of the DPP is measurable in the eventuation of actual prosecution or the lack thereof in cases involving public procurement corruption.[468]
Botswana Police Service[469]	The role of the Botswana Police Services (hereafter BPS) in curbing public procurement corruption is similar to most jurisdictions.[470] The BPS works together with the DPP, DCEC and other bodies. However, some criticisms of the BPS on the grounds of corruption makes it difficult for public procurement corruption cases to be handled exclusively by the BPS, especially in the area of investigations.[471] Hence the involvement of the DCEC in complementing the work of BPS in the area of corruption.
The Ombudsman[472]	The role of the Ombudsman in fighting public procurement corruption is that the Ombudsman ensures that there is transparency in the manner in which the organs of state and the executive conduct their operations.[473]
Auditor General[474]	In the context of public procurement, the Office of the Auditor General has the legal mandate to audit government income and expenditure by all state departments.[475] It is the auditing of the expenditure side that makes the Office of the Auditor General a crucial organ in fighting public procurement

466 The Directorate of Public Prosecutions (hereafter DPP) was created in 2005 through a Constitutional amendment (51A).

467 Sechele "The Independence of the DPP" 1.

468 The DCEC does not have prosecutorial powers and relies heavily on the competence and independence of the DPP. If the DPP is unwilling to prosecute a public procurement corruption case which in the eyes of DCEC is prosecutable, that may create a difficulty in curbing public procurement corruption. Further, if there is any political interference (actual or perceived) in the DPP, then again public confidence will diminish, and this may create a breeding ground for public procurement corruption.
The independence of the DPP in prosecuting public procurement corruption may be threatened by the fact that the DPP is supervised by the Attorney General. Political interference may happen in a public procurement case involving the politically powerful. This is because the DPP is financially dependent on the generosity of the Attorney General.

469 Act No 29 of 1978.

470 Nsereko *Criminal Law in Botswana* 27-28.

471 Sebudubudu and Boloane "Botswana" 4.

472 Act No 5 of 1995.

473 Good "Diamonds, Dispossession and Democracy in Botswana" 41.

474 Section 124 of the Constitution of Botswana.

475 OAG 2011 http://www.gov.bw.

Name of Institution	Characteristics
	corruption. Not only does the Auditor General report on the operations of various government departments, but the Auditor General also audits the PPADB and the DCEC.[476]

4.5.4 Civil activism

In this study civil activism refers to the role which individuals, civil society organisations and the media play in fighting public procurement corruption in Botswana.[477]

4.5.4.1 Individual activism

The role played by individuals in curbing public procurement corruption in Botswana has been steadily increasing over the last years.[478] This has been attributed to the fact that the DCEC has embarked on massive anti-corruption education countrywide.[479] It has taken its education campaign to primary and secondary schools.[480] This has made the *Batswana* aware of or conscious of corruption. Reports show that individuals report corruption without necessarily classifying it as public procurement corruption or just corruption in general.[481] It is the duty of the DCEC then to determine the nature of the alleged corrupt act.[482]

However, no individual has taken the government to court as a matter of civil activism, as has happened in South Africa.[483] A number of reasons could be given for this. For instance, it could be the cost of litigation for "no personal gain", as litigation is generally expensive in Botswana.[484] Another reason could be that generally the *Batswana* are not litigious, perhaps because of the small population and the low level of education.[485] Another reason could be that once an individual decides to litigate on matters of corruption, there is no guarantee that he will not be

476 OECD *Specialised Anti-Corruption Institutions Review of Models* 96.
477 KAS and NANHRI "Stakeholder's Conference on Corruption and Human Rights "1.
478 KAS and NANHRI "Stakeholder's Conference on Corruption and Human Rights "1.
479 Fombad and Sebudubudu "The Framework for Curbing Corruption in Botswana" 100.
480 Republic of Botswana 2015 http://www.gov.bw.
481 Mwamba *An Evaluation of Anti-Corruption Initiatives in Botswana* 79-80.
482 Fombad and Sebudubudu "The Framework for Curbing Corruption in Botswana" 100.
483 For instance, in South Africa, Hugh Glenister, an ordinary citizen, took the government to court over the disbandment of an anti-corruption body. A further discussion of this case is to be found in Chapters Five and Six.
484 Maundeni "Civil Society, Politics and the State in Botswana" 1.
485 Quansah "An Examination of the Use International Law as an Interpretive Tool" 37.

victimized.[486] Botswana does not have a whistle-blower protection law, so such individuals may choose to remain anonymous when it comes to matters relating to corruption, not only in general but also in public procurement.[487]

4.5.4.2 Civil society organisations

Civil society organisations in Botswana are generally focussed on health matters, education, gender and development, orphans and vulnerable children, and other related matters.[488] Most CSOs in Botswana operate under the umbrella of the Botswana Council of NGOs.[489]

Of all the CSOs under Botswana Council of NGOs, only the Botswana Centre for Human Rights (also known as Ditshwanelo) has taken an interest in advancing the cause of combating public procurement corruption.[490] Apart from that organisation, there are no CSOs in Botswana that are active in the governance and politics space. According to Mogalakwe and Sebudubudu,[491] the CSOs in Botswana are weak, and this has not aided in making Botswana a progressive democracy where active CSOs are engaged in ensuring the advancement of the country.

No Botswana CSO has taken the government to task over public procurement corruption or has litigated against any Minister or state-owned enterprise over public procurement corruption. The way forward is for the government to encourage the participation of CSOs in governance issues, which participation would eventually help to curb public procurement corruption. CSOs may not only litigate against the government but they may also assist in other areas such as research, publishing and public education in public procurement corruption.[492] They could also participate as *amicus curiae* in litigation which assists in the development of public procurement corruption jurisprudence.[493]

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486 Matlhare "An Evaluation of the Role of the Directorate Corruption and Economic Crime" 67.
487 Matlhare "An Evaluation of the Role of the Directorate Corruption and Economic Crime" 67.
488 Afrinype 2017 http://www.afrinype.org/the-sustainability-of-civil-society-organisations-in-botswana/.
489 The African Capacity Building Projects *Botswana Council of NGOs* 1.
490 Ditshwanelo *UPR NGO Working Group Press Statement on the current state of Freedom* 1-2.
491 Mogalakwa and Sebudubudu 2006 *Journal of African Elections* 209.
492 OECD *Fighting Corruption: What Role for Civil Society Organisations* 23.
493 *Economic Freedom Fighters v The Speaker of the National Assembly and Others and Democratic Alliance v the Speaker of the National Assembly and Others* 1.

4.5.4.3 The media

The role of the media in Botswana in fighting public procurement corruption has been growing over the last 20 years.[494] The media has always been one of the most important players in fighting public procurement corruption in Botswana. This can be traced as far back as 1975, when the media reported that an Engineer Kunz was involved in corruption.[495] Media reports also unearthed the corruption that took place between 1980-1990 (the textbook scandal, the land scandal and the BMC matter). This led to the establishment of three presidential enquiries.[496] The media followed these enquiries religiously and kept the public well informed. The result was the establishment of the DCEC by the government in 1994.[497]

Therefore, the establishment of the DCEC is not just a government initiative. The media had a great deal to do with it.[498] Ever since the establishment of the DCEC and the PPADB, the media has been relentless in its covering of public procurement corruption in Botswana.[499] There is no organ of the media, independent or state owned, that has not reported or covered a case of corruption. Of course, the degree and the extent of the coverage as well as the depth of the reporting differ,[500] with the independent media reporting more, whilst the state media report less.

However, the media have played and continue to play their part in reporting public procurement corruption in Botswana. Sebudubudu[501] observes that:

> In an open admission of the skewed access to resources, the BDP's secretary-general was recently reported to have responded to complaints that members of the BDP's businesses were awarded government tenders from which they sponsor the party by saying: "I always hear people complaining of how BDP members win tenders but they seem to forget that we are in the ruling party. How do you expect us to rule when we don't have money? You should just live with it and accept that we are ruling."

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494 Ittner *Fighting Corruption in Africa – A comparative study of Uganda and Botswana* 11.
495 Sebudubudu *Combating Corruption in Southern Africa* 116.
496 Sebudubudu *Combating Corruption in Southern Africa* 117-118.
497 Sebudubudu *Combating Corruption in Southern Africa* 116.122.
498 Good "The Presidency of General Ian Khama: Militarisation of the Botswana Miracle"; Smith "Ian Khama: An Officer, A Gentleman and A Dictator?"
499 Sebudubudu "The Evolution of State Corruption and Anti-Corruption in Botswana" 16; Gbadabosi "Corruption Perception and Sustainable Development: sharing Botswana" 263.
500 Sebudubudu "The Evolution of State Corruption and Anti-Corruption in Botswana" 16; Gbadabosi "Corruption Perception and Sustainable Development: sharing Botswana" 263.
501 Sebudubudu "The Evolution of State Corruption and Anti-Corruption in Botswana" 16.

The response by the BDP was as a result of media reports that BDP politicians were being favoured in the awarding of government contracts.[502]

However, the private media in Botswana remain under threat, especially from the current government, when it comes to reporting public procurement corruption cases. According to the Botswana INK Centre for Investigative Journalism:[503]

> Serite, freelance reporter for feisty investigative newspaper the Botswana Gazette, was allegedly arrested during a private meeting with a source. Serite has recently published a series of articles in the Gazette critical of President Ian Khama's government, including reports alleging corruption involving Botswana Railways and Transnet of South Africa. The Botswana parastatal is purchasing coaches from its South African counterpart.

Politicians in Botswana have been accused of unduly influencing the awarding of contracts with impunity, especially by the private media.[504] In Botswana the private media have continued to accuse members of the BDP and the President of concentrating power in himself and his close allies, who are known as the "A-Team".[505]

According to Ditlhase[506] there are allegations that the President's two twin brothers have been awarded defence contracts running into millions of pulas[507] without following the tender procedures. Writing for an organ of the private print media, Ditlhase reports that:[508]

> Khama (59), who has been president for four years and was vice-president for 10 years before that, has concentrated enormous powers in his hands. One of his close relatives, Ramadeluka Seretse, is the Minister in charge of the defence force, police, intelligence services and the law enforcement machinery. So far the President's cronyism has escaped the attention of international corruption watchers. Many of Khama's relatives and friends have benefited from government tenders and other business, particularly contracts handed out by the Botswana Defence Force and the Botswana Police Service. Beneficiaries include his bothers, twins Tshekedi and Anthony, who are middlemen acting on behalf of the defence force.

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502 Ditlhase 2012 https://mg.co.za/article/2012-11-02-00-khama-inc-all-the-presidents-family-friends-and-close-colleagues.

503 Centre for Investigative Journalism 2017 http://inkjournalism.org/.

504 OSISA 2015 http://www.osisa.org.

505 Kavahematui *Botswana Guardian* 1.

506 Ditlhase 2012 https://mg.co.za/article/2012-11-02-00-khama-inc-all-the-presidents-family-friends-and-close-colleagues.

507 Botswana local currency.

508 Ditlhase 2012 https://mg.co.za/article/2012-11-02-00-khama-inc-all-the-presidents-family-friends-and-close-colleagues.

Mogalakwe[509] confirms these media reports by stating that the President's twin brothers allegedly supplied defence equipment to the Botswana Defence Forces through a company called Seleka Springs in which they were directors. The nature of the equipment and the value of the procurement are facts that are not publicly available.

In another related transaction, Seleka Springs supplied 45 Austrian Pandur Tanks.[510] It was reported in the media that these tanks were unsuitable for the terrain in Botswana. The government paid P426 million for the tanks, and the current President was at that time the Commander of the Botswana Defence forces.[511] It should also be noted that the current President was the head of the defence forces for a very long time, and in the process developed strong links with defence force personnel.[512] The President has not publicly denied these allegations.[513]

These and many other allegations of public procurement corruption reported in the media have not been formerly investigated.[514] Ignoring these allegations does not help in the fight against public procurement corruption. In addition, one may say that if the media reports of corruption are true, they are overshadowed by the fact that according to the general perception of public sector corruption as published by TI, Botswana has remained the least corrupt country in Africa.[515]

4.5.4.3.1 Social media

Recently, the use of social media, in particular of Facebook, has been and is being used by the DCEC to fight corruption.[516] The DCEC has created a Facebook page

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509 Sunday Standard Khama One of Early Beneficiaries of the Elite Corruption 1.

510 Ditlhase 2012 https://mg.co.za/article/2012-11-02-00-khama-inc-all-the-presidents-family-friends-and-close-colleagues.

511 Ditlhase 2012 https://mg.co.za/article/2012-11-02-00-khama-inc-all-the-presidents-family-friends-and-close-colleagues.

512 Ditlhase 2012 https://mg.co.za/article/2012-11-02-00-khama-inc-all-the-presidents-family-friends-and-close-colleagues.

513 Ditlhase 2012 https://mg.co.za/article/2012-11-02-00-khama-inc-all-the-presidents-family-friends-and-close-colleagues.

514 Ditlhase 2012 https://mg.co.za/article/2012-11-02-00-khama-inc-all-the-presidents-family-friends-and-close-colleagues.

515 TI Corruption 2016 http://www.transparency.org/news/feature/corruption_perceptions_index_2016.

516 DCEC 2016 https://www.Facebook.com/pages/The-Directorate-on-Corruption-and-Economic-Crime-DCEC-Botswana/353801698160729?fref=ts.

dedicated to fighting corruption.[517] At a glance it can be seen that it had 164 likes as of March 2016.[518] The Facebook page is quite active, with updates posted almost daily, and at times three of more updates are posted by the DCEC per day.[519] It covers all the areas that the DCEC is working on.

Through the Facebook page, the DCEC posted that it had established Anti-Corruption Clubs in some secondary schools.[520] Of course, the use of Facebook can be criticised as it is accessible only to those who have access to the internet.[521] Whilst this criticism may be valid, the important point to note is that every media tool must be used in reaching out to people in the fight against corruption.[522] Therefore, this initiative is highly commendable, and other developing countries in Africa should follow suit.

The reporting of public procurement corruption by the media has not been without consequences. Where allegations of corruptly awarding tenders have been raised in the media, especially against high-ranking political office bearers, this has resulted in the media being sued for defamation.[523] In *Tsodilo Services Pty Ltd t/a Sunday Standard and Others v Tibone*,[524] a politician who was a Cabinet Minister claimed P3 million in damages against a newspaper that had reported that he had awarded a government contract corruptly. The High Court awarded the claim but it was reduced to P250 000 by the Court of Appeal.[525]

There is always a conflict for the media not only in Botswana but in general between freedom of speech, public interest and the individual dignity of the political figures.[526] Of course, where the media reporting is malicious the defamation damages must be

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517 DCEC 2016 https://www.Facebook.com/pages/The-Directorate-on-Corruption-and-Economic-Crime-DCEC-Botswana/353801698160729?fref=ts.
518 DCEC 2016 https://www.Facebook.com/pages/The-Directorate-on-Corruption-and-Economic-Crime-DCEC-Botswana/353801698160729?fref=ts.
519 DCEC 2016 https://www.Facebook.com/pages/The-Directorate-on-Corruption-and-Economic-Crime-DCEC-Botswana/353801698160729?fref=ts.
520 DCEC 2016 https://www.Facebook.com/pages/The-Directorate-on-Corruption-and-Economic-Crime-DCEC-Botswana/353801698160729?fref=ts.
521 Lamb Facebook usage may Help Curb Government Corruption 1.
522 OECD Fighting Corruption in Transition Economies 83.
523 Fombad *Media Law in Botswana* 93.
524 2011 2 BLR 494 CA.
525 *Tsodilo Services Pty Ltd t/a Sunday Standard and Others v Tibone* 4.
526 *Khumalo and Others v Holomisa* Case CCT 53/01 para 22-23.

paid.[527] The Courts in Botswana should therefore be careful in awarding defamation damages in order to avoid restraining the media from reporting instances of public procurement corruption. This is one of the risks that the media in Botswana are exposed to when reporting on allegations of corruption in government procurement.

4.6 Conclusion

The aim of this chapter was to firstly to present an overview of Botswana's public procurement system. The discussion in that regard has shown that Botswana has come a long way in developing its procurement system. For such a small country to be able to put in place a well-oiled procurement system that is backed by dedicated procurement legislation which has provisions that are international in character is an achievement on its own. In addition, this chapter has demonstrated that all the procurement committees envisaged in the PPAD Act are functional and staffed with reasonably competent procuring officials.

It has also been shown in this chapter that both at the national and local district level Botswana has put in place sound procurement dispute resolution mechanisms. Such is the confidence in these dispute resolution bodies that it is a statutory requirement for one to first exhaust internal public procurement grievance mechanisms before approaching the Courts. It has also been revealed that Botswana has made steady progress in observing procurement principles at national and local district level.

However, a notable criticism is that Botswana should commit itself at regional level by becoming a member of COMESA or at international level by ratifying the WTO GPA in order for the country to improve its public procurement to an even higher level.

Secondly, it was the intention of this chapter to discuss the measures that Botswana has put in place in fighting public procurement corruption, focussing on criminal measures, administrative measures, institutional measures and civil activism measures.

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527 *Khumalo and Others v Holomisa* 18.

Botswana has opted for the classical approach to combat public procurement corruption. The classical approach as stated in Chapter One combines the much revered traditional approach of regulating public procurement and combating public procurement corruption into a single piece of legislation. Botswana has managed to partly attain this approach through procurement reforms. However, the classical approach that Botswana is using although it may be the way to go for some developing countries it does not go far enough with its anti-corruption provisions. One may appreciate that procurement reforms in Botswana were enacted in 2001 at a time when the traditional approach[528] of combating public procurement corruption was highly dominant, hence, the limited anti-corruption provisions in PPAD Act. The classical approach to combating public procurement approach by Botswana is complemented by DCEC which executes Botswana's anti-corruption strategy from a criminal point of view.

Botswana has established a single anti-corruption agency, the DCEC, modelled on Hong Kong's ICAC, and the DCEC uses mainly criminal measures as a tool for use in fighting public procurement corruption. Two outstanding features of the institutional measures have been identified, namely the Anti-Corruption Units placed in each ministry, and the Botswana Corruption Court.

The establishment of Anti-Corruption Units in each ministry and in local government marks the creation of a unique model that has helped Botswana to curb public procurement corruption. In addition, the PPADB employs administrative measures, mainly suspension and delisting as opposed to debarment, but without a clearly defined suspension and delisting period. Furthermore, there are other institutions such as the Botswana Police Service, the Botswana Prosecution Division and the Directorate of Audit that complement the work of the DCEC. Lastly, civil activism in Botswana is relatively weak, although the DCEC has been trying to use the social media to encourage civil participation in combating public procurement corruption.

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[528] The traditional approach of combating public procurement corruption separates public procurement regulation from anti-corruption legislation. This means that matters of public procurement legislation cannot be used to combat public procurement regulation. The reasoning behind the traditional approach is to avoid conflation of the primary objective of public procurement.

CHAPTER 5: SOUTH AFRICA

5.1 Introduction

The primary aim of this chapter is twofold: first to give a broad overview of South Africa's public procurement system and the principles that underpin it, and second to give an overview of South Africa's public procurement corruption and how South Africa is using criminal measures, administrative measures, institutional measures and civil activism measures as legal mechanisms for combating public procurement corruption.

This first part of this chapter will focus on South Africa's public procurement regime. This entails a discussion of: (i) public procurement legislation; (ii) public procurement institutions and; (iii) public procurement principles. Under public procurement legislation the following legislation will be discussed, bearing in mind that South Africa does not have a single piece of public procurement legislation: the *Constitution* (section 217); the *Public Finance Management Act* (hereafter *PFMA*); the *NT Regulations* (hereafter NTR);[1] the *Local Government: Municipal Finance Management Act* (hereafter MFM);[2] the *Local Government Municipal Systems Act* (hereafter MSA);[3] the *Preferential Procurement Policy Framework Act* (hereafter PPPFA);[4] the *Broad-Based Black Economic Empowerment Act* (hereafter BBBEE);[5] the *Construction Industry Development Board Act* (hereafter CIDB);[6] and the *Promotion of Administrative Justice Act* (hereafter PAJA).[7]

In terms of public procurement institutions the following have been chosen due to their significance and relevance to public procurement: the National Treasury (hereafter NT); the Office of the Chief Procurement Officer (OCPO); the Provincial Treasury; and the Committee System for Competitive Bids in Local Government. In addition, the roles of organs of state or state owned enterprises as well as that of the Accounting Officer will be discussed to the extent that they are relevant to public

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1 1 of 1999.
2 56 of 2003.
3 32 of 2000.
4 5 of 2000.
5 53 of 2003.
6 38 of 2000.
7 3 of 2000.

procurement. The last part of the overview of South Africa's public procurement system focuses on the public procurement principles as provided in section 217 of the Constitution.

The second part of this chapter is a discussion of the overview of public procurement corruption in South Africa with the intention of discussing the use of the four identified anti-corruption measures. In order to do this, the following structure is followed: (i) a definition of public procurement corruption; (ii) the causes of public procurement corruption.[8] In addition, the types and forms of public procurement corruption will briefly be referred to. In the final analysis, the use of criminal measures, administrative measures, institutional measures and civil activism measures as legal mechanisms for combating public procurement corruption will be discussed.

As a starting point it is necessary to briefly discuss South Africa's governance and economic structure in order to have an understanding of the jurisdiction under consideration.

5.2 South Africa's governance and economic system

South Africa is a country located in sub-Saharan Africa with an estimated population of 55 million people.[9] It gained democratic independence[10] in 1994 after the defeat of apartheid. South Africa's history has been influenced by four distinct phases which had a huge impact on the state as it is known today, namely Dutch occupation (1652); British occupation (1806-1961); apartheid South Africa 1961-1994 and post-apartheid South Africa 1994.[11]

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8 The personal circumstances of procuring officials; the personal circumstances of politicians; Political transition and; Economic transition.

9 Statistics South Africa Statistical release Mid-year Population Estimates P0302.

10 The use of the phrase democratic independence is preferred as opposed to just independence, because South Africa gained formal independence in December 1931 and became a sovereign Republic in 1961 after it completely divorced itself from Britain. However, the Republic of South Africa, though it was independent, had a discriminatory governance system which was not democratic. It was only in 1994 that democratic independence was gained, which through the Constitution gave civil and political rights to all South Africans regardless of race.

11 MacKinnon *The Making of South Africa: Culture and Politics* 25.

The transition in 1994 gave birth to a constitutional state which is governed in terms of constitutional supremacy as opposed to legislative supremacy. This was done through the adoption of the Constitution.

In terms of governance, the Constitution creates three arms of government, the national legislature (parliament), the national executive and the judiciary.[12] Although South Africa is not a federal state it exhibits some characteristics of a federal state in that it has nine provinces. The governance of each province is made up of the premier (the head of the province), the provincial legislature, the provincial executive and the administrative organs.[13]

Economically, South Africa has a diversified and well established economic base in agriculture, energy, transport, construction, real estate, tourism and mining.[14] In 2015, Statistics South Africa reported that the country had a nominal GDP of R991 billion.[15]

5.3 South Africa's public procurement overview

The development of public procurement in South Africa finds its origin under different transitions. These periods are the Dutch occupation in 1652; the Batavian government 1803-1806;[16] the second British occupation 1806-1910;[17] the Union of South Africa 1910-1961; and[18] apartheid South Africa 1961 – 1994.The year 1994 introduced a new era in South Africa that changed the approach of public procurement.

The adoption of the Constitution and in particular section 217 influenced public procurement in the manner in which government procurement is to be conducted.[19] Another important milestone that took place in 1994 was that South Africa was able to be admitted into the international community.[20] In line with this, South Africa

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12 Section 8 (1) of the Constitution.
13 Sections 103-105 of the Constitution.
14 Stats SA 2016 http://www.statssa.gov.za/?page_id=593.
15 Statistics South Africa 2015 South http://www.statssa.gov.za.
16 MacKinnon *The Making of South Africa: Culture and Politics* 25.
17 Etherington *The Great Trekkers The Transformation of Southern Africa* 1815-1854 2.
18 MacKinnon *The Making of South Africa: Culture and Politics* 185.
19 Bolton 2006 *Potchefstroom Electronic Law Journal* 3.
20 DIRCO 2017 http://www.dirco.org.

exercised this right when it joined the WTO. In joining the WTO, South Africa was free to become a signatory to the WTO GPA.[21] This means that South Africa had an opportunity to be a member of the WTO GPA and to conduct its procurement in line with international best practices of public procurement.[22] Therefore, it is necessary to briefly discuss the position of South Africa in relation to the WTO GPA within the broader framework of South Africa's international approaches to public procurement.

5.3.1 International instruments

As explained in Chapter Two, the WTO GPA is the only international instrument that is open for ratification by any WTO member state.[23] Although the country had been a member of GATT ever since 1948, it was only in 1995 after the demise of apartheid in 1994 that South Africa was admitted as an official member of the WTO.[24] However, as with most developing countries South Africa is not a party to the WTO GPA. One of the reasons why South Africa is not a member of the WTO GPA may be that South Africa uses public procurement *inter alia* as a tool of economic empowerment.[25] The use of public procurement as an empowerment tool may be viewed as protectionist and anti-trade liberalisation, which is contrary to the spirit of the WTO GPA.[26]

In addition, South Africa has committed to ensuring that 75% of government procurement is sourced locally if possible, which is contrary to the objectives of the WTO GPA.[27] The commitment to local sourcing was done in terms of the National Industrial Participation Programme as well as the 2011 Local Procurement Accord.[28] Therefore, it seems unlikely that South Africa will commit to the WTO GPA unless there are significant changes to the WTO GPA.[29] These significant changes should be able to allow developing countries like South Africa to continue using public procurement *inter alia* for economic empowerment without being accused of violating

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21 South Africa became a member of the WTO on 1 January 1995.
22 WTO Opening Markets and Promoting Good Governance 4.
23 WTO 2017 WTO GPA Agreement of the Text https://www.wto.org/english/tratop_e/gproc_e/gpa_1994_e.htm.
24 South Africa joined the WTO on 1 January 1995.
25 Bolton 2006 *Journal of Public Procurement* 194.
26 Bolton 2006 *Journal of Public Procurement* 195-196.
27 DTI Unknown http://www.dti.org.za.
28 DTI *The National Industrial Participation (NIP) Revised Guideline* 13.
29 McCrudden *Buying Social Justice: Equality, Government Procurement and Legal Challenge* 273.

the WTO GPA. Since South Africa is not a party to the WTO GPA, how has South Africa responded to regional approaches to public procurement?

5.3.2 Regional instruments

At regional level, South Africa is a member of the AU,[30] the SADC[31] and the SACU.[32] None of these regional blocs make provisions that directly regulate public procurement.[33] South Africa, currently ranked as the second biggest economy in Africa after Nigeria, may wish to consider seriously leveraging its economic power by advocating for the opening up of procurement within the region.[34]

For instance South Africa is the dominant economic player in Sub-Saharan Africa, including the SADC and the SACU, and should be able to take the lead in inter-sub-regional procurement. The benefits for South Africa are that the country should be able to use its expertise in energy supply, transport, marine resources, and mining to bid for major procurement projects within Sub-Saharan Africa, which is developing in these specific areas.[35] The Chinese have the largest share of government procurement in Sub-Saharan Africa.[36]

South Africa has failed to transform its economic power and influence into a meaningful sub-regional procurement arrangement.[37] COMESA, as discussed in Chapter Two,[38] is the only African regional body that has developed a public procurement framework.[39] South Africa is not party to COMESA and therefore cannot benefit from COMESA's public procurement framework.

The above has established that South Africa is not a party to any international or regional public procurement agreement. Effectively, South Africa uses only its own domestic public procurement legislation to regulate its public procurement.[40] For this

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30 Since 6 June 1994.
31 Since 30 August 1994.
32 Since 11 December 1969.
33 de la Harpe 2015 *Potchefstroom Electronic Law Journal* 1586-1587.
34 Statistics South Africa Category Archives: Economic Growth 2015 http://www.statssa.gov.za.
35 European Commission *Public Procurement Africa Reforms* 6.
36 CIDB *Export of South African Contracting Services A Feasibility Study* 4.
37 OECD *Perspectives on Global Development* 126.
38 See para 2.10.2.
39 AFDB *COMESA Enhancing Procurement Reforms and Capacity Project* 22-24.
40 Bolton *The Regulatory Framework for Public Procurement in South Africa* 183.

reason, attention is now given to South Africa's domestic regulation of public procurement.

5.3.3 Domestic procurement

At domestic level, South Africa's public procurement must be understood in the light of (i) its public procurement legislation; (ii) its procuring institutions; and (iii) its public procurement principles. These are the focus of the discussion below.

5.3.3.1 Legal framework

The Constitution, in particular section 217, as already stated, is the foundation of public procurement in South Africa. The PFMA is the primary legislation that attempts to give life to section 217.[41] In some cases the provincial and local governments have got their own legal regime on procurement, which must not contradict the broader procurement principles enunciated in section 217 as well as the primary legislation on procurement (PFMA). In addition to the PFMA, Quinot[42] identifies 9 distinct pieces of legislation that have a bearing on procurement and these are:

(k) *The Local Government: Municipal Finance Management Act*[43] (hereafter MFMA);

(l) *The Local Government: Municipal Systems Act*[44](hereafter MSA);

(m) *The Preferential Procurement Policy Framework Act*[45] (hereafter Procurement Act);

(n) The State Tender Board Act;[46]

(o) *The Broad-based Black Economic Empowerment Act*[47] (hereafter BBBEE);

(p) *The Prevention and Combating of Corrupt Act;*[48]

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41 Bolton "The Regulatory Framework for Public Procurement in South Africa" 184.
42 Quinot *An Institutional Legal Structure for Regulating Public Procurement* in *SA* 5.
43 56 of 2003.
44 32 of 2000.
45 5 of 2000.
46 86 of 1968.
47 53 of 2003.

(q) *The Construction Industry Development Board Act;*[49] (hereafter CIDBA);

(r) *The Promotion of Administrative Justice Act;*[50] (hereafter PAJA);

(s) *The National Land Transport Act;*[51]

(t) *The National Supplies Procurement Act;*[52]

(u) *The State Information Technology Agency Act*;[53]

(v) *The National Treasury Regulations* (hereafter NTR).

Further, Quinot identifies other legislation that is used for specific procurement by specific government organs.[54] In the same vein, there is additional legislation that also affects procurement, which relates to access of information.[55] What the above indicates is that South Africa has an array of legislation which Quinot describes as "fragmented" procurement legislation.[56] Acknowledging the truth of Quinot's assertion, the following legislation will be briefly discussed due its significance in public procurement: the *Constitution*; the PFMA; the NTR; the MFM; the MSA; the Procurement Act; BBBEE; the CIDB; and the PAJA.

5.3.3.1.1 Constitution

One of the most challenging projects of post-apartheid South Africa was to create a society which reflects the wider values and aspirations of the South African people. The country was faced with the challenge of redressing the economic marginalisation of most black people, who are also the majority of the population.[57] At the same time, there was a need to accommodate previously advantaged people,

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48 12 of 2003.
49 38 of 2000.
50 3 of 2000.
51 5 of 2009.
52 89 of 1970.
53 88 of 1998.
54 *Financial Management of Parliament Act* 10 of 2009; *Road Traffic Management Corporation Act* 20 of 1999; *Armaments Corporation of South Africa, Limited Act* 51 of 2003; *Administrative Adjunction of Road Traffic Offences Act* 46 of 1998; *Nursing Act* 33 of 2005; *Public Audit Act* 25 of 2004; *Health Professions Act* 56 of 1974; *Housing Act* 107 of 1997; *Disaster Management Act 57 of 2002 and Correctional Services Act 111 of 1998.*
55 *Promotion of Access to Information Act* 2 of 2000.
56 Quinot *An Institutional Legal Structure for Regulating Public Procurement* in *SA* 10.
57 Phillip 2010 *Law Democracy and Development* 106.

in particular a privileged group of the white people.[58] Furthermore, South Africa had to come up with a Constitution that was also appealing to the international community, whose support had been instrumental to the realisation of democratic independence.[59]

The preamble of the Interim Constitution[60] acknowledged *inter alia* that after apartheid there was a need to create a new order in South Africa for the enjoyment of democracy, sovereignty and above all equality between men and women of all races as well as the exercise of fundamental rights and freedoms. In the Namibian case of *S v Acheson*[61] it was stated that:

> The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a mirror reflecting the national soul; the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government.[62]

The revised Constitution of 1996 created the general principles of procurement in section 217.[63] These principles were meant to complement other existing government efforts to create a nation that sought to embark on the values and aspirations of the South African people. Previously, that is, under the apartheid government, the majority of the black people were unable to participate in government contracts due to the existence of an institutionalised discrimination that was inherent within the apartheid state.[64] In order to remedy this, the new Constitution in section 217 provided that:

> (1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for good or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
>
> (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement system policy providing for-
>
> (a) Categories of preference in the allocation of contracts; and

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58 The particular group of white people that needed protection controlled the wheels and machinery of the economy prior to and after independence.
59 Phillip 2010 *Law Democracy and Development* 110.
60 Act 200 of 1993.
61 1991 2 SA 805.
62 813A-C.
63 Bolton "The Regulatory for Public Procurement in South Africa" 179.
64 Phillip 2010 *Law Democracy and Development* 110.

(b) The protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination

(3) National legislation must prescribe a framework within which the policy referred to in subsection (2) may be implemented

The importance of section 217 above is two-fold. First it lays down the broad procurement principles that must be adhered to *inter alia* by the three spheres of government namely, the national, provincial and local governments.[65] Furthermore, it makes it obligatory for all organs of state to abide by section 217 when dealing with government contracts and to derogate from section 217 only when justified in doing so.[66]

Secondly, it is clear that the government of South Africa sought to use public procurement to advance socio-economic benefits to previously disadvantaged people who were excluded from government contracts under apartheid due to discrimination.[67] In this regard, the PPPFA was enacted. Its relationship with section 217 (3) of the Constitution is discussed further below.[68]

Two more important Constitutional provisions that are profound in the administration of public procurement are sections 33 and 195 respectively. The former deals with the right to just administrative action.[69] It confers this right on an aggrieved supplier who seeks judicial review of procurement decisions.[70] As already discussed in Chapter Two, procurement decisions fall within the ambit of administrative action. As such, they are open to legal challenge.

There is a constitutional requirement in section 33(1) for all procurement decisions to be lawful, reasonable and procedurally fair.[71] In addition, the aggrieved supplier has a constitutional right to be given reasons in writing for the procurement decisions.[72] South African courts have on numerous occasions reaffirmed the importance of

65 Bolton 2006 *Journal of Public Procurement* 199-200.
66 Bolton 2008 *Public Procurement Law Journal* 782.
67 Bolton 2008 *Public Procurement Law Journal* 783.
68 See para 5.3.3.1.6.
69 Quinot *State Commercial Activity: A Legal Framework* 77-79.
70 Quinot *State Commercial Activity: A Legal Framework* 246-247.
71 Quinot *State Commercial Activity: A Legal Framework* 246.
72 Quinot *State Commercial Activity: A Legal Framework* 250-251.

section 33 in the dispensation of public procurement in South Africa.[73] Section 33 was given effect with the enactment of the PAJA. The discussion of the PAJA takes place below.[74]

The latter (section 195) provides *inter alia* for nine values and principles that must govern public administration.[75] The importance of section 195 within the context of public procurement is that, if public procurement as a function of public administration is conducted in terms of section 195, then public procurement corruption will be minimised.[76]

Therefore, the South African Constitution establishes a solid public procurement legal framework. Below is a discussion on the most relevant legislation that reflects the above constitutional provisions, beginning with the PFMA.

5.3.3.1.2 Public Finance Management Act

The PFMA is one of the most significant pieces of legislation at the heart of financial expenditure and asset management in South Africa.[77] According to its preamble it seeks to regulate financial management in the national and provincial governments.[78] Furthermore, it ensures that all revenue, expenditure, assets and liabilities of the national and provincial governments are managed efficiently and effectively.[79] The principles of public procurement attempt to ensure there is a cost-effective use of state funds on behalf of the public, and this is what the preamble of PFMA tries to capture.[80] In addition, the preamble places the responsibility for the prudent use of public funds on persons entrusted with financial management.[81]

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73 *Member of the Executive Council, Department of Education, Gauteng and Others v Governing Body of Rivonia and Others* 2013 ZACC 34.
74 See para 5.3.3.1.9.
75 Section 195 makes it obligatory for public procurement officials to exhibit *inter alia*: a high standard of professional ethics; an efficient, economic and effective use of resources; the provision of services in an impartial, fair and equitable manner; accountability; transparency and human resources maximisation.
76 *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another* 2010 ZACC 21.
77 National Treasury *2015 Public Sector Supply Chain Management Review* 3.
78 Preamble of PFMA.
79 Preamble of PFMA.
80 Ambe and Badenhorst-Weiss 2012 *Journal of Transport and Supply Chain Management* 244.
81 Preamble of PFMA.

The PFMA is divided into eight chapters that are relatively detailed prescribing the manner in which public finance must be managed. Although all eight chapters are significant in dealing with public finances, only the provisions that are relevant to public procurement will be discussed below.

Section 2 of the *PFMA* clearly outlines the objectives of the *PFMA*:[82]

> The objective of this Act is to secure transparency, accountability and sound management of the revenue, expenditure, assets and liabilities of the Institutions[83] to which the Act applies.

The *PFMA* defines irregular expenditure as:[84]

> Expenditure, other than authorised expenditure, incurred in contravention of or that is not in accordance with a requirement of any applicable legislation.

The overall power to control and manage government's financial resources is devolved to the NT by virtue of section 5 of the PFMA.[85] The powers and functions of the NT that are pertinent to combating public procurement corruption include *inter alia* managing the budget preparation process;[86] exercising control over the implementation of the annual national budget, including any adjustments to the budgets;[87] monitoring the implementation of provincial budgets;[88] and promoting and enforcing transparency and effective management in respect of the revenue, expenditure, assets and liabilities of departments, public entities and constitutional institutions.[89]

It is incumbent upon the NT to ensure that there is proper justification for adjustments of budgets particularly where there is a request to increase the initially allocated budget.[90] It is submitted that it is not necessary to treat every request for a budget increase with suspicion, as this may create unnecessary tension between the NT and other departments.

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82 Section 2 of the PFMA.
83 According to section 3 of the PFMA the institutions covered by this Act are departments, public entities, constitutional institutions and Parliament and the Provincial Legislatures.
84 Office of the Accountant-General *Guideline on Irregular Expenditure* 2.
85 The NT is hereby established, consisting of the Minister who is the head of the Treasury and the national department or departments responsible for financial and fiscal matters.
86 Section 6(c).
87 Section 6(d).
88 Section 6(f).
89 Section 6(g).
90 Auditor General *National and Provincial Audit Outcomes PFMA* 2014-15.

The PFMA requires the appointment of Accounting Officers who head procurement in different government departments and Constitutional institutions in terms of section 36. The Accounting Officers are employed in different departments at national and provincial level. Section 38 provides for the general functions of the Accounting Officer which include *inter alia* ensuring:

> Effective, efficient and transparent systems of financial and risk management and internal control;
>
> An appropriate procurement and provision system which is fair, equitable, transparent competitive and cost-effective.

The Accounting Officer plays a crucial role in ensuring that section 217(1) of the Constitution is effected by the different government procuring units that they head.[91] The competence, that is, the personal expertise and the ethical beliefs of the Accounting Officer has a bearing on the manner in which procurement is conducted in his or her department.[92]

For instance the 2016 Audit Report by the Auditor General revealed *inter alia* that a number of Accounting Officers has failed to adhere to simple procurement methods, and that this had resulted in both corruption and irregular expenditure.[93] The failure to adhere to procurement methods can be blamed either on lack of expertise of the Accounting Officer or the lack of diligence of the Accounting Officer; or it may point to the low ethical standards of the Accounting Officer in the execution of his procurement duties. In the same vein, it seems as if the legal mechanisms for holding responsible an Accounting Officer who violates procurement procedures are not being effectively enforced, thereby perpetuating the abuse of the procurement system.[94]

Another responsibility that the Accounting Officer has is to implement a system of project evaluation of "all major capital projects" prior to the final decision as to whether the procurement for such a project should go ahead.[95] This means that the Accounting Officer should be able to direct the entire planning phase of the

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91 NT *2015 Public Sector Supply Chain Management Review* 3.
92 NT *2015 Public Sector Supply Chain Management Review* 51.
93 NT *2015 Public Sector Supply Chain Management Review* 4.
94 NT *2015 Public Sector Supply Chain Management Review* 22.
95 NT *2015 Public Sector Supply Chain Management Review Act* 5.

procurement project.[96] In Chapter Two it has already been noted that there are different procurement phases prior to the awarding of a contract. All of which are susceptible to corruption.

It is against this background that the Accounting Officer is expected to be in full control of the procurement process for major capital projects in terms of section 38(1) (a) (iv). It should be borne in mind that the PFMA does not prescribe one single uniform procurement system for national, provincial and local government.[97] The Accounting Officer enjoys the flexibility of putting in place a procuring system that best addresses the needs of a particular procurement.[98] What is important is the realisation by the Accounting Officer of fairness, equitability, transparency, competitiveness and cost-effectiveness in the preferred procurement system.

Also, it is the responsibility of the Accounting Officer to discipline any person who contravenes procurement processes either for personal gratification (corruption) or in such a manner as to cause irregular and wasteful expenditure, which can be distinguished from public procurement corruption.[99]

Chapter 10 of the PFMA provides for varying degrees of financial misconduct and the applicable penalties. It provides *inter alia* that there is need for officials in departments to comply with the requirements of the PFMA.[100] In the event that the official fails to comply with the requirements of the PFMA, that official commits an offence and is liable to be the subject of a disciplinary hearing.[101] In addition to the disciplinary hearing, criminal proceedings may be instituted.[102]

In practice, numerous reports, especially by the Auditor General, have stated that there is rampant disregard of procurement provisions of the PFMA, but not much

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96 NT *2015 Public Sector Supply Chain Management Review* 5.
97 NT *2015 Public Sector Supply Chain Management Review* 4-5.
98 NT *2015 Public Sector Supply Chain Management Review* 6.
99 Section 38(1) (h).
100 Section 83.
101 Section 81.
102 Section 86.

action is taken against those officials.[103] There is no official explanation by the NT as to why it has been slow to institute disciplinary proceedings.[104]

As intimated earlier, the PFMA is not fully-fledged procurement legislation. As such, some of the gaps and grey areas in the PFMA, as far as they relate to public procurement, have been addressed by the National Treasury Regulations.

5.3.3.1.3 National Treasury Regulations

The NTR are enacted in terms of section 76 of the PFMA. The purpose of the NTR is to give additional guidelines and clarifications in the entire public finance management cycle. These include guidelines and clarifications *inter alia* in the procurement process. The first NTR came into force in 2001.[105] It has been amended several times, with the latest amendment coming into force in 2013.[106]

The NTR establishes three procuring institutions, namely a department, a constitutional institution and a public entity.[107] The NTR applies to these procuring institutions. This means that there is no other body or unit that is authorised to procure goods, services and works except if it is constituted in terms of the NTR.

The most relevant NTR is 16A, which deals with Supply Chain Management (SCM). Every department, organ of state or public entity must have an SCM policy or system for the acquisition of goods and services.[108] The SCM system has to reflect the five principles that are stated in section 217 of the Constitution.[109] In addition, the NTR establishes the SCM unit, which is mandated to implement the SCM system. The SCM units are located within the department, the constitutional institution or the public entity, but as separate units. The NTR establishes other procuring committees, and these will be discussed below under "procuring institutions".[110] Also, relevant for public procurement is NTR 16A8.1, which provides that:

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103 Auditor General *National and Provincial Audit Outcomes PFMA 2014-15* 9.
104 Section 86.
105 NTR Treasury Regulations for Departments, Constitutional Institutions and Public Entities.
106 National Treasury *Implementation Guide: Preferential Procurement Regulations,* 2011 5.
107 NTR 16A1.
108 NTR 16A3.1 (a).
109 NTR 16A3.2 (a).
110 See para 5.3.4.

> All officials and other role players in a supply chain management system must comply with the highest ethical standards in order to promote:
>
> (a) Mutual trust and respect; and
>
> (b) An environment where business can be conducted with integrity and in a fair and reasonable manner.

The importance of NTR16A8.1 is that both procurement practitioners and suppliers are expected to exhibit procurement conduct that is blameless.[111]

Some of the aspects regulated by the NTR in so far as public procurement is concerned are the following: the abuse of office for corrupt purposes; the non-awarding of government contracts to suppliers who have been prohibited from contracting with government contracts; the rejection of bids from previously corrupt suppliers; and the cancellation of the award of a government contract to corrupt suppliers.[112]

5.3.3.1.4 *Local Government: Municipal Finance Management* 56 of 2003

The MFMA acknowledges the involvement of local authorities in procurement in fulfilling the constitutional obligations of creating a better living environment for the people of South Africa.[113] The involvement of local authorities in procurement is part of a decentralised procurement system in South Africa.[114] According to the preamble of the MFMA, it envisages ensuring that there is secure and sustainable management of the financial affairs of municipalities.[115] However, the MFMA does define the ambit of the sustainable management of financial affairs. Once public procurement corruption has been identified, this means that there is unsustainable mismanagement of financial affairs.

There are 278 local municipalities and fewer than 10% of these obtained a clean audit, according to the Auditor General's Report presented to parliament for the 2013/204 period.[116] 90% of the municipalities failed to comply with procurement regulations and procedures. According to the Auditor General, most of the municipalities violated the MFMA, the PFMA and the Constitution by awarding

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111 National Treasury *Implementation Guide: Preferential Procurement Regulations, 2011* 5.
112 NT *2015 Public Sector Supply Chain Management Review* 28.
113 Ambe and Badenhorst-Weiss *Procurement Challenges in the South African Public Sector* 247.
114 WC Government, British High Commission and Greencape *Understanding Municipal* 11.
115 Preamble of the MFMA.
116 OAG *Consolidated General Report on the Audit Outcomes of Local Government 2013/2014* 553.

contracts to employees of municipalities (conflict of interest) and awarding contracts without going to tender.[117]

Furthermore, it was reported by the Auditor General that there is a huge shortage of procurement professionals in municipalities.[118] Most of the Accounting Officers who preside over municipal tenders do not have the required training in procurement matters.[119] This has the effect of compromising the procurement process, and cases of corruption are not likely to be effectively addressed. Another criticism that has been observed is that some municipalities do not have a procurement policy, let alone an anti-corruption policy that expresses the municipality's position on corruption.[120]

Furthermore, there are no codes of conduct or constant training on issues of integrity in procurement for some municipalities.[121] These observations, coupled by the findings by the Auditor General, are clear demonstration that procurement in South African municipalities needs urgent reform in order to minimise corruption and also to give effect to the Constitutional procurement provisions, which may have the eventual result of improving service delivery.[122]

5.3.3.1.5 *Local Government Municipal Systems Act* 32 of 2000

The MSA is elaborate in its preamble as it attempts to give a framework on the objectives of the MSA.[123] In so far as public procurement is concerned, the preamble of the MSA provides *inter alia* for affordable essential services; regulating the use of powers by municipal officials; planning and management; providing a framework for the provision of services; and legal matters pertaining to local government.[124]

South Africa, as already indicated, has 278 municipalities that are heavily involved in procurement.[125] According to the 2014/2015 Auditor General's Report the 278

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117 OAG *Consolidated General Report on the Audit Outcomes of Local Government 2013/2014* 553.
118 OAG *Consolidated General Report on the Audit Outcomes of Local Government 2013/2014* 554.
119 NT *Guide for Accounting Officers: Public Finance Management Act* 25-26.
120 NACF 2015 http://www.nacf.org.za.
121 Disoloane *Reception of a Code of Conduct at the Capricorn District Municipality in the Limpopo* 95.
122 OAG *Consolidated General Report on the Audit Outcomes of Local Government 2014/2015* 72.
123 NT *2015 Public Sector Supply Chain Management Review* 11.
124 Preamble of the *MSA*.
125 Auditor General *Consolidated General Report on the Audit Outcomes of Local Government* 22.

municipalities had a total expenditure of R347 billion. The greatest percentage of this expenditure was in procurement. Of the R347 billion, R14.7 billion was irregular expenditure, while R1 billion was wasteful and fruitless expenditure.[126] These figures alone highlight the role that municipalities play within the overall governance framework.[127]

The Auditor General also noted that the continued disregard of compliance legislation such as the MSA was one of the key causes of non-compliance. It stated in the 2014/2015 Auditor General's Report[128] that:

> We reported inadequate contract management at more municipalities in 2011-2012 and have seen little improvement in the past four years in addressing uncompetitive or unfair procurement processes and the high prevalence of awards being made to suppliers in which employees, councillors and state officials have an interest. Furthermore, little progress has been made in complying with legislation relating to awards made to close family members of employees and councillors.

The above findings by the Auditor General are worrying, particularly where public procurement corruption is concerned. It is unfortunate that the Auditor General did not classify the above as public procurement corruption. It has been noted earlier that one of the red flags signalling corruption is evident where government contracts are awarded to close family members or where state employees or municipal employees themselves are awarded government contracts.[129] This flagrant violation of the MSA by municipalities speaks to the lack of enforcement of the MSA by the relevant authorities and the lack of seriousness in the NT to rein in the non-compliant municipalities.

5.3.3.1.6 Preferential Procurement Policy Framework Act

The general principles of procurement laid down in section 217 of the Constitution *inter alia* promote the use of public procurement as an instrument of economically empowering previously disadvantaged people. In order for this to be realised, the government enacted the Procurement Act as far back as in 2000.

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126 Auditor General *Consolidated General Report on the Audit Outcomes of Local Government* I6.
127 Auditor General *Consolidated General Report on the Audit Outcomes of Local Government* 30.
128 Auditor General *Consolidated General Report on the Audit Outcomes of Local Government* 17.
129 OAG *Consolidated General Report on the Audit Outcomes of Local Government 2014/2015* 89.

The purpose of the Procurement Act[130] is to give effect to section 217 (3) of the Constitution. In simple terms, the Procurement Act is designed to compel government procurement bodies together with the public entities to give preference to the bids submitted by persons who were discriminated against during apartheid. Further guidance and clarity in the implementation of the Procurement Act is stated in the Preferential Procurement Regulations (hereafter PPR). The latest PPRs were issued in 2017.[131]

The PPR provides *inter alia* how a tenderer can qualify to be awarded a government contract using the point system, and the treatment of tenders that do not satisfy the preference point system.[132] A preference point system is a method that is used to calculate the number of points out of a 100 that a tenderer attains.[133] The PPR uses the 80/20 preference point system and the 90/10 preference point system.[134] For a tender that is below R1 million but not less than R30 000, 80% of the points are awarded for the price and 20% are awarded for compliance with the criterion of being previously disadvantaged.[135] For a tender that is above R1 million, 90% of the points are awarded for the price and 10% are awarded for compliance with the criterion of being previously disadvantaged.[136]

The importance of the PPR in fighting corruption is that each invitation to tender by government procurement entities must specify the preference point system that is going to be used during tender evaluation.[137] This is meant to create a level playing field in so far as the calculation of the preference point system is concerned.[138] Failure by a government procurement agent to indicate the preference point system may result in the nullification of the tender process and the invitation of tenders may be reinstituted.[139]

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130 In 2016 President Jacob Zuma stated that the Procurement Act would be repealed. This was said at a Black Business Council dinner held on 27 September 2016.

131 *Preferential Procurement Policy Framework Act*, 2000: Preferential Procurement Regulations, 2017.

132 National Treasury *Implementation Guide: Preferential Procurement Regulations, 2011* 5.

133 Preferential Procurement Regulations, 2011 reg 3-6.

134 Preferential Procurement Regulations, 2011 reg 3-6.

135 Preferential Procurement Regulations, 2011 reg 3-6.

136 Preferential Procurement Regulations, 2011 reg 3-6.

137 National Treasury *Implementation Guide: Preferential Procurement Regulations, 2011* 5.

138 National Treasury *Implementation Guide: Preferential Procurement Regulations, 2011* 11.

139 National Treasury *Implementation Guide: Preferential Procurement Regulations, 2011* 28.

In the same context, where a tender will be awarded in accordance with local content production, the PPR makes it obligatory for the procuring entity to state this in its invitation for tenders.[140] Again, this is meant to provide bidders with as much information as possible on the tender requirements.[141] This also reduces the opportunities for corruption, if properly complied with.

The Procurement Act works in tandem with the requirements of BBBEE. A brief discussion BBBEE, in so far it relates to procurement and corruption, follows below.

5.3.3.1.7 *Broad-based Black Economic Empowerment Act*

The BBBEE was enacted three years after the *Procurement Act*. The purpose of the BBBEE, as stated in its preamble, was to create a legislative framework promote the economic advancement of black people.[142] In other words, it follows the same path as the Procurement Act, in that under the BBBEE race is to be used as a factor in the allocation of government procurements, in order to balance the apartheid economic inequalities.[143] It is not in dispute that procurement as explained in section 217 is an instrument that the government of South Africa chose to use as a tool with which to address this anomaly.[144]

The noble objectives of the BBBEE have been abused to commit acts of public procurement corruption.[145] One example has been "fronting", which is generally defined by Bolton as the "practice of black people being signed up as fictitious shareholders in essentially 'white' companies". The issue of fronting was fore grounded in *Viking Pony Pumps (Pty) Ltd t/a Tricom Africa v Hydro-Tech Systems (Pty) Ltd*.[146]

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140 Regulation 9(1) An organ of state must, in the case of designated sectors, wherein the award of tenders local production and content is of critical importance, advertise such tenders with a specific tendering condition that only locally produced goods, services or works or locally manufactured goods, with a stipulated minimum threshold for local production and content will be considered.

141 *SAAB Grintek Defence v South Africa Police Service* 316/2015 ZASCA 104 5 2.

142 *SANRAL v The Toll Collect Consortium* 796/2012 2013 ZASCA 102 3.

143 *Minister of Mineral Resources v Mawetse SA* 20069/14 2015 ZASCA 82 12.

144 Bolton 2006 *Journal of Public Procurement* 199.

145 Heywood *Mail and Guardian* 1.

146 Case CCT 34/10 2010 ZACC 21 29-30.

There have been calls for the complete disbandment of the BBBEE due to this abuse, whilst its proponents have argued that the disbandment of BBBEE would run counter to the empowerment of black people.[147] The abuse of the BBBEE to commit public procurement corruption has manifested itself *inter alia* in the construction industry, which was the preserve of a few white people prior to 1994.

5.3.3.1.8 *Construction Industry Development Board*

The CIDB Act regulates construction procurement. Further amplification of the CIDB Act is provided by the CIDB Regulations.[148] The CIBD Act establishes the Construction Industry Development Board (hereafter CIDB), which has the power to regulate and administer construction procurement in South Africa.[149]

Construction in South Africa is one of the most lucrative and highly litigated areas in so far as procurement is concerned.[150] It is estimated that over 500 construction contractors and sub-contractors participate in construction procurement annually.[151] At national level the Department of Works leads national procurement and it is also responsible for the construction that takes place in the provincial and local government spheres as well.[152] According to Anthony,[153] the construction industry constitutes almost 4% of the country's gross domestic product.

The private sector both nationally and internationally dominates the awarding of construction contracts by the government.[154] It is also has the highest number of consortiums and sub-contractors.[155]

Anthony[156] expresses the opinion that South Africa is exposed to corruption through construction procurement. One of the forms of corruption that has besieged the

147 SAIIA 2015 http://www.saiia.org.za.
148 CIBD 2016 http://www.cidb.org.za.
149 CIDB Act (section 2).
150 Anthony *The Regulation of Construction Procurement in South Africa* 25-26.
151 PWC *SA Construction* 3-5.
152 Department of Public Works 2009 http://www.publicworks.gov.za/PDFs/Articles/2017News/More_state_coastal_properties_to_stimulate_economic_development_in_smaller_towns.pdf.
153 Anthony *The Regulation of Construction Procurement in South Africa* 25.
154 PWC *SA Construction* 12.
155 PWC *SA Construction* 12-14.
156 Anthony *The Regulation of Construction Procurement in South Africa* 69.

procurement industry is collusion,[157] as is evidenced by the R1.46 billion that the Competition Commission of South Africa received as fines in 2013 from construction companies convicted of collusion.[158] In general, collusion in the construction industry occurs when construction bidders agree amongst themselves on who will submit the winning bid.[159] These arrangements are made discreetly using a number of mechanisms.[160] Once the collusion agreement has been reached, at the time of bid submission other construction bidders intentionally submit non-competitive bids just to create an impression that the bidding process was competitive.[161]

Collusion is one of the most flagrant and egregious violations of competition law.[162] As explained in Chapter Two, public procurement thrives when there is genuine competition amongst different bidders.[163] Collusion stifles most of the fundamental objectives of public procurement in particular works. Inherent in collusion are price inflation and manipulation.[164] In the end there is no value for money and if it is not harshly sanctioned this practice has the ability to collapse the budget for construction procurement in developing countries.[165]

One of the measures to combat construction corruption was the introduction of the Construction Sector Transparency Initiative, the immediate purpose of which was to enhance transparency and accountability in the public sector construction contracts.[166] This was after it was observed that there are cartels in South Africa's works procurement that were perpetuating public procurement corruption under construction.[167]

The punishment of these cartels and other forms of anti-competitive behaviour as well as the investigation of allegations of corruption including actual corruption are

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157 Corruption Watch 2016 http://www.corruptionwatch.org.za.
158 Competition Commission *Competition Commission Invites Construction Firms* 3.
159 *Esorfranki Pipelines v Mopani District Municipalities* 40/13 2014 ZASCA 21 7-8.
160 *Esorfranki v Pipelines v Mopani District Council* 16.
161 Khumalo, Nqobela and Njisane "Cover pricing in the Construction Industry" 1.
162 Ratshisusu 2014 *South Africa Journal of Economic and Financial Sciences* 589.
163 See para 2.6.
164 Steyn *Mail and Guardian* 1. According to the Mail and Guardian 19 cases of collusion were reported during the construction of the 2010 world cup stadiums. At least R14 billion was lost by South African Municipalities.
165 Polity 2012 http://www.polity.org.za/article/construction-collusion-consequences-companies-take-note-2013-04-19.
166 Anthony *The Regulation of Construction Procurement in South Africa* 96.
167 PAG *Construction Cartel: Construction Industry Development Board Cartel* 1.

the responsibility of the Competition Tribunal, as noted in the *Southern Pipelines Contractors/Conrite Walls v Competition Commission*.[168]

The functions of the Competition Commission, Competition Tribunal and other procuring entities are administrative in nature and are regulated in terms of the PAJA.

5.3.3.1.9 Promotion of Administrative Justice

Procurement decisions are part of administrative action as envisaged in section 33 of the Constitution, which deals with the right to just administrative action.[169] Section 33 makes it imperative for national legislation to be enacted in order to give life to section 33. The PAJA was enacted in compliance with section 33. The importance of the PAJA in the procurement process has been dealt with at large by the South African courts.[170]

For example, in the case of *Allpay Consolidated Investments Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others*,[171] the court ruled *inter alia* that procurement decisions are administrative in nature and they are subject to review. What this means is that no public procurement decision can escape the test of the PAJA for its validity.[172]

5.3.3.1.10 Reflections

The above discussion has focussed on the procurement regulatory framework in South Africa. It has revealed that the public procurement regulatory regime in South Africa seeks *inter alia* to reflect the Constitutional provisions (secs 33, 195 and 217). The reflection of these Constitutional principles is via the PFMA, the Procurement Act and other pieces of legislation.

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168 Case No: 105/CAC/DEC10; *Woodlands Dairy v Competition Commission* 2010 6 SA 108 (SCA) para 10; *Federal-Mogul Southern Africa v Competition Commission* 2005 1 CPLR 50 CPAC 67.

169 Section 33(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair. (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. (3)(a) National legislation must be enacted to give effect to these rights, and must (a) provide for the review of administration by a court or, where appropriate an independent and impartial tribunal; (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and (c) promote an efficient administration.

170 *Aurecon South Africa (Pty) Ltd v City of Cape Town* 20384/2014 2015 ZASCA 209 para 10.

171 ZACC 7 para 2.

172 Further discussion of the PAJA is done below. See para 5.5.5.3.3.

The multiplicity of procurement-related legislation has created nightmarish bureaucratic experiences for public procurement stakeholders. This has created a conducive environment for public procurement corruption.[173] As part of the solution, there is a push for the enactment of new public procurement legislation.[174] Meanwhile, public procuring institutions must endeavour to implement the archaic procurement legislation.

5.3.4 Procurement institutions

South Africa operates a decentralised procurement system.[175] As explained earlier, procurement takes place in the national, provincial and local government spheres as well as being performed by other government entities and parastatals. According to the PFMA, the NT is the institution that is at the helm of procurement administration.[176] In addition, Provincial Treasuries are the leading procuring institutions at provincial level.[177]

In addition there are also (i) Bid Specification Committees, (ii) Bid Evaluation Committees and (iii) Bid Adjudication Committees, as acknowledged in *Actaris South Africa (Pty) Ltd* v *Sol Plaatje Municipality, Intelligent Metering Systems (Pty) Ltd*.[178] Bolton classifies the above three Committees as a "Bid Committee System". These three committees will be discussed briefly below under "Bid Committee System".

A recent intervention in South Africa's procurement institutions is the introduction of the Office of the Chief Procurement Officer (hereafter OPCO).

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173 Gumede *Policy Brief 14: Combating Corruption in South Africa* 1.

174 South African Government 2017 http://www.gov.za/public-procurement-reforms-underway.

175 NT *2015 Public Sector Supply Chain Management Review* 3.

176 In terms of section 6(1) (g) of the PFMA the NT has an obligation to ensure that there is transparency in and effective management of public finances. This is one of the indicators that the NT has a role to ensure that corruption within the procurement process does not take place or at least is minimised. Therefore, the NT is an integral part in the fight against corruption within the procurement system. However, over the years the NT has been criticised for failing to actively participate in the fight against corruption. It is only in the last two years that concerted efforts have been put in place to ensure that there are procurement reforms.

177 The role of the Provincial Treasury in the administration of financial affairs includes provincial procurement; in this case, the procuring of goods, services and construction works in the provincial sphere. An amount of R1.327 trillion was allocated for expenditure to the nine provinces in the 2015 Medium Term Budget Policy Statement. It is for this reason that the administration of provincial procurement must comply at the minimum with section 217(1) procurement principles.

178 (1357/2007) 2008 ZANCHC 12 December 2008.

5.3.4.1 National Treasury

The role of the NT is *inter alia* to manage all finances of the government.[179] In actual fact the NT manages public finances as directed by government policy.[180] There are high expectations that in managing public finances every effort will be taken by the NT to ensure the prudent use of public finances. One of the ways to achieve this is by ensuring that public procurement corruption is effectively controlled through public procurement directives and other interventions spearheaded by the NT.[181] All government departments, provincial governments, local governments and state owned enterprises procure in terms of the directions and guidance given by the NT.[182] Thus, the NT is an indispensable institution in the fight against public procurement corruption.

In terms of section 6(1) (g) of the PFMA the NT has an obligation to ensure that there is transparency in and effective management of public finances. This is one of the indicators that the NT has a role to ensure that corruption within the procurement process does not take place or at least that it is minimised.[183] Over the years the NT has been criticised for failing to actively participate in the fight against public procurement corruption.[184] It is only in the last two years that concerted efforts have been put in place to ensure that there are procurement reforms in order to harness public procurement corruption.[185] The need for procurement reforms resulted in the establishment of the Office of the Chief Procurement Officer (hereafter OCPO).

5.3.4.2 Office of the Chief Procurement Officer

The OCPO was established in 2013.[186] At the helm of the OCPO is the Chief Procurement Officer.[187] The purpose of the OCPO is to ensure that there is effective, prosperous and successful government procurement.[188] In order to achieve this, the OCPO operates on five strategic objectives and rests upon five pillars, namely value

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179 NT *2015 Public Sector Supply Chain Management Review* 4.
180 PMG "Public Sector Supply Chain Management Review 2015: National Treasury Briefing" 1.
181 NT *2015 Public Sector Supply Chain Management Review* 12.
182 NT *2015 Public Sector Supply Chain Management Review* 3.
183 NT *2015 Public Sector Supply Chain Management Review* 12.
184 PARI *Diagnostic Research on Corruption, Non Compliance and Weak Organisations* 11.
185 NT *2015 Public Sector Supply Chain Management Review* 6.
186 OCPO 2016 http://ocpo.treasury.gov.za/About_Us/Pages/The-Chief-Procurement-Officer.aspx.
187 The incumbent is Kenneth Brown. He was appointed in February 2013.
188 OCPO 2016 http://ocpo.treasury.gov.za/About_Us/Pages/The-Chief-Procurement-Officer.aspx.

for money, open and effective procuring procedures, ethics and fair dealing, accountability, reporting and equity.[189]

The responsibility for ensuring that procurement takes place in accordance with the above principles is placed upon two functional units, namely the policy strategy unit and the client support unit.[190] Under the policy strategy function, there are four sections, namely: (a) transversal contracting;[191] (b) governance, monitoring and compliance;[192] (c) strategic procurement;[193] and (d) information and communication technology.[194]

Quinot[195] submits that the creation of the OCPO is a step in the right direction for the NT and for the development of public procurement. However, one criticism levelled against the OCPO is that in all its functions and strategies there is no mention of the need to fight public procurement corruption.[196] The OCPO does not in any way outline its anti-corruption strategy in curbing public procurement corruption. It is submitted that the OCPO may have to create a specific unit under (b) that deals with public procurement corruption.

Furthermore, a mechanism should be created under the client services function to allow aggrieved suppliers to report corruption. In addition, the client services function should be able to educate potential bidders on corruption matters within the procurement system.

5.3.4.3 Bid Committee System

The Bid Committee System comprising of (i) Bid Specification Committees; (ii) Bid Evaluation Committees and (iii) Bid Adjudication Committees is discussed with

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189 National Treasury 2016 Strategic Objectives http://ocpo.treasury.gov.za/About_Us/Pages/Strategic-Objectives-.aspx.

190 OCPO 2016 http://ocpo.treasury.gov.za/About_Us/Pages/The-Chief-Procurement-Officer.aspx.

191 Its function is to effectively manage government transversal contracts so that cost savings and socio-economic objectives are achieved.

192 Its function is to oversee and monitor government sector procurement practices to ensure compliance within the regulatory framework.

193 Its function is to research, develop and implement strategic procurement practices so that cost savings and socio-economic objectives are achieved.

194 Its function is to design and implement effective systems to improve government procurement practices.

195 Quinot *An Institutional Legal Structure for Regulating Public Procurement* in *SA* 1.

196 PMG *Progress with its Efficiency Drives: Office of the Chief Procurement Officer Briefing* 1.

specific reference to public procurement at local government level.[197] The Bid Specification Committee kicks in for local government procurement that is (i) above R200 000; and (ii) involves long-term contracts.

In brief, the Bid Specification Committee has the sole task of compiling and drafting specifications for tenders above R200 000; the Bid Evaluation Committee has the task of evaluating the ability of the tenderer to perform the specifications of the call for tender; and the Bid Adjudication Committee has the task of (i) making the final award or (ii) recommending to the Accounting Officer (the Municipal Manager) that the tenderer be awarded the contract.[198]

Key for the purposes of combating public procurement corruption are (i) the professionalism of the personnel involved in the Bid Committee System and (ii) the independence of the three committees from one another, as well as from political interference.[199]

As explained earlier, the Auditor General has on numerous occasions bemoaned the lack of professionalism in municipalities when it is comes to public procurement.[200] Therefore, it is imperative for the government to put in place training programmes and other interventions to ensure that the Bid Committee System fulfils its legislative role.

On the same note, the independence of the three Committees is paramount in fighting public procurement corruption. Most of the personnel in these Committees are already workmates, and that alone creates a challenge in the sense that it is not possible to control the conversations that these workmates may have.[201] Furthermore, the independence of the personnel from political interference may be difficult to achieve in the light of the fact that politicians at local government level are close to the people and have almost unhindered access to the municipal personnel.[202]

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197 Bolton 2009 *Potchefstroom Electronic Law Journal* 68.
198 Bolton 2009 *Potchefstroom Electronic Law Journal* 62.
199 Bolton 2009 *Potchefstroom Electronic Law Journal* 62.
200 OAG *Consolidated General Report on the Audit Outcomes of Local Government 2014/2015* 89.
201 Bolton 2009 *Potchefstroom Electronic Law Journal* 62, 63, 67 and 68.
202 Corruption Watch *Local Government in South Africa Part 1* 1.

Currently, the functions of the Bid Committee System have been neglected, resulting in public procurement corruption in the local government sphere.[203] It is submitted that adequate legal mechanisms such as outlining their proper scope and functions as well as their tenure of office, that guarantee the independence of the Bid Committee System be put in place as a matter urgency.

Having discussed the above, what remains is a summation of the general principles that underpin South Africa's public procurement systems.

5.3.5 Procurement principles

As explained earlier, the Constitution in section 217 (1) expressly states the first five procurement principles that must be adhered to, namely fairness,[204] equitability,[205] transparency,[206] competitiveness,[207] and cost-effectiveness.[208]

This means that any procurement law, regulation, policy or procurement decision must first comply with these principles. There is a great deal of literature and case law on the meaning, interpretation and application of these procurement principles.[209] All of these principles have been explained and referred to in different parts of this study. The discussion of these principles will therefore not repeated here.

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203 Bolton 2009 Potchefstroom Electronic Law Journal 88-89.

204 Bolton states that as a general principle, fairness in public procurement within the South African context refers to procedural fairness as opposed to substantive fairness. This means that procurement decisions must be made in accordance with the law and the controlling legislation.

205 The equality that is envisaged in section 217 is *sui generis* in the sense that public procurement should "favour" the previously disadvantaged people when awarding government contracts. As Bolton puts it, "equitable in section 217(1)... refers to the equalling of disparate groups in South Africa".

206 Generally, transparency in public procurement refers to an open procurement system. In order to realise transparency, all information that relates to a specific procurement must be made public. It is made public through proper advertisement (the use of the media and other means) that reaches as many potential suppliers as possible in the simplest form(s) of language.

207 Competition in South Africa has to do with the encouragement of the participation of as many role players as possible. In the context of public procurement, section 217(1) envisages *inter alia* that potential suppliers must "fight" to be awarded a government contract. It is in competition that potential suppliers may innovate in the provision of goods, services and works as the case may be.

208 Bolton states that cost effectiveness refers *inter alia* to "adequate financial return". In the past, cost effectiveness was centred on the lowest price. However, in South Africa, cost effectiveness as a general rule does not just refer to the lowest price, but it also includes *inter alia* (i) the durability of the goods or products in question; (ii) the after-care of the goods of the goods or services; (iii) the maintenance of the goods after provision.

209 Bolton *The Law of Government Procurement in South Africa* 40-42.

5.3.6 Reflections

At international and regional level, it has been observed that South Africa remains a low-key player and that it has failed to take advantage of its influence in the region and internationally in order to create procurement legislation and practice to its own advantage.[210] Domestically, still smarting from the effects of apartheid in 1994, South Africa inherited a public procurement system that was relatively intact.[211] Procurement legislation and procurement institutions were in place.[212] Relatively experienced procurement staff were also in employment in these institutions.

Upon attaining its democratic independence, South Africa elevated public procurement by constitutionally providing for it in section 217 of the Constitution.[213] However, the use of the PFMA as the primary procurement legislation has outlived its life span in that it no longer caters adequately for modern needs of public procurement such as self-cleaning.[214] New procurement legislation is being advocated as an intervention. The NT is the lead procurement institution, supported in the provincial sphere as well as in the local government sphere by the Bid Committee System.[215] Recent institutional interventions include the establishment of the OCPO in 2013.[216] Although South Africa's procurement system is not in dire straits, it has shown enormous strain, which has manifested itself *inter alia* in public procurement corruption, which is the subject matter of the discussion below.

5.4 Public procurement corruption in South Africa: an overview

South Africa suffers from astronomical levels of public procurement corruption in the national, provincial and local government spheres.[217] According to the Special Investigations Unit (hereafter SIU), every year South Africa's loses an estimated R25-30 billion through public procurement corruption.[218] According to Corruption

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210 Hanks *Sustainable Procurement in South Africa* 11.
211 Bolton *The Law of Government Procurement in South Africa* 4.
212 Bolton *The Law of Government Procurement in South Africa* 4.
213 Bolton *The Law of Government Procurement in South Africa* 5.
214 OECD *Country Case: Public Procurement Reform in South Africa* 1.
215 Bolton 2009 *Potchefstroom Electronic Law Journal* 68.
216 OCPO 2016 http://ocpo.treasury.gov.za/About_Us/Pages/The-Chief-Procurement-Officer.aspx.
217 Sugudav-Sewpersadh *Corruption and the Law: An Evaluation of the Legislative Framework* 5-6.
218 Corruption Watch *What is the Real Cost of Corruption? Part One* 1.

Watch, it received 465 reports directly related to public procurement corruption between 2012 and 2014.[219]

A number of reasons have been advanced by different scholars on the causes of public procurement corruption in South Africa, such as it being an aftermath of apartheid, the weak enforcement of anti-corruption laws, the lack of competent human resources, the lack of political will, and the undermining of anti-corruption institutions by politicians.[220] Numerous possible solutions have also been advanced, such as adherence to procurement principles, political will, the commissioning of integrity pacts, stricter penalties for corrupt behaviour, and proper and strong enforcement of the law.[221]

However, despite all these efforts, public procurement corruption has remained arguably the biggest challenge to the economic and social development of South Africa.[222] This part of the dissertation therefore presents an overview of public procurement corruption in South Africa. It is structured as follows: the definition of public procurement in South Africa; the types and forms of public procurement corruption; the causes of public procurement corruption (the personal circumstances of procuring officials, the personal circumstances of the politicians, political transition and economic transition); and measures of combating public procurement corruption (criminal, administrative, institutional and civil activism).

5.4.1 Definition of public procurement corruption

Public procurement corruption is not expressly defined in South Africa.[223] Its definition is inferred within the ambit of general corruption. The Corruption Act, which is the primary legislation that deals corruption, does not expressly define corruption (including public procurement corruption).[224] However, section 3 gives guidance on how public procurement corruption may be defined. This section states *inter alia* that if one (i) accepts or agrees to accept any gratification (ii) gives or agrees or offers to

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219 Corruption Watch *What is the Real Cost of Corruption? Part One* 1.
220 Williams-Elegbe *Fighting Corruption in Public Procurement* 7-12.
221 Williams-Elegbe *Fighting Corruption in Public Procurement* 14-15.
222 *SABC v DA* (393/2015) 2015 ZASCA 156 para 44.
223 Mantzaris *Public Procurement Tendering and Corruption* 71.
224 Mantzaris *Public Procurement Tendering and Corruption* 71.

give any gratification (iii) with the intention to influence that particular person, one is guilty of corruption.[225]

From section 3 one may define public procurement corruption in South Africa as an intentional act of unduly influencing a procuring official by a potential supplier or his agent or an intentional act of solicitation by a procuring official or his agent in order to award or influence the awarding of a government contract in return for a gratification (personal or otherwise).

5.4.2 Types and forms of public procurement corruption

As already discussed in Chapter Two, the types of public procurement corruption can be classified *inter alia* as active, passive, political corruption or grand political corruption.[226] Active corruption in the context of public procurement has already been defined *inter alia* as paying or promising to pay a bribe to a procuring official or to a person who can influence the awarding of a government contract.

In *S* v *Selebi*[227] the accused was a Police Commissioner who had been charged *inter alia* with sharing tender information of work that was to be done in Sudan. This information was shared with Glen Agliotti. In return for sharing this information, Mr Selebi was given various gifts (gratifications).[228] Mr Selebi's actions and that of Mr Aglotti fulfilled the definition of active and passive corruption respectively.

The forms of public procurement corruption as discussed in Chapter Two are intertwined with the types of public procurement corruption.[229] In Chapter Two three main forms of public procurement corruption were identified, namely bribery; bid rigging and collusion.[230] Bribery remains the most common form of public procurement in South Africa.[231] In the *Selebi-case* the offering of the gifts in return for tender information to Mr Agliotti is an example of bribery within the procurement process.

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225 Sections 12 and 13 of the Procurement Act are discussed on para 5.5.3.1.2.
226 See para 2.8.4.
227 Case Number 25/09 High Court of South Africa, Gauteng Division 5 July 2010.
228 *S v Selebi* para 5.
229 See para 2.8.5.
230 See para 2.8.4.
231 *S v Selebi* para 6.

In *Viva Engineering Project CC and Another v Minister of Water Affairs and Others*[232] two bidders were disqualified in a tender for water provision for both bid rigging and collusion. The basis of the disqualification on the grounds of bid rigging and collusion arose from the fact that two applicants in the matter had submitted two separate bids even though the two companies were in principle one company.[233] Bribery, bid rigging and collusion in public procurement have been mistakenly identified as causes of public procurement corruption.[234] This study argues that they are the results of the underlying causes within the public procurement system, rather than causes in themselves. These underlying causes have been classified in this study as (i) the personal circumstances of procuring officials; (ii) the personal circumstances of politicians; (iii) political transition; and (iv) economic transition.

5.4.3 Causes of public procurement corruption

This study has identified four causes of public procurement corruption. These are the subject matter of the discussion below.

5.4.3.1 Personal circumstances of procuring officials

The personal circumstances of procuring officials have been defined in this study as the family life, aspirations (economic and political), education, religious beliefs and remuneration of procuring officials that may compel them to commit acts of public procurement corruption. In one investigation[235] the Public Protector was seized with an investigation into an allegation that a company called Sebata employed the wife of the Chief Financial Officer of Senqu Municipality.[236] This company had a contract with Senqu Municipality "for the installation and maintenance of a financial management system". It was unearthed through the investigation by the Public Protector that the wife of the Chief Financial Officer was in actual fact a consultant with Sebata. The importance of this investigation is that it is exemplary of the unfettered involvement of the family members of procuring officials in government contracts.

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232 (64340/13) 2015 ZAGPPHC 254 para 8.
233 *Viva Engineering Project CC and Another v Minister of Water Affairs and Others* para 14.
234 Mills *Causes of Corruption in Public Sector Institutions and its Impact on Development* 4.
235 Public Protector *Report on an Investigation into the Alleged Irregular Appointment* 9.
236 Public Protector *Report on an Investigation into the Alleged Irregular Appointment* 9.

The Chief Financial Officer is part of the Bid Adjudication Committee, which is part of the greater Bid Committee System.[237] The Bid Adjudication Committee, as described already, has the authority to make the final award of any contract above R200 000. In this instance, the Chief Financial Officer failed to honour the integrity of the procurement system and allowed his personal circumstances (conflict of interest) to influence the awarding of this contract.[238] The motivation for this kind of behaviour is the financial benefit which will obviously accrue to the Chief Financial Officer, despite him being one of the highest paid employees within the Municipality in which he is employed.[239]

In *Minister of Finance and Others* v *Gore NO*[240] a tender for facilitating social pensions was flouted by the Provincial Administration of the Western Cape and awarded to Nisec CC. 3D-ID Systems (Pty) Ltd lost the tender and challenged the award,[241] but the challenge was initially unsuccessful.[242] However, after five years it was discovered that two employees (Louw and Scholtz) of the Provincial Administration of the Western Cape had corruptly connived with Nisec to award the tender to Nisec.[243] In return, Louw and Scholtz had been awarded new contracts of employments with Nisec and were paid massive bribes.[244]

This case demonstrates that personal circumstances, as envisaged in this study, may motivate officials to commit acts of public procurement corruption in order to "upgrade" their careers. In the *Gore NO-case,* Louw and Scholtz were already occupying high positions in the Western Cape Provincial Government. For example, Louw chaired the Bid Evaluation Committee, meaning that he already occupied a top position and was also influential in the within the Bid Adjudication Committee. In addition, the fact that both Louw and Scholtz were already fairly well remunerated did not deter the procuring officials from pursuing their appetite for more money.

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237 Bolton 2009 *Potchefstroom Electronic Law Journal* 58.
238 Bolton 2009 *Potchefstroom Electronic Law Journal* 68.
239 Bolton 2009 *Potchefstroom Electronic Law Journal* 58.
240 2007 1 SA 111 (SCA).
241 *Minister of Finance and Others v Gore NO* 2.
242 *Minister of Finance and Others v Gore NO* 3.
243 *Minister of Finance and Others v Gore NO* 9.
244 *Minister of Finance and Others v Gore NO* 9.

5.4.3.2 Personal circumstances of politicians

In this study the personal circumstances of politicians refers to the desire for the consolidation of political power by a politician who has influence directly or indirectly over public procurement in the widest sense. This consolidation of political power is exercised through a corrupt relationship between the politician's family, friends, and business associates and the state.[245] In South Africa, the personal circumstances of politicians over the procurement process can be traced especially from the time of the Dutch occupation throughout the different colonial periods until the beginning of apartheid.[246] However, it was during the apartheid period that the personal circumstances of politicians held particular sway over public procurement.[247]

The extent of the corruption under the apartheid government has been difficult to evaluate.[248] A few researchers that have attempted to write on apartheid corruption have admitted to this difficulty. Only three scholars have attempted to write authoritatively on this subject, namely Hyslop,[249] van Vuuren[250] and Lodge.[251] All three concur that the apartheid government was very secretive in its governance, and this secrecy was obfuscated by the involvement of an elite group of Afrikaaners who were known as the Broederbond (the Brotherhood), members of which secret organisation were awarded most of the procurement contracts.[252] According to Lodge,[253] public procurement corruption took the form of political corruption. Lodge[254] defines political corruption as the unsanctioned or unscheduled use of public resources for private ends.

The Broederbond was the first group to be informed whether informally or formally of available public procurement contracts due to its political affiliation to the apartheid government.[255] This was a manifestation of the conflict of interest in the sense that the Broederbond had both political and personal business interests in the apartheid

245 Soreide *Corruption in Public Procurement: Causes, Consequences and Curses* 4.
246 Kuitenbrouwer *War of Words: Propaganda and South African Dutch ProBoer* 88.
247 Vegte *Daily Maverick* 1.
248 Vegte *Daily Maverick* 1.
249 Hyslop 2005 *Journal of Southern African Studies December* 773.
250 van Vuuren *Apartheid Grand Corruption* 2.
251 Lodge *Political Corruption in South Africa* 157.
252 Habtemichael *Anti-corruption Strategies in Public Sector* 164.
253 Lodge *Political Corruption in South Africa* 158.
254 Lodge *Political Corruption in South Africa* 158.
255 Lodge *Political Corruption in South Africa* 164.

government.[256] The Broederbond was influential in all the spheres of the apartheid government: the legislature, the judiciary, the executive, the provinces and the local government.[257] The corruption that the Broederbond was involved in *inter alia* benefited the strategic goals of Afrikaner nationalism and in the process the Broederbond consolidated its political power.[258]

This distinguishes apartheid public procurement corruption from post-apartheid public procurement corruption as far as the personal circumstances of politicians are concerned, as will be demonstrated below. Post-apartheid public procurement corruption has created its own Broederbond, who are loyal to the African National Congress (hereafter ANC), not necessarily because they share the values of the ANC as espoused in the Freedom Charter[259] but motivated by the desire for corrupt gains.[260]

An example of this manifested itself in the Arms Deal procurement in 1999.[261] The Arms Deal procurement resulted in the awarding of different tenders for the procurement of 24 Lead-in Fighter Trainer Aircraft (Hawk 100), 28 Advanced Light Fighter Aircraft, Four patrol corvettes, three submarines and 30 Light Utility Helicopters.[262] The total cost of the procurement was approximately R30 billion.[263] This was the most costly single procurement that post-apartheid government had been involved in.

Implicated in the Arms Deal procurement were top government officials including the current President, the then President Thabo Mbeki, and a number cabinet ministers from the ANC.[264] Numerous investigations were instituted but faced executive and political interference which eventually tainted their ultimate findings.[265] It was stated by some witnesses to the earlier investigations that part of the proceeds from the corruption that took place in the Arms Deal was used to fortify the political power of

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256 Lodge *Political Corruption in South Africa* 164.
257 van Vuuren *Apartheid Grand Corruption* 7.
258 Lodge *Political Corruption in South Africa* 164.
259 Department of Education *Celebrating 50 Years of the Freedom Charter* 3.
260 Kaßner *The Influence of the Type of Dominant Party on Democracy* 207.
261 Formerly known as the South Africa Strategic Defence Procurement Package.
262 Arms Procurement Commission *Inquiry into Allegations of Fraud, Corruption* 7.
263 Arms Procurement Commission *Inquiry into Allegations of Fraud, Corruption* 8.
264 Arms Procurement Commission *Inquiry into Allegations of Fraud, Corruption* 436.
265 Corruption Watch *All Kinds of Corruption in the Arms Deal* 1.

ANC politicians, notably Jacob Zuma and his close associates.[266] Zuma became the President of South Africa in 2009. 15 years after the signing of the Arms Deal agreements with various international suppliers in 1999 (that is, in 2011) the controversial Seriti Commission was instituted at the instance of President Zuma to investigate *inter alia* public procurement corruption during the Arms deal procurement.[267]

Serious allegations of public procurement corruption by high-ranking ANC politicians were raised with the Seriti Commission.[268] Evidence was placed before the Commission on how public procurement corruption took place, particularly in the awarding of sub-contracts.[269] However, in its final finding the Commission chose to concentrate only on the primary contracts and refused to attempt to pierce the veil of the primary contracts by investigating the sub-contracts. This was despite the fact that the alleged corruption took place in the awarding of the sub-contracts, the evidence for which the Seriti Commission chose to treat very selectively.

It is submitted that the allegations of public procurement corruption were criminal in nature. There was no basis for setting up a commission that had no proper legal criminal mandate. The irony of the situation is that the *Yengeni-case*[270] and the *Shabir-case,*[271] which were tackled on criminal grounds based on the same evidence as that produced before the Seriti Commission, resulted in the criminal convictions of both corruptees.[272] The findings of the Seriti Commission in so far as public procurement corruption is concerned can therefore not be celebrated.

More recently, the Public Protector investigated allegations of “state capture” by a family known as the GUPTA family.[273] The allegations included that the GUPTA family through the influence of the current President were being corruptly awarded

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266 Corruption Watch *All Kinds of Corruption in the Arms Deal* 1.
267 The Arms Procurement Commission Terms of Reference of the Commission of Inquiry into Allegations of Fraud, Corruption, Impropriety or Irregularity in the Strategic Defence Procurement Package ("The SDPP").
268 Corruption Watch *All Kinds of Corruption in the Arms Deal* 1.
269 The Arms Procurement Commission *Inquiry into Allegations of Fraud, Corruption* 15-16.
270 *S v Yengeni* (A1079/03) 2005 117 (11 November 2005).
271 *S v Shaik and Others* 2007 1 SA 240 (SCA).
272 Corruption Watch *Timeline of the Arms Deal* 1.
273 Public Protector *State of Capture* 4.

government contracts.[274] In return for the government contracts, it was alleged that the President and his political elite would receive massive financial backup to consolidate their political power.[275] In addition, some of the allies of the President at national, provincial and local government were alleged to be corruptly benefitting from the President's relationship with the GUPTA family.[276]

Through the Presidents' allies, who are colloquially known as the "Premier League"[277] and who are also beneficiaries of government contracts in their own right, the President consolidates his national and provincial power, thereby reaffirming his national presidency, despite resistance to his presidency by some of the called so-called ANC stalwarts.[278] The President has survived three votes of no confidence, allegedly due to his consolidation of political power within the ANC.[279] However, it is not easy to objectively verify whether the President's survival of votes of no confidence is solely due to his consolidation of political power or if other factors are involved as well.[280]

The Public Protector conducted her investigation pursuant to the allegations of state capture *inter alia* by the GUPTA family.[281] In her Report released in 2016 she confirmed the serious allegations of corruptly awarding government contracts to the GUPTA family[282] by state institutions that were accused of being under the influence of the President.[283] It was reported in the State of Capture Report[284] that President Zuma's son, Duduzane Zuma, was a director at Oakbay Investments, in which position, it is reported, he became a billionaire.[285] A number of government contracts

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274 Public Protector *State of Capture* 3-5.
275 Public Protector *State of Capture* 6.
276 Public Protector *State of Capture* 7.
277 Politics Web *ANC Premier League must be Dismantled* 1.
278 Johnston *South Africa: Invention of a Nation* 44.
279 Cotterill *Financial Times* 1.
280 Cotterill *Financial Times* 1.
281 Public Protector *State of Capture* 3-5.
282 The GUPTA family owns and controls one television station, the ANN7, and a newspaper called The New Age, whose editorial policy is to protect the image of President Zuma and those high-ranking ANC members loyal to the President.
283 Public Protector *State of Capture* 4.
284 Public Protector *State of Capture* 5.
285 Public Protector *State of Capture* 30.

were allegedly corruptly awarded to Oakbay Investments.[286] However, following the public outcry over state capture, he resigned from Oakbay Investments.[287]

This resignation signifies little in the fight to restore the integrity of public procurement, and will continue to be insignificant until there is a credible Judicial Commission of Enquiry that exonerates Duduzane Zuma in line with one of the Public Protector's recommendations.[288] What is also important to note in the State of Capture debacle is how the President, allegedly using his son as a "front", managed to exert his (presidential) influence in the awarding of government contracts to members of his family and his political allies, which led to the consolidation of his political power.[289] A Judiciary Commission of Inquiry has been appointed to deal with the allegations cited in the State of Capture.[290]

The personal circumstances of politicians, as already noted, cannot be divorced from political transition.

5.4.3.3 Political transition

South Africa has gone through a number of political transitions.[291] One of the transitions that has been accused of being responsible for the proliferation of public procurement corruption was the political transition to the apartheid government.[292] According to van Vuuren,[293] the apartheid government was not a saint when it came public procurement corruption. Arguments have been put forward that the current high levels of public procurement corruption in South Africa were imported from the apartheid government.[294]

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286 Public Protector *State of Capture* 50.
287 The Daily Maverick "Guptas and Duduzane Zuma Resign from Oakbay" 1.
288 Public Protector *State of Capture* 353.
289 Public Protector *State of Capture* 50-53.
290 The Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State. This Commission of Inquiry is chaired by the Deputy Chief Justice, Ray Zondo.
291 Marais *South Africa - Limits to Change* 2.
292 van Vuuren *Apartheid Grand Corruption* 1.
293 van Vuuren *Apartheid Grand Corruption* 2-3.
294 Cilliers and Aucoin *Economics, Governance and Instability in South Africa* 12-13.

However, of particular importance is the political transition from the apartheid government to the democratic government in 1994. Did this transition create opportunities for public procurement corruption?

The new government in 1994 inherited a well-structured and properly defined public procurement system that had a procurement legal framework and established procurement institutions.[295] The challenges faced by the then new government were *inter alia* the following: (i) the retaining of the experienced procurement personnel; (ii) how to manage the expansion of the scope of procurement; (iii) the enactment of new procurement legislation that was capable of addressing (a) public procurement and (b) public procurement corruption; (iv) the ability to effectively manage provincial procurement, especially when the provinces were increased to nine; (v) the ability to effectively manage local government procurement, especially the increase in the number of municipalities to 278; and (vi) to conduct a public procurement corruption audit immediately after the political transition.[296]

The democratic state was under a lot of pressure to procure at different levels. The areas identified above were not addressed immediately after 1994, and some remain unaddressed or insufficiently addressed to date.[297] The political transition from 1994 has witnessed intra-political transition within the ANC, and a greater political divide which has given a new meaning to political transition and how it causes public procurement corruption.[298]

Of particular importance are the intra-political divisions within the ANC that have contributed to a lack of accountability in the national, provincial and local spheres of government.[299] The continued intra-political fights within the ANC have created a culture of "public procurement corruption impunity" and have released a "demonic spirit" of looting through public procurement corruption.[300] Efforts to exorcise this "demonic spirit" through existing constitutional institutions have been met with

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295 Bolton *The Law of Government Procurement in South Africa* 33.
296 PARI *The Contract State: Outsourcing and Decentralisation in Contemporary South Africa* 13-14.
297 PARI *The Contract State: Outsourcing and Decentralisation in Contemporary South Africa* 16-17.
298 Tandwa "ANC Leaders are Divided, Causing Destruction – Ramaphosa" 1.
299 Dlamini *Intra-Political Infighting versus Service Delivery* 2.
300 Baker *Business Day* 1.

massive resistance by one faction from the ANC, which has interpreted the call for accountability as political opportunism.[301]

Therefore, political transition in South Africa has created intra-political divisions within the ruling party (ANC) and this has contributed to the exacerbation of public procurement corruption.[302]

Related to political transition as one of the causes of public procurement corruption is economic transition.

5.4.3.4 Economic transition

In this dissertation economic transition refers to the transfer of control of the South African economy from the hands of the colonisers or oppressors to the new government.[303] The new South African government took control of the Treasury and used it as a vehicle of targeted procurement to advance *inter alia* infrastructure development.[304] It then used its economic power through the Treasury to redistribute wealth and economic influence *inter alia* through public procurement.[305] The reasoning of those guiding the new dispensation was that the economy and wealth distribution had to be transferred from the "white people" to the "black people" (the majority of the previously disadvantaged people).[306]

This involved the enactment of the proper legislation and agreement on appropriate policies that allowed public procurement to be used to aid in fostering economic growth.[307] Further, it involved making organisational and institutional arrangements administered by competent procurement staff that were capable of understanding and executing their mandate.[308] This also involved technical procurement training and economic reforms.[309]

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301 Polity *ANC Women's League Viciously Attacks Public Protector* 1.
302 Public Protector *State of Capture Report* 144-145.
303 Weitzman 1993 *European Economic Review* 1993 549-550.
304 Ambe and Badenhorst-Weiss 2012 *Journal of Transport and Supply Management* 245.
305 Ambe and Badenhorst-Weiss 2012 *Journal of Transport and Supply Management* 245.
306 Ambe and Badenhorst-Weiss 2012 *Journal of Transport and Supply Management* 245.
307 Ambe and Badenhorst-Weiss 2012 *Journal of Transport and Supply Management* 245.
308 Ambe and Badenhorst-Weiss 2012 *Journal of Transport and Supply Management* 246.
309 Ambe and Badenhorst-Weiss 2012 *Journal of Transport and Supply Management* 246.

South Africa did not have this capacity in 1994. The lack of this capacity witnessed the employment of untrained procurement staff who also lacked integrity, which fuelled public procurement corruption.[310] There was serious hope among the ANC politicians before 1994 that the new democratic dispensation would usher in a new economic path and that the government would leverage the economy to empower the previously disadvantaged people through public procurement.[311] This did not happen for the general public, save for a few black elite who were high-ranking ANC officials who used economic transition for their personal benefit.[312] These people were able to manipulate and influence the awarding of government contracts to their companies under the guise of economic transformation.[313]

Related to the above was the impact of the size of the government and economic transition.[314] At the time of the transition, the apartheid government operated a fairly small government which had proper reporting and accountability structures, although in practice accountability on issues of governance was weakly enforced.[315] This small government, although not immune from public procurement corruption (as discussed), did not experience excessive levels of public procurement corruption.[316]

However, the new democratic government in 1994 announced massive increases in the size of the national government and the provincial governments.[317] Obviously, issues of the capacity to staff such a big government were fore grounded.[318] In the context of public procurement, numerous bureaucrats found themselves involved in the awarding of government contracts.[319] Unfettered discretionary powers were conferred on generally unskilled procuring personnel, who in most cases were members of the ANC.[320]

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310 Molver and Gwala 2015 *Law Business Research London* 273.
311 Vabaza A Review of the Implementation of Government Procurement Policy 31.
312 Kassner 2015 *Cornell International Law Journal* 684.
313 Kassner 2015 *Cornell International Law Journal* 684.
314 Goel and Nelson *Corruption and Size: A Disaggregated Analysis* 111-112.
315 Kassner 2015 *Cornell International Law Journal* 686.
316 Vegte *Daily Maverick* 1.
317 DPME *Twenty Year Review in South Africa: 1994-2014* 20.
318 DPME *Twenty Year Review in South Africa: 1994-2014* 24-25.
319 NT *SCM Review Update* 1.
320 PARI *The Contract State: Outsourcing and Decentralisation in Contemporary South Arica* 15.

There were no proper checks and balances, and no corruption risk assessments were done in the awarding of government contracts.[321] There was a belief in some people particularly from the ANC and their allies that government contracts had to be awarded to the previously disadvantaged people even if the preferred bidder did not have the ability to deliver on the tender.[322] The result was in some case poorly performed contracts where the goods or services or works were of inferior quality that forced the affected departments or organisations or municipalities either to re-tender or incur massive maintenance costs.[323] This seemed not to bother the government because public procurement was viewed as tool to seek "revenge" by punishing the "white" people by not awarding them tenders in order to limit their influence on the economy.[324]

Today, there are even greater calls for the so-called "radical economic transformation".[325] This is in the wake of the realisation that the prospects of economic transition have not yielded the desired gains for the previously disadvantaged people.[326] Radical economic transformation has not been defined nor is there a clear government policy that gives proper guidelines on what radical economic transformation is and how it can be achieved.[327] However, the ANC government has made it clear that it is going to use government procurement as one of its tools to achieve this radical economic transformation.[328]

It is submitted that without addressing the fundamentals, such as procurement legislation, sound procurement institutions, well trained procurement staff, that were not in place in 1994 and which are generally still not in place or functioning optimally, the high levels of public procurement corruption of 1994 and beyond will be repeated, this time on a grand scale.

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321 PARI *The Contract State: Outsourcing and Decentralisation in Contemporary South Arica* 15.
322 PARI *The Contract State: Outsourcing and Decentralisation in Contemporary South Arica* 9.
323 *Aurecon South Africa (Pty) Ltd v City of Cape Town* 7.
324 National Treasury *Radical Economic Transformation for Inclusive Growth* 1.
325 National Treasury *Radical Economic Transformation for Inclusive Growth* 1.
326 National Treasury *Radical Economic Transformation for Inclusive Growth* 2.
327 National Treasury *Radical Economic Transformation for Inclusive Growth* 2.
328 National Treasury *Radical Economic Transformation for Inclusive Growth* 2.

5.4.4 Reflections

The above discussion has established that South Africa is not immune from the public procurement corruption that is perpetrated by procuring officials who choose to further their personal interests by not declaring conflict of interest.[329] Further, even though some procuring officials are highly remunerated they still commit public procurement corruption, an observation which confounds the general assumption that high salaries deter public procurement corruption.[330] Further, it was observed that politicians' desire to consolidate political power has been a major cause of public procurement corruption.[331] This relationship has strengthened to such an extent that strategic procurement institutions have been "captured" to further consolidate political power.[332]

Checks and balances constitutionally provided have been trampled upon by politicians.[333] The use of public procurement as an instrument of economic transition has not yielded the desired gains for the general population.[334] Instead, economic transition has been used as a vehicle to commit acts of public procurement corruption. The gravy train seems not to be stopping, as there is a new wave of radical economic transformation which is likely to result in unprecedented levels of public procurement corruption.[335]

Against this background, the question is how South Africa can use criminal measures, administrative measures, institutional measures and administrative measures to curb public procurement corruption?

5.5 Measures for combating corruption - 1994 onwards

South Africa's public procurement expenditure has grown exponentially since the advent of constitutionalism. It is reported that South Africa has so far spent an

329 Fourie 2015 *Public and Municipal Finance Volume* 42.
330 Gong and M.wu A 2012 *Review of Public Personnel Administration* 193.
331 van Vuuren *South Africa: Democracy, Corruption and Conflict Management* 26.
332 Public Protector *State of Capture Report* 5.
333 Thulare *The Limits of Judicial Review of Executive Action: The South African Perspective* 41-43.
334 Turley and Perera *Implementing Sustainable Procurement in South Africa: Where to Start* 10-11.
335 National Treasury *Radical Economic Transformation for Inclusive Growth* 1.

estimated R8 trillion in public procurement in the last 20 years.[336] Of this amount between 10% and 25% is said to have been lost through public procurement corruption.[337] In response, the government has put in place some measures to curb such corruption, in line with international best practice.[338] Reliance for curbing public procurement corruption was placed on criminal sanctions as well as adherence to standard procurement principles (transparency, accountability, fairness, competitiveness and cost effectiveness).[339]

Despite the use of these measures, it seems as if little progress has been achieved, as evidenced by the poor ranking of South Africa on Transparency International's Corruption Perception Index.[340] There is growing pressure on the government to be more pragmatic and innovative in tackling public procurement corruption, as noted by the Constitutional Court.[341]

Therefore, the discussion below focuses briefly on international and regional instruments that influence South Africa's strategy or policy on combating public procurement corruption. This will be followed by a discussion of the use of the following four classes of anti-corruption measures: (i) criminal measures; (ii) administrative measures; (iii) institutional measures; and (iv) civil activism in combating public procurement corruption.

5.5.1 International anti-corruption instruments

There is only one international instrument that South Africa has ratified that speaks directly to combating corruption, which is the UNCAC.[342] The UNCAC has already been discussed in Chapter Two and the discussion will not be repeated here. However, it is important to consider briefly whether or not South Africa has complied with the UNCAC as far as the framework for combating public procurement is concerned.

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336 According to the NT South Africa spends an estimated R500 billion per year in public procurement.
337 NT *2015 Public Sector Supply Chain Management Review* 3-4.
338 Williams-Elegbe *Fighting Public Procurement Corruption* 75.
339 Bolton 2006 *Potchefstroom Electronic Law Journal* 14-15.
340 Transparency International 2016 http://www.transparency.org.
341 *Economic Freedom Fighters v Speaker of National Assembly and Others; Democratic Alliance v Speaker of National Assembly and Others* paras 52-53.
342 South Africa signed the UNCAC on 9 December 2003.

5.5.1.1 Compliance with UNCAC

The first objective of the UNCAC calls for the strengthening of existing anti-corruption measures.[343] In addition, the same objective emphasizes that these measures must be effective and efficient.[344] There are different tools (data analysis, scientific analysis, and economic analysis) to measure the efficiency and effectiveness of the anti-corruption strategies envisaged in the UNCAC.[345] In South Africa, the ultimate test is whether there is a decrease in the number of actual cases of corruption in all three spheres of government.[346] For this to happen, there has to be an increase not just in prosecutions but also in convictions for public procurement corruption.[347]

One significant step that South Africa has taken to partly comply with the UNCAC was the introduction of the Corruption Act.[348] South Africa's approach has been more about curing public procurement corruption after the fact than preventing it, which seems to contradict the first objective of the UNCAC.[349] According to the UNCAC, member states should focus more on the prevention of public procurement corruption rather on the cure.[350]

The findings of the Auditor General and the poor ranking of South Africa in the TI Corruption Perception Index reflect that the legal mechanisms for use in preventing public procurement are rather ineffective.[351] Even the recent Constitutional Court judgment[352] has emphasised the need for robust preventative measures to combat corruption, which is a symptom of the unfettered abuse of power by public officials. If South Africa seems to be struggling to fully comply with the UNCAC anti-corruption provisions,[353] how does it fare with regional instruments?

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343 UNODC *Guide on Anti-Corruption in Public Procurement* 7.
344 UNODC *Guide on Anti-Corruption in Public Procurement* 7-9.
345 Global Integrity *User's Guide to Measuring Corruption and Anti-Corruption* 11-17.
346 UNODC and DPSA *Country Corruption Assessment Report South Africa* 59.
347 Munzhedzi 2016 *Journal of Transport and Supply Management* 5.
348 12 of 2004.
349 Tamukamoyo and Mofana *Is South Africa Really Complying with the Anti-Corruption Protocols* 1.
350 UNODC *Guide on Anti-Corruption in Public Procurement* 2.
351 Transparency International *Corruption Perception Index* 1.
352 *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* para 52.
353 Tamukamoyo and Mofana *Is South Africa Really Complying with the Anti-Corruption Protocols* 1.

5.5.2 Regional anti-corruption instruments

After becoming a democratic state in 1994, South Africa officially became a party to the AU[354] and the SADC.[355] It was already a member of the Southern African Customs Union (hereafter SACU) having been one of its founding parties.[356] South Africa is not party to ECOWAS. On the other hand, South Africa has shown interest in joining the OECD, but has not gone a step further in cementing its position on the OECD.[357] The AU Corruption Convention and the SADC Protocol against Corruption are the only regional instruments that South Africa is a party to. In terms of their key provisions, they do not offer incentives to reinforce their member states' efforts to combat public procurement.[358]

The AU Corruption Convention and the SADC Protocol against Corruption do not have specific provisions that relate to combating public procurement corruption, save to encourage state parties to ensure that there are sufficient measures that promote transparency and accountability in the use of public funds.[359] The mechanisms for holding each state party accountable in terms of its compliance with both the AU Corruption Convention and the SADC Protocol against Corruption are very lax.[360]

South Africa has not published an accountability report on public procurement corruption, either to the AU or to the SADC.[361]

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354 South Africa joined the AU on 6 June 1994.

355 South Africa joined the SADC on 30 August 1994.

356 SACU 2013 http://www.sacu.int.

357 The OECD Council entered into co-operation with South Africa in order to fortify the relationship with BRICS as well as Indonesia. The OECD Council of Ministers adopted this Resolution on 16 May 2007. South Africa is the only developing country that has entered into such an agreement with the OECD and has shown some interest in making its position with the OECD official.

358 Ever since the establishment of the AU and the SADC there has been no single conference or robust effort aimed at ensuring that state parties take practical measures to combat public procurement corruption. For this reason, it is submitted that the focus by the AU and the SADC should now shift from discussing the general provisions of corruption to seriously tackling public procurement corruption. Research has shown that Africa loses an estimated US$148 billion yearly, while other statistics state that over US$50 billion is lost through public procurement corruption.

359 Akena *Challenges and Opportunities in Combating Corruption within the AU* 4-6.

360 Olaniyan *The African Union Convention on Prevention and Combating Corruption* 74.

361 Akena *Challenges and Opportunities in Combating Corruption within the AU* 6-8.

5.5.2.1 OECD Convention on Combating Bribery of Foreign Public Officials

South Africa ratified the OECD Bribery Convention on 19 June 2007 and it entered into force on 18 August 2007.[362] South Africa is the only African country that is a party to the OECD Bribery Convention. In 2014 the OECD Working Group on the Implementation of the OECD Bribery Convention by South Africa reported *inter alia* that it was "seriously concerned about the lack of foreign bribery enforcement actions by South Africa".[363] It was reported that since South Africa became a party to the OECD Bribery Convention, only ten cases had been reported.[364] Of these ten cases, none had resulted in proper investigations, let alone prosecution.[365]

The observation by the OECD Working Group confirms what has been submitted above concerning South Africa's lacklustre approach to complying with international and regional instruments in combating not just corruption in general but also public procurement corruption.[366] In the light of these observations, one wonders whether South Africa takes its international and regional obligations seriously in combating public procurement corruption.[367] It is submitted that if no stern action is taken by South Africa to improve its international and regional efforts in combating public procurement corruption, such corruption will not just continue but will also escalate.

It is hoped that South Africa may soon start producing accountability reports to the OECD, which is more active in combating public procurement corruption and does strong country follow-ups.

What remains to be discussed is South Africa's domestic approach to combating public procurement corruption with special emphasis on criminal measures, administrative measures, institutional measures and civil activism measures.

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362 OECD *South-OECD Anti-Bribery Convention: Implementation and Enforcement* 1.
363 OECD *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in South Africa* 1.
364 OECD *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in South Africa* 5.
365 OECD *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in South Africa* 5.
366 OECD *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in South Africa* 5.
367 Tamukamoyo and Mofana *Is South Africa Really Complying with the Anti-Corruption Protocols* 1.

5.5.3 Domestic Measures

5.5.3.1 Criminal measures

The use of criminal measures in combating public procurement corruption in South Africa has been the traditional method of curbing such corruption.[368] Criminal measures in South Africa find their sources in the Constitution as well as in legislation.[369] In addition, there are institutions established by the criminal legislation that assist in the enforcement of the anti-corruption criminal measures. The sources of combating public procurement corruption from a criminal law perspective are as follows:

(a) Constitution

(b) *The Prevention and Combating of Corruption Act*[370]

(c) *The Criminal Procedure Act*[371]

(d) *The Prevention of Organised Crime Act*[372]

(e) *The Protected Disclosures Act*[373]

(f) *The National Prosecuting Act*[374]

(g) *The South African Police Service Act*[375]

(h) *The Special Investigating Units and Special Tribunals Act*[376]

(i) *The Promotion of Access to Information Act*[377]

Not all of the above legislation will be discussed. Only the anti-corruption legislation that is most relevant and closely linked to combating public procurement corruption

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368 Mosselini *Anti-Corruption Initiatives in South Africa since 1994* 17-18.
369 AU Charter on Human and Peoples' Rights 2016 http://www.justice.gov.za.
370 12 of 2004.
371 51 of 1977.
372 121 of 1998.
373 26 of 2000.
374 32 of 1998.
375 68 of 1995.
376 74 of 1996.
377 2 of 2000.

will be given attention, and some of the legislation will be summarised. Of the above legislation, it must be noted that the Corruption Act is the primary legislation that deals with corruption, and it will be discussed in greater detail than other legislation.[378] Attention is given first to the Constitution.

5.5.3.1.1 Constitution

The importance of the Constitution to combating public procurement from a criminal law point of view is massive - yet it is rarely emphasised.[379] First, the Constitution provides the framework for the creation of key law enforcement institutions in fighting public procurement corruption such as the SAPS,[380] the NPA[381] and other special investigations organisations. Furthermore, the Constitution establishes the other three branches of the state (the executive,[382] the judiciary[383] and the legislature[384]), which are crucial to curbing public procurement corruption. Over the years the role and attitude of these three institutions towards public procurement corruption have determined society's attitude towards public procurement corruption.[385]

Second, the Constitution provides for the provision of basic services such as water, electricity, refuse collection etc commonly known as "service delivery".[386] If there is public procurement corruption at any level of government in awarding contracts that are related to service delivery, then the provision of services to the communities is compromised.[387] This has been most evident in the local government sphere, especially in 2015-2016, when according to reports, South Africa has experienced as many eleven service delivery protests per day.[388]

Third, the Constitution provides for checks and balances of all branches of government, which is another key legal mechanism of controlling public procurement

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378 Williams and Quinot 2007 *The South African Law Journal* 339.
379 Kruger 2001 *Journal for Juridical Science* 117-118.
380 Section 205.
381 Section 179.
382 Chapter 5.
383 Chapter 8.
384 Chapter 4.
385 van Vuuren *South Africa: Democracy, Corruption and Conflict Management* 14.
386 These are basic amenities such as water, electricity and ablution facilities.
387 Moloi *International, Comparative Perspectives on Corruption* 3.
388 de Wet P *Mail and Guardian* 1.

corruption.[389] This speaks directly to the rule of law and governance.[390] These principles are enshrined in the Constitution.[391]

Fourth, the Constitution encourages the employment of ethical and responsible government employees and those that are in the employ of state-owned enterprises as well as other organs of state that are *inter alia* involved in public procurement.[392]

Lastly, the Constitution provides a framework for the prudent use of public finances and requires that those who are irresponsible in abusing funds *inter alia* through public procurement corruption should be held accountable.[393]

Therefore, the Constitution as noted in the *Hugh Glenister-case* is integral in the fight against public procurement corruption in South Africa.[394]

In order to give life to the aspirations of the Constitution to the extent that it is relevant to combating public procurement corruption, the Corruption Act.[395]

5.5.3.1.2 The Prevention and Combating of Corruption

The enactment of the Corruption Act witnessed a shift in the manner in which public procurement corruption is now being interpreted and prosecuted in comparison to the pre-1994 dispensation.[396] The Corruption Act has been couched in a very broad language and it has tried to deal in detail with some of the loopholes in the previous *Corruption Act* 94 of 1992.[397] The Corruption Act clarified and extended the ambit of corruption, taking into account the advent of technological changes that enable corrupt acts to take more sophisticated forms.[398] The title of the Corruption Act indicates that it seeks mainly to achieve only two things: the prevention and combating of corruption.

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389 Mogoeng *The Rule of Law in South Africa* 5.
390 Mogoeng *The Rule of Law in South Africa* 5.
391 Kruger 2010 *Potchefstroom Electronic Law Journal* 468.
392 Section 195.
393 Chapter 13.
394 Singh *Fighting Corruption, A Constitutional Imperative: The Case of Hugh Glenister v President of the Republic South Africa* 19.
395 12 of 2004.
396 Mosselini *Anti-Corruption Initiatives in South Africa since 1994* 2.
397 *Glenister v The President of the Republic of South Africa and Others* 41-42.
398 Jones and Bezuidenhout 2014 *Administration Publica* 72-73.

In its preamble the Corruption Act states *inter alia* that it seeks to "provide for the strengthening of measures to prevent and combat corruption and corrupt activities".[399] Prior to the enactment of Corruption Act there were a number of pieces of legislation whose aim was to aid in the fighting of corruption in general including public procurement corruption.[400]

The Corruption Act allows for investigative measures;[401] establishes the endorsement of a Register in order to place certain restrictions on persons and enterprises convicted of corrupt activities relating to tenders and contracts;[402] places a duty on certain persons in positions of authority to report certain corrupt activities; and provides for extraterritorial jurisdiction in respect of the offence of corruption.[403]

One of the most debatable provisions in the Corruption Act is the ambit and creation of section 4. The application of section 4 of the Corruption Act came into question in the *Selebi-case*.[404] After being convicted in the High Court *inter alia* of public procurement corruption, the issue on appeal was whether Selebi, at that time being the National Commissioner of Police, had received payment from Agliotti, and whether he had provided Agliotti with any *quid pro quo* as a result of such payment in violation of the Act.[405]

Section 4(1)(a)(ii) provides *inter alia* that:

> Any public officer who accepts any gratification[406] from any other person in order to act in a manner that amounts: to the abuse of a position of authority; breach of

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399 Preamble of Corruption Act.
400 Hyslop 2005 *Journal of South African Studies* 773-774.
401 Preamble of Corruption Act.
402 Preamble of Corruption Act.
403 Preamble of Corruption Act.
404 *S* v *Selebi* 2012 1 SA 487 paras 2-3.
405 *S* v *Selebi* 2012 1 SA 487 paras 2-3.
406 Section 1(ix) Gratification includes (a) money (b) any donations, gift, loan, fee, reward, valuable security, property or interest in property of any description, whether movable or immovable, or any other similar advantage (c) the avoidance of loss, liability, penalty, forfeiture, punishment or other disadvantage (d) any office, status, honour, employment, contract of employment or services, any agreement to give employment or render services in any capacity and residential or holiday accommodation (e) any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part (f) any other service or favour or advantage of any description, including protection from any penalty or disability incurred or apprehended or from any protection or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted, and includes the exercise or the forbearance from the exercise of any right or any official power or duty (h) any right or privilege (i) any real or pretended aid, vote, consent,

> authority; a breach of trust; the violation of a legal duty or a set of rules is guilty of the offence of corrupt activities relating to public officers.

The correct interpretation of this provision has a strong bearing on whether or not a public official would by the act of receiving a gift have committed the crime of corruption in so far as public procurement is concerned.

The central issue in "receiving a gift" is that of intention to commit a corrupt act by the procuring official, as the Corruption Act does not mention intention. In other words, did the public official receive the gratification with a corrupt intention? Snyman[407] states the elements of the crime of corruption as: (a) acceptance (b) of a gratification (c) in order to act in a certain way (d) unlawfulness and (e) intention.

The first four elements have been adequately provided in the Corruption Act and there is no dispute on this aspect. However, the contentious issue is the establishment of the intention of committing a corrupt act, which is not expressly provided for in the Corruption Act. In dealing with this aspect, the court in the *Selebi-case* said *inter alia* that:

> Intention is not specifically mentioned in the definition in the *PCCA* but the definition must be construed as requiring intention.[408]

In reinforcing this view, the Court went on to quote this statement by Snyman, who expresses the opinion that:

> Intention always includes certain knowledge, namely knowledge of the nature of the act, the presence of the definitional elements and the unlawfulness. A person has knowledge of a fact not only if she is convinced of its existence, but also if she foresees the possibility of the existence of the fact but is reckless towards it; in other words she does not allow herself to be deterred by the possibility of the existence of such fact. She then has intention in the form of *dolus eventualis*.[409]

The approach of the court should be applauded as far as the elements of public procurement corruption are concerned. The state should not go an extra mile to prove intention. Once the state establishes that the person concerned was a public official for the purposes of Corruption Act, and that official indeed received a

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influence or abstention from voting and (j) any valuable consideration or benefit of any kind, including any discount, commission, rebate, bonus, deduction or percentage.

407 Snyman *Criminal Law* 412.

408 491F-H.

409 491H-I.

gratification in the scope of his or her official duties which was not legally due to him, then in applying the principle laid down in the *Selebi-case* intention has been established.

Section 12 of the Corruption Act criminalises an act whereby a person directly or indirectly accepts gratification in order to:

> Improperly influence in any way the promotion, execution, procurement of any contract with a public body, private organisation, corporate body or any other organisation or institution;[410] or fixing of the price, consideration or other moneys stipulated or otherwise provided for in any such contract.[411]

What this section seeks to achieve is to hold people involved in public procurement corruption accountable even where the benefit (the gratification) is disguised. Usually, instead of the gratification being given directly to the corrupt procuring official, the gratification may be given to his associates in the form of equity. This makes it difficult for the investigating authorities to track it.

Section 13 further provides that a person who accepts a gratification as:

> Inducement to personally or by influencing any other person so to act award a tender, in relation to a contract for performing any work, providing any service, supplying any article, material, substance or performing any other act;[412] upon an invitation to tenderer for such contract which has its aim to cause the tenderer to accept a particular tender;[413] or withdraw the tender made by him or her for such contract;[414] shall be guilty of an offence.[415]

The issue with regards to the withdrawal of a tender after it was awarded to a supplier was raised in *Vodacom (Pty) Ltd and Another* v *Nelson Mandela Bay Municipality and Others.*[416] Briefly, the Municipality invited tenders for the provision of mobile voice and data services. The tender was awarded to MTN in violation of the *PAJA*, the Constitution and the Procurement Act*,* as contended by Vodacom.[417] MTN

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410 Section 12(1)(b)(i) (aa).
411 Section 12(1)(b)(i)(bb).
412 Section 13(1)(a)(i).
413 Section 13(1)(a)(ii).
414 Section 13(1)(a)(iii)
415 Section 13(1) (b).
416 2012 3 SA 240 ECP paras 3,4 and 9.
417 *Nelson Mandela Bay Municipality and Others v Vodacom* paras 1-2.

was awarded the tender despite not fully complying with the tender requirements.[418] Only Vodacom satisfied all the requirements (made a conforming bid).[419]

Vodacom raised the issue with the Municipality that MTN should not be awarded the tender, based on its non-conforming bid.[420] The Municipality then gave all the bidders an opportunity to rectify their errors in order to satisfy the tender requirements.[421] This was done after the official closing date of the tenders had expired.[422] Vodacom argued that since it was the only bidder that had met all the requirements, it should have been awarded the tender.[423]

The Court accepted that there had been an irregularity in the manner in which the Municipality had allowed the other tenderers to rectify their bids well after the closing date at the insistence of the Municipality.[424] Although this case was not argued on the basis of public procurement corruption, it gives a clear indication as to how the procurement process can be manipulated to favour certain service providers. In this case there was no justification of why the Municipality chose to award the tender to MTN despite these glaring mistakes of non-compliance with the tender requirements.

Chapter 5 of the Corruption Act provides for specific penalties and sentences connected with public procurement corruption. Depending on the nature of the corrupt activity a person may be sentenced to life imprisonment,[425] a period not exceeding 18 years,[426] and a period not exceeding 5 years or a fine of R250 000.[427]

Another measure that is prescribed in terms of the Corruption Act is the Endorsement of a Register.[428] What this means is that once there is a conviction for public procurement corruption, the Court must compile a register with the following

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418 *Nelson Mandela Bay Municipality and Others v Vodacom* paras 4, 5 and 6.
419 *Nelson Mandela Bay Municipality and Others v Vodacom* 4-5.
420 *Nelson Mandela Bay Municipality and Others v Vodacom* paras 4-5.
421 *Nelson Mandela Bay Municipality and Others v Vodacom* para 22.
422 *Nelson Mandela Bay Municipality and Others v Vodacom* 1-2.
423 *Nelson Mandela Bay Municipality and Others v Vodacom* 1-2.
424 *Nelson Mandela Bay Municipality and Others v Vodacom* 37.
425 Section 26(1)(a)(i) provides that in the case of a sentence imposed by a High Court, to a fine or to imprisonment.
426 Section 26(1)(a)(ii) provides that in the case of a sentence to be imposed by a Regional Court, to a fine or to imprisonment for a period not exceeding 18 years.
427 Section 26(1)(a)(iii) provides that in the case of a sentence to be imposed by a Magistrate, to a fine or to imprisonment for a period not exceeding five years.
428 Section 28.

information: the particulars of the convicted person,[429] the conviction, the sentence,[430] and any other order of the Court consequent thereupon.[431]

If it is an enterprise, the following information must be kept in the Register: the particulars of that enterprise;[432] the particulars of any partner, manager, director or other persons wholly or partly exercising or who may exercise control over that enterprise and who was involved in the offence concerned;[433] the conviction and sentence; and any other order of the Court consequent thereupon.[434] In the same vein, an additional register called Register of Tender Defaulters must be kept at the Office of the Treasury.[435] This Register is administered by a Registrar[436] who must manage and maintain the Register in terms of section 28 as discussed above.[437] The use of these registers seems to be less effective, and an innovative approach to make these registers relevant to combating public procurement corruption will be explored further in Chapter Six.[438]

The above discussion has focused on the Constitution and the Corruption Act as the leading criminal legal framework for fighting public procurement corruption. It has already been indicated that the other criminal legislation relevant to the study under consideration will be summarised. This legislation is tabulated below:

Table 16: Additional legal framework

Name of Act	Characteristics
National Prosecuting Authority Act[439]	The powers, functions and duties of the NPA are provided in section 20 of the *NPA Act*. Three main powers that are mentioned are: (i) to institute and conduct criminal proceedings on behalf of the state;[440] (ii) to carry out any necessary functions incidental to instituting and conducting such criminal proceedings;[441] (iii) and to discontinue criminal proceedings.[442] The NDPP[443] has the overall authority over all prosecutions in the Republic[444] *inter alia* prosecuting public procurement corruption.

429 Section 28(1)(a)(i).
430 Section 28(1)(a)(ii).
431 Section 28(1)(a)(iii).
432 Section 28(1)(b)(i).
433 Section 28(1)(b)(ii).
434 Section 28(1)(b)(iii).
435 Section 29.
436 Section 30.
437 Section 31.
438 See para 6.6.
439 32 of 1998.
440 Section 20(1) (a).
441 Section 20(1) (b).

Special Investigation Units and Special Tribunals	The SIU has eight distinct functions as provided for in section 4 and all have a direct bearing on the manner in which the SIU tries to combat public procurement corruption. These are: (i) to investigate all allegations with regard to the matter concerned;[445] (ii) to collect evidence relating to the investigation;[446] (iii) to institute and conduct civil proceedings[447] in a Special Tribunal or Court of law;[448] (iv) to refer evidence regarding or which points to the commission of an offence to the prosecuting authority;[449] (v) to perform functions which are not in conflict with previous Acts;[450] (vi) to report on the progress of matters before it and the Special Tribunal;[451] (vii) to submit a final report once it is done with an investigation;[452] (viii) and to submit a report on its operations at least twice a year to Parliament.[453] Some of these powers have been tested in court.[454]

442 Section 20 (1) (c).
443 National Director of Public Prosecutions.
444 Section 21(1).
445 Section 4 (1) (a).
446 Section 4(1) (b).
447 This includes any relief to which the State Institution concerned is entitled, including the recovery of any damages or losses and the prevention of potential damages or losses which may be suffered by such a State institution.
448 Section 4(1) (c).
449 Section 4(1) (d).
450 Section 4(1) (e).
451 Section 4(1) (f).
452 Section 4(1) (g).
453 Section 4 (1) (h).
454 In *Sello v Grobler* 623/2009 2010 ZASCA 134*,* the police searched a pharmacy and a house belonging to Sello (the owner of the Pharmacy) and seized several drugs that they suspected were being sold without prescription. This was done without a warrant and in the court *a quo* Sello lost his challenge to the unlawful search and seizure. On appeal it was held that the search and seizure done by the police had been unlawful and the court ordered the police to return the drugs that Sello was entitled to lawfully to possess.
The Court went on to state that derogation from obtaining a warrant is justified only under section 22 of the Criminal Procedure Act 57 of 1977 (hereafter CPA), which *inter alia* authorises search and seizure without a warrant where a police official believes that the delay occasioned by obtaining a warrant would defeat the object of the search. Therefore, in dealing with matters of public procurement corruption where it is necessary to enter and seize certain documents, it is incumbent upon the SIU or the police officer as the case may be to obtain a search warrant. One must try as much as possible to follow the laid down procedure when dealing with matters relating to public procurement corruption. Courts are not willing to condone searches and seizures that violate the rights of individuals, especially in circumstances that do not justify derogations as provided for in section 22 of the CPA.
Additional references may be found in *Minister of Police and Others v Kunjana* 2016 ZACC 21; *Thint (Pty) Ltd v National director of Public Prosecutions and Others, Zuma and Another v National Director of Public Prosecutions and Others* 2008 ZACC 13.
454 *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re:Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2000 ZACC 12.

Prevention of Organised Crime Act	The Prevention of Organised Crime Act (hereafter POCA) deals with public procurement corruption. It caters for sophisticated and complicated corrupt activities within and outside the borders of the Republic. It envisages situations where the proceeds of public procurement corruption can be moved from the Republic to other countries in an attempt to evade arrest or other legal measures. POCA deals with a wide range of criminal activities but those that are important to public procurement corruption are money laundering, racketeering, and the recovery of assets that were obtained as a result of unlawful activities.[455]
Protected Disclosures Act	The Protected Disclosures Act, popularly known as the Whistle Blower Act, has a special place in combating public procurement corruption. According to its preamble it aims to protect employees both in the private and public sector who make a disclosure[456] regarding unlawful or irregular conduct either by their employers or their employees. Furthermore, the Act recognises that criminal and other irregular conduct in organs of the state and private bodies are detrimental to good, effective, accountable and transparent good governance. Public procurement corruption does not happen in a vacuum, nor is it a mystery that needs to be scientifically proven. People are involved in public procurement corruption and whenever they are, some other people are bound to know about it. As explained earlier on, because of the nature of public procurement corruption, especially in the entire procurement process, there are government employees who may know of the corruption.[457] Also, some employees of the supplier may be aware of the corrupt activity.[458] Should these employees decide to reveal information regarding criminal corrupt conduct in the form of a disclosure as the Act puts it, then these employees should not be victimised.[459]

The purpose of this part of the dissertation was to discuss criminal measures for combating public procurement corruption. It has been revealed that although South Africa has signed international and regional instruments on corruption, the country has made little progress in complying with key provisions that relate to combating public procurement corruption. On a domestic level South Africa has an array of

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455 In the preamble of the POCA it is acknowledged that there is a need to prevent criminal activities that can cause economic instability and social damage. The POCA also recognises that new trends of public procurement corruption have developed. These new trends involve cartels that are located all over the world. The cartels should be stopped since their activities have the effect of undermining the rule of law. Also, governments find it almost impossible in developing countries to improve service delivery in their respective countries. In this light the POCA holds accountable an enterprise that is alleged to be involved in criminal activities.

456 The Act defines disclosure as: "Any disclosure of information regarding any conduct of an employer, or an employee of that employer, made by any employee who has reason to believe that the information concerned shows or tends to show one or more of the following; that a criminal offence has been committed, is being committed or is likely to be committed; that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject; unfair discrimination as contemplated in the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 has been, is being or is likely to be deliberately concealed".

457 Polity.Org 2016 http:://www.polity.org.

458 Polity.Org 2016 http:://www.polity.org.

459 Polity.Org 2016 http:://www.polity.org.

pieces of legislation that addresses public procurement corruption, in particular the Constitution and the Corruption Act.

In addition, other pieces of legislation that have been summarised and that are relevant to public procurement corruption are the *NPA Act*, the *SIU* and the *Special Tribunal Act*, the *POCA* and the *Protected Disclosures Act*. Some weaknesses have been identified in the criminal measures for combating public procurement corruption that have been discussed above. Can some of the weaknesses in criminal measures identified above be addressed by administrative measures for curbing public procurement corruption?

5.5.3.2 Administrative Measures

In South Africa, the use of administrative measures prior to 1994 in combating public procurement corruption was minimal.[460] However, with the advent of the Constitution in 1994 one witnessed an increase in the use of administrative measures in curbing public procurement corruption.[461] Administrative measures in South Africa are *inter alia* premised on what procurement entities or procurement officials can legally do to penalise and punish the corrupt suppliers to help reduce public procurement corruption.

In other words, what sanctions can be invoked by the procurement entity or procurement officials against corrupt suppliers or their employees? These sanctions could be permanent or temporary, depending on the nature of the offence and the legal provisions.[462] This part of the dissertation will discuss three administrative measures, namely debarment, black-listing and suspension as measures for combating public procurement in South Africa.

5.5.3.2.1 Debarment

The debarment of suppliers in South Africa is the placing of restrictions (temporary or permanent) on suppliers who have intentionally violated the procurement procedures

460 Bolton *The Law of Government Procurement in South Africa* 36-38.
461 Naidoo and Jackson *Reviewing South Africa's Efforts to Combat Corruption* 3.
462 Bolton *The Law of Government Procurement in South Africa* 17-19.

or other financial dicta.[463] Debarment is targeted either at suppliers (as a company or organisation or firm) or individual directors or shareholders who may have deliberately or negligently condoned acts of public procurement corruption.[464] It is important to note that in South Africa debarment is an administrative decision that is provided in legislation and taken at the discretion of the procuring entity/officials.[465]

Purpose of debarment

The general purpose of debarment in South Africa is to ensure that suppliers do not intentionally disregard procuring rules to the prejudice of the objectives of the procurement system.[466] Debarment is used for a number of deliberate procurement violations by suppliers.[467] In other words, there are several grounds for debarment. In the present discussion, the focus is on the use of debarment as a measure to combat public procurement corruption.

Another important use of debarment is to ensure that the government of South Africa reduces the risk of contracting with dishonest suppliers.[468] However, as will be argued below, debarment is one of the least used measures by all three spheres of government.

Legal framework for debarment

The legal framework for debarment is contained in the Corruption Act (secs 12, 13 and 28), as discussed above, and in addition, in the PFMA Regulations, in particular 13(2) (a) and 16A9.1 (e)[469] and (f).[470] In the same context, Corruption Act also

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463 Williams-Elegbe *Fighting Corruption in Public Procurement* 76.

464 Wiliams and Quinot 2008 *The South African Law Journal* 250-251.

465 Williams-Elegbe *Fighting Corruption in Public Procurement* 116.

466 *Millenium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province Board* 2007 SCA 165 RSA 3-4.

467 Bolton 2014 *Potchefstroom Electronic Law Journal* 2322.

468 *Dr JS Moroka Municipality v The Chairperson of the Tender Evaluation Committee of the Dr JS Moroka All* SA 545 (SCA) 7-8.

469 The accounting officer or accounting authority must reject a proposal for the award of a contract if the recommended bidder has committed a corrupt or fraudulent act in competing for the particular contract.

470 The accounting officer or accounting authority must cancel a contract awarded to a supplier of goods or services (i) if the supplier committed any corrupt or fraudulent act during the bidding process of the execution of that contract; or (ii) if any official or other role player committed any corrupt or fraudulent act during the bidding process of the execution of that contract that benefited the supplier.

provides for debarment when enforcing preferential procurement. Of particular importance is debarment regulated in terms of Corruption Act section 13(2) (a).

What is not clear is whether the procuring entity/officials can invoke debarment based on the Corruption Act without waiting for a criminal conviction of the alleged corruptors by a Court of law. Assuming that the procuring entity/officials invoke the debarment based on the PFMA Regulations without waiting for a criminal conviction, it is also not clear whether the invoking procuring entity/officials has an obligation to report such alleged corruptors to the SAPS or any other law enforcement agent.

However, if debarment is triggered by section 28 of the Corruption Act, then the invoking procuring entity/officials has to wait for a criminal conviction before enforcing the debarment sanction.

On the municipal level it was categorically stated in *Entasha Henra BK v Hessequa Munisipaliteit*[471] that the power to debar is well enshrined in the law. It was ruled in the *Entasha Henra-case inter alia* that the power to debar resides with the Municipal Manager (the Accounting Officer) and not with any other entity.[472] The *Entasha Henra BK-case* settled the dispute whether the power to debar within municipalities resided with the Bid Evaluation Committee or the Accounting Officer.[473] The Court ruled that in South Africa the Bid Evaluation Committee cannot exercise powers of debarment whatsoever.[474]

It is also important to note that debarment has a very close link with the Tender Defaulters' Register.[475]

Tender Defaulters' Register

The Tender Defaulters Register records the details of the particular entity or owners or shareholders or managers or any other person involved in a corrupt act.[476] In addition, the details of any other entity where the convicted suppliers are involved

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471 2008 JDR 0455 (C).
472 Bolton 2009 *Potchefstroom Electronic Law Journal* 76
473 Bolton 2009 *Potchefstroom Electronic Law Journal* 76.
474 Bolton 2009 *Potchefstroom Electronic Law Journal* 76.
475 Wiliams and Quinot 2008 *The South African Law Journal* 253-254.
476 *Mogale City Municipality v Fidelity Security Services (Pty) Ltd* (572/2013) 2014 ZASCA 192 7.

should be recorded in the Tender Defaulters' Register.[477] As part of the debarment procedure, the invoking procuring entity/official has in terms section 28 (1) (a) of the Corruption Act to keep and maintain a Tender Defaulters' Register.[478]

The period of debarment for the convicted supplier/entity may not be less than five years and not more than 10 years in terms section 28(3) (a) (ii) of the Corruption

Act.[479] The *PFMA Regulations* 13(2) (a) and 16A9.1 (e) and (f) do not set the duration of the debarment. Therefore, one may assume that either the invoking procuring entity/official may impose its own periods or may be guided by the period set in terms of section 28(3) (a) (ii) of the Corruption Act. Debarment seems to affect only a corruption conviction for that particular contract and not for any other contract in terms of section 16A9.1 (f) of the *PFMA Regulation*.[480]

Debarment allows companies to be more prudent with whom they partner (including sub-contracting), as they risk losing lucrative government tenders otherwise.[481]

Debarment may sometimes be interpreted as blacklisting and in some cases debarment may be distinguished from blacklisting.

5.5.3.2.2 Blacklisting and suspension

The legal provision for blacklisting and suspension is *PFMA Regulations* 16.A9.1, 16A9.2 and 16A9.3. These two concepts are linked to the Tender Defaulters' Register. There seems to be no available case law on businesses that have been blacklisted or suspended and that have then challenged such blacklisting and

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477 *Mogale City Municipality v Fidelity Security Services* 9.

478 *Mogale City Municipality v Fidelity Security* Services 9.

479 In South Africa the details of the corrupt supplier in terms of Regulation 3 should remain in the Register for Tender Defaulters for 20 years. Therefore, should the maximum debarment period be 20 years or 10 years? It is submitted that the 10-year period provided in terms of section 28(3) (a) (ii) seems to be reasonable and should prevail. The 20-year period may seem to be a life ban, especially if the business of the supplier is sorely reliant on government contracts. However, the 20-year period may be imposed in the event of recurring public procurement corruption by the same supplier. Therefore, there is a need for South Africa to come up with proper debarment periods, taking into account suppliers who are first-time offenders and recidivists, as is usually the case in criminal matters. It has been suggested that South Africa needs a new public procurement law, and when that law is passed it should clarify the debarment periods of first time offenders and recidivists.

480 If the supplier committed any corrupt or fraudulent act during the bidding process of the execution of that contract.

481 *Mogale City Municipality v Fidelity Security Services* 7.

suspension.[482] The blacklisted and suspended suppliers can challenge such blacklisting and suspension by virtue of NT Practice Note SCM 5 of 2006.[483] As such, it is difficult for one to give an objective analysis on the use of these two measures. However, South Africa's Treasury keeps a database of Restricted Suppliers.[484]

The online database lists the names of affected suppliers (companies and individuals).[485] The current online database lists 1261 suppliers and individuals that are blacklisted for a particular time.[486] It contains (i) the name of supplier/person; (ii) the supplier's registration number/ID number; (iii) the reason for restriction by the relevant Accounting Officer/Authority; (iv) the period; of the restriction; and (v) the identity of the ministry/department authorising the restriction.[487]

5.5.3.2.3 Self-cleaning

As explained in Chapter Two, the privilege of self-cleaning may be extended to debarred companies or private suppliers, to clean or make good (pay appropriate compensation or other relevant remedies) the causes of their public procurement corruption.[488] South Africa's legislation does not provide for self-cleaning. Whether South Africa should legally provide for it will be argued in Chapter Six.

5.5.3.3 Institutional Measures

The legal regime of combating public procurement corruption is enforced through different institutions.[489] These can be divided into law enforcement institutions and other complementary institutions.[490] There are three main law enforcement institutions empowered to enforce sanctions against public procurement corruption, namely the South African Police Services (hereafter SAPS), in particular the

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482 *Mogale City Municipality v Fidelity Security Services* para 9.
483 Paragraph 2.5
484 National Treasury 2016 www.treasury.gov.za.
485 National Treasury 2016 www.treasury.gov.za.
486 National Treasury 2016 www.treasury.gov.za.
487 For example, in the current online database manual, D was blacklisted for "fraudulent, corrupt and improper conduct" and suspended for a period of five years (29 November 2012 – 29 November 2017) as authorised by the City of Cape Town Metropolitan Municipality. This supplier in his or her individual capacity will not be able to tender for any contracts called for by the City of Cape Town Metropolitan Municipality.
488 Punder, Prieβ and Arrowsmith *Self-Cleaning in Public Procurement* 15.
489 Office of the Public Service Commission *A review of South Africa's National Anti-corruption Agencies* 3.
490 Habtemichael *Anti-corruption Strategies in the Public Sector* 116.

Department of Priority Crime Investigations, the NPA and the Judiciary.[491] Other institutions are classified in this study as complementary institutions.

In this study, "complementary institutions" refers to those institutions that have the power to partly enforce the law as well as additional power to help the law enforcement institutions. Some of the complementary institutions are creatures of the Constitution (like the Office of the Public Protector), while others are created through government legislation and policies. Attention immediately below is given to SAPS.

5.5.3.3.1 South African Police Services

SAPS occupies an important position in curbing public procurement corruption. The SAPS was established in terms of section 199(1)[492] of the Constitution. SAPS is the primary law enforcement body in the Republic. The role of SAPS in fighting public procurement corruption has been criticised.[493] A lot of criticism has been levelled against SAPS in that it lacks the professionalism required to effectively tackle public procurement corruption, as noted in *S* v *Selebi.*[494]

Tiscornia,[495] who is one of the critics of the lack of integrity within SAPS, argues that some of SAPS members exhibit such reprehensible corrupt behaviour as for it to culminate in police corruption. The result of police corruption is an exacerbation of public procurement corruption.[496] While this may be true, it must not escape one's mind that SAPS through its various units has in some cases successfully arrested public officials involved in public procurement corruption, including police officers.[497] The Anti-Corruption Unit was established in order to address corruption within SAPS.[498]

Of particular importance under SAPS is the Department of Priority Crime Investigations.

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491 Public Protector "Corruption and Governance Challenges: The South African Experience"
492 The security services of the Republic consist of a single defence force, a single police service and any intelligence services established in terms of the Constitution.
493 van Vuuren "South Africa: Democracy Corruption and Conflict Management 20-21.
494 (240/11) 2011 ZASCA 249 (2 December 2011).
495 Tiscornis *On Corruption in South Africa Policy* 4.
496 Mills *Causes of Corruption in Public Sector Institutions and its Impact on Development* 6.
497 *Selebi v State* (240/11) 2011 ZASCA 249 (2 December 2011).
498 Politicsweb *SAPS Anti-Corruption to be Launched – Riah Phiyega* 1.

5.5.3.3.2 Department of Priority Crime Investigations

The Department of Priority Crime Investigations (hereafter Hawks) was created in 2008 amidst much controversy.[499] The Hawks are a unit of SAPS. Debate raged amongst scholars and other stakeholders as to whether the creation of the Hawks was more of political move rather than a legal move.[500] Before the creation of the Hawks, there was another anti-corruption unit known as the Directorate of Special Operations (hereafter DSO).[501] The DSO had arguably made significant inroads into combating not just corruption in general but also public procurement corruption.[502]

It is difficult to establish what cases of public procurement corruption that the Hawks have successfully investigated have resulted in convictions. Faull and Mtsolongo[503] are of the opinion that:

> South Africa's new elite police unit, known as the Hawks, has been created in the midst of political change. Objectors have criticised its location in the SAPS, saying that the integrity of the unit, and its ability to conduct politically neutral investigations, may be compromised by its location.

The questioning of the placement of the Hawks under SAPS was taken a step further by a private citizen, namely Hugh Glenister, when he challenged the constitutionality of the legislation that created the Hawks and placed them under SAPS.[504] His legal battle over the need to create an independent anti-corruption agency in South Africa is currently the leading authority on the modalities of such an institution in so far as tackling public procurement corruption is concerned.

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499 Goga 2014 *SA Crime Quarterly* 63.

500 Kasipo *Mail and Guardian* 1.

501 The Directorate of Special Operations (hereafter Scorpions) was established in terms of section 7 (1) of the NPA Act 32 of 1998.[501] It is important to recall that the Scorpions were disbanded and replaced by the Hawks. It is not possible to discuss the effectiveness of the Hawks and the NPA in fighting public procurement corruption without discussing the scope and function of the Scorpions, the reasons for its disbandment, and the effect of its disbandment on combating public procurement corruption. The powers and functions of the Scorpions were stated in *Glenister v President of the Republic of South Africa and Others* (hereafter *Glenister I*) as encompassing "Powers of investigation, including the power to gather, keep and analyse information, and the power to institute criminal proceedings, where appropriate, relating to organized crime and other offences".
The spirited efforts of the Scorpions to fight public procurement corruption were arguably the best the country had ever seen before and after apartheid. According to Corruption Watch, "The Shaik and Yengeni rulings and the Selebi and Agliotti cases all originated with the Scorpions. The unit had a conviction rate of between 82% and 94%. In 2002 66 people were arrested. In 2006 this number had climbed to 217. In 2002 180 prosecutions were finalised".

502 Corruption Watch *Switching Scorpions' Cases to Hawks* 1.

503 Faull and Mtsolongo 2009 *SA Crime Quarterly* 17.

504 *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) 2011 ZACC 6.

The main issues raised by Glenister can be summed up as follows: (i) the constitutional validity of the NPA Amendment Act[505] and the SAPS Amendment Act;[506] (ii) whether the Constitution imposes an obligation on the state to establish and maintain an independent body to combat corruption and organised crime.

The raising of these issues by Glenister suggested that the placement of the Hawks under SAPS was effectively placement under the control of ANC political appointees, in particular the Minister of Police, and that the unit had by implication lost its independence.[507] So far, the arguments raised by Glenister seem to be confirmed.[508] Ever since the creation of the Hawks no single case of public procurement corruption involving high-ranking ANC politicians has been successfully prosecuted.[509] Under the defunct DSO, there were no sacred cows as far as public procurement corruption was concerned.[510] It is for this reason that hope for success in the fight against public procurement corruption in South Africa rests with the judiciary.

5.5.3.3.3 Judiciary

The Judiciary is created in terms of chapter 8 of the Constitution. A number of courts are in operation in South Africa.[511] The question is, how does the judiciary enhance the fight against public procurement corruption? The judiciary uses a variety of legal principles to curb public procurement corruption,[512] but this study focuses on the specific principle of the judicial review of administrative action.[513]

The judicial review of administrative action in the context of public procurement in South Africa as in most other jurisdictions is a special remedy available to suppliers or other stakeholders who are aggrieved with a decision taken by administrators.[514]

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505 56 of 2008.
506 57 of 2008.
507 *Glenister v President of the Republic of South Africa and Others* para 59.
508 Kasipo *The Mail and Guardian* 1.
509 Kasipo *The Mail and Guardian* 1.
510 Corruption Watch *Switching Scorpions' Cases to Hawks* 1.
511 Section 166 establishes the following: the Constitutional Court; the Supreme Court of Appeal; the High Court; the Magistrates' Court; and any other court established in terms of an Act of Parliament.
512 SAFLII 2013 *De ReBus* 1.
513 *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 ZACC 6.
514 Bolton *The Law of Government Procurement* 17-20.

In the present case, the decision taken by the procuring entity will be the cause or nexus between the awarding of a contract and public procurement corruption.[515]

The sources of the judicial review of administrative action are primarily section 33 of the Constitution and the PAJA. Section 33 of the Constitution provides that:

> (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair;
>
> (2) Everyone whose rights have been adversely affected by administrative action has the right to be given reasons;
>
> (3) National legislation must be enacted to give effect to these rights, and must (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal; (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and (c) promote an efficient administration.

The PAJA is one of the most critical Acts that South Africa has passed. It helps in the administration of public procurement disputes.[516] It is directly related to the regulation of public procurement and how administrative power or action can be abused to further public procurement corruption. Burns and Beukes[517] support this opinion of the significance of the *PAJA* when they state *inter alia* that the PAJA applies to and binds the entire administration in all spheres of government; that is, the national, provincial and local spheres.

Administrative action and public procurement

It is important for one to understand the legal relationship between the PAJA and the need to fight public procurement corruption. The PAJA defines administrative action as:

> Any decision taken, or any failure to take a decision by an organ of state when exercising a power in terms of the Constitution or provincial constitution; exercising a public power or performing a public function in terms of any legislation; or a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external and legal effect.

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515 Bolton *The Law of Government* Procurement 18.
516 Bolton *The Law of Government Procurement* 17-20.
517 Burns and Beukes *Administrative Law* 4.

The PAJA provides that an administrative action must be procedurally fair if the consequences of that decision are going to adversely affect the rights of others or their legitimate expectation.[518] It is submitted that with regards to public procurement corruption, once a decision has been taken that permits a corrupt deal to succeed, then that decision is a violation of section 2 of the PAJA.

The question of what amounts to procedural fairness has been dealt with by the Courts on a number of occasions.[519] It should be noted that the PAJA makes a distinction between procedural fairness that affects any person and procedural fairness that affects the public.[520] It is submitted that public procurement corruption affects both; that is, the rights of any individual and that of the public.[521]

In summary, Currie[522] says that as far sections 3 and 4 of the *PAJA* are concerned they are meant to allow an accountable, open and transparent administration. Once there has been a lack of transparency and suspicions of public procurement corruption are raised then the aggrieved party may challenge that administrative action or decision.[523]

Administrative decisions of various government department and organs of state including those decisions of alleged public procurement corruption have also been the subject of the Office of the Public Protector (hereafter PP).

5.5.3.3.4 Public Protector

The office of the PP is provided for in the *Constitution* as one of the six State Institutions[524] that support constitutional democracy. Its core mandate is *inter alia* to "investigate and redress improper conduct, prejudicial conduct and maladministration".[525] The PP investigates cases of public procurement corruption as

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518 Section 3(1).
519 *SAAB Grintek Defence v South African Police Service* (316/2015) 2016 ZASCA 104 para 8.
520 Section 4.
521 *SAAB Grintek Defence v South African Police Service* para 3.
522 Currie *The Promotion of Administrative Justice Act A Commentary* 118.
523 *SAAB Grintek Defence v South African Police Service* para 6.
524 Chapter 9 State Institutions are the Public Protector, the South African Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the commission for Gender Equality, the Auditor General and the Electoral Commission.
525 Public Protector 2016 "Vision and Mission" http://www.pprotect.org/about_us/Vision_mission.asp.

part of its broader mandate.[526] When the PP unearths public procurement corruption, the PP will recommend binding remedial action.[527] The PP is an outstanding independent institution that has stood firm in fighting public procurement corruption.[528]

In a recent report[529] regarding allegations of corruption and maladministration in the procurement of the Riverside Office Park by the Independent Electoral Commission (hereafter IEC) the PP reaffirmed her powers. Allegations were levelled against the former Chief Electoral Officer, Advocate Tlakula, that she unduly influenced the procurement of the Riverside Office Park.[530] It was alleged that she used her position to award the tender to her close business partner in violation of the *PFMA* and the IEC procurement policies and procedures. As a result of her actions, two advance irregular payments of R22 603 374 in March 2010 and R26 979 155 in December 2010 were made.[531]

On the enquiry of flouting public procurement regulations the PP found *inter alia* the following, and it is necessary to quote her findings in full:

> While there was no impropriety to the Commission handling its own procurement of immovable assets as a constitutional institution, the process followed by Advocate Tlakula and her EXCO in the procurement of Riverside Office Park was grossly irregular as it was characterised by a violation of procurement legislations and prescripts such as section 38 of *PFMA*, Treasury Regulations 5.1 and 16A6, section 2(1)(e) of the *Procurement Act* as well as chapter 4 of the Electoral Commission Procurement Policy and Procedures 10 March 2005.[532]
>
> By her own admission Advocate Tlakula issued a directive on 11 February 2009 for the procurement process to be handled by EXCO to the exclusion of the procurement committee in violation of her own Commission Procurement Policy and Procedures. In so doing, she countermanded the decision of the Commission which had made a decision 12 January 2009 to award the tender to a different company.[533]

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526 Public Protector 2016 “Vision and Mission” http://www.pprotect.org/about_us/Vision_mission.asp.
527 Public Protector *State of Capture* 353.
528 Section 182 (1) (b) of the *Constitution*.
529 Public Protector *Inappropriate Moves* 29.
530 Public Protector *Inappropriate Moves* 218.
531 Public Protector *Inappropriate Moves* 5.
532 Public Protector *Inappropriate Moves* 207.
533 Public Protector *Inappropriate Moves* 207.

> There was no separation of roles and responsibilities between the various committees within the Commission that are tasked with the procurement process i.e bidding specification, bid evaluation and bid adjudication committees.[534]
>
> Accordingly, there is a process that must be followed in respect of tenders and/or procurement which was not followed in respect of the procurement of the Riverside Office Park.[535]
>
> There was indeed an undisclosed and unmanaged conflict of interest between the then Commission Chief Electoral Officer, Advocate Tlakula's responsibility to act in the best interests of the Electoral Commission as its *Accounting Officer* and her special business interest with Honourable Mufamadi, her Chairperson and Co-director in Lehotsa Investments Holdings.[536]

Against this background the remedial action recommended by the Public Protector was that:

> The Speaker of Parliament, in consultation with the Electoral Commission to the exclusion of the Chairperson, consider whether action should be taken against Advocate Tlakula for her role in the procurement of the Riverside Office Park building to accommodate the head offices of the Commission in light of the unmanaged and undisclosed conflict of interest and her contravention of the procurement laws and prescripts dealt with in this report and accordingly advise the President of the appropriate action to take.[537]

This case exposed the manner in which public procurement corruption occurs in certain government procurements, and in particular how Accounting Officers unashamedly manipulate the procurement process for corrupt purposes.[538] Further, it revealed the need to have internal, strong and enforceable checks and balances within the constitutional institutions and other state-owned enterprises.

It also highlighted the effectiveness of the Office of the PP in fighting corruption in public procurement. However, it also revealed the limitations of the operations of the PP in that the PP could have charged Advocate Tlakula with corruption, instead of which the PP chose to refer the matter to the Parliament. The Parliament did not charge Advocate Tlakula with corruption despite the findings of the PP. The PP did not follow up on the remedial action taken by the Parliament. However, opposition

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534 Public Protector *Inappropriate Moves* 208.
535 Public Protector *Inappropriate Moves* 209.
536 Public Protector *Inappropriate Moves* 214.
537 Public Protector *Inappropriate Moves* 218.
538 Public Protector *Inappropriate Moves* 8-9.

parties took Advocate Tlakula to Court in the light of the findings of the PP, which resulted in Advocate Tlakula's resignation in 2014.[539]

In addition to the above institutions, the other complementary institutions are *inter alia* the Asset Forfeiture Unit,[540] the Witness Protection Unit,[541] the Special Tribunal,[542] the Auditor General,[543] the Public Service Commission,[544] the Multi Agency Working Group,[545] and Commissions of Enquiry.[546]

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539 Advocate Tlakula was appointed by President Zuma in 2016 to head the newly formed Information Regulator. It is submitted that this appointment is morally reprehensible, if viewed against the findings of the PP.

540 The Asset Forfeiture Unit (AFU) is a specialised unit that operates under the NPA. It was established in 1999. The functions and powers of the AFU appear not to be well defined but they can be extrapolated from its operation, particularly in cases involving the alleged violation of the POCA. According to the NPA the main focus of the NPA is give legal effect to Chapters 5 and 6 of the POCA. The AFU has a number of options under these two chapters in order to ensure that the perpetrators of corruption in public procurement do not enjoy these benefits, where possible. For instance the AFU can *inter alia* apply for confiscation and restraint orders as a means of bringing to futility the illegal advantage that would have accrued to either the corruptor or the corruptee as a result of public procurement corruption.

541 The Witness Protection Unit (hereafter WPU) deals with the legal protection of threatened or intimidated witnesses. When public procurement corruption occurs it is usual for some employees within the government or those that are associated with the corruptor to know about the corrupt activity. It gets a little complicated when the person involved is superior to the witness. The subordinate may fear to disclose or reveal the corrupt activity for fear of victimisation on or off the employment premises. Under such circumstances the WPU rescues the witness.

542 The powers and functions of the tribunal are provided in section 8. These include issuing suspension orders, interlocutory orders or interdicts on application by such a Unit or party; making any order which it deems appropriate so as to give effect to any ruling or decision given by it; and making any order which it deems appropriate as to costs. The jurisdiction of the Special Tribunal is only on civil actions brought to it by the SIU or any interested person emanating from an investigation by the SIU.

543 The relevance of the AGSA in fighting public procurement corruption is best understood in terms of the functions of the AGSA, which are stated in section 188 (1) as follows:
The Auditor General must audit and report on the accounts, financial statements and financial management of - All national and provincial state departments and administrations; All municipalities; and Any other Institution or accounting entity required by national or provincial legislation to be audited by the Auditor General Therefore the AGSA plays a critical role in fighting public procurement corruption. The AGSA provides the much-needed evidence in terms of the actual expenditures of the national, provincial and local governments. The AGSA also has access with regards to who provided the service, who contracted the supplier, how the contract was managed and whether such expenditure was justified or not.

544 The importance of the PSC in curbing public procurement corruption is found in section 195 of the Constitution, which provides for following principles:
A high standard of professional ethics must be promoted and maintained; Efficient, economic and effective use of resources must be promoted; Services must be provided impartially, fairly, equitably and without bias; Public administration must be accountable; Transparency must be fostered by providing the public with timely, accessible and accurate information

545 The Multi Agency Working Group was announced by President Zuma on 3 August 2013. He said the purpose of this Group was to have coordination between the various anti-corruption agencies in the country in investigating supply chain management practices. As noted earlier, South Africa

The above has shown that South Africa has several anti-corruption institutions charged with the duty to combat public procurement corruption. The roles of the above anti-corruption agencies are not clearly defined, especially their roles in curbing public procurement corruption. This has resulted in duplication and in some instances omissions and also the bungling of evidence in cases involving public procurement corruption.[547] It is submitted that South Africa needs an institution that commands, spearheads and coordinates the fight against public procurement corruption.

The recommended anti-corruption institution should be clothed with sufficient power to effectively investigate and prosecute corruption. In addition, the recommended anti-corruption institution should be well resourced; that is, it should be financially and institutionally represented in all the nine provinces. The envisaged anti-corruption institution should in its strategy have a mechanism for encouraging and facilitating civil activism as one of the measures for combating public procurement corruption.

5.5.3.4 Civil activism

This section of the dissertation examines the roles of three arms of civil activism, namely individuals, CSOs and the media, in fighting public procurement corruption. First, "individual activism", as noted in Chapter Two, refers to the active role that individuals play in initiating and influencing litigation that involves public procurement corruption. Second, "CSOs" refers to the role that the CSOs play in educating the public, litigating, and holding the government accountable in so far as public procurement corruption is concerned. Third, the role of the media is not so much in litigation but in performing investigative journalism and informing the public about the evils of public procurement corruption.

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has more than fifteen anti-corruption agencies. It seems as if the work of these agencies in tackling public procurement corruption, though it is noble, has resulted in fragmentation and reluctance to take responsibility for combating public procurement corruption.

546 One interesting phenomenon in the array of South African institutions charged with fighting public procurement corruption has been the establishment of Commissions of Enquiry (hereafter CoE). These CoEs are established in terms of the Commissions of Enquiry Act 8 of 1947. Significant legal debate has taken place on the extent to which the government has been willing to abide by the findings of the CoEs. Two Commissions have been established whose findings have a direct bearing on fighting public procurement corruption. These are the Khampepe Commission and the Strategic Defence Procurement Packages Commission.

547 Faull and Mtsolongo 2009 *SA Crime Quarterly* 17.

In addition, it has become an international trend to relentlessly report on cases of public procurement corruption in South Africa, and some organs of the media have dedicated editorials that report specifically on corruption.[548] In the same light, the use of social media in South Africa has become a very important tool in disseminating as well as raising issues that relate to public procurement corruption.[549]

The discussion below turns first to the role of individual activism in combating public procurement corruption in South Africa.

5.5.3.4.1 Individual activism

"Individual activism" refers to the actions of those South African individuals that take responsibility for pursuing matters involving public procurement corruption, whether it directly or indirectly affects them. In South Africa, individual activism in fighting public procurement corruption gained momentum in 1999 when Patricia De Lille (hereafter De Lille) took it upon herself to expose the alleged corruption in the Arms Deal.[550] At the time when she called for an official investigation, she acted as a whistle-blower.[551] Calls were made (especially by the ANC) for De Lille to be ignored, as she was accused of political grandstanding.[552]

However, relentless pressure resulted in numerous unofficial investigations and reports.[553] Such was the pressure that the President eventually set up the Seriti Commission to investigate alleged defence procurement corruption.[554] Sadly, after two years of hearings and investigations, the Seriti Commission concluded that no public procurement corruption that had taken place.[555] The efforts by De Lille, viewed objectively, should be applauded.[556]

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548 OECD *Preventing Public Procurement Corruption* 18.
549 Roos 2012 *South African Law Journal* 381-382.
550 De Lille *Briefing to Honourable Patricia De Lille Member of Parliament* 1208-1209.
551 De Lille *Briefing to Honourable Patricia De Lille Member of Parliament* 1208-1209.
552 Munusamy *Daily Maverick* 1.
553 Arms Procurement Commission *Inquiry into Allegations of Fraud, Corruption* 1-4.
554 Arms Procurement Commission *Inquiry into Allegations of Fraud, Corruption* 1.
555 Arms Procurement Commission *Inquiry into Allegations of Fraud, Corruption* 733-734.
556 Corruption Watch has filed a Court application challenging the findings of the Seriti commission. The matter is before the Gauteng High Court of South Africa (*Corruption Watch and Another v The Arms Procurement Commission).* The case is yet to be allocated a case number.

The second high profile demonstration of individual activism was that of Hugh Glenister.[557] As already said, Hugh Glenister, a private citizen, took the President of the Republic of South Africa as far as the Constitutional Court in an attempt to ensure that South Africa retained the independence of the then DSO.[558] He succeeded in having parts of the SAPS Act declared unconstitutional in that the Hawks were not independent in so far as fighting corruption was concerned, as they resorted under the structures of SAPS.[559] Having the Hawks as a part of the SAPS structure, as said earlier, has weakened the general zeal for combating public procurement corruption, especially where the politically connected are involved.[560]

The *Hugh-Glenister case* demonstrated the available legal channels that private citizens can use to fight corruption. It is submitted that with the necessary support and reduced legal fees this platform could be fruitfully exploited by private citizens interested in combating public procurement corruption.

However, in 2015 the house of Hugh Glenister was burgled by police who explained that they were investigating a report that Hugh Glenister was dealing in drugs and that the alleged drugs were on his premises.[561]

After the raid the police admitted that they had not found anything and apologised to the extent of offering Hugh Glenister compensation.[562] The act by the police can be viewed as an abuse of power by the state under the influence of a political party, in this case the ANC, who view Hugh Glenister as a menace.[563] The case also demonstrates the threat that private citizens face when they decide to address corruption head-on. This threat also extends to whistle-blowers. In this light, some private citizens may prefer to use CSOs as a mechanism to combat public procurement corruption, where they may be protected from victimisation.

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557 *Glenister v President of the Republic of South Africa and Others* (CCT 41/08) 2008 ZACC 19.
558 *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) 2011 ZACC para 17.
559 *Glenister v President of the Republic South Africa and Others* 2011 ZACC 6 (also known as Glenister II).
560 Hoffman *Hawks or Eagles: What does South Africa Deserve?* 1.
561 Evans *Mail and Guardian* 1.
562 Evans *Mail and Guardian* 1.
563 Evans *Mail and Guardian* 1.

5.5.3.4.2 Civil society organisations

This part of the dissertation examines *inter alia* the practical measures and the efforts that CSOs have undertaken and are willing to embark on in the fight against public procurement corruption. For example, the Helen Suzman Foundation has been instrumental in joining cases of corruption.[564] In the famous case of Hugh Glenister, the Helen Suzman Foundation joined the application by Hugh Glenister to prohibit the government from disbanding the DSO.[565]

Corruption Watch is another non-profit organisation that is geared up to fighting corruption in South Africa.[566] It was launched in 2012 and is an organisation to which people can report incidents of corruption.[567] Corruption Watch investigates these cases of corruption and then hands them over to the relevant authorities.[568] Furthermore, it monitors the investigative process or lack thereof of each case that it has reported to the relevant authorities.[569]

In addition, Corruption Watch conducts research in areas that seem to be hotspots of corruption.[570] The findings of the research are then published on their website and also through other forms of media.[571] This was demonstrated in *Corruption Watch and Another* v *The Arms Procurement Commission and Others,*[572] where Corruption Watch is challenging the findings of the Seriti Commission and has applied for the findings of the Commission to be reviewed and set aside.[573]

Section 27 is another CSO that has not been shy to highlight cases of alleged public procurement corruption.[574] Over the last three years Section 27 has managed to

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564 *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others* 2015 2 SA 1 CC.
565 *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others* para 4.
566 Corruption Watch *Understanding Tender Corruption* 1.
567 Corruption Watch 2012 http://www.corruptionwatch.org.za/about-us/who-we-are/about-corruption-watch/.
568 Corruption *Watch Understanding Tender Corruption* 1.
569 Corruption Watch 2012 http://www.corruptionwatch.org.za/about-us/who-we-are/about-corruption-watch/.
570 Corruption Watch *Understanding Tender Corruption* 1.
571 Corruption Watch *Understanding Tender Corruption* 1.
572 The case is still pending before the Gauteng High Court, Pretoria.
573 *Corruption Watch and Another v The Arms Procurement Commission and Others* 318.
574 Veriava *The 2012 Limpopo Textbook Crisis* 1.

direct attention to alleged corruption in the awarding of government tenders for the provision of educational materials, especially in Limpopo.[575]

Section 27 brought a court challenge to the Department of Basic Education (in the famous case of *Section 27 and Others* v *Minister of Education and Another).*[576] The gist of the case was that the textbooks that were supposed to be delivered by the Department of Basic Education in Limpopo had taken longer to deliver than anticipated.[577] It was advanced *inter alia* that the cause of the delay was public procurement corruption in the awarding of that particular contract.[578] Section 27 was able to show that the alleged corruption started at the planning needs phase and went right through to the awarding of the textbook contracts.[579] The media took great interest in the case and reported extensively on the matter, to extent that even the Presidency issued official statements over the matter.[580]

Attention is now given to the role of the media as a facet of civil activism of value in combating public procurement corruption.

5.5.3.4.3 Media

In this study "the media" are defined as independent modes of communication. Examples of the media are the electronic media, the print media and the social media.[581] The media have been strong pillars to lean on in the fight against public procurement corruption in South Africa.[582] The South African media have arguably been among the most independent in the world.[583] There are independent media as well as state-controlled media.[584] Even the state-controlled media sometimes exhibit a high degree of independence and objectivity in their coverage of public procurement corruption.

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575 Veriava *The 2012 Limpopo Textbook Crisis* 1.
576 *Section 27 and Others v Minister of Education and Another* para 28.
577 *Section 27 and Others v Minister of Education and Another* 5-6.
578 *Section 27 and Others v Minister of Education and Another* 15.
579 Veriava *The 2012 Limpopo Textbook Crisis* 2.
580 Davis *Daily Maverick* 1; Evans *The Mail and Guardian* 1; Seale *IOL News* 1.
581 The social media include platforms such as Facebook, Twitter, Instagram, short message services (sms), Whatsapp and other such related forms of communication.
582 Kariuki *Fighting Corruption in South Africa: The Role of Civil Society Sangonet* 1.
583 Brand *Media Law in South Africa* 20.
584 Brand *Media Law in South Africa* 20.

The media enjoy constitutional protection and the courts have on numerous occasions reiterated the need for media freedom in the promotion of constitutional development.[585] In fact, some of the most damaging cases of public procurement corruption have been reported first in the media, and the reports have provoked action by the state law enforcement apparatus.[586]

For example, action, whether successful or abortive, on the alleged corruption in the Arms Deal,[587] the Nkandla scandal,[588] the acquisition of the IEC headquarters,[589] the procurement of the Tshwane prepaid meters[590] and the recent procurement of locomotives by the Passenger Railway Agency[591] emanated from the publication of media reports in every instance. The role of the media has not only been in reporting but also in strongly following up court cases.[592] This has kept public procurement corruption cases under the spotlight. The media should be applauded by the advocates of combating public procurement corruption.

The relentless pressure by the South African media in not tolerating public procurement corruption has forced the government to intervene.[593] In a number of media briefings the government has been challenged by the media to explain its position on some cases involving public procurement corruption allegedly perpetrated by top government officials, including the President.[594] The Nkandla debacle was one such case where the media forced the government to demonstrate its willingness to tackle public procurement corruption.[595]

The political will to combat public procurement corruption in all spheres of government in South Africa has been lacking, and it has worsened over the last seven years under the administration of President Zuma.[596] The media have often

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585 *South African Broadcasting Corporation v Director of Public Prosecutions* 2007 1 SA 523 para 28.
586 Arms Procurement Commission *Inquiry into Allegations of Fraud, Corruption* 733-734.
587 Arms Procurement Commission *Inquiry into Allegations of Fraud,* Corruption 733-734.
588 Public Protector *Secure in Comfort* 4.
589 Public Protector *Inappropriate Moves* 21.
590 Yelland *Daily Maverick* 1.
591 ENCA *Alleged ANC Corruption in Prasa must be Investigated* 1.
592 KAS "Stakeholders' Conference on Activism against Corruption".
593 South African Government 2014 www.gov.za.
594 South African Government 2014 www.gov.za.
595 Media Policy and Democracy Project *Nkandlagate* 1.
596 *Economic Freedom Fighters Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 11.

pushed for government to demonstrate its political will to fight public procurement corruption.[597] The media have questioned this lack of political will on numerous occasions when the institutions that are fighting public procurement corruption involving high government officials are being threatened by the supporters of the current government.[598]

In South Africa the media occupy a very special and sacred place in curbing public procurement corruption.[599] Thus, every effort should be put in place to ensure that the media are protected and the efforts of the media to expose public procurement corruption should be supported by the government and those that are serious in curbing public procurement corruption.

5.5.4 Reflections

The above discussion focused on the role of civil activism in combating public procurement corruption in South Africa. First, it was discovered that individuals have the latitude to participate in the fight against public procurement corruption. However, barriers to the use of individual activism have been identified, in particular the financial costs of litigation. Another hindrance that has been identified is intimidation, as in the state-sponsored burglary of Hugh Glenister's home. Second, CSOs, though small in number, are actively involved in fighting public procurement corruption. This has been demonstrated by Corruption Watch and Section 27. Third, the media have been instrumental in performing investigative journalism and have reported extensively on public procurement corruption. High-profile cases of public procurement corruption have begun with media reports. The efforts of the media should be applauded.

5.6 Conclusion

The primary aim of this chapter was twofold: first to give a broad overview of South Africa's public procurement system and the principles that underpin it, and second to give an overview of South Africa's public procurement corruption and how South Africa is using criminal measures, administrative measures, institutional measures

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597 Gumede *Democracy Works Policy Brief 14: Combating Corruption in South Africa* 1.
598 SABC 2015 www.sabc.co.za.
599 *South African Broadcasting Corporation v Director of Public Prosecutions* 2007 1 SA 523 para 2.

and civil activism measures to combat public procurement corruption. It was established in this chapter that when South Africa emerged from apartheid, the democratic South African government inherited a relatively well structured public procurement system.

Further, it was discovered in this chapter that upon the attainment of democratic independence South Africa clothed public procurement with Constitutional status. Section 217 provides the general principles to be realised in such procurement (that it should be fair, equitable, transparent, competitive and cost-effective). On the other hand, South Africa uses public procurement as a tool for socio-economic empowerment. This is realised through the Procurement Act. The PFMA is the primary procurement legislation in use today, although it is not exclusive procurement legislation. In addition, there is an array of pieces of loose legislation that impact on public procurement, such as the PAJA and the Corruption Act.

In addition to the legislation, there are number of procurement institutions dedicated to this field, spearheaded by the NT and active in the national, provincial, and local government spheres, including organs of state and even procurement committees.

It has been established in this chapter that South Africa is on a downward spiral in fighting public procurement corruption. Firstly, the country does not have a precise definition of public procurement corruption. This has caused South Africa to be reactionary to matters of public procurement corruption after the fact. The country does not have strong anti-corruption strategy on public procurement corruption. Secondly, the types and forms of public procurement corruption have found a fertile ground for multiple breeding almost with impunity because there is blurring of professional roles of procuring officials and that of the ANC government at national government, provincial governments and local governments as well as in state owned enterprises.

This blurring of roles has resulted in some of the procuring officials exploiting the public procurement system for personal gain whether it is for political expediency or sheer greed as demonstrated in the *GORE-No case.* In addition, it was established in this chapter that top high ranking South African politicians in particular the

executive, has failed to demonstrate its willingness to rein on public procurement corruption as demonstrated in the *EFF-case.*

The rot in public procurement corruption in South Africa has taken a new turn with State Capture that has undoubtedly introduced systemic corruption at national government, provincial government, local government and state owned enterprises as revealed by the State of Capture report by the PP. The need to rectify past political and economic injustices have now become excuses of engaging in public procurement corruption in South Africa at all three levels of government. This has been fuelled by the failure of the executive to be held accountable as well as weak enforcement of existing anti-corruption measures.

The executive has infiltrated the institutions that are meant to enforce anti-corruption measures with the exception of the Judiciary. This infiltration has been orchestrated through legislation and biased political appointments in strategic anti-corruption institutions such as the Hawks. The Judiciary so far has remained the only hope that still stands firm in combating public procurement corruption. Lastly, all arms of civil activism are relatively active in the fight against public procurement corruption. However, their efforts in combating public procurement corruption have met fierce and unparalleled resistance from the current government.

The way forward is twofold: first, is to embark on procurement reforms in particular the enactment of procurement legislation that embraces both procurement as well as provisions of combating public procurement corruption; second, is the establishment of an independent anti-corruption agency that has both extensive investigative and prosecutorial powers that has a dedicated unit on combating public procurement corruption considering that the high budget of public procurement as well as the devastating impact of public procurement corruption on the national fiscus as well as on service delivery. Additional measures of the way forward are discussed in detail in the following chapters.[600]

[600] See paras 6.6, 7.2 and 7.3.

CHAPTER 6: COMPARATIVE ANALYSIS

6.1 Introduction

It is important to recall that the aim of this study is to distil progressive practical measures for combating public procurement corruption in developing countries. In order to accomplish this, the previous chapters have focused on the normative frameworks of public procurement and measures (criminal, administrative, institutional and civil activism) for combating public procurement corruption as provided in international and regional instruments as well as domestic legislation, with specific reference to Hong Kong, Botswana and South Africa.

In the light of the above, the purpose of this chapter is to distil the best and most progressive practical and innovative measures for combating public procurement corruption in Hong Kong, Botswana and South Africa. It is also the purpose of this chapter to propose new public procurement anti-corruption tools that developing countries may wish to consider in combating public procurement corruption. Further, this chapter proposes a few recommendations in addition to the suggested public procurement anti-corruption tools, after which a conclusion is drawn.

To achieve the purpose of this chapter, the study briefly compares the public procurement regimes of the three jurisdictions, as discussed in the previous chapters, with specific focus on the international and regional approaches, the domestic public procurement regimes, the procurement methods, the procurement institutions and the procurement principles. The aim of this comparison is to distil the most progressive and practical measures that may be used to combat public procurement corruption.

Further, the comparative study deals with public procurement corruption in the three jurisdictions by focussing on the following: the definition of public procurement corruption, the types and forms of public procurement corruption, the causes of public procurement corruption and the measures of combating of public procurement corruption. The latter concentrates on the international and regional measures as provided in the international and regional instruments discussed; and the criminal

measures, the administrative measures, the institutional measures and the civil activism measures.

Thus, in the process of these brief comparisons, unique features will be highlighted and discussed which will then be consolidated to inform the new public procurement anti-corruption tools as well as the recommendations that will be suggested in the last part of this chapter.

As a point of departure, a brief comparison of the governance and economic systems of the three countries is done in order to recall and set the tone for the discussion.

6.2 Governance and economic systems

The three jurisdictions have been shaped by different historical experiences that have influenced their approach to governance and economic development. Hong Kong was under British occupation for over a century.[1] A new transition that witnessed the handing over of Hong Kong to China took place in 1997.[2] Botswana, on the other hand, was a British colony until it achieved its independence in 1966.[3] South Africa was also a former British colony, for more than 100 years, before being declared a republic by the apartheid government in 1961 and achieving its democratic independence in 1994.[4]

The previous chapters have demonstrated that the motive for the British occupation was different and also influenced the amount of resources that the British expended in each jurisdiction. Botswana was occupied by Britain because it was militarily expedient for Britain to do so, and was not developed by the British to further interests other than military expeditions.[5] Therefore, Britain did not have any economic interests in Botswana.[6] On the contrary, Hong Kong and South Africa were occupied for both military and economic reasons. These two jurisdictions were the sites of extensive development, both administrative and legal, in comparison with

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1 Flowerdew *The Final Years of British Hong Kong* 16.
2 Chung "One Country Two Systems" 10.
3 Leith *Why Botswana Prospered* 3-4.
4 Simpson *2011 African Historical Review* 84.
5 Mogalakwe *How Britain Underdeveloped Bechuanaland Protectorate* 67.
6 Mogalakwe *How Britain Underdeveloped Bechuanaland Protectorate* 67.

Botswana. This influenced their public procurement regimes and the manner in which corruption in public places was to be combated. In both jurisdictions public procurement structures in particular legislation and other procuring entities were much more developed in comparison to Botswana.

Therefore, all three jurisdictions were at one point under British domination. The difference among them was the degree of occupation in terms of the period, intensity and areas of interest.

The current legal systems of Hong Kong, Botswana and South Africa were all greatly influenced by the British occupation and all three jurisdictions subscribe to (i) common law; (ii) customary law; (iii) legislation and; (iv) judicial precedent as part of their legal systems.

Also important, the three jurisdictions under consideration are now constitutional democracies. Hong Kong has the Basic Law of Hong Kong as its Constitution, while Botswana has the 1966 Constitution and South Africa has the 1996 Constitution. The three jurisdictions have executives, legislatures and independent judiciaries. In addition, all three jurisdictions subscribe to the rule of law, which is reflected in their public procurement regimes.

6.3 Comparison of their public procurement regimes

This part of the study briefly compares the main characteristics of the three jurisdictions with a focus on the public procurement regime; that is, the international and regional instruments as well as domestic legislation. A brief comparison of the procurement institutions, procurement methods, and procurement principles will follow to the extent that it is relevant to this study.

6.3.1 International approaches

Hong Kong is a party to the WTO GPA whilst Botswana and South Africa are not.[7] As a party to the WTO GPA, Hong Kong has opened up its procurement to other members of the WTO GPA.[8] This enables Hong Kong to ensure that its public

[7] OECD *Reviews of Innovation Policy China* 78.
[8] OECD *Reviews of Innovation Policy China* 78.

procurement regime meets international standards, as other countries that are party to the WTO GPA have a direct interest in all issues of procurement in Hong Kong.[9] This means that, in addition to its domestic oversight institutions, its membership in the WTO GPA gives Hong Kong an added measure of checks and balances on the entire public procurement regime.[10] Botswana and South Africa do not enjoy such benefits and rely only on their domestic institutions for oversight. Over and above, the oversight institutions in Botswana are weak, while those in South Africa are even weaker.

As a point of emphasis, Hong Kong, under the WTO GPA, is required to eliminate all forms of barriers that may affect public procurement.[11] This is based on the understanding that public procurement is a tool to enhance international trade.[12] Botswana and South Africa, as non-members of the WTO GPA, have so far failed to effectively utilise public procurement as a vehicle for promoting international trade.[13] This is mainly because public procurement in these two jurisdictions has restrictions against foreign suppliers.

Another advantage that Hong Kong enjoys which Botswana and South Africa do not, is that by being a party to the WTO GPA, Hong Kong has increased the competition by foreign suppliers for government contracts, which promotes transparency and results in the realization of value for money.[14]

Of course, not all public procurement contracts are subject to the WTO GPA. There is a threshold to which WTO GPA members may participate.[15] This allows Hong Kong to consider bids from its own citizens for procurements that are below the WTO GPA threshold.[16] This gives Hong Kong citizens an opportunity to participate in government contracts. Based on the above, it may be concluded that it is possible for Botswana and South Africa to negotiate procurement thresholds within the WTO GPA framework that will have certain procurements reserved for their citizens.

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9 Parsons *et al* "Hong Kong" 160.
10 Council of Europe *Texts Adopted 4-8 October 2004* 51.
11 Carbaugh *International Economics* 189.
12 Rickard and Kono *Think Globally, Buy Locally* 4.
13 European Parliament *Public procurement International Trade* 14-15.
14 WTO "Ministerial Conference, Bali, 2013 Briefing note: the WTO" 1.
15 WTO 2017 https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm.
16 WTO 2017 https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm.

Another advantage that emanates from the membership of the WTO GPA is that Hong Kong must settle procurement disputes using WTO dispute resolution mechanisms.[17] Botswana and South Africa rely on domestic dispute resolution mechanisms. The use of WTO dispute resolution in procurement disputes reduces procurement litigation to the minimum, as WTO dispute resolution mechanisms seek, *inter alia*, to harmonise procurement as much as possible, and it favours arbitration as opposed to formal litigation.[18]

Further, Hong Kong must submit a yearly report to the WTO Committee on Government Procurement representing its compliance with the WTO GPA.[19] In the report, Hong Kong must describe, *inter alia*, its successes, challenges and areas of dispute. This allows for the development of public procurement generally, as these issues inform the revisions of the WTO GPA to make it more appealing to the parties and other countries that may wish to join it.

On the other hand, Botswana and South Africa do not compile any reports to any international body for the purposes of accountability. As a result, both countries either catch up late or miss out on new developments in public procurement which may help to improve their domestic procurement practices. It also means that there is no incentive for either country to develop its public procurement regime speedily to reflect international best practice. The above deficiencies could be cured at regional level.

6.3.2 Regional approaches

For African countries, COMESA is the only regional body that has made strides in developing a public procurement regime that is binding.[20] However, Botswana and South Africa are not members, so they cannot benefit from any COMESA procurement regional arrangements. For Asian countries, APEC is the regional body

17 Lee *Improving Remedies in the WTO GPA Dispute Settlement* 6.
18 WTO *A Handbook on the WTO Dispute Settlement System* 17.
19 WTO "Report (2015) of the committee on Government Procurement" 3.
20 Kayonde *Towards an International Standard on Government Procurement in the WTO* 2.

that has put in place public procurement legal mechanisms. Hong Kong is a signatory to the APEC's Transparency Standards on Government Procurement.[21]

What this means is that, in addition to the WTO GPA, Hong Kong has another procurement obligation at regional level that further allows Hong Kong to continually develop and refine its public procurement regime. APEC seeks, *inter alia*, to ensure that there is a high degree of transparency in public procurement[22] and places emphasis on the publication of procurement decisions - that is, publication of the reasons for the selection of any particular bid by a procuring entity. This publication of procurement decisions has to do with the granting of access to information.[23] It is this access to information that is critical in allowing other procurement stakeholders to challenge the procurement decision.[24]

However, what is critical and missing in APEC is the insistence on timely publication of the procurement decision giving the detail that makes such reports informative (the name of the winner, the amount, and a summary of the reasons why that particular bid won). It is submitted that APEC may wish to set a reasonable time frame within which the procuring entity must publish the reasons why it selected a particular bid.

As indicated above, Botswana and South Africa are not party to any regional procurement agreement that seeks to improve transparency in public procurement. Consequently there is no mandatory requirement for Botswana and South Africa that compels the procuring entity to publish the reasons a particular bidder was selected. This is an indication of a lack of transparency in these countries. This means that neither country is more transparent than Hong Kong in these matters. In effect, transparency in Botswana and South Africa is most often tested through litigation.

This may explain why South Africa in particular has a higher incidence of procurement litigation[25] than Botswana or Hong Kong. In other words, although the issue of transparency is constitutionally provided in South Africa, there remains an

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21 Lindmann *Cross Strait Relations and International Organisations* 164.
22 OECD *APEC-OECD Co-operative Initiative and Regulatory Reform* 72.
23 Jones "Competition and Transparency in Government Procurement in South East Asia" 102.
24 OECD *APEC-OECD Co-operative Initiative on Regulatory Reform* 61.
25 Quinot 2014 *Journal of Juridical Science* 117.

apparent lack of effective mechanisms for attaining this transparency.[26] It is for this reason that both Botswana and South Africa rely on their domestic public procurement regime for achieving transparency.

6.3.3 Domestic public procurement regime

In considering the domestic public procurement regimes of the three jurisdictions, the focus is on their Constitutions and their influence on public procurement. This discussion will be followed by a brief comparison of the procurement legislation in the three jurisdictions to the extent that it is relevant to curbing public procurement corruption.

It is important to note that the international and regional instruments discussed above form part of Hong Kong's domestic public procurement regime. However, Botswana and South Africa are not part of any international or regional instrument, which is why there is a need to discuss their domestic public procurement regimes separate from international and regional approaches. The influences of the WTO GPA and APEC on Hong Kong's domestic public procurement regime will be referred to where necessary.

6.3.3.1 Constitution

Of the three jurisdictions, South Africa is the only one that has clothed procurement with Constitutional status, in section 217.[27] It is one of the few developing countries to have such a provision. Although Hong Kong and Botswana do not have such Constitutional provisions, their awareness of the need to have efficient public procurement systems can be inferred from the aspirations and values of these two jurisdictions, especially in the provision of basic services.[28] The efficient and cost-effective provision of basic services is espoused in the Constitutions of Botswana and Hong Kong and elaborated upon in their public procurement legal frameworks.

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26 *AllPay Consolidated Investments Holding (Pty) Ltd v Chief Executive Officer of Social Security Services* 20.

27 *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive of the South African Social Security Agency* 42.

28 National Treasury *2015 Public Sector Supply Chain Management* 33.

6.3.3.2 Specific procurement legislation

Hong Kong and Botswana are the only two jurisdictions that have specific procurement legislation that is divorced from general national financial legislation, unlike South Africa. Botswana's procurement legislation, the PPAD Act, has better procurement features in terms of its provisions than the equivalent legislation in Hong Kong (PFO) and South Africa (PFMA).[29] The PPAD Act is exclusive procurement legislation in that it does not deal with issues of national revenue collection and national expenditure, as is the case in South Africa.[30] Streamlining these functions in exclusive procurement legislation allows for the non-conflation of procurement issues with those of national financial interest.

South Africa's lack of exclusive procurement legislation,[31] has contributed to the polarisation of its public procurement. The budget of public procurement in South Africa is almost 10 times (R500 billion annually for basic procurement outside infrastructure)[32] than that of Hong Kong or Botswana. Yet, Hong Kong like Botswana has clearly defined procurement legislation, namely the PFO amplified by the SPR.[33]

With such a huge procurement budget it is not proper that South Africa should have multiple legislation that impacts on public procurement.[34] South Africa is urged to speedily reform its procurement legislation in order to reflect the demands of modern procurement, taking into account new international developments in public procurement. By enacting modern public procurement legislation South Africa could do away with the ambiguity of the procurement legislation currently in place, which has resulted in confusion, duplication, endless litigation and a failure to place public procurement as a distinct commercial subject and a field of research within the academic economic environment.[35]

Botswana has demonstrated that developing countries may succeed in adopting the classical approach to procurement, where the objective of procurement legislation is

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29 Kumar and Caborn "The Regulatory Framework for Public Procurement in Botswana" 31-33.
30 Kumar and Caborn "The Regulatory Framework for Public Procurement in Botswana" 31-33.
31 Quinot *An Institutional Legal Structure for Regulating Public Procurement* 9-10.
32 SONA 2017 published on 14 February 2017.
33 ADB/OECD *Curbing Corruption in Public Procurement in Asia and the Pacific* 43.
34 Quinot *An Institutional Legal Structure for Regulating Public Procurement* 3-4.
35 OECD *Country Case: Public Procurement Reform in South Africa* 1.

twofold: (i) to enable the procurement of goods, services and construction works at the most economically advantageous price; (ii) and simultaneously to establish anti-corruption mechanisms. The classical approach adopted by Botswana is applauded for its appreciation of the importance of adequately addressing public procurement corruption, a quality that general corruption legislation fails to incorporate. The PPAD Act creates offences relating to public procurement and then provides the mechanisms for combating such corrupt acts. Below is a discussion of some of the unique features embedded in the public procurement system of each jurisdiction.

6.3.3.3 Anti-Corruption Units

One unique feature is the introduction of ACUs in each ministry in Botswana.[36] The purpose of the ACUs is to detect, *inter alia*, public procurement corruption risks and actual public procurement corruption at an early stage without further compromising the procurement process.[37] This is an exceptional feature which is highly recommended not only for Hong Kong and South Africa but for other developing countries too. What is important is to ensure that the ACUs do not themselves become corrupt and complicit in public procurement corruption. In order to achieve this, the recruitment of ACU personnel should be transparent, with the involvement of, *inter alia*, civil society and opposition parties (where they have parliamentary representation). It is important to state that, if the recruitment of ACU personnel is done on partisan lines, then the objective of having ACUs will be rendered ineffective.[38]

Hong Kong and South Africa do not have ACUs or similar units as part of their procurement system. However, South Africa is worst affected by this lack of ACUs or similar bodies because of its weak anti-corruption system.[39] Although Hong Kong also does not have ACUs or similar bodies, it has compensated for this lack by establishing an effective anti-corruption body (ICAC), as will be discussed further below.[40]

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36 Mwamba *An Evaluation of the Anti-Corruption Initiatives in Botswana* 78.
37 Mwamba *An Evaluation of the Anti-Corruption Initiatives in Botswana* 78.
38 OECD *Ethics Training for Public Officials* 9.
39 Mosselini *Anti-corruption Initiatives in South Africa since 1994* 51-52.
40 Wing-chi 2014 *Tsinghua China Law Review* 246.

6.3.3.4 Dispute resolution

Another distinct feature of Botswana's PPAD Act is the establishment of a clear and simple procurement dispute resolution mechanism. A complaint of suspected public procurement corruption follows a simple three-stage process: first, the complaint must be lodged with the procuring entity; second, it goes to the PPADB; and third, it goes to the ICRC.[41] The ICRC operates like an appeal body within the procurement dispute resolution process.[42] The complaint and dispute resolution mechanism is meant to allow the smooth running of the procurement process with timely dispute resolution to ensure efficiency. This is quite helpful in cases where the alleged public procurement corruption is in actual fact not corruption. The dispute resolution mechanism gives the procuring entity an opportunity to deal with complaints internally before any escalation takes place.

Hong Kong and South Africa do not have well-established procurement dispute resolution mechanisms regulated by procurement legislation. Both jurisdictions rely heavily on litigation (the public law remedy), which is outside the purview of procurement legislation for public procurement disputes. This has the negative effect of unnecessarily interfering with the procurement process. Procurement litigation is usually costly and time consuming.[43]

There are instances where public procurement litigation may be the most useful and expedient route to take, depending on the nature of the procurement. However, the new developments in resolving public procurement disputes are encouraging reliance on alternative dispute resolution mechanisms.[44]

6.3.4 Procurement methods

All three jurisdictions subscribe to open tendering as the default tendering method for all procurement, subject to a few exceptions. The exceptions, which are similar in all three jurisdictions, are defence procurement and sensitive procurement (depending on how "sensitive" is understood in each jurisdiction). All three jurisdictions

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41 Section 195.
42 PPADB ICRC regs 9, 10 and 11.
43 Europa *Public Procurement in Europe: Cost Effectiveness* 74.
44 Schebesta *Damages in EU Public Procurement Law* 76.

acknowledge other forms of procurement methods such as selective tendering, pre-qualification, single sourcing, negotiated tendering and quotation for procurements. Therefore, as far as their procurement methods are concerned, there are no significant differences among the three jurisdictions to render further discussion.

6.3.5 Procurement institutions

Botswana has one lead procurement institution (PPADB) which coordinates all the procurement in Botswana.[45] The PPADB delegates procuring authority to other procurement entities.[46] As a result there is no confusion about which procuring entity procures which goods, services and construction works. Hong Kong has two leading procurement institutions, namely, the GLD (for goods and services) and the Development Bureau (for works).[47] Hong Kong also has clarity and certainty about the roles of each procurement institution and other ancillary procurement committees.[48]

On the other hand, South Africa has a multiplicity of procurement institutions established by an array of legislation.[49] On paper the NT is the primary body that spearheads public procurement (operationally) in South Africa,[50] but the NT has on numerous occasions demonstrated that it lacks the capacity to efficiently and effectively deal with the huge amount of procurement in the country.[51] This difficulty may be attributed to the complexity of the government departments, provincial governments, and local government, the morass of procurement legislation, and the general failure of the procuring personnel to understand and implement it.[52]

This has led to a heightening of the bureaucracy; and the confusion in national, provincial and local government as to which procuring committee has the authority to conduct which procurement, as evinced in the *Aurecon-case.*[53] Instead of fast-

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45 Section 10 of PPAD Act.
46 Section 26 of PPAD Act.
47 Hong Kong 2017 http://www.gov.hk.
48 Hong Kong 2017 http://www.gov.hk.
49 Quinot *An Institutional Legal Structure for Regulating Public Procurement* 19.
50 Ambe and Badenhorst-Weiss 2012 *Journal of Transport and Supply Chain Management* 242-243.
51 Ambe and Badenhorst-Weiss 2012 *Journal of Transport and Supply Chain Management* 242-243.
52 Quinot *An Institutional Legal Structure for Regulating Public Procurement* 9.
53 *Aurecon South African (Pty) Ltd v City of Cape Town* 3.

tracking the enactment of new procurement legislation South Africa has responded to the above challenges by introducing the OCPO.[54] The establishment of the OCPO was mired in controversy due to the fact that there is no express public procurement law that provides for the establishment of such an office.[55] Consultants had to be called in to sift through a myriad of procurement legislation in an attempt to figure out how the OCPO could be established.[56]

The OCPO was established in order to, *inter alia*, promote the transparent and effective management of the supply chain.[57] Although the establishment of this body is a welcome development in public procurement in South Africa, the OCPO does not expressly provide for a public procurement corruption strategy within South Africa's entire public procurement system.[58] The work of the OCPO cuts across national, provincial and local government procurement. Without a public procurement anti-corruption strategy it is submitted that the OCPO may in the long run become a white elephant at the expense of taxpayer's money.

6.3.6 Procurement principles

All three jurisdictions subscribe to the generally accepted international procurement principles that are fundamental to public procurement.[59] These include but are not limited to transparency, competitiveness, fairness, accountability, equitability and integrity.[60] All three jurisdictions have demonstrated similar difficulty in attaining these principles.

6.3.6.1 Transparency

All three jurisdictions subscribe to the notion that transparency is achieved when the supplier is able to access as much procurement information as possible.[61] In addition, all three jurisdictions agree that as part of achieving transparency the procuring entity has to ensure that the tender advertisement should specify the

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54 Quinot *An Institutional Legal Structure for Regulating Public Procurement* 46.
55 Quinot *An Institutional Legal Structure for Regulating Public Procurement* 1-3.
56 Quinot *An Institutional Legal Structure for Regulating Public Procurement* 1-3.
57 Quinot *An Institutional Legal Structure for Regulating Public Procurement* 46.
58 PMG *Progress with its Efficiency Drives: Office of the Chief Procurement* 1.
59 UNCITRAL *UNCITRAL Model Law on Public Procurement* 1.
60 Arrowsmith *EU Public Procurement Law an Introduction* 129.
61 OECD *Transparency in Public Procurement – Moving Away from the Abstract* 1.

criteria upon which the bids will be evaluated.[62] Furthermore, all three jurisdictions are *ad idem* that the information on bid evaluation should be as precise as possible and that the procuring entity is prohibited from employing any other criteria, as this would constitute unfairness.[63]

6.3.6.2 Fairness and equitability

Differences in attaining fairness and equitability deserve special mention. In addition to the primary objectives of procurement, Botswana and South Africa, unlike Hong Kong, also use procurement to achieve non-procurement objectives (secondary objectives).[64] Both countries, like most other developing countries, use procurement to empower their citizens. What differs in these two jurisdictions is the degree to which this may be achieved.

6.3.6.3 Accountability

The accountability of the procuring entities in public procurement transactions that implicate the executive is highly problematic for Botswana[65] and South Africa.[66] In this context, such accountability is made onerous, if not impossible, by the unwillingness of the oversight institutions to hold both the procuring entity and the executive accountable.[67] For example, in South Africa the Constitutional structures, in particular the National Assembly, has failed to compel the President to explain his involvement in the alleged public procurement corruption for the security upgrade at his private residence.[68] Being in the majority in the National Assembly, the ANC refused all attempts to hold the President accountable, preferring to acquiesce in his exercise of political patronage.[69]

The opposition parties had to approach the Constitutional Court in this matter. In *Economic Freedom Fighters v Speaker of the National Assembly and Others*;

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62 OECD *Preventing Corruption in Public Procurement* 15.
63 Transparency International *Curbing Corruption in Public Procurement: A Practical Guide* 12.
64 OECD *Preventing Corruption in Public Procurement* 7.
65 Mogae *Botswana Sunday Standard* 1.
66 *Economic Freedom Fighters v Speaker of the National Assembly and Others* paras 3-4.
67 Malapane 2016 *Journal of Public Administration and Development Alternatives* 138-139.
68 Being in the majority in the National Assembly, the ANC refused all attempts to hold the President accountable, preferring to acquiesce in his exercise of political patronage)*Economic Freedom Fighters v Speaker of the National Assembly and Others)* paras 13.
69 *Economic Freedom Fighters v Speaker of the National Assembly and Others* para 13.

Democratic Alliance v Speaker of the National Assembly and Others,[70] (hereafter National Assembly-case) the Constitutional Court ruled *inter alia* that by shielding the President from having to account for his role in the procurement of the "security upgrade" of his private residence, the National Assembly had violated the Constitution, while the President had violated his oath office.[71] However, no consequences followed for either the National Assembly or the President.

Similarly, in Botswana the BDP[72] which is the majority in the National Assembly has over the years resisted calls to investigate the President and other members of the executive on allegations of public procurement corruption.[73] These similarities point to the executive over-reach on the national assembly and how the role of political parties either exacerbates or aids in the controlling of public procurement corruption especially where the executive is implicated.[74] From the above, a new form of lack pf accountability by the political parties that are in the majority either in the National Assembly or Parliament (as the case may be) is emerging in developing countries as evidenced in Botswana and South Africa.

6.3.7 Role of political parties in combating public procurement corruption

Political parties that are in the majority may choose to side with public procurement corruptees at the expense of tax payers, who have a legitimate expectation that their money will be used prudently. This problem resonates in most developing countries.

In South Africa this is demonstrated in the *National Assembly-case* in which it became evident that the citizenry does not have readily available legal mechanisms for holding the National Assembly accountable in cases where the latter seems to be neglecting its duties of promoting responsible and non-partisan public procurement.[75] The only avenue currently available is parliamentary elections, which may be too late

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70 2016 3 SA 580 (CC) (31 March 2016).
71 *Economic Freedom Fighters v Speaker of the National Assembly and Others* para 105.
72 Botswana Parliament has a total of 57 seats. Currently, the BDP holds 37 of the seats and the other 20 are shared among opposition parties.
73 The Daily Maverick "Botswana's Bubble Bursts as Economic Decline Sets" 1.
74 LeVan *Dictators and Democracy in African Development* xv.
75 Wolf *Daily Maverick* 1.

to be of effect in some cases.[76] Moreover, the elections may be influenced by other socio-political issues beyond public procurement to the benefit of the ruling party.[77]

Even if the National Assembly is directed to conduct a proper public procurement accountability procedure, it may decide to do so not out of conviction but as an obligation.[78] This may result in the performance of murky public procurement accountability procedures which may still absolve the culprit(s) in question.[79]

In these instances, there has to be a legal way of allowing citizens to force their parliamentarians to hold the executive and politicians accountable when they are implicated in public procurement corruption.[80]

In Hong Kong, the former Chief Executive Donald Tsang (2005-2012) recently appeared in Court on allegations of corruption and bribery during his term.[81] The Hong Kong Legislative Council[82] had the power to hold him accountable whilst he was in office. This did not happen then, but in 2017, Tsang was investigated by ICAC and was convicted and sentenced to a 20-month imprisonment.[83]

In the same context, there are a number of allegations of bribe against the current leader of Hong Kong, Leung Chun-ying.[84] To date, the Legislative Council, which is equivalent to the National Assembly in Botswana and South Africa, has not shown an interest in holding him accountable.[85]

To overcome this problem, Hong Kong is undergoing electoral reforms pertaining to the manner in which the Chief Executive is elected.[86] Currently, the Chief Executive of Hong Kong is elected by an electoral committee composed of 1200

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76 Bratton and Logan *From Elections to Accountability in Africa* 6.
77 Bratton and Logan *From Elections to Accountability in Africa* 10.
78 *Economic Freedom Fighters v Speaker of the National Assembly and Others* para 3.
79 Mogoeng "Constitutionalism & Rule of Law" 6.
80 Butler "The Politics of the public sector: Political accountability in post-apartheid South Africa" 1.
81 The Guardian 2015 http://www.theguardian.com.
82 Hong Kong's National Assembly has powers and functions similar to those of Botswana's National Assembly and South Africa's National Assembly.
83 Wong "Donald Tsang, Former Hong Kong Leader, Gets 20 months for misconduct" 1.
84 Barber "Hong Kong Leader Faces Twin Investigations Over Financial Scandal" 1.
85 SCMP "Hong Kong Chief Executive is not Above the Executive, Judicial and Legislative Powers" 1.
86 Axworthy, Leonard and Baker Jr *Accountability in Hong Kong* 4-6.

representatives.[87] If the majority of the 1200 representatives have unquestionable loyalty towards a certain political group, they elect a leader from that group to be the Chief Executive of Hong Kong. Therefore, if the Chief Executive is corrupt, the corrupt group in the Legislative Council is unlikely to hold him accountable, based on the exercise of political patronage.

While Hong Kong's approach may or may not work for Botswana and South Africa, an immediate solution is needed to ensure that the legislature checks the powers of the executive through effective and timeous intervention, thereby overcoming the retrogressive political dynamics in most developing countries, especially in Africa.[88]

6.3.8 Reflections

Introduction of modern procurement law such as that of Botswana will assist a country like South Africa to bring legal certainty in the area of public procurement. This will assist in minimising gaps that may be exploited for public procurement corruption purposes.

Further, the above discussion reveals that the realisation of public procurement principles remains a mammoth task for developing countries. While one appreciates the efforts made to encompass and enforce the standard procurement principles in the three jurisdictions, a lot of work needs to be done urgently. The stakes are higher in cases where the executive and high-ranking political office bearers are implicated.

The delays or disinterest in investigations during a person's tenure in office is also common in Botswana and South Africa. This demonstrates that other innovative ways are needed in order to force parliamentarians to hold members of the executive and other elite politicians accountable in matters involving public procurement corruption.

The discussion that follows compares public procurement corruption in the jurisdictions under discussion.

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87 LegCo *Methods for Selecting the Chief Executive in 2017* 9.
88 Whittle "SADC Lawyers urged to Monitor Accountability" 1.

6.4 Public procurement corruption

The discussion below briefly compares the following: the definition of public procurement corruption, the types and forms of public procurement corruption, the causes of public procurement corruption and the measures of combating of public procurement corruption. The latter concentrates on the international and regional measures as provided in the international and regional instruments discussed; and the criminal measures, the administrative measures, the institutional measures and the civil activism measures. Immediately after this discussion; is the introduction of the suggested new public procurement anti-corruption tools followed by a few recommendations, after which a conclusion is drawn.

6.4.1 Definition of public procurement corruption

None of the three jurisdictions has an express definition of public procurement corruption, but all three make reference to offences that are related to public procurement corruption, in particular, bribery, collusion and bid rigging. Developing countries must be bold in defining public procurement corruption.[89] This will assist them to tailor-make anti-corruption instruments that are effective, that leave nothing out and are without unnecessary legal elements (vague definitions) that make it difficult to identify and punish public procurement corruption.

Also in defining the term, there is a thin line between irregular expenditure,[90] wasteful expenditure[91] and public procurement corruption. The latter may erroneously be classified as irregular or wasteful expenditure, and the distinction may be clarified by arriving at a proper definition of public procurement corruption.[92] Such a definition would have to anticipate the different forms of public procurement corruption that might develop as new technology becomes available to meet modern demands. This

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89 Appolloni and Nshombo 2013 *Rivista di politica Economica* 3-4.

90 It is generally accepted that irregular expenditure involves the actual payment of a particular transaction in violation of specific legislation.

91 Wasteful expenditure, which is sometimes referred to as irregular expenditure, takes place when unnecessary goods, services or works are procured which would not have been procured if the procurement officials had been diligent.

92 Public Protector Report on an Investigation into an Allegation of Irregular Expenditure 15-17.

study has suggested a new definition of public procurement corruption, which may be adopted by developing countries.[93]

6.4.2 Types and forms of public procurement corruption

The types and forms of public procurement corruption in all three jurisdictions are created by legislation and in some cases emanate from common law. The generally accepted types and forms of public procurement corruption, such as bribery, collusion, bid rigging, extortion, conspiracy and fraud, are provided for in all three jurisdictions.[94] There are no unusual or unique types and forms of public procurement corruption in any of the jurisdictions. The difference among these jurisdictions is in the attempts to combat these types and forms of public procurement corruption. All three of them agree that the types and forms of public procurement corruption manifest themselves under certain conditions, which have been identified in this study as the causes of public procurement corruption.

6.4.3 Causes of public procurement corruption

This study has identified four causes of public procurement corruption, namely the personal circumstances of procuring officials, the personal circumstances of politicians, political transition and economic transition. These are the subject of the discussion below.

6.4.3.1 Personal circumstances of procuring officials

All three jurisdictions demonstrate that procuring officials are tempted and fall into the trap of committing acts of public procurement corruption. Circumstances such as conflict of interest, a desire for a higher standard of living, the pursuit of higher wages, and the need to secure post-employment benefits are common factors that cause some procuring officials to engage in acts of public procurement corruption. There are no personal circumstances worthy of further discussion and peculiar to any one jurisdiction that cause procuring officials to be corrupt.

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93 See para 1.6.

94 UNODC *Guidebook on Anti-Corruption in Public Procurement* 4.

6.4.3.2 Personal circumstances of politicians

In all three jurisdictions the burning desire of politicians to retain political power, in particular of the executive and those that are closely associated with the executive, is a common factor and a major cause of public procurement corruption. Further, the lack of executive accountability in the three jurisdictions attests that the consolidation of political power is at the centre of public procurement corruption by high-ranking political figures.[95] In the process, democratic institutions such as the legislature ignore their constitutional obligation to hold the executive accountable.[96]

6.4.3.3 Political transition

Political transition has had different effects on the extent of public procurement corruption in the three jurisdictions. For Hong Kong, under British rule, not many opportunities for public procurement corruption were available. The current escalation in public procurement corruption in Hong Kong has been attributed to the fact that mainland China is exporting public procurement corruption into Hong Kong, as those implicated have or have had close links with mainland China.[97] However, one former Chief Executive has already been prosecuted and convicted, *inter alia*, on charges of public procurement corruption under Chinese rule.[98] The current Chief Executive Officer may also be investigated for corruption.[99] Both executives have close ties with mainland China.

In Botswana, political transition did not immediately create opportunities for corruption. Two reasons have been identified for this, which are: (i) the vision for the nation and the ethical leadership that the then leadership possessed; and (ii) at the time of political transition there was no meaningful economic activity, and therefore insignificant activities relating to public procurement.

However, Botswana has also shown that changes in the political leadership from the political party that attained independence may influence the tide of public

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95 Stapenhurst and O'Brien *Accountability in Governance* 1-2.
96 Craig *The Lisbon Treaty: Law, Politics and Treaty Reform* 116.
97 South China "Morning Post Forty years since its Creation, how ICAC Cleaned up Corruption" 1.
98 The Guardian "Former Hong Kong Leader Donald Tsang Jailed for Corruption" 1.
99 Yi "Xi Investigates Leung Chu-yin Secret Payment Scandal" 1.

procurement corruption positively or negatively.[100] The BDP has been in power since 1966 and has produced all four Presidents to date.[101] However, under the current President public procurement corruption has been on the rise, prompting concerns about the integrity of the President and his political resolve to curb public procurement corruption.[102] Of course, Botswana is not on a downward spiral with regard to public procurement corruption.[103] However, leadership from the President is seriously required, as will be shown below under the discussion on the independence of the DCEC.

South Africa, on the other hand, went through a series of political transitions and witnessed an increase in the incidence of public procurement corruption under the apartheid government (1961-1994). The conditions of secrecy, lack of accountability, parliamentary supremacy, lack of institutional capacity, lack of international procurement checks and balances, covert operations and consolidation of political power all contributed to public procurement corruption.[104]

In 1994 with the democratic transition, a relatively well organised procurement system was inherited from the apartheid government at the time of the 1994 political transition.[105] However, the consolidation of political power over the years witnessed deliberate violations of procurement rules in the awarding of government contracts.[106] In addition, cadre deployment in strategic organs of state replicated the apartheid government's practices.[107] Democratic South Africa, like Botswana, has witnessed four Presidents all from the same political party. Public procurement corruption has been at its worst under the leadership of President Zuma.[108] That speaks to the poor ethical leadership, lack of integrity and political attitude of the person at the helm of the ruling party.

What is common in Hong Kong and South Africa is that the conditions at the time of political transition were rife for public procurement corruption, but it takes visionary

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100 Lee *Are Botswana Presidents Beacons of Good Governance* 1.
101 Lee *Are Botswana Presidents Beacons of Good Governance* 1.
102 Lee *Are Botswana Presidents Beacons of Good Governance* 1.
103 Kuris *Managing Corruption Risks: Botswana Builds and Anti-Graft Agency 1994-2012* 3-4.
104 van Vuuren *Apartheid Grand Corruption* 46-48.
105 Bolton 2006 *Journal of Public Procurement* 22.
106 van Vuuren "South Africa: Democracy, Corruption and Conflict Management" 14-15.
107 Chipkin *The Politics of Corruption: Two Competing Views* 8-9.
108 Munzhedzi 2016 *Jnl of Transport and Supply Chain Management* 3-4.

and ethical leadership to steer any country out of the mire of public procurement corruption.[109] Any leader has at his disposal the full might of the law to fight public procurement corruption, thus political transition is an invalid and unacceptable defence for neglecting the fight against procurement corruption.[110]

6.4.3.3.1 Political transition and cadre deployment

Another observation is that key strategic anti-corruption institutions in Botswana (DCEC) and South Africa (the Hawks and the NPA) are generally staffed with people who pay allegiance to the executive and its cronies.[111] When this is so, the mechanisms designed to curb public procurement corruption are largely idle. It is the "small fish" that are sacrificed, and the resultant statistics are then used to create the impression that public procurement corruption is being curbed.[112]

In Hong Kong, cadre deployment to key strategic anti-corruption institutions (such as the ICAC) has not been possible due to the stringent requirements of accountability and the international scrutiny that the jurisdiction attracts.[113]

Another feature common to Botswana and South Africa is the lack of access to information about public procurement corruption cases that implicate high-ranking political figures. This secrecy is achieved when such politicians employ "gate-keepers" masquerading as government ministers, or top executives in state owned enterprises, to manage the amount of tender information that is made public.[114]

Thus, the ethical values of the leader in power at the time of transition are critical to the success of the war against public procurement corruption.[115]

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109 Sonye *The Dragon Called Corruption* 133-134.
110 Hope *Corruption and Governance in Africa: Swaziland, Kenya and Nigeria* 167.
111 Chipkin *The Politics of Corruption: Two Competing Views* 8-9.; Transparency International "Overview of Corruption and Anti-corruption in Botswana" 1.
112 TEI "The Ethics Institute Fighting Corruption" 1.
113 Quah *Curbing Corruption in Asian Countries: An Impossible Dream?* 256.
114 Dithlhase "Khama Inc: All the president's family, friends and close colleagues" 1; Public Protector *State of Capture Report* 17-18.
115 Lumumba "Corruption: The Bane of Africa" 21-23.

6.4.3.4 Economic transition

Under 100 years of British rule Hong Kong developed a fully functional and highly sophisticated economy.[116] A great deal of infrastructural development took place in that period, meaning huge expenditure in construction procurement.[117] The economic transition from the British to the Chinese witnessed a rise in the number of cases of public procurement corruption due to actual corrupt activities.[118] All of the governments of Hong Kong that have come to power after the Chinese transition have been embroiled in cases of public procurement corruption.[119] This phenomenon has been attributed to the exposure of new governments to huge procurement budgets,[120] with a lack of integrity from the executive to manage procurement responsibly and prudently.[121]

Botswana, on the contrary, did not have much of an "economy" to talk about at the time of transition in 1966.[122] There was no money and there was nothing significant to procure, and therefore no public procurement corruption at the time of its economic transition.[123] Public procurement corruption began to surface and increase in the early 1980s when the economy began to grow from the mining of diamonds and the new revenue that accrued to the government.

On the other hand, independent South Africa inherited a relatively developed economy from the British.[124] This economy was the backbone of the apartheid government In the process of that economic development, huge and lucrative procurements were clandestinely reserved for the "Broederbond", the then most exclusive and powerful group of Afrikaners.[125]

At the democratic transition, the ANC government took control of, arguably, the most advanced economy in Africa.[126] The government did not have the ability in terms of

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116 HKSAR *Hong Kong - Facts* 1.
117 Wong *Recent Infrastructure Developments in Hong Kong – the Background* 3-5.
118 Chan *Corruption Prevention – The Hong Kong Experience* 370.
119 Baark and Sharif *The Hong Kong Experience with Public Procurement for Innovation* 10.
120 Hong Kong 2017 https://www.budget.gov.hk/2017/eng/budget01.html.
121 The Star "Former Hong Kong Leader Found Guilty in Unprecedented Corruption Trial" 1.
122 Fibaek "Botswana's Modern Economic History Since 1966" 4-5.
123 Suleiman "Overview of Public Procurement Reforms in Commonwealth Countries" 16.
124 Fourie *An Inquiry into the Nature, Causes and Distribution of Wealth of the Cape Colony* 4.5.
125 van Vuuren *Apartheid Grand Corruption* 25-27.
126 Roux *Everyone's Guide to the South African Economy* 172.

procurement expertise or resources to manage this economic transition,[127] and was also under immense pressure to use its procurement power to advance the living conditions of the previously disadvantaged people and to empower them for economic participation.[128] For this purpose, the government introduced targeted procurement through legislation.[129] The discretion accorded to procuring officials in the implementation of this law has resulted in massive public procurement corruption.[130] Consequently, public procurement corruption has continued to flourish and has escalated with each new administration.[131]

The above discussion was centred on the four causes of public procurement corruption and how each jurisdiction fared in terms of each cause. In sum, then, it is now possible to dispel the assumption that despotic governments are more corrupt than democratic governments.[132] The South African position suggests that there may even be substance to the suspicion that democratic governments are more corrupt than despotic governments, both in terms of the volumes of the transactions conducted in public procurement as well as in terms of the huge amounts of money involved in public procurement.[133] In South Africa the problem has been compounded by the country's inexplicable desire to over-regulate public procurement by enacting more and more legislation.

It can be argued that at the time of the economic transition in Hong Kong and Botswana both governments were rather small, which resulted in there being less public procurement spending to misdirect. Hong Kong and Botswana were not subject to political and economic pressures at the time of their transition either. For this reason both jurisdictions were able to navigate their procurement aspirations and challenges with much better ease. They were fully in control of their public procurement.

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127 PARI *The Contract State: Outsourcing & Decentralisation in Contemporary South Africa* 15.
128 Ambe and Badenhorst-Weiss 2012 *Journal of Transport and Supply Chain Management* 245-246.
129 van Vuuren and Badenhort-Weiss "South African Provincial Government Reform" 279.
130 Laing "Deviations and (In) Discretions in the Governance of South African Public Entities" 142.
131 Newham *Why is Corruption Getting Worse in South Africa?* 1.
132 Rose-Ackerman *The Challenge of Poor Governance and Corruption* 11-12.
133 Kinswell *Post-Apartheid Political culture in South Africa 1994-2004* 71.

These two jurisdictions were able to recruit, train and equip their procurement officials without much pressure. In addition, there was no pressure to over-regulate any area of expenditure, because both jurisdictions had concentrated economic zones. For Hong Kong it was financial services, and for Botswana initially it was cattle ranching, and later diamonds.

Conversely, democratic South Africa had a huge economy and a huge government, not just at national level but also at provincial level, which meant increased spending with little or less effective anti-corruption control mechanisms.[134] In addition, it also meant that there was political interference and influence in procurement matters at all three levels of government, which was not the case in Hong Kong and Botswana.

It may be deduced from the above that the size of the government at the time of political and economic transition, in particular its capacity to control and manage public procurement, may influence the extent of its public procurement corruption.[135]

In the light of the above, what remains for discussion is a brief comparison of the measures of combating public procurement corruption in the three jurisdictions.

6.5 Measures for combating public procurement corruption

The discussion below proceeds as follows: first, a discussion of the international and regional instruments for combating public procurement corruption and how each jurisdiction uses these instruments; second, a discussion of the domestic measures for combating public procurement corruption, in particular criminal measures, administrative measures, institutional measures and civil activism measures, adopted by the three jurisdictions, with the intention of distilling the most practical measures out of this accumulation and highlighting areas that need to be improved; and third, two new public procurement anti-corruption tools are suggested as additional measures to complement the existing anti-corruption measures.

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134 Triegaardt "Poverty and inequality in South Africa" 3.

135 Ambe and Badenhorst-Weiss 2012 *Journal of Transport and Supply Chain Management* 245.

6.5.1 International instruments

All three jurisdictions are party to the UNCAC. However, differences emerge in the implementation of the UNCAC's provisions that deal specifically with combating public procurement corruption, particularly the establishment of anti-corruption institutions.[136] The use of institutional measures as envisaged in the UNCAC is discussed further below under the comparison of domestic measures.

6.5.2 Regional instruments

South Africa is the only jurisdiction that is a party to the OECD Bribery Convention.[137] The aim of the OECD Convention on Bribery is, *inter alia*, to criminalise and punish the "supply side" of bribery, which is the most prevalent form of public procurement corruption.[138]

Hong Kong and Botswana are not parties to this OECD Convention on Bribery. Hong Kong, which has opened its procurement to international suppliers, would do well to be a party to this Convention as an additional tool to its existing procurement legal framework. In the same context, Botswana already awards certain government contracts to international suppliers and it would be in Botswana's interest to be a party to this Convention.

Although these two jurisdictions have made some significant strides in combating public procurement corruption, signing the OECD Convention on Bribery would give them the added advantage of having a well-established and internationally recognized bribery instrument at their disposal. Yet, South Africa, which is party to the OECD Convention on Bribery, has nothing to show for its membership. Its failure to comply with the OECD Convention on Bribery is lamented by the Committee that monitors the implementation of the Convention.[139]

At regional level and by virtue of their geographical location, Botswana and South Africa are parties to the AU Corruption Convention and the SADC Protocol on Corruption. However, these two regional instruments, as discussed in Chapter Two,

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136 This is discussed below under "Institutional Measures".
137 OECD *South Africa Fight Against Bribery* 1.
138 OECD *Implementing the OECD Anti-Bribery Convention* 3-4.
139 OECD *Phase 3 Reporting on the Implementation the OECD Anti-Bribery Convention* 5.

are weak on provisions that relate to public procurement corruption.[140] Even the reporting mechanisms on compliance with the general provisions of corruption are very weak, which makes it difficult to deduce any reliable information from the committees that are responsible for the implementation of these two regional instruments.[141]

Despite being party to the relevant regional instruments, all three jurisdictions rely heavily on domestic measures to combat public procurement corruption. These measures have already been classified as criminal measures, administrative measures, institutional measures and civil activism measures, and are the subject of the discussion below.

6.5.3 Criminal measures

The three jurisdictions use criminal measures as their default public procurement anti-corruption measures. In all three jurisdictions public procurement corruption is treated as part of general corruption, although Botswana has made some strides in providing for public procurement corruption separately within its procurement legislation.[142] This means that public procurement corruption is addressed, using general criminal law principles and public procurement principles.

In all three jurisdictions these criminal measures are mostly used after the fact.[143] The significant differences revolve around the enforcement of these criminal laws, particularly the proportionality of the punishments to the corrupt acts. This is where the institutional measures of combating public procurement corruption are critical, as they are used to enforce the objectives of criminal law.[144]

6.5.4 Institutional measures

All three jurisdictions have many institutions that assist in the curbing of public procurement corruption. These institutions can be classified as: (i) enforcement institutions; and (ii) supporting or complementary institutions. Under the enforcement

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140 Carr 2009 *Int Jnl of Law in Context* 158-159.
141 SADC "SADC Anti-Corruption Committee (SACC) Meeting".
142 OECD *Preventing Corruption in Public Procurement* 13.
143 OECD *Fighting Bribery in Public Procurement in Asia and Pacific* 143.
144 UNDP *Institutional Arrangements to Combat Corruption: A Comparative Study* 4-5.

institutions, for Hong Kong the ICAC is the most important, for Botswana the DCEC is the most important, and for South Africa the Hawks is the most important.

Although Hong Kong's ICAC is a criminal enforcement agent, its strength lies, *inter alia,* in the following: (i) its independence; (ii) its modus operandi; (iii) its professionalism; and (iv) its accountability.[145]

From the time of its inception, one key characteristic of Hong Kong's ICAC has been its independence in the performance of its function of effectively combating general corruption, including public procurement corruption.[146] The need to create an independent anti-corruption institution was informed by the fact that the previous unit, which had been under the control of the Hong Kong police force, had not been independent and actually contributed to the escalation of corruption in Hong Kong.[147]

The independence of the ICAC is derived from: (a) Article 57 of the Basic Law of Hong Kong (which is equivalent to a Constitutional guarantee of independence); and (b) the ICAC Ordinance, which grants the ICAC the power to: (i) arrest; (ii) detain; (iii) grant of bail; (iv) search and seize; and (v) handle any other offence disclosed during the corruption investigation. The ICAC does not reside under any particular government department or ministry. It is a stand-alone governance institution in that it is one of the institutions that promote the rule of law in Hong Kong. The ICAC is partly independent of Hong Kong's Chief Executive and fully independent of the Legislative Council and any other government department and functionary.[148]

Botswana adapted Hong Kong's ICAC model and established the DCEC in 1994. It is supposed to be independent, though its independence is not expressly derived from the CECA, which is the enabling legislation, or the Constitution of Botswana.[149] Its independence can be inferred from the powers conferred on the DCEC in terms of the CECA.[150]

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145 UNDP *Institutional Arrangements to Combat Corruption: A Comparative Study* 6.
146 Wing-chi 2014 *Tsinghua China Law Review* 251.
147 Wing-chi 2014 *Tsinghua China Law Review* 241.
148 Wing-chi 2014 *Tsinghua China Law Review* 242.
149 OECD *OECD Investment Policy Reviews: Botswana* 4.
150 OECD *OECD Investment Policy Reviews: Botswana* 4.

However, the independence of the DCEC is highly questionable and distinguishes itself from Hong Kong's ICAC, because it is under the Office of the President.[151] Several criticisms have been levelled against the placement of the DCEC in the Office of the President.[152] One of the more recent criticisms has related to the alleged concealment of corruption dockets involving at least ten cabinet ministers, all from the BDP – the ruling party.[153] It is reported that corruption dockets including dockets on construction procurement corruption are ready for prosecution, but that the top executive of the DCEC is unwilling to proceed with prosecution, allegedly on instructions from the President.[154]

South Africa, has the Hawks that was established to fight organized crime. Corruption and public procurement corruption have been classified as aspects of organised crime and therefore come under the mandate of the Hawks.[155] The Hawks reside under the administration and operations of SAPS,[156] and SAPS falls under the Minister of Police, a political appointee.[157]

This means that structurally and operationally the Hawks are not independent.[158] The current position of having the Hawks under the Ministry of Police was the exact same as the position in Hong Kong prior to the creation of the ICAC, when the Anti-Corruption Office of the Hong Kong Police Force was responsible for fighting corruption.[159] As noted above, this arrangement fuelled massive corruption, which resulted in the creation of the ICAC.

One of the key ingredients in the independence of an anti-corruption agency is in its decision making process.[160] In other words, it is whether the decision to investigate or not to investigate, prosecute or not to prosecute a case of public procurement corruption based on the facts of the case alone without any political or other extraneous factors being taken into account. The ICAC has on many occasions

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151 Sebudubudu *The Evolving State of Corruption and Ant-Corruption Debates in Botswana* 12.
152 Sebudubudu *The Evolving State of Corruption and Ant-Corruption Debates in Botswana* 12.
153 Botswana Daily News "Botswana: DCEC Investigates" 1.
154 Sunday Standard "DISS and DCEC team up to Conceal Corruption in High Places" 1.
155 SAPS 2014 http://www.saps.gov.za.
156 *Major General Shadrack Sibiya v Minister of Police and Others* Case No 5203/2015 para 2-3.
157 *Major General Shadrack Sibiya v Minister of Police and Others* Case para 2.
158 Burger Why does SA's elite corruption-busting agency suffer from a credibility problem? 1.
159 Wing-chi 2014 *Tsinghua China Law Review* 242.
160 *The Helen Suzman Foundation v The Minister of Police and Others* Case No: 1054/2015.

demonstrated that if an anti-corruption body is *bona fide* and independent, such a body is capable of making decisions based solely on the facts.[161]

In addition, the ICAC has demonstrated that structural independence cannot be divorced from operational or administrative independence.[162] The DCEC and the Hawks fall short on the test and true meaning of the independence required in anti-corruption agencies due to the fact that some of their decisions, especially those that involve investigating and prosecuting high-ranking politicians, are influenced by the executive.[163]

In terms of the *modus operandi*, the ICAC has a three-pronged approach comprising law enforcement, corruption prevention and community education.[164]

Botswana, as already noted, adapted Hong Kong's ICAC structure.[165] It also adapted the same three-pronged approach.[166] The differences between Hong Kong's ICAC and Botswana's DCEC are in their areas of emphasis, as well as in staffing and resources. For example, ICAC has a staff complement estimated at 1 300 and has massive financial and other resources,[167] while Botswana's DCEC has a staff complement estimated to be below 200 and is under-funded.[168] As a result, Hong Kong has managed to achieve better results than Botswana, maximising the benefits derived from the strength of its human resources.

It is important to note that these two anti-corruption agencies (ICAC and DCEC) are very active in community education. For example, both of them use the social media, in particular Facebook, to communicate with and educate the civil population, especially the young, on the evils of corruption, which includes public procurement corruption.

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161 Wing-chi 2014 *Tsinghua China Law Review* 242.
162 *Helen Suzman Foundation v President of the Republic of South Africa and Others*; *Glenister v President of the Republic of South Africa and Others* 32.
163 *Helen Suzman Foundation v President of the Republic of South Africa and Others* para 4.
164 de Speville *Anticorruption Commissions: The Hong Kong Model Revisited* 53-55.
165 de Speville *Anticorruption Commissions: The Hong Kong Model Revisited* 47.
166 de Speville *Anticorruption Commissions: The Hong Kong Model Revisited* 47
167 ICAC *2015 Annual Report* 22.
168 Mwamba *An Evaluation of the Anti-Corruption Initiatives in Botswana* 118-119.

In South Africa, the Hawks do not have an anti-corruption strategy, meaning that there is no clear direction on law enforcement, corruption prevention and community education, as is the case with Hong Kong and Botswana.[169] The result has been catastrophic for South Africa in. The Hawks have so far failed to take the lead in fighting public procurement corruption, *inter alia*, for the lack of a *modus operandi* (clear anti-corruption effective strategy). This speaks to a number of issues including the level of professionalism and competence of the anti-corruption agency. In short, the level of professionalism in anti-corruption agencies is paramount in fighting public procurement corruption, as evidenced by Hong Kong's ICAC.

6.5.4.1 Professionalism

This study has identified three pillars on which a professional anti-corruption agency must be built if it is to address public procurement corruption effectively. They are: (i) the integrity of the process of the appointment of the head of the anti-corruption agency; (ii) the calibre (the ethical integrity) of the staff; and (iii) the full execution of the anti-corruption strategy.

Hong Kong's ICAC has a transparent process for appointing the ICAC Commissioner.[170] In addition, the integrity of the Commissioner is and should be of unquestionable standard. On this issue Hong Kong seems to have done well, although there have been some accusations that the current Chief Executive, Leung Chun-ying, has been trying to interfere with the operations and appointments of ICAC senior staff, which has resulted in the resignation of one of the lead investigators at the ICAC.[171]

Botswana's head of the DCEC is appointed by the President.[172] There have been controversies over the appointment of the current Director of the DCEC, Rose Seretse.[173] A relative of the President, Rose Seretse is compromised in terms of her work as the head of the country's lead anti-corruption agency.[174] Already allegations of public procurement corruption against several of the President's relatives either

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169 Hoffman "A Common Thread" 1.
170 Quah *Curbing Corruption in Asian Countries: An Impossible Dream?* 256.
171 Frasier and Ng "Turmoil at ICAC after Principal Investigator becomes Second Departure" 1.
172 Mmegionline "I Did Nothing Wrong – Seretse" 1.
173 Rose Seretse is a cousin to President Ian Khama.
174 Mmegionline "I Did Nothing Wrong – Seretse" 1.

have not been investigated or the status of the investigation is being kept secret.[175] Effectively, it means that her integrity is questionable, and this in turn negatively affects the execution of the DCEC's anti-corruption strategy.

It is submitted that transparency lies not in the appointment of personnel but in the selection process. Therefore Botswana, like any other developing country, should have an open selection process for the head of the DCEC as opposed to the current process.

In South Africa the appointment of the head of the Hawks, Berning Ntlemeza,[176] by the Minister of Police, has been argued as one of the most controversial appointments under the administration of President Zuma.[177] His selection and appointment process was said to be a political move in order to fortify a political faction that is in support of the administration of President Zuma.[178]

Critics of his appointment argue that before his appointment there was a court decision which berated his character as biased, dishonest and that he lacked integrity.[179] Berning Ntlemeza's appointment has affected public confidence and there is a general perception that the Hawks are not serious in tackling public procurement corruption.[180]

6.5.4.2 Public procurement anti-corruption strategy

The impression that the South Africa's Hawks are incapable of fighting public procurement corruption is supported by the fact that the Hawks do not have an anti-corruption strategy similar to that of Hong Kong or Botswana. The lack of a clear public procurement anti-corruption strategy has resulted in their allegedly being used to fight political battles instead of concentrating on their key function, which includes curbing public procurement corruption.[181] As such, a new intervention or strategy

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175 Sunday Standard "DISS and DCEC Team Up to Conceal Corruption in High Places" 1.

176 At the time of submission of this study Berning Ntlemeza had been suspended by a High Court, pending appeal. *The Helen Suzman Foundation v The Minister of Police and Others* Case No 1054/15.

177 *Freedom Under Law Helen Suzman Foundation and Freedom Under Law go to Court* 1.

178 Evans "New Hawks Boss, a Controversial Appointment" 1.

179 Legalbrief "'Dishonest' Judgment to be Challenged by Hawks" 1.

180 Kane-Berman "Going off the rails: The slide towards the lawless South African State" 1.

181 Hoffman "A Common Thread" 1.

that must at least encompass proper and effective law enforcement, prevention and community education must be established by the head of the Hawks and his team if South Africa is to have public procurement corruption under control.[182]

It is submitted that such a public procurement anti-corruption strategy must be properly thought out and strategically rolled out in all nine provinces as well as in the local government sphere. Without such an anti-corruption strategy as the minimum standard, it is difficult for one to fathom how South Africa and the Hawks in particular can fight and win the battle against public procurement corruption.[183] In executing the anti-corruption strategy it is imperative for the anti-corruption agency to have clear legal accountability lines.

6.5.4.3 Accountability of the anti-corruption agency

An effective anti-corruption agency operates under the rule of law, meaning that the agency must explain its functions, budgets and operations to another organ of state.[184] Hong Kong's ICAC reports to and is accountable to the Chief Executive.[185] Botswana's DCEC is accountable to the President, and it is the President who decides on whether or not *inter alia* to release the DCEC's annual report.[186] The Hawks in South Africa are accountable to the police Minister. The danger that this reporting structure has for South Africa is that public procurement corruption cases, especially those involving high-ranking government officials, have to be disclosed to the police Minister, who may or may not interfere in them, or direct the manner in which a particular investigation should take place.[187]

All three anti-corruption agencies have flawed accountability structures. It is recommended that for effective accountability that resonates with transparency all anti-corruption agencies must be accountable only to the legislative arm, and this

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182 Hoffman "A Common Thread" 1.
183 Montesh and Berning 2012 *Acta Criminologica: Southern African Journal of Criminology* 134-135.
184 Montesh and Berning 2012 *Acta Criminologica: Southern African Journal of Criminology* 134-135.
185 South China Morning Post "Chief Executive of Hong Kong should not be ICAC Boss" 1.
186 Matlhare *An Evaluation of the Role of the Directorate on Corruption and Economic Crime* 23.
187 Thamm "House of Cards: Gloves off as Head of IPID Alleges Minister Protects Corrupt Cops" 1.

reporting must be done publicly by the head of the anti-corruption agency, preferably during a live broadcast.[188]

6.5.4.4 Corruption Court

A corruption court is an additional institutional measure to fight corruption in general. In this regard Botswana established the Botswana Corruption Court.[189] The purpose of establishing this specialised court was to bolster the already existing anti-corruption efforts, including the institutional measures.[190] This is a specialised court which is meant to facilitate the speedy adjudication of corruption cases including public procurement corruption.[191] According to the Botswana Chief Justice Maruping Dibotelo, from the inception of the Court in 2012 there were 160 corruption cases and at the end December 2016 there were 22 outstanding cases.[192]

It is not yet clear how many cases deal with public procurement corruption[193] but the absence of this information does not negate the importance of such a Court with respect to curbing public procurement corruption. If this Court is properly resourced financially and its staff, is allowed to exercise its independence, and insulated from political manipulation, then it will be able to deliver on its mandate and it is likely to influence other African countries to replicate it.[194]

Hong Kong and South Africa do not have anti-corruption courts or any specialised courts that deal with and focus specifically on corruption, including public procurement corruption. The closest that South Africa has is the Specialised Commercial Crime Court, which was established in 1999[195] to deal with commercial crime, mainly fraud and theft.[196] The Specialised Commercial Crime court in South

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188 Guy *Ensuring Integrity and Improving the Efficiency of Public Management* 18-19.
189 Shone *Botswana Guardian* 1.
190 Shone *Botswana Guardian* 1.
191 Dibotelo "Address by the Hon. Chief Justice M Dibotelo" 26.
192 Shone *Botswana Guardian* 1.
193 Shone *Botswana Guardian* 1.
194 AFROBAROMETER Fighting Corruption in Uganda: Despite small gains 1.
195 Altbeker *Justice Through Specialisation? The Case of the Specialised Commercial Crime Court* 1.
196 Altbeker *Justice Through Specialisation? The Case of the Specialised Commercial Crime Court* 1.

Africa has not been successful in dealing with cases of corruption, and in particular cases of public procurement corruption.[197]

Whilst public procurement corruption can be classified as a commercial crime, almost all cases of public procurement corruption in South Africa have been adjudicated under the normal court system.[198] Effectively, this renders the Specialised Commercial Crime Court unfit for the purposes of fighting public procurement corruption. It may be expedient for Hong Kong and South Africa to establish a specialised anti-corruption court similar to that of Botswana.

In this regard, it is important to consider the advantages that these two jurisdictions would gain from such court. First, the establishment of an anti-corruption court to deal with public procurement corruption has the advantage of reducing the time frames that are associated with the ordinary court roll.[199] Prolonged public procurement corruption cases may negatively affect public perception, which is critical in fighting public procurement corruption.[200] Second, reducing the time frames may mean increased efficiency in dealing with cases of public procurement corruption. For example, in both in Hong Kong and South Africa there have been outcries over the lack of efficiency in dealing with public procurement corruption cases involving the political elite as well as high-ranking business people who have political connections.[201]

Third, establishing such a court promotes skills specialisation in all the judicial officers.[202] Fourth, to make this court a success there has to be a synergy between the investigating authority and the prosecution authority.[203] The investigating authority has to be a special department that deals only with cases of public procurement corruption.[204] In addition, the prosecuting authority must also have a department that deals with similar cases. It is submitted that these two departments must be well grounded and must have a good working relationship.

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197 *S v Boshoff* Case No. CA and R 390/12 27 September 2014 para 3.
198 Corruption Watch *Corruption and the Law in South Africa* 21-22.
199 Shone *Botswana Guardian* 1.
200 UNODC *Corruption and Public Procurement* 5.
201 Linder "Former Hong Kong leader Donald Tsang Faces up to 7 years in Jail for Corruption" 1.
202 OECD *Specialised Anti-Corruption Institutions – Review Models* 10.
203 OECD *Effective Means of Investigation and Prosecution of Corruption* 63-64.
204 OECD *Effective Means of Investigation and Prosecution of Corruption* 83.

This would allow prosecutors to be involved in the investigation stages of public procurement corruption cases at a much earlier stage. The advantage of involving prosecutors at an early stage is that it addresses the legal deficiencies in securing crucial evidence for successful prosecution in cases involving public procurement corruption.[205] A number of cases have been lost or not prosecuted mainly because the police investigators focused on the wrong aspects of the evidence, crucial to securing a conviction.[206]

In South Africa, for example, there is a dearth of police investigators qualified to deal with public procurement corruption.[207] The Hawks of South Africa have on numerous occasions been found wanting.[208] The same applies to the NPA, which is the lead prosecuting authority in cases involving public procurement corruption.[209]

However, debate has been raging as to whether the investigating arm should also be the prosecutorial arm in cases involving public procurement corruption.

6.5.4.5 Investigating and prosecutorial powers

In Hong Kong, the ICAC has inherent investigative powers but no inherent prosecutorial powers.[210] However, for the ICAC to prosecute a particular case of public procurement corruption, the consent of the Secretary for Justice,[211] which is the lead prosecuting authority (like the AG in Botswana and the NPA in South Africa) is required. There are no reported cases where the ICAC has been denied such consent by the Secretary for Justice.[212]

Effectively, this gives the ICAC full control of cases involving public procurement corruption, from the investigation stage to the prosecution stage, and this has contributed to the success that Hong Kong enjoys. Therefore, although Hong Kong has no anti-corruption Court, the excellent working relationship between the ICAC and its Secretary for Justice has made it possible for the ICAC to house within itself

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205 PWC *Identifying and Reducing Corruption in Public Procurement in the EU* 145.
206 Ferwerda, Deleanu and Unger 2016 *Eur J Crim Policy Res* 4.
207 Corruption Watch *SAPS needs Special Investigating Units* 1.
208 Corruption Watch *SAPS needs Special Investigating Units* 1.
209 Schonteich 2014 *SA Crime Quarterly* 6-7.
210 ICAC *Legal Empowerment* 1.
211 Xu *ICAC Prosecution, Capital Investment, and the Rule of Law in Hong Kong* 18-20.
212 Michael *Can the Hong Kong ICAC Help Reduce Corruption on the Mainland?* 2-3.

both investigative and prosecutorial powers, which is not the case in Botswana and South Africa.[213]

Thus, developing countries should consider establishing specialised anti-corruption courts among their institutional measures to curb public procurement corruption.[214] In order for these to courts to be a success, three more innovations are important: (i) specialised prosecutors that focus exclusively on public procurement corruption; (ii) special police investigation units that focus on public procurement corruption and; (iii) legal mechanisms that allow the investigative unit to prosecute in cases where the investigative unit is not the prosecuting authority, as is the case in Hong Kong.

6.5.5 Administrative measures

This study focuses on three administrative measures to combat public procurement corruption, namely debarment, suspension and blacklisting. It has already been established that debarment is the most widely used administrative measure meted out to errant suppliers involved in public procurement corruption.[215] More attention will therefore be given to the analysis of debarment than to suspension and blacklisting.

6.5.5.1 Debarment

In Hong Kong it is mandatory for procuring entities to check whether a potential supplier has been convicted, not just of corruption but of any other offence committed in violation of the Employment Ordinance, the Immigration Ordinance, the Criminal Procedure Ordinance, or the Provident Fund Ordinance.[216] In addition, convictions for debarment are not confined only to government contracts but also apply to private contracts.[217] Further, the conviction extends to any crime in addition to the specific offences committed in violation of the above-mentioned legislation.[218]

Another interesting feature of Hong Kong's debarment procedures is that where the supplier is appealing a conviction or has applied for the review of a conviction, the

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213 Man-wai *Successful Anti-corruption Strategy & International Good Practices* 117-118.
214 Schutte *Specialised Anti-Corruption Court: Uganda* 1.
215 Hjelmeng and Soreide *Debarment in Public Procurement* 1.
216 FSTB *Applications for Review of the Debarment Period under the Review Mechanism* 1.
217 FSTB *Applications for Review of the Debarment Period under the Review Mechanism* 1.
218 FSTB *Applications for Review of the Debarment Period under the Review Mechanism* 1.

appeal or review will not influence the debarment.[219] In other words, the debarred supplier remains debarred from government contracts until there is a final conclusion to the appeal or review. The maximum debarment period is five years.[220]

Botswana does not have an express provision on debarment. There is no legally provided procedure for debarment as is the case with Hong Kong. In addition, Botswana does not have clear grounds for debarment.[221] It follows that there is no prescribed period for debarment, as is the case in Hong Kong.[222] Inferences relating to debarment may be drawn from section 125 of the PPAD Act, which requires all contractors to comply with a Code of Conduct, failure of which will result in the suspension and delisting of the contractor from the Register of Contractors.

The Code of Conduct is limited in terms of its application to procurement-related conduct as provided by the PPADB Act. Botswana's public procurement is expanding, and like most other developing countries Botswana is becoming highly litigious, as noted by Botlhale.[223] Therefore it is recommended that Botswana immediately address debarment by providing clear and unambiguous guidelines that must have the following minimum information: (i) the target of debarment; (ii) the role of previous and current convictions; (iii) the grounds and procedures for debarment; and (iv) the period of debarment.[224] This will enable Botswana to follow best international practice, as debarment is a growing practice internationally.

South Africa has relatively well-defined debarment procedures in comparison with Botswana.[225] As discussed earlier, debarment is provided in terms of the Corruption Act, the PFMA, and the PFMA Regulations.[226] South Africa, like Hong Kong, statutorily provides for debarment in all three spheres of government, that is, national, provincial and local government. What has not been tested in South Africa is whether debarment can be invoked on the grounds of the violation of labour and immigration laws, as is the case in Hong Kong. In addition, it is also not clear

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219 FSTB *Applications for Review of the Debarment Period under the Review Mechanism* 2-3.
220 FSTB *Applications for Review of the Debarment Period under the Review Mechanism* 2-3.
221 PPADB *Operations Manual* 38.
222 PPADB *2016 Annual Report* 130-132.
223 Bothlale "Public Procurement in Botswana: A Survey of Issues" 192-193.
224 Hjelmeng and Soreide *Debarment in Public Procurement* 3.
225 Williams-Elegbe *Fighting Corruption in Public Procurement* 285-286.
226 Williams-Elegbe *Fighting Corruption in Public Procurement* 285-286.

whether debarment is triggered only on convictions that are related to public transactions, or if it can be extended to convictions that are related to private transactions, as is the case in Hong Kong. The PFMA does not prescribe a mandatory debarment period, but the Corruption Act sets the maximum debarment period at 10 years.[227]

What South Africa must probably learn from Hong Kong is to extend the grounds for debarment to include convictions for any act that involves financial dishonesty in the widest possible definition. This is important for South Africa in light of the massive amount of public procurement corruption in the country and the increase in public procurement expenditure.[228] If this is done the government will be able to protect itself from contracting with dishonest suppliers.

The maximum debarment period in South Africa of 10 years should remain the same, due to the high level of public procurement corruption. This is something that can be considered by Botswana and perhaps by Hong Kong as well for more serious offences.

Suspension and blacklisting are related to debarment. As alluded to earlier, Botswana uses suspension and delisting as opposed to debarment.[229] Hong Kong has no express legal provisions on blacklisting and suspension, while South Africa uses blacklisting and suspension by reason of its Tender Defaulters' Register.[230]

Hong Kong allows debarred suppliers to apply for the review and reduction of the periods and conditions of their debarment.[231] In essence this is self-cleaning in public procurement, although Hong Kong does not define it expressly as self-cleaning.

6.5.5.1.1 Self-cleaning in public procurement

As may be recalled from Chapter Two, Punder, Prieβ and Arrowsmith[232] define self-cleaning in public procurement as a legal concept that is extended to a company that would have been excluded or debarred from further contracting with government for

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227 OECD *Directorate for Financial and Enterprise Affairs: South Africa* 4.
228 National Treasury *Budget Review 2017* 24.
229 PPADB *Annual Report 2016* 7.
230 Section 28(1) (a) of Corruption Act.
231 FSTB *Applications for Review of the Debarment Period under the Review Mechanism* 1.
232 Punder, Prieβ and Arrowsmith *Self-Cleaning in Public Procurement Law* 4.

contracts. The grounds for the exclusion or debarment may range from violations of the procurement law to criminal law convictions including corruption.[233] Some authors prefer to narrow down the application of debarment to a final conviction based on corruption or other finance-related irregularities.[234]

Although Hong Kong does provide for self-cleaning through the Review Mechanism, it lacks the following core fundamentals for effective self-cleaning:

(i) Clarification of the relevant facts and circumstances that led to the debarment;

(ii) Repair of the damage caused; and

(iii) Personnel measures

Structural and organizational measures

On the other hand, Botswana and South Africa do not provide for self-cleaning at all. Botswana and South Africa must embrace the self-cleaning process as part of the broader procurement regime, taking into account the procurement administrative challenges that already exist and the general lack of professionals in the procurement space.

Having aired this topic sufficiently, the dissertation goes on to consider the role of lay citizens in combating public procurement corruption.

6.5.6 Civil activism

In this study "civil activism" refers to the role of individuals, CSOs and the media play in combating public procurement corruption.

6.5.6.1 Individual activism

Botswana and Hong Kong have not reported any cases of private citizens litigating in cases of public procurement corruption where there is no personal interest at stake. The position in South Africa is different.[235] Citizens have, of their own volition,

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233 Hjelmeng and Soreide *Debarment in Public Procurement* 3.
234 Hjelmeng and Soreide *Debarment in Public Procurement* 4.
235 Maiman "Political Cultures in Conflict: Analyzing Constitutional Litigation in South Africa" 29.

litigated in cases involving public procurement corruption on behalf of other citizens. Hugh Glenister, a private citizen, challenged the South African government's decision to disband the Scorpions, though he was not personally affected by the disbandment.[236] In another case, De Lille acted as a whistle-blower that resulted in the Arms Deal investigation.

Also in South Africa, Terry Crawford-Browne, another private individual, approached the Constitutional Court in an effort to set aside the findings of the Seriti Commission, which concluded, *inter alia*, that there had been no public procurement corruption in the procurement of arms.[237]

Therefore, private individuals in Botswana and Hong Kong must be encouraged to follow the example set by South Africans. For these two countries to be able to afford their citizens this role, issues of *locus standi* must be dealt with.[238] In other words, there has to be a relaxation on *locus standi,* as it has been used in most developing countries as a tool to frustrate litigation, especially in cases perceived to be liable to expose the short-comings of the government.[239]

The following have been identified to be core to effective individual activism: (i) political will; (ii) proper legal protection of the individuals concerned; and (iii) a fund supplied by the government but that is administered independently to support such litigation.

In cases where individuals find it difficult to curb public procurement corruption, the concerned individuals may do so through CSOs.

6.5.6.2 Civil society organisations

CSOs in this study have been defined as non-state actors who are engaged in fighting public procurement corruption in any manner. The study has identified, *inter alia*, that CSOs in Hong Kong and Botswana are not as active as those in South

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236 *Singh Fighting Corruption, a Constitutional Imperative The Case of Hugh Glenister v President of the Republic South Africa* 3.

237 Business Day "Arms Deal Saga Continues for Crawford-Browne Despite Top Court's Ruling" 1.

238 *Sinohydro CMC Joint Venture v The Republic Procurement and Asset Disposal Board and Others* 2.

239 Haskett 1981 *Canada-United States Law Journal* 39-40.

Africa in combating public procurement corruption.[240] South Africa's lead in the participation of CSOs in the fight against public procurement corruption is facilitated by the existence of the following: (i) the rule of law; (ii) good governance structures; (iii) a highly competent judiciary; and (iv) the legal protection of CSOs operating in this space.[241]

The existence of these factors has allowed CSOs such as the Helen Suzman Foundation, Corruption Watch and Section 27 to litigate against the government on issues of public procurement corruption without fear. Difficulties have been identified in South Africa, which most CSOs in developing countries suffer from when it comes to fighting public procurement corruption from is the issue of funding, victimisation and political intolerance.[242]

While one appreciates that it is difficult, if not impossible, for governments to fund CSOs, the government may assist CSOs by intervening either through policy or legislation in order to, *inter alia*, lower legal costs in cases where public procurement corruption is concerned.

Most governments including Botswana are generally under the impression that CSOs are sponsored to facilitate regime change, particularly in African countries.[243] Whilst this may be true, it is not always the case. Some of these CSOs raise legitimate concerns that promote good governance, which in turn improves transparency in government decisions.[244]

6.5.6.2.1 Case analysis relating to CSOs – nuclear deal

It is necessary to shed more light on the role that CSOs have played in South Africa as a means of informing the other jurisdictions. A recent example is the decision by the government to procure an estimated 9,600 MW of nuclear power at an estimated cost of R1 trillion.[245] South Africa's 2017/2018 annual budget was R1.4 trillion.[246]

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240 Essoungou *The Rise of Civil Groups in Africa* 1.
241 OECD *Stocktaking of Business Integrity and Anti-Bribery Legislation* 111.
242 National Development Agency *Funding Constraints and Challenges Faced by Civil Society* 33.
243 OECD *OECD Investment Policy Reviews Botswana* 4.
244 Olaniyan *Corruption and Human Rights in Africa* 158.
245 NESCA *SA March against R1 Trillion Nuclear Deal* 1.
246 National Treasury *Budget Review 2017* 6-7.

This makes the nuclear deal procurement the largest in the country's 24-year history.[247]

The procurement of energy in South Africa is done in terms of the *Electricity Regulation Act*,[248] in particular section 34(1) (hereafter section 34 determination). In 2013 the then Minister of Energy made the first section 34 determination[249] which directed that the Department of Energy had to spearhead the procurement of the 9 600 MW of nuclear.[250] A new Minister of Energy was appointed[251] and issued a new section 34 determination in December 2015 cancelling the 2013 determination[252] which directed Eskom to spearhead the nuclear procurement deal.[253]

Earthlife and Southern African Faith Communities challenged both determinations, arguing *inter alia* that these determinations are prone to corruption and some other procurement malfeasance.[254] In the court papers presented, the two CSOs argued *inter alia* that (i) the power to make such a determination is unconstitutional; (ii) in the event that it is found to be constitutional then such a determination must be approved by parliament; (iii) the decision to make such a decision was administrative action and subject to judicial review; and (iv) public participation was crucial for transparency purposes.[255]

In *Earthlife and Another v Minister of Energy and Others*[256] the Court ruled in favour of the CSOs and set aside the Ministerial determinations by ordering that the envisaged nuclear procurement was "unlawful and unconstitutional".[257]

What is critical in the above narrative is that it demonstrates that CSOs are capable of advancing the cause of clean procurement. Section 34 determination by the Minister of Energy in its current form does not promote transparency in the

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247 Right to Know *On Budget Day, the Trillion Rand Nuclear Deal is Back in Court* 1.
248 34 of 2008.
249 *Earthlife and Another v Minister of Energy and Others* para 4.
250 *Earthlife and Another v Minister of Energy and Others* para 16.
251 *Earthlife and Another v Minister of Energy and Others* para para 4.
252 *Earthlife and Another v Minister of Energy and Others* para 4-5.
253 Dpt of Energy *Nuclear Programme Determination Under Section 34(1) ERA Act*.
254 Sole and Reddy "The Largest Procurement in SA to date" 1.
255 On this point the Minister opposed this point arguing that the decision to make such a determination was a policy decision and therefore not subject to judicial review (*Earthlife and Another v Minister of Energy and Others*) para 17.
256 Case No 19529/2015.
257 *Earthlife and Another v Minister of Energy and Others* 72.

procurement process. It is astounding that the Minister of Energy would argue for the retention of such absurd authority without qualifying it and without proper justification. A limit on the amount that the Minister may choose to procure must be attached to Section 34 determination.

6.5.6.2.2 The State capture and public procurement corruption

State capture has been defined by Martin and Solomon[258] as those actions of a group of people in the private and public sector that influence the formation of laws, and government policies to their own advantage. Following from the above paragraph it has been argued that the 2015 section 34 determination that appointed Eskom to spearhead the procurement of nuclear energy that was influenced by state capture.[259] The former Chief Executive Officer of ESKOM was identified as in the State of Capture Report released by the Public Protector in 2016, where the Public Protector stated *inter alia* that he was involved in acts of public procurement corruption, conniving with the GUPTA family in a number of procurement projects including the nuclear deal procurement.[260]

Following these allegations the Chief Executive Officer of ESKOM resigned in January 2017,[261] only to be appointed by as a Member of Parliament for the ANC in February 2017.[262] In May 2017, he resigned as a Member of Parliament for the ANC and has since been re-appointed to his previous position as the Chief Executive Officer of ESKOM.[263] A move that has been viewed as a confirmation of state capture and public procurement in South Africa.[264]

The findings of state capture and public procurement corruption by the Public Protector are binding until such findings have been reviewed and set aside by a competent court. No such review court application has been filed and those findings still hold.

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258 Martin and Solomon 2016 *SAPSS Jnl* 22.
259 Public Protector *State of Capture Report* 5.
260 Public Protector *State of Capture Report* 86.
261 Pather "Brian Molefe Resigns from ESKOM" 1.
262 Matya "Molefe Welcomed as MP in Parliament" 1.
263 The Daily Maverick "Molefe Re-appointment, Cope, Protest Outside Eskom" 1.
264 The Daily Maverick "Molefe Re-appointment, Cope, Protest Outside Eskom" 1.

Hong Kong and Botswana can learn from South Africa's experience of how CSOs assist in the curbing of public procurement corruption. While the rule of law, good governance structures, highly competent judiciaries and legal protection exist in Hong Kong and Botswana, it is the degree to which CSOs are allowed to freely exercise these rights that is paramount to curbing public procurement corruption.

In Botswana, for example, CSOs that have attempted to address governance issues, including public procurement corruption, have been viewed very negatively by the government.[265] The government of Botswana has closed down the space that CSOs may use to expose public procurement corruption. The government of Botswana has a reputation for victimizing those CSOs purported to be anti-government through labelling and calling them such.[266]

Botswana should be encouraged to allow CSOs to participate in the fight against public procurement corruption in accordance with the Botswana Constitution, and as encouraged by the international community.[267] Likewise, there are no reported cases of CSOs in Hong Kong that have litigated in the area of public procurement corruption out of public interest.[268] Similar recommendations to those of Botswana should be seriously considered by Hong Kong.

6.5.6.3 Media

The media in all three jurisdictions are active in fighting public procurement corruption, in particular through their investigative journalism and their reporting. A number of cases of public procurement corruption emanating from the media have occurred in all three jurisdictions. Further, the initial reporting of cases of corruption is followed up by the reporting of the court cases and how they unfold.

In all three jurisdictions there is constitutionally guaranteed freedom of expression, and there is reasonable exercise of this freedom by the media. All three jurisdictions have independent media.

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265 Mwamba *An Evaluation of the Anti-Corruption Initiatives in Botswana* 31.
266 The Botswana Gazette "The BDP Government is Fighting with Terror" 1.
267 Mwamba *An Evaluation of the Anti-Corruption Initiatives in Botswana* 31.
268 OECD *Strategies for Business, Government & Civil Society to Fight Corruption in Asia* 165.

6.5.6.3.1 Independent media

The independence of the media evident in the three jurisdictions has become an essential tool for use in combating public procurement corruption, but Botswana has less tolerance of the media's independence than Hong Kong or South Africa, as noted by Freedom House.[269] The limited space in which independent media may operate in Botswana constrains the role of the Botswana media in combating public procurement corruption.[270] The Botswana media have been under threat, especially under the administration of the current President.[271] There is a need in Botswana to protect the independence of the media and promote the role of the media in combating public procurement corruption.

In the same context, Hong Kong and South Africa should not rest on their laurels in connection with the need to continue to protect and promote the independence of the media, but should strive to create an environment where the media are incentivised to investigate and expose public procurement corruption.

6.5.6.3.2 Social media

In all three jurisdictions, the social media or digital media are grossly underutilised. Botswana takes the lead in the use of social media in particular because of the DCEC's use of Facebook in fighting public procurement corruption.[272] The DCEC uses Facebook as an educational tool on the evils not just of public procurement corruption but of corruption in general.[273] In addition, the DCEC uses Facebook to target a specific sector of the population, mainly young people and those that are still at school, college and university.

On the other hand, Hong Kong's ICAC and South Africa's Hawks are not very active in the use of the social media in fighting public procurement corruption. It is necessary for Hong Kong and South Africa to appreciate how useful the social media

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269 Freedom House *Botswana Freedom of the Press 2016* 1.
270 Freedom House *Botswana Freedom of the Press 2016* 1.
271 Freedom House *Botswana Freedom of the Press 2016* 1.
272 As of December 2016 the DCEC Facebook webpage had 5002 likes. This indicates that the DCEC has managed to attract a good audience.
273 https://www.facebook.com/The-Directorate-on-Corruption-and-Economic-Crime-DCEC-Botswana-353801698160729/.

may be, since the majority of the youths in these countries generally use the social media as tools of communication.

6.6 New developments

One interesting feature that cannot be classified as civil activism but exhibits some of the key characteristics of civil activism is the work of the Operations Review Committee in Hong Kong, which was established in terms of the corruption law.[274] In summary, the purpose of this Committee is, *inter alia*, to monitor all cases of corruption including public procurement corruption that have been reported, are being investigated, are being prosecuted, are borderline cases, are to be withdrawn, or cannot be pursued for various reasons (such as lack of evidence and so forth).[275]

6.6.1 Oversight and accountability committees

The unique feature of this Committee is that it is composed of civilians and occupies a special place within Hong Kong's anti-corruption strategy. For the purposes of fighting public procurement corruption, this Committee monitors every case of public procurement corruption as part of its broader anti-corruption drive.[276] There is no case of public procurement corruption that cannot be withdrawn or not prosecuted once it has been reported without the approval or authority of this Committee.[277]

Even where the ICAC has lost a public procurement corruption case in Court, the Committee has the mandate to go over the case to find out why the case was lost and whether there was a lack of diligence on the part of the prosecutor or the investigators.[278] In this way, the Committee works as an oversight body or watch-dog over all public procurement corruption cases.

This makes ICAC officials and other officials (police) involved in fighting public procurement corruption more diligent in their work, with the knowledge of possible further scrutiny by the Committee. This Committee is well respected in Hong Kong.

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274 OECD *Specialised Anti-Corruption Institutions Review of Models* 51.
275 McWalters and Carver "Independence Commission Against Corruption"100.
276 McWalters and Carver "Independence Commission Against Corruption" 100.
277 Quah *Curbing Corruption in Asian Countries an Impossible Dream?* 276.
278 ICAC *Operations Review Committee* 1.

In addition to the functions described above, it reports to the Chief Executive Officer on any suggested areas of improvement to buttress the fight against graft.[279]

Botswana and South Africa do not have such a Committee, and the lack of it has exposed short-comings in the manner in which public procurement corruption investigations are handled by their leading institutions. In both countries serious concerns have been raised particularly about the lack of transparency in public procurement corruption cases involving the political elite and their business cronies, as discussed above.

For example, in Botswana the investigation into allegations of interference by the President in allegations of public procurement corruption based on the awarding of government tenders to his family and close friend has not made progress. In South Africa, the influence of the President on South Africa's head prosecuting authority (the NPA) has resulted in the clouding of public procurement investigations against the President and other cabinet ministers.

The President's influence was cited in the conduct of the Deputy National Director of Public Prosecution, the Special Director of Public Prosecutions, the Head of the Crime Unit and the Director of Public Prosecutions at the Gauteng High Court.[280] In response to these allegations, the General Council of the Bar of South Africa intervened and sought a court order to declare these four as not being fit and proper persons within the legal fraternity and the practice of law.[281]

In their application, the General Council of the Bar cited two cases[282] involving the President that the four had frustrated and interfered with by ensuring that the cases were not prosecuted. In *The General Council of the Bar South Africa v Jiba and Others*[283] it was ruled *inter alia* that the four had indeed allowed external influences

279 Kofele-Kale *The International Law of Responsibility* 238.
280 *The General Council of the Bar South Africa v Jiba and Others* 2017 1 SACR 47 (GP) 4.
281 *The General Council of the Bar South Africa v Jiba and Others* 8, 14.
282 *Democratic Alliance v Acting National Director of Prosecutions* 2013 All SA 610 (GNP); *Zuma v Democratic Alliance and Others* 2014 4 SA 35.
283 2017 1 SACR 47 (GP).

to taint their roles in prosecution. These officials have been since suspended as per the High Court order.[284]

If a committee such as that which is operational in Hong Kong (the Advisory Committee) was operational and fully supported in South Africa, the chances are that these top prosecuting officials would have found it much more difficult to interfere with the cases. The absence of such an oversight committee that calls for accountability resulted in the General Council of the Bar South Africa having to play a role that the government should have played.

In the light of the above, it is submitted that South Africa needs to urgently consider establishing such a Committee that is staffed by non-partisan ordinary members of the public. In effect, these Committees must be established at national and provincial level. This is necessary if one considers the volumes of public procurement transactions that take place at national and provincial level, as well as the cases of public procurement corruption that are reported.[285]

The accountability of the NPA is missing in the completion and investigation of public procurement corruption cases in South Africa. Although South Africa, like Botswana, does have Parliamentary Committees on Justice, their role is merely oversight of accountability in the administrative issues such as issues of the budget and the staff complement. The Parliamentary Committees on Justice in Botswana and South Africa do not audit the prosecution of cases, as is the case with the Advisory Committee in Hong Kong.

In addition to the Committee, Hong Kong has additional committees established by legislation.[286] These committees are all staffed by ordinary people who hold no government position, and no government official is allowed to sit in any of these committees.[287]

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284 *The General Council of the Bar South Africa v Jiba and Others* 108.
285 National Treasury *2017/2018 Budget Review* 5.
286 Kofele-Kale *The International Law of Responsibility* 238.
287 Kofele-Kale *The International Law of Responsibility* 238.

6.6.2 Research and advisory committee

In Hong Kong, the first of these is the Corruption Prevention Advisory Committee, whose primary responsibility is research and offering advice on how to deal with procedures, including procurement procedures, which are susceptible to corruption.[288] The second is the Advisory Committee on Corruption, whose mandate is to advise the Commission on how to improve corruption policy and how other policies from other government departments may be used to enhance the overall anti-corruption policy.[289] The third is the Citizens Advisory Committee on Community Relations, whose role is mainly to educate the public on issues of corruption and its detrimental effects on the public and the economy.[290]

Therefore, Hong Kong has strong base for public participation, which has helped it in its fight against public procurement corruption.[291] Botswana and South Africa do not have such committees. Such committees are not only beneficial to the anti-corruption institutions but they are an important ingredient to the public's perception of the government, as the public has the comfort of the additional participation of public representatives in the public procurement anti-corruption strategy.

6.7 Innovation tools and recommendations

The above discussion has highlighted some of the strengths and shortcomings of the four measures (criminal, administrative, institutional and civil activism) that developing countries rely on. For some developing countries their short-comings are more prevalent than their strengths. These short-comings can be addressed through the public procurement anti-corruption tools suggested below.

6.7.1 Public procurement anti-corruption tools

6.7.1.1 Corruption clearance certificate

The corruption clearance certificate is defined in this study as a certificate issued by a relevant authority confirming that: (i) the potential supplier/bidder (an individual,

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288 Klitgaard *Controlling Corruption* 109.
289 Klitgaard *Controlling Corruption* 109.
290 OECD *Specialised Anti-Corruption Institutions* 53.
291 Sen *Law Enforcement and Cross Border Terrorism* 58.

shareholders, or a firm) has been previously convicted of corruption or financial irregularity by a competent court of law or; (ii) that the potential supplier/bidder (an individual, shareholders or a firm) has no record of corruption or a pending court decision that involves corruption or financial irregularity.[292] The corruption clearance certificate will be applicable for procurement of a certain threshold, for example, any procurement above $US 20 000 should require a corruption clearance certificate for tendering purposes.[293]

6.7.1.1.1 How will this corruption clearance certificate work?

There has to be a body or a government agency that is responsible for the administration of corruption clearance certificates.[294] This body keeps the data base of every supplier (an individual, shareholders or a firm) who wishes to contract with the state above the stipulated threshold.[295] The body or government agency captures the personal details of the suppliers including the details of the firm concerned and its subsidiaries.[296] The envisaged body will issue a corruption clearance certificate that indicates whether the supplier is free from corruption or related financial misconduct or whether the supplier has previous corruption convictions or pending corruption convictions.[297]

This corruption clearance certificate becomes a mandatory requirement for every bid the supplier wishes to make.[298] Without such a corruption clearance certificate the supplier's bid will automatically be disqualified.[299] When the call for tenders is advertised, this will become a standard and mandatory requirement for every bid. In practice it will work as demonstrated below:

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292 Brooke *Handbook of International Financial Management* 337.
293 Dragos "Sub-dimensional Public Procurement in the European Union" 201.
294 OECD *Public Governance Review* 52.
295 Dube "Johannes and Lewis "Government Procurement, Preferences and International Trading" 440.
296 Dube "Johannes and Lewis "Government Procurement, Preferences and International Trading" 440.
297 Heissner *Managing Business Integrity: Prevent, Detect and Investigate White-Collar Crime* 47.
298 Khan *Indian Financial System* 6.
299 Khan *Indian Financial System* 6.

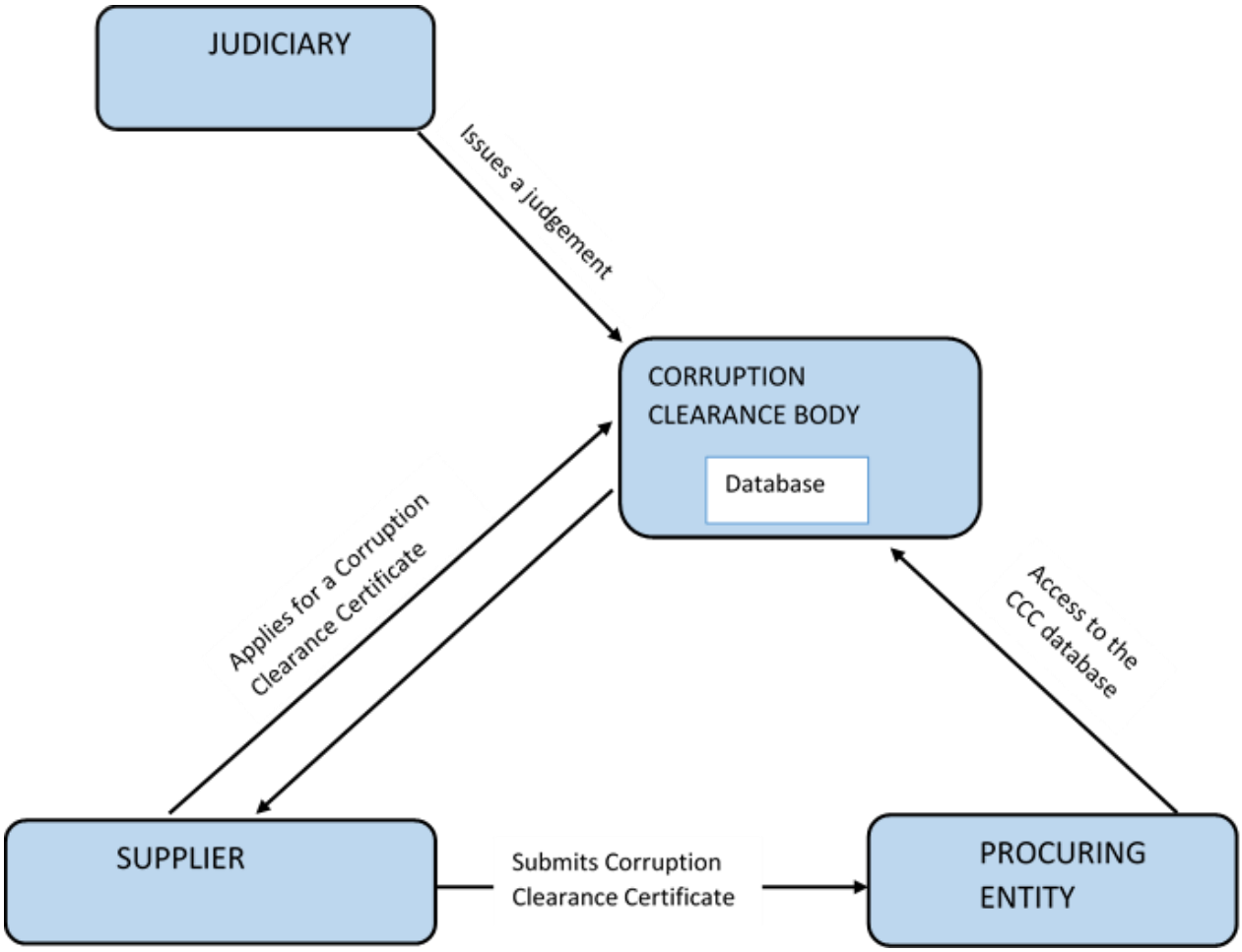

Figure 10: Corruption clearance certificate

There will be a legal requirement that every judgment that involves corruption or financial irregularity, from the level of the regional court or an equivalent court, should automatically sent as a hard copy and electronically to the corruption clearance body within seven days of the judgment.[300] The corruption clearance body then captures and uploads the details of the persons or firm involved, the offence, the amount involved, the sentence, the place and court that passed the judgment, and any appeal (pending).

This database should be publicly available at all times.[301] The procuring entity must have access to this data base and must be encouraged to verify the potential suppliers' corruption conduct at any stage during the life of the contract. If the government contract is going to be sub-contracted, it is the responsibility of the main

[300] Williams-Elegbe *Fighting Corruption in Public Procurement* 152.
[301] Williams-Elegbe *Fighting Corruption in Public Procurement* 152.

supplier to ensure that the sub-contractor obtains the relevant corruption clearance certificate.[302]

If the main contractor cannot submit the corruption clearance certificate for the sub-contractor at the time of the bid, it must be legally binding that the main contractor will not be paid in part or in full without such a corruption clearance certificate of the sub-contractors.[303] This will help the procurement system to rid itself of corrupt suppliers and advocate integrity within public procurement players.[304] If this approach is acceptable, the main contractors will ensure that they sub-contract with suppliers of good ethical repute.[305]

In terms of oversight and accountability, the corruption clearance body should be accountable to the Parliament and should at least appear twice before the Parliament to account on the progress of the report.[306]

The corruption clearance register is distinguished from the tender defaulters' register in that the tender defaulters' register is meant to capture all malfeasance that relates to public procurement.[307]

The proposal for the establishment of a corruption clearance certificate is sound if one takes into account that most bids for a specific threshold require the potential supplier to submit tax clearance certificates.[308] The submission of tax clearance certificates has become standard practice in almost all developing countries, subject to the procurement threshold.[309] It would be possible to use the same data base as that used for tax clearance certificates to extract information on suppliers that are already active in the supply chain. This information would then be used to start the data base of the corruption clearance register.

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302 Tookey and Chlamers "Corruption in the UK Construction Industry" 124.
303 OECD *Development Policy Tools: Corruption in the Extractive Value Chain* 58.
304 Kameswari *Anti-Corruption Strategies: Global and Indian Perspectives* 258.
305 Howe "The Regulatory Impact of Using Public Procurement" 336.
306 Graells *Public Procurement and the EU Procurement Rules* 111.
307 Naude "The Civil Consequences of Corruption under the South African Law" 322.
308 Bahta "The Regulatory Framework in Ethiopia" 71.
309 OECD *The Call for Innovative and Open Government: An Overview of Country Initiatives* 104.

6.7.1.2 Mandatory anti-corruption clause

A mandatory anti-corruption clause is defined in this study as a legally binding agreement between the procuring entity and the supplier, where both the procuring entity and the supplier undertake that they had not engaged in any corrupt activities before the conclusion of the contract, that no corruption shall take place during the execution of the contract, and that any violation of the mandatory anti-corruption clause automatically terminates the contract and triggers criminal liability on the part of those responsible for the violation.[310]

The anti-corruption clause must be signed for all contracts (goods, services, works, emergency procurement, strategic procurement, including even defence and security procurement).[311] This anti-corruption agreement must be signed for all procurement that has a minimum value of $US 5 000.00. The mandatory anti-corruption clause must be signed by each and every supplier and/or sub-contractor at the time of the submission of bids.

6.7.2 Other recommendations

In addition to the models suggested above, the jurisdictions under consideration and other developing countries may wish to consider the following as measures for combating public procurement corruption.

6.7.2.1 Gradual introduction of self-cleaning

Self-cleaning, as already discussed, is a remedy for suppliers that have been debarred whether by reason of mandatory or discretionary debarment, to enable them to be available once again tenders for government contracts.[312] The three jurisdictions under consideration here and other such jurisdictions may wish to consider the gradual introduction of self-cleaning. However, extreme caution must be taken by the bodies responsible for the introduction of self-cleaning. Strict compliance with regards to the personnel involved, the clarification of facts and the

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310 Langseth, Stapenhurst and Pope “National Integrity Systems” 145.
311 ADB/OECD *Curbing Public Procurement Corruption in Asia* 51.
312 Arrowsmith, Prieβ and Friton *Self-Cleaning Public Procurement Law* 5.

measures that the debarred persons, shareholders or the firms have taken in order to effectively deal with the causes of the debarment must be insisted on.

In addition, it is important to ensure that the personnel involved in the administration of self-cleaning must be of the highest ethical standards.[313] If the people administering the self-cleaning process are unethical, then there is the danger of throwing a lifeline to dishonest suppliers, who will continue to milk the public funds through public procurement corruption.[314]

6.7.2.2 Special anti-corruption task force

A special anti-corruption task force is defined in this study as an anti-corruption unit that is set up specifically to monitor the entire procurement process for specific procurement projects that are high-value transactions.[315] The special anti-corruption task force will be involved from the planning phase of such projects right up to the termination of the contract. The special anti-corruption task force will assess the corruption risk of the project itself, as well as the probity of contractors involved and their sub-contractors. The mandate of the special anti-corruption task force will include, *inter alia*, investigating issues of collusion, bid rigging, bribery, price adjustments etc.

6.7.2.3 Civil v criminal charges

Criminal charges instead of civil claims must be laid against both the suppliers and the procurement staff that are involved in public procurement corruption.[316] The tendency in some cases is to pursue a civil claim especially in construction works, which by nature is not a sufficient deterrent in fighting public procurement corruption.[317] Collusion especially in construction works must attract criminal liability as opposed to the fines that are generally preferred in most developing countries such as South Africa.[318]

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313 OECD *Integrity of Public Procurement Good Practice from A to Z* 63.
314 OCED *International Drivers of Corruption: A Tool for Analysis* 78.
315 Freedom House *Countries at the Crossroads 2010: An Analysis of Democratic Governance* 226.
316 Tarun *The Foreign Corrupt Practices Handbook* 237.
317 Koehler *The Foreign Corrupt Practices Act in New Era* 33.
318 Wang and Buckeridge "Ethics for Construction Engineers and Managers in a Globalized Economy" 147.

6.7.2.4 Consequent procurement

Consequent procurement in this study refers to the strong penalties and sanctions that must be meted out against corrupt procuring officials.[319] In most developing countries including in Botswana and South Africa corrupt procuring officials are either demoted or fired or relocated, but without being held criminally liable.[320] Therefore, it is submitted that in every case of alleged public procurement corruption, in addition to the internal measures (suspension or demotion etc) there must be a mandatory requirement that forces all state procuring entities to report the corrupt official for criminal investigations.[321]

6.7.2.5 Collusion, debarment and criminal charges

In most developing countries, where there is collusion, especially in the procurement sector, the guilty parties are fined, in most cases by the competition commission or a tribunal or a similar institution, depending on the jurisdiction.[322] No criminal charges are laid.[323] It is submitted that in future all collusion, particularly in construction works, that affects public procurement must be reported for criminal investigation.[324] Further, in the event of a conviction the colluding parties must be debarred and their details must be recorded in the suggested corruption clearance database, which must affect their consideration for any government further contracts.

6.8 Conclusion

The purpose of this chapter was in the main, to extract the best practical measures for combating public procurement corruption in Hong Kong, Botswana and South Africa with reference to the public procurement regime and the public procurement corruption regime. It was also the aim of this chapter to suggest new public procurement anti-corruption models as well as other new innovations in order to assist developing countries in curbing public procurement corruption.

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319 Curry "Ethics in Procurement" 153.
320 Pinheiro "Corruption in International Commercial Contracts" 268.
321 OECD *Public Governance Reviews: The Korean Public Procurement Service* 29.
322 Gericke "Improving the Management of the National Road Network" 170.
323 OECD *Public Governance Reviews: Integrity Framework for Public Investment* 23-24.
324 Wardhaugh *Cartels, Markets and Crime* 72.

The above discussion focused primarily on the four measures for combating public procurement corruption, namely criminal, administrative, institutional and civil activism. It has been observed that in all three jurisdictions, criminal measures remain the most widely used form of combating public procurement corruption.

6.8.1 Criminal measures

Hong Kong has managed to create a formidable public procurement corruption strategy by creating a synergy between the criminal measures outlined in the criminal laws and empowering the ICAC as an independent and highly competent institution that has the dual powers of investigation and prosecution.[325] Botswana has done fairly well from a criminal law point of view by enacting the relevant criminal law, as well as establishing the DCEC, which resembles the ICAC in purpose.[326] However, the independence of the DCEC is tainted as it is under the office of the President.[327]

Although the DCEC has investigative powers, it has no prosecutorial powers.[328] This has affected the efficiency and objectivity of DCEC.[329] South Africa has its own criminal law and has established the Hawks with the sole mandate of investigating serious corruption, including public procurement corruption.[330] Of the three, the Hawks are the least independent and the least competent to execute the mandate of curbing public procurement corruption.[331]

6.8.2 Administrative measures

In terms of the administrative measures, mandatory debarment is the most widely used form of curbing public procurement corruption by Hong Kong and South Africa, while Botswana uses suspension and delisting, but the intention is the same.[332] What varies in the three jurisdictions are the debarment period, the target of debarment

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325 Johnston “Fighting Systemic Corruption” 97.
326 OECD *Specialised Anti-Corruption Institutions Review of Models* 99.
327 Rotberg *The Corruption Cure* 132.
328 OECD *Specialised Anti-Corruption Institutions Review of Models* 99.
329 OECD *Specialised Anti-Corruption Institutions Review of Models* 99.
330 Fombad “Emerging Hybrid Institutions in Africa” 333.
331 Freedman *Understanding the Constitution of the Republic of South Africa* 306.
332 Adeyeye *Corporate Social Responsibility of Multinational Corporations* 126.

(individuals, shareholders and firms), the reasons for debarment, and the offences that trigger debarment.[333]

The tool to cure debarment, self-cleaning, is not available in any of the three jurisdictions. However, Hong Kong provides a mechanism that allow for something like self-cleaning through its Review Mechanisms.[334] Botswana and South Africa are encouraged to seriously consider self-cleaning as a tool to enhance public procurement.

6.8.3 Institutional measures

In addition to leading institutions ICAC – Hong Kong, DCEC – Botswana and Hawks – South Africa, Botswana has introduced Anti-corruption units in each ministry to monitor procurement and a Corruption Court.[335] These are not available in Hong Kong and South Africa, and are needed much more in South Africa than in Hong Kong. Botswana should be applauded for taking these additional measures.

6.8.4 Civil activism measures

Civil activism is more active in South Africa than in Hong Kong and Botswana.[336] Issues of the cost of litigation and *locus standi* remain a major hindrance in all three jurisdictions.[337] The activism of CSOs is an additional measure to curb public procurement corruption.[338] They are most active in South Africa, particularly in litigation.[339] No CSOs in Botswana and Hong Kong have of their own accord litigated on public procurement corruption.

The legal mechanisms for CSOs to use these avenues exist in Botswana and Hong Kong. The main hindrances against their participation in combating public procurement corruption are the costs of litigation, *locus standi,* and victimisation.[340] The media, especially the independent media, play a crucial role in combating public

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333 Williams-Elegbe *Fighting Corruption in Public Procurement* 31.
334 FSTB *Applications for Review of the Debarment Period under the Review Mechanism* 1-4.
335 Rotberg *The Corruption Cure* 133.
336 Rotberg *The Corruption Cure* 135.
337 Olaniyan *Corruption and Human Rights Law in Africa* 321.
338 OECD *Fighting Corruption in Eastern Europe and Central Asia: Anti-Corruption Reforms* 37.
339 Mbaku *Corruption in Africa: Causes and Consequences and Cleanups* 312.
340 Ladell-Mills *Citizens Against Corruption* 1987.

procurement corruption.[341] Of particular importance are investigative journalism, the reporting of court cases and the media's educative function.[342] The social media (chiefly Facebook) are used mostly by Botswana's DCEC.

6.8.5 New development and innovation

In the final analysis it was observed that Hong Kong has established through legislation a number of oversight committees staffed by civilians that monitor cases of public procurement corruption.[343] Botswana and South Africa do not have such committees, and the leading anti-corruption units grossly lack accountability, a factor which may be contributing to the exacerbation of public procurement corruption. It is recommended that both countries consider establishing such oversight committees.

Second, three new models have been suggested for introduction, namely the corruption clearance certificate, the mandatory anti-corruption clause for every government contract over a certain threshold, and a combination of the two.

Third, four recommendations were made, namely the gradual introduction of self-cleaning, the establishment of a special anti-corruption task force especially for mega projects, the laying of criminal charges instead of civil claims against corrupt suppliers and procuring officials as well as consequent procurement for corrupt procuring officials.

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341 Kajsiu *Discourse Analysis of Corruption: Instituting Neoliberalism Against Corruption* 124.
342 OECD *Fighting Corruption in Transition Economies* 186.
343 Rotberg *The Corruption Cure* 132.

CHAPTER 7: CONCLUSION

7.1 Introduction

The primary purpose of this study was to identify the most practical and effective measures for combating public procurement corruption in developing countries, with a special focus on criminal measures, administrative measures, institutional measures and civil activism measures. This was motivated by the thought that what has been recommended as the best international practice of curbing public procurement corruption may not necessarily be the most practical in any specific place. In developing countries, for instance, their political, economic and social conditions have been shaped by various histories of colonialism and therefore tend to demand divergent approaches from the best international practice.[1] To achieve this primary purpose, the study compared three anti-corruption models used in combating public procurement corruption in developing countries. These models are from Botswana, Hong Kong and South Africa, which were selected for their individual uniqueness in the field of combating public procurement corruption. To this end, the study undertook a comparison of the anti-corruption measures adopted in the three jurisdictions.

Below is a summation of the main findings of each chapter, beginning with Chapter One. This will be followed by a critique of the main findings, the way forward, suggested areas of further research and the final remarks.

7.2 Main findings

7.2.1 Chapter One – Introduction

Chapter One introduced the study, provided the background to the study and motivated it. The chapter highlighted, *inter alia*, that governments in developing countries arguably spend the highest percentage (15-35%) of their budget (estimated to be US$820 billion) annually on the procurement of different goods, services and construction works.[2] Of this amount, US$148 billion is lost annually to

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1 Ganahl *Corruption, Good Governance and the African State* 219.
2 See para 1.3.

public procurement corruption.[3] As a background to the study, this chapter also highlighted that numerous initiatives have been undertaken by various stakeholders in attempts to find lasting solutions to control public procurement corruption in developing countries.[4] Furthermore, Chapter One noted that, some of the key solutions suggested by the various stakeholders are the adherence to public procurement principles, political will, good governance, enforcement of existing anti-corruption measures and so forth.[5] However, it was stated in Chapter One that the reality in most developing countries is that these solutions do not support a significant decrease of public procurement corruption.[6] Hence, the need to find other anti-corruption measures that complements existing measures.

To accomplish the main objective of the study, which is to recommend a way of putting an end to this massive drain on the finances of these jurisdictions, the approach taken by the researcher was analogous to that of a good brain surgeon, who would first carefully do proper diagnosis of the patient's condition before embarking on a cure, which might even include brain surgery.[7] On the other hand, a bad brain surgeon might operate on the basis of the general principles of brain surgery before making a proper diagnosis, and the result might be the final incapacitation of the patient.

Public procurement in this study is the brain of any government in a developing country. It has over the years suffered from the disease of corruption.[8] Different cures such as adherence to procurement principles and the exercise of political will have been prescribed, but without a proper diagnosis.[9] This has led to public procurement systems that are riddled with corruption.[10]

A good brain surgeon would understand that a well-functioning brain would be essential in a well-functioning human being.[11] This study argued that a well-

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3 Nzabanita *Renewed for Africa's Makeover* 42.
4 OECD *Fighting Corruption and Promoting Integrity in Public Procurement* 38.
5 Neamtu and Dragos "Fighting Corruption and Central and Eastern European Countries" 160.
6 Hameed *The Costs of Corruption* 21.
7 Lewis and Lewis *Gifted Hands: The Ben Carson Story* 107.
8 Wraith and Simpkins *Corruption in Developing Countries* 164.
9 OECD *Preventing Public Procurement Corruption* 10-15.
10 Mills *Causes of Public Procurement Sector Institutions and its Impact on Development* 2.
11 Lewis and Lewis *Gifted Hands: The Ben Carson Story* 107.

functioning public procurement system devoid of corruption is paramount to a healthy and democratic nation with a generally satisfied citizenry.

Against this background the public procurement systems of the three jurisdictions were selected. It was stated in Chapter One that Hong Kong was chosen for two key reasons: first, it has an anti-corruption strategy that is executed by a single anti-corruption agency, the ICAC; and second, for its innovative use of anti-corruption committees staffed by members of the general public, who oversee the work of the ICAC in each and every case on public procurement corruption.[12]

Botswana was chosen for four main reasons. First, it has been ranked as the least corrupt African country by Transparency International for the past 16 consecutive years, a finding which is internationally accepted. Second, it adapted the Hong Kong model by establishing the DCEC. Third, it has introduced Anti-Corruption Units in each Ministry and established the Botswana Corruption Court. And fourth, it has reformed its public procurement law by introducing a single public procurement legislation, the PPADB Act, which incorporates both public procurement procedures as well as (some) measures for combating public procurement corruption.[13]

South Africa was chosen for four main reasons. First, it has one of the highest percentages of public procurement corruption among countries with comparable or smaller economies.[14] Second, it has no anti-corruption strategy and it has over 10 state institutions, all of which claim to be fighting public procurement corruption. Third, it has a great deal of procurement legislation, that impact directly on public procurement.[15] And fourth, South Africa may be able to learn from other jurisdictions that are doing fairly well in reducing public procurement corruption.

7.2.2 Chapter Two - Theoretical foundations

The first purpose of Chapter Two was to establish the internationally accepted public procurement norms by examining: (i) international instruments on public procurement; (ii) regional instruments on public procurement; and (iii) how

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12 Quah *Curbing Corruption in Asian Countries: An Impossible Dream?* 449.
13 OECD *Investment Policy Reviews Botswana 2014* 140.
14 Sugudav-Sewpersadh *Corruption and the Law: An Evaluation of the Legislative Framework* 5-6.
15 Naude "The Civil Law Consequences of Corruption under South African Law" 338.

international and regional instruments on corruption provide for curbing public procurement corruption, with special focus on criminal measures, administrative measures, institutional measures and civil activism measures.[16]

It was established in Chapter Two that both international and regional instruments recommend that each country must have a specific procurement legislation that clearly provides for its procurement methods as well as its procurement processes.[17] It was further established that an effective public procurement system must be founded on at least the following procurement principles: transparency; accountability; fairness; equality; competitiveness; value for money; and integrity.[18] Also, it was shown in this chapter that the realisation of these principles depends, *inter alia,* on the professionalism of the procurement personnel.[19]

The second purpose of Chapter Two was to discuss the notion of public procurement corruption. It was established in this chapter that there is no generally accepted definition of public procurement corruption within the international community.[20] However, the absence of a definition of public procurement may influence the inappropriate measures for curbing public procurement corruption.[21]

Further, Chapter Two identified different types and forms of public procurement corruption, such as bribery, collusion, bid rigging, bid rolling, bid rotation and political corruption.[22] It was established that these are caused in the main, by the following: the personal circumstances of the procuring officials; the personal circumstances of politicians, including the desire to consolidate political power; political transition, especially the assumption of power by democratic states from colonial powers, creating, *inter alia,* a vacuum in institutions, the legal framework and the personnel capable of curbing public procurement corruption; and lastly, economic transition.

With respect to the measures for combating public procurement corruption, it was established in Chapter Two that criminal measures remain the most widely used

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16 OECD *Principles of Integrity in Public Procurement* 134.
17 LEGO *Comparison of the International Instruments on Public Procurement* 2-3.
18 Georgieva *Using Transparency Against Corruption in Public Procurement* 34.
19 Steinfield "The What, Who and How of Public Procurement: Job Functions Performed" 312.
20 Georgieva *Using Transparency Against Corruption in Public Procurement* 52.
21 Quinones "The OECD Convention and Asia" 41.
22 Ware *et al* "Corruption in Procurement: A Perennial Challenge"65.

method.[23] Under administrative measures, debarment remains the most widely used method - in particular, mandatory debarment.[24] Here too, another important concept identified was self-cleaning.[25] It was emphasised that self-cleaning as a measure to cure debarment should be seriously considered by developing countries, both at regional and at domestic level.

It was noted in Chapter Two that for institutional measures to be more effective, the relevant institutions must be operationally, structurally, financially and politically independent.[26] Further, it was established that streamlining between law enforcement institutions and procurement institutions may be necessary to give focus to each institution, provided the institutions have been given the necessary power to conduct effective investigations and prosecutions.[27]

It was concluded in Chapter Two that at international and regional level civil activism remains the measure least used.

The theoretical findings of Chapter Two were the general standards against which the public procurement systems of Hong Kong, Botswana and South Africa, their susceptibility to public procurement corruption, and how each jurisdiction uses criminal measures, administrative measures, institutional measures and civil activism measures to curbing such corruption were judged.

7.2.3 Chapter Three – Hong Kong

Chapter Three discussed Hong Kong's public procurement regime and its measures for combating public procurement corruption, with special focus not just on the ICAC as an instrument dealing with criminal remedies but also Hong Kong's use of administrative measures, institutional measures and civil activism measures.[28] This chapter noted that Hong Kong is subject to international and regional procurement legislation, in particular the WTO GPA at international level and the APEC at regional

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23 Arrowsmith, Linarelli and Wallace *Regulating Public Procurement* 59.
24 Adeyeye *Corporate Social Responsibility of Multinational Corporations* 126.
25 Tatrai "EU Public Procurement and Probity" 485.
26 Lopes and Theisohn *Ownership, Leadership and Transformation* 117.
27 OECD *Specialised Anti-Corruption Institutions Review of Models* 12.
28 Baark and Sharif "Hong Kong Special Administrative Regions" 180.

level.[29] In addition, it also has the necessary domestic procurement legislation, which is used to regulate affairs that are not covered by the WTO GPA and the APEC.[30] Further, Hong Kong has a clear procurement method and uses open tendering as its default procurement method.[31] It was noted that Hong Kong observes four procurement principles (public accountability, value for money, transparency, and open and fair competition) in accordance with international best practice.[32]

Further, Chapter Three made the point that Hong Kong's has a clear general anti-corruption strategy, which extends to public procurement.[33] This anti-corruption strategy is executed by the ICAC, which incorporates both criminal and institutional measures.[34] This chapter dealt with the independence of the ICAC and established that the ICAC enjoys a very high degree of autonomy in terms of, *inter alia*, its operations, budget, personnel, investigations and prosecutions.[35] Further, it was also established in this chapter that despite its independence, the ICAC is continuously under political threat aimed at weakening its independence.

Hong Kong uses the traditional approach for combating public procurement corruption, that is, using criminal law legislation for curbing public procurement corruption and public procurement legislation specifically for procurement purposes.

In terms of administrative measures it was established that Hong Kong makes use of debarment, but makes limited application of suspension and blacklisting.[36]

Another finding was that Hong Kong provides for self-cleaning, albeit with a different name.[37] This is of limited application. It was further established that Hong Kong must reform its self-cleaning measures and must provide legal certainty with regards to the conditions which suppliers must comply with, in order to be eligible for self-cleaning.

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29 Yamazawa *APEC: New Agenda in its Third Decade* 62.
30 ADB/OECD *Anti-Corruption Initiative for Asia and the Pacific* 15.
31 ADB/OECD *Anti-Corruption Initiative for Asia and the Pacific* 15.
32 ADB/OECD *Anti-Corruption Initiative for Asia and the Pacific* 15.
33 Quah *Curbing Corruption in Asian Countries: An Impossible Dream?* 237.
34 Quah *Curbing Corruption in Asian Countries: An Impossible Dream?* 238.
35 Caroll *A Concise History of Hong Kong* 174.
36 ADB/OECD *Anti-Corruption Initiative for Asia and the Pacific* 23.
37 FSTB *Applications for Review of the Debarment Period under the Review Mechanism.*

Also, it was established that civil activism is the least used measure for combating public procurement corruption.[38]

The same chapter revealed that Hong Kong makes use of four different oversight committees staffed by members of the general public. These committees have sweeping monitoring powers in the handling of public procurement corruption cases by the ICAC, from the reporting of the public procurement corruption allegation to the conclusion of the case.

7.2.4 Chapter Four - Botswana

Chapter Four discussed Botswana's public procurement regime and its measures for combating public procurement corruption, with special focus on criminal measures, administrative measures, institutional measures and civil activism measures.[39] The chapter found that Botswana has specific procurement legislation, the PPADB Act. This legislation has the dual effect of regulating public procurement and combating corruption (the classical approach).

It was noted in Chapter Four that Botswana has one preeminent procurement institution, the PPADB, which delegates procurement authority to various government procurement units and other organs of state.[40] Further, it was found in Chapter Four that Botswana has a clearly defined procurement philosophy with open tendering as the default method of procurement, which is realised through the proper and effective use of procurement principles.

Also, Chapter Four noted that Botswana is not a party to any international or regional instruments on public procurement.[41]

Further, Chapter Four revealed that Botswana's public procurement corruption is on the rise, compared to the period before the current administration came to power.[42]

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38 ADB/OECD *Anti-Corruption Initiative for Asia and the Pacific* 165.
39 Mwamba *An Evaluation of the Anti-Corruption Initiatives in Botswana* 70.
40 Mwamba *An Evaluation of the Anti-Corruption Initiatives in Botswana* 69.
41 Carborn and Arrowsmith "Procurement Methods in the Public procurement Systems of Africa" 303.
42 Mungiu-Pippidi *The Quest for Good Governance* 148.

It was also noted in Chapter Four that although Botswana adapted the Hong Kong anti-corruption model, it has failed to create legal mechanisms that ensured that the DCEC, the lead anti-corruption body, was independent structurally and operationally; and in terms of its decision-making process, because it resides in the Office of the President.

Unique features revealed in Chapter Four were the Botswana Corruption Court and the Anti-corruption Units in each ministry, which were established as additional institutional measures for curbing public procurement corruption.

Moreover, it was found that Botswana does not have express provisions on debarment, although its practice of suspensions and delisting can be partially equated to debarment. Further, this chapter revealed that there is no self-cleaning in Botswana. Chapter Four established that although civil activism is infrequent and under threat in Botswana, the DCEC has managed to use the social media, in particular Facebook, to educate the young on the evils of public procurement corruption.

7.2.5 Chapter Five – South Africa

Chapter Five discussed South Africa's public procurement regime and its measures for combating public procurement corruption, with special focus on criminal measures, administrative measures, institutional measures and civil activism measures. This chapter noted that South Africa is not party to any international or regional instrument on public procurement.

Further, it was found that South Africa relies on domestic procurement legislation in particular the PFMA. The problems highlighted were, *inter alia*, that South Africa has a great deal of fragmented procurement legislation, a fact which has created easy opportunities for public procurement corruption.[43] This chapter also found that the lack of specific public procurement legislation has created a lacuna, in that there is no procurement institution that is entirely responsible for the administration and

[43] Quinot *An Institutional Legal Framework for Regulating Public Procurement in South Africa* 44-46.

coordination of public procurement.[44] This gap makes it extremely difficult for South Africa to enforce its procurement principles, although they are constitutionally provided. This conclusion is supported by the high levels of public procurement corruption and the unprecedented quantity of public procurement litigation that the country is faced with.

As far as combating public procurement corruption is concerned, it was established in Chapter Five that South Africa uses the traditional cum silo approach. Other problems dealt with in this chapter that emanate from the traditional sum silo approach include South Africa's lack of an anti-corruption strategy and an effective lead anti-corruption unit.[45] This makes the existing criminal measures for combating public procurement corruption generally ineffective. Further, it was highlighted in this chapter that cadre deployment, executive influence and the failure by oversight institutions, in particular the National Assembly, to hold the executive accountable are some of the major causes of public procurement corruption.

In addition, there are more than 10 institutions that are mandated to fight public procurement corruption, however, there is no institution that effectively administers, leads and coordinates the fight against public procurement corruption. It was stated in this chapter that this has resulted in the selective prosecution, duplication and omission of public procurement cases, which have aided in the escalation of public procurement corruption at all government levels.

This chapter also found that although South Africa makes provision for debarment as the main administrative measure for combating public procurement corruption, debarment still needs to be properly categorised and its processes must be clearly outlined preferably through a single procurement legislation.

This chapter also established that self-cleaning is not expressly provided for, and it has been suggested in this chapter that legislation needs to be passed that promotes self-cleaning.

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44 Quinot *An Institutional Legal Framework for Regulating Public Procurement in South Africa* 10.
45 Habtemichael *Anti-corruption Strategies in Public Sector* 95-96.

Civil activism is alive to combating public procurement corruption, in particular via the CSOs and the media.[46] Further, individuals are relatively active on the matters that aid in the combating of public procurement corruption and have managed to influence legislative amendments that have a bearing on combating public procurement corruption.

It was also seen in this chapter that although South Africa is the only African country that is a party to the OECD Convention on Bribery, the country has dismally failed to comply with this Convention.[47]

7.2.6 Chapter Six – Comparative analysis

Chapter Six highlighted a number of similarities and differences in the development of public procurement in each jurisdiction. It was established in this chapter that historically all three jurisdictions were at one stage British colonies and have maintained the application of common law as part of their legal system. The periods before and after colonisation by Britain and the subsequent colonisers have had different impacts on public procurement as well as public procurement corruption and the manner in which it is curbed.

In so far as the public procurement regime is concerned, it was established that Hong Kong and Botswana have specific procurement legislation, while South Africa does not have such legislation.[48] Hong Kong and Botswana have benefited from the establishment of specific procurement legislation in that: (i) red tape is reduced; (ii) procurement principles are enforced; (iii) there is a reduction in public procurement corruption; (iv) there is harmonisation of the procurement process; (v) there is a reduction in irregular and wasteful expenditure; and (iv) there is a standardised dispute resolution process. By failing to enact specific procurement legislation, South Africa has failed to effectively address these key areas of concern.

It was also highlighted in Chapter Six was that by enacting specific procurement legislation Hong Kong and Botswana, unlike South Africa, have managed to

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46 Santiso *Financial Governance and the Rule* 6.
47 OECD *Better Policies for Development 2014: Policy Coherence and Illicit Financial Flows* 36.
48 Quinot *An Institutional Legal Framework for Regulating Public Procurement in South Africa* 44-46.

professionalise their public procurement systems.[49] This was done through the deliberate training and recruitment of staff with public procurement expertise. Another advantage which South Africa does not enjoy is the establishment and continuous development of specific public procurement institutions.[50]

In the area of public procurement corruption, it was established in Chapter Six that all three jurisdictions have specific corruption legislation. However, Hong Kong and Botswana have clear anti-corruption strategies, which South Africa does not have.[51] In the context of public procurement corruption, Hong Kong and Botswana have preventative mechanisms as part of their anti-corruption strategy.

Both jurisdictions have a single dedicated anti-corruption unit, whilst South Africa has many anti-corruption units. The advantage that this has brought to Hong Kong and Botswana is the professionalisation of their anti-corruption units, consistency in the enforcement of their anti-corruption laws, and the accountability of their anti-corruption units. For South Africa, the lack of a dedicated anti-corruption unit has resulted in the manipulation of the multiplicity of smaller anti-corruption units by, *inter alia*, the executive.

Further, it was established in Chapter Six that all three jurisdictions do not have clearly defined debarment procedures and that this must be addressed.

It was also established that in all three jurisdictions the concept of self-cleaning is not clearly provided for.

Further, it was established that in Hong Kong and South Africa civil activism is fairly established as one of the mechanisms for combating public procurement corruption. In Botswana there is scarcely any civil activism except for the use of social of media by the DCEC.

Chapter Six concluded by recommending the following two main anti-corruption tools: a corruption clearance certificate and; a mandatory anti-corruption clause in

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49 World Bank *Benchmarking Public Procurement 2016: Assessing Public Procurement Systems* 14.

50 Quinot *An Institutional Legal Framework for Regulating Public Procurement in South Africa* 24, 28-29.

51 Quah *Curbing Corruption in Asian Countries: An Impossible Dream?* 449.

government contracts for certain thresholds. Additional recommendations were: the pursuance of criminal charges in all cases of public procurement corruption as opposed to civil charges; consequent procurement; criminal charges for collusion, as opposed to fines, especially in construction procurement; and the introduction of a special anti-corruption task force specifically for high-value procurement.

7.3 A critique of the main findings

This thesis acknowledged that best international practice in public procurement and combating public procurement corruption has been incorporated in the legislation of developing countries. However, the levels of corruption in public procurement indicate the ineffectiveness of international best practice in these countries. In discussing the public procurement systems of Hong Kong, Botswana and South Africa, this study identified that there are basically three approaches to fighting public procurement corruption. These three approaches were labelled in this study as the traditional approach (Hong Kong); the classical approach (Botswana); and the traditional *cum* silo approach (South Africa).

7.3.1 Traditional approach

The traditional approach, identified in Hong Kong, uses procurement legislation and procurement institutions mainly for procurement purposes. However, to address public procurement corruption it reverts to general corruption legislation. For this reason, the traditional approach relies heavily on the use of criminal measures for combating public procurement corruption.

For the traditional approach to be effective, the criminal justice system must have the following minimum standard: high level political will at the highest level of the government that spearheads the fight against public procurement corruption, not just in words but in action. This must be demonstrated by fully supporting the institutions that are tasked with this mandate; and a clear anti-corruption legal framework. The anti-corruption legal framework must clearly create corruption offences, establish an independent anti-corruption agency which has the following powers (to investigate, to prosecute, to search and seize, to detain suspects for a reasonable time, to intercept communications, to establish an anti-corruption strategy, to access bank

accounts, to hold and examine business documents, to prohibit selling of any assets and to protect confidentiality of the investigation); in addition, the legal framework must provide for security of tenure, it must protect employees of the anti-corruption agency and their families from any victimisation associated with their work.

However, Hong Kong as a jurisdiction that uses the traditional approach has demonstrated that it over relies on the enforcement of criminal measures by ICAC. This has resulted in the administrative measures and civil activism measures not being fully used in combating public procurement corruption. As discussed already, debarment as part of administrative measures has recently been introduced in Hong Kong *albeit* in an unconvincing legal manner.[52] Again, as discussed earlier civil activism has been noted in the media but not by individuals and CSOs.

However, what Hong Kong has managed to do very well is to create a very strong oversight mechanism over the work of ICAC. The oversight institutions (four of them) are created by the ICAC Ordinance and are very active in combating public procurement corruption.

Notable weaknesses of the traditional approach that have been identified in Hong Kong under criminal measures are that ICAC reports to the Chief Executive of Hong Kong. This has the potential of negatively influencing the decisions and operations of ICAC especially if a corrupt leader takes over as the Chief Executive of Hong Kong. It is suggested that ICAC must rather report to the Legislative Council which is made up of, both the governing party and members of the opposition party. This way the Chief Executive will not have any control over ICAC.

Developing countries that would like to stick to the traditional approach must not follow the example of Hong Kong's ICAC blindly. They must ensure that in addition to the positives identified in traditional approach the following issues must be addressed from a legal point of view: structurally and institutional independence of the anti-corruption agency must be guaranteed; the legislation must be provide and promote administrative measures for combating public procurement corruption; the legislation must be provide and promote civil activism measures for combating public procurement corruption.

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[52] Hong Kong needs more legal clarity on the principle of self-cleaning.

It submitted that it is pointless for developing countries to replicate the ICAC model without the requisite sincere political will and oversight institutions that are staffed by non-government employees who have access to all the information regarding a particular public procurement corruption case, that is, from the reporting phase, investigation and prosecution until the conclusion of that particular case.

7.3.2 Classical approach

The classical approach ascribed in this study to Botswana, is comprised of procurement legislation, which contains some but not all relevant public procurement anti-corruption provisions. Thus, the classical approach moves away from the traditional approach by incorporating in the procurement legislation certain mechanisms for fighting public procurement corruption. However, the classical approach as practiced in Botswana, relies heavily on criminal measures of combating public procurement corruption. In addition, Botswana has modelled its anti-corruption model in the same fashion like Hong Kong. The effect is that the anti-corruption provisions provided in the procurement legislation are hardly enforced by the procuring institutions.

Furthermore, the classical approach manifest in Botswana does not create any strong and credible oversight institutions that monitor the operations of DCEC. This lack of internal oversight arising out of criminal measures has made the operations and investigations of DCEC very suspicious and highly political in some cases. This has resulted in the public generally perceiving DCEC to be less independent particularly under the current the administration.

Another criticism levelled against the classical approach is its failure to have legal provisions that embrace and promote administrative measures to the full extent that is required for effectively combating public procurement corruption. Whilst Botswana provides for delisting and suspension as part of administrative measures for combating public procurement corruption, glaring gaps such as mandatory and discretionary suspension and blacklisting are not expressed in the PPAD Act.

Another criticism of the classical approach as is the case in Botswana is that both the procurement legislation and the anti-corruption legislation (CECA) do not provide

for civil activism. The following factors that encourage civil activism are lacking in the classical approach as practiced by Botswana: the legal framework that protects civil participation in governmental activities, legal framework that eases access to information for civil activism purposes, legal framework that eases *locus standi* in cases involving public procurement corruption and enactment of deliberate policies aimed at reducing legal costs where civil activists are litigating in cases involving public procurement corruption for the benefit of the citizens.

7.3.3 Traditional cum silo approach

The traditional cum silo approach, identified with South Africa, is made up of the traditional approach as discussed above as well as multiple anti-corruption institutions that are involved in combating public procurement corruption investigations and prosecutions. These multiple anti-corruption institutions are fragmented and do not share information regarding on-going public procurement corruption investigations or pending public procurement corruption investigations. In the end, there are selective investigations and prosecutions, omissions of public procurement corruption investigations, duplication of investigations and prosecutions, wastage of resources (human and financial), inept handling of crucial evidence relating to public procurement corruption investigations and toxic political infiltration of some of the anti-corruption institutions by the executive and their corrupt allies.

Criticisms levelled against the traditional cum silo approach are many but the following are critical: the criminal measures are not as compact in comparison to the pure traditional approach; there is no leading anti-corruption institution that spearheads, coordinates and harmonises all investigations of public procurement corruption; there is no anti-corruption strategy; the investigations are conducted by multiple institutions who may lack the competence and zeal required to effectively tackle public procurement corruption; a separate prosecution institution is required to prosecute on a public procurement investigation done by another investigation institution that may lack crucial evidence deliberately omitted by the investigative institution to secure a successful conviction.

Additional criticisms of the institutional frameworks under the traditional cum silo approach are also worth mentioning. First, separating the investigation and prosecution institutions creates room for political influence especially if one or both institutions are politically polarised. Second, the multiple anti-corruption institutions are retrogressive to the professionalisation of those institutions. Third, multiple anti-corruption institutions inherently stunt staff development in the fight against public procurement corruption. Fourth, the lack of independence of some of these institutions is endemic. Other criticisms are that: lengthy investigations are conducted; the lack of proper accountability; and there are no effective internal oversight institutions that have access to public procurement corruption cases that are on-going, pending or those that have been concluded.

From an administrative point of view, the traditional cum silo approach is criticised for failing to address the issues of debarment holistically. Of notable concern is the inability of the traditional cum silo approach to have a single legislation that provides for debarment;[53] legal and logical reasons for debarment are not clearly spelt out; debarment is limited only to offences that have their genesis in procurement; whether a conviction coupled by a final judgment is a requirement for debarment;[54] proper identification of the procuring entity that is responsible for debarment at national level, provincial level and local government level is not provided for; inefficient management of the tender defaulters register which may be used to effect suspension or blacklisting.

Under the traditional cum silo approach there is no legal framework for self-cleaning.[55] Effectively, it means that debarment under the traditional cum silo approach is punitive in nature as the debarment legal framework does not allow any derogation from the debarment sanction.

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53 South Africa has three legislation that provides for debarment (mandatory and discretionary). These are the PFMA, PPPFA and the Corruption Act.

54 In South Africa for example the PFMA and the PPPFA are silent on whether there is need for a conviction and a final judgement for debarment purposes whereas the Corruption Act makes only a conviction a requirement for debarment but is silent on whether the conviction must not emanate from a final judgment. It is not clear what the effect of an appeal in South African law for debarment purposes. Does an appeal suspend debarment or does debarment holds until the appeal is finalised.

55 In South Africa a supplier may attempt to be considered for self-cleaning in terms of the Corruption Act (section 28(4)) which authorises the National Treasury to have discretion on the debarment period.

Positives that emanate from the traditional cum silo approach are that it has strong civil activism characteristics in so far as combating public procurement corruption is concerned. The traditional cum silo approach has managed to create an environment that is civil activism friendly due to the following factors: constitutionally recognising and giving effect to the right to access of information; enacting appropriate legislation that allows freedom of expression; enacting legislation that promotes access to information; judiciary that is flexible in granting individuals, CSOs and the media, the right to be appear in court as *amicus curiae* in litigation and legislation that promotes and protects whistle-blowers.

7.4 Way forward

The above critique has highlighted the strengths and weaknesses of the three approaches (traditional, classical and the traditional cum silo) as far as combating public procurement corruption is concerned with specific focus on criminal measures, administrative measures, institutional measures and civil activism measures. The essence of the above critique was to address the question: What are the most practical and effective measures that can be taken to combat public procurement corruption in developing countries?

The traditional cum silo approach is the most undesirable approach to combating public procurement corruption. It is a complete recipe for the escalation of public procurement corruption. South Africa and other developing countries that are practising the traditional cum silo approach are encouraged to effect public procurement anti-corruption reforms as a matter of urgency.

It was established that the traditional approach if implemented in its purest form, may still be a good option for those developing countries that would like to maintain it. However, with the new challenges that modern public procurement is demanding, it may be increasingly ineffective in the long term.

The classical approach may be the better option provided it is able to adopt the traditional approach in its purest form while effectively regulating public procurement corruption through clear and sufficient legal provisions. However, like the traditional approach, the classical approach may not provide for contemporary challenges

arising from e-procurement and cyber-crime in public procurement corruption, something that was not discussed in detail in this study but may require further research.

None of the approaches is capable to address the modern procurement challenges effectively while anticipating future challenges of regulating public procurement corruption. With this in mind and in light of the above discussion: What is the way forward in combating public procurement corruption? This study proposes a fourth approach to fighting public procurement corruption

7.4.1 Contemporary approach

The contemporary approach advocates for the creation of a single legislation that regulates public procurement and public procurement corruption. This thesis proposes a model the *Public Procurement and Combating of Public Procurement Corruption Act* (hereafter PPCPPC) for consideration by developing countries. This legislation principally aims to make a distinction between regulating general corruption and public procurement corruption. The envisaged PPCPPC should provide for public procurement regulation in Part A and measures for combating public procurement corruption in Part B (criminal measures, administrative measures, institutional measures and civil activism measures) in one legislation.

7.4.2 Key features of the contemporary approach

7.4.2.1 Criminal measures

The PPCPPC will automatically embrace the strengths of criminal measures under the traditional approach. In addition, it will establish a combination of the enforcement mechanisms of criminal measures and independent public procurement anti-corruption institutions as part of the criminal measures.

7.4.2.1.1 Specific procurement offences

The PPCPPC must also create offences that are specific to public procurement. It is clear that the three approaches discussed above treat public procurement corruption as part of general corruption which may have resulted in the wrong techniques being used both to investigate and prosecute cases of public procurement corruption. The

contemporary approach also envisages the use of technology and cyber-crime in the commission of public procurement corruption. Currently, a number of countries have shown interest in e-procurement but without fully appreciating how public procurement corruption takes place within the environment of e-procurement. In addition, most developing countries do not have legislation that addresses technological advancement within the public procurement space. The contemporary approach must address this gap by ensuring that the PPCPPC has legal provisions that adequately address the use of technology in public procurement.

7.4.2.1.2 International data base and foreign convictions

This study further proposes that the contemporary approach, through the PPCPPC must provide for the creation an international data base for multi-national companies that are involved in corruption and other malpractices that affect the integrity of public procurement. Currently, all the approaches do not provide for such an eventuality. The international data base for multi-national companies involved in corruption, financial malpractices and other malpractices detrimental to sound procurement will become very important in the future especially in areas of debarment and self-cleaning. It will also become very important in dealing with the role of foreign convictions for debarment and self-cleaning considerations, an area that is not addressed by most developing countries.

7.4.2.2 Institutional measures

In terms of the PPCPPC , the independent public procurement anti-corruption institutions must be independent from political interference and must have their own financial resources funded directly from the state finances subject to national audit and other audits that may be deemed necessary. The personnel of the independent public procurement anti-corruption institutions must be independent contractors with security of tenure as opposed to civil servants as is the current position in most developing countries. This will enable the professionalisation of the independent public procurement anti-corruption institutions. The public procurement anti-corruption institutions must have the powers to investigate and prosecute in addition to any other powers that they may possess. They must not delegate this power to any other entity.

7.4.2.3 Administrative measures

In terms of administrative measures, the contemporary approach, through the PPCPPC must provide for a proper legal scope for debarment. The PPCPPC must clearly outline and define the following: the principles of debarment, the grounds for debarment, the period of debarment, the target of debarment, the effect of debarment on the main contractor and sub-contractors, the effect of debarment on shareholders, the effect of debarment on subsidiary firms, the effect of debarment on senior management and personnel.

7.4.2.3.1 Self-cleaning

The contemporary approach through the PPCPPC must address the concept of self-cleaning as a tool either to reduce the debarment period or to have the debarment period cancelled and all other matters that may arise out of debarment. The contemporary approach must address the legal requirements for self-cleaning such as: clarification of facts; repairing the damage, personnel measures, structural and organisational measures, self-cleaning period, recidivists and self-cleaning as well as assigning proper institutions that are responsible for self-cleaning.

7.4.2.4 Civil activism

The same factors that have made civil activism a success under the traditional cum silo approach must be adopted in the contemporary approach. These factors must therefore be included in the PPCPPC in the chapter on civil activism. The factors include: the right to access of information; the right freedom of expression; and legal protection for whistle-blowers from any victimisation.

7.4.2.5 Oversight

Oversight of the enforcement of all the public procurement anti-corruption measures under the contemporary approach should adopt Hong Kong's approach of creating oversight institutions that have unlimited access to any public procurement corruption case throughout its entire cycle. Staffing of these oversight institutions will be from non-government employees (ordinary citizens). This is in addition to other

oversight institutions such as the courts and the national assembly. This should be distinctly provided in the envisaged PPCPPC.

7.4.2.6 Additional anti-corruption tools

7.4.2.6.1 Corruption clearance certificate

An additional pillar that will strengthen the contemporary approach that must be incorporated in the PPCPPC is the compulsory requirement for each supplier to provide a corruption clearance certificate at the time when the supplier submits tender documents. The corruption clearance certificate should be in the government contract from a certain threshold that will be determined by the developing country. Currently, all developing countries require written contracts for procurement that is of certain value. The threshold in a particular country that determines whether a tender must be competitive and reduced in writing can be the starting threshold for the introduction of the corruption clearance certificate. Adopting the corruption clearance certificate should not be cumbersome since most developing countries already prescribe for tax clearance certificates from suppliers for procurement considerations of a certain threshold. Therefore, the corruption clearance certificate can be adopted immediately without waiting for the other massive procurement reforms suggested for the contemporary approach.

7.4.2.6.2 Anti-corruption clause

Another pillar aimed at strengthening the contemporary approach that must be incorporated in the PPCPPC is the introduction of the mandatory anti-corruption clause in all government contracts that are of the same value as those that require a tax clearance certificate or corruption clearance certificate. Violation of the anti-corruption clause will then trigger a series of sanctions which must include criminal sanctions and debarment from further government contracts. The latter will be subject to strict self-cleaning measures depending on the nature of the offence in question and the punishment meted out by the court.

The founding pillars of the contemporary approach are summarised in the diagram below:

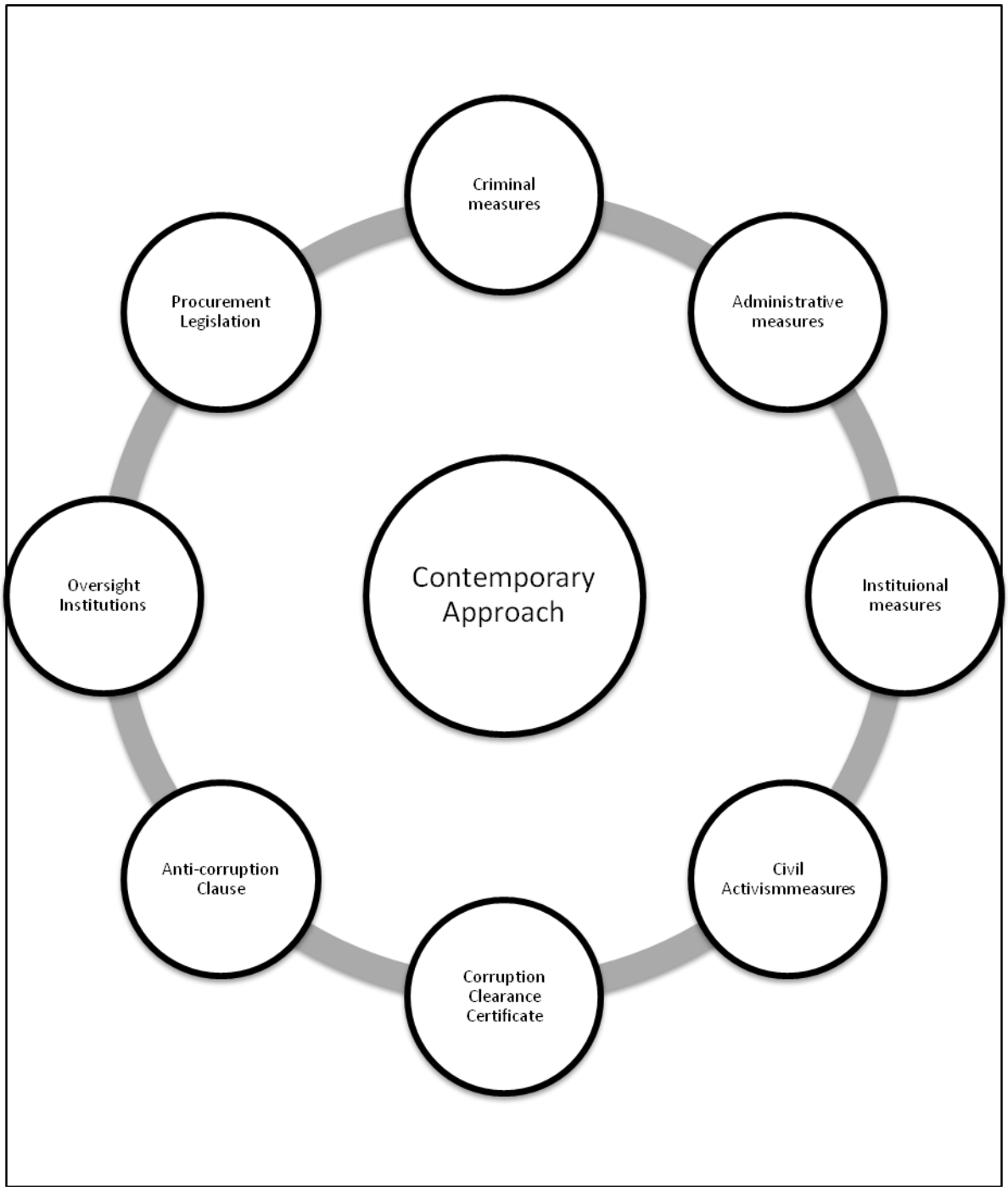

Figure 11: Contemporary approach

7.5 Areas of further research

A number of problems have been highlighted in this study that make it difficult for developing countries to combat public procurement corruption. These problematic areas were not properly ventilated in this study and require further research. The following areas for future research have been identified:

(i) An investigation (preferably empirical) could be performed into why the WTO GPA has not been attractive to developing countries.[56] Would it be necessary to revise the WTO GPA in order to give it purpose as an international instrument in public procurement? This may require a stakeholder conference or individual engagement with each WTO member state.

(ii) How far should anti-corruption provisions be incorporated in procurement legislation? Should procurement legislation retain its traditional approach of regulating public procurement and leave public procurement corruption to be dealt with under a separate legal regime?[57]

(iii) It has been established in this study that Hong Kong's ICAC has investigative powers and prosecutorial powers. How will such power be managed against abuse, especially in the hands of dictators, a risk which seems to be realised in many developing countries, especially in Africa?[58] On the other hand, if anti-corruption units are good at investigating but are let down by an incompetent and partisan prosecuting authority and vice versa, which results in poor or low conviction rates, how does one balance this power to get the best results?

(iv) Debarment, whether it is mandatory or discretionary, is still a problematic area for most developing countries.[59] Should debarment be enforced by the procuring entity, or there is need to establish a central body that administers debarment? The latter is preferred, depending on the size of the jurisdiction. For example, smaller jurisdictions like Botswana may consider centralising debarment, but in jurisdictions like South Africa this may not be expedient, taking into account the volume of procurement transactions that take place. Bigger jurisdictions may consider splitting the mandate for the enforcement of debarment.[60]

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56 Chakravarthy and Dawar "India's Possible Accession to the GPA" 138.

57 OECD *Specialised Anti-Corruption Institutions Review of Models 135*.

58 Fombad "Emerging Hybrid Institutions in Africa" 331.

59 Williams-Elegbe Fighting Corruption in Public Procurement 71.

60 As an illustration, a debarment period of 12 months or less may be enforced by the procuring entity, but for any period exceeding 12 months it has to be enforced by the central authority. The period of debarment which a procuring entity may impose may be varied depending on the objectives of the jurisdiction.

(v) Another issue to consider is whether debarment should be extended to non-finance-related offences, as is the case in Hong Kong, or whether it should be limited to finance-related transactions and the commercial implications thereof. Also, the effect of debarment on subsidiaries as well as on shareholder(s) who may be debarred in one firm but hold shares in other firms contracting with government through other commercial vehicles such as trusts etc needs to be investigated.

(vi) Self-cleaning needs to be explored further, especially in developing countries. It may be necessary for developing countries to allow a debarred contractor to serve a minimum period of the debarred period before applying for or being considered for self-cleaning.[61] For instance, if the firm has been debarred for five years it might be necessary for the debarred firm/contractor to first serve half (two-and-a-half years) of the debarment period before being considered for self-cleaning. In addition, further research is needed on how on to deal with recidivists, that is, whether the period for self-cleaning for recidivists should be increased, which may even include "life debarment" of the offending supplier/firm. Also, should self-cleaning be handled by the procuring entity or be centralised?

7.6 Final remarks

This study has demonstrated that there are no "best" measures for combating public procurement corruption. The effectiveness of such measures (criminal, administrative, institutional and civil) depends on a number of variables. These variables include but are not limited to historical (political and economic) factors; the ethical convictions of the executive; the procurement legislation (preferably single and not fragmented); genuine political will; executive accountability; an anti-corruption strategy; the independence of anti-corruption institutions; the effectiveness of sanctions on the supplier; the professionalism of both the procurement and the anti-corruption staff; and unconditional support for civil activism. Innovation is necessary to complement the existing public procurement

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61 Punder, Prieβ and Arrowsmith *Self-Cleaning in Public Procurement Law* 2.

corruption measures, such as the introduction of corruption clearance certificates, mandatory anti-corruption clause in government contracts and special anti-corruption task force for high-value public procurement transactions. There is need for procurement reforms that address immediate public procurement corruption gaps such as the introduction of the corruption clearance certificate and the mandatory anti-corruption clause while anticipating future developments both in public procurement and public procurement corruption by enacting a holistic and harmonised legislation such as the PPCPPC.

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