“Public Procurement Law and Anti-Corruption in Sub-Saharan Africa”

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1. Introduction

Public procurement is a core government activity: Every state needs to conduct public procurement, i.e. to acquire goods, construction works, and services from external sources by using public funds, in order to provide adequate public services to its citizens and to increase public welfare.¹ In the development context, it is estimated that nowadays, more than half of official development assistance (ODA) is spent through public procurement by partner countries and donors.² Yet, as empirical evidence suggests,³ donors question the integrity of partner country procurement systems, and therefore continue using their own procurement guidelines and mechanisms, or require additional safeguards.⁴ The present study aims to advance qualitative case study research in the field of public procurement law by providing an in-depth analysis of the individual regulatory frameworks in Tanzania, Kenya, and Uganda, and to explore why public procurement systems in Sub-Saharan Africa are insufficiently equipped to prevent corruption.

Law and Development research has repeatedly deplored the lack of legal effectiveness in developing countries: the divergence of ‘law in books’ and ‘law in action’ is considered to be one of the main impediments for effective legal reforms in Sub-Saharan Africa.⁵ Accordingly, the success of public procurement law as anti-corruption tool depends to a large degree on its actual implementation. Taking both factors into account, the research question is in fact tripartite. First, the study seeks to assess the law as it is written in the books, and to determine to what extent regulatory frameworks on public procurement in Sub-Saharan African provide for anti-corruption mechanisms. Although there is a (slow)-growing number of studies analyzing public procurement laws in Sub-Saharan African states,

² 129 billion US$ ODA in 2010. Based on numbers from 2007 and 2009, it is estimated that 69 billion US$ were spent through public procurement – 12 billion US$ by bilateral donors, 5 billion US$ by multilateral donors, and 52 billion by partner countries (Ellmers 2011: 10-11). See also La Chimia 2013: 223.
³ Knack 2014.
⁴ OECD 2011: 53.
⁵ Bryde 1986: 31; Meinecke 2007: 97; see also Sommermann 1999: 1023. The terms ‘law in books’ and ‘law in action’ go back to an article published by Roscoe Pound in 1910, the former dean of Harvard Law School who is considered to be one of the founders of the school of legal realism. Nowadays, the concept of ‘law in action’ is predominantly taught at the University of Wisconsin Law School. A similar anthropological approach is put forward by Jean-Pierre Olivier de Sardan (2015) who observes “a dissonance between formal rules and real practices of civil servants”, and proposes a concept of ‘practical norms’ that fill the gap between official, professional norms and actual behavior of individuals (Olivier de Sardan 2015: 19, 21).
this undertaking has still an exploratory character as the legislative frameworks are very recent and continuously subject to reform.\textsuperscript{6} Yet, a “good system on paper does not necessarily translate into a good system in practice”.\textsuperscript{7} It is therefore crucial to identify the main implementation gaps between public procurement laws and public procurement practice. Most legislative texts regulating public procurement in developing countries are to a large extent compliant with international standards including anti-corruption provisions. However, there is evidence that implementation lacks in terms of execution, monitoring, and enforcement of the rules, which ultimately renders the anti-corruption impact of public procurement regulation ineffective.\textsuperscript{8} Last, but not least, this study seeks to explore the main impediments for effective implementation of Sub-Saharan African public procurement laws.

While the task of assessing to what extent regulatory frameworks on public procurement provide for anti-corruption mechanisms can be approached through the use of legal methods, the research questions on the identification of main implementation gaps between public procurement laws and public procurement practice and main impediments for effective implementation require empirical research. When investigating the effects of rules on socioeconomic phenomena (i.e., understand law as an instrument reaching beyond the quest for achieving constitutional or political values), a purely text-based research strategy appears to be inadequate.\textsuperscript{9} This especially holds true for exploring the dynamics of certain mechanisms, such as, for example, law reforms. Although considered to be a valuable asset for studying legal effects and the impact of law on individuals and the society as a whole, empirical legal research is scarce.\textsuperscript{10} It is precisely the purpose of this study to fill this gap by applying qualitative research methods, such as documentary analysis and expert interviews.

2. Procurement-related corruption and development

While the academic debate in the 1960s and the first half of the 1970s emphatically supported the idea that corruption can be beneficial for development, particularly in dysfunctional bureaucracies or markets,\textsuperscript{11} the scientific community agrees nowadays, that corruption is detrimental in the long-term to economic, political, and societal development.\textsuperscript{12} Based on empirical findings, the interrelation between

\begin{footnotesize}
\textsuperscript{6} Cf. Odhiambo & Kamau 2003: 22-23.
\textsuperscript{7} Trepte 2011: 377.
\textsuperscript{9} Bell 2006: 1270–1271.
\textsuperscript{10} Bell 2006: 1269; Sommermann 1999: 1023.
\textsuperscript{12} Cf. Heinrich & Hodess 2011: 18; Arrowsmith et al. 2000: 37; Fitzpatrick 2003: 283; Ofosu-Amaah et al. 1999: 1; Hope 2014: 500–501. For empirical studies on correlations between corruption and macroeconomic factors, see Mauro 1995; extended in Mauro & Driscoll 1997; Mauro 2002; confirmed by Mo 2001; Knack & Keefer
\end{footnotesize}
corruption and underdevelopment is uncontested in state-of-the-art academic discourse. Despite the fact that corruption is a global phenomenon and also affects industrialized states, there are only very few underdeveloped countries with significantly low levels of corruption. This chapter examines negative effects of procurement-related corruption on development in three broad categories: (1) value for money, (2) allocation of resources, and (3) non-economic factors.

2.1 The impact of corruption on value for money

The core objective in public procurement, the achievement of value for money, is put at risk when personal enrichment becomes a determinant in decision making, as corruption “increases public spending without an increase in public welfare.”

Corruption distorts the public procurement process by selecting the offer that promises the highest return in bribes, which is not necessarily the most economically efficient option. Disregarding the price and quality of procurement offers means, first and foremost, that government spending is unnecessarily increased; goods, works, and services may be purchased at inflated prices; or even worse, that needless, oversized, or technically inadequate supplies or services may be procured. Bribes are often calculated in proportion to the total contract sum to cover the risks involved. In turn, financial offers including bribe amounts are inflated, compared to prices in line with the market range. The costs of procurement projects can also be artificially increased by excessive and ill-founded contract amendments during the execution phase. By doing so, the corrupt offer itself looks competitive in the evaluation procedure, and can be selected without attracting suspicion. Although flawed, the tender process appears to be compliant with procurement law. Contract management is therefore a particularly vulnerable component in public procurement and requires close monitoring.


15 Williams-Elegbe 2012: 12.


17 The same applies for disposal procedures where unnecessarily low income might be generated (Transparency International 2006: 29).


19 Søreide 2002: 5.

20 Wiehen 1999: 494.
Secondly, corruption in procurement not only means that goods or services will be purchased at higher prices, but may also be of lower quality.\textsuperscript{21} Compared to procurement of adequate quality, sub-standard products and services usually entail consequential costs that are disproportionate to the acquisition value: maintenance and repair services, as well as replacement, are typically required earlier and at higher costs;\textsuperscript{22} late delivery or corrective measures for underperformance delay the project execution causing further expenses;\textsuperscript{23} and low-quality infrastructure, e.g. electricity supply or roads maintenance, adversely affects economic development.\textsuperscript{24} Besides financial harms, poor quality of public services can also have an immediate effect on people’s safety: In case environmental, health, or security standards are neglected, basic government provisions, such as the water supply or building security, can cause physical threats to the population, long-term financial liabilities, or permanent environmental damages.\textsuperscript{25}

Once corruption has become an entrenched part of public procurement, more indirect, but not less detrimental consequences occur. Based on past experiences with corruption, honest bidders may be discouraged to participate in tender procedures, making public procurement a ‘closed shop’ – a situation that further aggravates the problem of inefficiency and facilitates monopolistic competition. In markets where procuring entities continuously contract the same suppliers or service providers, new technologies often miss the chance of being considered. Since innovative solutions do not improve market access, companies shift their focus to building personal relationships with decision makers instead. When innovation is neglected though, domestic markets remain internationally non-competitive and are severely limited in their development capacities.\textsuperscript{26} The acquisition of technically complex or custom-built, instead of off-the-shelf, products can be appealing for corrupt procuring entities indeed, since it restricts the pool of competitors naturally. However, in this case, it is not the intention of the purchaser to support innovative solutions, but to prefer overqualified and costly technology to more adequate and inexpensive options.

Alternatively to refraining from participating in distorted tender procedures, previously upright companies may also decide to engage in corrupt activities themselves, since they are deprived of any government business opportunities when bidding honestly. In this case, corruption becomes a standard behavior in public procurement and lowers general business ethics standards.\textsuperscript{27} At the same time, corruption is a high-risk business practice. It is perceived as an extra tax or non-tariff barrier in public

\textsuperscript{21} Søreide 2002: 5, 8; Wiehen 1999: 494; Søreide 2002: 8; Moody-Stuart 1997: 22.
\textsuperscript{22} Transparency International 2006: 29.
\textsuperscript{23} Cf. Wiehen 1999: 494.
\textsuperscript{24} Mauro & Driscoll 1997: 7; van Aaken 2014: 630.
\textsuperscript{26} Cf. Transparency International 2006: 30.
\textsuperscript{27} Arrowsmith et al. 2000: 37–38.
procurement that is incalculable for new market players and particularly for foreign firms; foreign direct investment is therefore likely to decrease.\(^\text{28}\)

In sum, procurement-related corruption causes important losses of scarce financial resources that are required to cover the basic needs of a developing state’s population and to foster socioeconomic development.\(^\text{29}\) Due to its long-term macroeconomic impact, corruption also negatively affects government revenue and therewith increases budget deficits.\(^\text{30}\) The wasting of funds, as mentioned in the introductory chapter of this study, not only concerns domestic resources of developing countries, but also external development aid.\(^\text{31}\) By tolerating systemic corruption, developing countries also risk losing the financial and technical support of donors, which represents an important share of the national budgets.

2.2 The impact of corruption on allocation of resources

Corruption leads to squandering of government resources, and also fosters the misallocation of public funds and human capital: While it is less attractive for corrupt states to invest in labor-intensive areas, they are eager to support capital-intensive, but socially unproductive projects that guarantee more opportunities for rent seeking and higher returns in bribe.\(^\text{32}\) For this reason, the composition of public expenditure in countries with high levels of corruption shows a general preference for construction of large infrastructure projects (e.g. hydropower dams) and defense procurement\(^\text{33}\) at the expense of sectors that are less prone to corruption. Empirical research has provided evidence that corruption negatively influences public investment in education and health.\(^\text{34}\) Yet, these areas are of utmost importance for poverty reduction and socioeconomic development, and should therefore be prioritized in the budget allocation.\(^\text{35}\) Instead, corrupt governments invest in measures with no or very limited developmental impact. In the worst cases, these are ‘white elephant projects’, oversized and needless for the population, like sumptuous presidential mansions or overdimensioned airports.\(^\text{36}\)

Thus, corruption in public procurement “diverts decision-making and the provision of services from those who need them to those who can afford them […]”\(^\text{37}\) Corruption benefits the rich and harms the poorest; therewith producing and maintaining inequalities, and hampering poverty reduction.\(^\text{38}\)
the needy are deprived of their rights; in particular, their economic, social and cultural human rights, only few economically privileged groups can compensate individually insufficiencies in public services caused by corruption in procurement. Ironically, in deeply corrupt systems, these groups have acquired their wealth through corruption; they are hence not victims of the institutional failure they have contributed to, but profiteers. Equitable distribution is threatened by corruption, which is a central issue for African countries, where poverty has historically been a problem, where certain ethnic groups have been economically and socially dominant, and where these groups seek to maintain their status quo. However, systemic corruption is not limited to the elite; on the contrary, it spills over to impoverished people. These groups dispose of only very few opportunities to refrain from entrenched corruption on the one hand, for instance when paying unofficial fees for the provision of health services. On the other, they are forced to generate income from corruption in order to satisfy their basic needs, e.g. underpaid corrupt traffic police officers who depend on bribes to make a living. These mutually reinforcing effects make it particularly difficult to incentivize non-corrupt behavior. Furthermore, corruption affects the distribution of professional capacity in public procurement. Despite many efforts to advance procurement skills in developing countries, the overall capacity level remains comparatively low. Since modern public procurement systems are decentralized, the scarce procurement knowledge is not only required in the capital and for central institutions, but also in the regions, sometimes in very remote locations. However, since returns from corrupt transactions are expected to be higher for large procurement contracts that are typically tendered by central government entities, procurement jobs in the capital attract more applicants. Although rent-seeking motives may only be one aspect, they certainly contribute to the capacity gap among procurement officers in central and remote regions.

2.3 The impact of corruption on non-economic factors

Besides economic considerations, corruption also has an impact on the political and social development of a state. Systemic corruption in public procurement can become universally – yet unwillingly – accepted and lower the integrity standards of the entire business community. Honest companies in deeply corrupt markets interested in winning government contracts have only two options: either they lower their moral standards and play along the faulty rules, or they refuse to participate and protect their integrity. Consequently, tender participation is lower than in countries where fair procurement proceedings are upheld, competition is insufficient, innovation is thwarted, favoritism is further simplified, and value for money is not achieved.

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42 Cf. Søreide 2002: 5.
Distorted public procurement not only erodes the basis of a liberal market, but also undermines the trust of citizens in the government. When principles based on integrity are replaced by norms arising out of corruption, i.e. when corruption becomes the rule and not the exception to it, the legitimacy of public institutions in general and democratic values eventually decline.\textsuperscript{44}

“Corruption further disrupts democracy and the citizenry's right to political participation; if one considers that where a public agent alters his decision-making on the receipt of a bribe, he is denying the right of other people to participate in the process, and subverting democracy by flouting formal processes.”\textsuperscript{45}

Corruption scandals that involve the political elite and are reported by the media reaching a larger public audience cause deep-rooted distrust of citizens in democratic institutions, particularly in the executive. This perception, in turn, can have negative consequences on political participation: Citizens assume that once their corrupt government is able to rig public procurement procedures (i.e., one of the core government functions) beyond parliamentary or judiciary control, it is probably also disposed to manipulate elections. A low voter turnout and a prevalent disenchantment with politics may be the citizens’ reaction. However, democratization processes in developing countries essentially rely on active voters and engaged civil society organizations; political apathy is detrimental to democratic development. Furthermore, parallel ruling structures operating outside the democratic system, such as organized crime, find breeding grounds when government institutions cease to fulfill their basic functions.\textsuperscript{46} Thus, procurement-related systemic corruption is an obstacle to democratization and can ultimately account for political instability.

Finally, entrenched corruption negatively affects the independence of the judiciary. Courts may either be infiltrated by corrupt individuals, or controlled and instructed by the corrupt executive from the outside. In both cases, court decisions are flawed and deny citizens their right to impartial settlement of disputes, carrying several severe implications: First, when legal protection erodes, people shy away from litigation and search for alternative ways of conflict resolution. Yet, court cases have an improvement function for the regulatory framework, e.g., public procurement systems, itself: challenge proceedings enforce compliance of the institutions; for instance, while judicial interpretation by judges develops the law further. Thus, corruption in public procurement adversely affects the development of the regulatory framework. Second, court decision disregarding the principles of generality and equality create a feeling of unjust treatment among the disadvantaged and can, in the long-term, cause social unrest in the population. The lack of legal certainty can be a threat to peace and security. And third, corruption runs contrary to the rule of law,\textsuperscript{47} which is considered a core factor

\textsuperscript{44} Transparency International 2006: 30; Arrowsmith et al. 2000: 37–38; Heggstad & Frøystad 2011: 2; Wiehen 1999: 495–496.
\textsuperscript{45} Williams-Elegbe 2012: 12-13.
\textsuperscript{46} Arrowsmith et al. 2000: 38; Wiehen 1999: 496.
\textsuperscript{47} According to the UN, the rule of law is “a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated,
for socioeconomic development, the protection of human rights, and legal empowerment. Accordingly, the United Nations General Assembly in its Declaration of the high-level meeting on the rule of law at the national and international levels states:

“We are convinced of the negative impact of corruption, which obstructs economic growth and development, erodes public confidence, legitimacy and transparency and hinders the making of fair and effective laws, as well as their administration, enforcement and adjudication, and therefore stress the importance of the rule of law as an essential element in addressing and preventing corruption, including by strengthening cooperation among States concerning criminal matters.”

3. Conceptual framework for assessing the potential capacity of public procurement law as an anti-corruption tool

From a Sociology of Law perspective, legal effectiveness is understood as “the conditions under which legislation and/or judicial decisions effectively guide behavior or result in anticipated and desired social changes.” Taking an instrumentalist stance, law is expected to guide social relations and to improve social order. Wherever legal objectives (e.g., the prevention of corruption) are not met, researchers seek to identify the mechanisms that cause the gap between ‘law in books’ and ‘law in action’. As empirical evidence about the deficient use of country procurement systems suggests, public procurement systems in Sub-Saharan Africa are perceived by donors to be insufficiently equipped to prevent corruption – thus, public procurement law has failed to deliver socioeconomic change, and legal effectiveness is lacking. In order to find answers to the questions on why the law has not been able to achieve the intended results and how legal effectiveness can be improved, it is necessary, to first reconstruct the implementation of applicable legal norms. Accordingly, this part of the chapter aims to operationalize anti-corruption in public procurement legislation by discussing relevant overarching procurement principles and ascertaining individual legal provisions to be analyzed at a later stage.

Since corruption is a control crime (i.e. both benefitting parties act unlawfully and have an interest in concealing their transaction, while the aggrieved party is unconscious about the criminal offense), external control authorities are indispensable to disclose and prosecute corruption. Two factors are equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.” (United Nations Security Council: The rule of law and transitional justice in conflict and post-conflict societies. Report of the Secretary-General (UN Doc. S/2004/616 of 23.08.2004, available on http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2004/616)).

49 Sarat 1985: 23.
51 Transparency International 2006: 15.
crucial here: First, the controlling instance must have insight into the activities of the procuring entity; second, the corrupt procurement officer must bear the consequences for his or her actions.\textsuperscript{52} In short, anti-corruption in public procurement is based on the two pillars of \textit{transparency} and \textit{accountability},\textsuperscript{53} as reflected in Art 9 (2) United Nations Convention against Corruption (UNCAC):

“Each State Party shall, in accordance with the fundamental principles of its legal system, take appropriate measures to promote \textit{transparency and accountability} in the management of public finances. […]” (emphasis added)

While it is subject to discussion whether anti-corruption is a proper objective or rather, a means to achieve value for money in public procurement, it is uncontested that transparency and accountability merely serve the purpose of anti-corruption without being self-contained goals.\textsuperscript{54} As the following section elaborates, both pillars are closely interlinked, since it is only through a sufficient level of transparency in the administrative process that will allow for the objective verification of whether integrity in the decision making of procurement officers is safeguarded.\textsuperscript{55}

3.1 The transparency pillar

Transparency in administrative proceedings is the antidote to one of the inherent characteristics of corruption: opaqueness. It uncovers what is otherwise concealed and, in so doing, makes corruption more exposed and less attractive.\textsuperscript{56} According to Art 9 (1) UNCAC on public procurement and public finances, transparency is associated with legal effectiveness in corruption prevention and, hence, an indispensable tool to promote integrity in public procurement:

“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 \textit{transparency}, \textit{competition and objective criteria} in decision-making, that are effective, inter alia, in preventing corruption. […].” (emphasis added)

Yet, due to its frequent use in the recent public discourse, transparency has become a buzzword or synonym for anti-corruption rather than an elaborate concept, although it incorporates a very specific set of measures in the context of public procurement. These measures shall be presented in the following section.


\textsuperscript{53} Trepte 2006: 2-3; Wiehen 1999: 496; Schooner et al. 2008: 6, 10; see also Deininger & Mpuga 2005: 171; Yukins 2007: 308. On the interplay of transparency and accountability on the political level, see Potter & Tavits 2011.

\textsuperscript{54} Cf. Trepte 2006: 15; Schooner et al. 2008: 12-13

\textsuperscript{55} Trepte 2006: 3, 22; UNODC 2013: 2, 8, 10.

\textsuperscript{56} Trepte 2006: 15; Transparency International 2006: 49; Williams-Elegbe 2012: 29; Arrowsmith et al. 2000: 38; Bac 2001: 87; UNODC 2013: 8. It can be argued, however, that a large degree of transparency can also foster corruption in certain circumstances: For instance, the public disclosure of information on participating bidders facilitates the formation of illicit cartels (Bac 2001: 87-96; Beck 2012: 7).
To begin, pertinent elements of transparency in public procurement are the publication and availability of relevant laws and regulations. Although this seems to be a self-evident condition for the application of the law at first sight, the accessibility of legal texts, but also of guidelines, manuals, and templates, is indeed a major challenge for many developing countries. For instance, since the information and communication technology infrastructure is typically weak, hard copies of documents need to be disseminated, also to very remote areas. This distribution issue deteriorates when there is more than one lingua franca and legal texts need to be translated into other languages. Developing countries often do not dispose of sufficient funds to accommodate translation needs. Furthermore, transparency is an important aspect for the actual content of public procurement laws and regulations. Transparency is considered a general guiding principle throughout the entire procurement process, including the use of specific procedures (as transparency within) and the publication of tender information (as outward transparency). The latter covers the tender documents available prior to the procurement procedure, i.e. all material needed to prepare a valid offer, clarification during the proceedings, as well as information on the completed tender evaluation and contract award. Depending on the subject matter, information can be provided to a restricted group of people, for instance the participating bidders, or to the general public, the press and civil society. As mentioned above, the public procurement system is monitored by external control bodies, whose anti-corruption impact is contingent upon the accessibility level of information. Hence, transparency measures are essential prerequisites for the establishment of resilient accountability mechanisms; due to its interdependence, transparency is a necessary, but not a sufficient condition to ensure integrity in public procurement.

The analytical part of this study will accommodate this critical point by assessing the availability and publication of general public procurement rules, tender documents, and evaluation outcomes. Transparency as a means of achieving procurement objectives not only supports integrity, but related purposes as well. In particular, transparency also promotes competition by providing equal access to procurement opportunities to all qualified bidders. Modern procurement systems are based on the assumption that open competition generates value for money, as the best offer is chosen among the maximum number of eligible bidders. Therefore, the law prescribes the publishing of procurement

58 Among the country procurement systems researched in this study, the official language in Tanzania, yet not stipulated by law, is Swahili. It is used in everyday life, in public administration, in the executive and in the legislative, but not in the judiciary. Legal texts are often not translated and people, especially bidders who are not familiar with English texts, remain ignorant about the legal basis.
60 Cf. Trepte 2006: 3, 15; DeAses 2005: 566-567; Heggstad & Frøystad 2011: 13-15; Schooner 2002: 105-106; UNODC 2013: 8; Mbaku 2007: 247; Piga 2011: 170-171. As rightly argued by Søreide, in fact the entire bureaucracy needs to be saturated by transparency, including the disclosure of budgets, public access to information, and freedom of the press, to launch a “culture of transparency” (Søreide 2002: 21). The assessment of transparency issues in a broader perspective is beyond the scope of this study, however.
63 Cf. DeAses 2005: 566-567. Empirical studies show mixed evidence on the correlation between competition and corruption. For an overview, see Celentani & Gauza 2002: 1274-1275. In addition to the positive impact on
notices widely; for instance, in the national press or web portals. The degree of transparency depends on the procurement method to be applied: Open tendering is internationally acknowledged as the default procurement method,\(^\text{64}\) as it guarantees accessibility to all potential bidders; while restricted methods are considered as alternatives that are allowed only under certain stipulated circumstances, for instance, if items are readily available and inexpensive, or if the procurement has become very urgent for reasons beyond the control of the procuring entity.\(^\text{65}\) Contrarily, corruption seeks to restrict participation for non-corrupt bidders and to privilege one competitor who has not necessarily submitted the best offer, but the best bribe.\(^\text{66}\) Consequently, the excessive use of alternative procurement methods limiting tender participation instead of opening it might indicate corrupt activities and is therefore subject to additional approval mechanisms by oversight authorities.\(^\text{67}\) However, the sheer number of participating bidders is not reliable proof of corruption, as there might only be one provider in technically complex, geographically small, or economically weak procurement markets.\(^\text{68}\) For the analysis of transparency with regard to competition, the empirical part of this study will investigate legal provisions on the choice of procurement method and related aspects.

Finally, transparency is also an important factor regarding the requirement of objective criteria in public procurement. Objective criteria are to be applied for the technical specifications, the evaluation of offers, and the pre-qualification of bidders. Firstly, technical specifications (or terms of reference for services) describe, as precisely as possible, what is to be purchased as well as how, when and where the supply or service is to be delivered. Above all, specifications must be neutral, i.e. they must not favor a certain brand, origin or any feature that is potentially discriminating against competing products. Procurement decisions are transparent only if the evaluation result matches the predefined procurement requirements; objective criteria in the specifications are therefore of utmost importance for ex-post controls. Nevertheless, specifications can be tailored to one particular supplier or service provider in multiple ways, and these manipulations are very difficult to detect since the procurement procedure as such appears to be compliant with legal provisions. Secondly, the criteria applicable to the evaluation process are supposed to be objective. Based on the principle of transparency, procuring entities are required to define evaluation criteria before issuing procurement notices. It is, however, common to distort competition by altering evaluation criteria upon the opening of offers, i.e. by adapting the evaluation scheme according to the content of the preferred offer. While this practice implies a relatively high risk of detection, as other bidders probably become aware of the manipulation, it is less parlous to juggle the criteria already when drafting the tender documents.

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\(^{64}\) Cf. Art 28 (1) UNCITRAL Model Law on Public Procurement of 2011.

\(^{65}\) Engelbert 2015.


\(^{67}\) Engelbert 2015; Udeh 2013: 189.

\(^{68}\) Cf. Søreide 2002: 28-29.
this case, the evaluation criteria might be transparent, but still rigged.\footnote{Trepte 2006: 20.} Last, but not least, decisions made during the pre-qualification phase, where the general eligibility of interested bidders is assessed before entering into the actual bidding phase, must be based on objective criteria. They are used to rate the economic, financial and technical capacity of the applicant to execute the procurement contract, as well as the reliability of the company. Similar to specifications and evaluations, objective criteria in pre-qualification must be applied to prevent favoritism. The basis of valuation must be externally and internally transparent in order to enable verification tools.\footnote{Trepte 2006: 18-19.} The analysis of selected country procurement systems will therefore take into account the relevance of transparency for objectivity by focusing on tender specifications, pre-qualification and evaluation criteria.

3.2 The accountability pillar

As explicated above, transparency must be complemented by accountability mechanisms in order to unfold its impact on corruption:

“In the narrower context of administrative control over the procurement process, transparency is used to ensure accountability which will be vouchsafed through a supervisory process. Since the principal cannot supervise each procedure […] the agent must, in some way, be held directly accountable for his actions. This is done by way of ensuring that the considerations taken into account (relating to qualification of bidders and the setting of specifications, for example) and which have been made transparent […] are also objectively verifiable. Thus, the bases upon which bids are evaluated must be clear and precise and must be capable of \textit{ex post} assessment. There will still be discretion in the hands of the agent […] but it will be capable of verification, though that ability to verify will depend on the capacities of the monitoring and enforcement authorities.”\footnote{Trepte 2006, S. 22.} (emphasis as in quotation)

Despite the fact that the discretionary power of individual procurement officers is considerably restricted, decentralized procurement systems still operate on the basis of procurement decisions taken by individuals. Accountability is therefore a crucial factor in fighting corruption in public procurement.\footnote{Trepte 2006: 21: see also Deininger & Mpuga 2005: 171; Persson et al. 2013: 452.} This chapter aims to elucidate the concept of accountability in the context of corruption in public procurement and to determine concrete anti-corruption elements related to it.

The academic debate recognizes accountability as a two-dimensional concept in two respects: In a process-related understanding, accountability can be horizontal or vertical; with regard to its substance, accountability implies answerability and enforcement. \textit{Answerability}, according to Andreas Schedler (1999), describes the obligation of public officials to be able to inform about their actions, as well as to explain and justify them. Public officials are answerable with regard to facts (the informational dimension of answerability) or to the reasons for their decisions (the argumentative
dimension of answerability). Since the core of answerability lies in the transmission of information, at least two parties are involved: While the public official, or the procurement officer for the purpose of this study, is obliged to deliver information, the right-holder to access to information can be a bidder, a control body (like the regulatory procurement authority), or even any interested citizen, depending on the specific context.\footnote{Cf. Schedler 1999: 14-15, 19-20.} In this regard, answerability is closely related to transparency, as both are considered means to reduce informational asymmetries between the principal and the agent. Yet, accounting institutions not only interrogate accountable actors, but also impose sanctions on public officials for not adhering to the law by means of enforcement mechanisms.\footnote{Schedler 1999: 15-17; Kpundeh 2005: 74; Arrowsmith et al. 2000: 749.} Enforcement is considered to be a critical point in fighting corruption, as its failure erodes any preventive attempt to create deterrence effects and damages probity.\footnote{Transparency International 2006: 49; Schedler 1999: 17; Heggstad & Frøystad 2011: 14.} In terms of anti-corruption tools, accountability thus entails both monitoring and enforcement components.\footnote{Schedler 1999: 16; see also Schooner et al. 2008: 13.}

Accountability can be established in both horizontal and vertical dimensions. The classical example for vertical accountability is the elected official, e.g. the parliamentarian, who is directly accountable to his or her voters. The electorate can request information from the official, and, in case of wrongdoing, can punish the official by voting him or her out of office. For non-elected bureaucrats, however, alternative accountability mechanisms have to be put in place: Since direct supervision is not feasible for such a vast number of administrative procedures like in public procurement, auxiliary mechanisms have to be institutionalized.\footnote{Trepte 2006: 3, 12, 22; Klitgaard 1988: 82-87; Jones 2009: 156; Schedler 1999: 23; see also Lambsdorff 2009: 392; Sosa 2004: 597.} Vertical accountability in public administration is rather limited and covers enforcement tools for citizens, the media and civil society organizations. Besides administrative and judicial review procedures, which will be researched empirically in this study, participatory approaches such as social audits and expenditure tracking in the public service can be classified as vertical accountability mechanisms in public procurement;\footnote{Cf. Arrowsmith & Caborn 2013: 290-291.} since these tools are rather new, locally applied, and not prescribed by law, they will not be subject to investigation here.

Horizontal accountability, on the other hand, is exercised by state institutions, e.g. by other public agencies mandated by the government, by law, or even by the constitution to hold institutions accountable.\footnote{Diamond et al. 1999: 3. See also Santiso 2001: 17; Potter & Tavits 2011.} These mechanisms cover record keeping, reporting to superior institutions, internal and external audits, as well as decentralized approval of procurement decisions, and shall be the basis for analyzing the answerability dimension of accountability in this study. In fact, horizontal accountability is based on the assumption that the accounting party has sufficient power to monitor the accountable part; yet, this is not always the case in reality. Schedler argues, therefore, that instead of focusing on equal or equivalent power, the two parties need to be independent from each other in their respective
fields of competence: “[H]orizontal accountability presupposes a prior division of powers, a certain internal functional differentiation of the state.” The independence of procurement regulatory authorities that are the first accountability instance for procuring entity will therefore be subject to investigation in this study.

However, jurisdiction under administrative law does not encompass criminal offenses. Accordingly, the public procurement system is mandated only to sanction irregularities in the procurement process, while law enforcement organs of the state are in charge of investigating and prosecuting criminal matters. Since deterrence effects arising from criminal proceedings, including potential litigation and conviction, are an essential factor in fighting corruption, its credibility must be safeguarded. The interplay of public procurement regulatory authorities and law enforcement organs, e.g. the police, public prosecution service, or specialized anti-corruption agencies, is of crucial importance, and will therefore be included as a unit of analysis in this study.

Sanctioning under public procurement law includes both the demand-side and the supply-side of corruption. Bidding companies can be – temporarily or permanently – excluded from ongoing and future tender participation on grounds of previously committed infringements related to corruption, by means of debarment. Procurement officers, on the other hand, face disciplinary sanctions, such as dismissal from their current position, from professional cadres, or from public service in general, in case they breach public procurement law. Both measures seek to disrupt corrupt transactions between the agent and the client, but also to damage the reputation of the individuals and companies. In addition to that, both parties can be fined and are liable for damages, which might be – depending on the amount the penalty - a tangible punishment. Debarment procedures and disciplinary sanctions will be part of the analysis.

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81 See also Mbaku 2007: 184, who argues rightly that enforcement organs mandatorily need to be legitimate. In case corruption is endemic, all accountability mechanisms are deficient (Trepte 2006: 21-22).
83 Engelbert 2015; DeAses 2005: 568.
84 Williams-Elegbbe 2012: 31. This term is interchangeably used with disqualification, exclusion, suspension, rejection, or blacklisting, depending on the terminology of the respective legal system.
85 Engelbert 2015.
4. The transparency pillar of anti-corruption elements in public procurement systems

The present chapter is dedicated to investigating the transparency dimensions of anti-corruption elements within public procurement systems in Tanzania, Kenya, and Uganda. To recap, the principle of transparency is linked with competition, objective criteria, and publication of tender information according to Art 9 (1) UNCAC:

1. Each State Party shall […] take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption. Such systems […] shall address, inter alia:

   (a) The public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contracts, allowing potential tenderers sufficient time to prepare and submit their tenders;

   (b) The establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication;

   (c) The use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures. (emphases added)

In conformity with the analytical framework set out in Chapter 3 and with international law agreements, the following provisions in Tanzanian, Kenyan, and Ugandan public procurement laws are examined: rules governing the choice of procurement methods, in particular of competitive tendering as the default method and permitted exemptions from it; requirements regarding the establishment of tender specifications and terms of reference, qualification conditions for suppliers and service providers, and evaluation criteria; as well as clauses regarding the publication of statutory texts, tender documents, and evaluation reports. In addition to the aforementioned provisions that regulate the execution of the tender phase, the analysis also includes procedural aspects of the pre- and post-tender phase, i.e., needs assessment, procurement planning, and contract management, as these (often neglected) parts of the public procurement process are particularly susceptible to corruption. The preventive effect of transparency elements in public procurement, with regard to corruption, is assessed through a comparative perspective by means of a hermeneutical text interpretation of the respective regulatory frameworks, including primary and subsidiary public procurement law, supplemented by an analysis of state-of-the art academic literature. Empirically, the analysis employs data published in the annual performance reports of the domestic procurement regulatory authorities. While a structured comparison between the individual data sets in these reports is restricted due to different and partly incompatible methodologies applied, the oversight authorities’ assessments are helpful to flesh out implementation issues related to transparency aspects. Last, but not least, a

86 See also UNODC 2013: 10.
computer-assisted qualitative data analysis of expert interviews sheds light on the actual effectiveness of public procurement law in mitigating corruption as perceived and experienced by practitioners.

The analysis of public procurement regulatory frameworks with a special focus on the transparency dimension reveals, most importantly, that the systems in Tanzania, Kenya, and Uganda, manifest only minor deviations from legal provisions suggested by the UNCITRAL Model Law 2011 as summarized below (Figure 2).
Figure 2: Summary of legal provisions governing transparency in public procurement

<table>
<thead>
<tr>
<th>5.1 Procurement method</th>
<th>UNCITRAL Model Law</th>
<th>Tanzania</th>
<th>Kenya</th>
<th>Uganda</th>
</tr>
</thead>
<tbody>
<tr>
<td>Open tendering as default method</td>
<td>Art 28 (1)</td>
<td>Pursuant to Art 28 (1) UNCITRAL Model Law</td>
<td>Pursuant to Art 28 (1) UNCITRAL Model Law</td>
<td>Pursuant to Art 28 (1) UNCITRAL Model Law</td>
</tr>
<tr>
<td>Emergency procurement subject to competitive negotiations method</td>
<td>Art 30 (4) (b)</td>
<td>Competition is not automatically excluded, but may be waived</td>
<td>Direct procurement can be applied for emergency procurement</td>
<td>Competition is not automatically excluded, but may be waived</td>
</tr>
<tr>
<td>Framework agreements as a self-contained procurement method</td>
<td>Ch VII</td>
<td>FAs as centralized procurement for aggregated needs across procuring entities via the GPSA</td>
<td>FAs as a self-contained procurement method for recurrent needs in one procuring entity</td>
<td>FAs as a specific contract type for recurrent needs in one procuring entity</td>
</tr>
</tbody>
</table>

| 5.2 Objective selection criteria | Tender specifications are fixed, objective, neutral, and standardized Art 10 | Tender specifications are fixed, objective, and neutral | Pursuant to Art 10 UNCITRAL Model Law | Pursuant to Art 10 UNCITRAL Model Law |
| Qualification criteria are fixed. False qualification documents lead to annulment of the tender procedure and debarment of bidders Art 9 | Pursuant to Art 9 UNCITRAL Model Law | Pursuant to Art 9 UNCITRAL Model Law | Pursuant to Art 9 UNCITRAL Model Law |
| Evaluation criteria are fixed, objective, and quantifiable Art 11 | Pursuant to Art 11 UNCITRAL Model Law | Pursuant to Art 11 UNCITRAL Model Law | Evaluation criteria are fixed |

| 5.3 Publication of information | Legal documents shall be made accessible to the public Art 5 | For international tendering: languages customarily used in international trade  
For national tendering: national official language(s) Art 13 | For international tendering: English  
For national tendering: Kiswahili or English | For international tendering: English  
For national tendering: English unless specified otherwise by the PPDA |
<p>| Participating bidders are | Persons with a legitimate | Pursuant to Art 42 | Pursuant to Art 42 |</p>
<table>
<thead>
<tr>
<th>admitted to tender opening sessions <strong>Art 42</strong></th>
<th>interest in tender opening sessions are admitted</th>
<th>UNCITRAL Model Law</th>
<th>UNCITRAL Model Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Award intention notice to be sent to participating bidders <strong>Art 22 (2)</strong></td>
<td>Pursuant to Art 22 (2) UNCITRAL Model Law</td>
<td>Pursuant to Art 22 (2) UNCITRAL Model Law</td>
<td>Award intention notice to be sent to participating bidders and to be published</td>
</tr>
<tr>
<td>Public notification of contract award <strong>Art 23 (1)</strong></td>
<td>Notification of contract award sent to participating bidders</td>
<td>Pursuant to Art 23 (1) UNCITRAL Model Law</td>
<td>Award intention notice to be sent to participating bidders and to be published</td>
</tr>
</tbody>
</table>

**5.4 Pre- and post-tender phases**

<table>
<thead>
<tr>
<th></th>
<th>Procurement plan shall be established</th>
<th>Procurement plan shall be established</th>
<th>Procurement plan shall be established and published</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Contract management regulated</td>
<td>Contract management regulated</td>
<td>Contract management regulated</td>
</tr>
</tbody>
</table>

Source: author’s own illustration.
The analysis of interview data, however, exposes certain implementation gaps. Implementation challenges regarding the use of open tendering as the default method to be applied in public procurement seem to be twofold: On the bureaucratic level, procurement officers perceive open tendering as too long, putting at risk the timely execution of tender procedures, detracting more manpower resources from the procuring entity, and requiring the intricate creation of evaluation and tender committees. Thus, a tendency to avoid open tendering can be observed. Where procuring entities resort to restricted tender procedures, however, they often deplore an insufficient amount of bids received and, thus, unsatisfactory tender results. Competitive tendering, particularly in rural areas, seems to be deficient. All of these compliance issues were not directly associated with corruption risks during the interviews, whereas on the political level, it was suspected that major procurement projects were based on corrupt deals among top politicians. Several examples have shown how public procurement law was circumvented and contracts were awarded directly to preselected suppliers and service providers from abroad. These ‘diplomatic arrangements’ outside the jurisdiction of public procurement law carry all endeavors to strengthen transparency in tender proceedings ad absurdum.

Concerning objective selection criteria, interviewed experts confirm that, in their view, tender specifications, terms of reference, and qualification requirements were frequently manipulated to select one preferred bidder. Yet, this practice is extremely difficult to detect and prove by external control mechanisms. Only bidders dispose of sufficient in-depth market knowledge to notice equivocal anomalies in the tender documents. Thus, it is important to strengthen the controlling function of tender participants by granting them the right to challenge procurement decisions and to report alleged corruption cases, for instance through whistleblowing mechanisms.

While publication and dissemination of procurement information (i.e. legal, tender, and evaluation documents) seems to be satisfactory, a significant gap seems to exist between tender parties located in major towns and those in rural areas with poor ICT infrastructure. This means, on the one hand, that citizens in remote places are deprived of information on their rights and duties in tender proceedings; and, on the other hand, any wrongdoing in public procurement is less likely to be disclosed in areas that are far from the control reach of central oversight authorities.

Reaching beyond the UNCITRAL Model Law 2011 stipulations, the three investigated country systems have integrated provisions on procurement planning and contract management into their statutory frameworks, in order to reduce corruption in the pre- and post-tender phase and enhance value for money. Nevertheless, procurement planning, in particular, remains a challenge with regard to budget integration, while contract management is still a neglected area in procurement practice. Compliance levels are therefore not yet adequate.
5. The accountability pillar of anti-corruption elements in public procurement systems

The various components of public procurement law, adapted from the principle of transparency discussed in the previous chapter, are essential for safeguarding the integrity of bureaucratic procedures. Only when transparency is ensured, public procurement proceedings are accessible and verifiable for internal and external control mechanisms, such as audits and compliance checks by oversight authorities, administrative and judicial review systems by aggrieved bidders, and investigations conducted by law enforcement organs. Recollecting the accountability dimension developed in the analytical framework in Chapter 3, these monitoring tools are of utmost importance to prevent and sanction corruption in public procurement. The deterrent effect of accountability arises from the consciousness of the involved parties that their actions can be monitored ex-post by controlling instances; the actors subjected to oversight are more reluctant to behave unlawfully; that is, corruptly.

Figure 3 summarizes the results of the legal analysis and points out two main findings regarding accountability mechanisms as prescribed by the ‘law in books’ in Tanzania, Kenya, and Uganda: First, reference clauses provided by the UNCITRAL Model Law 2011 are only partially available. As the Model Law is primarily concerned with procedural matters in public procurement, it is ill-suited to give guidance on accountability issues regarding the internal composition of procuring entities and decentralized decision making, internal and external audits, debarment of bidders, penalties against public officials, and cooperation with law enforcement organs. Second, and despite the lack of international standards, the investigated national public procurement laws address comprehensively answerability and enforcement matters. While the bulk of the individual provisions features only minor variance among the three statutory frameworks, the institutional design of administrative reviews systems differs considerably. Although the impact of administrative review systems on the actual level of corruption in public procurement is not directly measurable, the numbers of review cases give an idea on their status and application in the respective countries: Kenya’s review processes outnumber those in Uganda and Tanzania by far. The one-stage administrative complaint mechanism in use in Kenya is, by its very nature, the most efficient and expedited option, and has certainly contributed to the very good international reputation of the Kenyan administrative review board and a greater willingness of aggrieved bidders to seek review. The institutional structure in Uganda, on the other hand, has reached the highest degree of independence from potentially unduly influencing ministerial bodies by the recent introduction of a quasi-judicial administrative tribunal as a third

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89 This data, however, refers to review systems that have since been reformed. It will be interesting to see whether these legal revisions will lead to an increased use of administrative reviews, and eventually enhance the systems’ capacity to curb corruption.
administrative review stage. The new tribunal has been granted stronger enforcement powers compared to other review bodies.

In contrast to the sound ‘law in books’, the ‘law in action’ remains dysfunctional in several accountability respects as interview data has revealed. Record keeping represents a major challenge for procuring entities due to storage facilities that are usually insufficient in size and poorly equipped to protect files from degradation. Efforts to replace paper-based filing by e-procurement have been restricted to public bodies disposing of a developed data processing structure and internet access, neglecting those procuring entities in remote areas that actually face the most severe problems in record keeping. Thus, the target group for the universal introduction of e-procurement would need to be reconsidered, and the development of information and communication technology infrastructure intensified.

Decentralized public procurement decision making in Tanzania, Kenya, and Uganda is realized through committee approval mechanisms at several stages of the tender process. Yet, the prescribed number and composition of committees are beyond the capacities of smaller procuring entities in terms of manpower, expertise, and time. Two scenarios are conceivable to tackle the problem: Either the number of procuring entities could be reduced by aggregating the procurement function of the smallest entities in centralized procurement agencies; or greater discretionary power could be granted to individual procurement officers by substituting the committee decision making for a four-eye principle, where at least two well-trained procurement officers are in charge of procurement decisions. Taking all factors into consideration, especially the general capacity level in public procurement, the first solution seems to be more feasible and less corruption-prone.

Budget problems are not confined to the procuring entities; internal and external audit mechanisms, as regulated by law, also suffer from underfunding of the regulatory authorities. The coverage of compliance checks is deficient, performance reports are issued late, and external audits are consequently backlogged. The audit chain as stipulated by law is suspended, at time for several years – answerability through audits is therefore not ensured in large parts of the public procurement systems.

Apart from the structural individual characteristics of the administrative review systems mentioned above, the general reluctance of bidders to access review procedures can be traced back to common mistrust in formal arbitration and court proceedings, as well as to retaliation risks. Bidders shy away from interrupting the procurement procedure and potentially upsetting the procuring entity, in fear of hazarding future tender opportunities and risking further unpredictable losses and long-term business damages. For the time being, administrative review procedures are rather exceptional, while judicial reviews are virtually non-existent; regulatory authorities carry out trainings to strengthen the perception of review mechanisms as compliance tools that are mutually beneficial for procuring entities and bidders. However, public procurement review mechanisms have not yet tapped the full potential for anti-corruption.
The jurisdiction of public procurement systems for sanctioning corruption is limited to debarment procedures of corrupt bidders and to penalties imposed on procurement officers. Both measures are implied in the Tanzanian, Kenyan, and Ugandan systems in varying degrees; as procurement markets are typically undersized in developing countries, regulatory authorities are however cautious to exclude private companies from tendering in order not to further diminish competition. Disciplinary sanctions are handed out to procurement officers where involvement in corruption is established; nevertheless, this measure seems ineffective in political systems where corruption in public procurement originates from the elite, i.e., the executive, politicians, or top management, and is merely processed by public officials in the procuring entities. In a nutshell, sanctioning corruption in public procurement targets the wrong people.

Last, but not least, the three public procurement systems investigated in this study are submitted to different institutional collaboration approaches with law enforcement organs to combat corruption. The strategy applied in Tanzania and Kenya appears to be more centralized and streamlined as responsibilities among law enforcement bodies are better defined, yet more exposed to exertion of political influence. By distributing investigation and prosecution functions among several entities, the Ugandan system has opted for the very reverse, that is a dispersed approach. Experience has shown, however, that inefficiencies due to overlapping mandates and unclear jurisdictions are detrimental to anti-corruption efforts as well.
Figure 3: Summary of legal provisions governing accountability in public procurement

<table>
<thead>
<tr>
<th>UNCITRAL Model Law</th>
<th>Tanzania</th>
<th>Kenya</th>
<th>Uganda</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>6.1.1 Record keeping</strong></td>
<td>Complete procurement file to be maintained Art 25</td>
<td>Complete procurement file to be maintained for five years partially accessible for bidders</td>
<td>Complete procurement file to be maintained for six years accessible for bidders and parties with legitimate interest</td>
</tr>
<tr>
<td><strong>6.1.2 Disclosure of conflicts of interest</strong></td>
<td>Conflicts of interest regulated in codes of conduct Art 26</td>
<td>Conflicts of interest regulated in primary legislation; covers only evaluation committee members, no stipulations on disclosure and penalties</td>
<td>Conflicts of interest regulated in primary legislation; covers all involved parties, all procurement stages, disclosure and penalties</td>
</tr>
<tr>
<td><strong>6.1.3 Decentralized decision making</strong></td>
<td>Segregation of responsibilities via committee building</td>
<td>Segregation of responsibilities via committee building</td>
<td>Segregation of responsibilities via committee building</td>
</tr>
<tr>
<td><strong>6.1.4 Audits</strong></td>
<td>Compliance checks as a core task of the regulatory authority</td>
<td>Compliance checks as a core task of the regulatory authority</td>
<td>Compliance checks as a core task of the regulatory authority</td>
</tr>
<tr>
<td></td>
<td>External audits are based on annual performance reports of the regulatory authority</td>
<td>External audits are based on annual performance reports of the regulatory authority</td>
<td>External audits are based on annual performance reports of the regulatory authority</td>
</tr>
<tr>
<td><strong>6.2.1 Review systems</strong></td>
<td>Preliminary reconsideration by the procuring entity; administrative review by independent authority; judicial review by courts Art 64 (2), 66</td>
<td>Preliminary reconsideration by the procuring entity; administrative review by independent authority; judicial review by courts</td>
<td>Administrative review by independent authority; judicial review by courts of law (two instances prescribed)</td>
</tr>
<tr>
<td></td>
<td>No exempted grounds for review</td>
<td>Exempted grounds for review: selection of procurement method</td>
<td>Exempted grounds for review: selection of procurement method, rejection of all tenders</td>
</tr>
<tr>
<td></td>
<td>Submission period requests for review: 28 days Standstill period: 14 days</td>
<td>Submission period requests for review: 14 days Standstill period: 14 days</td>
<td>Submission period requests for review: 10 working days Standstill period: 10 days</td>
</tr>
<tr>
<td>Remedies: overturn the</td>
<td>Remedies: overturn the</td>
<td>Remedies: overturn the</td>
<td>Remedies for administrative</td>
</tr>
<tr>
<td>Procurement</td>
<td>Payment of compensation for costs, losses, and damages \textit{Art 67 (9)}</td>
<td>Procurement decision; payment of compensation for costs, losses, and damages</td>
<td>Procurement decision; payment of compensation for costs</td>
</tr>
<tr>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td><strong>6.2.2 Debarment</strong></td>
<td>Debarment possible where corruption “is established”</td>
<td>Debarment possible where bidder is “guilty” of corruption</td>
<td>Debarment possible where bidder is “convicted” for corruption</td>
</tr>
<tr>
<td></td>
<td>Length of debarment for corruption: min. ten years</td>
<td>Length of debarment for corruption: min. three years</td>
<td>Length of debarment for corruption: undefined</td>
</tr>
<tr>
<td><strong>6.2.3 Penalties against procurement officers</strong></td>
<td>Min. 4,500 USD or min. seven years of imprisonment or both</td>
<td>For natural persons: max. 40,000 USD or max. ten years of imprisonment or both</td>
<td>Between 1.500 USD and 5.900 USD, or max. three years (bidders) or max. five years (public officials) of imprisonment or both</td>
</tr>
<tr>
<td><strong>6.2.4 Cooperation with law enforcement</strong></td>
<td>Formalized and streamlined cooperation between regulatory authority and anti-corruption agency</td>
<td>Informal streamlined cooperation between regulatory authority and anti-corruption agency</td>
<td>Informal dispersed cooperation between regulatory authority and several law enforcement bodies</td>
</tr>
</tbody>
</table>

Source: author’s own illustration.
6. Main impediments for effective implementation of public procurement laws

This concluding chapter returns to the third research sub-question dedicated to exploring the main impediments for effective implementation of Sub-Saharan African public procurement laws. Drawing primarily from the empirical findings of interview data analysis, the chapter identifies implementation challenges on the macro-, meso-, and micro-level: First, the study ascertains internal and external political factors that play a role in curbing corruption in public procurement, specifically the deficient political will to realize public procurement law reforms. Second, institutional impediments are highlighted, concerning in particular the disintegration of legal and social norms determining the citizens’ (non-)intercourse with the judiciary. Third, individual parameters are assessed that affect the outcome of critical anti-corruption endeavors governed by public procurement law, such as ethical standards.

6.1 Political will

Politicians are those stakeholders who benefit most from corruption in systems where corruption is deeply entrenched, and, hence, are keen on preserving the status quo for themselves and their cronies – an impression that was shared by a number of interviewed experts. The analysis has corroborated the theory by revealing that many weaknesses of the public procurement systems with regard to their capacity to prevent corruption can be traced back to the will of the political elite not to enforce anti-corruption mechanisms. Tortious interference manifests in institutional structures that are supposed to work independently and guarantee impartiality, but are restricted in their autonomy by the executive. This retrenchment affects the operation of regulatory authorities and prosecution services alike, and may also target the judiciary. The institutions are incapacitated in sanctioning corruption, resulting in insignificant conviction rates. Thus, enforcement of anti-corruption rules is severely hampered by the government. Political leaders ignore public procurement law entirely to award contracts directly where diplomatic interests prevail. In these events, the rule of law is at stake.

In addition to the leverage of political will on the enforcement of laws, it also impedes the drafting and passing of anti-corruption laws in the first place. Indeed, the enactment of the first Tanzanian, Kenyan, and Ugandan public procurement laws between 2003 and 2007 as well as their revised versions from 2014-16 were considerably delayed by the ministries. One interview partner pointed out how personal interests interfered with the enactment of public procurement laws:

90 The identity of interview partners has been anonymized. The sampling and the codes for interviews can be found in the annex.
91 BK11, BK12, BT10, BU5.
92 BT9. However, vested interests related to corruption are not necessarily the (only) reason for holding back legislative drafts. In Kenya, the drafting of the new procurement bill was protracted due to deep disagreements between the policy department in the Ministry of Finance and the regulatory authority which were supposed to work jointly on the draft (BK2). In fact, the new constitution of 2010 required a revision of the Public...
“If the law was that important, why did they drag that period of time before you could realize it? So you can see a lack of political good will, which to date is not there. Because if that law operates as it [was supposed to], then you did deny that political class their food, their business. So it’s not in their interest that the law works.”

Yet, there are critical junctures in the political process that open windows of opportunity for law reforms. An interviewee in Kenya explained how the first Public Procurement Act came about in 2003, when a new and “firm” Minister of Finance pushed the bill to be passed “because the new government wanted to deal with the old regime which had entrenched corruption.” The newly elected government used anti-corruption narratives and law reform to dissociate itself from the old regime. However, as soon as the public procurement act had been enacted, politicians “realized that they also reached office” and that they needed to recover the money spent on election campaigning:

“After all, it appears you need money. Once you win an election, you have used a lot of money, so some people want to get money quickly to recoup the expenses. So they allowed some people to bypass those procurement rules.”

Thus, the private interest as a typical component of corruption is in fact a political interest, as “[i]t costs a lot of money to regain elections.” In this connection, the private benefit is not expressed in monetary terms, but in securing power positions. The example illustrates how political and bureaucratic corruption intermingle: The private gain is generated at the political level, but the corrupt deal itself is administered at the bureaucratic level – and may produce benefits for individual procurement managers as well who are rewarded for their obedience. Thus, public procurement law only regulates bureaucratic corruption, but is affected to no lesser extent by political corruption.

Despite the fact that public procurement is generally perceived as a technical matter, major infrastructure procurement projects are highly political in nature and steered by the government. Especially in presidential republics like Uganda where the president – head of state and head of government – has been in office for 30 years,

“[t]hey will not set up a hospital somewhere unless the president is attached to this project. So it has political rewards - but this is my thinking - if a road, some infrastructure and whatever is set up.”

Procurement Act until 2014; yet, it only came into force beginning of 2016. Thus, dissension among stakeholders have eventually led to a breach of the constitution.

93 BK5.
94 BK12.
95 BK12.
96 BK12.
97 BK12.
98 BT5.
99 BU5.
However, it is not only the executive piloting systemic corruption. East African Parliamentarians are frequently involved in political corruption, for instance through the Constituency Development Funds (CDF). The Kenyan CDF\textsuperscript{100} was established in 2003 as a funding mechanism supposed to support development projects at the constituency level, targeting poverty reduction by channeling funding from the central government directly to the electoral constituencies. Yet, decisions about the allocation of these funds were heavily influenced by the Parliamentarians of the respective constituencies, violating the principle of checks and balances: Members of the legislative are mandated to draft laws, and not to control the disbursement of public funds, since budget execution is a task of the executive, or, as one Kenyan interviewee stated, “our Members of Parliament legislate and they are also patrons […]”.\textsuperscript{101}

Apart from the more general criticism regarding democratic underpinnings, CDFs have also been found promoting clientelism between Parliamentarians and their voters. Their procurement practices were not in line with statutory regulations and showed clear indications of corruption. The Kenyan regulatory authority stated:

“Our experience with CDFs has been funny because they don’t do documentation, they don’t keep records of procurements, they don’t follow basic guidelines and they cite ignorance, say they don’t have capacity. […] But CDFs have been areas of corruption. The projects they have undertaken, they have either been partly completed, they have either been substandard or non-existent at all.”\textsuperscript{102}

Similar problems with corruption-induced public procurement at the local government level were reported in Uganda where politicians “want to go to the districts and supply”\textsuperscript{103} without respecting public procurement law, and also in Tanzania where “politicians, especially the councilors […] tend to take advantage of the position to do whatever they like.”\textsuperscript{104} Following numerous reports on the misuse of funds, the Kenyan CDF act was revised in 2013 and 2015.

6.2 Coexistence of legal and social norms

The analysis has revealed that the application of public procurement laws is negatively influenced by a stark divergence between social and legal norms. According to the empirical data analysis in this study, social norms are crucial for crime prevention as well as for the enforcement of legal rules, as this section seeks to explicate.

Starting with the latter topic, the enforcement of legal rules is deficient as reflected in extremely low conviction rates. Social norms seem to prevent people from seeking justice before formal institutions

\begin{flushright}
\textsuperscript{100}CDFs also exist in Tanzania and Uganda, but on a much lower scale. \\
\textsuperscript{101}BK13. \\
\textsuperscript{102}BK13. \\
\textsuperscript{103}BU4. \\
\textsuperscript{104}BT4. 
\end{flushright}
such as review authorities and courts, as courts of law are perceived as alien institutions that are not part of the legal culture. Challenging procurement decisions before the administrative review system is perceived – by both private companies and public entities – as an offense rather than a legitimate remedy. Resorting to legal norms, for instance the review mechanism, is sanctioned outside the legal system, based on social norms, by unofficially blacklisting complainants and excluding them from business circles. Thus, social norms seem to impede the unfolding of the legal anti-corruption capacity in terms of law enforcement. A promising approach to reconcile both norm levels would be the introduction of alternative informal arbitration as already practiced in Tanzania.

Often, corrupt acts are executed by the procurement officers at the request of supervisors; in other words, public administration is abused to carry out political corruption. Honest procurement officers face a norm dilemma here: When they “get the orders from the top”\textsuperscript{105}, they can either obey to social norms (a behavior that is expected and sanctioned by the supervisor) or to legal norms (a behavior that is required and sanctioned by law). Since the threat of job loss is manifest and drastic, most public officials try to reconcile both normative requirements by carrying out the corrupt deal and reducing the risk of detection through airtight concealment at the same time. In order to satisfy their bosses and remain unassailable, officers forge procurement documentation and circumvent regulations to appear compliant with the legal framework.\textsuperscript{106} In systems where corruption is deeply entrenched and trust in the impartiality of oversight institutions is absent, procurement officers who refuse to take orders from their corrupt superiors are not sufficiently protected. Having said that, it should not be neglected that procurement officers may act corruptly at their very own will:

“\textit{[W]hen personal interests come to the business picture, people may tend to forget every loyalty, when the issue is loyalty [versus] money.}”\textsuperscript{107}

These ethical issues are subject to discussion in the following section.

6.3 Ethics

Compliant public procurement procedures are not necessarily ethical, and, as the previous section has carved out, unethical conduct is often covered by ostensible compliance. Thus, ethical behavior cannot be observed by looking at compliance rates only; instead, ethics is supposed to be more deeply (up)rooted in the moral mindset of people. Interviewed experts have also elaborated on the relation between ethics and wages, ethics in the context of socioeconomic development, and attempts to draft legally binding documents ensuring ethics in public procurement. The results are presented in this section.

\textsuperscript{105} BT3.
\textsuperscript{106} BT3; BU4; BU7.
\textsuperscript{107} BU9.
Regarding the issue of salaries and their impact on ethical behavior, opinions of experts were mixed. Interview partners agreed in large parts that at the lower management level, insufficient wages were a source of corruption,\textsuperscript{108} while for political corruption, the income of corrupt actors was deemed to be irrelevant. One interviewee described a recent fraud scandal in Uganda in the following way:

\begin{quote}
“The people we have seen in corruption scandals, these are not people who, we would say, are getting a poor pay. We had [the Commonwealth Heads of Government Meeting] sometime [ago] here, [...] the Queen was there. [...] I think around 500 billion was spent on that function of which I think 400 were stolen, out of 500. Now 500 million is a tenth of our national budget. It was stolen. But the people who stole it [...], none [of them] was convicted. The people I saw being taken to prison and coming out and whatever, vice-president, ministers, these people did get good money. So yes, corruption could [be a] result of poor pay for low income manners. But at a higher level, I think it is grabbing, people just feel there is something to grab [...].”\textsuperscript{109}
\end{quote}

A Ugandan university lecturer gave the example of his graduate students looking for jobs after three years of public procurement law studies. Procurement job opportunities were advertised on the district level, but the students did not fulfill the requirements. Their lecturer therefore advised them to apply for open procurement positions at the local level, but the students refused to do so because “[t]here’s no money there.”\textsuperscript{110} All procurement officers receive the same salary, no matter if they work with districts or lower administrative units, “but what they were talking about is money got from corruption.”\textsuperscript{111} Since procurement contracts set up in local procuring entities are typically of less value than those in the districts, the soon-to-be procurement officers feared not to generate sufficient return in bribes. A similar case was told in Tanzania where a private sector employee decided to work for public administration as the job appeared to be more lucrative, despite the lower salary, because “people who buy in an organization are paid commissions”\textsuperscript{112}:

\begin{quote}
“I had an acquaintance who had a very good job as IT specialist with one of the big ones, I don’t remember whether it was Vodafone or Airtel or something, and they actually do earn pretty well in the private sector. And this one has accepted a position with TANESCO, the local power supplier. Where the basic salary was considerably lower than with the private firm, but where he had calculated very clearly, first, I will be sent around, meaning, I get many per diems. And secondly, I get more bribes.”\textsuperscript{113}
\end{quote}

The cases illustrate convincingly that integrity in public procurement is a moral issue and not to be installed through higher wages.\textsuperscript{114} In turn, corruption was deemed to be triggered by greed,\textsuperscript{115} as

\begin{quote}
“human beings [...] are never content. Even if we are being paid handsomely, [we] would always
\end{quote}

\textsuperscript{108} BT4, BT8, BU5, BU7.
\textsuperscript{109} BU5.
\textsuperscript{110} BU5.
\textsuperscript{111} BU5.
\textsuperscript{112} BK8.
\textsuperscript{113} BT6, own translation.
\textsuperscript{114} BK11, BT4.
\textsuperscript{115} BK12.
need to get something. Do you know why? It's because a lot of money, a lot of funds go to procurement. And a lot of people get rich quickly through procurement because you get a lot of money quickly, quickly, quickly.\textsuperscript{116}

One interviewee reported that collecting large sums of money was considered a creditable achievement in developing countries, and people getting rich in a very short time frame were not questioned how they became wealthy, but rather praised for their cleverness. According to her, this attitude was due to the poor economic background of large families, where one member can raise considerably the living conditions for many with money. Social pressure as a social norm influences strongly individual ethical standards; not taking personal advantage on behalf of the family would be considered as irresponsible and immoral. Eventually, the end justifies the means, and ethics are not challenged.\textsuperscript{117} A structural negligence of ethical issues was also observed on the organizational level, where a ‘culture of corruption’ may prevail and honest public officials get “absorbed”\textsuperscript{118}. Thus, ethics were not regarded as an individual behavioral choice, but as “the outcome of a lot of things”\textsuperscript{119}, including the working and environment, positive and negative incentives, and personal and professional relationships.\textsuperscript{120} One interview partner felt the need “to create a sense of, here we call ucalendo, national root, but it is patriotism to people”\textsuperscript{121}; thus, to institute ethics nationally. Such project would require people committed to achieve the main purpose of public procurement, which is value for money for public goods.\textsuperscript{122}

In order to provide guidance on ethical behavior, and in line with Art 9 (1) (e) UNCAC that requires signatory states to undertake “measures to regulate matters regarding personnel responsible for procurement, such as declarations of interest in particular public procurements, screening procedures and training requirements”,\textsuperscript{123} a range of preventive anti-corruption measures targeted at the integrity of procurement officers have been implemented in the national public procurement systems. These include, among others,\textsuperscript{124} codes of ethics that “are supposed to serve as an obstacle for private interests to interfere with those of the government.”\textsuperscript{125} Codes of ethics typically regulate how gifts and personal benefits are to be handled in public administration; which forms of communication and association with external agents involved in administrative cases are allowed; and which reporting mechanisms for corruption exist.\textsuperscript{126} Thus, codes of ethics grant procurement officers the possibility to assess their

\begin{footnotes}
\item[116] BT10.
\item[117] BT4.
\item[118] BK8.
\item[119] BT4.
\item[120] BT4, BT8.
\item[121] BT10.
\item[122] BT10.
\item[123] Cf. UNODC 2013: 11.
\item[125] Søreide 2002: 28.
\item[126] Søreide 2002: 28.
\end{footnotes}
personal integrity against the organization’s ethics standard, determine the boundaries of ethical action, and, therewith, hold public officials fully accountable for their actions.\textsuperscript{127} In Uganda, the Code of Ethical Conduct forms part of the Public Procurement Act, and is to be signed by public officers and experts contracted to provide advisory services to the public procurement system.\textsuperscript{128} The same is applicable for the Tanzanian Code of Ethical Conduct;\textsuperscript{129} yet, the code of ethics is not included in the text of the Public Procurement Act. The Kenyan procurement law, on the other hand, requires the regulatory authority to develop a Code of Ethics that is binding for “every person on whom this act applies.”\textsuperscript{130} According to interviewees, however, the signing of a code of ethics can only serve as a supplementary accountability instrument, but not as a stand-alone anti-corruption mechanism.\textsuperscript{131}

7. Recommendations for future reforms

The final chapter builds on the previously described impediments at the macro-, meso-, and micro-level, and aims at identifying more promising reform impetus than applied to date. This study acknowledges, and has demonstrated in the analysis, that corruption thrives in the public procurement context; yet, the present research is based on the core assumption that “there is nothing inevitable about the phenomenon”\textsuperscript{132} – it is, thus, normative in nature. It is therefore at the heart of this study to provide insights on past public procurement reforms of the case studies presented, and to draw conclusions for future reform strategies in order to increase anti-corruption effectiveness of public procurement laws.

On the macro-level, the previous section has demonstrated that political will at the national level is unincisive, and thereby frustrates successful implementation of public procurement laws. The role of the ‘principled principal’ is neither assumed by the government nor Parliamentarians in highly corrupt states; instead, its function is exercised by the donor community through aid conditionality. The analysis has found that this strategy is certainly helpful in overcoming reform deadlocks and instigating change processes. However, donor-driven legal reforms must be eventually resumed by the partner countries in order to be effective and sustainable. In absence of a committed political class (one of the main impediments to anti-corruption reform, according to the findings of this study), special importance should be attached to the influence of CSOs. Already today, stakeholder consultation meetings take place during the drafting of public procurement bills; NGOs, professional associations, and academics should continue engaging in law reforms, bring in their expertise, and represent public interests. Media, and to an ever growing extent online media, play a crucial role in

\textsuperscript{127} Søreide 2002: 22.
\textsuperscript{128} Fifth Schedule Public Procurement Act of Uganda.
\textsuperscript{129} \textsection 102(1) Public Procurement Act of Tanzania.
\textsuperscript{130} \textsection 181 Public Procurement Act of Kenya.
\textsuperscript{131} BK1, BT4.
\textsuperscript{132} Trepte 2006: 4.
informing citizens on ongoing and planned legislative procedures, which is pivotal for ensuring electoral accountability. In a nutshell, ‘collective action’ is needed to reduce corruption entrenched in public procurement.

On the meso-level, public procurement policy makers should strive for a closer integration of social and legal norms. In terms of enforcement, one possible solution may be the expansion of low-threshold complaints mechanisms. Less formal, community-based arbitration bodies as established in Tanzania, for example, enable citizens to resolve disputes without having to resort to courts. Another means to encourage bidders and concerned citizens to address corruption in public procurement would be to increase accessibility of administrative review systems. In order to protect procurement officers better from corrupt superiors forcing them to infringe anti-corruption laws, an ombudsman and whistleblowing mechanisms may be established in (at least major) procuring entities. They would allow to escalate alleged corruption cases to law enforcement organs without revealing the identity of the whistleblower.

Finally, tools are to be identified that increase ethical standards in the society. Procurement officers, as any member of society, must adhere to high ethical standards. The analysis indicates that neither the pay level nor the contractual obligations to respect a Code of Ethics have an impact on moral behavior in public procurement. Ethics is a topic reaching far beyond the field of public procurement and difficult to be regulated statutorily, as the educative effect of law is limited in general – at least in those judiciary systems that lack enforcement capacities. Instead of relying on the deterrent to engage in corruption provided by law, it may be more sustainable to anchor a deep-rooted sense of ethics in society already at younger ages. For example, it would be thinkable to integrate ethics as a subject into the general academic curriculum of schools; religious organizations may also play a role in educating people on the harming effects of corruption on the welfare of the public. The issue of integrity and probity, however, must be addressed in a larger anti-corruption context than public procurement law, in order to solve the collective action dilemma.
Annex: Interview sample composition and codes

<table>
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<tr>
<th>Sample group</th>
<th>Tanzania</th>
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<th>Uganda</th>
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<tr>
<td>Procurement authorities</td>
<td>BT3 BT9</td>
<td>BK10</td>
<td>BU8</td>
</tr>
<tr>
<td>Other procurement-related statal bodies</td>
<td>BT4 BT7 BT8</td>
<td>BK8</td>
<td>BU7</td>
</tr>
<tr>
<td>Procuring entities</td>
<td></td>
<td>BK3</td>
<td>BU9</td>
</tr>
<tr>
<td>Bidders</td>
<td></td>
<td>BK6</td>
<td>BU6</td>
</tr>
<tr>
<td>Procurement consulting firms</td>
<td></td>
<td></td>
<td>BU4</td>
</tr>
<tr>
<td>Academics &amp; lawyers</td>
<td>BT10</td>
<td>BK5</td>
<td>BU1</td>
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</tbody>
</table>

References


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133 Public procurement regulatory authorities and administrative review authorities.

134 E.g. vocational institutes, ministerial departments responsible for public procurement policy making, or central distribution agencies.


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