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The White-Collar Elephant in the Room: The human rights impact of private sector corruption in South African public procurement

by

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Thesis submitted in partial fulfilment of the requirements of the degree

LLM in International Trade and Investment in Africa

Prepared under the supervision of Dr Oyeniyi Abe

International Development Law Unit

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Submitted on 12 November 2019

ACKNOWLEDGEMENT

I would like to extend gratitude to my supervisor for the valuable and succinct guidance and feedback he provided. In addition, I would like to thank my dear husband for his unwavering support and advice throughout this enriching and challenging journey. Lastly, I would like to thank my classmates for sharing this journey with me and my friends for their patience, love and support in seeing me through to my academic advancement. The completion of this momentous task would not have been possible without them by my side.

ABSTRACT

In order to lead effectively, governments are mandated by the citizens to provide public services. These services are provided through a public procurement system. The South African constitution provides that contracts for goods and services identified by the government should be carried out in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. However, all too often, these principles are undermined by corruption which is engaged in by all actors within the public procurement system. Over the last two decades, the South African media have uncovered several scandals that have revealed how pervasive corruption has been within the South African government and its public procurement system. The intricate details of the impact on the economic and human development of the country have revealed themselves with the deaths of several children in pit latrines and the ever-increasing gap between the wealthy and poor. The focus of this thesis will be on the role that private actors, in their capacity as service providers to government, play in further entrenching corruption within South Africa's public procurement system. It will identify the anti-corruption measures that are currently in place to detect, investigate and prosecute the perpetrators. It will be shown that the measures currently in place in the South African legal framework, though theoretically adequate, have been weakened through excessive manipulation and interference by the executive branch of government. Drawing from the civil observer mechanism that has been embedded into the Philippine government procurement framework, it will propose legislative reforms to increase the efficacy of public participation of individual South African citizens and civil society to further empower the public in combating the corruption engaged in by the private sector.

Keywords: Public procurement, Corruption, private sector, human rights, anti-corruption measures, public participation

List of Abbreviations

AU	African Union
BBBEE	Broad-based Black Economic Empowerment
DPCI	Directorate for Priority Crime Investigation
DSO	Directorate of Special Operations
GPRA	Government Procurement Reform Act
IRR	Implementing Rules and Regulations
MFMA	Municipal Finance Management Act
MSA	Municipal Systems Act
NPA	National Prosecuting Authority
OECD	Organisation for Economic Co-operation and Development
PAJA	Promotion of Administrative Justice Act
PFMA	Public Finance Management Act
POCA	Prevention of Organised Crime Act
PPPFA	Preferential Procurement Policy Framework Act
SADC	Southern African Development Community
SAPS	South African Police Services
UN	United Nations
UNCAC	United Nations Convention against Corruption

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Chapter 1
Introduction and background

"Corruption is authority plus monopoly minus transparency." ~ Anonymous

1. Introduction

International and regional communities have made great strides in recognizing the corrosive effects of corruption on the social and economic development of countries affected by it. Some of these instruments include the United Nations Convention against Corruption,[1] the Southern African Development Community Protocol against Corruption,[2] the Organisation for Economic Cooperation and Development (OECD) Convention on Bribery of Foreign Public Officials in International Business Transactions[3] and the African Union Convention on Preventing and Combating Corruption.[4] South Africa is a signatory to all of the aforementioned conventions[5] and has promulgated national legislation to combat corruption – most notable being, the Prevention and Combating of Corrupt Activities Act.[6] It is also widely accepted that public procurement systems, the world over, are particularly susceptible to corruption.[7] However, the problem of corruption, including procurement corruption, has been tackled from a macroeconomic point of view often failing to take account of the impact that corruption has on the individual.[8] The most vulnerable citizens are the ones who pay the gravest price when those who hold political and economic power abuse that power for their own selfish gains.

This thesis seeks to explore what the human rights impacts are when the private sector engages in corruption when providing goods and supplying services to the South African government through its public procurement mechanisms. The research begins by defining what is meant by private sector corruption in the public procurement system. This will be done through a detailed literature review of the varying definitions, forms and causes of corruption in public procurement. Thereafter it will establish what responsibility the private sector bears in protecting and promoting human rights.

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[1] UN Convention Against Corruption: UN General Assembly Resolution 58/4 of 2003

[2] Southern African Development Community Protocol Against Corruption 6 August 2003

3 Organisation for Economic Cooperation and Development Convention on Bribery of Foreign Public Officials in International Business Transactions 15 February 1999

[4] African Union Convention on Preventing and Combating Corruption 11 July 2003

[5] These conventions will be discussed in detail in Chapter 3

[6] Corruption Watch 'Corruption and the Law in South Africa' (2015) https://www.corruptionwatch.org.za/wp-content/uploads/2015/06/Corruption-Watch-Corruption-and-the-law-in-SA.pdf (date accessed 12 November 2019)

[7] Moustapha Diallo 'Corruption, Fraud and African Procurement' in Sope Williams-Elegbe & Geo Quinot (eds) *Public Procurement Regulation for 21st Century Africa* (Juta, 2018)

[8] Berihun Adugna Gebeye 'Corruption and human rights: Exploring the relationships' (Paper presented at the Human rights & human welfare. A forum for works in progress. Working paper, 2012) 17

It will also set out the South African legislative framework for public procurement and the anti-corruption mechanisms employed, with a view to determining whether any of these measures are effective in detecting and prosecuting economic crimes perpetrated within the public procurement system by suppliers to government. It will be shown that although South Africa's procurement framework does not adequately acknowledge the role of the private sector in perpetuating corruption; the anti-corruption legislation and institutional framework has all of the makings of a robust framework that can effectively combat corruption. However, in spite of the fact that it looks good on paper, the institutions have not been effective in detecting and enforcing the anti-corruption laws of the country, in the face of the egregious revelations of the state capture project that was undertaken during former President, Jacob Zuma's years at the helm.

Lastly, drawing from the example of the government of the Philippines, it will provide recommendations on how the South African legal and institutional framework may be amended or expanded to cater more fully to empower the South African citizenry in combating the corruption engaged in by the private sector.

1.1 Background

When one thinks about corruption one automatically relegates it to a "government problem". The danger with this automatic relegation is that it does not take into account what Magda Wierzycka said in her interview on the Tim Modise Network that, "for every tender that originates from the public sector which requires payment of a bribe, there is a private sector participant that participates in order to deliver the bribe".[9]

Corruption is difficult to define by virtue of the fact that it is an activity or series of activities that are conducted under the veil of secrecy. However, a broad definition that is widely accepted is that it is 'the abuse of public power for private benefit'.[10] Tanzi offers a more neutral definition that simply states that corruption is "the intentional non-compliance with an arm's-length relationship aimed at deriving some advantage from this behaviour for oneself or for related individuals". [11] This definition is more appealing for the purposes of this research as it does not ascribe fault on the public sector alone – in its neutrality it can be read to acknowledge the equally culpable private sector element of the corrupt relationship. All forms of corruption exist and flourish equally in the public and private

[9] ENCA Newsroom 'Corruption equally bad in private sector' Wierzycka 23 July 2018 https://www.enca.com/south-africa/corruption-equally-bad-in-the-private-sector-as-it-is-public-sector (date accessed 29 September 2019)

[10] V Tanzi 'Corruption around the world: Causes, consequences, scope and cures' (1998) International Monetary Fund Working Paper WP/98/63 at 8

[11] As above, where the author references his previous work (V Tanzi 'Corruption, Arm's-Length Relationships and Markets' *The Economics of Organised Crime* G Fiorentini & S Peltzman (eds) (1995) Cambridge University Press) in which the author proposed this definition

sectors, however, the forms that are most commonly engaged in by the private sector when providing services to the government are collusion, bribery and fraud.[12]

Now turning to the definition of public procurement; it can be defined as "the purchasing, hiring or obtaining by any other contractual means of goods, works and services by the public sector".[13] Williams and Quinot also define it as the 'purchasing by a government of the goods and services it requires to function and pursue public welfare'.[14] It has also been defined to mean 'the purchasing of commodities and contracting of construction works and services if such acquisition is affected by resources from state budgets, local authority budgets, state foundation funds, domestic loans, and foreign aid as well as revenue received from the economic activity of the state.'[15]

All of these definitions are helpful because through them we can see why it has been observed by many writers that public procurement is particularly susceptible to corruption; it is as a result of the large sums of public money amassed by governments[16] – and indeed resource rich countries, such as South Africa, are particularly vulnerable.[17] Coupled with the fact that, particularly in developing nations, the transparency of procurement systems allows corrupt activities to flourish.

1.1.1 Contextual background on South Africa's contemporary corruption scandals

South Africa has a long and disturbing history with corruption; in the last five years several exposé and books have revealed the corruption that occurred during the apartheid era (with several private companies continuing to supply arms to the apartheid government in violation of sanctions imposed against the apartheid state and thus, profiteering on the back of crimes against humanity)[18] and in more recent times the deep-seated corruption and fraud in the public sector in the form of state capture by the Gupta family, the Indian-born family that has risen to notoriety through their corrupt relationship with former President Jacob Zuma. As we continue to learn about the extent of state capture through the Zondo Commission,[19] the realisation that corruption is not a public sector problem alone has never been more palpable for the citizens of South Africa.

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[12] See Chapter 2 for a detailed discussion on the forms of corruption

[13] Diallo (n 7)

[14] S Williams & G Quinot 'Public procurement and corruption: The South African response' (2007) 124 South African Law Journal at 340

[15] J Mubangizi & P Sewpersadh 'A human rights-based approach to combatting public procurement corruption in Africa' (2017) 66 African Journal of Legal Studies at 69

[16] Intaher M Ambe and Johanna A Badenhorst-Weiss, 'Procurement challenges in the South African public sector' (2012) 6(1) *Journal of transport and supply chain management* 244 - 245

[17] C Leite & J Weidmann 'Does Mother Nature Corrupt? Natural Resources, Corruption, and Economic Growth' (1999) International Monetary Fund Working Paper WP/99/85

[18] H van Vuuren 'Apartheid Guns and Money: A Tale of Profit' (Jacana: Cape Town) 2017

[19] The Judicial Commission of Inquiry into Allegations of State Capture: Corruption and Fraud in the public Sector including Organs of State https://www.sastatecapture.org.za/ (date accessed 4 September 2019). This Commission of enquiry was established in terms of Proclamation 3 of 2018 published in Gazette No. 41403 dated 25 January 2018

State capture is a serious crime and connotes grand corruption with dire consequences. The People's Tribunal on Economic Crime state that the consequences of state capture are "the theft of state resources at the expense of South Africa's most vulnerable, growing inequality, and the breakdown of democratic institutions entrusted with combating corruption."[20] But what is the far more sinister element of state capture and grand corruption as a whole is the "[manipulation of] the political space for private enrichment".[21]

Through the prolific reporting of the media and testimonies heard at the Zondo Commission, KPMG, McKinsey, Bell Pottinger and the Venda Building Society (VBS) Mutual Bank have all been implicated in various forms of fraud and corruption all linked to state capture, the Guptas and the looting of state coffers that has defined Jacob Zuma's presidency. McKinsey has been implicated in receiving one billion Rand in fees which constitute outright syphoning of funds from Eskom to enrich itself and Trillian, a Gupta-linked company. It was found by the National Prosecuting Authority (NPA) that no valid contract existed between Eskom and either of McKinsey or Trillian and therefore, there was no legal basis for Eskom to have made the payments.[22] In more recent revelations at the Zondo Commission, Nedbank has been incriminated for profiteering in relation to questionable interest rate swaps on a loan to Transnet in 2015 for the purchase of approximately one thousand locomotives. Nedbank is said to have made R780 million on these dodgy trades.[23]

Even prior to the revelations of state capture, several companies have been castigated through the imposition of hefty fines by the South African Competition Commission for price-fixing; Foodcorp (Pty) Ltd and Tiger Brands were fined R45 406 359.82 and R98.7 million respectively for participating in a bread cartel that fixed the price by simultaneously and artificially inflating the price of bread on an agreed date, during the period 1995 to 2006,[24] and all of South Africa's large construction firms were found guilty of collusion in building the 2010 FIFA World Cup stadia which was estimated to have increased the construction cost for municipalities by R14 billion. The firms

[20] The People's Tribunal on Economic Crime 'Joining the Dots: the long shadow of economic crime in South Africa' (2018) https://corruptiontribunal.org.za/site/wp-content/uploads/2018/01/JoiningTheDots_sp.pdf (date accessed 12 November 2019)
[21] As above
[22] A Serrao 'NPA concludes Eskom payments to McKinsey and Trillian were criminal' 17 January 2018 https://www.fin24.com/Economy/npa-concludes-eskom-payments-to-mckinsey-and-trillian-were-criminal-20180117 (date accessed on 29 September 2019)
[23] S Masondo 'Nedbank pockets R780m from Transnet' 12 May 2019 https://city-press.news24.com/Business/nedbank-pockets-r780m-from-transnet-20190512 (date accessed on 29 September 2019)
[24] South African Government News Agency 'Bread cartel member Foodcorp fined R45.4m' 6 January 2009 https://www.sanews.gov.za/south-africa/bread-cartel-member-foodcorp-fined-r454mil (date accessed on 29 September 2019)

have collectively paid fines amounting to approximately R1.5 billion,[25] which pales in comparison to the losses suffered by South African citizens.

What these revelations evidence is that there are two myths around corporate crimes that must be addressed:

> [I]t is suggested that criminality in the private sector is less widespread or its impact is not as serious as corruption in government. The other myth is contained in the first, that one can or should separate the idea of corporate criminality from corruption in government. Bankers, auditors, lawyers and management consultants were fundamental in facilitating illicit activity by the Gupta network of companies, and the undermining of governance in the public sector.[26]

The PwC Global Economic Crime and Fraud Survey 2018[27] reveals that South Africa currently has the highest reported rate of economic crime in the world, with 77% of South African organisations having experienced economic crime in the preceding 12 months[28]; 39% of companies reported to have experienced procurement fraud as well as 34% reporting experiencing bribery and corruption in 2018.[29]

South Africa's private sector has been intricately involved in grave human rights violations of late. This begs the question of how these entities can be held accountable for the actions in a manner that positively impacts the citizens who were directly affected by their wrongdoing. The following discussion will investigate the role of the private sector in protecting, respecting and fulfilling human rights.

1.1.2 Private sector's role in protecting, respecting and fulfilling human rights

International Human Rights law puts forward that human rights are universal, interdependent and indivisible. Mubangizi and Sewpersadh set out these principles as follows:

> The principle of universality of human rights is founded on the notion that all human rights apply uniformly and with equal force throughout the world. The principle of interdependence holds that the full and meaningful enjoyment of a particular right is dependent on the possession of all the other rights, and the indivisibility of human rights is founded on the assumption that all human rights have the same basic characteristics – and should be upheld through the medium of equally potent enforcement mechanisms. The inference from these principles is that human rights are universal and should apply to all persons at all times – without distinction.[30]

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[25] L Steyn 'World Cup stadium construction cartel gets its comeuppance' 4 December 2015 https://mg.co.za/article/2015-12-03-remaining-2010-world-cup-stadium-colluders-face-prosecution (date accessed 29 September 2019)

[26] Open Secrets *Corporations and Economic Crime Report, Volume 1: The Bankers* (2018) at 6

[27] 'The Dawn of Proactivity: Countering threats from inside and out' PwC Global Economic Crime and Fraud Survey 2018 6th South African edition (February 2018)

[28] As above at 8

[29] As above

[30] n15, 70

The far-reaching effects that the private sector has in violating human rights has, in recent years, brought to the fore the question of the role that private actors should play in protecting human rights. This topic is being engaged with increasing fervour in the international arena with several companies across the globe signing up to the United Nations Global Compact which encourages companies to 'align [their] strategies and operations with universal principles on human rights, labour, environment and anti-corruption, and taking actions that advance societal goals'.[31] The United Nations Office of the High Commissioner on Human Rights have also endorsed a set of Guiding Principles on Business and Human Rights which is intended, as the title suggests, to provide business enterprises with a framework to assist them in protecting human rights in the performance of their activities and ensuring that they take measures to avoid violating human rights or to mitigate against the adverse impacts on human rights that emanate from their activities.[32]

The South African constitution also acknowledges that companies have a role to play in protecting human rights. Section 8(2) provides that:

> A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by that right.

Therefore, over and above the voluntary initiatives of the UN, there already exists a legal obligation on the South African private sector to respect human rights. Indeed, these enterprises do not operate in a vacuum and are interdependent on the government as well as the citizens of South Africa. Therefore, considering the substantial gains the private sector makes from corrupt practices, holding these private actors to account for the lack of social and economic development being experienced by the citizens of the countries in which corruption is rife has become an urgent matter.

In an attempt to address this urgency, an in-depth analysis will be conducted on the proactive measures the private sector is legally obliged to take within their organisations, to avoid engaging in, and identifying instances of, corrupt practices and how effectively these measures are being implemented.

1.2 Statement of the research problem

Much of the work that has been done both regionally and internationally in combating corruption presupposes that corruption is a victimless crime.[33] As a result, it often goes unpunished. It is only in the last few decades that theorists and legislators have begun to engage the topic of corruption as a

[31] https://www.unglobalcompact.org/what-is-gc (date accessed 6 September 2019)

[32] UN Human Rights Council 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy Framework" HR/PUB/11/04. UN Guiding Principles 11, 12 and 13

[33] Kolawole Olaniyan 'Corruption and Human Rights Law in Africa' Studies in International Law (Hart, 2016) 1-39

violation of international human rights. This can be seen from the proliferation of anti-corruption laws both in South Africa and internationally, adopted in the early 2000s.[34]

As will be indicated in subsequent chapters, this thesis highlights that the remedies and anti-corruption measures that have been adopted both internationally and locally do not acknowledge the victims of corruption and do not in themselves guarantee effective prosecution of economic crimes.

Furthermore, it will be shown that although the legislative and institutional framework employed in South Africa is a robust framework, the incidence of corruption in general remain high and those who engage in corrupt activities enjoy impunity; because of criminal justice institutions that have been weakened through political interference. As a result of the rampant corruption in the Zuma administration, public infrastructure in the energy sector remains inadequate and under-maintained[35] while several children have suffocated in pit latrines and the quality of public education, which the majority of South Africans rely on is devastating generations of children; very few of the people that were involved in perpetuating these social ills, both in the public and private sectors, have been held to account.[36]

It must be noted that South Africa's civil society organisations are a very strong and effective tool in combating corruption in South Africa.[37] Corruption Watch and the Centre for Applied Legal Studies, among others, were instrumental in bringing to light various elements of state capture and in conducting strategic litigation to declare invalid the tender process that allowed Cash Paymasters to distribute social grants to millions of South Africans on behalf of the South African Social Security Agency.[38] Yet enforcement and prosecution remain low and impunity high among both the public and private sectors.[39] What this thesis seeks to achieve is to determine whether there are mechanisms that can be put in place to bolster the role that the South African citizenry and civil society plays in tackling corruption in South Africa.

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[34] See the Prevention and Combating of Corrupt Activities Act 12 Of 2004 in South Africa; The Corrupt Practices and other Related Offences Act 2000 of Nigeria, and The UN General Assembly Resolution on Convention Against Corruption of 2003

[35] Portfolio Committee on Public Enterprises Final Report on the Eskom Inquiry (November 2018) https://www.egsa.org.za/wp-content/uploads/2019/03/Eskom_Inquiry_Final_Report_Nov2018.pdf (date accessed 28 September 2019)

[36] B Macupe 'The struggle to uncapture the classroom' *Mail & Guardian* 16 August 2019 https://mg.co.za/article/2019-08-16-00-the-struggle-to-uncapture-the-classroom (date accessed 27 September 2019)

[37] David Everatt 'Lessons from KPMG: be on guard, South Africans are on your case' 21 September 2017 *The Conversation* https://theconversation.com/lessons-from-kpmg-be-on-guard-south-africans-are-on-your-case-84478 (date accessed 6 September 2019)

[38] South Africa Social Security Agency and another v Minister of Social Development and others [2018] ZACC 26

[39] Corruption Watch and the Institute for Security Studies 'State capture and the political manipulation of criminal justice agencies: A joint submission to the Judicial Commission of Inquiry into Allegations of State Capture' (April 2019)

1.3 Research questions

The observations highlighted above bring about the need to assess the procurement system and anti-corruption legislation that South Africa has employed to determine why they are not sufficiently conducive to curbing the procurement corruption perpetrated by the private sector (in its capacity as supplier to the government) and ascertaining whether there may be appropriate reforms to the system to better enable it to do so. Accordingly, the study seeks to answer the following questions:

1.3.1 What are the deficiencies of the current public procurement system and anti-corruption measures that South Africa employs?

1.3.2 To what extent has impunity within the private sector compromised public procurement processes in South Africa?

1.3.3 What adequate reforms are available that can be implemented so as to bolster South Africa's anti-corruption measures in combat procurement corruption?

1.4 Research objectives

In attempting to answer these questions, the study will seek to fulfil the following objectives:

1.4.1 Identify the South African public procurement legislative framework as well as its anti-corruption legislative and institutional framework;

1.4.2 Investigate which aspects of the South African public procurement system are most susceptible to corruption;

1.4.3 Determine whether a relationship exists between human rights and corruption;

1.4.4 Explore the anti-corruption measures currently built into the South African legal framework;

1.4.5 Analyse the approach employed by the government of the Philippines to incorporate a human rights-based approach to combat corruption, having regard to public participation and active citizenry measures; and

1.4.6 Propose human rights-based measures that can be incorporated into the South African legal framework.

1.5 Research Methodology

The author will rely on a collection of primary and secondary sources to conduct a desktop analysis of the subject matter. The sources are books, journals, newspaper reports, dissertations, case law as well as blog posts and other online resources.

In attempting to understand the effects that private sector corruption within the procurement process has on the broader South African public, the study will employ a descriptive approach wherein the concepts of public procurement, corruption and human rights; and their relationship to one another will be explored in detail.

The study can be said to have characteristics of a qualitative approach in that the interpretation is aided by the views of eminent scholars, organisations or judicial officers. However, such views are not obtained through a process of interviews, focus groups or case studies; rather they are obtained through review of the relevant literature. The study also contains a comparative dimension to it as the legislation and policies of the Philippines will be evaluated in order to ascertain whether and to what extent the reforms that have been introduced in the procurement process in the Philippines can be employed within the South African framework to improve the public participation within the public procurement process.

1.6 Delineation and Limitations of the Research Problem

This thesis will only focus on the consequences of corruption engaged in by the private sector. Therefore, any human rights impact or any other direct or indirect consequences that are solely attributable to the public sector will not be discussed. Furthermore, any anti-corruption measures and remedies aimed at correcting the behaviour of public officials will not be discussed, unless and to the extent that those measures are applicable to the private sector as well.

1.7 Overview of Chapters

1.7.1 Chapter 1 is the current research chapter which provides a contextual background on the meaning of private sector corruption and public procurement and provides a synopsis of the role of private sector in protecting and promoting human rights. The chapter also expresses the problem statement and research objectives. Thereafter, the chapter outlines the research methodology and states the delineations and limitations of the research. Lastly, the chapter gives an overview of all the chapters for the dissertation.

1.7.2 Chapter 2 will discuss the phenomenon of corruption in public procurement and how this phenomenon is linked to human rights. This will be done by means of a literature review of the views of various scholars, jurists and practitioners.

1.7.3 Chapter 3 will outline South Africa's international and domestic legal framework on public procurement which will give clarity on the system that governs the relationship between the public and private sectors. It will also set out the legislative and institutional anti-corruption framework within which South Africa operates with a view to determining whether the current framework is effective in identifying the private sector as a potential perpetrator of procurement corruption; as well as being able to detect, enforce and prosecute economic crimes.

1.7.4 Chapter 4 will argue for a public procurement oversight committee to be established within the South African procurement framework, which framework will assist in bolstering the South African citizenry's ability to combat corruption. This will be done through a comparative analysis of the civil observers mechanism that has been incorporated in to the public procurement framework of the Government of the Philippines.

1.7.5 Chapter 5 will provide a brief synopsis of the topics dealt with in the dissertation and provide a summary of the legislative and policy reforms that the research has identified that can increase the independence of the criminal justice agencies already operating in South Africa, as well as measures to enhance civil society and citizens' ability to participate in the procurement process and in the fight against corruption. Chapter 5 concludes the thesis.

Chapter 2
Understanding the phenomenon of private sector corruption in public procurement

"I see in the near future a crisis approaching that unnerves me and causes me to tremble for the safety of my country… corporations have been enthroned and an era of corruption in high places will follow, and the money power of the country will endeavor to prolong its reign by working upon the prejudices of the poor until all wealth is aggregated in a few hands and the Republic is destroyed." ~ Abraham Lincoln

2 Introduction

Public procurement is often defined as the purchasing, hiring or obtaining by any other contractual means of goods, works and services by the public sector.[40] Williams and Quinot define public procurement as the "purchasing by a government of the goods and services it requires to function and pursue public welfare".[41] It is alternatively defined as the 'purchase of commodities and contracting of construction works and services if such acquisition is affected by resources from state budgets, local authority budgets, state foundation funds, domestic loans or foreign loans guaranteed by the state and foreign aid, as well as revenue received from the economic activity of the state'.[42] Essentially public procurement is the acquisition and disposal[43] of goods and services by the government using public funds.

Bolton puts forward the rationale for a government's need to engage in public procurement in this manner:

> In view of the high volume and variety of goods and services needed by governments, and the importance conventionally attached to individual freedom of action, governments today generally choose to meet most of their needs by means of consensual arrangements with private entities i.e. through private sector provision. From a cost effectiveness point of view, where transaction costs, such as the cost of implementing and monitoring a contract are smaller than internal costs associated with planning and producing a service, by definition [a government] will tend to minimise local costs by sourcing from outside organisations.[44]

In summary, the ultimate goal of each procurement is to satisfy the public interest by obtaining quality services while securing value for money and ensuring fairness, transparency and accountability during the process.[45]

In South Africa government procurement has been granted constitutional status, in section 217 of the Constitution.[46] This has been done with a view to inculcating the principles of fairness, equity,

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[40] Diallo (n 7), 100
[41] n 14, 340
[42] Andrea Appolloni and Jean Marie Mushagalusa Nshombo 'Public procurement and corruption in Africa: A literature review' in *Public Procurement's Place in the World* (Springer, 2014) 185
[43] P Bolton 'The Public Procurement System in South Africa: Main Characteristics (2008)' 37 *Public Contract Law Journal* 784 where Bolton proposes that "procurement" in the South African context "should be afforded a broad meaning [that] refers to both the acquisition of goods or services *and* the selling and lending of assets." (text emphasis)
[44] Phoebe Bolton *The Law of Government Procurement in South Africa* (Lexis Nexis Butterworths, 2007) 2
[45] Diallo (n 7)

transparency, competition and provision of value for money into the South African procurement system; as well as applying procurement as a policy tool to promote development, and to create a preferential procurement system that advances the inclusion of black South Africans who were previously excluded from the South African economy through the apartheid regime. A detailed discussion of the constitutional principles and the legislative framework that has been constructed to support these principles will be discussed in later in this chapter.

2.1 The procurement system

Before a government authority is able to appoint a private sector supplier to perform the service or deliver the goods in accordance with the contractual arrangements agreed between the parties, there are several stages that must be undertaken prior to the award of a contract. Consequently, the procurement process can be broken down into several stages as follows:[47]

a) procurement planning (this would involve performing a needs analysis and determining the specifications for the goods or the nature of the services to be procured[48]);

b) preparing and processing of procurement requests (i.e. requests for proposal or tender documents);

c) developing and reviewing requirements documents;

d) planning for evaluation;

e) contract award;

f) preparation and signing of contracts; and

g) contract administration.

Bolton succinctly groups these various phases into four broad categories[49] namely; (1) the pre-award period (which would cover points a to d above); (2) the award period (covered in e); (3) conclusion of contracts (corresponds with f); and (4) the stage after conclusion of the contract until completion of the contract performance, which will be referred to as the monitoring phase (which corresponds with g). Corruption in various forms can occur at any one of these stages. Appolloni and Mushagalusa proffer a few examples as follows:

> In [conducting the needs analysis and specifications in phase one], reports could be prepared that falsely report damaged equipment in order to create an excess supply that could be used for corrupt purposes. The procurement requirements could also be written to prefer a

[46] The Constitution of the Republic of South Africa 1996
[47] Appolloni (n 42), 4
[48] Precoro Inc. blog post https://blog.precoro.com/en/2016/08/main-stages-of-the-procurement-process/ (date accessed 19 August 2019). The blog post sets out the procedure for procurement within a private company setting; however, most of the elements in the process outlined are equally applicable to public procurement.
[49] n 44, 13

> particular supplier or contractor. [Similarly, in compiling] the evaluation criteria in the request for proposals or tender documents, [such criteria] could be drafted to favour a particular supplier or service provider or… to emphasize the weaknesses of a particular competitor. [In the contract award phase] an offeror could propose an unrealistically low offer in the hope that after the contract is awarded procurement officials will allow amendments to increase costs… It is also possible to corruptly require sub-contractual relationships with favoured suppliers. [50]

The OECD estimates that worldwide, procurement spending averages between 12% and 20% of gross domestic product.[51] Diallo submits that this global spending amounts to over US$9.5 trillion each year; which is the equivalent of 15% of global GDP.[52] Since government is the single largest buyer in most countries[53] and because of the sheer volume of funds channelled through the procurement system it is a small wonder that public procurement has been identified as the government activity most vulnerable to mismanagement and corruption.[54]

The remaining portions of this chapter will discuss the phenomenon of corruption as it manifests through the private sector's engagement with public officials in the procurement system. This will be undertaken through an analysis of the various definitions, forms, causes and consequences of private corruption within public procurement. Secondly, it will briefly explore the relationship between corruption and human rights and thereafter it will conclude by asserting that, although there is a significant amount of literature that focuses on public corruption and private corruption in forms independent of each other, there is a lacuna in the literature that should deal with the convergence of the two. This is necessary because, as will be shown throughout this thesis, the impacts of the private sector's engagement in corruption is as corrosive to the public at large, given that the private actor is merely the other side of the same coin. By converging the roles of the public and private sectors within the procurement system, this will create the platform for scholars, legislators and practitioners to begin to understand corruption within public procurement in a way that will allow them to bolster the effectiveness of anti-corruption measures.

2.2 The private actor as the primary focus

Williams and Quinot submit that 'private sector corruption poses less of a problem to government, since it is less likely to become systemic and is unsustainable, as the increased costs of doing business will decrease a firm's competitiveness over time. Furthermore, private sector corruption does not generally produce the social costs of public sector corruption such as the 'contagion' of corruption

[50] n 42, 4-5; This is not an exhaustive list of the incidence of corruption within the procurement process but merely offers a few examples thereof

[51] https://www.oecd-ilibrary.org/docserver/gov_glance-2017-en.pdf?expires=1566661544&id=id&accname=guest&checksum=3BA829FE6B27D4EF7948DB4386805547 (date accessed 24 August 2019)

[52] n 7

[53] Ambe & Badenhorst-Weiss (n 16), 244

[54] As above. In addition, see Pandelani Harry Munzhedzi, 'South African public sector procurement and corruption: Inseparable twins?' (2016) 10(1) *Journal of transport and supply chain management*

(alluding to the disease-like spread of corruption across borders) or the waste and inefficient allocation of public resources'.[55]

Furthermore, McLachin J stated that 'the most important difference [between public and private contracting] is the fact that municipalities undertake their commercial and contractual activities with the use of public funds. Another consideration justifying different treatment of public contracting is the fact that a municipality's exercise of its contracting power may have consequences for other interests not taken into account by the purely consensual relationship between the council and the contractor. For example, …integrity in the conduct of government business, and the promotion and maintenance of community values require that the public procurements function be viewed as distinct from the purely private realm of contract law. Finally, it must be remembered that municipalities, unlike private individuals, are statutory creations, and must always act within the legal bounds of the powers conferred upon them by statute. In particular, council members cannot act in pursuit of their own private interests, but must exercise their contractual powers in the public interest.' [56]

The propositions proffered by the learned academics and jurist are both valid and unequivocally correct. However, by diminishing and distinguishing the role of the private actors within the public procurement paradigm these propositions perpetuate the narrative that corruption is an 'ordinary crime' and 'victimless'[57] and in turn this tends to create the impression that the corrosive effects of corrupt activities, when engaged in by public officials, are far more dire for the citizenry than when they are engaged in by private sector individuals and enterprises.

Both international law and domestic South African law place a fiduciary duty on the management and executives of a company. This duty, when breached, not only adversely impacts the shareholders, to whom the duty is legally owed in the greatest share; but it also impacts the employees and ultimately the consumers of that company. Where the breach is severe the impacts could result in the company being dissolved, or having to undergo mass retrenchments. Not only are the employees negatively impacted by such impacts but the families they support are affected. Ultimately this could put pressure on public resources that are required to ensure that all citizens are able to achieve a decent standard of living.

Broadly speaking, the literature fails to take the fiduciary duty owed by directors to their companies into account when considering corruption in public procurement. Scholars place great emphasis on the culpability of public officials, all the while forgetting that, as is more often the case than not, there is a private sector participant on the other side of the corrupt transaction who is benefitting to an equal, and oftentimes to a far greater degree than the public official; whether the benefits are pecuniary, political or otherwise.

[55] n 14, 340 - 341
[56] Shell Canada Products Limited v City of Vancouver [1994] 1 S.C.R 231, 240-241
[57] Olaniyan (n 33), 25

In the discussion that follows, a keen focus on the role of the private sector will be displayed in exploring the relationship between corruption and public procurement.

2.3 Defining corruption

Corruption is difficult to define by virtue of the fact that it is an activity or series of activities that is or are conducted under the veil of secrecy. Furthermore, it is an issue that is 'steeped in morality and ethics, which even in secular societies is imbued with elements of disapprobation, shame and wrongdoing, making it a sensitive subject to address'.[58]

The term corruption comes from the Latin *corruptio* which means to mar, bribe, or destroy. According to the Oxford Dictionary it:

i. denotes the process of decay or putrefaction;
ii. means dishonest or fraudulent conduct by those in power, typically involving bribery; or
iii. is the act or effect of making someone or something morally depraved.

Gebeye states that '[i]n the legal field the term corruption is used to group certain criminal acts which correspond to the general notion of abuse of entrusted power. International conventions against corruption reflect this, since they do not define corruption but instead enumerate criminal acts that amount to corruption.' [59]

In light of this, it can be seen that in trying to conceptualise corruption the issues of ethics and morality and criminality emerge. There is, however, no universally accepted definition of corruption. Furthermore, it is said to be culturally specific;[60] as 'one man's bribe may be another man's gift'.[61]

A broad definition, advanced by the World Bank, that is widely accepted is that it is 'the abuse of public power for private benefit'.[62] It is noted that this definition has been updated since its initial introduction in 1997; it currently reads: 'the abuse of public or corporate power for private gain.'[63] Transparency International (TI) has said of this definition that, although it is broad enough to encompass both the public and the private sector in corrupt acts, historically attention has primarily

[58] Williams & Quinot (n 14), 340
[59] n 8, 6
[60] See Gebeye (n 8); P Sugudhav-Sewpersadh *Corruption and the law: an evaluation of the legislative framework for combating public procurement corruption in South Africa* (LLD Thesis, University of Kwa-Zulu Natal, 2016); and Olaniyan (n 33), 19
[61] Gebeye (n 8), 5
[62] Helping countries combat corruption: the role of the World Bank (September 1997) http://www1.worldbank.org/publicsector/anticorrupt/corruptn/cor02.htm#note1 (date accessed 25 August 2019)
[63] Vinay Bhargava 'The cancer of corruption' (Paper presented at World Bank Global Issues Seminar Series) 2005 http://siteresources.worldbank.org/EXTABOUTUS/Resources/Corruption.pdf (date accessed 25 August 2019)

focused on corruption involving public officials and corrupt forms of behaviour that occur entirely within the private sector have been largely overlooked.[64]

TI submits three reasons why the discourse has remained primarily focused on the public sector's misdeeds:[65]

1. In the aftermath of the Cold War, a powerful school of thought held free markets to be engines of efficiency; unlike monopolistic state-run enterprises, free markets were seen by pro-market reformers as self-evident that healthy competition would penalise inefficient behaviour in the long run. This meant that anti-corruption policies and reform programmes were focussed solely on the failings of the public sector;
2. While it is clear that public officials are expected to act on behalf of the public good, private sector employees are seen – or see themselves – as accountable only to their shareholders;
3. The reality is much more complex, since powerful private interests often exert undue influence in shaping public policy, institutions and state legislation.

This final point is aptly illustrated by, Brooks when he stated that:

> Revelations in these fields have made it plain that much of the impetus to wrong-doing in the political sphere comes originally from business interests. This is not to be taken as in any sense exculpating the public officials concerned; it simply indicates the guilt of the business man as *particeps crimins* with the politician.[66]

Consequently, it is the premise of this thesis that in combatting corruption one cannot merely focus on the public official and seek to prosecute or vilify the official alone for their misdeeds. In order to effectively tackle procurement corruption, it needs to be viewed holistically taking into account both parties to the transaction; often times the second party is a private actor. The definitions that follow are those that have acknowledged the fact that the public official does not act alone in perpetrating his corrupt act but that, in fact, he is induced by or at the very least in partnership with a private sector participant.

Tanzi offers a definition that simply states that corruption is "the intentional non-compliance with an arm's-length relationship aimed at deriving some advantage from this behaviour for oneself or for related individuals".[67] This definition is very neutral, allowing the reader to impute blame on either the public sector or the private sector for the misdeed.

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[64] Transparency International 'Regulating private sector corruption' (April 2018) Anti-corruption helpdesk https://knowledgehub.transparency.org/helpdesk/regulating-private-sector-corruption (date accessed 25 August 2019)
[65] As above
[66] Robert C Brooks 'The nature of political corruption' (1909) 24(1) *Political science quarterly* 1 at 5
[67] n 11

Manzetti and Wilson define it as an 'illegal transaction where public officials and private sector actors exchange goods for their own enrichment at the expense of society at large'.[68] This definition is attractive because it is inclusive in its framing of corruption.

Joseph Nye defines corruption broadly as:

> [B]ehaviour 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.[69]

These definitions are appealing for the purposes of this thesis as they do not ascribe fault on the public sector alone – each of the definitions are either neutral, inclusive or broad enough that they acknowledge and confirm the involvement of the equally culpable private sector element of the corrupt relationship.

Although, as has been stated previously, there is no universally recognised or applied definition of corruption; what is evident from the literature and from the definitions set out above is that in order to be recognised as corruption the following elements must at the very least be present:[70]

1. corruption is intentional – the corrupt [actor] must know the better and choose the worse;
2. a political or fiduciary duty must exist 'or there is no possibility of being corruptly unfaithful to it'[71];
3. 'the duty mis-performed or neglected for personal reasons must be recognised';
4. the motive of a corrupt act must be some advantage more or less directly personal; and
5. the personal interest sought to be gained is 'susceptible to numerous gradations from egoism to altruism… [i]t may be extended to include the welfare of relatives – a form of corruption so common as to have acquired a name of its own' [i.e. nepotism[72]].

2.4 Causes of Corruption

As mentioned above, the large volumes of capital which flow through the procurement system are one of the reasons that make this area of government administration so vulnerable to corruption. Some additional reasons put forward for the high susceptibility to corruption in public procurement are 'the nature of the relationship between the decision-maker and the public body, which is such that deviating from the public interest will not normally affect the decision-maker's personal finances; the

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[68] Luigi Manzetti and Carole J Wilson 'Why do corrupt governments maintain public support?' (2007) 40(8) *Comparative political studies* 949 at 950

[69] J. S. Nye 'Corruption and Political Development: A Cost-Benefit Analysis' (1967) 61(2) *The American Political Science Review* 419

[70] Brooks (n 66)

[71] Brooks' article sets out the elements of political corruption and as such his views are framed with reference only to the role of the public official. In reiterating these elements, the author has made attempts to incorporate references to the private sector actor, where specific reference is required.

[72] For a definition of nepotism see paragraph 2.6 below

presence of unsupervised discretion; bureaucratic rules; budgets that may not be tied to specified goals; as well as salaries that are not related to performance or that are low'.[73]

This comprehensive statement has several elements that are worthy of further discussion. Particularly within the South African context, there are three elements that stand out for the author as relevant considerations impacting the procurement system within the country:

a) the deviation from public interest that has no effect on the official's personal finances – it is submitted that this element refers to the opportunity to abuse power. Since governments have great administrative powers that have a direct impact on the lives of citizens, regulating access to food, healthcare and social security (to name but a few), officials can abuse this power to extract value for themselves in their private capacities. Olaniyan states that '[t]he concept of the state historically reflected a supreme authority whose words were law and which could do no wrong.' [74] He goes on to say that 'the prevailing political thoughts in the past were that only the existence of s supreme authority with absolute and perpetual power to make incontestable decisions could serve as a panacea for sustainable peace, security and orderly government. The overriding considerations were then the preservation of the sovereign order, immunity for any wrongdoing and the vesting of private privileges, not the interest of citizens.'[75]

   It is the view of the author that it is this attitude within the Zuma administration that allowed the grand corruption that has taken place over the last 15 years of his presidency and vice presidency;

b) bureaucracy – as will be seen in the discussion of the domestic legislative framework, South Africa's procurement system is convoluted. This has resulted in complicated administrative procedures and at times, the erroneous non-compliance with the laws by public officials and administrators; and

c) unsupervised discretion – as a result of the rampant cronyism prevalent in the South African government, it is submitted that this has bolstered government's apathy towards accountability and its affinity towards commissions of enquiry; the outcomes of which do not result in the prosecution of wrongdoers.

It has been said that 'the causes and consequences of corruption – whether large-scale or petty – vary from country to country and the effects of corruption can depend on different political, legal economic and social variables'.[76]

[73] Williams & Quinot (n 14), 341
[74] n 33, 55 - 56
[75] As above
[76] Olaniyan (n 33), 51

Thus, it is submitted that the determinants of corruption can only be defined within the context of the levels of development, taking into account the levels of political stability, the strength of the enforcement agencies and the independence (or lack thereof) of the judicial system of the state. It is the opinion of the author that, from a South African perspective, what is currently ailing the country and has continued to feed the insatiable appetites of the political elite and their private counterparts who wantonly engage in corruption is patronage systems that have allowed rampant cronyism in the filling of government posts, is a lack of will on the part of political leaders and impunity for the perpetrators.

2.5 Forms of Corruption

All forms of corruption exist and flourish equally in the public and private sectors. There are several taxonomies that are used to describe the various types of corruption that occur such as grand corruption, which occurs when a high level public official commits an act that distorts policies or the central functioning of the state, enabling him/her to benefit at the expense of public good.[77] Conversely, petty corruption connotes corrupt activities engaged at the lower levels of government in the officials' everyday interactions with ordinary citizens. An example of this would be where an official refuse the citizens access to public services unless a bribe is paid.

Incidental or individual forms of corruption which are confined to instances of malfeasance on the part of individual politicians or public officials are episodic rather than systemic.[78] Ogundokun contends that 'this form of corruption is a feature of life in almost all societies'.[79] Systemic corruption on the other hand 'occurs where corruption pervades the entire society and, in the process, becomes routinised and accepted as a means of conducting everyday transactions. It affects institutions and individual behaviour at all levels of the political and socio-economic system.'[80]

Williams and Quinot identify three types of corruption which prevail within the procurement system:

> Public corruption moves from the supplier to the public official responsible for taking procurement decisions. This frequently takes the form of bribes or other non-monetary inducements given to the public official in order to influence the exercise of his discretion… private corruption in the shape of collusion, price-fixing, maintenance of cartels or other uncompetitive practices engaged in by suppliers to the detriment of the government. Thirdly, auto-corruption occurs when a public official wrongly secures for himself, or an associate, privileges rightly belonging to the public, by by-passing or manipulating the formal procedures necessary for the award of these privileges.[81]

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[77] Bolton (n 44), 8

[78] Opeoluwa Adetoro Ogundokun *A human rights approach to combating corruption in Africa: appraising the AU convention using Nigeria and South Africa* (University of Pretoria, 2005) at 10

[79] As above

[80] As above

[81] n 14, 341 - 342

These above taxanomies are useful in identifying the forms of corruption that exist within the private sector, and in particular, those specific private sector corrupt activities that most often permeate the public procurement system, some of which have already been alluded to in the preceding paragraphs:

2.5.1 Bribery[82] - The offering, promising, giving, accepting or soliciting of an advantage as an inducement for an action which is illegal, unethical or a breach of trust. Inducements can take the form of gifts, loans, fees, rewards or other advantages (taxes, services, donations, favours etc.). Such inducements often lead to bid-rigging,[83] bid suppression[84] and low-balling.[85]

2.5.2 Conflicts of interest – this occurs when an agent has an undisclosed interest in a transaction that adversely affects their professional role.[86]

2.5.3 Collusion[87] - A secret agreement between parties, in the public and/or private sector, to conspire to commit actions aimed to deceive or commit fraud with the objective of illicit financial gain. The parties involved often are referred to as cartels. Cartels connote the anti-competitive nature of the price-fixing that can often occur in procurement contracts. Often form of corruption manifests itself as bid rotation.[88]

2.5.4 Extortion – where 'money and other resources [are] extracted by the use of coercion, violence or the threats to use force… Corruption in the form of extortion is usually understood as a form of extraction "from below" by Mafias and criminals'.[89] In other words, it denotes the scenario where a public official is being blackmailed or extorted in another way by a private actor in order that the private actor might extract pecuniary or other gains from the official through violent means.

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[82] https://www.transparency.org/glossary/term/bribery (date accessed 16 May 2019)

[83] Glenn T Ware et al 'Corruption in procurement' (2011) 65 *Handbook of Global Research and Practice in Corruption* at 73 defines bid rigging as occurring 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.

[84] WT Mugadza 'Combating corruption in public procurement in developing countries: a legal analysis' (North-West University, 2018), 59 states that 'bid rigging takes place when one or more competitors agree not to bid', or withdraw their bids. He states further that this decision is influenced by a public official with the intention of justifying awarding the contract to a sole bidder, who would have been deemed to be the only one to comply with all of the tender requirements. The other bidders then decide to withdraw their bids; if the bid suppression succeeds then those contractors who did not submit tenders or withdraw them will be rewarded with sub-contracting arrangements with the "successful" bidder; which sub-contracting arrangements would have been facilitated by the public official upon payment of one or more bribes.

[85] Ware (n 83) states that low balling occurs 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 b amended and the contract price increased to enable the winning bidder to complete the work and inflate his profit margin, part of which may be shared with the public official."

[86] Regulating private sector corruption (n 64)

[87] https://www.transparency.org/glossary/term/collusion (date accessed 16 May 2019)

[88] Ware (n 83) defines bid rotation as the situation where there is an agreement between bidders that they tailor their bidding in order for a particular bid to win. The arrangement is such that each of those bidders will at some point be awarded the tender.

[89] Apolloni (n 42), 9

2.5.5 Favouritism – it is a 'mechanism of power abuse implying "privatisation" and a highly biased distribution of state resources… Favouritism is the natural human proclivity to favour friends, family and anybody close and trusted'.[90] The earlier example set out in paragraph 2.1 above, where procuring official draft tender documents to favour particular suppliers, illustrates how favouritism permeates the procurement system.

2.5.6 Fraud[91] – to cheat. The offence of intentionally deceiving someone in order to gain an unfair or illegal advantage (financial, political or otherwise). Countries consider such offences to be criminal or a violation of civil law.

2.5.7 Nepotism – 'is a special form of favouritism, in which an office holder prefers his proper kinfolk and family members (wife, brothers and sisters, children, nephews…)'.[92]

On a review of the various manifestations of corruption committed by the private section within the procurement system that the majority of these corrupt acts must necessarily be committed at the pre-award stage of the procurement process to ensure that the contract is awarded to the corrupt private actors. Therefore, it is submitted that it is the pre-award period of the procurement system that is most vulnerable, at the first instance, to private sector corruption.

2.6 The effects of corruption and its relationship with human rights

There is a growing body of evidence that shows that corruption is bad for business.[93] For the firm itself it can cause reputational damage and the related loss of business. In addition, there are the added costs of investigation and remedial action that must be accounted for.

Furthermore, the effects can be felt throughout the supply chain, distorting markets and competition, increasing costs for firms and excluding smaller firms that cannot afford to compete on these terms or those with integrity to do not wish to engage in corrupt activities. Ultimately, the consumer will suffer as the price of goods and services increases while the quality of those goods and service decreases.

These negative effects remain equally true when the private sector collaborates with or induces public officials to perform corrupt acts.

However, there is a school of thought that corruption can have positive effects, particularly within the context of development; Leite and Weidmann set out the views of several scholars as follows:

> In this context, Leff and Huntington suggest that corruption may allow entrepreneurs to work around the extensive bureaucratic procedures, negating some of the deleterious effects of red tape; Liu uses an equilibrium queuing model to suggest that corruption allows the queue to be rearranged in a way that brings about an efficient allocation of time, giving those for whom time is most valuable the opportunity to move to the front of the line; and Beck and Maher…

[90] As above
[91] https://www.transparency.org/glossary/term/fraud (date accessed 16 May 2019)
[92] Appolloni (n 42), 10
[93] Regulating private sector corruption (n 64)

> suggest that corruption may serve to ensure that projects are awarded to the most efficient firms, who stand to gain the most from payment of bribes.[94]

Nye similarly postulated the revisionist's argument that corruption in less developed countries was beneficial for the socio-political and socio-economic development of those countries and was necessary to prevent political instability and violent conflict; accordingly, he stated that corruption is necessary in transitional societies because of the lack of infrastructures of governance and because corruption helps to facilitate investment opportunities for entrepreneurs that, in turn, bring innovation and efficiency, contribute to economic development, and break down the wall of bureaucracy in those societies.[95] However, Nye does conclude that 'it is probable that the costs of corruption in less developed countries will exceed its benefit [on the whole]'.[96] This is the view of contemporary theorists; a view which the author shares. The negative impacts of corruption far outweigh any benefits that could accrue, particularly in the face of the grand corruption in the grave magnitudes that it is experienced, the world over, today.[97]

Sator and Beamish submit that 'corruption has become one of the world's most pressing challenges, affecting environmental protection efforts, human rights, national security, access to healthcare and justice services, economic development and the legitimacy of governments around the world'.[98] Similarly, Gebeye sums up the impact of corruption on society so eloquently when he says, 'Corruption is damaging for the simple reason that important decisions are determined by ulterior motives, with no concern for the consequences for the wider community.' [99]

Mubangizi and Sewpersadh, in a similar vein, state that,

> It impairs the ability of governments to fulfil their obligations and ensure accountability in the implementation and protection of human rights – particularly socio-economic rights pertinent to the delivery of economic and social services like healthcare, education, clean water, housing and social security. This is because corruption diverts funds into private pockets – which impedes delivery of services, thereby perpetuating inequality, injustice and unfairness.[100]

Corruption also undermines economic development; 'it reduces economic growth by reducing the incentives for product investment, both by domestic residents and by foreigners.'[101] It is evident that whenever corruption is prevalent there is an inevitable impairment of the government's ability to fulfil its custodial duties of service delivery. This inability to fulfil what is arguably, one of its core

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[94] n 17, 5 (full references omitted)
[95] n 69, 419 - 420
[96] n 69, 427
[97] For examples of contemporary grand corruption see https://www.transparency.org/news/feature/25_corruption_scandals (date accessed 24 August 2019)
[98] Michael A Sartor and Paul W Beamish, 'Private Sector Corruption, Public Sector Corruption and the Organizational Structure of Foreign Subsidiaries' (2019) *Journal of Business Ethics* 1
[99] n 8, 9
[100] n 15, 67
[101] Bhargava (n 63),

objectives, is ultimately always experienced in the most pronounced forms on the most vulnerable members of society – women, children, the physically and mentally impaired members of society, to name a few. In acknowledging this fact alone, the tether between corruption and human rights can begin to be bound. The violations of socio-economic rights that are perpetrated as a result of the misdirection and illicit flow of state resources into private wealth impacts severely on citizens' ability to live a decent life.

Based on the dire human rights impacts that corruption can have on a nation, it is imperative to strike back at it with a human rights-based approach. A human rights-based approach has been described in the following terms:

> [It's] about empowering people to know and claim their rights and increasing the ability and accountability of individuals and institutions who are responsible for respecting, protecting and fulfilling rights. This means giving people greater opportunities to participate in shaping the decisions that impact on their human rights. It also means increasing the ability of those with responsibility for fulfilling right to recognise and know how to resect those rights, and make sure they can be held to account.[102]

Human rights in this context is referring the 'rights inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion or any other status'.[103] The call for a human rights-based approach is a call to recognise that, although the emphasis on the economic consequences of corruption is warranted, there is yet another layer of harm that is not being adequately addressed; the translation of the economic harm into a lack of adequate food and shelter; a lack of clean and safe drinking water and sanitation; a lack of education and access to labour that pays a living wage. It is a multi-pronged approached that not only requires good governance in both the public and private sectors but it recognises the symbiotic relation of public participation in governance.

If one looks to the UN Guiding Principles on Business and Human Rights[104] as a template for a human rights-based approach, it can be said that such an approach is one that interrogates the detection, mitigation and reporting mechanisms employed by governments and business entities in how they conduct their affairs. It compels a critical analysis of the granular impacts of a corporation's activities and mandates that consultation with the effected communities and civil society organisations be conducted to ensure that these granular impacts are identified and considered to the greatest degree possible.

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[102] n 15, 86

[103] As defined by the UN Office of the high commissioner for human rights https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx (date accessed 6 September 2019)

[104] n 32

It is from this perspective that this thesis will engage with the human-rights based approach; from the perspective of increased public participation in the public procurement process as a means of mitigating the incidence of corruption within it.

2.6.1 Corruption and Human Rights in South Africa

Section 8(2) of the Constitution provides that:

> A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

This provision creates a direct horizontal application of the bill of rights. In so doing, the constitution seeks to 'deal with private power as exercised by private individuals and sanctioned by long-established common law'.[105] This means that the bill or rights is directly applicable to the conduct of private individuals and this allows 'a plaintiff [to] rely directly on a particular substantive right, (insofar as it is applicable to private individuals), to found a cause of action and the defendant, likewise is able to do so for the purposes of raising a defence'.[106] In the South African judiciary's recent history, it has begun to grapple with the mechanics of direct horizontal application of the bill of rights.

In *Juma Musjid* Case[107] Nkabinde J acknowledged that private persons may have a duty to protect socio-economic rights when he said:

> This Court, in *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, made it clear that socio-economic rights . . . may be negatively protected from improper invasion. Breach of this obligation occurs directly when there is a failure to respect the right, or indirectly, when there is a failure to prevent the direct infringement of the right by another or a failure to respect the existing protection of the right by taking measures that diminish that protection. It needs to be stressed however, that the purpose of section 8(2) of the Constitution is not to obstruct private autonomy or to impose on a private party the duties of the state in protecting the Bill of Rights. It is rather to require private parties not to interfere with or diminish the enjoyment of a right. Its application also depends on the intensity of the constitutional right in question, coupled with the potential invasion of that right which could be occasioned by persons other than the state or organs of state.

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[105] Deeksha Bhana 'The horizontal application of the Bill of Rights: a reconciliation of sections 8 and 39 of the Constitution' (2013) 29(2) *South African Journal on Human Rights* 351 - 352

[106] As above, 355

[107] *Governing Body of the Juma Musjid Primary School and Others v Essay NO & Others (Centre for Child Law and Another as Amici Curiae)* [2011] ZACC 13; 2011 (8) BCLR 761 (CC)

Most recently, in *AllPay Consolidated Investment Holdings (Pty) Ltd & Others v Chief Executive Officer of the South African Social Security Agency (SASSA) & Others*[108] the constitutional court was faced with the dilemma of having to declare invalid a contract concluded between SASSA and Cash Paymaster Services (CPS) for the payment of social grants. Had the contract merely been cancelled this would mean that millions of South Africans would not be paid their social grants, money on which they depend for their very livelihood. To avoid the catastrophe that would ensue if social grants were not paid, the court declared the contract invalid but ordered that it remain in force until SASSA completed a new tender process and appointed a new service provider to fulfil the payment of social grants.

In arguing against the court invalidating the contract, CPS and SASSA submitted to the court that if the contract were invalidated, CPS would have no further obligations towards anyone and would simply be able to walk away without any sanction for doing so.

The court stated that this submission was unsustainable and based its reasoning on the following:

> [T]he argument ignores the public accountability aspect that accompanies the conclusion of procurement contracts for the performance of public functions. Cash Paymaster undertook constitutional obligations by entering into the social grant payment contract with SASSA. During the existence of the contract these obligations stem from the contract it concluded. But even after the dissolution of the contract, but before the appointment of another service provider, Cash Paymaster will have constitutional obligations… Where an entity has performed a constitutional function for a significant period already, as Cash Paymaster has here, considerations of obstructing private autonomy by imposing the duties of the state to protect constitutional rights on private parties, do not feature prominently, if at all. The conclusion of a contract with constitutional obligations, and its operation for some time before its dissolution – because of constitutional invalidity – means that grant beneficiaries would have become increasingly dependent on Cash Paymaster fulfilling its constitutional obligations. For this reason, Cash Paymaster cannot simply walk away: it has the constitutional obligation to ensure that a workable payment system remains in place until a new one is operational.[109]

In making this argument the court has laid down a fundamental principle: when the private sector enters into a public procurement contract with the state; it automatically assumes constitutional obligations to uphold human rights. In so doing, the court has made it clear that the South African constitution and its courts mandate holding the private sector to account for, at the very least, failing to refrain from violating the human rights of South African citizens.

2.7 Conclusion

Much of the literature on corruption and its consequences either focusses on the private sector or the public sector. At no point has the literature converged to tackle private corruption within the procurement system. This chapter has sought to draw comparisons with these two streams of thought

[108] [2014] ZACC 12

[109] As above, paras 64 and 66

in an attempt to tease out where they might converge. The conclusions can be drawn about private corruption within the procurement system are that (i) the private sector has a fiduciary duty, the breach of which is as dire as the breach of the public official's duty to exalt the public interest; (ii) as with public officials, private actors enter into corrupt activities with a view to acquire some personal gain whether pecuniary, political or otherwise; (iii) its effects are as damaging for the public at large as public corruption because it is merely the other side of the same coin; and (iv) the private sector, when entering into the public procurement system has, at the very least, an obligation to refrain from violating human rights.

Chapter 3 will set out the legislative and institutional framework that South Africa relies on in conducting its procurement processes and the measures that it has in place to combat corruption within the procurement system. The discussion centres around determining whether the legislative framework recognises the role of the private sector within procurement corruption and whether the institutional framework is adequately equipped to fulfil its mandate.

Chapter 3
Legal and Institutional Framework for Public Procurement and Corruption in South Africa

"Without strong watchdog institutions, impunity becomes the very foundation upon which systems of corruption are built. And if impunity is not demolished, all efforts to bring an end to corruption are in vain." ~ Rigoberta Menchú

3 Introduction

This chapter sets out the international law framework that South Africa employs in tackling corruption. Thereafter, it will discuss the South African laws and regulations that regulate public procurement and corruption as well as the institutions that have been established to fight corruption. The intention of mapping out the framework within which the South African public procurement system operates and its response to corruption is to determine whether this framework, in its current form, adequately acknowledges and addresses the role of the private sector, as supplier to the government, in perpetuating the looting of state coffers and the corrosive impact that this has on the general public; and whether the institutions are adequately equipped to fulfil their functions as agencies established to eradicate economic crimes in South Africa.

3.1 The role of international law in South Africa

Sewpersahd states that 'the gross human rights violations seen during World War II, and the creation of the United Nations in 1945 saw the adoption of fundamental and international human rights. This gave rise to an international human rights culture, which dominates a large portion of international law… Corruption stands as a threat to a multitude of fundamental human rights. Accordingly, a number of international anti-corruption instruments have been established and adopted by various states.' [110]

Public international law is afforded constitutional recognition within the in South African legal system. Sections 232 and 233 of the Constitution provide respectively that:

- 'Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'; and
- 'When interpreting any legislation, every court must refer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'.

As a result of this constitutional recognition of international law in South Africa, the courts have considered international law in a large number of cases where it was applicable.[111] A notable case in

[110] n 60, 51

[111] Examples of these are *S v Makwanyane* 1995 (3) SA 391 (CC) which dealt with the right to life and the death penalty, *S v Williams* 1995 (3) SA 632 (CC), which dealt with the constitutionality of corporal punishment; *Bernstein v Bester* 1996 (2) SA 751 (CC), which dealt with the right to privacy and the right to a fair trial;

the contemporary anti-corruption debate is the *Glenister* case[112] in which the applicant contended that the legislation that created the Directorate for Priority Crime Investigation also known as the Hawks) and disbanded the Directorate of Special Operations (also known as the Scorpions) was constitutionally valid. The court found that indeed the legislation was not valid in that it did not sufficiently insulate the Hawks from political influence and, therefore compromised the independence of the anti-corruption agency. However, the court suspended the declaration of constitutional invalidity of the offending provisions, thus allowing Parliament an opportunity to remedy the defects in the legislation. In the majority judgement the court confirmed the authority of international law in South Africa. Referring to international anti-corruption conventions, the constitutional court made the following averment:

> The obligations in these Conventions are clear and they are unequivocal. They impose on the Republic the duty to international law to create an anti-corruption unit that has the necessary independence. That duty exists not only in the international sphere, and is enforceable not only there. Our Constitution appropriates the obligation for itself, and draws it deeply into its heart, by requiring the state to fulfil it in the domestic sphere.[113]

The court goes on to link the obligation under international law to create an independent anti-corruption unit to the South African government's duty to respect, protect, promote and fulfil the rights in the Bill of Rights.[114] The significance of this acknowledgement, particularly within the context of corruption, is that it is also an acknowledgement of the transnational nature of corrupt activities and the illicit financial flows that are generated as a result of them.[115]

In fulfilling this obligation, South Africa has become a signatory to a number of international anti-corruption instruments. Not all of these instruments are applicable to corruption within public procurement, however, they all purport to establish some universal anti-corruption principles. These instruments will be discussed below.

Ferreira v Levin 1996 (1) SA 984 (CC), which dealt with the rule against self-incrimination and the right to a fair trial); *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC), which dealt with the constitutionality of imprisonment for judgement debts; *S v Rens* 1996 (1) SA1218 (CC), which dealt with the right of appeal); *Dabelstein v Hildebrandt* 1996 (3) SA 42 (C), which dealt with the constitutionality of Anton Piller Orders and *Ex Parte Gauteng v Provincial Legislature In re Dispute concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC), which dealt with language and religious rights of minorities.

[112] *Hugh Glenister v President of the Republic of South Africa & Others* CCT48/10 [2011] ZACC 6

[113] As above at para 189

[114] As above; this obligation is set out in section 7(2) of the Constitution

[115] Indeed, the UNCAC recognises in its preamble that 'corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international co-operation to prevent and control it essential.'

3.1.1 The United Nations Convention against Corruption (UNCAC)

The UNCAC was ratified by South Africa in 2004 and came into force in 2005. One of the defining features of the UNCAC is its advocating for international cooperation among states in an attempt to address the transnational nature of some corrupt activities, particularly organised crime. Therefore, under UNCAC, South Africa is obliged to help other parties to prevent and fight corruption by providing technical assistance if necessary. Some of the other key features of the UNCAC are the requirements to take steps to prevent and criminalise corruption; and to recover assets.

In addition, UNCAC sets out various implementation mechanisms to assist parties to ensure that they are able to meet the obligations set out above; along with requirements that must be in place to ensure participation by all stakeholders within the state. These requirements include the promotion of active participation of individuals and groups, including civil society and community-based organisations, in the prevention of and fight against corruption; codes or standards of conduct for public officials; and appropriate training so that they can perform their functions effectively and honestly.

These anti-corruption policies must comply with the rule of law, and foster integrity, transparency and accountability; Whistle-blowers are also covered under the convention, which states that parties should consider incorporating measures into their domestic legal systems to provide protection against unjustified treatment of persons who report corruption in good faith.

The Convention also recognises public procurement as a critical area of focus and sets specific requirements for corruption prevention within that sector:

Article 9(1) of UNCAC provides that:

> Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are affective, inter alia, in preventing corruption.

Furthermore, in Article 9(2) it requires State Parties to take appropriate steps to promote transparency and accountability in the management of public finances. It will be seen in the discussion relating to the domestic legislative framework that South Africa has internalised these principles expounded by the UNCAC and has elevated them to constitutional status. In addition, South Africa has gone to great lengths to regulate the management of public finances through the Public Finance Management Act (PFMA) and Municipal Finance Management Act (MFMA), which are also discussed in greater detail later in this chapter.

South Africa's anti-corruption obligations in terms of this convention find expression in domestic legislation such as the Prevention and Combatting of Corrupt Activities Act; the Protected Disclosures Act;[116] and the Criminal Procedure Act, among others.

3.1.2 The UN Convention against Transnational Organized Crime[117]

This convention is specifically aimed at combating organised crime and money-laundering. Article 8 provides for the criminalisation of corruption by making it a criminal offence to promise, offer or give a public official an undue advantage to influence the official's behaviour in the exercise of his duties. Similarly, it is an offence for the official to solicit or accept such an undue advantage to influence his behaviour in the exercise of his duties. Article 9 calls for legislative, administrative or other effective measures to be put in place to 'promote integrity and to prevent, detect and punish the corruption of public officials'. In addition, Article 9(2) states that:

> Each State Party shall take measures to ensure effective action by its authorities in the prevention, detection and punishment of the corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions

South Africa ratified this convention on 20 February 2004 and enacted the Prevention of Organised Crime Act as a response to the obligations contained in it.

3.1.3 The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Anti-bribery Convention)[118]

The OECD Anti-bribery Convention establishes legally binding standards to criminalise bribery of foreign public officials in international business transactions. Under this convention, parties must take measures to establish that, under their own laws, it is a criminal offence for any person to bribe a foreign public official to obtain an improper benefit in international business. Parties must ensure that such action is punishable. South Africa is a non-member country of the OECD, but since 2007 has been a party to the convention. It has a working relationship with the OECD organisation and has adopted this convention.

3.1.4 The AU Convention against Corruption

The African Union Convention on Preventing and Combating Corruption was adopted in 2003 and came into force in 2005. In 2004, South Africa signed the convention and ratified it in 2005. It has a

[116] This Act, also known as the Whistle-blowers Act, was enacted - as the name suggests - to provide for the protection of those individuals who come forward to report information about corrupt activities within their organisations, or in the performance of their duties as public servants. Protection from reprisals becomes necessary because of the intimidation, threats of harm and, in severe cases, death that can befall whistle-blowers.

[117] UN General Assembly Resolution 55/25 of 2000

[118] 15 February 1999

number of provisions similar to those of the UN Convention against Corruption. The AU convention requires signatories to establish, maintain and strengthen independent, national anti-corruption authorities or agencies.

3.1.5 The SADC Protocol against Corruption

The Southern African Development Community's Protocol against Corruption was adopted by Heads of State at the August 2001 summit in Malawi. This was the first sub-regional anti-corruption treaty in Africa and is also the only one of the five treaties discussed that makes explicit reference to corruption in the private sector.[119] The SADC Protocol against Corruption provides for the prevention, detection and punishment of corruption. It also covers co-operation between states, and corruption in both the public and private sectors. The protocol recognises that demonstrable political will and leadership are essential in the fight against corruption. It affirms the need to garner public support for initiatives to combat corruption.

A recurring theme that runs through all of the above conventions and protocols is that of prevention. Olaniyan[120] finds that:

> The World Bank has described prevention as the 'preferred method' to address the problem of corruption, and the [abovementioned] instruments reinforce that without effective preventive measure, states cannot achieve the objective of combatting corruption in all its forms and manifestations… Preventive strategy is thus crucial to the viability and success of any such response, and should in fact be prioritised in practice, and not just on paper. Prevention has the added benefit of removing opportunities and incentives for corruption, and therefore reducing the reliance on criminalisation and sanctions to fight corruption, which… has not proved to be a sufficient deterrent…

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[119] It states as its purposes in Article 2 as:

a) to promote and strengthen the development, by each of the State Parties, of mechanisms needed to prevent, detect, punish and eradicate corruption in the public and private sector;
b) to promote, facilitate and regulate cooperation among the State Parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption in the public and private sector; and
c) to foster the development and harmonization of policies and domestic legislation of the State Parties relation to the prevention, detection, punishment and eradication of corruption in the public and private sector.

Article 3(1)(e) and (f) also identify as acts of corruption:

- 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 himself/herself or for anyone else, for him/her to act, or refrain from acting, in breach of his/her duties; and
- 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/she is able to exert any improper influence over the decision making of any person performing functions in the public or private sector…

[120] n 33, 157

Now turning to the domestic legislative framework, it will be demonstrated how the protocols and conventions have been implemented in South Africa.

3.2 The Constitution

Public procurement has been granted constitutional status by section 217(1) of the Constitution which states that:

> When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.

Section 217 (2) of the Constitution creates the scope for a preferential procurement system to be embedded within the framework, the intention of which is to promote the inclusion of people "historically disadvantaged by unfair discrimination on the basis of race, gender or disability"[121] within the economy.[122] S217(3) provides for the enactment of legislation enabling the preference.

3.3 The Public Finance Management Act[123] (PFMA)

The five foundational principles outlined in section 217(1) of the Constitution underpin the entire legislative framework governing public procurement in South Africa. These five principles are echoed in various other pieces of legislation regulating public administration, most notably, the PFMA and the Municipal Finance Management Act[124] (MFMA).

Section 76(4) of the PFMA mandates National Treasury to "make regulations or issue instructions… [regarding] the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective."

In addition, sections 38(1)(a)(i) and (b) of the PFMA provide respectively that the accounting officers of state departments:

i. must ensure that the department has and maintains effective, efficient and transparent systems of financial and risk management and internal control; and
ii. is responsible for the effective, efficient, economical and transparent use of the resources of the department.

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[121] The Preferential Policy Framework Act 5 of 2000 sec 2(1)(d)(i) which states that the specific goals of a preferential procurement policy framework may include contracting with persons, or a category of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability.

[122] S217(2) provides that "Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for –

(a) Categories of preference in the allocation of contracts; and
(b) The protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination".

[123] Act 1 of 1999

[124] Act 56 of 2003

Sewpersadh explains very succinctly the purpose of the PFMA as follows:

> The [PFMA] was adopted with the objective to modernise financial management and enhance accountability. A basic principle of this modernised financial model is that managers must be given the flexibility to manage, within a framework that satisfies the constitutional requirements of transparency and accountability. This is the context within which the PFMA was drafted. The PFMA regulates financial management and is applicable to national and provincial government departments. It sets out procedures for the efficient and effective management of all revenue, expenditure, assets and liabilities and establishes the duties and responsibilities of government officials in charge of finances.[125]

3.4 The Municipal Management Act

The MFMA regulates financial management at a local or municipal government level. Chapter 11 is dedicated to development and implementation of a legal framework for an integrated supply chain management process in local government. The accounting officer of the municipality is responsible for the implementation of the supply chain management policy.[126]

Section 112 of the MFMA mandates municipalities to adopt a supply chain management system that is fair, equitable, transparent, competitive and cost-effective and prescribes several other criteria which must be observed by the municipality in constructing its supply chain management policy and process. The MFMA contains much of the same procurement provisions as the PFMA and it should be noted that neither of these Acts are dedicated solely to procurement; rather they are "overarching statute[s] regulating government finances"[127] at the national and provincial level in respect of the PFMA and at the local government level in respect of the MFMA.

3.5 The Preferential Procurement Policy Framework Act[128] (PPPFA)

The hallmark of South African government procurement law is the manner in which public procurement is being employed as a social policy tool to address discriminatory policies and practices which led to the economic exclusion of the majority of the citizens of the country under the Apartheid government. As stated above, it is S217(3) that mandates the enactment of legislation enabling preferential procurement. As a result, the PPPFA was enacted. The PPPFA establishes the manner in which preferential procurement policies are to be implemented, and together with the Preferential Procurement Regulations,[129] the aim of the preferential procurement legislation is to "use public

[125] n 60, 77
[126] n 124, sec 115
[127] Sugudhav-Sewpersahd (n 60), 78
[128] n 121
[129] The latest iteration of the regulations was issued on 20 January 2017 and came into force on 1 April 2017.

procurement as a lever to promote socio-economic transformation, empower small enterprises, rural and township enterprises, designated groups and promotion of local industrial development."[130]

3.6 The Broad-Based Black Economic Empowerment Act[131] (BBBEE Act)

The BBBEE Act was enacted with the primary purpose of addressing the legacy of apartheid and promoting the meaningful economic participation of black people[132] in the South African economy.[133] The BBBEE Act serves as another mechanism that the South African government has employed to enhance public procurement as a policy tool and to bolster the inclusion of the previously disenfranchised individuals of the country into the economy.

Section 10 of the BBBEE Act provides that every organ of state and public entity must apply any relevant Code in, amongst others, determining qualification criteria for the issuing of licences, concessions or other authorisations in respect of economic activity in terms of any law; and in developing and implementing a preferential procurement policy.

However, the BBBEE Act and the corresponding Codes[134] do not impose a legal obligation on firms to comply with specific BBBEE targets. Steyn and Padayachy state that

> The Codes simply provide a methodology for measuring a firm's BBBEE rating and the targets in the Codes are not legally binding… However, a firm's BBBEE status is an important factor affecting its ability to successfully tender for government and public entity tenders, and (in certain sectors like mining and gaming) to obtain licences.[135]

Although the main purpose for which it was enacted, i.e. BEE rating and status of corporate entities, does not constitute a binding obligation on entities who wish to obtain a BEE rating, the BBBEE Act does contribute to South Africa's arsenal of anti-corruption measures by criminalising the practice of fronting.[136]

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[130] Media Statement issues on behalf of National Treasury dated 23 January 2017 http://www.treasury.gov.za/comm_media/press/2017/2017012301%20-%20Media%20Statement%20revised%20PPR.pdf (date accessed 22 July 2019)

[131] 53 of 2003

[132] 'Black People' is defined in section 1 of the BBBEE Act as:

> a generic term which means Africans, Coloureds and Indians who are citizens of the Republic of South Africa by birth or descent or who became citizens of the Republic of South Africa by naturalisation before 27 April 1994 or on or after 27 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date.

[133] P Steyn & S Padayachy 'The BBBEE Act and Codes Explained' (Werksmans Inc, 2018) 3

[134] This is a reference to the Codes of Good Practice issued in terms of the BBBEE Act which came into effect on 1 May 2015

[135] n 133, 5

[136] A 'fronting practice' is defined in section 1 of the BBBEE Act as:

> A transaction, arrangement or other act or conduct that directly or indirectly undermines or frustrates the achievement of the objectives of [the BBBEE] Act or the implementation of any of the provisions of [the BBBEE] Act, including but not limited to practices in connection with a BBBEE initiative –

Bolton gives a succinct explanation of fronting as 'the practice of black people being signed up as fictitious shareholders in essentially 'white' companies'.[137] Bolton also classifies this practice as corruption.[138] The penalty for this practice, as well as the other criminal offences outlined in the BBBEE Act a fine of up to 10% of the annual turnover of an enterprise or up to 10 years imprisonment for convicted persons;[139] which penalty corresponds with that set out in the Corruption Act.[140]

3.7 Municipal Systems Act[141] (MSA)

The MSA is the Act that seeks to acknowledge and foster a relationship between the public officials within local government and the communities that they serve. It also purports to provide for the core principles, mechanisms and processes that are necessary to enable municipalities to move progressively towards the social and economic upliftment of local communities and ensure the provision of basic services to all people, and specifically the poor and disadvantaged.[142]

In order to advance these aims the Act provides that municipalities may procure the services of private persons to provide or perform a municipal service[143] by way of a service delivery agreement.[144]

(i) in terms of which Black Persons who are appointed to an enterprise are discouraged or inhibited from substantially participating in the core activities of that enterprise;
(ii) in terms of which the economic benefits received as a result of the BBBEE status of an enterprise does not flow to Black People in the ratio specified in the relevant legal documentation;
(iii) involving the conclusion of a legal relationship with a black person for the purpose of hat enterprise achieving a certain level of BBBEE compliance without granting that Black Person the economic benefits that would reasonably be associated with the status or position held y that Black Person;
(iv) involving the conclusion of an agreement with another enterprise in order to achieve or enhance BBBEE status in circumstances in which:
  a. there are significant limitations, whether implicit or explicit, on the identity of the suppliers, service providers, clients or customers;
  b. the maintenance of business operations is reasonably considered to be improbable, having regard to the resources available;
  c. the terms and conditions were not negotiated at arm's length and on a fair and reasonable basis.

[137] n 44, 293-294

[138] As above, 57 where she states that "Corruption on the part of tenderers can take the form of, *inter alia*… fronting i.e. where black people are signed up as fictitious shareholders in essentially 'white companies'".

[139] Section 13O(3)(a) of the BBBEE Act

[140] See paragraph 3.12.1 below

[141] 32 of 2000

[142] Preamble to the MSA

[143] The MSA defines, in section 1, a municipal service as:

> a service that a municipality in terms of its powers and functions provides or may provide to or for the benefit of the local community irrespective of whether –
> (a) such a service is provided… by the municipality through an internal mechanism (i.e. procured from another municipality) as contemplated by section 76 or by engaging in an external mechanism (i.e. a private sector supplier) contemplated in section 76; and

To the extent that the municipality chooses to provide a municipal service through a private entity it is required to embark on a competitive bidding processes which are required to be:[145]

i. compliant with chapter 11 of the MFMA;
ii. allow all prospective service providers to have equal and simultaneous access to information relevant to the bidding process;
iii. minimise the possibility of fraud and corruption;
iv. make the municipality accountable to local community about progress with selecting a service provider, and the reasons for any decision in this regard; and
v. takes into account the need to promote the empowerment of small and emerging enterprises.

One of the promising features of the MSA is the accountability mechanisms that are built into the procurement processes to be employed by municipalities. Sections 4, 5 and 6 of the Act set out the rights and duties of the municipal councils, local communities and the duties of municipal administrators respectively. Some of the duties imposed on the municipal councils (within the municipality's financial and administrative capacity and having regard to practical considerations[146]) are to encourage the involvement of the local community[147] and to consult the local community about the level, quality, range and impact of municipal services provided by the municipality, either directly or through another service provider; and the available options for service delivery.[148]

Local communities have the right to, amongst others, contribute to the decision-making processes of the municipality and submit written or oral communications, representations and complaints to the municipality[149] as well as demanding that the proceedings of the municipal council and those of its committees are open to the public, conducted impartially and without prejudice and untainted by personal self-interest.[150]

In addition, section 80(2) states that before a municipality enters into a service delivery agreement with an external service provider it must establish a programme for community consultation and information dissemination regarding the appointment of the external service provider and the contents of the service delivery agreement. The contents of the service delivery agreement must be communicated to the local community through the media.

The provisions allowing for public participation are commendable and appear to show government's commitment to meeting the needs and demands of their communities with appropriately assessed

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(b) fees, charges or tariffs are levied in respect of such a service or not.

[144] Section 76(b) read with 80(1)(b) MSA
[145] Section 83(1) MSA
[146] Section 4(2) MSA
[147] Section 4(2)(c) MSA
[148] Section 4(2)(e) MSA
[149] Sections 5(1)(a) and (b) MSA
[150] Section 5(1)(e) MSA

demand. However, the Act does not cater for either the establishment of formal complaint mechanisms for local communities who have been adversely impacted by the implementation of any services by the municipality or their appointed service providers or an anti-corruption framework or strategy that can be followed by municipal councils and managers to give credence to their obligation to minimise the possibility of fraud and corruption.

3.8 Promotion of Just Administrative Action Act[151] (PAJA)

PAJA is applicable to the public procurement process in so far as it provides a dispute resolution mechanism for aggrieved tenderers. Where the relevant procurement legislation does not contain satisfactory appeal or review mechanisms, then the aggrieved bidder may rely on PAJA. It was enacted to give effect to section 33 of the Constitution.[152] Bolton clarifies the application of administrative law in the procurement process when she states that:

> the pre-award period of the government procurement process is not contractual in South African law. The pre-award period is instead regarded as pre-contractual: the period is governed by public law (administrative law) rules and thus the availability of primarily administrative law remedies.[153]

It is submitted that it is during the pre-award phase of the procurement process that the bulk of private sector corruption occurs.[154] It is trite law that procurement decisions (some of which include the evaluation of tenders and award of contracts to successful bidders) amount to administrative action[155] and as such are subject to judicial review in terms of PAJA.[156]

3.9 Construction Industry Development Board Act[157] (CIDB Act)

The CIDB Act establishes the means by which the Board can promote and implement policies, programmes and projects, including those aimed at procurement reform, standardisation and

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[151] No 3 of 2000

[152] Section 33 (1) and (2) of the Constitution provide that:

1. everyone has the right to administrative action that is lawful, reasonable and procedurally fair; and
2. everyone whose rights have been adversely affected by administrative action has the right the given reasons.

[153] n 44, 309

[154] Refer to Chapter 2 at para 2.6

[155] see *AllPay Consolidated Investments Holdings (Pty) Ltd and Others v Chief Executive Officer of the South Africa Social Security Agency and Others* 2013 (4) SA 558, para 2

[156] Section3(2)(b) of PAJA provides as follows:

"In order to give effect to the right to procedurally fair administrative action, an administrator… must give a person… -

- adequate notice of the nature and purpose of the proposed administrative action;
- a reasonable opportunity to make representations;
- a clear statement of the administrative action;
- adequate notice of any right of review or internal appeal, where applicable; and
- adequate notice of the right to request reasons in terms of section 5."

[157] No 38 of 2000

uniformity in procurement documentation, practices and procedures within the government's procurement policy framework through the establishment of:

- a national register of contractors (and consultants and suppliers, if required) to facilitate and manage public sector procurement and its incumbent risks;
- a register of projects above a certain value with data relating to contracts awarded and completed and a best practice project assessment scheme; and
- best practise within the construction industry.

It also establishes a code of conduct for all participants engaged in construction procurement, with the intention instilling the principles of equity, honesty and transparency (among other behaviour) within the construction industry. Section 29 of the CIDB Act provides for the enforcement of the code of conduct, bestowing upon the board the power to sanction those in breach of the code by issuing a warning or fine or referring the matter to the South African Police Services (SAPS), where the breach is committed by a private sector participant.[158]

3.10 Various Treasury Prescripts

In addition to the above statutes and regulations, a number of National Treasury prescripts are applicable to public procurement. These prescripts are issued in terms of either section 76(c) of the PFMA or section 168(1)(a) of the MFMA. They are far too voluminous to evaluate and would not add any significant value in unpacking the main themes of this mini-dissertation.

3.11 Evaluation of the legislative framework

It is evident from what has been set out above that South Africa's procurement legislation is voluminous; with a series of regulations, prescripts and pieces of legislation, none of which are specifically dedicated to public procurement. South Africa's constitutional stance and noble commitment to a procurement system that reflects international best practice are evident from the principles espoused in the legislation. However, Sewpersadh hits the nail on the head in her assessment of the deficiencies of the framework when she states that:

> South Africa's legislative environment is so lacking in providing clear legislative direction on a consistent and uniform… system that it may be credibly argued that South Africa does not meet the requirements of Article 9 of the UNCAC.[159] An inconsistent system and a system where rules are found in a plethora of laws may promote ambiguities in conflicting provisions

[158] CIDB Code of Conduct http://www.cidb.org.za/publications/Documents/Code%20of%20Conduct.pdf (date accessed 31 August 2019)

[159] To be discussed in detail in Chapter 4. Article 9 requires State Parties to establish appropriate systems of procurement.

> and the selective application of law in order to disguise corrupt intentions… A plethora of laws negates the principle of transparency.[160]

Furthermore, it is submitted that too much discretion is given to provinces and municipalities to determine their own specifications for goods and services and the establishment of the supply chain management systems. This decentralisation of procurement that is a product of post-apartheid governance[161] has resulted in non-compliance with all applicable procurement laws and susceptibility to corruption. It is argued that a hybrid system of centralisation and decentralisation should be employed to lessen the levels of discretion afforded to individual municipalities.

It is not apparent on a reading of the legislation that there is a strong acknowledgement of the role that the private sector plays in perpetuating corruption. It is noted that the MFMA, PFMA and MSA criminalise the financial misconduct or untoward influences exerted by accounting officers and public officials on other officials. However, no mention is made of the conduct of the private sector participant's behaviour or influence. The justification for this may be that because the legislation deals with public finances, to which only public officials and accounting officers would have access, it would make sense that a spotlight be shone on the behaviour of those officers. However, it is submitted that by not criminalising the other party to the corrupt transactions that are set out in the legislation it scapegoats the public officials and results in far larger amounts of money being syphoned out of the South African economy into off-shore bank accounts by private actors.

The South African government has attempted to redress this lacuna through the enactment of anti-corruption legislation and the establishment of institutions to deal with economic crimes. These are discussed below.

3.12 Anti-corruption legislation and institutions

3.12.1 The Prevention and Combating of Corrupt Activities Act

Munzhedzi explains the purpose of the Prevention and Combating of Corrupt Activities Act[162] (hereafter referred to as the 'Corruption Act') as follows:

> It is [this Act] that makes corruption and related activities an offence; establishes a register in order to place certain restrictions on persons and enterprises convicted of corrupt activities relating to tenders and contracts; and places a duty on certain persons holding a position of authority to report certain corrupt transactions.[163]

[160] n 60, 98
[161] Munzhedzi (n 54)
[162] 12 of 2004
[163] n 54, 4

He goes on to make the point that "the introduction of this Act was necessary to address issues of corruption, but the existing literature shows that corruption through the public procurement [system] has been on the rise in the South African public sector." [164]

Sewpersahd highlights the fact that the Corruption Act is the chief anti-corruption statute in South Africa, but it is not solely applicable to public procurement corruption.[165] Sections 12 and 13 of the Corruption Act are the provisions most directly applicable to public procurement; these provisions deal with corrupt activities relating to contracts and the procuring and withdrawal of tenders respectively.

In respect of penalties for offences committed under the Corruption Act, the Act employs a number of strategies to remedy and address offences. However, two strategies that have not been frequently used in South Africa, which this Act introduces, are what Quinot and Williams refer to social and administrative measures[166] namely, the establishing of a register for tender defaulters in section 29 and debarment in section 28(3). Debarment involves the exclusion of a contractor from further contracting with government for a specified or indefinite period.[167]

According to these provisions, the Minister of Finance is charged with establishing the Register for Tender Defaulters within the office of National Treasury and, upon conviction of a person of an offence contemplated under sections 12 or 13 the court may order that the particulars of the convicted person, the conviction and sentence and any other order of the court consequent thereupon may be endorsed on the register.

These provisions are applicable to delinquent juristic persons as well and, in respect of these entities, the court may order that the particulars of any partner, manger, director or other person, who wholly or partly exercises control over the enterprise or who knows or ought reasonably to have known or suspected that the enterprise committed the offence, should also be endorsed in the register. It is within the purview of National Treasury to determine how long the convicted person or entity's details will remain on the register; however, this period must be between 5 and 10 years.[168]

Section 28(3)(a)(i) and (iii), and Section 28(3)(c) provides that once a convicted person or enterprise's particulars have been entered on the register National Treasury may impose further restrictions against that defaulter:

i. cancellation of the agreement in respect of which the person or enterprise was convicted of the offence; or

[164] n 54, 4
[165] n 60, 88
[166] n 14, 342 - 346
[167] Willard T. Mugadza 'Self-Cleaning in Public Procurement in Africa: Lesson from the European Union' in Sope Williams-Elegbe & Geo Quinot (ed) *Public Procurement Regulation for 21st Century Africa* (Juta, 2018) 155
[168] Section 28(3)(a)(ii) of the Corruption Act

ii. National Treasury, the purchasing authority or any government department must ignore any offers made by the convicted person/entity or disqualify such person/entity from making any offer or obtaining any agreement relating to the procurement of a specific supply or service for the duration of the debarment; and

iii. to the extent that the agreement was cancelled National Treasury may recover any damages incurred as a result of the tender process, or such cancellation or which the state may suffer by having to make less favourable arrangements thereafter.

Lastly, section 34 requires managers, secretaries and directors of companies, partners in a partnership, the executive manager of a bank, chief executive officers of any entity and any person responsible for the overall management or control of a company to report any corrupt activities that the know of or ought to have known of or suspected to a police official. Failure to report these activities is an offence.[169]

3.12.2 The Prevention of Organised Crime Act[170] *(POCA)*

The POCA is aimed at combating organised crime; money laundering; criminal gang activities and racketeering activities. A person can be charged with racketeering if they have any property in their possession which they know is linked to any illegal business activity. Anybody who buys or rents or is involved in any deal linked to property which they suspect has been illegally acquired (or contributes to unlawful activities) must report their suspicion within a reasonable time.

The POCA provides for the forfeiture of assets obtained through criminal activities. A person can only be convicted if they know or ought reasonably to have known that the property formed part of an unlawful activity. Fines and/or imprisonment can be imposed if a person is successfully convicted under POCA.

3.12.3 Companies Act and the King Code IV

The Companies Act[171] mandates that every state owned company, listed public company, and any other company that has a public interest score of above 500 points in two of the previous five years are obliged, in terms of Section 72 and regulation 43, to establish and maintain a Social and Ethics Committee ("S&E Committee"). The public interest score of a company is calculated at the end of each financial year of the company, as the sum of the following:

- The number of points equal to the average number of employees of the company during the financial year;
- One point for every one million rand (or portion thereof) in third party liability at the financial year end;

[169] Section 34(2) of the Corruption Act
[170] No 121 of 1998
[171] No 71 of 2008

- One point for every one million rand (or portion thereof) in turnover during the financial year; and
- One point for every individual who, at the end of the financial year, is known by the company to have, directly or indirectly, a beneficial interest in any of the company's issued securities, or to be members of a non-profit company.[172]

A company's S&E Committee must comprise of not less than 3 directors or prescribed officers of the company, at least one of whom must be a director who is not involved in the day to management of the company's business, and must not have been so involved within the previous 3 financial years.

The functions of the S&E committee in terms of Regulation 43(5) of the Companies Act include (but are not limited to) the following:

a) Monitoring the company's activities, having regard to any relevant legislation, other legal requirements or prevailing codes of best practice, with regard to matters relating to –
   i. Social and economic development, including the company's standing in terms of the goals and purposes of -
      - The ten principles set out in the United Nations Global Compact;[173] and
      - The OECD recommendations regarding corruption;
      - The Employment Equity Act,[174] as amended;
      - The BBBEE Act, as amended;
   ii. Good corporate citizenship, including the company's –
      - Promotion of equality, prevention of unfair discrimination, and reduction of corruption;
   iii. Contribution to development of the communities in which its activities are predominantly conducted or within which its products or services are predominantly marketed;
   iv. The environment, health and public safety, including the impact of the company's activities and of its products or services;
b) To draw matters within its mandate to the attention of the board as occasion require; and
c) To report through one of its members, to the shareholders at the company's annual general meeting on the matters within its mandate.

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[172] As an example, if a company that had in its previous financial year:
- An average of 355 employees;
- A turnover of R40 million;
- At year end R28 million of liabilities; and
- 80 shareholders

The public interest score would be calculated to 503 (355+40+28+80).

[173] n 31. The UN Global Compact is a voluntary initiative based on CEO commitments to implement universal sustainability principles and to take steps to support UN goals. Its ten principles are centred around human rights, labour, the environment and anti-corruption.

[174] 55 of 1998

Regulation 43 has focused attention on important issues that many companies may have neglected in the past. It elevates social and ethics matters to board level, thus ensuring that they are treated as matters of strategic importance. In addition to, and in compliance with, regulation 43, the King IV Report on Good Governance (the "King Code")[175] includes as a principle of good governance, the establishment of a S&E Committee. The King Code is applicable to all organisations whether for-profit, not-for-profit, state owned, public or private.

Although the King Code is a set of voluntary principles, the Johannesburg Stock Exchange (JSE) has made application of certain of the principles mandatory, one of which is the establishment of an S&E Committee.[176] Failure to adhere to the mandatory principles and practices of the King Code may result in the JSE suspending the listed company's listing.[177]

3.12.4 Institutional framework

South Africa has adopted a multi-pronged approach to fighting corruption.[178] This includes a number of institutions and commissions that have the responsibility and mandate to tackle corruption. While the Public Service Commission and the Independent Police Investigative Directorate focus on investigating and prosecuting the public sector and the police, respectively, for corrupt practices, the entities discussed below have a hand in investigating and prosecuting private sector corruption as well.

3.12.4.1 Auditor-General

The Auditor General has a mandate in terms of the Constitution to audit and report on accounts, financial statements and the financial management of all national and provincial departments, municipalities and any other institution required by legislation to be audited. Although this is not a functionary that investigates or prosecutes private corruption it plays an important function in detecting corruption within the state; which, in turn is an imperative to uncovering the involvement of private actors in corrupt practices in public procurement.

[175] King IV came into effect on 1 April 2017

[176] JSE Listings Requirement 3.84

[177] See sections 1 and 3 of the JSE Listings Requirements

[178] It is noted that the Green Paper on Public Sector Procurement Reform in South Africa (1997) Gen G 691 in GG 17928 of 14 April 1997 envisaged the establishment of a Procurement Compliance Office. In 2013 this office was established within the National Treasury as the Office of the Chief Procurement Officer. The main objective of this office is to oversee the procurement system and ensure that there is 'proper and successful government procurement' which is achieved through 5 strategic objectives: value for money, open and effective competition, ethics and fair dealing, accountability and reporting and equity (see http://ocpo.treasury.gov.za/About_Us/Pages/Strategic-Objectives-.aspx date accessed 3 September 2019) . It is noted that no specific mention is made of the imperative to combat corruption in its overall strategy to ensure proper and successful government procurement.

3.12.4.2 Public Protector

The Public Protector is mandated to investigate any conduct in state affairs, or in the public administration of any sphere of government where there is suspected impropriety. The Public Protector reports on such conduct and is empowered to take appropriate remedial action. This office is accessible by the public and may approach any citizen who has information on illicit activities within the state. As with the auditor general, the mandate of the public prosecutor explicitly deals with the state's affairs. However, in fulfilling this mandate, the public protector can be instrumental in uncovering the inducement, by the private sector, of public officials to engage in corrupt activities.

3.12.4.3 National Prosecuting Authority (NPA)

The NPA institutes criminal proceedings on behalf of the state. It has a number of specialised units, including the Specialised Commercial Crime Unit; the Asset Forfeiture Unit and the Witness Protection Unit (which ensures protection for whistle-blowers).

3.12.4.4 Directorate for Priority Crime Investigation (the 'DPCI')

The DPCI or 'the Hawks' is a division within the SAPS that focusses on serious organised crime, serious corruption and serious commercial crime. The DPCI manages, prevents, investigates and combats serious offences. This division was created in place of the Directorate of Special Operations (DSO) which was an effective and independent agency that was house within the NPA which investigated and prosecuted organised crime, prior to its disbandment.

3.12.4.5 The Asset Forfeiture Unit

The Asset Forfeiture Unit is a unit within the Office of the National Director of Public Prosecutions. It was established in order to implement Chapters 5 and 6 of the POCA, which allow for the seizure of assets used in criminal activities.

3.12.4.6 The Special Investigating Unit (the 'SIU')

The SIU is a state body that fights corruption through quality investigations and litigation. It is an independent statutory body that was established by the President. The SIU conducts investigations and reports the outcomes of its investigations to the President.

3.12.4.7 The Financial Intelligence Centre

The Financial Intelligence Centre is established in terms of the Financial Intelligence Centre Act.[179] The Centre receives reports of suspicious financial transactions. The Centre aims to combat money laundering in South Africa.

3.13 Evaluation of the anti-corruption legislation and institutions

The anti-corruption legislative framework has within it all of the mechanisms to promote accountability and transparency within the private sector. It calls for essentially all companies[180] to establish social and ethics committees whose role it is to ensure that the companies are adhering to the principles of good governance and the ten principles of the UN Global Compact and obliges companies to detect and report on incidence of corruption within their firms. Furthermore, although King IV is not hard law it is a code to which most companies are expected to comply, especially those listed on the JSE. Therefore, together with the corruption specific legislation, the legal framework is in place to detect and deal with corruption in the private sector is robust and well thought out. However, the reporting of corrupt activities remains low and the incidence of corruption is on the rise.[181]

Similarly, it would appear that South Africa has a robust institutional framework in place to combat corruption. Indeed, the work of the public prosecutor, auditor general and the DSO was instrumental in uncovering the corruption involved in the procurement of armaments by the South African National Defence Force (known as the "Arms Deal") and more recently, in uncovering the wasteful and erroneous expenditure incurred by the state in making upgrades to the former president's personal home in Nkandla.

However, the weaknesses in the system have come to light as we continue to unravel the extent of state capture and as SAPS continues to battle the rampant gangsterism and drug trade that has enveloped the Cape flats. What is clearly evident from submissions to the state capture inquiry,[182] in particular, is that the crime enforcement agencies in South Africa have been seriously compromised by extensive political interference by the Executive branch of government; this political interference

[179] 38 of 2001

[180] Though some have the option to opt-in on voluntary basis

[181] See the Corruption Watch Annual Report 2018 https://www.corruptionwatch.org.za/wp-content/uploads/2019/05/CW-Annual-Report-2018-Upholding-Democracy-Single-Pages-Agent-Orange-Design-10042019.pdf (date accessed 4 September 2019)

[182] https://www.sastatecapture.org.za/site/hearings (date accessed 2 September 2019)

has resulted in a "brain drain" from these agencies, leaving it under-staffed and lacking the skills and capacity to perform its function related to detecting, investigating and prosecuting complex economic crimes.[183]

The joint submission by Corruption Watch (CW) and the Institute for Security Studies (ISS) to the Zondo Commission of Inquiry into state capture[184] (the "Joint Submission") details how the provisions of the Constitution and its application by the Executive has led to the weakening of crime enforcement agencies. The focus of their submission is in respect of SAPS, the NPA and the Hawks. The report submits that:

> An important characteristic of the constitutional and legal framework in South Africa is that it provides the president and other members of the Executive with the power to appoint many of the senior leaders of the country's key criminal justice agencies. In virtually all cases where this power is conferred… the president and the Executive are authorised to act unilaterally[185]… Implicit within the constitution is the assumption that the Executive will exercise these powers in good faith in order to appoint people who are likely to discharge their responsibilities effectively in line with the constitution. However, notably during the Zuma era, a number of senior appointments were made by the Executive that were apparently intended to ensure that the powers if these agencies were exercised in a selective manner favourable to the Executive.[186]

Furthermore, the National Anti-Corruption Strategy (NACS) discussion document[187] identifies that the Corruption Act has not been effectively utilised to prosecute cases of corruption. It finds that:

> Law enforcement agencies prefer to investigate and prosecute potentially corrupt activities through the use of legislation pertaining to other financial crimes or common law offences such as fraud, than to investigate or prepare cases based on offences listed under the [Corruption Act]. This appears to be due to the lack of police training on how to develop cases for prosecution under the Act, and the need for training on the Act in the courts, and due

[183] Corruption Watch and the Institute for Security Studies 'State capture and the political manipulation of criminal justice agencies: A joint submission to the Judicial Commission of Inquiry into Allegations of State Capture' (April 2019)
[184] As above
[185] Examples of where these powers are conferred are Section 207(1) of the Constitution which allows for the appointment of the national commissioner of SAPS to be made by the president; the national head and deputy national head of the Hawks are appointed by the police minister in terms of section 17CA(1) and (4) respectively; and the National Director of Public Prosecutions (section 179(1)(a) of the Constitution and Section 10 of the NPA Act) as well as the Deputies (section 11 NPA Act) are both appointed by the president.
[186] Joint submission (n 183), 18 - 20
[187] NACS Steering Committee, Discussion Document: Towards a National Anti-Corruption Strategy for South Africa (December 2016), 21

> to difficulties in proving that bribery took place. Significant, the enforcement of the Act… [is] affected by the capacity of the criminal justice system and relevant oversight bodies.[188]

This sentiment was reiterated in an August 2018 press release by Godfrey Lebeya, the head of the Hawks is reported to have told Parliament's Portfolio Committee on Police that the Hawks were struggling to deal with serious commercial crimes and that they didn't have capacity to deal with some of the cases. (it was investing Steinhoff and VBS Mutual Bank at the time). He stated that the unit had to look outside for assistance and had therefore, hired the services of auditing firms because they lacked the personnel with financial and forensic investigative skills.[189]

In the *Glenister* case the Constitutional Court emphasised that:[190]

> It is incontestable that corruption undermines the rights in the Bill of Rights, and imperils democracy. To combat it requires an integrated and comprehensive response. The state's obligation to "respect. protect, promote and fulfil" the rights in the Bill of Rights thus inevitably, in the modern state, creates a duty to create efficient anti-corruption mechanisms.

Based on this judgement and others challenging the independence of the Hawks and the dissolution of its predecessor, the DSO, the courts have built up a body of law in relation to the attributes that an agency requires to be regarded as independent.[191] These factors include:[192]

a) security of tenure of senior leadership – this is achieved by providing clearly defined procedures for the removal from office of senior leadership; which procedures should protect them from arbitrary dismissal;
b) appointment of senior leaders for a single fixed term ad prohibition of renewal or extension; thus, reducing the susceptibility of appointments to undue influence;
c) provisions preventing interference in the level of remuneration and conditions of service that senior leaders enjoy;
d) autonomy in determining which cases are investigated or prosecuted and the exclusion of executive interference and influence over decision making; and
e) an adequate budget.

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[188] As above
[189] Bekezela Phakathi 'Hawks Boss admits elite unit is struggling' (16 August 2018) www.businesslive.co.za/bd/national/2018-08-16-hawks-boss-admits-elite-unit-isstruggling/ (date accessed 3 September 2019)
[190] n 112, para 177
[191] See also *McBride v Minister of Police & Another* CCT255/15 [2016] ZACC 30; *Corruption Watch NPC & Others v President of South Africa & Others; Nxasana v Corruption Watch NPC & Others CCT333/17; CCT13/18 [2018] ZACC 23*
[192] Joint submission (n 183), 17

3.14 Conclusion

Although there are many critiques that could be made about the functioning and efficacy of the multi-pronged approached currently in place to fight corruption, the most urgent and necessary problem that must be addressed is the systemic interference by the Executive branch of government with the independence of the criminal justice agencies of South Africa. While the main argument of the Joint Submission is that this manipulation has had the effect of increasing impunity among, particularly senior leadership within the Executive, the author contends that it has similarly increased impunity among the private sector participants involved in corruption generally.

CW and ISS put forward some recommendations to enhance the independence of the criminal justice agencies and reduce political interference in the appointments of senior leadership. Those most relevant to this research are set out below:

- Conduct competency assessments against minimum standards for all senior and top-level management, coupled with taking steps to address any situation where a person has been appointed to a post for which they do not have the requisite competencies, experience, have criminal records or have unresolved questions regarding their integrity;
- Undertake a process of renewed commitment to accountability fairness and impartiality through training programmes and any other appropriate measures that will revive, affirm and strengthen a culture that supports the officials' ability to operate in an accountable manner in accordance with the principles of the rule of law;
- reviewing the current systems in place to identify obstacles to effectively investigating corruption and serious financial crime and strengthening the capacity of the agencies to carry out these investigations;
- An independent review of the SAPS crime intelligence division should be carried out with a view to enhancing performance, transparency and accountability;
- Legislative amendments should be made to the NPA Act and SAPS Act to ensure that there is greater transparency with respect to the relationship between the Executive and the senior leadership of criminal justice agencies;
- Mechanisms to ensure that competent and experienced personnel are appointed; In the appointment of the new National Director of Public Prosecutions, Shamila Batohi, President Cyril Ramaphosa (in a major departure from past practice) appointed a panel to advise him on the appointment; similar mechanisms should be instituted in all future appointments in senior leadership of criminal justice agencies;

- Amendments should be made to SAPS employment regulations to ensure that all appointments follow a clearly defined skills assessment and appointment process to improve the chances of appropriately skilled personnel being appointed;
- Ensuring that legislation clearly defines and limits the duration of acting appointments; one of the reasons the Executive within the Zuma administration were able to manipulate the criminal justice agencies for so long, is that the legislation governing these bodies is silent on the duration of acting appointments;
- As has been mentioned already in this chapter, the investigation and prosecution of corruption is multi-pronged; however, there is no clear system of reporting on the collective effort of these agencies on the crimes they pursue as well as internal investigations or disciplinary matter concerning senior managers. In order to be able to assess the response by criminal justice agencies and other departments of government to corruption government should produce an annual report dealing with progress made in the investigation and prosecution of corruption, and in respect of disciplinary measures for corruption and other financial misconduct. In addition to providing statistical data this should provide an update on the status of all major cases.

The author agrees with the recommendations put forward in the Joint Submission and reiterates the urgent need to institute these recommendations so that government can work towards restoring public confidence in its ability to uphold the rule of law and keep them safe.

It is the belief of the author that restoring confidence in the ability of the criminal justice system as whole, and these specialised corruption units in particular, will be achieved through the implementation of the recommendations set out above, but it needs the additional confidence of the public to be able to hold these institutions to account without fear of reprisal and with faith from the public that its voice and opinion matters in ensuring good governance within public institutions.

The next chapter will set out the mechanisms that can be employed to increase public participation in the fight against corruption. An active citizenry who names and shames those who engage in corrupt activities and is unrelenting its holding those charged with their protection to account will go a long way to eradicating private sector corruption within the procurement system.

Chapter 4

Public participation in government procurement: Lessons from the Philippines

"Democracy must be built through open societies that share information. When there is information, there is enlightenment. When there is debate, there are solutions. When there is no sharing of power, no rule of law, no accountability, there is abuse, corruption, subjugation and indignation"
~ Atifete Jahjaga

4 Introduction

As alluded to already in chapter 3, South Africa's civil activism is vibrant and effective at holding government actors as well as private actors to account through strategic litigation, prolific journalism, and whistle-blowing within organisations. However, it is the opinion of the author that the force of civil society and public engagement is not being harnessed to its full potential in the efforts to combat procurement corruption.

Indeed, the NACS Discussion Document identifies as areas for improvement the need to increase efforts to 'engage and empower more citizens in the fight against corruption'[193] and addressing 'challenges to collaboration and information sharing across the government, business and civil society sectors'.[194] One way to tackle both of these challenges and increase the efficacy of civil activism to tackle procurement corruption is to embed public participation within the procurement system. As has already been seen in Chapter 2, South Africa's procurement legislation already recognises the importance of public participation at a local government level; the MSA makes provision for the municipality to consult the local community about the level, quality, range and impact of municipal services provided by the municipality, participation by the community in the decision-making processes of the municipality and for prior consultation with the community before the municipality enters into a service delivery agreement. It is worth noting that public participation is also mandated by the Constitution. Section 195(1)(e) states that 'People's needs must be responded to, and the public must be encouraged to participate in policy-making', and section 152(1)(e) lists as one of the objects of local government that it must 'encourage the involvement of communities and community organisations in the matters of local government.'

These are indeed valiant efforts on the part of the government; however, it is submitted that there is insufficient guidance on how the government can facilitate the effective communication and participation amongst communities and municipalities. This chapter seeks to address this lack of a mechanism for enhanced public participation through an assessment of the inclusion of observers as

[193] NACS Discussion Document (n187), 12
[194] As above

mandated by the Government Procurement Reform Act[195] of the Government of the Philippines, and its corresponding Implementing Rules and Regulations[196] (hereinafter referred to as the 'GPRA' and the 'IRR' respectively). Philippines procurement legislation is unique in that it legislatively mandates the presence of civil observers in all of the stages of the procurement process from the date that the invitation to bid or request for expression of interest is advertised to the public until the issuance of a notice to proceed with contract implementation occurs.

4.1 Salient Provisions of the GPRA and IRR

Prior to the enactment of the GPRA the system of procurement in the Philippines was much like South Africa's current system; with a plethora of laws, executive orders and directives governing various forms of procurement at different levels of government. Local governments were given vast discretion in creating their own procurement laws without reference to national law.[197] Inevitably this created confusion in government contracting and increased incidence of corruption.

The GPRA was signed into law by President Gloria Macapagal-Arroyo on January 10, 2003 and became effective on January 26, 2003 with a view to streamlining procurement legislation and processes in government contracting, increasing transparency as well as to regulate the procurement of services, which prior to its enactment had not been catered for in legislation.[198] The GPRA consolidates and standardizes procurement rules and procedures for all National Government Agencies (NGAs) including Government–Owned and/or Controlled Corporations (GOCCs) and Local Government Units (LGUs), which apply to procurement of goods and services, including infrastructure projects and consulting services. The law's coverage is from procurement planning up to the stage of contract implementation, termination of contract and warranty. There are also provisions on the alternative modes of procurement as these are resorted to by some agencies and allowed by other international financial institutions in certain instances.

The first set of its Implementing Rules and Regulations (IRR-A) was approved by the President on September 18, 2003 through Memorandum Order 119 and was deemed effective on October 8 of the same year. Since then the IRR has undergone several amendments with the most recent one having been affected on 25 August 2016. This IRR governs and applies to the procurement of infrastructure projects, goods and consulting services by any branch, agency, department, bureau, office or instrumentality of the Philippine Government, including GOCCs, government financial institutions, state universities and colleges and LGUs that are wholly funded by the Philippine Government.

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[195] Republic Act No 9184

[196] The 2016 revised Implementing Rules and Regulations of Republic Act No 9184

[197] Myrish T Cadapan-Antonio, 'Participation of Civil Society in Public Procurement: Case Studies from the Philippines' (2006) 36 *Pub. Cont. LJ* 629, 634

[198] As above

Section 3 of the GPRA sets out the governing principles of government procurement as follows:

a) Transparency in the procurement process and in the implementation of procurement contracts through wide dissemination of bid opportunities and participation of pertinent non-government organisations;
b) Competitiveness by extending equal opportunity to enable private contracting parties who are eligible and qualified to participate in competitive bidding.
c) Streamlined procurement process that will uniformly apply to all government procurement. The procurement process shall be simple and made adaptable to advances in modern technology in order to ensure an effective and efficient method.
d) System of accountability where both the public officials directly or indirectly involved in the procurement process as well as in the implementation of procurement contracts and the private parties that deal with government are, when warranted by circumstances, investigated and held liable for their actions relative thereto.
e) Public monitoring of the procurement process and the implementation of awarded contracts with the end in view of guaranteeing that these contracts are awarded pursuant to the provisions of this Act and the IRR, and that all these contracts are performed strictly according to specifications.

4.1.1 The Government Electronic Procurement System

It provides for a single Government Electronic Procurement System (G-EPS) which was implemented for the purpose of consolidating all procurements towards the use of government acquisition through electronic means. Article III, Section 8 of the GPRA provides that this is 'in keeping with the principles of transparency and efficiency' and that the single portal 'shall serve as the primary and mandatory source of information of all government procurement'. It serves as a centralized electronic database of all manufacturers, suppliers, distributors, contractors and consultants who are registered on the system.[199]

Use of the G-EPS is mandatory and all procuring entities required to make full use of it by registering with the network ad undertaking measures to ensure that they have access to an online network to facilitate their transactions.[200]

4.1.2 Civil Society Observers

The most significant feature of the GPRA is Rule V, section 13 of the IRR which mandates the presence of civilian observers at all stages of the procurement process

[199] Rule III, Section 8.2.2 IRR
[200] Rule III, Section 8.3 IRR

Section 13.1 provides that:

> To enhance the transparency of the process, the BAC shall, during the eligibility checking, short-listing, pre-bid conference, preliminary examination of bids, bid evaluation, and post qualification, invite, in addition to the representative of the Commission on Audit, at least two (2) observers, who shall have no right to vote, to sit in its proceedings.

These observers must come from a duly recognized private group in a sector or discipline relevant to the procurement at hand,[201] and the other from a nongovernment organization. The observers are also required to be duly registered with the Securities and Exchange Commission or the Cooperative Development Authority and should meet the criteria for observers as set forth in the IRR.[202] In addition, an observer's attendance can only be permitted to the extent that they do not have a conflict of interest (directly or indirectly) in the bidding process.[203]

The Bid Awards Committee (BAC) is required to notify observers at least five calendar days before the particular bid process commences where their presence is required.[204] However, the absence of observers does not nullify the BAC proceedings, provided that the invitation was sent to the observer in writing at least five days before the proceedings took place.[205]

Observers are charged with the task of assessing the BAC's compliance with the provisions of the Code and its IRR and they are required to make recommendations for areas of improvement by submitting a report of their observations and findings to the Head of the Procuring Entity and

[201] Examples of what constitutes a "duly recognised private group" are set out in Section 13.1.1 as follows:
- (a) For Infrastructure Projects, national associations of constructors duly recognized by the Construction Industry Authority of the Philippines (CIAP), such as, but not limited to the following:
  - (1) Philippine Constructors Association, Inc.; or
  - (2) National Constructors Association of the Philippines, Inc.
- (b) For Goods, a specific relevant chamber-member of the Philippine Chamber of Commerce and Industry.
- (c) For Consulting Services, a project-related professional organization accredited or duly recognized by the Professional Regulation Commission or the Supreme Court, such as, but not limited to:
  - (1) Philippine Institute of Civil Engineers (PICE);
  - (2) Philippine Institute of Certified Public Accountants (PICPA); or
  - (3) Confederation of Filipino Consulting Organizations

[202] Section 13.2 sets out the criteria as follows:
- (a) Knowledge, experience or expertise in procurement or in the subject matter of the contract to be bid;
- (b) Absence of actual or potential conflict of interest in the contract to be bid; and
- (c) Any other relevant criteria that may be determined by the Bid Awards Committee.

[203] Section 13.4(c) IRR

[204] Section 13.3 IRR

[205] As above

providing a copy to the BAC Chairperson.[206] This feature is also available in procurements by electronic means, which require that observers monitor online proceedings.[207]

The report prepared by the observers (jointly or separately) must also be furnished to the Government Procurement Policy Board and to the office of the Ombudsman.[208]

4.1.3 The mechanics of the Philippine Procurement System

4.1.3.1 The Government Procurement Policy Board (GPPB)

The GPPB was established in terms of the GPRA[209] as an independent inter-agency body that is impartial, transparent and effective, with private sector representation. The GPPB was created for the purpose of:

i. protecting national interest in all matters affecting public procurement, having due regard to the country's regional and international obligations;
ii. formulating and amending, whenever necessary, the IRR and corresponding standard bidding forms;
iii. ensuring that procuring entities regularly conduct procurement training programs and prepare a procurement operations manual for all offices and agencies of government; and
iv. conducting an annual review of the effectiveness of GPRA and make amendments thereto, as may be necessary.

The GPPB is supported by its Technical Support Office (TSO), which undertakes the tasks of monitoring the implementation of public procurement reforms in the Philippines, acting as the Secretariat of the GPPB, and conducting nationwide training programs on the procurement law.

4.1.3.2 The Bid Award Committee

As provided for in Rule V, Sections 11 and 14, all procuring entities shall create and establish a BAC and a BAC Secretariat, respectively. The main functions of the BAC are as follows:

- Advertise/Post Invitation to Bid
- Conduct pre-procurement /pre-bid conferences
- Determine eligibility of bidders
- Receive bids and conduct evaluation of bids
- Undertake post-qualification
- Resolve Motions for Reconsideration

[206] Section 13.4 IRR
[207] Section 8.7 IRR
[208] Section 13.4 IRR
[209] Article XX GPRA

- Recommend awards of contract, the imposition of sanctions, where necessary and use of alternative methods of procurement; and
- Create the Technical Working Group (TWG)

To assist the BAC in the conduct of its functions, the Head of the Procuring Entity can also create a Secretariat that will serve as the main support unit of the BAC. In many instances, the Head of the Procuring Entity designates an existing organic office within the agency to perform as the Secretariat.

4.1.3.3 Execution of different procurement stages from advertising to contract awarding[210]

4.1.3.3.1 Pre-Procurement Conference

The BAC, through its Secretariat, can call for a pre-procurement conference to ensure, among others, that the intended procurement is in accordance with the project and annual procurement plans. The holding of a pre-procurement conference may not be required for small procurements (i.e. procurement for goods costing 2 million pesos and below, procurement of infrastructure projects costing 5 million pesos or less and procurement of consulting services costing 1 million pesos or less).

4.1.3.3.2 Advertising – Function of the Procuring Entity's BAC

Pursuant to Rule VII, Section 21.2.1 of the GPRA and its IRR, Part A, the following are the rules in advertising and posting:

- The Invitation to Apply for Eligibility and to Bid shall be advertised at least twice within a maximum period of 14 calendar days, with a minimum period of six calendar days in between publications, in a newspaper of general nationwide circulation which has been regularly published for at least two years before the date of issue of the advertisement.
- The Invitation to Apply for Eligibility and to Bid shall be posted continuously in the website of the procuring entity concerned, if available, the website of the procuring entity's service provider, if any, as provided in Section 8 of the IR, and the G-EPS during the maximum period of 14 calendar days stated above.
- The Invitation to Apply for Eligibility and to Bid shall be posted at any conspicuous place reserved for this purpose in the premises of the procuring entity concerned, as certified by the head of the BAC Secretariat of the procuring entity concerned.

[210] The information contained herein was compiled with the use of the Procurement Observer's Manual (2014) http://pubdocs.worldbank.org/en/488821434986536867/pdf/Philippines-GPRA-Procurement-Observers-Guide-2014.pdf (date accessed 6 September 2019) as well as the ADB/OECD Anti-corruption initiative for Asia and the Pacific: Thematic review on provisions and practices to curb corruption in public procurement, self-assessment report Philippines (2004) http://www.oecd.org/countries/philippines/35054442.pdf (date accessed 6 September 2019)

4.1.3.3.3 Pre-bid Conference

At least one pre-bid conference shall be conducted for each procurement, unless otherwise provided for in the IRR. Subject to the approval of the BAC, a pre-bid conference may also be conducted upon the written request of any prospective bidder. In many instances, the members of the TWG clarify issues and concerns with the prospective bidders during the pre-bid conference.

4.1.3.3.4 Eligibility Check and Bid Opening

The Eligibility Documents, the Technical Proposal, and the Financial Proposal are placed inside individual envelopes and sealed. They are submitted to the BAC on the time, date and place specified in the Invitation to Apply for Eligibility and to Bid. The BAC shall first open the envelope containing the eligibility documents and conduct eligibility checking using the non-discretionary "pass or fail" criteria. The BAC goes over the presence or absence of the required documents. If all documents are found, the bidder is rated "passed". If one or more documents are missing, the bidder is rated failed and eventually considered ineligible for that particular bidding. The sealed technical and financial proposals of the bidders who failed in the eligibility checking shall be returned to them unopened while the technical proposals of those who passed shall be opened. The financial proposals of those whose technical proposals are responsive as evaluated by the TWG shall be opened thereafter. The sealed financial proposals of those whose technical proposals are not responsive shall be returned to them unopened. All these should take place in one sitting, if possible.[211]

4.1.3.3.5 Bid Evaluation

For the procurement of goods and infrastructure projects, the purpose of bid evaluation is to determine the Lowest Calculated Bid. The total bid prices are ranked from the lowest to the highest. In the case of consulting services, the BAC shall identify the bidder with the Highest Rated Bid. The eligibility documents, the technical proposals and the financial proposals of the successful bidders are evaluated by the BAC through the TWG observing the 15 days period requirement. When the lowest calculated responsive bid for goods and infrastructure projects or highest rated responsive bid for consulting services is identified, the BAC through the TWG shall conduct a post-qualification review on the bidder that tendered the lowest calculated responsive bid for goods and infrastructure projects or the highest rated responsive bid for consulting services within the seven days period requirement.

4.1.3.3.6 Post-Qualification

Within seven days from the determination of the Lowest Calculated Responsive Bid or the Highest Rated Responsive Bid, as the case may be, the BAC, through the TWG, shall conduct and accomplish

[211] ADB/OECD report (n 210)

a post-qualification review of the bidder with the Lowest Calculated Responsive Bid/Highest Rated Responsive Bid to verify and validate all the information and documents submitted by the concerned bidder to the BAC. If the bidder with the Lowest Calculated Responsive Bid for procurement of goods and infrastructure projects or the Highest Rated Responsive Bid for consulting services does comply with all the criteria for post-qualification, then, the concerned bidder shall be awarded the contract.

The Head of the Procuring Entity concerned awards the contract to the said bidder. In exceptional cases, the seven calendar day period may be extended by the GPPB.

4.1.3.3.7 Award of Contract

Within a period of no more than 15 calendar days from the determination of the Lowest Calculated Responsive Bid or Highest Rated Responsive Bid, and the recommendation of the award, the Head of the Procuring Entity or his duly authorized representative shall approve or disapprove the said recommendation. Where he approves the recommendation, he shall immediately issue the Notice of Award to the bidder with the Lowest Calculated Responsive Bid or Highest Rated Responsive Bid. In the case of GOCCs and GFIs, within which a determination must be made is 30 calendar days. Within the same period, the BAC is to inform all the losing bidders of its decision. The winning bidder or his duly authorized representative shall formally enter into a contract with the concerned procuring entity and submit all the necessary documentary requirements to perfect the contract within ten calendar days from receipt by the winning bidder of the Notice of Award.

4.2 The viability of public participation in the procurement process

As international discourse continues to move towards reliance on human rights-based approaches to solving the world's most pertinent issues, including tackling corruption, the incorporation of anti-corruption strategies that depend on public participation grows in prominence. Cadapan-Antonio notes that studies conducted by the World Bank have revealed that:

> Working with non-governmental actors is a crucial component to broadening an anti-corruption coalition. In countries with poor to fair governance where there is an increasingly strong civil society and a developing free press, an anti-corruption agenda cannot do without the support of non-governmental organisations (NGOs) and the mass media. Civil society groups, such as NGOs, academic institutions, and research organisations, have proven themselves in various cases to be powerful partners in counter-corruption coalitions.[212]

Indeed, article 13 of UNCAC also realises the importance of promoting 'active participation of individuals and groups outside of the public sector, such as civil society, NGOs and community-based organisations, in the prevention of, and the fight against corruption'. Thus, it can be advanced that the

[212] Cadapan-Antonio (n 197), 652

principle that public participation in governance is key to national development is an established and ideal norm.

In his critique of the viability of public participation in the procurement process as applied in the Philippines, Cadapan-Antonio[213] concludes that:

> Civilian participation is crucial in instances when the procurement is large and involves a large prospective contractor with vast experience and popularity in the locality of office where procurement is undertaken.

Cadapan-Antonio contends that there are several aspects within the Philippine example that have not been tested for voracity such as whether the civil observers are adequately qualified to perform meaningful critiques of the procurement process in, for example, large, technical infrastructure projects.[214] However, success has been achieved in involving civil observers in the process of contract administration in respect of the delivery of textbooks. The observers were tasked with checking the physical condition of the books; that they were properly bound, and that there were no wrinkles on the pages, no reversed pages or uneven colour schemes. This initiative was successful because it was instrumental in minimising the incidence of "ghost-deliveries",[215] under-delivery of the required number of textbooks and delivery of textbooks that were sub-standard.[216]

In order to try and address this issue, the GPRA and IRR mandate accreditation of the civil observers in section 13 of the IRR. In addition, the government of the Philippines has compiled a Procurement Observers Guide[217] which seeks to assist civil society organisations in training up their members to meaningfully participate in the observer process. In addition, the office of the Ombudsman, in collaboration with the Department of Education, has compiled a 'Graft and Corruption Prevention Education Teaching Exemplar'[218] which seeks to introduce anti-corruption education into the curriculum for primary and secondary schools.

Cadapan-Antonio also notes that the legislation is scant on determining the parameters of what constitutes an 'direct or indirect interest' in the contract at issue, which leads to questions such as '(i) to what extent will friendship be considered an indirect interest? (ii) what degree of affinity or

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[213] Cadapan-Antonio (n 197), 659
[214] Cadapan-Antonio (n 197), see Part IV, E at 659 - 663
[215] On a plain reading of this term, it refers to the situation where public officials report that a specifically mandated delivery has been made when in fact it has not.
[216] Cadapan-Antonio (n 197), Part IV, D at 652 - 659
[217] The latest guide having been issued in 2014 http://pubdocs.worldbank.org/en/488821434986536867/pdf/Philippines-GPRA-Procurement-Observers-Guide-2014.pdf (date accessed 6 September 2019)
[218] http://www.ombudsman.gov.ph/transparency-in-government/programs-projects/education-anti-corruption-promotion/graft-and-corruption-prevention-education-teaching-exemplars-gcpe/ (date accessed 6 September 2019)

consanguinity is unacceptable? (iii) what about owning a similar line of business related to the procurement?'.[219]

Coupled with this dubious expression of the notion of conflict of interest, he sites concerns of transparency and integrity on the part of the observer; The question of whether the observer will be faithful, or even adequately equipped, to perform his duty to report on the inefficiencies in the procurement process and what safeguards are in place to deter observers from colluding with prospective bidders. Although Cadapan-Antonio has identified many areas for improvement in the Philippine model, the author contends that the general conception of the codified public participation is nonetheless a viable option for South Africa. In addition, it is contended that these critiques are useful in formulating a model that can be applied within a South African context. Below is a conception of how codified public participation in South Africa could be utilised.

4.2.1 Codification of public participation in South African procurement law

South African society has a history of proving its willingness to take corruption, and injustice in general, head on. This ferocity lead to the international vilification and foreclosure of Bell-Pottinger, the communications firm that was instrumental in driving the 'White Monopoly Capital' narrative and spurring racial hatred in South Africa;[220] it also brought one of the big four auditing giants, KPMG to its knees, which has suffered significant reputational damage as a result of the exposure of its role in state capture.[221]

South Africa has, to a degree, grappled with the notion of codifying public participation in public governance when one considers the MSA discussed in Chapter 3. However, it has not done so in great detail. This is likely attributable, particularly in the context of public procurement, because of the plethora of laws dealing with procurement and the fact that procurement is decentralised.

However, it is submitted that these obstacles do not mean that a degree of codification cannot be implemented into the current system. In an attempt to construct a mechanism that could be applied to the current procurement framework of South Africa, Professor Stephen de la Harpe[222] proposes the following:[223]

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[219] Cadapan-Antonio (n 197), 661
[220] n 37
[221] n 37
[222] Stephen de la Harpe 'The use of civil activism in combating corruption in public procurement: A South African perspective ' in Sope Williams-Elegbe & Geo Quinot (ed), *Public Procurement Regulation for 21st Century Africa* (Juta, 2018) 119
[223] As above, 135

> A civilian oversight committee could be appointed to oversee the procurement process, from the [needs analysis] through all its phases. Such a committee would comprise for example, a retired judge and two experts, one in supply chain management and the other in the subject matter of the procurement. The inputs of civil society in the constitution of such a committee would be crucial. The committee must come from, be elected by, and represent civil society and be apolitical. It would have to report to civil society on a regular basis and in some way be accountable to its constituency.

Professor de la Harpe submits that the committee should be regulated to set out the parameters of various issues, including; identifying the instances when the need to constitute a committee arises; nomination and election of committee members on objective grounds; the minimum specifications of the feedback provided to the public and holding the member accountable.[224] He goes on to say that civil society's involvement in setting these parameters is crucial.

Lastly the professor calls for the institutionalisation of the committee, citing the following aspects that would need to be addressed to ensure that the institution is effective:

- [F]ormalisation and regulation of the relationship between procuring officials and the members of the committee, with a clear exposition of the committee members' role; the resolution of conflict between the committee and officials; replacement of members of the committee; the duty to report regularly to the chief procurement officer, the public protector and, where possible, to the public at large;
- The members of the committee must be independent; persons of integrity; experts in their respective fields; knowledgeable on public procurement; must have no conflicts of interest…
- The committee must know what its rights and obligations are; be adequately resourced; oversee all stages of the procurement process from [needs analysis] to the final conclusion of the contract; have access to all information including confidential information be able to give inputs and provide additional information during the process, for instance regarding the needs of interest groups such as the poor, vulnerable and specific communities; and be able to obtain outside expert advice.

The author agrees that all of the abovementioned issues must be dealt with and included into a public participation framework for South African procurement. Save to include a few further recommendations gleaned from the operation of the Philippine procurement system:

[224] n 222, 136

- Considering that current legislation protects the disclosure of certain types of information such as, innovative technologies that are yet to be patented or particular financial models; to the extent that the committee requires access to this information the members should be made to sign non-disclosure agreements and be prohibited from disclosing this information to the public,[225] unless the non-disclosure of the information would be against public policy.

- Just as the GPRA mandates that a representative of from the Commission on Audit must be an observer to the procurement process, it would be prudent to ensure that a representative of the Auditor-General's office is a sitting member of the committee. Such a representative would ensure that the provisions of the PFMA and MFMA in respect of public accounts management are adhered to.

- It is imperative that the public is made aware of this mechanism and is empowered with the ability to engage the public procurement participants sufficiently through it. Therefore, the committee, in partnership with government should be required to provide education and awareness campaigns to the public, as has been done through the office of the Ombudsman in the Philippines.

- Lastly, ensuring the government gets what it paid for and that the quality and specifications of the goods disclosed in the winning tender are received is pertinent to effective service delivery. Legislating the presence of committee members within the contract administration phase is crucial to ensuring that the constitutionally mandated public participation is realised.[226]

4.3 Conclusion

The South African constitution recognises the importance of public participation in governance, and the Philippine Constitution has similar provisions. However, the Philippine interpretation of this feature of the constitution is an innovative one that has proved effective, particularly in improving the delivery of textbooks in schools. The South African procurement system would benefit greatly from adopting this feature. The following recommendations are gleaned from applying the Philippine model with a few nuances to fit the South African context.

South Africa can establish a civilian oversight committee which is comprised of a retired judge and two experts, one in supply chain management and the other in the subject matter of the procurement. Civil society should be involved in constituting this committee and would ensure that such members

[225] This is an innovation utilised in the Philippine procurement system

[226] It is in this area that the GPRA has achieved notable success; through the use of observers in contract administration in respect of the delivery of school textbooks.

are experts in their field, persons with integrity and with no conflicts of interest. The committee should be appointed afresh for every procurement and should be present at all stages of the procurement. An additional observer to the procurement process should be a representative from the office of the Auditor General to ensure that the provisions of the PFMA and MFMA in respect of public accounts management are adhered to.

The committee must be regulated to ensure its independence and to govern the relationships among committee members and their relationships with procurement officers and bidders. Regulation would assist in conflict resolution and the appointment and dismissal procedures. It would also govern the manner and detail of the reporting requirements; both to the public and civil society as well as to the chief procurement officer and the public protector.

The committee must have expertise in the subject matter of the procurement or be able to obtain external advice where required. It must also have access to all pertinent information which can be facilitated through the signing of non-disclosure agreements. The non-disclosure agreement would also allow for the committee's participation in more technical and larger procurements such as infrastructure projects. It must also be able to give inputs and provide additional information during the process, for instance regarding the needs of interest groups such as the poor, vulnerable and specific communities.

Public awareness and education campaigns to ensure that the public are aware of the existence of the committee and its role in the procurement process is crucial. education campaigns such as the Teacher's Exemplar offered by the Philippine Ombudsman ensure that anti-corruption education is instilled in schools and communities and empowers citizens to report incidence of corruption.

Lastly, the committee's participation in contract administration is key in ensuring that effective service delivery is achieved.

Chapter 5
Recommendations and Conclusion

"Morality cannot be legislated, but behavior can be regulated. Judicial decrees may not change the heart, but they can restrain the heartless." ~ Martin Luther King Jr

5 Introduction

This study was conducted with the aim of evaluating the legislative and institutional framework of South Africa's public procurement system and anti-corruption measures to determine whether and to what extent it acknowledges and make provision for the role that the private sector plays in perpetuating corruption within public procurement.

The analysis revealed that the legislation does not adequately identify the private actor as a perpetrator of public corruption and instead focusses primarily on the public official. The thesis advocates that it is imperative that the private actor be recognised as an active participant in the perpetration of economic crimes, particularly within the procurement system because this will aid in better understanding, identifying and prosecuting the economic crimes that take place within public procurement.

Furthermore, the study proposed that applying a human-rights based approach to combatting corruption is a necessary initiative to bolster anti-corruption mechanisms within South Africa. A Human rights-based approach entails:

> empowering people to know and claim their rights and increasing the ability and accountability of individuals and institutions who are responsible for respecting, protecting and fulfilling rights. This means giving people greater opportunities to participate in shaping the decisions that impact on their human rights. It also means increasing the ability of those with responsibility for fulfilling right to recognise and know how to resect those rights, and make sure they can be held to account.[227]

In particular it advocates for the codification of public participation in the procurement system as a means of applying a human rights-based approach to public procurement corruption in South Africa. What follows is a summary of the evaluation of the domestic legislative and institutional framework and thereafter, recommendations for the legal reform in order to incorporate public participation into the current South African procurement framework.

[227] Mubangizi & Sewpersadh (n 15)

5.1 Summary of Legislative and Institutional framework

The evaluation of the domestic legal and institutional framework pertaining to South Africa's public procurement system and its anti-corruption mechanisms was undertaken with a view to addressing the following questions:

5.1.1. What are the deficiencies of the current public procurement system and anti-corruption measures that South Africa employs?

5.1.2. What has brought about the impunity within the private sector?

5.1.3. Can appropriate reforms be identified and implemented that might bolster South Africa's anti-corruption measures to combat procurement corruption?

The evaluation in Chapter 3 revealed that the deficiencies within the current procurement system lie in the fact that there are a plethora of procurement laws and prescripts, none of which are specifically dedicated to procurement. The multiplicity of laws has left the procurement system vulnerable to non-compliance and corruption.

It found further that too much discretion is given to provinces and municipalities to determine their own specifications for goods and services and the establishment of the supply chain management systems. This decentralisation of procurement that is a product of post-apartheid governance has resulted in non-compliance with all applicable procurement laws and susceptibility to corruption.

So confusing is the procurement framework that it has been submitted that 'South Africa's legislative environment is so lacking in providing clear legislative direction on a consistent and uniform… system that it may be credibly said argued that South Africa does not meet the requirements of Article 9 of the UNCAC'.[228] Furthermore, it was not apparent, on a reading of the procurement legislation that there is a strong acknowledgement of the role that the private sector plays in perpetuating corruption. It was acknowledged that this is likely due to the fact that the legislation deals with public finances, to which only public officials and accounting officers would have access, it would make sense that a spotlight be shone on the behaviour of those officers.

However, in respect of the anti-corruption laws, the study found that the legislative framework has within it all of the mechanisms to promote accountability and transparency within the private sector. It calls for essentially all companies (bar private companies that have the option to opt in) to establish social and ethics committees whose role it is to ensure that the companies are adhering to the principles of good governance and the ten principles of the UN Global Compact and obliges companies to detect and report on incidence of corruption within their firms. In addition, the laws acknowledge and contend with the notion of the private actor 's role in perpetrating economic crimes

[228] Sudugav-Sewpersadh (n 60), 98

and, though the corruption legislation is not dedicated to procurement, there are provisions within the Corruption Act and POCA that are applicable to public procurement.

In respect of the institutions that have been put in place to combat corruption the study found that, even though the legislative framework establishing these institutions is robust; the criminal justice institutions have fallen victim to extensive political interference by the Executive branch of government; this political interference has resulted in a "brain drain" from these agencies, leaving it under-staffed and lacking the skills and capacity to perform its function related to detecting, investigating and prosecuting complex economic crimes. It is lack of independence in the anti-corruption institutions that has brought about the impunity within the private sector.

Lastly as a means of identifying appropriate reforms that might bolster South Africa's anti-corruption measures to combat procurement corruption, it was found that incorporating a human rights-based approach into the procurement system can achieve this. Thus, the study engaged in a comparative analysis of the civil observers mechanism that has been incorporated into the public procurement system of the government of the Philippines in Chapter 4. What follows are the recommendations that the author puts forward that will a) enhance the independence, accountability and transparency of the anti-corruption institutions already in place and b) codify public participation within the procurement system as a means to bolstering the combating of procurement corruption.

5.2 Recommendations

The study puts forward several recommendations which, it is submitted could further enhance the institutional capability of the criminal justice mechanisms already in existence in South Africa. It also proposes the establishment of a civil oversight committee which could play the role of civil observer in all stages of procurement.

5.2.1 Institutional framework recommendations

To deal first with the institutional capacity of criminal justice institutions the following recommendations are made:

- Conduct competency assessments against minimum standards for all senior and top-level management, coupled with taking steps to address any situation where a person has been appointed to a post for which they do not have the requisite competencies, experience, have criminal records or have unresolved questions regarding their integrity;
- Undertake a process of renewed commitment to accountability fairness and impartiality through training programmes and any other appropriate measures that will revive, affirm and strengthen a culture that supports the officials' ability to operate in an accountable manner in accordance with the principles of the rule of law;

- Reviewing the current systems in place to identify obstacles to effectively investigating corruption and serious financial crime and strengthening the capacity of the agencies to carry out these investigations;
- An independent review of the SAPS crime intelligence division should be carried out with a view to enhancing performance, transparency and accountability;
- Legislative amendments should be made to the NPA Act and SAPS Act to ensure that there is greater transparency with respect to the relationship between the Executive and the senior leadership of criminal justice agencies;
- Mechanisms to ensure that competent and experienced personnel are appointed;
- Amendments should be made to SAPS employment regulations to ensure that all appointments follow a clearly defined skills assessment and appointment process to improve the chances of appropriately skilled personnel being appointed;
- Ensuring that legislation clearly defines and limits the duration of acting appointments;
- There is no clear system of reporting on the collective effort of these agencies on the crimes they pursue as well as internal investigations or disciplinary matter concerning senior managers. In order to be able to assess the response by criminal justice agencies and other departments of government to corruption government should produce an annual report dealing with progress made in the investigation and prosecution of corruption, and in respect of disciplinary measures for corruption and other financial misconduct. In addition to providing statistical data this should provide an update on the status of all major cases.

5.2.2 Codifying public participation in public procurement

It is submitted that the establishment of a public procurement oversight committee that could participate in the all stages of the procurement process could go a long way to enhance accountability in both the public and private sector. In ensuring the voracity of this committee it would need to be regulated and institutionalised. The process of regulating and institutionalising the committee can only be done with the input of civil society as this is the body that would be regulating its activities in public procurement. The following considerations would need to be taken into account in constructing the framework for the public procurement oversight committee.

South Africa can establish a civilian oversight committee which is comprised of a retired judge and two experts, one in supply chain management and the other in the subject matter of the procurement. Civil society should be involved in constituting this committee and would ensure that such members are experts in their field, persons with integrity and with no conflicts of interest. The committee should be appointed afresh for every procurement and should be present at all stages of the procurement. An additional observer to the procurement process should be a representative from the

office of the Auditor General to ensure that the provisions of the PFMA and MFMA in respect of public accounts management are adhered to.

The committee must be regulated to ensure its independence and to govern the relationships among committee members and their relationships with procurement officers and bidders. Regulation would assist in conflict resolution and the appointment and dismissal procedures. It would also govern the manner and detail of the reporting requirements; both to the public and civil society as well as to the chief procurement officer and the public protector.

The committee must have expertise in the subject matter of the procurement or be able to obtain external advice where required. It must also have access to all pertinent information which can be facilitated through the signing of non-disclosure agreements. The non-disclosure agreement would also allow for the committee's participation in more technical and larger procurements such as infrastructure projects. It must also be able to give inputs and provide additional information during the process, for instance regarding the needs of interest groups such as the poor, vulnerable and specific communities.

Public awareness and education campaigns to ensure that the public are aware of the existence of the committee and its role in the procurement process is crucial. education campaigns such as the Teacher's Exemplar offered by the Philippine Ombudsman ensure that anti-corruption education is instilled in schools and communities and empowers citizens to report incidence of corruption. Lastly, the committee's participation in contract administration is key in ensuring that effective service delivery is achieved.

5.3 Conclusion

The failure of both international and domestic anti-corruption and procurement legislation to sufficiently identify and acknowledge the private sector's role in public procurement corruption has led to the perpetuation of the myth that private sector corruption is not as harmful to the public as public sector corruption.

This study has made an attempt at dispelling this myth by looking at South Africa's own struggle with corruption and state capture as well as the in-depth discussion in Chapter 2 of the impacts of private sector corruption on human rights. The study has also proposed mechanisms to empower South African citizens with tangible tools that can be employed in fighting the equally damaging scourge of corruption in the private sector that led millions of South Africans losing their pension monies to the predatory capitalists and thieves that owned and controlled VBS Mutual Bank and that almost led to the collapse of the social security service that so many citizens depend on.

It is submitted that implementation of mechanisms to increase the independence of the Hawks and all other relevant state institutions as well as the establishment of a public procurement oversight committee can go a long way to significantly reducing the incidence of corruption in public procurement.

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