APPROACHES TO THE CONTROL OF CORRUPTION IN THE PUBLIC PROCUREMENT SYSTEM IN KENYA: AN INSTITUTIONAL ANALYSIS

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by

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ABSTRACT

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The problem with the populist approach to the question of corruption that focuses on micro-institutional changes is that it regards corruption as a top-down incentive-design problem. This approach, which is informed by the principal-agent theory, emphasises the need to restrain bureaucrats and politicians by changing incentive structures. This entails dealing with institutional factors that affect the decisions of individuals through compliance-enhancing policy measures. One of the problems with this approach is that it focuses on formal institutions whereas in reality, public officials respond to a mix of formal and informal constraints. Hence, comprehending corruption and its causes requires going beyond analysing the functioning of formal institutions that structure individual behaviour and constrain their decision-making preferences, to evaluating the complex network of informal institutions so as to gain a better understanding of the incentives driving individual behaviour.

This thesis argues that the best way to conceptualise the problem of corruption is as a process in socio-economic and political development that is more than a problem of individual morality or market imperfections. Consequently, it is argued that by analysing corruption as part of a broader process in a society's socio-economic structure, societal power relations that sustain the process and the institutions that have been internalised can be better understood, thus leading to more effective anti-corruption strategies.

In order to address the theoretical gap and explain the potential impact of formal institutions in constraining corruption or the role of informal institutions in the persistence of corruption, this thesis broadens the institutional analysis to include both formal and informal institutions.
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<tr>
<td>ACPU</td>
<td>Anti-Corruption Police Unit</td>
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<td>AIE</td>
<td>Authority to Incur Expenditure</td>
<td></td>
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<td>BPI</td>
<td>Bribery Propensity Index</td>
<td></td>
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<td>C&amp;AG</td>
<td>Controller and Auditor General</td>
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<tr>
<td>CIC</td>
<td>Consultancy Implementation Committee</td>
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<tr>
<td>CLARION</td>
<td>Centre for Law and Research International</td>
<td></td>
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<tr>
<td>CPI</td>
<td>Corruption Perception Index</td>
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<tr>
<td>CPK</td>
<td>Church of the Province of Kenya</td>
<td></td>
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<tr>
<td>CRCK</td>
<td>Constitutional Review Commission of Kenya</td>
<td></td>
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<tr>
<td>DfID</td>
<td>Department for International Development</td>
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<tr>
<td>ESAF</td>
<td>Enhanced Structural Adjustment Facility</td>
<td></td>
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<tr>
<td>FATF</td>
<td>Financial Action Task Force</td>
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<td>GDP</td>
<td>Gross Domestic Product</td>
<td></td>
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<tr>
<td>IAO</td>
<td>Integrity Assurance Officer</td>
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<tr>
<td>IEA</td>
<td>Institute of Economic Affairs</td>
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<tr>
<td>IFMS</td>
<td>Integrated Financial Management System</td>
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<td>IMF</td>
<td>International Monetary Fund</td>
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<tr>
<td>IRIS</td>
<td>Centre for Institutional Reform and the Informal Sector</td>
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<td>KACA</td>
<td>Kenya Anti-Corruption Authority</td>
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<td>KANU</td>
<td>Kenya African National Union</td>
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<tr>
<td>MDSR</td>
<td>Model Departmental Stores Regulations</td>
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<tr>
<td>MP</td>
<td>Member of Parliament</td>
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<td>NCCK</td>
<td>National Council of Churches of Kenya</td>
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<td>NEPAD</td>
<td>New Partnership for African Development</td>
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<tr>
<td>NGO</td>
<td>Non-governmental Organisation</td>
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<td>NSSF</td>
<td>National Social Security Fund</td>
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<td>OAS</td>
<td>Organisation of American States</td>
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<tr>
<td>OECD</td>
<td>Organisation for Economic Co-operation and Development</td>
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<tr>
<td>PAC</td>
<td>Parliamentary Accounts Committee</td>
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<tr>
<td>PACSC</td>
<td>Parliamentary Anti-Corruption Select Committee</td>
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<td>PIC</td>
<td>Public Investment Committee</td>
<td></td>
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<tr>
<td>PICK</td>
<td>Party of the Independent Candidate of Kenya</td>
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<tr>
<td>PPCRAB</td>
<td>Public Procurement Complaints, Review and Appeals Board</td>
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<td>SAP</td>
<td>Structural Adjustment Programme</td>
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<td>SOE</td>
<td>State-Owned Enterprise</td>
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<td>TI</td>
<td>Transparency International</td>
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<tr>
<td>UNDP</td>
<td>United Nations Development Programme</td>
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<tr>
<td>UNICTRAL</td>
<td>United Nations Commission on International Trade Law</td>
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<td>USAID</td>
<td>United States Agency for International Development</td>
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INTRODUCTION

Background to the Research

Available evidence suggests that corruption is an ancient and enduring feature in bureaucracies. In a treatise on public administration Kautilya, chief minister to the king in ancient India (circa 300 BC - 150 AD) writes in his Asthashastra:

Just as it is impossible not to taste honey (or the poison) that finds itself at the tip of the tongue, so it is impossible for the government servant not to eat up, at least a little bit, of the King's revenue. Just as fish moving under water cannot possibly be found out either as drinking or not drinking water, so government servants employed in the government work cannot be found out (while) taking money (for themselves) (Kangle, 1972:91).

Seven centuries ago, Dante placed bribers in the deepest part of Hell, reflecting the medieval distaste for corruption, and Shakespeare gave corruption a prominent role in some of his play (Tanzi, 1998). The progressive disintegration and eventual destruction of Rome was due to 'corruptio, the corruption of morals, the corruption brought by wealth, the corruption brought by poverty, the all-pervading corruption of Rome' (Simkhovitch, 1916:202). In the nineteenth century, public benefits and public offices were routinely, though not openly, bought and sold in most Western countries. Until the mid-twentieth century, and in some cases beyond, North American cities were rife with patronage, bribery, and embezzlement (Meagher, 1997). These examples attest to the fact that corruption is a continuing phenomenon that has been recurring, and even from the long past, there were those who sacrificed the nation’s interests for their own. The examples also illustrate that even then corruption was regarded as corrosive to the development of the state and that specific measures were therefore needed in response.

Yet, while corruption has been present in various forms in societies worldwide for thousands of years, it is only in the 1960s that the phenomenon began to feature in both academic and policy discourse (Williams and Beare, 1999). More recently and especially in the decade of the 1990s, corruption has specifically attracted a great deal of attention within the context of international and domestic policy debates and co-
ordinated effort has begun on both levels to address the issue. What has historically been defined as a domestic issue and subsequently the cost of doing business has re-emerged as a global political concern (Williams and Beare, 1999). Glynn, Koblin and Naim (1997:7) captured this shift when they wrote that, 'Campaigns against corruption are hardly new. But this decade is the first to witness the emergence of corruption as a truly global political issue eliciting global political response. The 1990s, we would predict, are unlikely to pass without the achievement of significant legal and institutional anti-corruption reforms'.

To a large extent, this prediction has been borne out in practice as prominent international organisations are now spearheading an offensive against corruption. Organisations such as the World Trade Organisation, financial institutions such as the World Bank and the International Monetary Fund (IMF), various United Nations agencies, the Organisation for Economic Co-operation and Development (OECD), the Organisation of American States (OAS), the European Union, the Council of Europe, and the Global Coalition on Africa are now addressing corruption as an important policy issue (Hors and Kpundeh, 1998).

In addressing the problem, these bodies have passed international conventions against corruption. In December 1996, the United Nations General Assembly passed a Declaration Against Corruption and Bribery in International Commercial Transactions in response to an initiative by the United States and member countries adopted the resolutions on January 28, 1997 (United Nations, 1997). During the same period, the Inter-American Convention Against Corruption was negotiated under the auspices of OAS and entered into force on March 6, 1997, after ratification by 18 member countries (U.S. Department of State, 2000).

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which was brought in operation on 15 February 1999, represents an important step in the concerted international effort to criminalise bribery and reduce the rampant corruption in world economies. It commits the world's biggest economies (comprising of 29 countries that account for about three-quarters of world exports and output) to participate in the fight against international corruption within their jurisdictions. The convention endeavours to prevent bribery in international business transactions by requiring countries to create the criminal offences of bribing a foreign public official and to provide for adequate sanctions and
reliable means for detection and enforcement. OECD has also led a crackdown on supervision standards in offshore jurisdictions through its Financial Action Task Force (FATF) to flush out money laundering (Financial Times, October 23, 2000). The European Union and the Council of Europe have also been developing comprehensive anti-corruption policies since the Criminal Law Convention on the fight against Corruption of November 1998.

International financial institutions, which previously perceived themselves as politically neutral and were reluctant even to discuss corruption citing limitations of their legal mandate according to their charters (UNDP, 1999a), have also launched wide-ranging anti-corruption initiatives. The World Bank and the IMF in particular have taken important steps. The World Bank Group, for example, has a dedicated Governance and Anti-Corruption Knowledge Centre established in 1994 to curb corruption by enhancing surveillance and governance in its client countries. Nearly 30 countries – principally in sub-Saharan Africa, Latin America, Eastern and Central Europe and, more recently Asia have received some form of support to improve governance and control corruption. In its commitment to fight corruption, the Bank concerns itself with 'the exercise of State powers in the broad sense but specifically with the appropriate management of the public sector and the creation of an enabling environment for the private sector' (World Bank, 1997:24). The Bank also introduced codes of good conduct clauses to blacklist companies found violating the Bank standards by fraud and corruption and ban them to bid for future procurement contracts in Bank-financed projects (World Bank, 2000). The IMF is also developing policies to combat corruption, one of which is to deny financial assistance to countries where corruption is likely to undermine economic recovery programmes. The IMF has also recently adopted guidelines concerning the role of the IMF in governance and promoting transparency and accountability in the public sector (UNDP, 1999a).

Far-reaching measures to promote democracy and good governance have also been endorsed by African governments. A recent summit gathering of African heads of state in Abuja, Nigeria under the auspices of New Partnership for African Development (NEPAD) approved a mechanism (the African Peer Review Mechanism) by which Africans monitor how the continent's leaders and governments comply with benchmarks for economic and corporate management. The review, based on eight draft codes was to be conducted by an independent and credible
African institute 'separate from the political process and structures' and should ensure 'that policies of African countries are based on best current knowledge and practices' (Daily Nation, March 28, 2002). Modelled on the 'Marshall Plan' through which the United States helped rebuild Europe after World War Two, the summit gave strong support for a draft declaration on good governance, committing heads of state to uphold plural democracy, respect human rights and freedom of press and judiciary and to eradicate corruption.

Non-governmental organisations (NGOs) around the world are also participating in the efforts to curb corruption. Among the international NGOs, Transparency International (TI), based in Berlin, Germany, has been a major influence in the increased action on the international arena in the fight against corruption. By strong advocacy through its 75 national chapters worldwide, it has been encouraging governments to establish and implement effective laws, policies, and anti-corruption programmes. It also aims to build public support for anti-corruption programmes and enhance public transparency and accountability in international business transactions to operate at the highest level of integrity. Another important contribution of TI has been the development of the Corruption Perception Index (CPI), which provides an indication of the levels of corruption believed to exist within countries. More recently, an important development by TI is the Bribe Propensity Index (BPI), which provides an indication of levels of corrupt practices engaged in by transnational companies abroad.

Why, in the 1990s has corruption suddenly become such a rhetorical priority in the international and domestic policy circles? Why, as Naim (1995) asks, have societies that have traditionally tolerated corruption at the highest levels in government and the private sector suddenly lost their patience and are willing to take to the streets to topple high officials accused of wrongdoing? How has the abundant intellectual discourse on corruption that has proliferated concomitantly with political rhetoric increased our understanding about corruption? Specifically, how has this body of knowledge contributed to policy strategies aimed at restraining corruption? With respect to the first two questions, a number of factors have been advanced to explain the possible sources of this growing concern.

One possibility stems from the departure by the West from the pre-Cold War political hypocrisy that had made the decision makers ignore the ills that existed in
particular countries (Tanzi, 1998). Industrial and donor countries now place less emphasis on ideological grounds for foreign assistance and more emphasis on trade and development. This has led the international aid and lending institutions to embrace corruption within the big issue of ‘good governance’ particularly with respect to the allocation and application of scarce public resources in Third World countries. The issue of good governance has become a major lending policy. This perspective is taken by the World Bank, which argues that:

Global concerns about corruption have intensified in recent years. There is increasing evidence that corruption undermines development. It also hampers the effectiveness with which aid is used in many developing countries, and this in turn threatens to undermine grassroots support for foreign assistance. Corruption is of growing concern to donors, non-governmental organisations, and citizens in developing and industrial countries alike (World Bank, 1997a: 2).

Another possibility is that globalisation of markets and the rapid rise of international trade has renewed attention to the problem of corruption. As complexities of the market and proliferation of electronic commerce have expanded competition in the international commerce, so too have opportunities for corruption increased, with the proliferation of offshore financial centres, which has made monitoring and detecting corruption more difficult (Johnston, 1997). The significance of globalisation on corruption is captured in an OECD policy report, which states:

The expansion and globalisation of the world economy have given the problem a fresh dimension. The deregulation of financial markets, the virtual elimination of exchange controls, the spread of new information technology and the development of even more sophisticated systems of payment are making it increasingly complicated to detect and punish corrupt practices (OECD, 1996: 9).

Globalisation has also brought another dimension about corruption. A frequent contact with individuals from countries with little corruption with those from countries where corruption is endemic has precipitated enthusiastic redefinition of standards by which public officials are measured. Furthermore, changes in political systems in the world have opened a window of opportunity in the fight against corruption. The increase in a number of countries with democratic governments and free, active press has also increased political pressure by an increasingly informed populace on intolerance with corruption (Naim, 1995).
A notable feature is the proliferation of a vast body of literature during the same period as the international campaign against corruption. A review of the scholarly work on corruption shows that in the 1990s, over 4,000 books and articles were published in 44 different languages, cutting across a broad spectrum of academic field and containing rich but unresolved debates branching in various directions (Hodess, Banfield and Wolfe, 2001). This review highlights the work on anti-corruption strategies as among the rapidly growing in the literature. While only 5 percent of the discourse on corruption primarily focused on methods of fighting corruption in 1990, this rose to 14 percent in 1999 (ibid.). Notwithstanding, scholars and policy-makers have remained vague about what can be done to eradicate it.

While discussing academic contributions to the anti-corruption initiatives, it is good to begin with the argument that the anti-corruption movement has proliferated 'without the luxury of significant experience and debate, and continue at a pace that is too fast for most academic institutions to add sufficient insight and guidance' (Langseth, 2000:3). The slow take-off in the anti-corruption literature is partly due to the controversy that originated in the 1960s about the theoretical possibility that corruption may be beneficial for growth and a virtuous activity for social integration (Huntington, 1968; Nye, 1967; Leff, 1964; Leys, 1965). Again, while theories abound, lack of credible data to test the theoretical contributions has hindered success in empirically linking the causes to possible remedies in a satisfactory analytical framework (Ades and Di Tella, 1997; Tanzi, 2000). As a result, the field of discussion has not yet been able to provide coherent policy guidelines to curb corruption. To understand how this has influenced policy response, scholars and policy-makers need to be familiar with how this field of discussion has evolved.

The 1960s revisionist assessment of corruption within the school of thought associated with modernisation theory - of whom Samuel Huntington ranked as one of its most forceful exponents - argued that corruption could positively be beneficial to society (Huntington, 1968; Leff, 1964; Leys, 1965; Nye, 1967). This strand of literature explored, primarily from a theoretical perspective, the likely socio-economic functional role of different forms of corruption. Some proponents of this school posited that corruption might not distort the efficiency of an economy if it merely entailed a transfer of economic rents from private party to a government official (Nye, 1967). Nye argued that the transfer of economic rents from a private party to a
government official could be an important source of capital formation, especially in countries where private capital was scarce and people did not have surplus income to be taxed. Thus, corruption might have possible positive consequences for Third World economic development. He further argued that corruption may help overcome divisions in a ruling elite and bridge the gap between the groups based on power and those based on wealth by allowing the groups to 'assimilate each other' (Nye, 1967:420). This argument, of course, assumed that under these circumstances the accumulated capital would then be put to use that promoted economic development, and not to wind up in some offshore banks.

Among the revisionists, some have argued that bribery can increase efficiency, under certain circumstances, by giving firms and individuals a means of avoiding burdensome regulations and overly restrictive legal systems. This suggests that where pervasive and cumbersome regulations exist, corruption actually improves efficiency and helps growth by oiling the wheels of a rigid administration. Leff (1964:516) argued that corruption might be a better alternative for circumventing erroneous policies or rigid government regulations stating that, 'if the government has erred in its decision, the course made possible by corruption may well be the better one'. At least, this is presumably a better alternative than, say, black-marketeering or smuggling. Nye (1967) too, argued that if the primary purpose is to buy favours from the bureaucrats responsible for formulating and administering government's economic policies, corruption is an effective means of cutting red tape. Huntington (1968:386) stated this bluntly: 'In terms of economic growth, the only thing worse than a society with rigid, over-centralised, dishonest bureaucracy is one with a rigid, over-centralised, honest bureaucracy'. While this classical view is less frequently proposed today, more subtle versions still abound (Lui, 1985). Critics point out that models that purport to show that corruption can have positive economic effects, however, are usually looking only at short-run static effects. In the long run, the results are likely to be costly in terms of economic efficiency, political legitimacy and basic fairness (World Bank, 1997a).

A number of critiques have recently emerged to challenge arguments that tend to show positive consequences of corruption. Indeed, recent empirical and theoretical studies show that the reason why most developing countries are poor today is partly because of endemic official corruption (Mauro, 1995; Rose-Ackerman, 1978;
Theobald, 1990). In a cross-country study, Mauro (1995) shows a robust correlation between high incidence of corruption and slow economic development. He also demonstrates that high corrupt countries tend to invest less in health and human capital. He argues that this occurs because health and education provides less lucrative corruption opportunities than other types of more capital-intensive public spending. Corruption also discourages investment by locals and foreigners (Knack and Keefer, 1995; Mauro, 1995; Olson, Sarna and Swamy, 1999).

One of the most discussed consequences of corruption on political and economic wellbeing is the distortion of government expenditure. Corruption engenders wrong choices and affects the composition of government expenditure (Pope, 2000). It creates incentives to choose investment projects not on the basis of their economic qualities but on the opportunity for bribes and kickbacks these projects present. This often results in public money being spent on large-scale projects, typically military or infrastructure projects, rather than on the necessary public services such as health and education (Rose-Ackerman, 1999). This is because, as stated above, it may be more difficult to collect bribes on education and health projects than on, for example, large defence projects (Mauro, 1998). Such capital spending therefore fails to generate the growth that policy-makers expect. Furthermore, lower quality infrastructure may result if the allocation of public corruption contracts is through a corrupt system. Cases of inferior work in Kenya have been reported. For instance, a road between Nairobi and Mombasa which had been repaired just few months earlier with funds from the World Bank, was destroyed by heavy rain, revealing that the tarring was too thin and the underlay insufficient. The local director of the World Bank attributed the poor quality to corruption (Lambsdorff, 2001).

Similarly, the argument that corruption is a panacea for overcoming red tape and cumbersome government regulations is questionable. The assumption ignores two significant negative consequences. First, instead of cutting red tape, corruption can be a source of extortion, providing incentives for bureaucrats to create more hurdles to maximise their gains. Myrdal (1968), citing the 1964 Santhanam Committee on the Prevention of Corruption appointed by the Government of India, argued that corrupt officials may, instead of speeding up, actually cause administrative delays in order to attract more bribes.
Available empirical evidence also refutes the grease and 'speed money' arguments and demonstrates a positive relationship between the extent of bribery and the amount of time that enterprise managers spend with public officials (Kaufmann, 1997b). Responses from more than 3,000 firms in 59 countries surveyed in the World Economic Forum's Global Competitiveness Survey for 1997 indicate that enterprises reporting a greater incidence of bribery also tend to spend a greater share of management time with bureaucrats and public officials negotiating licenses, permits, signatures, and taxes. Kaufmann further suggests that the cost of capital for firms tends to be higher where bribery is more prevalent.

Beyond the substantial body of empirical studies both measuring the degree of various types of corruption and its impact on economy and political stability, there appears to be a consensus on the need to develop policies and measures to combat corruption, both in the literature and also increasingly in practice. Research on corruption often underscores the important role that formal institutions play on the phenomenon and the literature analysing this relationship generally agrees that corruption is largely a symptom of underlying weaknesses in public policies and institutions (Abed and Davoodi, 2000). From this perspective, corruption is said to arise when wide discretionary authority is in the hands of decision-makers in the context of weak systems of transparency and accountability. The United States Agency for International Development (USAID) captures this perspective succinctly when it notes:

In general terms, corruption arises from institutional attributes of the state and societal attitudes toward formal political processes. Institutional attributes that encourage corruption include wide authority of the state, which offers significant opportunities for corruption; minimal accountability, which reduces the cost of corrupt behaviour; and perverse incentives in government employment, which induce self-serving rather than public serving behaviour. Societal attitudes fostering corruption include allegiance to personal loyalties over objective rules, low legitimacy of government, and dominance of a political party or ruling elite over political and economic processes (USAID, 1998:2).

This means the more activities public officials control or regulate, the more opportunities exist for corruption. Furthermore, the lower the level of accountability and transparency, the greater the potential opportunity for corruption. In addition to wide discretionarv power, the lower the salaries, the rewards for performance, the
security of employment, and the professionalism in the public service, the greater the incentives for public officials to pursue self-serving rather than public-serving interests. Independent of the opportunities, costs, and professional incentives with government institutions, general attitudes towards formal political processes influence corruption levels as well.

This argument recognises the fact that actions of the state crucially determine the nature and level of corruption. To a large extent, it is the state that, through its many policies and actions, creates the environment and the incentives that influence those who pay bribes and those who accept or demand them. Consequently, Tanzi, (1998) argues that any action against corruption is best pursued through structural, economic, and institutional reforms and the role of state apparatus is crucial as the fight against corruption cannot proceed independently from the reform of the state.

Much of the literature that discuss how to prevent officials from engaging in corrupt practices emphasise methods such as increasing the risk of getting caught, increasing the punishments involved for corruption, and limiting discretion of officials (Becker, 1968; Klitgaard, 1988; Rose-Ackerman, 1978, 1999). Following from this theoretical input, anti-corruption strategies tend to employ a combination of direct and indirect actions through administrative hierarchies to deal with corrupt behaviour. More generally, such strategies focus on formal solutions that emphasise administrative and legal remedies designed essentially to limit the discretion of public officials, for example, through carefully crafted rules and regulations, and production of more stringent laws and stricter enforcement of existing laws (Becker, 1968; Wade, 1982; Klitgaard, 1988). Other approaches based on fundamental economic reforms aim to remove the conditions that give rise to corruption in the first place. Such reforms seek to introduce more internal competition among government agencies, or commercialising or privatising those activities of government that can no longer be justified as a public responsibility (Shleifer and Vishny, 1993; Rose-Ackerman, 1999). Yet, other approaches generally focus on realigning incentives for bureaucrats by paying high wages and enhancing monitoring systems (Ades and Di Tella, 1997).

Two countries, Hong Kong and Singapore are usually set forth as success cases for significantly reducing corruption relatively quickly through a combination of stringent law enforcement and wage incentives (Ades and Di Tella, 1997). Both countries have established strong anti-corruption agencies, of which the Independent
Commission against Corruption (ICAC) of Hong Kong, which is discussed elsewhere in this thesis, is considered as the most successful example. Both countries have followed an incentive wage policy, where the bureaucrats are exceptionally well paid especially in Singapore where the salaries of cabinet ministers and other high level officials are reportedly among the highest in the world (Bardhan, 1997). However, what has not yet been empirically analysed is how much the wage policy contributes to the low-level corruption and how much should be attributed to tough approach to law enforcement. A few other developing nations too, notably Botswana and Uganda in Africa, Chile and Bolivia in Latin America, and Malaysia and Philippines in East Asia, are reported to have efficiently used their anti-corruption bodies to reduce the level of corruption (Kaufmann, 1997b).

Though without much success, Kenya has also adopted similar measures to combat the widespread corruption in the public sector, and most notably in the public procurement system. In a determined response to the problem of corruption in Kenya, the government has issued two policy papers the *Memorandum of Economic and Financial Policies* dated July 12, 2000 and the *Interim Poverty Reduction Strategy Paper 2000-2003*, which outline the measures it has taken or intends to take. According to the policy papers, the government has adopted a set of legal and administrative measures designed to improve governance and reduce corruption. These measures are designed essentially to limit discretionary intervention by public officials and to increase the cost of corruption. As part of this effort, the government has simplified public procurement regulations and adopted a more transparent and accountable process by decentralising procurement and creating a Public Procurement Directorate and the Public Procurement Complaints, Review and Appeals Board. The government has also progressively limited its role in the economy through continued privatisation and liberalisation of markets in a bid to reduce opportunities and incentives available to potential participants in corruption. The government also indicates its plans to enhance the effectiveness of accounting and auditing procedures through the introduction of an Integrated Financial Management System (IFMS) and to strengthen oversight bodies by increasing the operational capacity of the Kenya Anti-corruption Agency and the Controller and Auditor-General.

Other complementary anti-corruption reforms involve enhancing integrity and honesty in the public service through career control and ideological indoctrination.
On the career control, the government intends to restore merit-based recruitment and promotion of public officials and to set rewards and sanctions against performance standards, besides establishing a comprehensive, viable and motivating pay and benefits policy. The other and perhaps the most ambitious reform, is an attempt by government to imbue public officials to internalise its preferences through ideological and professional indoctrination. This is implemented through an education programme that aims to transform integrity, attitudes and behaviour of public servants (Republic of Kenya, 2002). In addition, the government has introduced a Public Service Code of Conduct and Ethics Bill, 2001, which is already in Parliament for debate and enactment, and is intended to serve as a disciplining instrument.

To a large extent, these wide-ranging sets of measures are consistent with what is suggested in the literature. Kaufmann (1997:10), for example, notes that 'setting up an improved civil service pay system, with adequate salary incentives and enforceable penalty for malfeasance, is crucial'. According to Kaufmann, two pillars in the stage of reform are government and regulatory reform 'which would not only help to curb corruption but also to sustain national growth strategies' (ibid.). Morgan (1998: 19) also maintains that 'serious and sincere commitments to counter corruption involve comprehensive institutional and administrative reform, reform of economic policy, legal or judicial reform, and in the extreme cases of patronage and cronyism, reform of political system'.

From the above discussion, it can be observed that by applying formal mechanisms, the major role of combating corruption substantially remains with the state. This assigned role is largely informed by the principal-agent theory, which emphasises the need to restrain bureaucrats and politicians, hence to change incentive structures in which informational asymmetries inherent in the political economy would inevitably lead to corruption. In this regard, corruption is viewed as an incentive design problem (Moe, 1984). Generally, the principal-agent problem is one of monitoring the public sector performance and hence avoidance of corruption, which is compounded by informational constraints and hence incentive-design problems (Rose-Ackerman, 1978; Klitgaard, 1988).

The principal-agent theory, however, does not take into account the role of social networks such as patron-client relations or reciprocal relations while theorising about corruption. While underscoring the importance of formal institutions in
controlling corruption, it is necessary also to look beyond the existence of formal structures and assess not only the capability of the infrastructure, which implements these measures, but also the dominant institutional factors that influence individual preferences. It can be argued that even the most well crafted legislation or policies can have no impact when promulgated into an institutional vacuum or an infrastructure incapable of implementation. Effective enforcement of anti-corruption law and regulations largely depends on the quality of the implementation mechanisms. However, many of the policy recommendations suggesting this approach demand extra resources and an obvious obstacle might be lack of funds. Therefore, public officials who are expected to enforce anti-corruption measures may lack motivation or ability to take action due to incentive problems.

Apart from the institutional limitations discussed above, another important contextual variable, which the principal-agent theory appears not to have considered, is the political and economic reality in a country. An analysis that takes into account the context of socio-economic environment would allow a better perspective on how informal institutions influence people's preferences and what impact such influence might have on any formal mechanism of controlling corruption. Moran (1999), for example, argues that a contextual analysis of the performance of ICAC in Hong Kong revealed that the long-term success of corruption control was attributed to three variables. One was the capacity of the colonial state to institute an important change in political policy, linked with its relation to the metropolitan power. Another was the effectiveness of the rule of law; and thirdly, there was a balance of power within Hong Kong's political economy.

In this thesis, a similar contextual analysis of corruption in Kenya at its present stage of socio-economic development advances the idea that the stage of development in a country and internal organisation of the state crucially determine the significance of formal mechanisms in controlling corruption. As the current academic debate on corruption does not provided adequate knowledge for understanding the societal-institutional nexus and the significant relationship with high-level corruption, this thesis has incorporated both formal and informal rules in the institutional analysis. The fundamental question the study has set to address has been how informal networks such as patron-client or reciprocal relations have significantly affected the role of formal institutions in controlling high-level corruption in Kenya.
The Research Problem

The central hypothesis of this research is that approaches to the control of corruption that rely solely on formal regulatory and incentives mechanisms will have limited impact on high-level corruption in a political system where informal institutions compete effectively against formal systems of governance. While formal institutions operate to structure and constrain individual behaviour regardless of their preferences, the reality is that public officials interact and respond to a mix of formal and informal constraints (Helmke and Levitsky, 2003). This is not to say that all informal institutions have negative effects. Some informal institutions such as self-enforcing ethical codes are complementary to formal institutions, but others such as patrimonial systems, patron-client and some forms of reciprocal relations, are generally dysfunctional and exist in the context of weak and ineffective formal institutions in which non-compliance can become institutionalised.

While responding to institutional constraints, individuals behave strategically, selecting options that confer them maximum benefits, and deviating from patterns that would make them worse off. According to rational choice theory the degree of compatibility between their expectations and their experience about the outcomes generated by institutions determines their future preferences (March and Olsen, 1984). This means that although individuals will tend towards institutions that will deliver quid pro quo, they will nevertheless weigh the likely benefits and costs of their actions. Those costs and benefits, which differ from one rule to another, create their own incentives and transaction costs that affect human behaviour. From this viewpoint behaviours are driven by preferences and expectations about consequences and the more predictable the institutional outcome, the more adaptive an individual will tend towards such institutional arrangements. Thus, when the rule of law, for instance, is perceived as weak or lacking in credibility, individuals might rely on informal personal relationships to achieve their desired objectives or resolve their problems.

From this perspective, it can be theorised that there is a variety of underlying factors that influence individuals to exploit the discretionary power in their hands for
self-serving ends. A basic factor is that corruption occurs on a *quid pro quo* basis and therefore the existence of the relationship between actors in corruption is sustained by the benefits it brings to them. With regard to political corruption, it is assumed that politicians have to compensate the electorate with patronage benefits in the form of 'pork barrel' allocations or jobs in exchange for votes. This position will sustain as long as the politician has resources to allocate. As for bureaucratic corruption, businesses pay bribes and kickbacks and in exchange receive government contracts. As long as public officials exercise discretionary power over public resources, firms will have an incentive to engage in illegal practices to obtain business or preferential treatment. This invariably results in complex networks of informal institutions that structure the processes by which these unofficial benefits are exchanged.

The extent to which parties are able or willing to countenance corrupt behaviour determines the stability of the practice. It follows therefore that systems of political and bureaucratic corruption would only collapse if the parties were unable or unwilling to execute their promises. Again, corruption should be understood as extending beyond allocation of scarce benefits by public officials to include the tradition of fulfilling certain obligations among members of solidarity networks. To the extent that corruption can become cyclical with all parties benefiting from it, it might be a problem to identify the appropriate principal with genuine desire to eliminate it. Arguably then, the control or elimination of corruption probably requires the emergence of new centres of interest and power outside the bureaucratic system.

These arguments recognise that understanding corruption and its probable causes requires going beyond analysing the functioning of formal institutions that structure individual behaviour, to evaluating the role that informal patron-client and solidarity networks might play in undermining the quality of formal institutions (Andvig *et al.*, 2000). When patronage systems rather than formal channels represent a common means of securing advantage of public resources, or when the legitimacy of government is low, this might induce individuals to disregard formal rules. Similarly, when interests of heterogeneous groups are not in harmony and some groups perceive as though they are being excluded or marginalised in the political or economic process, this might create incentives for those disadvantaged to disregard formal mechanisms advanced by the political system (USAID, 1998).
Research Methodology

The current mantra in social sciences is the value of using multiple methods to study particular problems (Eastley-Smith et al., 1991; Gabble, 1994), and this holds for studies of corruption in Kenya. This is based on the reasonable assumption that combining information is likely to increase accuracy (Lambsdorff, 2001). Nevertheless, research experts advise that since certain concepts are more appropriately studied by some methods than by others, the choice of a particular mode of inquiry should follow from the research problem one has. As Babbie (1994) suggests, there will usually be only one major methodology, which suits the research problem. Other methodologies would be used in a secondary role to help formulate issues or draw out details and nuances of issues that may extend the findings of the main methods.

This thesis is perhaps best characterised as incorporating elements of both the analytic and process tracing strategies to trace the source of informal institutions and assess how they significantly impinge on the role of regulatory and incentive systems (formal institutions) in the control of high-level corruption in Kenya. Particularly, the research problem is concerned with formal institutions and how they constrained corrupt behaviour of individuals in the context of competing and largely effective informal institutions. Formal and informal institutions are conceptualised here as binding, working rules that prescribe behaviours expected of occupants of various roles or, in other words, the 'rules of the game'. The research entailed a synthesis of formal institutional arrangements and the complex networks of informal institutions to identify the prevailing rules that actually shaped individual behaviour and incentives and to engage in corrupt practices. As such the major methodology that was used to examine the hypothesis and research questions outlined in this thesis was institutional analysis. The analysis employed historical institutionalist method to examine how institutional arrangements in Kenya incrementally changed over time, and rational choice and the normative versions of institutional theory to identify the constraints, imposed on, or the incentives available to individuals in relation to corruption (Peters, 2000).

While institutional analysis is the major form of analysis in all aspects of public policy (Hyden, 1984) there are a number of methodological issues inherent in
the tradition, and our preliminary task therefore begins with clarifying how this thesis attempted to overcome them. The first and potentially the most important problem was how to measure institutions and their attributes. What institutional variables were to be measured? Was the fundamental unit of analysis the individual, the group, or the institution? Without a clear and convincing explanation that there was systematic collection of evidence, we might not be able to argue that the study followed the canons of the conventional social sciences.

The tenets of methodological individualism argue that actors in political settings are individuals and, therefore, the only appropriate foci for political inquiry are individuals and their behaviour (Peters, 1999). This approach is based on the assumption that utility maximisation tends to drive individual choices and to understand the motives for such decisions, the appropriate focus for social and political analysis is the individual. This approach becomes problematic because motives are generally difficult to observe, and more so, corrupt motives. It is unrealistic to expect people to admit to criminal or even socially undesirable conduct, thereby exposing themselves to risk. In such circumstances, researchers tend use proxies to infer motives instead of experiential facts.

However, the proposition by March and Olsen (1984) that preferences are endogenous, based on the experiences of the individual within the institution is a revolution against the methodological individualism. They argue that individuals are important as they ultimately make choices, but the environment within which they function largely conditions those choices. For instance, the choice to engage in corrupt practices may be determined by analysing institutional characteristics, for example, quality of law and enforcement mechanisms. Therefore, by focusing on institutional design (i.e. design of the regulatory system) as the subject of analysis, one can possibly predict possible individual response and likely outcome produced by such a system. Peters (2000:5) also argues for the prospect of predicting individual behaviour through institutional lens: 'Even if the rational choice approach depends primarily on individual utility functions and rational calculations based on those utilities the presence of on-going institutions enables the external researcher to predict behaviour and to test hypotheses that might not be possible without the presence of the structures'. Following this line of argument, and considering that the quality of institutions and how they are implemented play an essential role in shaping individual
choices and behaviour (Johnston, 1982), the unit of analysis in this thesis was the regulatory infrastructure.

However, measuring informal institutions poses yet further challenges beyond those normally associated with the study of formal institutions. One of the major problems is how to identify informal institutions. As Helmke and Levitsky (2003) rightly point out, identifying informal institutions is far less straightforward than it is in conventional institutional analysis, even where informal institutions appear to have a clear effect on individual behaviour. Formal institutions are easy to identify as they are clearly written down, but the process of identifying informal institutions is more difficult. For instance, a constitution and other legal statutes can tell whether specific rights and limitations have been addressed in a given situation, but assessing the level of pervasiveness of clientelism or kinship networks is much more difficult. The second problem, was how to measure the degree to which institutionalisation had taken place. How did we identify incremental influence of informal institutions and how they superseded formal rules? First, we argued that institutional change has been progressive and concomitant with the dynamic post-independent political development in Kenya. For instance, as we discuss in chapter two, unregulated presidential control over state institutions through constitutional amendments resulted in the weakening of checks and balances on executive power, and widespread abuse of power through patron-client networks. Second, we identified stable patterns in the domain of state bureaucracy that did not conform to formal rules. In this case, the thesis used evidence from the Kenyan case with particular reference to the public procurement systems to illustrate how informal networks potentially undermine the institutional restraints designed to prevent opportunism in the public sector.

The thesis obtained data from three major sources: a review of relevant theoretical and empirical literature on the problem of corruption and the country's relevant legal framework, archival and documentary analysis of official reports, and elite interviews with key informants on the subject. The review entailed analytical synthesis covering literature on corruption mainly within modernisation, neo-patrimonialism and neo-institutionalism schools of thought. This strategy enabled investigation of the ways in which the conflict between traditional practices and modernisation doctrine shaped the institutional context that lead to the weakening of formal rules and systems, resulting in greater opportunities for corruption.
Documentary research and elite interviewing were undertaken during the fieldwork in Kenya during the first half of 2002. On documentary research, permission was sought from the Clerk of the National Assembly to peruse audit reports from the Controller and Auditor General (C&AG) and proceedings of the Parliamentary Accounts and Investments Committees. The C&AG is required by law to audit and report on the public accounts of all government ministries annually and submit the report to the National Assembly. Similarly, permission was sought from the Director of Public Procurement to examine supplies management inspection reports. After preliminary correspondences, which were essential for obtaining permission and co-operation to conduct research, access in both cases was granted.

Using documentary and elite interviews the thesis explored the nature of corruption in public procurement that explained the limitations of regulatory and incentive systems in constraining high-level corruption. The key question for investigation was, therefore, to determine how these formal mechanisms constrained or facilitated corruption in the procurement systems. The subject of analysis was therefore government regulatory and incentive systems. Although the focus of analysis was the legal and institutional framework, to evaluate its achievements and draw a reasonable conclusion about its effectiveness in the control of procurement corruption, the problem was approached from three dimensions. First, a systematic evaluation of the measures that promote accountability and transparency in procurement was made by examining the public procurement structure including the procurement procedures and the organisational responsibilities and capabilities primarily to identify the possible strengths and weaknesses of the institutional mechanisms. Second, data on the trends of procurement practice over time were analysed in order to identify possible regularities or variations from formal rules or procedures and to discern patterns of, or potential vulnerability to corruption. Finally, a review of the existing legal, regulatory and incentive framework was carried out in order to assess policy orientation towards constraining corruption in general, and procurement corruption in particular.

To operationalise and measure determinants of corruption in actual practice in a meaningful way, we identified and categorised variables or characteristics that were positively correlated with corruption. Specifically, we analysed corruption proxies such as evidence of routine disregard for procedures and collusion in contract awards.
and administration. In one category, we sought evidence of collusion and other irregularities and variations that occurred routinely in contract award and administration, but legitimately within the procurement rules. This evidence helped to discern and assess the strengths and weaknesses of the procurement regulations and its potential vulnerability to circumvention. In the second category, we assessed the quality of the legal framework in terms of its ability to restrain arbitrary action by powerful vested interests. Examples of manipulation or violation procurement rules and procedures with impunity were sought essentially to show how actors in high-level corruption are unrestricted by not only regulatory procedures in procurement, but also by the entire institutional mechanism.

To assess the quality of legal framework in terms of statutory and administrative instrument that constrain corruption, we identified variables that were inversely related to opportunities for corruption such as absence of arbitrary discretion in decision-making, transparency and accountability in procurement management. Also, meritocracy in hiring, promotion and firing was analysed to determine the quality and integrity of the public service as well as potential motivators for corruption.

Data collected principally through documentary research method served as the basis for understanding the form and mechanisms of corruption in public procurement. This entailed analysing the annual reports by the Controller and Auditor General (C&AG) presented to the Parliamentary Accounts Committee (PAC) covering the fiscal years from 1990/91 to 1997/98. Similarly, supplies (procurement) management inspection reports for the same period were reviewed. This material was supplemented by the information retrieved from a ten-year press archive from two leading daily newspapers - the Daily Nation and the East African Standard.

Elite interviewing utilising informal conversation and semi-structured interview methods where notes were contemporaneously taken complemented documentary research method. Elite interviewing is a research strategy that selects certain individuals with high levels of knowledge of the phenomenon under investigation for in-depth interviews (Denzin, 1978). The main objective of these interviews was to gain deeper elaboration of the topic, which as expected, revealed details and nuances of the issues that could not have been detected by the use of documentary data methods.
Key informants were intuitively selected on the basis that they were likely to yield the most comprehensive and balanced understanding on corruption. Procurement systems affect many different elements and about five major stakeholders can be identified. First there are procurement entities with the responsibilities to perform specific or designated duties for the country of providing services to the public in the most efficient and economic way. Then there is the business community of actual and potential suppliers to the government who rely on the government for business opportunities. Third, there is government through oversight bodies who have interest on how procurement rules and practices appropriately protect public spending. Fourth, there are the academic and public interest groups, which have important views in how public institutions manage their affairs. Finally, the largest interest group is the general public, who are more likely to feel satisfaction when they know that expenditures are being made through the public procurement system, which is economical, rational and fair (Wittig, 1999).

In this regard, businesspeople that participate in procurement contracting were thought to be a fertile source of how corruption exchanges actually work. Five contractors consented to the interview. Interviews were conducted on their experiences with corruption and bribery in the public procurement systems and their attitudes and level of tolerance towards corruption. In-depth interviews were carried out with two procurement officers including the Director of Public Procurement, a former senior procurement officer who had recently retired, and members of the audit staff. In addition, key informants from other areas helped to clarify and cross-reference the information gathered. Such informants included two editors of the local newspapers mentioned above, officers from the anti-corruption agency, legislators and local representatives of an international anti-corruption NGO.

During the interviews, an informal conversation interview method was adopted and we attempted not to be too rigid in the line of questioning and allowed the conversation to flow in the direction of interest to the interviewee. This method of maintaining flexibility was found appropriate, as we were able to pursue the questioning and generate new questions as appropriate depending on the information that emerged. There were clearly some lines of questioning that individual interviewees found uncomfortable to discuss. In several cases, interviewees requested anonymity or asked that the interview take place completely 'off the record.' In all
instances, these wishes were respected. This approach proved very successful and the
interviewees were quite responsive. However, some interviews were quite time-
consuming some running as long as four hours.

The issue of respondent bias arising from two possible reasons was, however,
anticipated in an inquiry of this nature. Businesspeople who were completely
exasperated with the procurement entities might have taken the opportunity to vent
their anger. In this case the quality of the institutional framework would be
consistently underestimated. The other possibility was that contractors who felt
reasonably happy with the procurement system or feared that government officials
would find out about their responses might have presented a too rosy picture, thus
creating assessment error. In order to temper this fear, questions were framed to elicit
anonymous responses and asked for no company-specific data, which would expose
the identity of the respondent. At the same time, the interviews focused on
institutions rather than individuals giving the respondents a reassurance that they were
not attacking individuals.

In carrying out the fieldwork, there were inevitably ethical and sometimes
legal dilemmas, which arose out of competing obligations and conflict of interest.
While it was the responsibility of the researcher to safeguard interests of those
involved or affected by the study, it was our duty to report the findings accurately and
truthfully. In certain cases this was not in the interests of the subjects and might in
some occasions result on some embarrassment to the participants. The fear of
offending placed constraining influence on the research as the difficulty of balancing
this conflicting interest arose, but not so much as to undermine the quality of the
interviews. To ensure a relationship of trust as far as possible with the subjects, the
tendency was to afford some kind of anonymity and confidentiality. However, the
use of archival research substantially minimised the ethical issues of violating
contractual relationship between the participant and the researchers. By addressing
institutions and not the individuals, the problem of linking identifiable individuals and
the data was also avoided.

On the basis of the information obtained, an in-depth review of the existing
legal, regulatory and incentive systems was carried out to assess its consistency and
impact in the control of corruption in public procurement. This entailed analysing
criminal legislation, in particular the Prevention of Corruption Act, the Penal Codes,
subsidiary legislation, i.e., the Public Procurement Regulations, and other regulations in form of official decrees published in Government Gazettes that contain provisions against corrupt activities. There were also general law provisions such as legislation covering money laundering, which have an effect on corruption prevention and also international instruments that have implications for domestic corruption prevention measures. This assessment enabled an evaluation of legal gaps, inefficiencies, and inconsistencies among various laws.

To assess the quality of bureaucracy, this study used available secondary sources. The research utilised quantitative data from the World Bank survey on the civil service reform in Kenya, and the United Nations Development Programme (UNDP, 2001) on the public service ethics in Africa. The World Bank data draws on a survey that assessed 450 civil servants randomly sampled from three major government departments. The assessment focused on personnel management practices including policy formulation, staffing, personnel career development, pay and benefits, budget management and corruption. Conducted in 2000, the survey provided the first systematic data on such structural issues in Kenya. The UNDP study collected data through interview with key informants and documentary analysis.

The use of data from these studies had two main advantages. First, it allowed a large sample to be analysed, which could otherwise have been impossible if we collected data ourselves. Second, the World Bank has probably conducted more surveys in developing countries than any other single institution and the UNDP, too, has had substantial research work in Africa. As a result of the large number of surveys and survey topics, these two institutions possess enormous experience of designing and implementing national surveys.

**Thesis Structure**

This thesis is organised as follows.

Chapter one reviews essential elements of major theoretical approaches that have engaged contemporary debate on the nature and causes of corruption. The chapter reviews the literature on the conceptualisations, nature and causes of
corruption mainly within the modernisation, neo-patrimonialism and neo-institutionalism schools of thought and evaluates the core issues in an attempt to build a theoretical foundation upon which this thesis is based. It is argued that although various approaches provide insights into specific aspects of corruption, none constitutes as yet, a coherent and consistent explanation to the complex issue of corruption. It is apparent that the current academic debate on corruption does not adequately link the causes to possible remedies in a satisfactory analytical framework. This is partly due to the complexity and diversity of underlying factors that give rise to corruption many of which lie beyond the traditional domain of one discipline. The literature in the neo-patrimonial school which addresses social and cultural reasons of corruption distinctly focuses on informal factor, while on the other hand, neo-institutionalist literature is concerned with formal institutions. To close this gap and obtain a better perspective of the subject, a multi-disciplinary approach from both traditions was needed. As a consequence, this thesis developed a framework drawn from the two traditions to provide intellectual directions about the effects of interactions between formal and informal institutions on public procurement corruption.

Chapter two applies the framework developed in chapter one to the Kenyan context and examines how political, economic and cultural forces contribute to the persistence of corruption. The process of socio-economic and political development is particularly relevant in explaining the dynamism of political culture and societal changing values about corruption. For this, modernisation theories have provided useful insights into this process of transformation. In order to identify the influence of modernisation theory in the analysis of corruption and to explain the source of neopatrimonialism, in Kenya, the thesis carried out an historical analysis of the pre-colonial, colonial and post-independent Kenya. The significance of this analysis is that the impact of transformation from traditional society to modernisation has been profound on the incidence of corruption. Not only did the country experience a proliferation of informal networks that sustained corruption, but also the perceived level of corruption progressively increased over time. Important conclusions drawn from this analysis is that the evolution of informal networks greatly undermined the formal mechanisms of governance, which are essential components of the fight against corruption.
Chapter three is a case study of public procurement in Kenya, which illustrates the institutional quality of the procurement framework and assesses its effectiveness in controlling corruption in the Kenyan public procurement system. This chapter is based on the evidence from documentary sources and interviews conducted during my fieldwork in Kenya in the first half of 2002. The methods used to collect this evidence are described in detail in the previous section. The chapter begins with a review of the public procurement structure and procedures from early 1970s, followed by a comprehensive description and analysis of the existing legal and regulatory framework. Against this background, the trend of procurement practice over time is analysed to identify possible variations from formal rules and procedures and to discern patterns of, or potential vulnerability to corruption. Documentary sources and interviews present a clear picture of how corruption is organised and reasserts the influence of informal institutions on public sector corruption, particularly in the public procurement.

Chapters four provides a detailed overview of anti-corruption measures operating in Kenya, essentially to identify the source of weakness of the formal institutions of governance and the challenges facing attempts to control corruption in general and the public procurement system in particular. Institutional studies argue that the extent to which individuals conform or deviate from formal rules largely depends on their preferences or expectations about the consequences (March and Olsen, 1989; Peters, 2000). Generally, individuals behave strategically and select options that confer them maximum benefits and, therefore, they would logically adhere to formal incentives and constraints because deviating from them would make them worse off. When reward and penalty mechanisms are weakly enforced or ineffective, individuals inevitably tend towards informal institutions to achieve their objectives. A review of the institutional infrastructure in Kenya provides clear evidence that economic and political circumstances hinder the progress of formal institutions in fighting corruption.

The concluding chapter analyses the most important results of the empirical work and discusses the findings in relation to the variety of theoretical perspectives and frameworks overviewed in chapters one and two. The chapter begins by presenting the main ideas behind the study and continues with a discussion of the question posed in the introduction. In the end, this thesis has made two major
contributions to the academic and policy-oriented debates. In contributing to the body of knowledge in the principal-agent theory, this thesis shows that contrary to basic assumption, the use of principal-agent theory is not limited to formal institutions and bureaucratic corruption (Johnston, 1996), but can also be modelled to analyse informal institutions. As the current debate on corruption is not adequate for understanding the formal-informal institution nexus and how this relationship compounds the problem of corruption, this thesis develops a framework that incorporates debates from various schools of thought and integrates them into institutional analysis on public sector corruption. On contributing to the policy debate, a broadened scope of institutional analysis generates sufficient arguments to support the hypothesis that approaches that rely solely on formal regulatory and incentive mechanisms would have limited impact on high-level corruption in Kenyan owing to incentive-design problem. An important argument is that the problem is not only structural as generally theorised in the principal-agent literature, by also socio-political as this thesis illustrates.
Chapter One

UNDERSTANDING CORRUPTION

Introduction

The central aim of this chapter is to review contemporary debates on the key theoretical and conceptual issues in an attempt to support the argument that the causes of corruption are ‘always contextual, rooted in a country’s policies, bureaucratic traditions, political development, and social history’ (World Bank, 1997a). It is argued that although various approaches provide insight into specific aspects of corruption, none constitute as yet a coherent and consistent explanation to the complex issue of corruption. This ultimately requires an analytical synthesis that incorporates theoretical insights from both cultural and institutional approaches.

Generally, corruption is a complex and difficult subject to address and one which cannot be explained within the boundaries of one single academic discipline. Until recently, corruption was mostly discussed in the fields of sociology, political science and public administration (Myrdal, 1968; Huntington, 1968; Heidenheimer, 1970). However, given its intractable nature, research into corruption also spanned across other academic fields such as law, economics, anthropology and even psychology (Morgan, 1998). More recently, economists and political scientists have taken the lead in the research on corruption world-wide (Andvig et al., 2000), with economists mainly supplying the tools for analysing the subject (Becker, 1968; Rose-Ackerman, 1978; Klitgaard, 1988; Tanzi, 1995). Today, corruption has become virtually a subject of interest in almost all spheres of life. Outside academic circles, it has become a topic of interest among people of different professions, in the media, investors, and aid agencies. Given its interdisciplinary nature and the complexity and diversity of the underlying factors that give rise to corruption a wide range of topics and issues are usually subsumed under the umbrella of 'corruption' (Kaufmann, 1998).

Certainly, there exists a respectable body of scholarship in various fields within social sciences, which has contributed significantly to the intellectual
understanding of corruption (Kaufmann, 1998). Despite the vast amount of literature on this topic, there is no central organising approach to the issue of corruption, or one that has succeeded in linking the causes to possible remedies in a satisfactory analytical framework. Indeed the majority of the literature comprises rich but unresolved debates, which cut across a broad spectrum of academic field branching in various directions. This has prompted important questions regarding the best approach to corruption as a field of study. Kaufmann (1998), for instance, poses the question whether corruption can be regarded as an emerging discipline:

Should it aim to be a freestanding field of investigation and academic training, consistent with its belated yet acknowledged importance for development and social welfare? Or, since corruption is increasingly recognised as an important symptom of fundamental institutional weakness, should it be integrated within existing fields of inquiry - which hitherto have not paid sufficient attention to corruption? If the latter, into which fields of inquiry should corruption be mapped? (Kaufmann, 1998:150).

The idea of looking at corruption as a freestanding field of study seems to be gaining interest among some scholars. Indeed, the word 'corruptologist' has recently begun appearing in some texts (Lancaster and Montinola, 1997:200). However, the central concern in this research is not with the issue of status, but to interrogate various approaches so as to identify essential elements with sufficient analytical power and potential utility for explaining corruption, within various approaches.

It is reasonable to suggest that the literature on corruption has, over the past decades, reverberated across three central issues. The first issue concerns whether corruption is beneficial or detrimental. There exists a strand of corruption literature suggesting that corruption might be efficiency and sometimes welfare enhancing in the face of structurally deficient bureaucratic, legal or political systems which might inhibit production of desired goods and services (Huntington, 1968; Leff, 1964; Nye, 1967; Nas, Price and Weber, 1986). This rationale has inspired many private firms to justify their behaviour of paying bribes to public officials to get business. Another strand that comprises the bulk of corruption literature describes the consequences of corruption as routinely negative (Bardhan, 1997; Goodie and Stasavage, 1998; Lambsdorff, 1999). For the purpose of this research, the detrimental nature of corruption is taken as read.

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The second issue is how and when political, social, and economic forces contribute to the persistence or reduction of corruption. The literature reveals many different explanations of the causes of corruption. Morgan (1998) summarises several widely accepted causes, noting that different methodological approaches identify different causes for corruption. At least three general causal factors are identified. One relates to ethical or cultural factors such as changes to religious beliefs and public morality, and the conflict between traditional practices and colonial institutions. Another examines socio-economic and structural incentives, which encourage corrupt activities. Finally, there are explanations that attribute cause to weaknesses in political systems and institutions and the breakdown in formal rules and systems. Collectively, these explanations might be classified as belonging to any one of the three dominant theoretical schools of thought: the modernisation school, the neo-patrimonial school and the neo-institutional school.

A third category focuses on what types of policies effectively counter corruption. Three types of policy reforms have been suggested as positive strategies against corruption (Ades and di Tella, 1997; Abed and Davoodi, 2000). One involves changing policies, which induce or provide opportunity for corruption. Another approach involves the reform of incentive structures operating in administrative and political institutions, which encourage corrupt behaviour on the part of state officials. The third approach concerns reforms of legal institutions to create enforcement capacity and strengthen the rule of law.

This chapter provides a conceptual linkage within and across the theoretical perspectives outlined above in order to form the basis upon which various anti-corruption strategies might be evaluated. The chapter is organised as follows: the first part examines a number of ways corruption has been defined and explores the various meanings of the term in an attempt to develop a working definition. The second section explores some of the influential typologies of corruption that scholars have constructed to supplement our understanding of the concept. This is followed by an overview of the various approaches that have been used to analyse the nature and causes of corruption, which entails a brief account of the origin of each of these approaches and their analytical strengths and weaknesses. In the section that follows, a case is made for an institutional analysis (of both informal and formal institutions)
as an important contextual approach for understanding bureaucratic and political corruption.

**Conception, Perception and Definition of Corruption**

How is corruption perceived in different societies? Is there a universal standard for defining what is corruption? When ordinary people talk about corruption they understand each other without difficulty. They generally know what is right and wrong in society and a precise definition of corruption is hardly of any significant importance to them. Generally, each of us has developed a mental image of what corruption is. The images evoked in our minds about corruption may slightly differ across cultures, but the notions about corruption are implicitly similar. Some cultures may sanction the proffering of 'gifts' to public officials while others do not, but when it is a payoff to a public official, they will all accept it as corrupt.

But when corruption becomes the subject of research, various approaches are applied to the analysis of the phenomenon and it become more difficult to agree on theoretical interpretations within the overall scientific concept. Definitions of corruption, therefore, have been a matter of considerable debate among scholars. Gould (1991:467) notes that 'corruption has no single definition. It varies from region to region and remains largely contextual'. No agreement has been reached on a precise and concrete definition, which universally applies to all forms, types and degrees of corruption. One of the reasons, argues Williams (1987), is that corruption is not a discrete phenomenon and may refer to many different human activities and behaviour in different circumstances. The phenomenon ranges from the single act of a venal exchange to an endemic malfunction of a political and economic system. Another reason is that public perception of what is termed corrupt varies from one nation to another and even from one community to another (Johnston, 1986). The fact that corruption is studied from several different disciplines, including law, economics, sociology, political science and anthropology also contributes to the variety of definitions (Morgan, 1998).

Moreover, the concept is steadily expanding, as a broad range of human action is continually being labelled corrupt. According to Jacobs (1999), the term corruption
is used to represent a whole collection of apparently related phenomenon covering a broad range of human actions that we have observed in the course of our life. The term casts a wide net, snaring the most trivial acts that most would ignore, as well as those acts approaching outright treason and threatening the basic democratic process. Sorting out the many elements of corruption becomes a difficult scholarly exercise, creating methodological problems for any attempt to measure the phenomenon.

The classical definition seeks to define corruption using certain common properties with the premise that these properties make certain behaviour 'corrupt' in all societies (Dobel, 1978). This definition views corruption from a moralist-normative perspective and has its roots in the writings of Plato, Aristotle, Thucydides, and Machiavelli on virtue (Dobel, 1978). According to the classical conception since Aristotle, but especially in Machiavelli, corruption is thought to be a decline of moral standards in society or, literally speaking, a breakdown of political virtues. It is predicated on prior judgement of non-corrupt conduct in public office, and focuses on deviation from civic virtue toward private interests. Thus, when Clive in 1765 condemned the servants of the East India Company for their corruption, it was on the ground that 'their sense of honour and duty to their employers had ... been estranged by the too eager pursuit of their own immediate advantages (Select Committee, 1771, quoted in Palmier, 1983). Political philosopher Dobel (1978: 960) summarises corruption as 'the loss of capacity for loyalty'. He then offers a conceptual framework based on political philosophy that unifies the moral, political, and social construct of corruption.

According to Dobel (1978) moral corruption exists when moral life becomes privatised and individuals lose capacity to make disinterested moral commitments to the institutions, which benefit the common welfare. In this case, individual choices involve the possibility of acting in one's interest rather than being loyal to a public trust, law or another's welfare. As a result, social relations are seen in terms of individual benefits instead of common welfare and citizens are unable or unwilling to do anything, which does not bring them sensual gratification, money or security. Loyalty, argues Dobel, is an important gauge for assessing the minimum attributes necessary for reinforcing and sustaining the basic moral virtues. Loyalty is defined as:
The willing and practical and thoroughgoing devotion of a person to a cause. A man is loyal when, first, he has some cause to which he is loyal; when, secondly, he willingly and thoroughly devotes himself to this cause; and when, thirdly, he expresses his devotion in some sustained and practical way, by acting steadily in the service of his cause (Royce, 1969, quoted in Dobel, 1978:960, emphasis in original).

Capacity for loyalty empowers public officials to exercise the self-discipline that is necessary to override the self-interested desires. On the other hand, a decline in loyalty is likely to result in the absence of respect for given norms.

Similarly, social contract binds the public officials to exercise a sense of commitment to the well being of citizens with a 'disinterested attachment to public good, exclusive and independently of all private and selfish interest' (Wood, 1969:96). When the public servants are driven by self-interests, they violate the trust and responsibility bestowed upon them by the citizenry.

In moral terms corruption is clearly seen in relation to standards and values. It is the moral values and standards, which are adhered to that determine whether certain practices will be deemed corrupt. This essentially seems to say something definite about the standards that have to be adhered to. But what are these values and standards and against what normative criteria are they to be measured or assessed? Analysts who choose to use corruption in its moral sense inevitably encounter the problem of contrasting standards especially when undertaking comparisons among dissimilar societies. Definitions of what type of behaviour is considered ethical or unethical would vary from society to society given their different cultural, social and psychological foundations. What might be frowned upon in Western societies where bureaucratic ideals have been well embraced might receive no censure in non-western societies where strong ties of solidarity are characterised by ethnicity, factionalism and nepotism (Chabal and Daloz, 1999). In some African contemporary societies, expectations of virtue appear to be limited to one's kith and kin, the members of one's community and not beyond. That may explain why there is little condemnation of corruption so long as its fruits are deemed to have been suitably redistributed according to the logic of patronage (ibid.).

In recent times, social scientists have tended to avoid the value-laden moral definitions of corruption and prefer to use behaviour-classifying meanings of
corruption. Behavioural-focused definitions generally agree that corruption is the abuse of public powers or resources for private benefit (Johnston, 1994). Heidenheimer (1970) groups the variety of definitions used by social scientists into three categories. The first is the public office or formal-legal definitions that identify corrupt behaviour with officials acting in ways that deviate from their formal legal and public role for the purposes of securing certain private gains. The second category consists of market system explanations that refer to corruption as situations in which officials see the positions as an authority to maximise personal gain by dispensing public benefits. The third, public interest definitions, view corruption as breach of faith or trust and betrayal of some broad 'public interest'. In this account, corruption exists whenever a responsible official is induced by the promise of certain rewards not legally provided for, to act in ways, which favour the provider of the rewards and thereby damaging the public and its interests. These definitions are now examined in turn.

The public-office-centred definitions of corruption define the phenomenon as behaviour that deviates from formal public duties of an official rather than simply ethical norms. This definition assumes that the deviation from the formal duties of the public role take place for private gains, thereby introducing the distinction between public and private interests. Writers have offered a variety of public-office-centred definitions but the most comprehensive and commonly used definition in the works of corruption is the one offered by Nye (1967: 419). He defines corruption as:

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

This definition has a major empirical advantage over the broader moralistic definition in that it is more precise and of better utility to researchers as it is more amenable to reliable measurement. Its breath is sufficient enough to take into account the abuse of power, which does not directly benefit oneself but one's party, class, tribe, friends, and family. However, some critics argue that it suffers from being
simultaneously too narrow and too broad in scope (Peters and Welch, 1978). All illegal acts are not necessarily corrupt and all corrupt acts are not necessarily illegal. If, for example, public officials are not forbidden by law from receiving gifts and according favours to family members in the disbursement of public resources, are we to consider such behaviour corrupt? The definition has also been criticised for being excessively concerned with illegality of such practice, defined from a modern, Western point of view (Sardan, 1999). The definition also avoids mention of the public interest and considers this as implied.

The public-interest definitions, on the other hand, address both the natures of the phenomenon and its consequences and focus on behaviour, which negatively impacts on the welfare of the public. Friedrich, for example, argues that:

The pattern of corruption can be said to exist whenever a powerholder who is charged with doing certain things, i.e., who is a responsible functionary or officeholder, is by monetary or other rewards not legally provided for, induced to take actions which favour whoever provides the rewards and thereby does damage to the public and its interests (Friedrich, 1966:74).

As in the public office definition, public interest conceptions depend on there being an understanding of public office in which the substitution of private for public interests is recognised as corrupt. Critics observe that the definition has some limitations with regards to the concept of 'public interest'. Theobald, 1990:6) contends, for example, that complex societies have 'a wide range of publics each with its own interests'. Moreover, even if the question of public interest was adequately resolved the definition assumes that the consequences of corruption follow a definite route. The nature and consequences of corruption are essentially two distinct issues, which cannot be resolves by a definition (Johnston, 1994).

Although there are clear links between public office and public interest accounts of corruption, one problem to further agreement on the definitions is the issue of which standards should be authoritative for the conduct of public office and the content of public interest. Ambiguity hinges on whether these standards should be established from public opinion, legal norms, or norms derived from modern western democratic systems (Philip, 1997). Even if the law provides an exhaustive set of standards for conduct within a state, there remains the more fundamental question of how far these are the accepted standards. Those in power can set up laws in ways,
which serve their individual interests, or change laws to legitimate their own conduct. For example, Ferdinand Marcos re-wrote sections of the Philippine Constitution to legalise his looting of the nation's wealth (Carbonell-Catilo, 1986).

Finally, the market-system definitions attempt to eschew the universalistic perspective of corruption. Instead, they tend to apply a contextual public choice approach, utilising economic methods and models within political analysis. Leff and Van Klaveren offer two definitions:

Corruption is an extralegal institution used by individuals or groups to gain influence over the actions of the bureaucracy. As such the existence of corruption *per se* indicates only that these groups participate in the decision-making process to a greater extent than would otherwise be the case (Leff, 1964:389)

Corruption means that a civil servant abuses his authority in order to obtain an extra income from the public . . . . Thus we will conceive of corruption in terms of a civil servant who regards his office as a business, the income of which he will seek to maximize. The office then becomes the maximizing unit. The size of his income does not depend on an ethical evaluation of his usefulness for the common good but precisely upon the market situation and his talents for finding the point of maximal gain on the public's demand curve (Van Klaveren, 1970:38-9).

Clearly, the two definitions offer ways of understanding or analysing corruption, rather than providing a way of defining it. An act is corrupt not because it is income maximising, but because it is income maximising in a context where prior conception of public office define income maximising as corrupt. This definition is more generally applicable to economic analysis of corruption and especially analysis that rely upon modelling public office in principal-agent terms or in the terms of rent seeking (Banfield, 1975). It is useful because it allows researchers to compare the incidence of specific behaviour in different cases whether or not particular norms or laws governing public office are similar (Lancaster and Montinola, 1997). Critics, however, argue that this definition overlooks non-monetary benefits of corruption such as prestige, promises of political support and the fact that demand for official services is often inelastic, highly individualised as in the case of cronyism and usually far exceeds supply (Johnston, 1994).

Despite the differences in the various definitions discussed above, most scholars do agree that, at a minimum, corrupt behaviour must involve public officials
'abusing' or 'misusing' their formal positions for private gain. Though they do not resolve the issue of precisely what constitutes the 'abuse' or 'misuse' of public office, they share a common emphasis upon the abuse of public office for personal advantage. The role of the state is also recognised as a key element as conventionally, the corrupt behaviour refers to someone who represents the state and the public authority. Another feature is that the public official acts in pursuit of personal interest, as opposed to public interest, in violation of the norms of public office. The illegal benefits by public officials need not necessarily be financial or immediate. Gifts or advantages, such as membership of an exclusive club or promise of scholarships for children, can be used as 'sweeteners' to clinch deals (World Bank, 1997a). The interaction between all elements of the corruptive chain characterises a specific relationship between public and private.

Most contemporary scholars on corruption avoid lengthy definitions and instead adopt a minimalist one. Thus, a more widely used definition in recent literature is 'the abuse of public office for private gain', which has been proposed by the World Bank (1997a: 8). This definition subsumes all the previous definitions and it is simple and sufficiently broad to permit the analysis of a wide range of corrupt practices. The World Bank identifies specific abuses, which constitute abuse of power, thus:

Public office is abused for private gain when an official accepts, solicits, or exhorts a bribe. It is also abused when private agents actively offer bribes to circumvent public policies and processes for competitive advantage and profit. Public office can also be abused for personal benefit even if no bribery occurs, through patronage and nepotism, the theft of state assets, or the diversion of state revenues (ibid.).

Like most other definitions, this definition places the public sector at the centre of the phenomenon. In this case, corruption involves behaviour on the part of officials in the public sector, whether politicians or civil servants, in which they improperly and unlawfully enrich themselves or those close to them by the misuse of the public power entrusted to them. It may include fraud, favouritism or nepotism as specific forms of corruption, which in that case may or may not involve external beneficiaries. This should not be taken to mean that corruption does not occur in the private sphere. However, whilst those activities that take place wholly outside the public spheres, such as private sector business and financial corruption, lie outside the
concern of this thesis, academic contributions to understanding then are nevertheless relevant.

In sum, the minimalist definition is simple and sufficiently broad to cover also forms unilateral abuses by government functionaries, whether elected or appointed to the office. While adopting the minimalist definition, this thesis has conceptualised corrupt behaviour as encompassing the following: (1) Bribery, where private parties offer or promise money or advantages in order to influence their decisions. Variations exist as to the solicitation or acceptance of a bribe by the official (active and passive bribery) (2) Extortion where an official demands money or some other consideration to engage in a particular course of action or inaction. (3) Embezzlement, which entails an official misusing or misappropriating public funds or resources for personal benefit. (4) Fraud, where a contractor over-prices, skimps on the quality of work, or alters specifications or timing of completion, in order to recover the cost of bribes. This also includes suppliers who charge for goods or services never delivered. (5) Conflict of interest, where an official stands to profit incidentally from an official act. This could involve engaging in transactions or acquiring a position or commercial interest that is incompatible with his official role and duties, e.g. the awarding of a government contract to a company in which the official has a financial interest. (6) Abuse of power or breach of trust through a host of official malpractice. This may involve favouritism where a public official exploits his position of power to make favourable decisions in the allocation of public resources. It may also involve violation of routine obligations and would include discriminate disclosure of bid information to competitors.

When it comes to application, the public office definition may become problematic. It does not give attention to the role of the private individual. While corruption is commonly described in relation to the behaviours of public officials, the activity in reality involves both the public and private individual. Either party can initiate corruption. Indeed, it has been argued that it is the competitiveness of international firms facing stiff competition in the wake of globalisation of markets that has fostered corruption in developing countries (Pope, 2000). If, according to the common definition corruption refers to a public official illegally diverting of public resources into unauthorised private use, what about those private businesspeople who interact with public officials? On the other hand, how do we resolve the question of
motive if the private individual is seeking to correct dysfunctional policies or oppressive regime? As Huntington (1968:368) states, '...the only thing worse than a society with rigid, over-centralised, dishonest bureaucracy is one with a rigid, over-centralised, honest bureaucracy'.

From the above discussion, it is clear that, there are many ways to conceive of and define corruption, each one with its strengths and weaknesses, and there is no generally valid definition of corruption. Thus, Johnston (1994) recently proposed to completely dispense with a definition of corruption as behaviour in comparative research:

We never will devise a definition of corruption as a category of behaviour that will travel well to all such places or times - or even, realistically, to most of them. Moreover, such approaches will often tell us little about the development or significance of corruption in real societies. I propose that in such instances we study not a category of behaviour, but rather the issue or idea of corruption, and the social and political processes through which it acquires its meaning and significance. I regard corruption as a 'politically contested concept', and suggest that comparative analysis can fruitfully focus upon what I call role-defining conflicts (Johnston 1994:2).

Ultimately, Lancaster and Montinola (1997) advise researchers to simply choose the most useful definition that helps explain the phenomenon that concerns them. As has become clear, the concept of corruption involves diverse processes, and different definitions directing attention to different lines of inquiry. Whether corruption is judged in terms of illegality, immorality, unpopularity or some other standards, the choice of definition reflects the focus and purpose of the line of inquiry. This illuminates the utility of particular definitions and facilitates an appreciation of the role of definition in social inquiry. Defining corruption, however, is not another way of explaining the phenomenon but just an aid to understanding what is being analysed and explained. Nonetheless, definitions also fulfil other functions. Definitions are necessary within the context of the law to specify what is being criminalised. Definitions are also important to administrative law, for instance, in the context of drafting codes of conduct for public officials.

But, definitions do not provide frameworks for understanding the internal organisation and different patterns of corruption in different contexts. In order to explicate the phenomenon of corruption further, a variety of attempts have been made
in the literature to build different typologies of corruption. Instead of seeing the concept of corruption in terms of its legal or ethical qualities, typologies are concerned with the process. This approach highlights patterns of corruption and the context in which it takes place. It provides a useful foundation for systematic analysis of corruption and can be applied in designing appropriate anti-corruption strategies. The explosion of the literature on corruption has introduced a plethora of typologies and the following section is an overview of different classifications.

**Explicating the Phenomenon: A Taxonomy of Corruption**

Heidenheimer (1970) develops a model that focuses on the distribution of the incidence of corruption and distinguishes tendencies of different social groups in the perception and tolerance of corruption. This model reflects the thinking of the 1960s modernisation school, which argues that since the intensity of corruption is correlated with different stages of modernisation among societies, tolerance levels also varies with time. Societies are grouped according to four types of socio-political relationships and obligations: traditional familist-based systems, traditional patron-client-based systems, modern boss-patron based systems, and civic-culture-based systems. Heidenheimer adopts a classification in a metaphorical colour schema to categorise corruption in three different groups - petty, routine and aggravated - depending on the incidence or seriousness.

The model seeks to show how different societies consider behaviour regarded corrupt in terms of Western norms regarding office-holding and civic participation, relatively severe or tolerable. Whether a particular type of unethical activity is tolerated as 'white,' or demonised as 'black' corruption, depends upon the type of community in which the observer lives and the social group with which he is identified. Black represents corruption, which the public and the elite are in consensus in condemning it and would want severe punishment of corrupt acts on grounds of principle. In this category, corruption is generally regarded as severe violation of community's moral and legal norms. This is characteristic for modern democratic societies. Grey is where a part of elite supports action against corruption but the majority of the population may be ambiguous of the acts that may be regarded
with reproach. Corruption is reprehensible in public moral standards, but the affected persons lack a consciousness of doing wrong. An example is where favouritism is disapproved, but some forms of 'giving consideration' remain. This is typical for modern constitutional states and those states in transition towards democratic political culture. White is corruption, which, in the public opinion and among the representatives of the elite, is tolerated. This is typically the case in traditional familist-based systems as well as in patron-client-based systems.

Using this model allows a comparative analysis of attitudes towards bribery in different societies and within societies at different times. Intuitively, the model has some inherent limitations as many of the characteristics in the model are drawn from a European and American context. Trends in corruption have changed; more global attention has been given to the subject of corruption than previously, and the model might not capture developing changes in attitudes. Furthermore, the fact that there are more sophisticated methods of classifying corruption internationally such as Transparency International's Corruption Perception Index (Pope, 2000) makes the utility of this schematic classification less favourable. Indeed, Heidenheimer (2001:3) concedes this after more than three decades later when he states, 'Though many observers found the achromatic, or black-grey-white schema of considerable use, trends that became more pronounced during recent decades contributed to its decreasing utility as an overarching framework for interconnecting socio-political realities and audience-specific perceptions'.

Another typology, which is heavily influenced by the need to explain corruption in transition countries places primary emphasis on the distinction between state capture and administrative corruption to highlight the patterns of corruption (World Bank, 2000b). In this study, the researchers attempt to disentangle two forms of corruption: 'state capture,' which centres on corruption surrounding the formation of laws, regulations, and policies; and 'administrative corruption' which refers to corruption in the implementation of existing laws, regulations, and decrees.

State capture is a systematic high-level corruption where powerful economic interests seek to shape the underlying rules of the game by influencing the formation and formulation of laws, regulations, decrees, and other government policies to their own advantage, through illicit and non-transparent private payments to public officials. Key state institutions - the legislature, the executive, the judiciary, or
regulatory agencies - are 'captured' by private interest to bias the policy-making process in favour of particular interests leaving the operation of government non-transparent. In exchange for capture, public officials receive benefits such as direct bribes, illicit equity stakes, informal control rights. These powerful economic interests could be private firms, narrow interest groups, and also powerful criminal networks. State capture tends to subvert, or even replace legitimate channels of political influence in decision-making. For instance, an influential oligarch at the head of a powerful financial-industrial group may purchase the votes of legislators to erect barriers to entry in the energy sector.

State capture thrives where economic power is highly concentrated, countervailing social interests are weak, and the formal channels of political influence are underdeveloped (ibid.). The underlying threat to democracy is obvious as elected politicians and public officials make decisions on grounds deviating from expected channels.

On the other hand, administrative corruption is distinct from state capture partly because of the location at which it occurs and partly because of differences in goals. While state capture would be concerned with expanding influence so as to secure preferential channels of access to government decision-making by particular individuals or groups, administrative corruption would be driven by pecuniary interest and is often at the implementation end. It serves as the instrumentality and conduit for state capture, such as when powerful political interests use their influence or provide illicit gains to public officials in exchange for intentionally distorting the implementation of existing laws, rules and regulations. At the root of this form of corruption is discretion on the part of public officials to grant selective exemptions, to prioritize the delivery of public services, or to discriminate in the application of rules and regulations (World Bank, 2000b:2).

Both state capture and administrative corruption can cut across different levels of government. State officials, private businessmen, or other non-state actors can initiate both types of corruption. In capturing the state, actors prejudice the rules to their own narrow advantage, which subsequently constrains the actions of others in the economy. Through administrative corruption actions obtain individualised exceptions to or a favourable application of those rules. The difference lies in how deep the corrupt transaction reaches into the operations and functions of the state and
the extent to which the advantages of the corrupt transaction are institutionalised into the basic rules of the game. Though there will be many specific cases where the borderline dividing these two forms of corruption might be difficult to draw with a high degree of certainty, the distinction nevertheless has important analytical and practical implications for the potential effectiveness of different anti-corruption strategies. The World Bank (ibid.) has developed an analytical tool based on this typology, for designing effective anti-corruption strategies, with emphasis shifting depending on the relative severity of state capture and administrative corruption.

Another typology, which has implications for designing anti-corruption strategies, is the one that distinguishes corruption according to the initiating agent and makes a distinction between 'transactive' and 'extortive' corruption (Alatas, 1990). The former pertains to some mutually advantageous bargain between the parties, while the latter refers to coerced exchange, undertaken to avoid harm to the donor. In the case of extortion, which Shleifer and Vishny (1993:601) term 'corruption without theft', the initiator is the public official. This occurs when an official demands a bribe but passes on the regular payment to the government. This is extortionary corruption since the applicant in a government office is not engaged in any illegal activities. But due to monopoly power of the official he has to pay a bribe for the service. This could happen if an official charged for a bribe in addition to an import license fee, but then passed the license fee on to the state treasury. In some cases, however, the applicant may be engaged in an illegal act, and government officials facilitate him in exchange of the bribe. The type of corruption is then subversive; for example, the import license of goods, where the applicant hopes to bribe the bureaucrat in return for an illegal reduction in the import duty. Because corruption without theft is coercive in that is does not in most cases serve the interests of the donor, there are possibilities of exposing it.

Conversely, the initiative of bribery, which Shleifer and Vishny (ibid.) term 'corruption with theft' obviously lies with the donor of the bribe. It involves instances where the regular payment is not made to the government. An example here would be when customs officials allow goods to enter the country without paying a duty in exchange for a bribe, or under-assesses taxes and in addition keeps a portion of the actual payment for himself. In this case, corruption aligns the interests of both the
donor and the public official and since there is mutual benefit, none would have the incentive to expose corrupt practices.

On the other hand, Johnston (1986) contrasts various categories of corruption to how, as a process of exchange, some forms of corruption can persist for a long time while others can last for only a short time. He differentiates four types of corruption - market, patronage, nepotism, and crisis - along the lines of numbers of suppliers and the stakes involved. In his analysis, market corruption, which involves routine stakes of exchanges and many suppliers dispensing corrupt benefits, is integrative and very stable. Patronage, involving few suppliers but routine stakes concerning large networks, is integrative and stable. Nepotistic corruption, which involves extraordinary stakes and few suppliers within a kinship and friendship network, is disintegrative outside this network and likely to be unstable. Finally, crisis corruption, involving multiple suppliers and extraordinary stakes, is the most unstable and disintegrative.

Approaches to Corruption

Due to the complexity of the phenomenon of corruption, it is hardly surprising that, in addition to the many typologies, the literature identifies many various approaches to the study of corruption. This section reviews the major theoretical perspectives and the insights that each purports to yield on the causes of corruption and the extent to which they have succeed in linking the causes to possible remedies. It is argued that while theories within these approaches abound, the difficulties of measurement present real problems of testing unambiguously their theoretical contributions (Ades and di Tella, 1997). As was discussed in the introduction, many theoretical explanations have been largely content with their simple dichotomy, although the political world is almost certainly more complex and dynamic than that.

Corruption and Modernisation

The theory of modernisation seems to have emerged in the decade of 1950s after the Second World War, instigated primarily by the global dismantling of
European Empires and was widely viewed as the most valuable development theory for around fifteen years (Knock, 1999). With the end of formal colonialism, various development theories were constructed by sociologists and political scientists to equip industrialised countries with expertise that would be used to help newly independent countries to achieve rapid economic development (Leys, 1996). Modernisation theory, which was dominant soon after the War, had focused its analysis on the discrepancies between the advanced Western countries and the underdeveloped newly independent Third World countries. It was a proposition to the Third World that in order to develop, it had to eliminate the blockade of their tradition and undergo the same process of transition from traditionalism to modernity previously experienced by more developed societies.

Scholars who popularised modernisation theory contended that the process of development could be seen as a series of successive stages of economic growth through which all countries must pass. Rostow (1960) identified five such stages and Smelser (1958) distinguished four processes. Modernisation was defined exclusively by reference to the characteristics of developed Western countries. Thus, Moore (1963) conceived it as "total" transformation of a traditional or pre-modern society into the types of technology and associated social organisation that characterises the "advanced", economically prosperous and relatively stable nations of the Western World' (Moore 1963:89). This universalistic conception formed the basis of a belief that the development of the Third World would essentially entail a process of convergence upon the economic, political, legal and social institutions prevailing in the First World.

Commentators observe that the ideological framework proposed by the modernisation approach was essentially Western and pro-capitalist spearheaded by the United States to champion its foreign aid, trade, and international relations policies (Moore, 1963; Davis and Trebilcock, 1999). It formed part of the process of Westernisation of developing countries. Theoretically, modernisation theories described the historical development course of the advanced countries, and proposed the course as a model of economic and social development for the Third World. They theorised the compatibility between institutions and social values, and presented the need of comprehensive socio-economic planning to correct the problems of traditional institutions or values of the Third World. In so doing, modernisation theorists came,
in practice if not always in intent, to advocate the convergence of less-developed societies to the Western model.

According to the modernisation doctrine, modernisation essentially means that people in traditional societies should adopt the characteristics of modern societies in order to modernise their social, political and economic institutions. In the context of development, it is assumed that the North consists of modern societies, and the south of traditional societies. The North is, therefore, regarded as a reference point in various respects towards which other countries are headed by means of all sorts of catching up processes. According to the views prevailing at the time, based on both economic and social interpretations, the countries of the former colonial empires could be seen as having a dual economy, comprising of two sectors - a traditional pre-colonial sector and a modern post-colonial sector (Rostow, 1960; Smelser, 1958).

Drawing on modernisation theory, scholars in the 1960s and 1970s hypothesised that the occurrence of corruption would be inevitable during the process of modernisation (Huntington, 1968; Myrdal, 1968). Approaches within the modernisation school that dominated the literature on corruption at the time started from the observation that corruption seemed to be more widespread in those countries experiencing rapid development and modernisation (Huntington, 1968, Myrdal, 1968). These approaches perceived corruption in relation to the legitimacy of the state, the patterns of political power, and the engagement of civil society. Corruption, as seen by the modernisation school, was a manifestation of the conflicts between traditional practices and modern institutions of the North introduced during colonialism. The general argument of modernisation theory is that societal values change with increased contact with the outside world and society begins to judge its leaders according to the newly acquired values. Variant of this approach is the emergence of an increasingly powerful capitalist class evolving from modernisation, which bargains for inclusion in the political power sharing.

Speaking of the association between modernisation and corruption, Huntington notes that the extent of political corruption correlates approximately with 'rapid social and economic modernisation of a society' (Huntington, 1968:492). He argues that corruption exists in all societies, but that its occurrence is more prevalent in some cultures than in others, and definitely more common at some times in the evolutionary phase than at other times. He believes that corruption is more prevalent
during the most intense phases of modernisation, and contends that this reflects the absence of effective political institutionalisation. Huntington observes that modernisation affects corruption in the sense that it necessitates a change in the basic values of the society. Thus, corruption in a modernised society is not the result of the deviation of behaviour from accepted norms and the general criteria of what is right or wrong, but is what leads to a conflict between modern and traditional norms.

As Huntington (1968) explains, modernisation involves social mobilisation, which produces significant changes in politics. Increasingly, populations have become more literate, urbanised, exposed to mass media, industrialised, and per capita income expands. In the process of this social change, governmental capabilities extend, as there are more demands for its services. Equally a greater proportion of the population becomes politically relevant, as large groups of people formerly outside politics are demanding entrance into the political system. How do these changes necessarily produce corruption? Huntington identifies three major but connected aspects of modernisation that cause corruption as changing values, new sources of wealth and power, and the expansion of government.

First, Huntington argues that corruption is a product of the distinction between public welfare and the private interest, which comes with modernisation. The general relevance of this suggestion lies in the fact that official and the general population in most contemporary Western systems recognise the important distinction between the public office and private roles, which is less significant in many non-Western societies. Western societies are, it is suggested, characteristically structured to force their incumbents to keep clearly distinct private and public accounts than in the developing countries. These values are gradually picked up by traditional societies in the process of contact with and political influence of the West. Slowly, society begins to judge its own leaders against new standards developed from the Western contact. What has traditionally been accepted as normal now becomes unacceptable and corrupt when viewed through the new standards (ibid.:493).

The distinction between the public and private office is perhaps the most important aspect that modernisation perspective introduced in the study of corruption. As Heidenheimer (1970) explains, the ingrained depersonalisation of office that is rooted in the political systems of the Weberian tradition varies according to the historical heritages of different countries. In tracing how, in the process of
modernisation and bureaucratisation, the holders of public offices came to be subject to norms and rules that distinguished the private from the public responsibilities, scholars show that prior to the 17th century all societies were virtually at the traditional stage (Knock, 1999). Under the feudal or patrimonial systems, a ruler could legitimately engage in self- or family-centred distribution of the national income, and no one could seek to challenge this decision. Similarly, the offices had become to be perceived as properties rather than being associated with assigned duties. The office could also be inherited in the family and the benefits associated with the office became personal property of the incumbent. These systems vested monopoly and discretionary powers on the incumbents and shielded them against any possible charges of mismanagement.

According to the modernisation perspective, all 'pre-modern' societies displayed similar personalised, patron-client-based characteristics, but the pace of take-off and eventual transition to modernisation varied among societies, resulting in some countries developing faster than others. In Europe, the feudal and patrimonial systems began to decline earlier than other parts of the world though gradually and in varying degrees between states. Bureaucratic characteristics began to emerge resulting in changes in the recruitment patterns and a clearer definition of the nature of public office and the duties of the incumbents (Heidenheimer, 1970). Monopoly power also fell apart into various economic powers as benefice holders obtained great autonomy from the rulers to manage their landed property as a payment for carrying out official duties for the rulers. Finally, in the course of the nineteenth century, the concept of public office as private property disappeared and was replaced by the concept of the officeholder oriented to the norms and rules of the bureaucratic system of which ones office was part. An essential feature that evolved from this system was the acceptance that favours by public officials to themselves, their families or friends could be regarded as instances of corruption because this would infringe the principal of keeping their public and private accounts separately (ibid.). That Weberian ethos was disproportionately embraced across countries is illustrated in Andreski (1968:351). He postulates for instance that in the 1960s, whereas the contemporary British public service 'old boy networks', family connections and so forth might account for 20 percent and qualifications for 80 percent, in Nigeria the proportion would be the other way round.
Even in Western societies, however, the bureaucratic concept of the public office has not evenly been embraced. Some political systems maintain what Myrdal (1970) calls 'hard-state' traditions. In 'hard-state' traditions such as those found in Sweden, Holland, and Germany, the integrity of the civil service evolved from the exceptional standards that had been maintained by the monarchs in managing state affairs. As the monarchs had drawn sharp lines between private assets and dynasty assets, private persons and public officials, this helped in developing an administration that recognised the distinction between public and private affairs. To maintain integrity the status of civil servants was carefully nurtured to an extent that they were made to feel consciously that they were members of a special class; distinct from other classes in that their oaths bind them to render faithful service to the state and the public welfare. Eschenburg (1970) observes that civil servants in Germany perceive they are above other classes and disdain favours from others, and hence, other classes including businessmen do not even care offer any favours. Thus, acceptance by officials of favours for themselves, their families, or friends may be regarded as instances of corruption because these officials infringe upon the principle of keeping their public and private accounts strictly separate. He argues, however, that this exemplary behaviour is declining partly because their superiors (ministers), not being bound by the civil service ethics are unable to set exemplary standards, and partly because the same superiors pressurise their juniors to offer biased administrative favours to political friends.

On the other hand, countries following 'soft state' traditions like Britain and the United States initially did not accord high status to their civil service, but instead supported political cultures with strong local and self-government traditions, which supported the decentralisation of power (Heideneheimer, 1970). This kind of heritage succeeded in promoting patronage systems and widespread official corruption. Britain slowly dispensed with this legacy and adopted a strong disciplined political party system and a rationalised civil service bureaucracy. The civil service became a major profession whose members came to accept and enforce corporate standards of ethics. It is estimated that of those who entered the higher administrative class, only a very small number, perhaps less than ten percent, left to take any other form of employment before retirement (ibid.). Heidenhener, explains that the American civil service, however, remained a loose and flexible social group, and the *esprit de corps*,
particularly in the lower echelon did not develop in the same way as Britain or continental Europe.

However, even in loose and flexible social systems such as North America, continuous exposure of scandals in societies that function in the tradition of the Weberian ethos illustrates how society recognises the distinction between public and private interests. For instance, IRIS (1996) explains that in the U.S., the Watergate and Iran-Contra Affairs saw the office of the President and other Executive departments such as the Internal Revenue Service and the office of the National Security Advisor become the vehicles for the pursuit of personal or partisan goals. This was contrary to public policy and in each of these cases, the personal agenda of the incumbent President, or at least a group of overzealous advisors, became the apparent policy. In these cases a most aggressive and sustained intervention by the press that Congress and the Judiciary exposed the reprehensible practices and brought some of the key offenders to justice (ibid.).

Insofar as public office in developing countries is concerned, public management is torn between a superstructure of 'Western' attitudes and values and an infrastructure of indigenous traditions and ethics (Heidenheimer, 1970). While Western values stress a system of control based on rational rules, which are meant to design and regulate the whole organisation on the basis of technical knowledge, traditional characteristics on the other hand, emphasise reliance and obligation toward kinship, friends and other primary groups. Within such infrastructures the distinction between public and private office becomes blurred. This is more prominent especially in countries with essentially non-competitive one-party systems where the administration is systematically dominated by party politics, to the extent that civil servants are unable to maintain objective standards of duty to office (Heidenheimer, 1970). This becomes more complex where the culture of society fails to make a clear demarcation between the private and public role of the Head of State or Government. In such circumstances the political system fails to clarify the distinction between public and private interests, which in effect blurs the demarcation between discharging public responsibilities and furthering private interests. In Kenya, for example, the concentration of power in the executive presidency and lack of clear demarcation between private and public role conferred upon the incumbent of the
office some measures of patrimonial infallibility, potentially rendering the office holder immune to criticism. This point is discussed in detail in chapter two.

Unlike Western societies where the concept of representation is the individual and organised interest groups, African leadership hinges very largely on the extent to which one is able to satisfy their own community. Thus, as individuals secure high public offices, they come under increasing pressure to provide favours, jobs and other economic benefits on ethnic lines. The individual becomes entangled in the centre of conflicting loyalties and pressures. For instance nepotism, though technically illegal, remains a characteristic mode of recruitment without causing much sense of guilty on the parties (Wraith and Simpkins, 1970). To an extent that one is a member of a wide social network, which conferred reciprocal rights and responsibilities, one is not likely to internalise fully the impersonal ethos of Weberian notions of bureaucratic conduct (Williams, 1987: 45).

The second aspect of modernisation that Huntington (1968) attributes to corruption is the creation of new sources of wealth and power, which according to his argument, provides the avenue for the politically powerful and the wealthy to assimilate each other. By way of example, Scott (1972a) illustrates how wealthy individuals in the seventeenth-century England with potential for influence but no formal access bought preferential access to positions of power and influence under the monarchy. The rapid pace of commercialisation at the time created a business elite of considerable wealth but whose formal influence did not reflect their newly acquired power in the economy. As Scott explains, some bought seats in Parliament by bribing small electorates while others used their financial influence to acquire lucrative franchise and government posts. Heidenheimer (1970:493) emphasises this by stating that 'the new millionaires bought themselves seats in the Senate or the House of Lords and thereby became participants in the political system rather than alienated opponents of it, which might have been the case if the opportunity to corrupt the system were denied them'. He also contends that many of the enfranchised immigrants in the United States exchanged the power of the ballot for jobs and favours from the local political machine to became enfranchised. Nye (1967) likewise maintains that the Asian entrepreneurs in East Africa used corruption to overcome economic discrimination against them and to gain access to political
decision-making necessary for their economic interests. Thus, corruption has been used to trade political power for money, or money for political power.

The third factor in Huntington's (1968) explanation is that modernisation invariably leads to the creation of governmental bureaucracies with an increase in governmentally regulated activities and the potential for massive and rampant corruption. The experience of economic development in post-independence sub-Saharan Africa since early 1960s and its accelerated growth that substantially made the region especially vulnerable to corruption is quite relevant here. Rapid growth in the region is quite in contrast with the gradual expansion in Western democracies. Whereas industrialised countries have the necessary infrastructure to manage capital absorption, i.e. effective use of capital (Ley, 1996:110), the free-market economy infrastructure in sub-Saharan Africa is underdeveloped. Thus, not only does government perform its traditional role, for example law and order and defence, but it also extensively intervenes in markets largely through similarly underdeveloped and ineffective state institutions, leading to frequent interaction between the public and civil servants. This frequent contact in turn creates opportunities for corruption. Some of the explanations advanced by the exponents of the modernisation approach regard corruption as not necessarily evil but rather something that could be beneficial (Leff, 1964; Nye, 1967; Huntington, 1968). Indeed, they perceived corruption as fulfilling positive functions with respect to making a sluggish bureaucracy more effective. This in turn could increase efficiency in a slow economy.

More recently, an emerging body of empirical research since Mauro (1995) introduced data into the study of corruption has triggered a re-evaluation of the effects and circumstances of corruption. There is a shift from the idea that corruption is beneficial. Contemporary studies generally agree, unlike earlier functional explanations, that corruption has a decidedly negative impact especially on economic growth and efficiency in developing countries (ibid.). These studies also show corruption to have a negative effect on the political system, reducing trust in the legitimacy of the state. However, some scholars in the contemporary debate still observe that corruption generates immediate positive results (Lui, 1985; Rose-Ackerman, 1997). For example, Rose-Ackerman (1997:38) asserts that 'payoffs to those who manage queues can be efficient since they give officials incentives both to work quickly and to favour those who value their time highly'. She further states that
in some restricted cases payoffs need to be legalised and converted into differential fees for those requiring fast-track services. However, this line of argument is criticised as disregarding the pernicious effects that such efficiency-enhancing corruption could have on the efficiency in the long run (Buscaglia, 2001). Another pertinent objection to corruption is the reality that it is virtually impossible to confine it to those areas, for instance, where its effects are deemed to desirable (Theobald, 1990).

The weaknesses of modernisation theories have been pointed out by developmental theorists particularly those within the dependency school, which emerged in the 1970s. The major critique of these theories comes from Leys (1996) who rejects the notion that different countries should be expected to experience similar forms of development as in the West. Third World countries could not realistically be compared with western countries in terms of development because they evolve from too diverse histories. He argues that development in many less developed countries is inevitably conditioned by facts that occur in the context of complex, economic, political and cultural relationships with developed countries, otherwise known as globalisation. From this position, the role of the Third World, and, indeed, the local political elite is to act as puppets or agents of Western governments, in which case authoritarianism, political underdevelopment including corruption would only persist (Andvig et al., 2000).

In summary, modernisation theory rests on the premise that the industrialised and developed countries of the world have become 'modern' by adopting among other things, a particular style of liberal democracy and state polity, which includes the fundamental notion of a 'rational-legal' bureaucracy. Bureaucracy, it is believed, functions on universalistic, neutral and objective principles to fulfil the aims of the state, which include the promotion of socio-economic development. It is further theorised that in order to attain the state of 'modernity' or indeed 'post-modernity' in line with the achieved status of the developed world, the rest of the world must go through the historical stages of abandoning 'traditional' norms that encourage patrimonialism and patronage relations, all of which retard the process of development. In the process of modernising, corruption is regarded in unequivocally normative terms and will only be eliminated upon modernisation. The influence of modernisation theory in the examination of patterns of political organisation, such as
patrimonialism, which we now turn to, and the processes by which resources are allocate and distributed in sub-Saharan Africa, is obviously evident.

Neo-Patrimonialism and Corruption

One of the problems that is often cited in cross-country studies on the causes and concept of corruption is that of cultural relativity. The argument is that what is seen as corruption in one culture, cannot be perceived as so in another culture (Gould, 1991). Hence, cultural explanations of corruption often start from the fact that some behaviour is regarded differently between countries and even regions within a country. Depending on historical factors, geographical, level of economic development and culture, the types and practices of corruption vary. Public response to corruption may differ from one group to the next due to different cultural or group norms. Meny (1996:310) supports this argument when he states that 'the sensitivity of public opinion towards corruption varies considerably from one country and one culture to another, not only between Europe and North America, or between Africa and Asia, but even within relatively homogenous groups such as Western Europe'. The more accepted the corrupt behaviour in a society or group the lower the expected cost for the individual. Cultural norms and values, therefore, logically influence the perception and thought process of individuals with regard to their ethical decisions, and their propensity to engage in corruption. This underpins the moral dimensions of corruption elaborated in Becker (1968), Rose-Ackerman (1978) and Klitgaard (1988). Even within a particular society or group different attitudes about corruption might exist because members have had different socialisation experiences.

Whilst culture itself is difficult to define, it is understood to a great extent in terms of shared meanings and values of a society or a given group in the society that creates likely behaviour from its citizens. Values create powerful feelings that affect the daily lives of people and define their view of reality and of what is acceptable and unacceptable. Values are the manifestation of culture that function as the guiding principles of people's perception and interpretation of issues (Brown, 1998).

The main work carried out on the relationship between values across different national cultures is that conducted by Hofstede (1980, 1991). In a comprehensive study from several surveys, Hofstede developed a model in which worldwide
differences in cross-cultural settings that affect behaviour are categorised and classified according to four dimensions or values. These are power distance, individualism, masculinity, and uncertainty avoidance. Power distance measures the response of people to inequality and the extent to which the less powerful members expect, or even prefer and support hierarchical power relationships. Individualism describes the degree to which people in a society are primarily concerned with their own self-interest and that of their families. Uncertainty is the degree to which individuals prefer structured, rigid, predictable, and clear guides to unstructured, flexible, and contingent frameworks. Finally, masculinity is the degree to which masculine traits and values are more important than feminine traits in a society. These value-patterns in particular represent the extent to which a population is culturally capable of exerting social control over higher ranks.

According to Hofstede (1980), societies with high inequality are characterised by low mobility between ranks, and high stability of elite. This creates the vertical networks of clientelism as well as the tightly knit horizontal networks of elite in which grand as well as small scale corruption takes place. Consequently, mechanisms of social control of the powerful and their transactions in business and government are poorly developed, and elite can take advantage of controlling the institutions of social control themselves: the justice system, the media and control by peers. This is empirically supported by Azfar et al. (1999) who find high levels of corruption in societies with high-income inequality, while those with high levels of secondary education and a high proportion of women in government positions have decreasing levels of corruption. Their gini-coefficient of income inequality indicates that after countries have attained a specific level of income equality corruption decreases exponentially. According to the data analysed by Azfar et al., higher corruption is found in most unequal countries (Sierra Leone, 62.3% and Brazil, 60.1) and lower in most equal countries (Austria, 23.1 and Denmark, 24). Nonetheless, the fact that countries with similarly low levels of inequality vary considerably with regard to levels of corruption indicates that they might differ with regard to the efficiency of measures taken against corruption.

The structural pattern is complemented by value patterns that are characterised by high social distance, that stress the distinctiveness of powerful groups and set them apart from the lower ranks, and define relations of dependency. Dependency and
power relations give rise to high levels of uncertainty in unequal societies, and consequently, levels of mistrust are high. Corrupt exchanges do not only take advantage of the opportunities created by these structural and cultural patterns, but they are functional in establishing trust relationships between ranks or in bridging ranks by providing opportunities for social mobility. Consequently, corruption supports, stabilises and deepens inequality within societies, in particular where inequality is based on ethnic differences.

Corrupt exchanges are embedded in the culture of inequality, which is characterised by 'dependent conformity', and risk avoidance in the lower ranks, and the demonstration of power and social distance by the higher ranks. Non-egalitarian societies have higher levels of corruption as well as a higher propensity to pay bribes. Collier (2002) observes that this relationship is found in some OECD countries, which - despite more egalitarian structures - have a more non-egalitarian culture like France, Belgium, Italy or Germany, which all rank at the upper end of the Corruption Perception Index as well as on the Bribery Propensity Index. The relative stronger weight of cultural factors points to the close links between cultural values and institutional practices, in particular institutions and institutional regimes in politics, government and business. It is the institutional and cultural context of power and controls, which has a decisive impact, and not the socio-structural pattern of society.

The specific cultural patterns, which are conducive to corruption, may spread even in more egalitarian societies. In particular, if the elite develops closely knit networks and become more exclusive - for example by establishing transnational networks - such cultural patterns will emerge and be strengthened. In Western democracies the sense of exclusivity or the 'old boy networks', rather than the rising inequality in terms of the increasing gap between the elite and the working class, might be the cause for the spread of corruption and the willingness to pay bribes. In developing countries, however, informal networks consisting of solidarity networks and patrimonial structures have significant implications for corruption but patrimonialism is considered to contribute a great deal towards much of the corruption.

Thus, drawing from the cultural theory and applying it to the African context, a school of thought originating in the late 1980s with French scholars stresses that traditional politics in Africa is radically different from politics elsewhere (Medard,
1986; Bayart, Ellis and Hibou, 1999; Chabal and Daloz, 1999). These scholars argue that the majority of African states do not meet the classical criteria of a modern rational-legal state, which requires a functional separation of the public and private spheres and the notion of citizenship binding individuals directly to the state. They assert that contemporary politics in Africa is dominated by informal institutions of power giving rise to neo-patrimonial systems. What this means in concrete terms is that, despite the formal political structures in place, power is exercised essentially through informal sector. The operation of formal institutions is largely influenced by personalised power and where there is divergence with the will of a powerful politician, the latter usually prevails. According to Chabal and Daloz (1999) the state in sub-Saharan Africa is merely an empty shell and formal institutions of the state are actually a façade that mask the realities of deeply personalised political relations. Their thesis is that there is a political institutionalisation of disorder in the region where real business of politics is conducted informally outside the official political realm for 'socially and culturally instrumental reasons' (ibid. 95).

For these scholars, such view of public office can be explained in terms of the 'patrimonial' and not Weberian ethos. The core characteristics of patrimonialism are the personalisation of power at all levels of authority, combined with centralised set-up that empowers top bottom hierarchical interference with decisions. Lemarchard (1972) and Erdmann (2002) however, distinguish between the Weberian concept of patrimonialism in the feudal system and the neo-patrimonial system in Africa. In the former all ruling relationships, both political and administrative, are personal relationships. There is no difference between the private and public spheres. By contrast, under a neo-patrimonial system the differentiation of private and public is recognised (at least formally), and therefore it can be referred to publicly. In practice, however, the private and public spheres are often not separated. This means two systems; the patrimonial system of personal relationships and the rational-legal one of the bureaucracy co-exist. Similarly, Medard (1986) argues that unlike Europe where patrimonial structures preceded legalised bureaucratic structures, these structures developed together in Africa. Thus, at the present state of political development, most of Africa, particularly sub-Saharan Africa is a hybrid of patrimonial and rational-legal system of government but formal standards of public behaviour have not been widely internalised (Scott, 1972b).
In this perspective, politics in sub-Saharan Africa is assumed to be radically different from politics elsewhere, and it is deemed futile to analyse corruption by means of the conventional modernisation theoretical approach, which relies on the dichotomy between the public and private spheres. Even where the distinction between the public and private domains exists in legal and formal terms, this does not function in daily politics because of certain contradictory cultural norms. As Theobald (1994:703) argues, 'administrative apparatus cohere around a network of personal dependencies rather than objective administrative structures, and in which there is no clear-cut separation between incumbent and office, between public resources and private interests'. Accordingly, Chabal and Daloz (1999) offer neopatrimonial perspective as the new approach for analysing the nature and causes of corruption in sub-Saharan Africa. They explain that corruption should be understood as part of a complex network of redistribution driven by particularistic social pressures. What would be seen as corruption from the Western perspective is actually a system most frequently bound up with important ties that rests on well-understood form of political reciprocity based upon the exchange of material and other rewards that links patrons and their clients across vertical social lines. Their main contribution is that they shift the general viewpoint of many analysis of corruption beyond the formal institutions at the peak of state power, in order to include more shadowy arrangements that lie behind them.

Political patronage may be conceptualised as 'the individualisation and personalisation of what are else packaged as pork barrel allocations' (Golden, 2000:2). Whereas individualised benefits accrue to individuals directly, pork barrel allocations involve distribution of collective benefits to a specific electoral constituency. Examples of pork barrel allocations might be construction of a factory the legislator's constituency so as to offer employment and other economic activities, or the construction of a road or school. Individualised allocation on the other hand, might be offering jobs to individuals or other material benefits such as access to public goods and services, privileges or property rights conveying economic rent, or transfer of land or grant of income-generating opportunities. Golden distinguishes between political patronage and political corruption in that the former involves legislators, bureaucrats and voters while the latter involves legislators, bureaucrats and businesses.
The basis for patron-client relations is the ability of the patron to give benefits to clients that are not available to non-clients. Private benefits - specific inducements that can be offered to one person and withheld from others - are therefore greatly favoured over collective benefits, which accrue to everybody in a group. Individual patrons must transfer enough benefits to clients to keep themselves in power, otherwise their followers fall away and attach themselves to a different patron (Scott, 1972b). Indeed, this is how Johnston (1986) distinguishes integrative from disintegrative forms of corrupt exchange. If exchanges involve routine stakes, which are repetitive such as government contracts, they encourage frequent contacts and linkage between the patron and client, thus maintaining a long and stable relationship between the two. Patronage practices may even tend to become pervasive when routine stakes are in the hands of many suppliers most notably in situations where politically correct appointees engage in allocation and division of 'spoils' in the form of jobs. On the other hand, extraordinary stakes like lucrative business concessions, appointments to key positions, unusually generous buy-outs public corporation by private interests, are far too few in number and may not lend themselves to repeated exchange. President Moi used the former tactic as an instrument to acquire and maintain his political support. He rarely delegated to ensure monopoly of public resources, appointed his cronies to public offices on short-term basis and apportioned economic advantages to a wide range of his political backers to ensure constant repetition of allocation.

Patron-client networks can have a profound impact on corruption. First, the preference for private benefits over collective benefits tends to lead to an under-provision of collective goods. Second, even when collective goods are provided their distribution tends to be less than optimal and skewed towards areas where patrons and clients are located. Third, patron-client networks generate strong incentives to increase the amount of rent available for distribution to clients. In turn, these incentives lead to an expansion of the public sector, and over-regulation of the private sector. A job in the public sector is often one of the benefits most valued by clients. In addition, expansion on the size of the state enterprise sector or increasing regulation of the private sector opens up new resources or rents that can be allocated to clients on individual basis. Fourth, the focus on the allocation of individual benefits inherent in a patron-client system causes policy makers to be less concerned
with generalised policy formulation and more focused on particular administrative decisions. Policy choices themselves become less the result of a clear, strategic, problem-solving process and more the *ad hoc* outcome of numerous individual demands for individual benefits. Fifth, on a broad level, patron-client networks tend to promote a high level of factionalism and undermine institutional arrangements and the legitimacy of public organisations.

Unfortunately, these corrosive effects often lead to a vicious circle. Initially, the existence of certain levels of poverty creates a favourable environment for the development of patron-client networks. As the networks develop, they undermine governance. In turn weaker governance tends to undermine economic growth and worsen poverty. Worsening poverty then further promotes the growth of patron-client networks. Individuals in the system may become trapped in the exchange circuits. As long as the political style embraces the patron-client networks instead of focusing on collective benefits for the general welfare, the vicious circle will remain.

If corruption is deleterious for the country as a whole, what is it that makes this otherwise condemned practice socially tolerated in sub-Saharan Africa? In what he terms the 'moral economy of corruption in Africa', Sardan (1999:25) analyses the links between corruption and such important social practices as negotiations, exchange, reciprocity and redistribution and argues that a host of social norms in Africa permit a justification of corruption by those who practice it. He argues, for instance, that the traditional African social practice of customary gift giving to the holders of power as a commodity for negotiations has not been wiped out by the arrival of Western rational-legal bureaucratic norms in the post-colonial Africa. The partial continuity with the old custom often helps to disguise the real nature of the act. In the contemporary Africa, many practices of petty corruption have entered into this form of 'gift' category; 'little something' by way of thanks to a helpful civil servant who gives 'weight to the file' confided to him, or prevents the documents from 'disappearing into thin air' (ibid.:39). The practice of gift giving can equally be in the direction of inferiors. It is a common practice to give 'taxi fare' to a visitor, a bank note to a relative one runs into in the street, or helping out a neighbour or a vague acquaintance in need. These social obligations exert considerable pressure upon many individuals to search for cash, and given the difficulty of getting resources, it is
easy to understand why predatory practices remain one of the main ways of obtaining the means of meeting such obligations (Chabal and Daloz, 1999).

In addition to the practice of gift giving, there exists a multitude of solidarity networks in forms of family frameworks, peers groups, adherence to common alliance or geographical connection within which individuals feel or are pressured to render services among themselves (Sardan, 1999). Although the practice of frequent gift-giving or solidarity with social networks does not automatically give rise to illicit practices, venality is more likely to thrive in an environment where informal compacts weigh more than formal institutions. Sardan notes that the typical African tradition is that individuals who accede to prestigious public positions are expected to use their official power to acquire public resources and distribute the largesse on the solidarity network basis. Writers on this point argue that in attempting to fulfil these obligations, the African official is unlikely to internalise the impersonal ethos of Weberian notions of bureaucratic conduct (Williams, 1987). Furthermore, as long as the networks of traditional kinship and other solidarity networks are the beneficiaries of the redistribution of acquired wealth and job favours, there is more tolerance of illicit practices and corruption would draw little condemnation, if any, from these quarters (Harsch, 1993; Cabal and Daloz, 1999). Consequently, these solidarity networks become important avenues for those seeking political support (Chabal and Daloz 1999).

In summary, neo-patrimonial systems result in a rent-seeking elite that turns state resources to their personal benefits or to the benefit of their families, friends and clients in exchange for political support. This practice constitutes an important dimension for maintaining loyalty within the informal networks. The practice essentially creates stable patterns of behaviour that do not correspond to formal rules, often operating directly and indirectly to weaken and distort formal state institutions with significant impact on the quality of governance. While these theoretical explanations suggests a link between particularism and corruption the obviously difficult task that face many researchers in this area is how to empirically verify the hypotheses that these explanations propose. However, they point to the importance of exploring how informal networks interact with formal institutions of governance and the circumstances in which this interaction generate self-serving behaviour or corrupt activities. To get the full picture entails an institutional analysis of the bureaucratic
and political systems. Schmit, (2000) proposes a basic framework that draws from two theoretical components. The first explains bureaucracy from an institutional perspective based on the internal and external organisational factors that affect behaviour. The second element involves rational individual choice derived from economic and organisational perspectives on bureaucracy that attempt to explain how individuals respond to alternative choices. This analysis is provided in the following section.

Institutions and Corruption

This section examines leading theoretical approaches to the study of institutions and public policy. It draws on 'neo-institutionalism' scholarship from political science, economics and sociology and examines how institutions shape behaviour of public officials. The theme of 'institutions' and the 'neo-institutionalist' covers a wide range of theories from major social science disciplines and does not constitute a unified body of thought (Peters, 1999). Actually, neo-institutionalism refers to a collection of schools of thought that include rational choice institutionalism, sociological institutionalism, and historical institutionalism, which seek to explain political, historical, economic and social institutions (Hall and Taylor, 1996). A full description of each institutionalism is not necessary here; it is sufficient to say that these schools share a common claim that institutions influence the political strategies adopted by individuals, firms, groups and governments, and thereby affect political behaviour and policy outcomes.

The study of institutions originated with a movement in American economic thought, which flourished between early 1890s and late 1920s but Boulding (1957) suggests that institutionalist literature on the social sciences dates earlier, touching on virtually the work of all major social and political thinkers in different historical periods. However, the movement went on interlude only to be re-launched as neo-institutionalism in mid-1970s largely in response to the behavioural perspectives that were influential during a wave of democratisation that swept southern Europe and Latin America in the 1970s and 1980s (Hall and Taylor, 1996; Hodgson, 1998). With the new wave of studies in the 1970s, the movement emerged as a major source of theoretical ideas that perhaps more than any other has shaped the foundations of this body of work on organisations.
Especially since the reassertion of institutional theories in the social sciences two decades ago when March and Olsen (1984:734) declared that 'a new institutionalism has appeared in political science', scholars from diverse research traditions have increasingly studied the role of institutions in governance policy outcomes and economic performance. Following from this seminal work, and subsequent publications in political science (March and Olsen, 1989, 1994; Brunsson and Olsen, 1993; Olsen and Peters, 1996; Peters, 1999), there has been a proliferation of institutional theories in economics (North, 1990; Alston, Eggerston and North, 1996; Khalil, 1995). Similarly, in sociology (DiMaggio and Powell, 1991; Scott, 1995; Zucker, 1977, 1987) important theoretical advances have taken place.

Neo-institutionalism contrasts classic institutionalism, in that the latter was only concerned with describing the nature of formal principles of constitutions and structures (Hodgson, 1998). Neo-institutionalism on the other hand, seeks a systematic explanation of the role institutions play for the political behaviour of individuals as well as for the actual and symbolic results of government policies. March and Olsen (1984) who coined the term neo-institutionalism to distinguish the approach from traditional institutionalism argued that political behaviour is not just embedded in an institutional structure of rules, norms and expectations; it is a consequence of rational, though bounded, calculated decisions of individuals. They argue that the best way to understand behaviour, whether individual or collective, is through the 'logic of appropriateness' that individuals acquire through their membership in institutions (March and Olsen, 1989:23). That is, people functioning within institutions behave as they do because they identify and associate with normative standards rather than on calculating expected utilities of alternative choices. Since the consequences of interest are to be realised in the future, individuals anticipate future outcomes on the basis of what they have experienced. Thus, conformity with government policies and other rule-bound codes is a reflection of accumulated experience of the appropriateness of such policies and rules (March and Olsen, 1984). Similarly, Peters (1999:11) argues that neo-institutionalism grew up 'not so much merely to reassert some of the virtues of the older form of analysis but more to make a statement about the perceived failings of what had been conventional wisdom of political science'. Thus, contemporary institutional analysis looks at actual behaviour rather than only as the formal, structural aspects of institutions.
Most definitions conceptualise institutions as binding, working rules that prescribe behaviours expected of occupants of various roles. Definitions from the political science literature focus on both formal units of the political system and the formal rules that bind them. Cortell and Peterson (1999: 181), for example, define institution as 'the formal rules, compliance procedures and standard operating procedures that structure the relationship between individuals in various units of the polity. For March and Olsen (1989:160) political institutions are 'collections of interrelated rules and routines that prescribe appropriate actions in terms of relations between roles and situations'. Davis and Trebilcock (1999: 11) also provide a definition of legal institutions as 'rules that govern behaviour in a given society, the means by which those rules are made, and the means by which the rules are administered or enforced. According to Peters (1999:18), there are four criteria that most institutional theories include in their definition. First, an institution 'transcends individuals to involve groups of individuals in some sort of patterned interactions that are predictable, based on specified relationship among the actors'. Second, to qualify as an institution there must be some degree of stability over time. Third, the institution must affect individual behaviour, and fourthly, in an institution there is a feeling of shared values and meaning among members.

The new institutional economics literature uses the terms 'institution' in a way that differs substantially from its use in common parlance or in political science. In this case, the term is applied in a broader sense to include not only formal laws and operating rules and organisations, but also informal structures and norms that channel behaviour. For Eggertson (1998), institutions emerge from social customs and habits, formal rules and regulations, and various enforcement mechanisms including internalised social norms. Manning, Mukherjee, Gokcekus (2000:3) define institutions as 'humanely devised constraints, or set of relational contracts...made up of formal constraints (e.g. rules, laws, constitutions), and informal constraints (e.g. norms of behaviour, conventions, codes of conduct), and their enforcement characteristics.' Proceeding from these definitions, IRIS (1996:5) categorises institutions into three levels. First, there are 'rules of the game' such as laws, regulations, policies, customary laws, and court decisions. Then, there are rules about who makes and applies those rules and how this is done, as in the case of administrative law and procedure, electoral laws, and civil service regulations.
Finally, there are rules that constrain all rulemaking - this would be the level of the constitution, the rule of law, and socially prescribed behaviour. As such, institutions embody the 'rules of the game' within which key actors (politicians, bureaucrats, businesspeople, citizens) operate. They are distinguished from individual preferences because they structure and constrain how individuals make decisions regardless of their preferences.

Thus, when the literature uses the term 'institution' it does not necessarily equate this with 'formal organisation' although organisations are core elements of institutions. The meaning has wider scope. According to Eggertson (1998), organisations are more or less formal associations, such as political parties, government agencies, business firms, and citizens' associations. Members of an organisation pursue shared goals, and internal rules and structures such as a constitution or a party statute including norms and expected appropriate behaviour govern their interactions. Collectively, organisations and the internal goals and rules that shape their behaviour could be referred to as institutions.

To illustrate how institutions work, we can in practical terms, look at a contract transaction and analyse its institutional aspect. First, a contract can set rules of the game between parties along with rules supplied by the state, such as the code governing contracts. These laws and regulations may favour the contractor, or they may not. At the second level, we are concerned with who makes and interprets these rules for the public and how. If a contractual dispute goes before a judge, what procedures and rules of interpretation apply? Under what rules and influences do legislators and bureaucrats make laws and regulations that apply to the transaction? Finally, at the third level, the question arises of how judges, legislators, and administrators are constrained by a constitution and the rule of law. If legislation nullifies contracts without justification, can it be challenged? Are there constitutional provisions and public law outlining the powers of higher courts to control abuses of power by administrators and courts of first instance?

Different approaches to institutional analysis often reflect the focus of analysis. In the political realm, institutions are significant because they constitute and legitimise political actors and provide them with consistent behavioural rules, conceptions of reality, standards of assessment, affective ties, and endowments, and thereby with a capacity for purposeful action (March and Olsen, 1989). While
acknowledging the role of individuals and groups in the policy process, preferences and capacities are usually understood in the context of the society in which the state is embedded. A body of literature largely in the field of public choice has extensively discussed the role of institutions in political accountability (Nas et al., 1996; Rose-Ackerman, 1999; Philip, 2000; Laffont and Meleu, 2001). This literature seeks a better understanding of the institutions concerned with ensuring representation, governance and the rule of law. The central argument in this literature is that democratic systems face the challenge of sustaining their political authority while simultaneously ensuring existence of mechanisms of accountability that allows for the punishment of politicians that adopt self-serving policies, thus forcing politicians to align their preferences with those of the electorate. Philip (2000) identifies two institutional features that significantly determine the degree of accountability and the nature of corruption in a political system.

One feature concerns broadening the scope of representation by making it possible for citizens to influence decision-making and the content of policies through the selection of political representatives. A range of institutions influences the form and extent of political representation. In any political system, those with power to distribute advantages bring influence to bear on the policies and practices of governments (Philip, 2000). Ideal democratic systems bestow this power upon citizens by allowing them to influence the choice of popular representatives from among contenders for public offices. This begins with the election of parliamentary and local representatives. According to Langseth, Stapenhurst and Pope (1997), this requires not only clear laws and procedures to guide the electoral process, but also an independent and well-resourced electoral commission or a similar body and non-partisan polling officials to guard against manipulation of the process. As a matter of practice, the civil society is expected to provide the necessary channels for monitoring and ensuring the elections are free and fair.

But multiparty elections or observance of existing electoral laws and regulations is not a sufficient condition for an election to be labelled democratic as two successive multiparty elections of 1992 and 1997 in Kenya illustrate. Although there was some evidence of vote rigging the major cause of KANU victory was deep fragmentation in the opposition (Steeves, 1997). Johnston (2000) cautions that by laying more emphasis on participation in the political systems and paying insufficient
attention to institutions, there is a risk of not having democracy fully institutionalised in a political system. He argues that strong, accountable institutions rather than political participation are the essential foundations for institutionalising democratic processes. With weak institutions, corruption can become an equity problem and a mechanism for facilitating and entrenching political systems that fulfil self-serving interests rather than public good. According to Johnston, most transition countries have acquired formal democracy without legitimacy or demonstrated capacity for governance. Decision-making and influence in those countries is partially institutionalised within official states, and the real centres of power are within informal networks that include systems of clientelism, black-market, economic cartels, or mafiyas and private armies. This evidence suggests that liberalising political participation, while a worthwhile goal, is not by itself a plan for democracy. Philip (2000) supplements this view by hypothesising that control of corruption in democracies will not be solved by more democracy, arguing that increasing access to, and participation in the political process may actually create incentives for corrupt practices. In conditions of poverty and widespread illiteracy like in many developing countries, electorates are vulnerable to manipulation, giving rise to an illegitimate means of access to political power.

The second important aspect is the strengthening of the rule of law and ensuring the existence of checks and balance mechanisms across different branches of government to make leaders accountable for their actions (Lenderman, Loayza and Soares, 2001). This is desirable in order to guard against abuse of power and to protect public resources from predatory opportunism. In many democracies, the rules that govern behaviour in a given society are often specified, first, by a constitution and then by many laws and regulations that give a specific content to the normally general principals stated in the constitution (Davis and Trebilcock, 1999). Constitutions are in themselves potentially significant institutions of restraint. They establish the rules of the game by providing a regulatory framework for the exercise of power and are the basis of authority for other laws and regulations that guide the actions of individuals and enterprises on the one hand and public organisations on the other (Tanzi, 2000). Invariably, the quality of institutions and how they are implemented play an essential role in shaping individual choices and behaviour (Johnston, 1982). The role of the constitution in determining the quality of the public
sector depends on whether the rule of law is well established in the country (Tanzi, 2000). Though the constitution is, in principle, the supreme document that governs a country and all other laws and regulations must be consistent with its expressions, it cannot specifically address all situations and, therefore, constitutional principles are often subject to interpretation by the country's constitutional courts. In countries with a dysfunctional rule of law, especially where private interests have powerful economic influence on the judiciary, constitutional interpretations may be made in favour of such interests.

While the constitution sets out general principals, specific laws guide the country's policies. These laws must, of course, be consistent with the principles set by the constitution. Rose-Ackerman (1998) argues that a basic condition for controlling corruption is a viable legal framework that enforces the law. Many countries with excellent laws have very high rate of corruption though, because laws are seldom enforced. In the analysis of what is a good legal framework, the quality of the laws as well as the systems that enforce those laws should be assessed. Countries with a good rule of law accompanied by effective judicial systems have the potential for deterring corruption as penalties for corrupt behaviour are ensured. Additionally, an effective legal system has the potential for balancing the power of an arbitrary state. With respect to administration and enforcement of laws, less developed countries face many challenges. Davis and Trebilcock (1999) study show that the court systems in these countries provide poor services and suffer from integrity, competence and independence.

Economists also recognise the importance of policies and institutions, although the extent of government involvement in economic activity with regard to micro-economic policy, among others, has been a source of controversy. One school of thought associated with neo-classical theory of economic growth believes that market should be left to themselves to deliver desirable outcomes, while the other argues that the functioning of markets can be improved through extensive government intervention (Azfar, Lee and Swamy, 2000). Both schools of thought, however, generally acknowledge that just as well-defined institutions are important in promoting political participation, they are equally necessary for structuring competition in the economy. That is, well-defined and functioning institutions provide an enabling environment for economic growth. As competitive participation
is essential in building fair political systems, economies too work best when people and groups have genuine choices open to them. Given this view, it is then appropriate to give the quality of governance a central role in analysing economic policy.

Johnston (2000) argues that because significant corruption is an equity and power problem, sound policies and institutions that weaken the ability of any one economic interest or political faction to dominate or intrude unduly upon the workings of others, are essential foundations for protecting critical rights and promoting fairness. He observes that in political spheres where the market economy is not supported by secure property rights or credible guarantees of orderly trade and transparent business practice, significant corruption is likely to occur. Furthermore, such political realm can encourage informal networks - politicians and powerful public officials enriching themselves quickly, and businesspeople buying official protection while maximising short-term returns and keeping their assets as mobile as possible (Scott, 1972a; Knack and Keefer, 1995; Keefer and Knack, 1997).

Several studies that analyse the impact of institutions on corruption and other determinants of economic growth such as education and foreign investment support these arguments (Lambsdorff, 1999). In a cross-country research that focused on institutional environment, Keefer and Knack (1997) hypothesise that deficient institutions rather than technological advances are some of the major causes of poor countries not catching up with wealthy countries. They employ various measures of institutional quality from a commercially produced rating system developed by Political Risk Services to create a composite index. They combined scores on quality of bureaucracy, measures of the prevalence of the rule of law, corruption, risk of expropriation of private investment, and the risk of repudiation of contracts by government, and found strong correlation between economic growth and the quality of institutions. In another work, Olson, Sarna, and Swamy (2000) have shown that better institutional quality, which is associated with lower corruption, can also promote growth through its impact on rate of growth of productivity.

The quality of bureaucracy is greatly determined by the institutional environment that public officials find themselves in. Generally, the administration of government business is governed by the administrative law (Pope, 2000). Pope argues that a sound institutional framework makes public administration clearly accountable by explicitly and unequivocally placing the duty upon public officials to
be lawfully and procedurally fair in their administrative actions. Public officials should also be expected to furnish reasons for their actions. This requirement holds the key to good governance, for without reasons, decisions can be rendered more difficult to challenge. At the same time, the framework needs to provide clear, transparent and impartial enforcement of procedures to be a good incentive for the public and its officials to respect and conform to country's rules. Such is a framework that requires government to operate within the confines of the law; exercise its statutory or other public powers, and that, the aggrieved citizens whose interests have been adversely affected are entitled to fair adjudication. Inevitably, a tension may occasionally arise between the government and the citizen in the exercise of its functions. When confronted with such a situation, the government may be inclined to make arbitrary decisions. However, where formal institutions function efficiently, courts or other independent and competent arbitrators should be available to settle such disputes in accordance with the rule of law.

Similarly, management practices and internal standards that consistently promote equality and transparency by ensuring adherence to procedures are important mechanisms for safeguarding integrity of the public servants. A professional civil service, which is politically neutral, has secure tenure with a decent salary, and is, traditionally recruited and promoted on merit is more likely to conform to administrative norms than the one, which is not (ibid.). On the other hand, personnel system based on patronage and political loyalty undermine administrative integrity and efficient delivery of services. Rose-Ackerman (1999), argues that countries emerging from a period of one-party or authoritarian rule face the challenge of creating a professional civil service that is capable of being politically accountable and at the same time perform its tasks with minimum corruption and favouritism. But even in a political pluralism, a professional civil service will not function properly if a country is sharply divided on ethnic lines. Officials in such countries instinctively tend to show favouritism to their kin. Freedom from political interference can also be affected where the civil service affairs are in the hands of political appointees. China, for example, continues to be managed by the Communist Party, and no distinction is made between political appointees and civil servants (Burns, 1993).

The dominance of a political party through political appointees weakens the prospects of establishing a stable and professional civil service administration because
decisions are often made with the life of the incumbent political leadership in mind, many of them being short-term policy decisions. Civil servants in such administration face serious job uncertainty as they may leave in the event of a political change. They have no time horizon, and work to please their political superiors. To perform well, public officials need to envision the relationship between their efforts and eventual outcome. They will be more confident and willing to gear up to organisational norms if they believe that policies will remain in force for some time and are not likely to be arbitrarily reversed (Manning, Mukherjee and Gokcekus, 2000). Hence, public officials may find no motivation for putting a lot of effort in their work when the results are so uncertain.

*Analysing Corruption: Problems and Prospects*

While the approaches outlined earlier have generated insightful and important theoretical advances into different aspects of corruption, none have produced a satisfying general theory or comprehensive framework for explaining the persistence of political and administrative corruption. Scholars have begun to point out the limitations of approaches that focus strictly either on formal institutions (modernisation and neo-institutionalism) or informal institutions (neo-patrimonialism). These scholars, perhaps most notably Andvig et al. (2000), call for greater conceptual linkages within and across the theoretical approaches that integrate both formal and informal institutions.

These calls arise from two key observations. One view recognises that although institutions may have traditional and patrimonial functions, citizens do relate to and are dependent on formal institutions to gain their various legal rights. In contrast, many of the 'rules of the game' that guide political behaviour are not found in the formal or written rules; there are powerful unwritten norms ranging from conventions and codes of conduct to patterns of clientelism and patrimonialism, that often shape actors' incentives in systematic and robust ways. If social and political actors respond to a mix of formal and informal constraints (Hyden, 1984), then good institutional analysis requires that scholars examine both sets of rules. In order to address these theoretical gaps and explain the potential impact of formal institution in
constraining corruption or the role of informal institutions in the persistence of corruption, an analytical approach that broadens the scope of institutional analysis to include informal rules is required.

A useful starting point in this respect is the analytical framework provided by public choice theory, agency theory, and transaction costs economics, within the fields of rational choice paradigm and neo-institutional economics or new economics of organisation (Moe, 1984). This framework informs most policy-oriented analysis of corruption, which views the phenomenon as arising from the design of state institutions. The central argument of this approach is that corruption arises from a host of contributing factors such as wide discretionary authority in the hands of decision-makers in the context of weak systems of transparency and accountability (Klitgaard, 1988) and perverse incentives in government employment (USAID, 1998). As Groenendijk (1997:207) explains, neo-institutional economics 'deals with institutional factors that affect the decisions of individuals' and, therefore, these flaws in the design of state institutions could potentially be remedied through legislative and policy measures, which constitute the 'rules of the game'. These measures entail creating credible structures of democratic governance such as the constitution, electoral systems and watchdog agencies to promote accountability and protect public organisations from corruption. In addition, a well-performing government capable of developing and implementing public policies that promote social welfare needs a framework, which emphasises meritocratic civil service that operates within a strong monitoring and incentive system.

In this regard, corruption in democratic politics is most usefully viewed as a principal-agent problem where a principal delegates authority to an agent but owing to asymmetries of information, the principal cannot costlessly monitor the actions of the agent (ibid.). A democratic political system is structured hierarchically by a chain of principal-agent relationships from 'citizen to politician to bureaucratic superior to bureaucratic subordinate and on down the hierarchy of government to the lowest-level bureaucrats who actually deliver services directly to citizens' (Moe, 1984:766). In other words, the voters can be seen as the principal in relation to the parliament to which they have delegated power. The parliament can be regarded as the principal in relation to the executive and government (cabinet), to which power is delegated. The government in turn delegate authority to the public administration.
The principal-agent theory is about what is happening when authority is delegated from a principal to an agent. One main assumption is that the preferences of the principal and agent often diverge, but the principal can establish incentives for an agent to take decisions that would maximise the principal's objectives. However, the principal is hampered by asymmetries of information and incentives (i.e., the agent possesses much more information). In a modern democracy, the political system is characterised by delegation of authority on all levels of government. Thus, adherents of principal-agent theory emphasise the need to restrain bureaucrats and politicians, hence to change incentive structures in which information asymmetries and pressures inherent in the political economy would lead to inevitable corruption. The main advantage with the principal-agent perspective is that it provides a framework to analyse these chains of delegation. It also gives a possibility for closer study and to better understand what are the reasons for weaknesses or strengths in the chains of delegation (Moe, 1984).

Several questions may then arise with regard to the operation in the chain of delegation. Does the principal really know if the agent is carrying out the duties as planned? Is the agent's information about its activities correct? A natural consequence of these questions leads us to think about how agents might be made accountable and controlled, so that the intentions of the principal are not lost. A crucial factor affecting the answers to these questions revolves around the degree of access to information. Generally the delegating party has less information about the true state of affairs than the party to which the authority has been delegated. In political science it has been a common assumption that this kind of delegation necessarily implies a loss of control on behalf of the delegating party (Christensen and Laegreid, 1999). But in modern political science it has been increasingly stressed that delegation might not necessarily be equal to abdication by elected representatives in relation to the parties which tasks have been delegated to (Lupia and McCubbins, 1999).

However, the traditional problem of administrative accountability regarding what institutional mechanisms allow elected officials to hold bureaucrats accountable for their administrative actions in the context of information asymmetry has to be tackled. To compensate for the lack of information in relation to the agent, the principal can take a range of measures including designing monitoring devices and
incentive structures (Moe, 1984). To improve monitoring, the principal can employ external sources to provide information about the real state of affairs or consequences of activities independently from the agent. This would increase the cost for an agent for delivering incorrect information or to conduct tasks in a way contrary to the intentions given, especially when systems for punishment are efficient. An important aspect to consider is hidden action and hidden information and the agent's ability of exploiting the position for purposes other than intended by the principal.

Aside from the problem of moral hazard, the principal also faces the problem of adverse selection, i.e., how to screen and detect opportunists before they are employed (Andvig et al., 2000). To overcome this problem, there are two specific ante-post measures that the principal can undertake. One, the principal can design a contract. Contract design concerns the instructions given; the training provided and mechanism by which new staff are made aware of the principal's wishes and control mechanisms. Two, the principal can screen applicants during selection process to detect agents who may have certain propensity for behaving dishonestly. If the requirements regarding skills or qualifications are low and the number of agents to be recruited is high, monitoring of applicants might not be quite efficient and opportunists may easily enter the system. Generally, the problem of adverse selection is not as central to the explanation of the causes of corruption as moral hazard, but may be important in the generation of corrupt acts (ibid.).

The principal-agent theory has thus become more and more central in corruption research (Collins and O'Shea, 2000) and many of the principal-agent models are centred on the public administration. One example of such a model is Klitgaard's agency model that traces organisational vulnerability (Klitgaard 1988), which is similar to vulnerability analysis of Johnston (1993). But others, like the one provided by Groenendijk (1997), have tried to show that expensive monitoring and a weak connection between the actions of the agent and the outcome maybe reasonably assumed to apply to the relationship also between elected representatives and the electorate in a representative democracy. The electorate cannot monitor the actions of the elected representatives without costs and the outcomes are not only a result of the actions and decisions of the elected representatives.

Although this approach provides a more robust analysis of corruption than do approaches in the modernisation and neo-patrimonial literature, it predominantly
focuses on formal institutions as 'the rules of the game', and fails to acknowledge the role of informal institutions in individual choices and how these affect formal institutions. The above statement is not intended to imply criticism of the usefulness of this approach per se, but to point out that this approach alone is inadequate. An emerging body of literature suggests that informal rules do have impact on the outcomes of formal institutions. In recent studies of presidentialism in new democracies, for example, O'Donnell (1996) shows how patrimonial norms of unregulated private presidential control over state institutions may result in a degree of executive dominance over legislative and judicial branches that far exceeds the constitutional prescriptions. Recent literature has thus sought to incorporate informal rules into mainstream institutional analysis in order to broaden the conceptualisation of institution and strengthen the empirical reality of institutional analysis (Helmke and Levitsky, 2003).

To address the empirical and theoretical gaps, therefore this thesis develops an approach drawn on theoretical insights from institutional theory (March and Olsen, 1984, 1989; Moe, 1984; Peters, 1999) and cultural theories of informal networks (Sardan, 1999). Specifically it focuses on how the logics of solidarity network, re-distributive accumulation, and predatory authority - which is essentially a divergence from formal institutions - promote a cultural embeddedness of corruption in society (ibid.). For example, Sardan notes that social links such as peer groups, comradeship, adherence to common association, integrate people into various networks to whom individuals feel obliged to renders services most often in a 'generalised exchange' (ibid. 41). When members of these networks are public servants, the exchange of personal favours using public resources is not uncommon. Solidarity networks are probably universal phenomena, but influence of family framework and pressures from kinship and ethnic groups is far weaker in the North than in the South. Unlike Western societies, leadership particularly in Africa hinges very largely on the extent to which one is able to satisfy his or her own community (Williams, 1987). Thus, as individuals secure high public offices, they come under increasing pressures and solicitations to provide favours, jobs and other economic benefits on ethnic lines. Finally, the logic of predatory authority is predominant in neo-patrimonial systems where the distinction between public and private interests is rather blurred. In this
context, informal structures and patron-client networks play decisive roles in the
distribution of national resources.

How is this analysis relevant in understanding the impact of formal institutions in shaping behaviour of individuals? Institutions are collections of interrelated rules and routines that define appropriate actions and guide individuals in terms of their obligations in certain roles or situations. The extent to which behaviour and expectations conform or deviate from the rules depends either upon what March and Olsen (1989:160) term 'logic of appropriateness' or 'logic of consequentiality'. In logic of appropriateness, people functioning within institutions behave as they do because of normative standards rather than because of their desire to maximise individual utilities. For instance, civil servants are constrained by normative standards such as administrative law and other legal prescriptions. By contrast, in logic of consequentiality preferences and expectations about consequences drive behaviours. Where formal and informal rule exist symbiotically, it is necessary to understand 'the actual rules that are being followed' (O'Donnell, 1996:10). As will be argued in the rest of this thesis, there is tension between formal and informal institutions. Although system of checks and balances exist in theory as part of the formal institutional structure, informal mechanisms of network subvert formal institutions to the extent that they violate formal rules of the game.

**Summary and Discussion**

Corruption is not identifiable as a single, separate, independent entity that can be isolated and destroyed. It is a complex set of processes involving human behaviour and many other variables, some of which are difficult to recognise or measure. What constitutes corruption are different behaviours linked to different factors and, therefore, there are different meanings of the word corruption. As such, a definition of corruption remains a contested concept. An examination of definitions of corruption often leads into discussion as to whether the definitions are universal across all cultural contexts. There is much discussion in the literature about the effects of cultural values and differing legal traditions and customs on whether certain practices are regarded as corruption. Due to these cultural differences, it is often
argued that what constitutes corruption may be different between countries. Therefore, Gould notes that 'corruption has no single definition. It varies from region to region and remains largely contextual' (Gould, 1991:467). As a result of the difficulties of arriving at a universal definition, Morgan (1998) notes that much of the literature adopts a minimalist definition - the abuse of public office for private gain. This definition is concise and broad enough to be of use in most instances of corruption. However, definitions just give a generalised picture of the concept. In an attempt to provide more concrete ways of explaining the phenomenon some scholars have built typologies to supplement the definitions of the concept of corruption.

While the concept of corruption is still unresolved, academic debate on the nature and causes of corruption is still unsettled. According to Collins and O'Shea (2000) this disagreement is partially due to different methodological approaches and intellectual perspectives that scholars use to look at the problem of corruption. While different approaches provide insights into different aspects of corruption, none have produced a satisfying general theory or comprehensive framework for explaining corruption in society. Each approach has its weaknesses and strengths in explaining corruption and this is hardly surprising given complexity of the phenomenon.

The literature from the modernisation school explains corruption in the context of history, arguing that corruption is an inevitable phenomenon in the modernisation process (Huntington, 1968). According to this school, corruption is a conflict of transition from traditional societies to modern societies. The relevance of this approach lies in the influence it has had in defining and interpreting the processes and structures of social systems, and how corruption features within those systems. However, the modernisation theory has a number of limitations and has come under severe criticisms especially from the dependency school. One of the criticisms is that it suffers from a crude interpretation of evolution of human activity, which inherently makes a comparative analysis difficult (Leys, 1996). The reality of development to modern polity in industrialised world, which is the point of reference of modernisation theory, was the result of a specific set of circumstances and not the evolution of a special, culturally sophisticated set of values. Therefore, modernisation cannot resolve the inherent problem of Weberian rational-legal ideal of bureaucratic transparency that is found in most Western societies and loosely embraced in many developing countries. Another problem with modernisation is that although it
recognises the existence of poverty, social deprivation and individual forms of organisation, it fails to explain how these factors might be improved in order to eliminate corruption. Indeed, the dependency school views developing economies puppets of industrialised world, in which case modernisation for the former is an illusory notion (Leys, 1996). Another problem with modernisation theory is that it does not account for the reality of patrimonial forms of organisation in the developing countries.

This last idea is popularised by the neo-patrimonial school, which bases its analysis primarily on African politics. Scholars in this school argue that majority of African states do not meet the classical criteria of a modern rational-legal state, that separate public from private spheres (Medard, 1986; Bayart, Ellis and Hibou, 1999; Chabal and Daloz, 1999). They argue that the African state is merely a façade that masks the reality of deeply personalised political relations. That in such vulnerable political circumstances, the neo-elite in power combines corruption with clientelism (Medard, 1986). In this perspective, African politics are assumed to be radically different from politics elsewhere, and it is deemed futile to analyse them by means of general theories of political development, democratisation, and formal institutions. This perspective is challenged as unconducive for understanding change, which has occurred in Africa over time from pure patrimonial state to hybrid of patrimonial and rational-legal states (Erdmann, 2002). Furthermore, neo-patrimonialism is not particularly helpful in explaining how one country evolves from 'politics of disorder' (Chabal and Daloz, 1999), to a more institutionalised form of democratic rule, as recent experience in some African states such as Ghana has shown.

Corruption may have its roots in culture and history, but it is, nevertheless, a product of discretion and monopoly power without adequate accountability and transparency. So long as officials have discretionary authority, corrupt incentives and opportunities will remain. However, the level of corruption is relative to the incentives and opportunities available. This means that the more the activities public officials control or regulate, the more opportunities exist for corruption. Furthermore, the lower the probability of detection and punishment, the lower the risk associated with corrupt deals. In addition, the lower the salaries, the rewards for performance, the security of employment, and the professionalism in public service, the greater the incentive for public to pursue self-serving rather than public serving interests.
Removing economic activities from state control, e.g., by privatisation and deregulation, can considerably reduce monopoly over goods and services in the government. Nevertheless, the government must retain monopoly of some functions due to their uniqueness or in order to maintain control of the country's administration. Similarly, the structure of governmental organisations inevitably provides public officials with discretionary powers. This essentially means that government will always have monopoly control over some activities and its officials will exercise some amount of discretion. The central challenge is, therefore, to formulate procedures, which will restrain corrupt tendencies without stifling the functions public officials.

Effectiveness of controls through the mechanism of monitoring and accountability will not only depend upon the quality of the institutional structures that are designed to deal with the problem, but also on how efficiently the mechanism is enforced. It is not exactly clear which institutional structures are suited for this goal. Reinforcing hierarchical controls through state institutions is one way in which governments can address this problem. However, as Rose-Ackerman (1978) argues, those who are paid to monitor the actions of lower-level officials can themselves be bribed not to blow the whistle, leading to redistributionary chain within the bureaucracy that simply transfers corruption to the next level of responsibility. Increasing hierarchical control can also exacerbate the problem of information asymmetries if officials far removed from the actual activities place are called upon to make judgements, which depend upon having accurate information (Gould and Amaro Reyes, 1983; Rose-Ackerman, 1978). An alternative to increasing hierarchical control is to privatise certain government functions, but this presumes that adequate institutions exist for corporate governance in the private sector, without which privatisation will simply mean trading the problem of public sector corruption for inefficiencies elsewhere. And as has been stated earlier, its is unrealistic for government to privatise all its functions.

Consequently, the approach outlined above, which is popularised mostly by public choice theorists as an effective anti-corruption reform and has become fashionable with donor agencies can potentially have inconsistent outcomes. Furthermore, its potential utility as a central organising approach suffers from certain shortcomings as Collins and O'Shea (2000) note:
It takes, however, too simplistic view of the motives of politicians, officials and citizens to be persuasive, particularly to understand corruption in the context of culture and history. Similarly, the economic approach does not easily account for uneven patterns of corruption within and between institutions. Further, it does not allow for the influence of a public service ethic, the democratic development of personal moral conviction (ibid. 87).

In other words, the approach does not take into account incoherent interests and objectives of politicians, public officials and citizens. It assumes that there is a common standard of public interest that would be applied to measure behaviour and expectations of each party. Thus, as Andvig et al. (2000: 142) suggests, research into corruption should look beyond formal structures of the central state to the informal networks of patronage and social domination that often determine how political power is actually wielded and the legacy of historical antecedents.

Perhaps because there is no central organising approach about broad questions on corruption, or one that has succeeded in linking the causes to possible remedies in a satisfactory analytical framework, much of the contemporary literature suggests a contextual approach to the problem of corruption (Gould, 1991, World Bank, 1997a). As such, it is important to understand the relationship between people and institutions to ascertain the structural failures. While analysing these relations, it is important to realise that laws or organisations operate within a political, economic and social context. The impact of these demands and pressures within government agencies is as much a function of individuals' conduct as it is the way these agencies are constructed and operate (Johnston, 1982).

In the next chapter, a contextual analysis of corruption in Kenya demonstrates that the problem of corruption can better be conceptualised as a process in socio-economic and political development rather than a problem of individual or market imperfections that easily fit in the conventional principal-agent approach. Consequently, understanding the developmental process and the actual stage of development can usefully inform the appropriate measures against corruption. In other words, alternative measures might have a better chance of success than populist solutions that merely focus on moral hazards.
Chapter Two

CORRUPTION IN KENYA: CONTEXTUAL FRAMEWORK

Introduction

The previous chapter reviewed contemporary approaches to the analysis of corruption and identified a number of limitations. It was argued that while several of the propositions postulated within the various schools of thought find resonance in the Kenyan experience, none fully explains, or would predict how institutional factors associated with informal structures and networks, or neo-patrimonial systems undermine formal institutional reforms.

Modernisation theory is concerned with the distribution of the incidence of corruption and their variations in different societies and employs historical institutionalist and political process tracing methods to explain perception of corruption at various stages of modernisation (Heidenheimer, 1970). The modernisation approach gives us some insight into variations in the tolerance of corruption, but is less useful in explaining the dynamics of corruption in a specific context. Furthermore, it focuses on formal institutions and, therefore, has only partial utility in analysing how formal and informal institutions interact to produce corruption. On the other hand, neo-patrimonialism distinctively focuses on the informal aspects of power to argue that African political systems cannot be evaluated in terms of the Western rational-legal norms as these standards do not actually work in African politics (Chabal and Daloz, 1999). One of the standard critiques of neo-patrimonialism is that it is almost inherently static while politics in Africa, which it seeks to explain, is almost inherently dynamic. Indeed, it is argued that power structures in many African countries are neither patrimonial in the Weberian sense nor fully democratic; they are 'hybrid' regimes (Erdmann, 2002). Finally, the neo-institutionalist approach departs from the two comparative approaches mentioned above and attempts to explain corruption in the context of institutional factors obtaining within a specific political system.
What emerges from these approaches is that they follow a set of arguments in their analysis that focus either on formal institutions or informal institutions but none incorporated insights from the various theoretical approaches to provide a comprehensive framework for analysing corruption. To provide a unifying approach that would facilitate an analysis of the nexus between formal, informal institutions and corruption, this thesis develops an alternative approach building on cultural and institutional theories.

Proceeding from this conflation, an institutional analysis drawing from rational choice institutionalism and principal-agent theory and focusing on both formal and informal institutions is applied to examine the complex relationship between institutional arrangements and corruption in Kenya. This analysis is based on the assumption that the causes and effects of corruption vary from country to country and they 'are always contextual, rooted in a country's policies, bureaucratic traditions, political development, and social history' (World Bank, 1997a:14). First, corruption is linked to institutional attributes that offer wide discretionary power to public officials in the context of lax systems of transparency and accountability, and perverse incentives in government employment (Kibwana, Wanjala and Oketch-Owiti, 1996; Republic of Kenya, 2000a). According to this viewpoint, wide discretionary authority to state officials offer significant opportunities; minimal accountability reduces the risk of corrupt behaviour; and the absence of sufficient and regulated in government employment induces self-serving rather than public-serving behaviour. The second factor is associated with societal attributes, which encourage allegiance to personal or group loyalties over state rules (Williams, 1987). Finally, perceived lack of government legitimacy and the sustained dominance of a single political party and ruling elite over political and economic process have fostered self-serving behaviour.

This chapter, therefore, attempts to synthesise these approaches to explain how political, economic and cultural forces contribute to the persistence of corruption in the context of Kenya. We will look into the major factors that have been identified as contributing to corruption. The conflict between traditional practices and Western practices, a product of modernisation process, is examined to explain the interface between corruption and culture, particularly the stress between socio-cultural history and the concept of public office. Corruption is present in both industrial democracies
and poor third world countries. Corruption, as centred on a public official's act, is a departure from the expectations for responsible use of power in society. As such, accountability of public officials must be analysed in terms of what society views as responsible use of power. In this light, any attack on corruption must come to terms not only with the law, but also with the country's culture, i.e., what is culturally accepted or tolerated by society.

The chapter is organised as follows: the first part provides a brief typology of corruption in Kenya. The second part is concerned with the sphere of politics - state omnipotence, political elite, and society. Here we provide a brief profile of the Kenyan history to draw attention to the influence of modernisation theory in the analysis of corruption and the source of neo-patrimonialism. Part three broadens the picture and looks at politics from neo-patrimonial perspective, examining in some detail the extent to which patronage systems have gone about solidifying informal networks, and in doing so, weakening formal institutions of the state. The argument centres on the analysis of the ways in which the political system, as inherited at independence has been reshaped both by the circumstance of post-colonial period and political culture to serve and perpetuate the interests of political elite, in what Chabal and Daloz (1999) call political instrumentalisation of disorder. The aim is to stress that in the effort to consolidate their political power the political elite's actions tend towards disregarding formal rules. Part four assesses a number of important economic and political sources, which have been effectively exploited to consolidate political power. From a public choice perspective, we show the extent to which government involvement in economic activity has supplied incentives for corrupt exchanges between government officials and the private sector. It is now generally acknowledged that violation of these rules is a major cause of corruption in government. We argue that corruption is due to a lack of competition in either or both the political and economic arenas. Greater interventions in terms of the size and scope of government increase the supply of rents, and correspondingly, corrupt behaviour. The ability of politicians and bureaucrats to intervene in the market provides them with the incentive and opportunity to extract bribes.
Typology of Corruption in Kenya

Corruption in Kenya is not a matter of a few 'rotten apples' but a systemic practice that traverses the entire social system (Kibwana, Wanjala and Oketch-Owiti, 1996). In 1993, Mr. Maalim Mohammed, then a Minister of State admitted that corruption in Kenya had reached disturbing proportions. He is quoted as having said that 'although corruption started in 1963, the kickback has reached a level where government officials demand 45% kickback, up from 10% in 1963' (ibid.:123) It ranges from petty bribery to the lowly paid civil servants to buy limited amount of power they posses, to hefty payments made to high-level officials, which Moody-Stewart (1997) distinguishes as petty corruption and grand corruption respectively. Building on this taxonomy, the Nairobi-based Institute of Economic Affairs (Shaw and Gatheru, 1998) introduces another category of grand corruption known as looting or 'lootocracy'. The term lootocracy appears to have originated from the Parliamentary Anti-Corruption Select Committee (Republic of Kenya, 2000a) appointed to investigate the causes and extent of corruption in Kenya.

Petty corruption is a low-level type of bribery, which is quite prevalent in the civil service and typically involves relatively junior officials (CLARION, 2001). It is known by a variety of terms in Kenya like *chai*, which literally means the beverage tea (but here means money), *kitu kidogo* or TKK (something small), or 'scratch my back and I will scratch yours'. Then there are those who will simply talk of *Kutoboka*, which in unrefined terms means to give out a bribe. There are other terms but these suffice to shed some light on how corruption continually generates its own lexicon. It is a practice that is found in virtually all sectors and spheres of Kenyan society and most Kenyans have come to see this form of corruption in public offices as a way of life. Indeed, the culture of bribery has been so institutionalised that government contractor now pay bribes without even being asked, to speed up various stages of bureaucratic process as they do not expect to be served by any public servant without having to offer a bribe.

According to Shaw and Gatheru (1998), those who receive bribes justify their actions by arguing that they have to do so in order to subsidise their low wages. It
seems that poverty borne out of unreasonably low earnings, many other forms of social-economic marginalisation, and high cost of living induce people to seek corrupt ways to make ends meet. Indeed, the incentive structures of low public sector wages, tolerance of corruption, lack of effective criminal sanction, and the expectation that all public servants will support large kin groups, weigh heavily in favour of participation in bribery and extortion.

On the other hand, 'grand' corruption involves high-level dealings (often at a political level) with significant payoffs. It mostly occurs in relation to procurement projects mainly in construction, roads, dams, hospitals, airports, and in arms and defence contracts (Rose-Ackerman, 1999). Procurement fraud and corruption take many forms, including collusion and bid rigging for government contracts on the private sector side, as well as huge payoffs to government officials for the award of particular contracts. Typically, high officials, in return for hefty payments or other favours, will direct an infrastructure project toward an influential contractor. Since the firm must recoup the cost of these payoffs and make profits, contractors inflate bids or over-invoice. Alternatively, the contractor may invoice within the expected range, but skimp on the quality or quantity of the material, or labour. Reports about this type of bribery appear every year in the account reports of Government Departments and Parastatals released by the Controller and Auditor-General (Kibwana, Wanjala and Oketch-Owiti, 1996).

In the Kenyan context the theft of public resources by public officials is known as looting. It is a kind of embezzlement or misappropriation of funds by state officials from the public institutions in which they are employed. However, there is a specific type of grand corruption emerging in Kenya that involves massive looting of public assets by powerful political elite. As previously mentioned, the Parliamentary Anti-Corruption Select Committee (Republic of Kenya, 2000a) refers to it as 'lootocracy'. It involves individuals or companies being paid huge sums of money by the state for goods or services that are never delivered. This includes pocketing of tax revenues by government officials, under-valuation of assets during privatisation, and payment of non-existing projects or 'air supply'. A vivid example is the Goldenberg Scam in which businessmen and powerful government and political officials allegedly defrauded the state about $400 million dollars in fictitious jewellery exports in 1990 (World Bank Development News July 31, 2000). This case has remained unresolved.
in the Kenyan courts since. 'Grabbing' of public property and houses is another method. In rural Kenya, cases have been documented where allocations of large tracts of government land have been covertly made to political elite and influential individuals resulting in displacement of peasant squatters (Republic of Kenya, 2000a). In the urban areas, covert allocation of government houses to private individuals has rendered a number of civil servants without affordable housing facilities. Between 1993 and 1996, 576 government-owned houses were allocated to individuals (Republic of Kenya, 1997).

Rather than merely looking at the taxonomy of corruption by scale and level, it can be conceptualised in terms of how individuals and societal groups perceive and are affected by it. To illustrate the social and political relations embedded within those categories, corruption can be seen in conceptual terms of 'abstract' and 'concrete', rather than categorising and specifying scales (Heilman and Ndumbaro, 2002). The notion of concrete and abstract depends on the perspective of an individual or identifiable societal group. Concrete corruption refers to those activities that have an immediate and tangible impact on the lives of people and tends to hurts them directly. This is the type of corruption that Kenyans are quick to talk about (Republic of Kenya, 2000a). While involving relatively junior officers such as traffic policemen or land registry clerks, people blame it on poverty borne out of unreasonably low earnings and many other forms of social-economic marginalisation, which render certain sections of the society amenable to corrupt behaviour. In extreme cases, it is generally correlated with extortionary corruption and blamed on blatant greed. Looting government land and houses mentioned above is a good example.

On the other hand, what is generally referred to as grand corruption or looting in Kenya is roughly correlated with 'abstract corruption' because the general public and individuals do not experience it directly and it does not directly affect their daily life and pocketbooks. Included in this category are major evaders of customs duties, well-connected road contractor and architects who design multibillion and kick-back motivated projects knowing very well that such projects will not be completed. There are also government suppliers who circumvent competitive bidding and transparency tendering systems and parastatal heads who build expensive office and sports complexes and staff housing projects ostensibly to provide housing for workers, but
actually open opportunities for rent-seeking. Also in this category are powerful individuals who alienate public land, which they later sell to the National Social Security Fund (NSSF) at inflated prices. A recent case revealed by the Public Investment Committee (PIC) involved the head of the Civil Service who is alleged to have abused her office by acquiring a Kenya Railways plot and selling it to the NSSF at an inflated price, making a US$1.2 million profit (Daily Nation, March 28, 2002).

To many Kenyans high-level corruption seems to be abstract because it consists of events removed from their daily lives with no immediate tangible consequences. In abstract corruption both individual businessmen and individual public officials benefit from the process. This type is often associated with neo-patrimonialism - the draining of public resources by a 'state elite' or a 'political aristocracy' (Harsch, 1993). By contrast with concrete corruption, it possesses hidden mechanisms, being practices between high officials in highly complex networks. The only loser is an abstract ill-defined public interest that is represented by the state. In part, the failure to hold public officials accountable is a result of patronage politics whereby groups that benefit from high level corruption work to perpetuate the notion that abstract corruption does not adversely affect individuals or society and therefore, as such, it is not bad. This has been complimented by the failure of the general public to establish the link between public property and their taxes. People do not realise that the misuse of foreign loans, for example, leads to government debt that must be repaid. There is also limited realisation that the embezzlement of public funds cuts down on the money that the state can invest in providing social services or to pay out as state pensions. While abstract corruption does not have the same directness as the real day-to-day and face-to-face experiences that average Kenyans obtain in their dealings with police, customs officers, or licensing officers; it nonetheless has important political and economic ramifications. Perhaps more importantly, it profoundly affects societal values and norms concerning the expected behaviour of public officials and large-scale business people.

In thinking about the relationship between 'petty' and 'concrete' or between 'grand' and 'abstract' it is important to realise they are theoretically distinct. 'Concrete' corruption does not just refer to amount of money involved or the level or rank of government officials, it refers to its direct impact on identifiable groups or individuals. Likewise, 'abstract' corruption does not necessarily concern an obscure
backroom kickback for a construction project that increases national debt and costs for outside donors, it can refer to the petty corruption problems of other individuals that do not directly affect another individual’s life. Therefore, most corruption activities entail a combination of ‘concrete’ and ‘abstract’ elements, depending on the perspective of the group being analysed. In this way, corruption could be thought of as combining the economic idea of an externality. That is, corruption can offer specific benefits to identifiable groups/individuals and transfer costs to an ill defined general public; or, corruption can make identifiable individuals/groups pay for (absorb a cost) a direct benefit for other specific individuals/group members.

However, the difference in nature and scale between concrete and abstract corruption should not prevent us from considering them at the same time as being two poles of a continuum, or from trying to discover the possible existence of common factors that favour or legitimate both. The accumulated effect of real and abstract corruption is that the private appropriation of public resources has become part and parcel of daily life. It has been tolerated, accepted, and institutionalised to the extent that both people who give and receive bribes have internalised that behaviour (Kibwana, Wanjala and Oketch-Owiti, 1996). In Kenya, corruption has become a norm and people assume most public servants receive bribes and if it can be established that an official does not receive bribes, people are shocked because it is not normal. And there are complex structural and contextual factors that have created an environment conducive for the spread of corruption. These range from structural weakness of formal institutions, government policies to generate economic rent, poverty, to adverse incentives to public officials.

Because corruption is closely related to opportunities, resources and constraints, one factor that determines its incidence is the degree of societal tolerance. This depends upon whether the boundary between the public and private is clearly defined and whether the norms governing public and private are highly internalised. Under these circumstances, citizens know what constitutes public property, they understand the linkage between their taxes and public property, and the public is empowered and perceives it has a responsibility to discourage public officials from using their offices for private gain. Under these circumstances, citizens have a variety of formal and informal means to control behaviour of public officials. The converse condition is where the separation between the public and private is ambiguous,
unstable or non-existent. If the level of citizen comprehension about public management is low and the public sometimes praises or at least countenances corrupt behaviour. In such a situation, societal norms may be considered as matching the practice of state officials in that the boundary between personal and private is intentionally blurred and accepted as legitimate. Under these circumstances, informal rules of the game are at odds, and often supersede the formal institutions of democratic governance. To a large extent, the country's culture and history determines whether the state will fit in the former or latter situation or somewhere in the middle. In locating Kenya's position along the continuum it is necessary to look at its historical development and the effects of the modernisation process.

Historical Development: Conflicting Values

Anthropological and historical studies on African traditional political systems show that at the onset of colonialism in the late nineteenth century, none of the 42 Kenyan ethnic groups had an established state system. The structure of politico-administrative leadership existed in the form of what Fortes and Evans-Pritchard (1964) called 'stateless societies.' Pre-colonial Kenya was therefore settled by such societies, which shared many characteristics in their socio-political life. Functionally, stateless societies did not have an elaborate hierarchy of authority that linked the centre to the localities. The Western notion of individualism where the individual person has a fixed, unique bounded identity did not exist as well (Berman, 1998). Instead, the kinship network was the basis of interpersonal relations. The highest organisational unit in the kinship network was a clan and rarely did the tribe operate as a social category for socio-cultural or governmental role.

Nevertheless, the absence of a centralised authority did not imply a state of anarchy. There was actually a clearly defined traditional governing process. In many of these societies, councils of elders made important decisions and matters were resolved in the open. However, an important feature of these societies was the selection of leadership. In some traditional African systems such as the Buganda of East Africa, leadership - especially top leadership - was usually inherited and an individual's position in the leadership structure was often determined by ascription.
The leader in turn appointed or influenced the appointment of those who occupied important positions in the state service. The situation that existed in Kenya was somewhat different. Instead of hereditary leadership, personal qualities were the basis for recruitment. Age, charisma and wealth were regarded as important qualities, with age being the major variable influencing actual recruitment. Age was associated with cumulative experience and wisdom and tended to confer rights and obligations. However, men of means and influence were recognised as leaders and accorded status as chiefs (Bode, 1964; Berman, 1998).

However, the colonial phase of Kenyan history, which might be fruitfully understood through a synthesis of theoretical insight from modernisation and neo-patrimonial approaches, gave rise to major changes with far reaching consequences for the nature and extent of corruption. First, the colonial political order and administrative apparatus essentially excluded Africans from effective participation in political and economic affairs. This typified a system of state omnipotence, which was 'paternalistic rather than participatory and which was founded on the superior wisdom of the governors rather than the consent of the governed' (Williams, 1987:36). This pattern also ensured that bureaucratic structures would predominate, which was important at the time as it met the economic objectives of the colonial government. Inevitably, this produced a precariously dependent peasantry who often sought access to bureaucrats and the resources they commanded. The main concern at the time was Britain's economic recovery from the ravages of the World War II (Dresang and Sharkansky, 1975). Besides, the white farming community was encouraged to increase commercial production to generate sufficient revenue to meet not only the colonial administrative costs, but also repay the loans for the railway infrastructure (Williams, 1987:81). African labour was necessary and this was secured through a variety of methods including force, taxation, and preventing Africans from having access to enough land or profitable crops to enable them to pay taxes without seeking wages (Leys, 1978).

Over time, a limited range of economic opportunities such as transport and trading were made available to Africans. Meanwhile, Africans were also progressively moving upwards within the government hierarchy to fill positions in the middle level. As it was to be expected, those who had acquired some education and those who had some money benefited from these changes. Apparently, due to their
geographical position the Kikuyu tribe enjoyed the greatest access to educational and other opportunities while at the same time they felt mostly acutely the alienation of their land (Williams, 1987). In the words of Davidson (1978:263) they 'had unusual access to the meaning of racist discrimination on one side and to modernising influences on the other'. Given their obvious educational and economic advantage, the Kikuyu dominated the African leadership and acquired the inherent political and economic power after independence and were naturally anxious to ensure that they continued to enjoy their prosperity and privileges in the future. This did not only stratify the Kenyan society in terms of economic power (ibid:37), it also created a closely-knit network of powerful and affluent elite in the government and commerce. Heliwell (1994) produces empirical evidence suggesting a close relationship between economic development and competitiveness; yet in a case such as Kenya's, economic growth that followed after independence also entrenched a parochial political elite with a common ethnic, linguistic, regional and education background.

While the colonial legacy failed to integrate ethnic groups into national leadership, it succeeded in producing a capitalist class where substantial personal wealth, however acquired, seemed to be a condition of success in Kenyan politics (Williams, 1987). Those who acceded to political leadership or became members of the higher echelon of the public service began to be measured in terms of the degree of affluence reflected by their lifestyles. William notes that the standard joke of the late 1960s concerned the discovery of a new ethnic grouping, the Wabenzi, whose main distinguishing feature was the possession of one or more Mercedes Benz motorcars. The joke reflected the contemporary preoccupation with conspicuous consumption and the popular association of the elite with self-aggrandisement. The image of an overblown middle-aged man with a black bowler hat and a cane in his hand addressing a harambee (fund-raising gathering) interspersed with school choirs and gifts of goats and sheep became the stereotypical character called mhesimiwa (honourable) in Kenya (Kituyi, 2000). William (1987) notes that since the 1960s obsession with financial success and ostentatious lifestyle among the political elite persists today, reflecting the association of ones' material wealth with power and success.

Invariably, in order to maintain or enhance this image considerable 'investment' was required (Hornsby and Throup, 1992; Barkan, 1975) especially for
politicians who were required to meet the constituents' expectations or face electoral defeat. The incumbents and adversaries alike had to show great 'generosity' by way of huge cash donations in local fund-raising campaigns. Political elections were also very expensive. In the 1970s, the cost of a Kenyan election was so high that expenditure per vote is estimated to have been approximately two-thirds of that in the United States (Barkan, 1975). State resources became an important source of wealth accumulation, and this resulted in competition among the elite for closer proximity to state leadership. This is an area where private economic and political interests conflict with public interests and encourages the abuse of public office. It is believed that today, the cost is much higher. The immense financial pressures to finance political campaigns give politicians incentives to solicit and accept payoffs on quid pro quo arrangements. In Kenya, business and political interests have become intertwined in a complex and non-transparent way, and businesses are increasingly active in political parties. Obviously, groups or individuals that give funds to elected officials expect in return favourable treatments on individual problems or in return for assistance in obtaining government contracts (Rose-Ackerman, 1999).

The structure and style of governance also failed to clarify the distinction between public and private interests (CLARION, 2001). In effect, without a clear perception of some demarcation between discharging public responsibilities and furthering private interests, the distinction between patronage and initiatives becomes blurred. Unlike Western societies where the concept of representation is on individual and organised interest groups, African leadership hinges very largely on the extent to which one is able to satisfy his or her own community. Thus, as individuals secure high public offices, they come under increasing pressure to provide favours, jobs and other economic benefits on ethnic lines. The individual becomes entangled in the centre of conflicting loyalties and pressures. To an extent that he is a member of a wide social network, which conferred reciprocal rights and responsibilities, he is not likely to internalise fully the impersonal ethos of Weberian notions of bureaucratic conduct (Williams, 1987: 45).

The notion of public interest has come to be regarded in a narrower scope. As a result, acceptable behaviour on the part of public officials is evaluated using different criteria from the larger public good, which is expressed in the national policies. Thus, national affairs degenerate into a contest for the division of spoils
among competing particularist interests and as long as one is able to deliver largesse to his or her constituency, probity and integrity becomes irrelevant. Such incoherence in the expression of principals' (i.e., society) implied objectives versus their manifested approval, naturally lead to a weakening of supposed controls existing in the principal-agent relationship, thus giving an opening for corruption. Up until today, there has not emerged for the majority of Kenyans the idea of a national society. Indicting nepotism, the Parliamentary Anti-Corruption Select Committee (Republic of Kenya, 2000a) contends that this has produced a national culture that has very high tolerance for, and even approval of corruption provided it is beneficial to the immediate kin, ethnic regional or political grouping.

The existence of ethnicity and regionalism as a basis for corruption can also be traced through Kenya's political history. During the single-party system of government in Kenya from 1969 until December 10, 1991 the country witnessed excessive patronage and skewed allocation of state resources (Throup, 1993). Since ethnicity was an important factor in Kenyan politics, allocation of resources tended to favour those associated with the regime. Cronyism and nepotism became significant in the civil service and public corporations where appointments and promotions were made on the basis of connections, as opposed to merit. This created inefficiencies and undermined professionalism and substantially caused much disillusionment among the public servants resulting in poor morale and changes in their attitudes toward work. When Moi took over from Kenyatta as president in 1978, he used his authority to reduce the preponderance of Kikuyu civil servants especially in the higher ranks of the public service, by replacing them with his people without regard of experience and expertise. He increasingly surrounded himself with Kalenjins (his own tribe) despite fear of some enlightened people from his tribe that to do so would arouse the animosity of other tribes. The problem of corruption heightened in 1980s when the tenure of office for High Court judges and the Comptroller and Auditor General was removed (Throup, 1993). Naturally, other civil servants and particularly senior civil servants apparently started becoming uncertain of the security of their jobs (Daily Nation, September 20, 1998) and of their livelihood, more especially since Kenya does not have a social security system.

As civil servants had been allowed to engage in business while in office since the recommendations of the Ndegwa Commission of 1971 (Ndegwa, 1971), many
resorted to their private businesses and others engaged in corrupt activities. Individuals' self interests became the normal motive for most actions, and anything was rational only when there was a personal gain. Senior officials who owned private companies or had substantial interest in those companies could use their influences to get preference during contract awards. This resulted in divided loyalty between public service and private interest. In consequence, officials were holding a plurality of offices, drawing the government's pay and using their time to build their private fortunes. By 1990 disillusionment with the government's widespread mismanagement and corruption seemed to have intensified and Kenya progressively witnessed an upsurge of anti-corruption movements led by a variety of forces, both internally and externally, targeting mainly high-level corruption.

Internally, pro-democracy movements and religious organisations drew a large number of people into political debate to pressurise the government for more democratisation and constitutional reforms as this was perceived as the cause of systemic corruption, especially during the period 1990-1995 (Oyugi et al., 2000). Among the crusaders were the National Council of Churches of Kenya (NCCK), the Church of the Province of Kenya (CPK), the Catholic Church, the Kenya Human Rights Commission, the Law Society of Kenya, Green Belt Movement and the Public Law Institute. Also in this group were other smaller pressure groups. In the absence of other political parties, the churches, especially the Anglican Church, had become the de facto opposition (Makinda, 1992). Detailed accounts of corruption also began to appear in the media and the civil society openly accused government officials not only for mismanagement but also for dishonestly putting in their pockets large amounts of state funds.

Externally, the donor community, especially the World Bank and the IMF also played a very significant role in forcing Kenya's attention to the issue of corruption and good governance. In 1991, the donors suspended aid to force the government to lift the ban on political parties (Associated Press July 29, 1997). Although the multipolitical party system was restored and donor aid reinstated the problem of corruption did not improve. Again, on July 31, 1997, the IMF suspended the recently reinstated Enhanced Structural Adjustment Facility (ESAF) for $216 million US dollars, as it believed that corruption was still so endemic and corrosive that the IMF's goal of economic growth was endangered. The Bretton Woods institutions demanded that the
government had to meet certain conditions before the resumption of the loan. These included establishment of an anti-corruption agency and a regulatory structure in form of an advisory board. The selection of this board was be undertaken in consultation with respected members of the civil society such as Transparency International, officials of the Law Society or Bar Association, and the chairman of the local chapter of the International Association of Jurists (Daily Nation, June 3, 1998). The demands also required guaranteeing the independence of the Kenya Revenue Authority and completion of the Goldenberg case, which has been mentioned earlier. Britain also entered in the fray by hinting in its Kenya Country Strategy Paper of July 1998, that aid to Kenya would increase to around 50 million Sterling Pounds or decrease to Sterling Pounds 20 millions by the year 2001 depending on the good governance progress (DfID, 2000).

Under pressure from these fronts, the government introduced some policies and legislative reforms to fight corruption. A Kenya Anti-Corruption Authority (KACA) was established on December 1, 1997 but the recruitment of its officers including the director prompted criticisms from observers. Some questioned whether the establishment of the Authority meant a genuine desire to do battle against corruption or that the strategies was driven more by the need to be "doing something" (Theobald, 1999). On June 18, 1998 Parliament also set up a 15-member Parliamentary Select Committee to investigate the causes and assess the impact of corruption.

The above overview provides a clear illustration of the impact of modernisation process on corruption or its perception thereof. The transition from traditional to modern culture, at least by Western standards, has involved a change in the basic values of the Kenyan society. In particular, it has meant, on the one hand, a gradual acceptance by the various groups within the society of universalistic and achievement-based norms, the emergence of loyalties and identifications of individuals and groups within the nation, and the spread of assumptions that Kenyans have equal rights and obligations. On the other hand, in the context of ongoing clash between the modernising influences and traditional values, behaviour that was acceptable and legitimate has gradually ceased to be accepted. This does not, however, imply that patrimonial practices have ceased. The following section discusses this feature and argues that the political structure, which is a post-colonial
phenomenon, has deliberately weakened formal institutions and consolidated informal networks to the advantage of the political elite.

**Neo-patrimonialism and Informal Practices**

Kenya's pattern of neo-patrimonial practices, which has shifted the instruments for making public policy from formal structures and institutions to the informal political systems emerged immediately after independence. At independence in 1963, the country inherited the 'Westminster model' of parliamentary government under a Prime Minister. Under this model the National Assembly was legally regarded as the supreme law-making body, but the power to initiate public policy decisions invariably rested in the executive branch (Okumu and Holmquist, 1984). At the time, the country possessed some of the key infrastructure features associated with modern state: a modern economic structure, a constitutional system of western orientation, a legal system largely patterned after the English common law tradition, and a public service modelled after public service in England (UNDP, 2001). However, the country made radical departures from the Westminster model after introduction of presidentialism in the Kenyan political system. When the country became a republic in 1964 with a president as the executive head of state, the executive began slowly and effectively to consolidate power in the state bureaucracy. Okumu and Holmquist (1984) argues that the reason for strengthening the executive branch of the government was because the incumbent president preferred the civil service to the political party as the primary instrument of his rule. But along this philosophy of rulership emerged a system of governance; the civil service increasingly became informal and personalised, paving way for patronage and clientelism (CLARION, 2001).

One of the basic characteristics of neo-patrimonialism is presidentialism and the informal power concentration in the presidency (Okumu and Holmquist, 1984). Okumu and Holmquist argue that right from independence, Kenya got into a situation, which was analogous to an (elected) absolute monarchy, which led to accumulation of powers under office of the president such that the life of the nation revolved around the occupant of that office. Soon, there was no distinction between the personal and
official life of the chief executive. Since Kenya gained independence, a series of laws and constitutional amendments have systematically increased the powers of the President vis-à-vis other branches of the government and the civil society organisations (O'Brien and Ryan, 2000). A major aspect of this concentration of power was the constitutional amendment that was adopted in 1982 to make Kenya a *de jure* single party state and a further amendment in 1988 that removed tenure of office for constitutional appointments. Although these provisions were later restored, their unfortunate effect was to undermine the stability and efficiency of senior public offices.

There is a consensus that the Kenyan bureaucracy is largely 'patrimonialised' by a ruling elite, which uses it as control tools to ensure their own permanence in power at the expense of serving the public interest. This is mainly associated with the progressive concentration of decision-making authority at the centre and, in particular, in the presidency and his circle of key advisors and associates in the control of access to national resources (Shaw and Gatheru, 1998). Naturally, where decision-making is highly centralised, other officers will be bypassed and favours sought from more powerful officials at the centre (Williams, 1987). Analysts maintain that the country retains a high concentration of power in the executive branch of government, headed by a president who is both the head of state and head of government with a wide range of formal and informal powers, but nominally answerable to parliament. The president is a Member of Parliament but never attends parliament save during the formal opening and the day of the budget speech, both of which are ceremonial occasions. As a result the president is never asked to justify directly any actions to the parliament. This factor shows a significant weakness in the mechanisms of checks and balances.

Analysis of the presidential powers shows that they are enormous. The president plays an inordinately large role in the control of electoral process and implementation of parliamentary decisions. He can dissolve parliament at any time and precipitate national elections. He appoints the Electoral Commission, the managers of the electoral process and has control over the registration of voters since his office is in charge of issuing personal identity cards, which are required during registration of voters. When parliament passes laws the president can withhold consent from those laws. To overcome the president's refusal to sign a bill into law,
the parliament must muster a 65% majority (Shaw and Gatheru, 1998). Many of the measures relating to public finances require executive action. Thus PAC and PIC investigations and reports have no effect unless the executive takes up their recommendations. The trouble is that even if the president soft-pedalled on these as has often been done in the past, the parliament has no powers of sanction.

Shaw and Gatheru (ibid.) illustrate how the president can exercise constitutional powers to sway the legislature. At one time, the president used the provisions of Articles 16 and 19 of the Constitution, to secure full influence over parliament by appointing a large number of ministers and assistant ministers to facilitate passing motions introduced and defeat of motions tabled by government. The presidential powers over parliament were enormously increased by the ability to nominate extra twelve MPs, who until 1992, could be replaced if they did not support governmental position on any matter. Against the presidency, even parliamentary immunity had no meaning as MPs were arrested and detained from precincts of parliament. As the presidency became stronger, other institutions became weaker, leading to a point where Parliament was reduced to a feeble voice mostly supporting the executives. Even as late as in the 7th Parliament, a nominated MP had to vacate his seat to create room for somebody else, a situation, which in other countries would be unthinkable. This flexibility in the use of executive powers has serious negative implications to public/national interests.

The president's political power has further been expanded through control of institutions inherited from the colonial regime, which might be used for political patronage and provide a source of economic rent for his cronies. Appointments of senior officers to the civil service particularly in the provincial administration, parastatals and other public corporations are in the domain of the president. He has also wide powers over the judiciary. The president not only appoints the judges of the High Court and courts of appeal, but also retains substantial control over their terms of employment by the control of the Judicial Service Commission. This consists of the chief justice as the chair, the attorney general, and two persons that he appoints from among the puisne judges and the chair of the Public Service Commission. For the rest of the executive branch, the presidency appoints permanent secretaries, heads and directors of public enterprises, commissioner of police, and heads of army, and is the chancellor of every public university. As regards the oversight agencies, the
Controller and Auditor General and Auditor General State Corporations, these are appointed singularly by the president. He wields powers to hire and fire any person in the public sector without reference to anybody else.

All that parliament can do is criticise but cannot remove those it is dissatisfied with. In some cases, individuals who have been openly criticised by parliament have been appointed to key positions in the judiciary and the cabinet. Therefore, the president has the capacity to reward those who are supportive and exclude those he considers not. This arbitrary power is reinforced by article 25 of the Constitution, which provides that ‘every person who holds office in the service of the Republic of Kenya shall hold that office during the pleasure of the president’. Some critics have argued that in reality, even the private sector has shown unwillingness to hire anybody singled out as giving the presidency displeasure (CLARION, 2001).

The responsibility to make appointments of all senior holders of positions in the public sector and lack of a neutral system of screening the appointments exposes the presidency to neo-patrimonial tendencies of personal relationships such as clientelism and nepotism. It also leads to potentially undue pressure by vested interests, a situation which can lead to corruptive influence by those who pose as middlemen or agents, sometimes by pretending to be kingmakers, as they seek advantageous positions to state resources. Consequently, a chain of informal networks proliferate in the nature of what Rose-Ackerman (1999:114) calls the 'industrial organisation' of corruption, which depends not just on the nature and organisation of government but also on the organisation and power of private actors. Ultimately, this has given rise to a state of corruption in Kenya that is organised as a 'kleptocracy' in which the president and a small cadre of top officials extract and divide the rents of government operation. The significance of this is examined in the following section.

The 'Industrial Organisation' of Corruption

Under anarchy, argues Olson (1993), uncoordinated competitive theft by 'roving bandits' destroys all investment, leaving little either for the population or the bandits. On the other hand, both can be better off if the bandit sets himself or herself
up as a ‘stationary bandit’ in form of an authoritarian ruler who monopolises and rationalises theft. Thus, while 'roving bandits' will take from the populace in a disorganised way that maximises their individual utility, 'stationary bandits' will act in the interests of aggregate economic performance because they stand to reap substantial returns as 'owners'. In other words a powerful kleptocratic ruler who can organise the political system to maximise its rent extraction possibilities would be preferable than when there is a large number of unorganised potential actors in the bribery.

As Rose-Ackerman (1999) points out, the industrial organisation of corruption depends not just on whether the kleptocrat has monopolistic bargaining power, but also on whether they are able to isolate others from extraction of corrupt rents. She distinguishes between kleptocracies where corruption is organised at the top of government and systemic corruption where the major institutions and processes of the state are routinely dominated and used by corrupt individuals and groups, and in which most people have no alternatives to dealing with corrupt officials. In the former case, the top official will seek to isolate the rent seeking business from everyday politics and sacrifice the benefits of patronage and petty favouritism to generate maximum benefits from the monopoly. In the latter case, the kleptocrat allows his subordinates to join the game for it is only by bringing more and more supporters to his side that he can stay in power.

Powerful kleptocratic rulers are often found in countries rich in raw material or agricultural products such as Mobutu Sese Seko of Zaire or Suharto of Indonesia, where they can control production by restricting concessionary licences (Rose-Ackerman, 1999). In Kenya, however, the kleptocrat is not as all powerful as Olson's (1993) stationary bandit for there are no natural resource concessions to control, but has been able to control patronage networks through granting government contracts and other infrastructure procurement, and public office employment. Instead of a stationary bandit, CLARION (2001) perceives Kenyan kleptocracies as many roving bandits in form of members of unofficial power structure that represent the interests of the ruling elite in all spheres of political life. This structure has the primary purpose of maintaining the ruling elite's hold on state power and, therefore, a major mode of economic accumulation. Since members of the elite and their associates are usually members of established institutions as well as informal power networks, they
invariably become effective sources of allocating national resources. Loyalty of those seeking economic resources shifts from the state to a kind of 'shadow state' that consists of these networks of personal relations. Hyden (1984:105) calls this kind of social connection the 'economy of affection'. In this situation, formal legal ground rules play only subordinate part in such matters as the letting of contracts, filling key post, or even ordinary administration functions. CLARION (2001) notes that even investors are quick to recognise the predominance of these centres of power over formal governance institutions and, therefore, seek to establish relationships with key players in the informal power structures to secure their investments.

The most common manifestation of the 'economy of affection' is patronage, by which political leaders secure and retain the loyalty of their supporters and followers by rewarding them with public goods such as official posts and access to economic interests. Rose-Ackerman (1999) explains that a weak kleptocrat favours a bloated and inefficient state maximise corrupt possibilities, a condition that has become more pronounced in Kenya since the 1970s. The leadership has deliberately and progressively weakened and sometimes dismantled political and civil society institutions, which have potentially become formidable watchdogs against arbitrary abuse by the ruling elite. Speaking of the weakening of the systems of checks and balances, Ikiara, who has manifested himself as one of the prime critics of economic mismanagement by the ruling elite states:

The weakening of parliament, executive interference with the electoral process, constitutional amendments to create a single party system, stifling of press freedom, control of labour unions and banning of many organisations and independent media all helped to create a highly conducive environment for corruption in all socio-economic facets of the Kenyan society (Ikiara, 1993:14-15).

The weakening of these systems allows the kleptocrat and his associates to disregard the established systems while predating on public sector resources. One area that is often abused is the procurement system. As Kibwana, Wanjala and Owiti-Oketch (1996) observe, tendering is irregularly done through corrupt influence to those making decisions or on the basis of political influence and patronage. While goods that are used up for consumption such as drugs for public hospitals are
favourite for corrupt deals among the less powerful functionaries because it is difficult
to verify their correct disposal, large-scale infrastructure or capital goods projects are
targeted by high-level officials for their substantial payoffs.

Another major source of monopoly rent with substantial impact on corruption is
the government intervention on the economy. Although a comprehensive analysis or
quantitative assessment of the interface between corruption and economy in Kenya
has not been undertaken yet, studies indicate that excessive government intervention
in the economy has profound impact on corruption (Rose-Ackerman, 1999; Tanzi,
1998). Nevertheless, there is emerging evidence that the post-independent
government enjoyed a monopoly of power. In a kleptocratic rule, regulatory system
is viewed as a source of personal profits. Thus, excessive regulatory system is
imposed to create bottlenecks, which businesses and individuals will attempt to
circumvent by paying bribes. During the period immediately after independence,
government authority over the economy was increased through regulatory framework
and a steady expansion of controls on domestic prices, interest rates, foreign
exchange, imports and exports (O'Brien and Ryan, 2000). At the time, the aims of
these controls were to respond to shocks such as capital flight especially following the
assassination of Minister Tom Mboya in 1969 and the first oil shock in 1973 but they
nevertheless opened opportunities for corruption.

Similarly, in the immediate post-independence years, Kenya was involved in
many economic activities especially where the state felt that national interest was at
stake. In its philosophy of stimulating development, the government made extensive
investment after independence through establishment of public enterprises with
mandates to operate as commercial organisations while at the same time serving the
demands of the nation as expressed by the political leaders. The public corporations
are quasi-autonomous agencies, free from civil service regulations, detailed public
treasury procedures, or ministerial supervision (Dresang and Sharkansky, 1975). By
early 1990s there were over 342 such institutions, of which 255 were commercially
oriented enterprises (Aseto and Okello, 1997). This commercial activity by the
government was supposed to be transitional and was intended to cease once a capable
private sector has been established.

These public enterprises have continued to be the most important conduit for
siphoning public funds by individuals, not to mention that parastatal jobs have been
used to reward people thought to be loyal to the government (Shaw and Gatheru, 1998). This is another feature of kleptocratic rule where public enterprises are exploited on the basis of personal economic interest rather than the national interest (Rose-Ackerman, 1999). Again, Ikiara (1993: 25) notes two main ways by which infrastructure projects become vulnerable to the extraordinary network of corrupt relation relationships created by the political patronage machine:

One is through joint ventures usually with private foreign businessmen and subsequent utilisation of government guaranteed loans and the implementation of 'white elephant' projects. The second is the most prevalent one, where funds are plundered by the managers of the parastatals. Over the years, the Government has lost a lot of money in many of these ostentatious ventures which are usually of great political appeal but doubtful economic viability. The more well known and publicised cases of failed ventures include Ken-Ren Chemicals and Fertilisers Ltd., Turkwell Gorge Hydro-Electric Power Project, the Kenya Fibre Corporation, Kenya Furfural Company, the Kisumu Molasses and the Nyayo Motor Corporation.

According to Githongo (1997), this patronage machine involves a small cadre of top officials in President Moi's ruling party KANU, high-ranking officers in the Office of the President and the State House. Thus, any analysis of the process of political patronage machine must recognise the central role of the President and his circle of key advisors and associates who control access to him.

Since early 1980s donor agencies and neo-liberal developmental theorists have been instigating, encouraging and supporting liberalisation and privatisation in their reform agenda aimed at addressing the country's serious economic malaise. This approach is based on the premise that liberalisation of markets and privatisation removes certain assets from state control and converting discretionary official actions into private, market-driven choices (Rose-Ackerman, 1999). Under the Structural Adjustment Programme (SAP) supported by the World Bank and the IMF in 1993-95, the state made substantial efforts to remove monopoly power from public officials. This meant eliminating market distortions, increasing competition in the domestic economy through deregulation of the private sector while phasing out public monopolies. In a very short period, the government was able to privatise state-owned enterprises, particularly non-strategic ones and considerably managed to reduce the
state control of the economy. A total of 159 firms have been privatised in Kenya out of the targeted total of 207 government owned institutions (Aseto and Okello, 1997). The government also eliminated trade barriers by reducing controls on access to foreign exchange and adopting a flexible exchange rate policy. By 1994, price controls had been abolished; import-licensing requirements removed, total liberalisation of the trade and foreign exchange affected, and many public-run corporations were privatised (O'Brien and Ryan, 2000).

Clearly, privatisation subjects erstwhile state resources to the discipline of the market and the scrutiny of investors. Market reforms have reduced formerly lucrative sources of graft. The freeing of exchange rates, the reduction of import and export tariffs and the ending of price controls have stripped many senior officials of the power to determine, for a fee, the market price of a multitude of commodities. The removal of these state monopolies eliminates a major source of bribery, shortages, black-markets, reduces transaction costs and other distortions and allows producers to focus on improving quality and cutting costs instead of cadging permits or dodging restrictions. By breaking up state monopolies, the privatisation of hundreds of state entities in recent years reduced one source of official corruption.

There seems to be little question that this has considerably reduced kleptocratic rule in Kenya. Ikiara (1993) argues that the introduction of free market economics in the 1980s and Kenya's opening to globalisation weakened the capacity of the president to use the economy and the big state enterprises to reward (and control) workers, peasants, bankers, industrialists, middle classes - just about everyone. There are fewer government jobs to bestow, fewer government companies that extort kickbacks from contractors, fewer rents and lower-transaction costs for business.

While the general effect of privatisation has been positive, emerging experience show that liberalisation and privatisation is fraught with corrupt opportunities (Kibwana, Wanjala and Okech-Owiti, 1996). First, the process of transferring assets to private ownership has fuelled corruption by allowing the deeper entrenchment of vested interests and corrupt elites. The process has created opportunities for favouring corrupt insiders by giving them information not available to the public. Similarly, firms are undervalued and awarded to those with the best political connect and special treatment in the bidding process, in return for payoffs. Corrupt officials normally present information to the public that makes government owned enterprises look weak.
while revealing to favoured insiders that it is actually doing well. Observers argue that this is attributed to neo-liberal reforms, which are implemented in the context of half-baked, poorly designed, and inadequately implemented market reforms (Johnston, 1997a). Secondly, even if the process were implemented through well-designed and properly executed reforms, this does not essentially eliminate corruption. Crony privatisation often produces private monopolies, ones whose regulation becomes a new source of corruption. The incentives for corruption are thus transferred from government functionaries to individuals in the private sector. Instead of bribing a state-owned firm to obtain contracts and favourable treatment, bidders bribe officials in the private sector, particularly where privatised firms still retain monopoly of the services.

**Summary and Discussion**

In this chapter, theoretical perspectives that focus on both formal and informal institutions have been applied to evaluate corruption in Kenya. While corruption in Kenya has always existed, there are perceptions that corrupt practices today span a wide spectrum, ranging from petty corruption where bribes are required before normal bureaucratic procedures are accomplished, to large-scale corruption whereby considerable sums of money are paid in return for preferential treatment or access. A variety of corrupt exchanges are influenced by the political and social structure in Kenya, which has evolved from the colonial legacy.

While routine stakes are readily available in a wide variety of corrupt exchanges, "extraordinary" stakes such as lucrative contracts and appointments to key positions are in the hands of a few and the process of the exchange is meant to maintain patronage-client networks. The significance of this is determined primarily by monopoly and wide discretionary power in the hands of opportunistic political elites and bureaucrats in the context of inadequate and weak systems of control and monitoring between the principals (society at large) and those who serve them (politicians and bureaucrats). It must be understood primarily as resting on a complex web of corrupt networks, which encompasses politicians, bureaucrats, and businesspeople at all levels. A fundamental source of the predatory nature lies deep
in bureaucratic and political institutions, and its causes can be traced from a country's policies, bureaucratic traditions, political development and social history (World Bank, 1997a). In reviewing this observation, some essential elements in the theoretical explanations have been probed. On the one hand, it has been important to understand whether corruption in Kenya mainly represents habit inherited from the past, or whether it is a manifestation of new kinds of behaviours. On the other, an attempt has been made to elicit whether there is variance between formal and informal institutions and whether these institutions are well developed and integrated in the political and social system.

Arguing from the modernisation perspective, Huntington (1968:490) notes that the presence of corruption 'correlates with rapid social and economic modernisation'. This generalisation, which arises from comparative theoretical explanation, also applies to Kenya. One fundamental product of Kenya's political development is the manipulation of government by powerful vested interests, the entrenchment of a stratum of political opportunists and big money politics, and a political system used as a means of wealth accumulation based on manipulation of state resources (Kibwana, Wanjala and Owiti-Oketch, 1996). How has this come about? The Literature suggests that modernisation has spawned an enlarged government, widening its authority and scope of intervention as activities that are subject to governmental regulations have equally expanded. As government expands its functions and services, this naturally accompanies 'multiplies opportunities for corruption' (Lodge, 1998: 160). Furthermore, as government expands, the impossibility of framing rules and regulations to meet every circumstances or contingencies becomes apparent and discretionary decision-making power is increasingly devolved to public officials.

An enduring feature in Kenya's post-colonial history, which has far-reaching consequences for the nature and extent of corruption, is a system of state omnipotence where the government is essentially paternalistic rather than participatory (Williams, 1987). The colonial government introduced this pattern to meet its economic objectives and it ensured predominance of the bureaucratic structures. The system produced a disproportionate political and economic structure of closely-knit network of powerful and affluent elite in the government and commerce on the one hand, and an inevitably precarious citizenry who often sought access to the bureaucrats and the
resources they commanded on the other. In such context, patrimonial values, which have arisen from this paternalistic relationship, have shaped the institutional characteristics and form of corruption in the country spawning a system of patronage in politics both at local and national levels.

The Neo-patrimonial system in Kenya is not in a sense the Weberian 'pure' form of patrimonialism, but a hybrid that is located between authoritarianism and democracy. In Weber's patrimonial system, all ruling relationships, both political and administrative are personal. There is no difference between the private and public spheres. In this structure, the ruler has no administrative staff but a 'system of favourites' who perform functions for the ruler out of loyalty or obligation (Morrison, 1998). By contrast, the Kenyan system has an established rational-legal administrative structure and a formal system of differentiating between private and public spheres. However, decisions are taken not on the basis of institutionalised rules, but in favour of personal relationships and to personal advantage. Unlike the patrimonial system where the source of exchange was the patron's own private possession and was not directly reciprocal, Kenyan patron-client exchanges involve transfer of public goods or resources on *quid pro quo* expectations.

Bayart, Ellis and Hibou (1999), in their penetrating analysis of the state of corruption in African, state that the state is a vehicle for organised criminal activity. The state we are commonly familiar with is a mere abstraction. The real state is a 'shadow state' of hidden powerbrokers who use intermediaries, front-men, and informal personalised networks to manipulate and control the official institutions of the state, including parliament and the judiciary. These official organs are converted into instruments for accumulation and protection of personal wealth and power. They observe, 'People who are relatively unknown, sometimes without official title or position whatsoever, are able to exercise political influence and occupy key economic posts which bear no relationship to their degree of institutional visibility' (ibid.:22). This description fits the political patronage machine system in Kenya where hidden powerbrokers who are the principal beneficiaries of the economy of plunder in Kenya network actively with the occupants of state offices to protect their ill-gotten wealth (Kibwana, Wanjala and Owiti-Oketch, 1996).

The Kenyan case is an extreme illustration of the predominance of informal networks and divergence between formal rules of responsible public behaviour and
what is considered acceptable locally or by a minority. The disproportionate diversion of resources towards favoured localities (even if attended by large-scale corruption with severe national consequences) is evidently still regarded as the legitimate fulfilment of a principal-agent relationship by at least some parts of the electorate. Indeed, the system of political patronage is so entrenched that people are not outraged when serious cases of grand corruption are reported unless the fruits of corruption and patronage are shared contrary to their expectations. Recently, the country witnessed a situation where a cabinet minister was brought before the law court to face corruption charges arrived accompanied by a huge crowd of cheering supporters.

To this end, the key players are members of solidarity networks and public officials with wide discretionary power to the detriment of public interest. The vast powers enjoyed by the executive and especially the president comes into the picture. The majority of those in key positions, thus having access to corrupt opportunities, are very likely to be beneficiaries of political patronage. Given the pattern of patronage in Kenya where kinship largely influences major public appointments, one community (the one associated with the incumbent political leadership) generally gets preferential treatment. This has created resentments and factional conflict between those who have benefited and those who feel that they have been left out (Johnston, 1986). The sharp ethnic lines that divide the country certainly exacerbate this problem. Ethnicity also makes strategies to reduce corruption through criminal process using anti-corruption agencies and other specialised bodies a very sensitive issue. As long as ethnic considerations remain a practice in the appointment of public officials, any sufficiently independent, fair and effective criminal action will appear to target one community. The next chapter will use the case of public procurement systems in Kenya to illustrate how informal rules of the game have been institutionalised in the public sector through effective solidarity networks.
Chapter Three

PROCUREMENT AND THE MECHANISMS OF CORRUPTION

Introduction

To a large extent, responses to procurement corruption face significant challenges owing to different and complex situations involved in public procurement and the potential opportunities these situations offer for corruption. Public procurement - the acquisition of public goods and services - represents anything from acquisition of office stationery to sophisticated construction and may involve several steps from designing to the execution of contracts. According to Rose-Ackerman (1999), procurement can be divided into four categories, and each category presents its own problems. There are purchases that require specialised research and development such as newly designed military aircraft; purchases of complex, special purpose projects, such as dams or port facilities, that do not involve advances in technology but require managerial and organisational skill. There are also purchases of standard products sold in private markets, such as motor vehicles or medical supplies, and finally, there are customised versions of products sold privately, such as special purpose computer systems or fleet of police vehicles.

Although procedures of procurement will differ for each of these four cases, governments have traditionally used regulation as a means to reduce opportunistic behaviour and also to improve efficiency in the procurement system. This is the standard principal-agent approach, where emphasis on legislation and regulation for restricting actions of government officials is made. In this regard, governmental organisations have tended to write elaborate procedures to control the procurement process and potentially reduce malfeasance by public officials (Frant, 1993). The difficult question is how to craft the law that anticipates all problems. For instance, how might a contract for a product not yet developed be written?

Partly because of such difficulties, this rule-based approach has increasingly been criticised by proponents of commercial-based approach (which is goal-oriented) in public procurement as not meeting the objectives of economy and efficiency.
(Kelman, 1990). They argue that strict and elaborate procurement codes inevitably lead to sub-optimal decisions as they deny officials flexibility to make decisions according to their expert knowledge. Kelman particularly suggests that procurement officers should be given very specific instructions about the goals of procurement and then be given considerable flexibility to determine the means of achieving the goals. They should only be held accountable for the outcomes. In spite of this controversy, there is a fairly consistent agreement that when there must be a trade-off between control and efficiency, some form of regulation is inevitable (Rose-Ackerman, 1999).

Kenya has adopted the traditional approach of regulation in public procurement. The government recently revised its procurement law and developed a comprehensive rule-based mechanism that focuses on reducing discretion in the procurement process by emphasising transparency and accountability. Underlying the entire procurement regulation is the notion that public officials are supposed to be transparent and accountable for the proper use of public funds. The main elements of competitive bidding process and award procedures, for example, are intended to ensure good practice and enhance transparency. Similarly, the embodiment of administrative process for review of procurement decisions aims to improve accountability. But does the convergence of these positive steps mean that corruption in the procurement is under control? Regrettably, as analysis in this chapter will show, while rules bring order and sound principals to the procurement process, vulnerability of this process to corruption is still very real.

This chapter focuses on the institutional quality of the procurement framework and assesses its effectiveness in controlling corruption in the Kenyan public procurement system. The chapter is based on the evidence from documentary sources and interviews conducted during my fieldwork in Kenya in the first half of 2002 (the methods used to collect this evidence were described at length in the introduction of the thesis). The chapter begins with a review of the public procurement structure and procedures from early 1970s, followed by a comprehensive description and analysis of the existing legal and regulatory framework. Against this background, the trend of procurement practice over time is analysed to identify possible variations from formal rules and procedures and to discern patterns of, or potential vulnerability to corruption. The documentary sources and interviews present a clear picture of how
corruption is organised and carried out with respect to routine procurement and infrastructure projects.

As will subsequently be revealed, although the procurement legislation has attempted to cover possible loopholes to constrain corruption, the disjunction between procurement regulations and reality on the ground shows that there are still enormous challenges in achieving these objectives. Opportunistic officials and government suppliers have consistently exploited the weaknesses in the system to engage in corrupt practices largely through collusion, while remaining legitimately within the rules. Corruption has ensured that companies obtain and retain government contracts, and in some situations businesses have become monopolies. Corruption has also been used to create demands for goods or services that would otherwise have not been purchased. Another serious aspect is that corruption has been used to counterbalance poor quality of work, sometimes in general disregard for safety. The basic procurement structure does not also prevent the disregard of existing procedures by powerful individuals, political favouritism or arbitrariness in procurement system, nor does it insulate public officials from the demands of such powerful vested interests.

The last section provides a summary of the changes that have progressively occurred in procurement regulation and addresses their potential effectiveness in controlling corruption. It is worth noting that recent regulations established an impartial and independent procurement authority to ensure strict compliance with the national procurement legislation and associated regulations. As this policy initiative is still at an incipient stage, it is too early to make any concrete evaluation of its impact on procurement corruption and, therefore, our conclusions require constant review.

**The Principal Features of the Legal, Regulatory and Institutional Framework**

Until March 2001 public procurement in Kenya was governed by a number of overlapping regulations. In central government procurement was governed by the Model Departmental Stores Regulations and the Financial Orders, which were revised regularly. In addition, there were a number of supplementary guidelines and instructions by way of Treasury Circulars issued from time to time by the Treasury.
In 1979, the Treasury produced a Supplies Manual, which was actually an updated version of Model Departmental Stores Regulations (MDSR), incorporating all revised regulations and procedures in procurement management (Treasury Circular No. 1/79). It contained comprehensive rules and procedures for conducting public procurement and has not changed substantially since, apart from regularly reviewing the financial procurement ceilings to match prevailing economic situations.

In the meantime, local government administrations, public schools and similar public bodies and corporations established their own procurement procedures, which were often substantially different from the central government. This was sometimes a source of confusion, especially when funding was partially provided by the central government and partially by the autonomous bodies, thereby creating overlapping jurisdictions in the procurement process. Because of such confusion and other related problems, the government commissioned a study in 1997 to examine the procurement framework and suggest necessary changes that would improve the public procurement (Odhiambo and Kamau, 2003). Following the recommendations of this study, the Minister for Finance issued a subsidiary legislation (the Exchequer and Audit [Public Procurement] Regulations 2001), that came into force through a Kenya Gazette Supplement No 24 issued on 30th March 2001. This legislation became the primary document governing public procurement in the country.

The new public procurement legislation amended the previous procurement regulations and was a major step in the recent procurement reform in that it created a uniform public procurement system and established basic principles and practices to be observed in public procurement. The legislation set out to regulate and make transparent the procedures for awarding public contracts for goods, services, and works. The nation-wide harmonisation of procurement rules and procedures was certainly an important step towards promoting transparency and accountability. In the newly legislated procedures the government made a conscious decision to decentralise the procurement system and to allow greater degree of delegation and discretion to procuring entities.

The new legislation abolished the Central Tender Board and decentralised procurement, placing responsibility for procurement clearly with the individual procurement entities. These entities are identified as the Central Government, Local Authorities, State Corporations and other public institutions. The legislation also
defines the financial and legal responsibilities of all participants in the procurement process, including suppliers and procurement entities. According to the legislation, procurement entities are now responsible for their own procurement (Regulation 6). They are required to determine their own procurement priorities and purchase independently, but have to apply uniform criteria that have been set for the entire procurement system. The legislation covers a wide range of government procurement. This includes acquisition of goods, works and services, and disposal of government property. The process also includes purchasing, hiring, leasing or any other contractual means of engaging suppliers in the provision of public services to the public.

The new legislation created two important bodies in the procurement system. One was the establishment of an independent Public Procurement Directorate (Regulation 7) with policy formulation, oversight duties, and enforcement of the law governing public procurement. The Directorate has the responsibilities for monitoring overall functioning of the procurement process and inspecting procuring entity records in order to enforce the application of the procurement regulations. A general picture given by critics of the current establishment is whether the Directorate is now independent enough to exercise sufficient authority in view of past experiences (Odhiambo and Kamau, 2003). One of the arguments is that the Director of the Public Procurement Directorate is an officer in the public service and subject to the control of the Minister for Finance and employing authority. Arguably, such a director may not be able to introduce discipline in the government's budgeting process in a sustainable way, especially within the parent ministry. The other problem is whether the Directorate has the human resources capacity to monitor compliance and expose corruption and collusion in the procurement process. In interview with auditors from this Directorate, it was pointed out that the status of the audit has not been upgraded and the budget for audit work was still very restricted. This deficiency was obviously noticeable by the infrequency of audits. According to supplies management inspection reports reviewed during this study, procuring entities were on average audited twice in ten years. The subject of audit will be discussed further in the next chapter.

The other body is an administrative review board known as the Public Procurement Complaints, Review and Appeals Board (PPCRAB) with powers to
address complaints from aggrieved bidders and provide corrective remedies (Regulation 41). The establishment of this Board aims to provide effective appealing procedures by vendors who disagree with the purchasers' contracting decisions. The procedure requires the aggrieved vendors to submit their protests to the Secretary of the Appeals Board. Upon receipt of the complaint, the Secretary, unless he dismisses the complaint on formal grounds, promptly gives a notice of the complaint to the procuring entity and calls a meeting of the Board within twenty-one days. The Board then decides whether tender principles have been violated and give directions as to whether the tender should be annulled and repeated. Any decision of the Board is, however, subject to a judicial review under any existing written law concerning judicial review of administrative decisions. Since its inauguration in January 2002, the appeals board has received several complaints from unsuccessful bidders regarding irregularities in contract adjudication (Odhiambo and Kamau, 2003). It has reviewed and cancelled a number of contracts awarded under circumstances it considered irregular.

Critics have expressed concern about whether the new policy lays sufficient foundation for an effective procurement reform (Odhiambo and Kamau, 2003). One area of concern is that the authority to issue regulations on public procurement rest with the Ministry of Finance, which is also a procuring entity. Because of the vested interest, procurement policy organisation under the Ministry of Finance might not give an appearance of independence. The Director of Public Procurement also expressed this concern and said that plans were under way to increase the autonomy of the public procurement organisation through a different instrument. He was in this case referring to the Public Procurement and Disposal Bill, which the government has published and tabled in Parliament (Agina, 2002).

Furthermore, like in the old system, members of the ministerial tender boards are officers who are responsible to permanent secretaries and, therefore, under great influence of their bosses, a position which even the pending Bill does not appear to change (ibid.). In the past, the Central Tender Board, Ministerial Tender Boards and Departmental Tender Boards were dominated by manipulable civil servants while the District Tender Boards were controlled by District Commissioners, who were rather unfamiliar with procurement procedures. Thus the argument for introducing outsiders and people who do not take orders from permanent secretaries into the ministerial and
other tender boards is meant to instil professionalism in the procurement process. However, a reasonable evaluation of the effectiveness of the new system is not possible at the moment because of the short time it has been in operation.

Another feature of the existing public procurement legislation is that it does not cover all public procurement. Regulation 3 removes procurement of goods and services classified by the government as necessary for national security or national defence from the requirements of Public Procurement Regulations. This means that institutions such as the Department of Defence, the National Intelligence Services and the Office of the President are outside open tendering procedures, an issue which has generally been controversial with respect to control of corruption in public procurement (Odhiambo and Kamau, 2003). Table 3:1 below summarises the principal features of the current procurement system in Kenya. As can be noted from the table, the law governing public procurement is provisionally a subsidiary legislation while the Bill entrenching public procurement in the Kenyan laws is still pending in parliament. Nonetheless, the pending Bill has not made any changes on the key institutions or the existing procurement methods. The aim of the anti-corruption legislation is not only to promote economy and efficiency in procurement but also to ensure that public procurement is conducted in a fair, transparent and non-discriminatory manner. Therefore, with respect to corruption control, some anti-corruption elements are integrated in the functions of the key institutions shown in the table, but dealing with corruption is not a primary function of these institutions. Therefore, any suspected violation that falls under the Anti-corruption and Economic Crimes Act has to be referred to the Anti-corruption Police Unit.

Table 3:1. Characteristics of the Public Procurement System in Kenya

<table>
<thead>
<tr>
<th>Legislative Framework</th>
<th>Key Institutions</th>
<th>Procurement Methods</th>
<th>Anti-corruption Initiative</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Exchequer and Audit (Public Procurement) Regulation, Legal Notice No 51.</td>
<td>Directorate of Public Procurement</td>
<td>Open/Competitive Tendering</td>
<td>Anti-corruption and Economic Crimes Act</td>
</tr>
<tr>
<td>Public Procurement and Disposal Bill (Yet to be approved by Parliament)</td>
<td>Procurement Entities Tender Boards</td>
<td>Restricted Tendering</td>
<td>Public Officer Ethics Act</td>
</tr>
<tr>
<td></td>
<td>Procurement Appeals Boards</td>
<td>Quotations and Contracts</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Public Procurement</td>
<td>Single Source Procurement</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Appeals Boards</td>
<td>Request for Proposals</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Ministry of Finance</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*Source: Odhiambo and Kamau, 2003*

In addition to the Public Procurement Regulation, there are other instruments such as the Constitution of Kenya, the Government Contracts Act (Cap. 25), and the
Government Proceedings Act (Cap. 40) that have relevance to public procurement in Kenya. The constitution sets forth the manner in which government revenue and other funds should be withdrawn and spent, and vests in the Parliament and the C&AG with oversight powers on public finances. According to the Kenyan Constitution (Section 99) government expenditure should be approved by Parliament through budgetary and other processes. The C&AG is required to inspect government accounts in order to ascertain whether there is any abuse of the provisions of the Constitution and other laws. The Government Contracts and Government Proceedings Acts specify the responsibilities and obligations of government officials with respect to any contract entered between government and third party.

**Organisation and Functions**

In general, the contextual changes brought about by the new legislation strengthened the decision-making responsibilities of accounting officers in procuring entities. Delegation was clearer and was followed by better reporting procedures. Accordingly, the officers, who are usually the Permanent Secretaries in their respective government ministries or chief executives in parastatals, are responsible and accountable for all procurement decisions in their organisations. The day-to-day functions of each procuring entity are delegated to the officers heading procurement units, who work in consultation with the established tender committees to adjudicate on tenders. Tender committees are permanent and generally composed of five or other odd number of senior members of staff from the procuring entity, and for technical matters, officials from the related technical units. As a matter of practice and in the spirit of corporate fairness, internal units concerned are expected to participate in the decision-making process.

However, according to information gathered from the auditors in the Directorate of Public Procurement, many members of tender committees have little experience in procurement. Other members such as the District Commissioners who chair District Tender Committees, are too overloaded in other government activities to get time to familiarise themselves with procurement regulations. Under such circumstances, many of the members are bound to intuitively rely on personal judgements rather than strictly on laid down procedures. Indeed, the auditors reported
instances where tender committees made wrong procedural decisions, though guided by honest intentions.

Public procurement in Kenya has undergone a number of organisational and structural changes since the early 1970s. In the early 1970s, public procurement was undertaken by external entities such as Crown Agents (Wittig, 2002). As public procurement became a major component of foreign aid, with a large share of development aid being spent on domestic and international procurement in early 1970s, demand increased and various purchasing functions were devolved to different government ministries. Ministerial Tender Boards and District Tender Boards were established essentially to harmonise procurement in government ministries (Treasury Circular No. 15/73). These boards assisted buying officer in the adjudication of tenders and quotations. Since then, they have undergone various reorganisations to improve efficiency in public procurement. For example, when the districts became the centres for rural development following the District Focus for Rural Development programmes in 1983, District Tender Boards were created to facilitate expediency in development activities (Treasury Circular No. 6/83).

In addition to the Ministerial Tender Boards, a Central Tender Board was constituted at the same time under the purchasing division of the Ministry of Public Works, headed by a Chief Procurement Officer (Treasury Circular No. 15/73). At the time, the Board had both contracting and oversight functions, which were carried out under the co-ordination of its secretariat. Its contracting functions included a central procurement responsibilities and adjudication of large contracts. Its oversight functions included monitoring and guiding the performance of the lower tender board. However, in 1994, the Central Tender Board was placed under the Ministry of Finance and Planning (Treasury Circular No. 3/94). The Permanent Secretary, Treasury, appointed the board members in consultation with the Head of the Civil Service. The Board membership was drawn from various Ministries mainly in the rank of Deputy Secretaries.

As stated earlier, the Government commissioned a study in 1997 to assess the country's procurement systems and identify the limitations in the procurement procedures. The study identified the weaknesses and subsequently recommended complete review of the procurement regulations and recasting the procurement manual. The study also recommended capacity enhancement in the procurement,
codifying the procurement law and establishment of procurement entities. In the meantime, new ideas were implemented in a bid to strengthen the tender boards and to tighten the procurement process by recruiting businesspeople to management positions. Thus, in February 1999, the government appointed the first chairman from the private sector, and at the same time restricted government representatives in the Central Tender Board to not lower than the level of Permanent Secretary (Kisero, 2000). Similarly, politicians gained new roles of representing public interests by being appointed members of District Tender Boards within their constituencies. The new management was made aware of the government's wishes in regard to malpractice and wastage. Managers that were recruited from the private business were expected to institute efficient business practices and to cut costs while operating within the procedural framework of public procurement.

Following recommendations of the procurement study the Minister for Finance issued a subsidiary legislation under the Exchequer and Audit Act (Public Procurement Regulation, 2001, which introduced significant changes in the procurement system. These changes included the abolition of the Central Tender Board and the creation of a uniform procurement system. The legislation also established an independent Public Procurement Directorate with policy formulation and oversight duties on public procurement process in Kenya. At the same time, the legislation created an Appeals Board with powers to address complaints from bidders and take remedial action.

Public procurement regulations set guidelines concerning distribution of powers and responsibility with regard to purchasing. They also impose minimum threshold below which heads of procurement entities have discretion in procurement. The value of a particular contract determines the method of purchasing as table 3.2 illustrates. According to Treasury Circular No. 1 of 1998, procurement officer are authorised to make cash purchased of items whose value does not exceed Kshs.10,000 (approx. US$128) in any one financial year. Goods and services above that value but below Kshs.200,000 (approx. US$2,564) may be procured without necessarily going through the rigorous process of tendering provided that at least three competitive quotations are invited and adjudication of the quotations is done by at least three responsible officers, one of whom has to be from the requisitioning department or unit. In the Local Authorities, the purchasing ceilings differ, depending on the size of
the council. Clerks in larger councils can purchase goods and services up to the threshold mentioned above, while smaller local authorities have a limit of Kshs.100,000 (approx. US$1,282). In special circumstances, procuring entities are authorized to procure goods from a single source without calling for quotations of up to Kshs.200,000. On all other cases, the tender committees must adjudicate the tenders.

### Table 3:2. Procurement Methods and Adjudication Responsibilities

<table>
<thead>
<tr>
<th>Adjudicating Authority</th>
<th>Threshold</th>
<th>Procuring Method</th>
</tr>
</thead>
<tbody>
<tr>
<td>Procurement officer</td>
<td>Items of less than Kshs.10,000 (approx. $128)</td>
<td>Cash purchase</td>
</tr>
<tr>
<td></td>
<td>Goods whose value not exceeding Kshs.200,000</td>
<td></td>
</tr>
<tr>
<td>At least three responsible officers</td>
<td>Goods whose value exceeds Kshs.10,000 but less than Kshs.200,000 (approx. $2,546)</td>
<td>Competitive quotations</td>
</tr>
<tr>
<td>Tender committee</td>
<td>Goods and services valued at over Kshs. 200,000 and less than Kshs. 2,000,000 (approx. $64,000)</td>
<td>Request for proposals</td>
</tr>
<tr>
<td></td>
<td>Goods and services exceeding Kshs.2,000,000</td>
<td>Open tenders</td>
</tr>
<tr>
<td></td>
<td>Goods and services not exceeding Kshs.10,000,000</td>
<td>Restricted tendering</td>
</tr>
</tbody>
</table>


These thresholds have been reviewed from time to time to adjust with the prevailing market conditions but the policy of competitive procurement has remained unchanged.

When we examine the monitoring and decision-making requirement, stronger controls seem to be in place. But according to information from the audit staff of the Directorate of Public Procurement, there are indications that controls are undermined by poor information coming from procuring departments mainly arising from poor planning. Generally, departments are required to prepare procurement plans in accordance with the financial resources available. But due to budgetary crisis, funding from the state budget is extremely unsystematic. Given this condition, procuring entities are unable to make accurate assessment of what to procure, as they do not know in real terms what amount will be allocated to them from the budget. For this reason procurement officers lack interest in planning as they do not see the value of making this effort. Without procurement plans, greater discretion is left to the
public officials. But there is little follow-up carried out to determine whether competent officers are involved in the activities and whether private interests, especially influenced by the relationships between suppliers and procuring officers, infringe on proper decisions.

In sum, procurement reforms in Kenya have taken important initiatives to make the procurement systems more efficient by increasing the capacity to plan, manage and monitor the procurement process. By codifying the procurement law and establishing appropriate procurement institutions and entities, the procurement framework has made lines of responsibilities and decision-making structures clearer. In addition, the reforms have created an administrative system of investigating and correcting violations of regulations. Generally, the effectiveness of these systems depend upon a comprehensive prescription of the procurement process including clear description of bidding process, contract terms and selection criteria.

Award Regulations

The procurement regulation provides for clear, standardised tender documents, bidding and tender documents that contain complete information and equal opportunities for all in the bidding process. To this end, Regulation 24 stipulates that tender documents for open and selective tendering must contain certain minimum information. This basic information include procurement agency’s address; the language to be used in the tenders; the date for submission of tenders; the period for which tenders remain valid; the award criteria and cost elements of the tender prices; the currency and conditions of payment. Finally, the regulation states that a comprehensive specification of the products or services to be supplied or of the work to be done, or a detailed schedule of work should be given.

Regulations also require that the subject matter of public procurement have to be described by objective technical and qualitative characteristics. There is a general ban on describing the subject matter and conditions of procurement in a way that could hinder fair competition (Regulation 14). Moreover, technical specifications cannot identify brand names, patents or origins, unless due to technical, economic or organisational reasons it is necessary to maintain norms, parameters or standards.
characterising the machines and equipment currently in possession of the procuring entity while such procuring entity allows equivalent tenders.

Subject to observance of the requirement of non-discrimination and of the principle of reasonableness, procurement agencies are also required to ensure that contracts are awarded only to suppliers who meet the financial, economic, and technical performance criteria. For this purpose procurement agencies may demand and peruse numerous documents. Typically, these would relate to the number of employees and their professional qualifications; certificates of the existence of a recognised quality-management system (particularly for technical contracts); financial capability; and proof of the payment of taxes and social-security contributions (Regulation 13).

The procurement agency may establish an evaluation system by which it assesses the suitability of suppliers and tenders. The evaluation system for suitability of suppliers must be stated in the pre-qualification document or other documents for solicitation of proposals. Suppliers may be struck off the register if they no longer meet the qualification criteria; have given false information; failed to pay taxes and/or social-security contributions. As a rule, suppliers involved in bankruptcy proceedings will in any case no longer meet the economic qualification criteria.

In no case may registers give rise to circumstances that make it possible to prevent or restrict effective competition among suppliers, or that allow discrimination between local and foreign suppliers. Apart from the registers, therefore, and in particular in selective procedures, applications to be invited to tender must also be included from interested suppliers whose names are not yet in the register (Regulation 30). But inclusion in the register of a new supplier is in many cases likely to cause delay because of the period for appeal in connection with inclusion. A supplier not accepted for inclusion in the register may therefore be excluded from participating in a tender if the delay in procurement is excessive or unreasonable. However, in the event of exclusion because of undue delay, the procurement agency may expose itself to the charge that it has failed to put the procurement procedure in hand early enough.

In order to assess whether contracts have been awarded to the most advantageous bid, tender documents must state the award criteria in their order of importance. These criteria may include: date of delivery or completion, quality, price,
economy, operating costs, after-sale service, suitability for use of products or services, aesthetic appearance, environmental impact, and technical worth.

**Advertisement of Invitation to Bid**

Regulation 22 requires that invitation to tender for goods and services, the value of which is in excess of a certain threshold must be advertised in at least three daily newspapers of nation-wide circulation. In case of international tenders, advertisements must also be placed in international media. In this case, candidates must be allowed sufficient time for preparation and submission of tenders. The regulation does not, however, stipulate the period the advertisement should go on. The advertisement must give information concerning the type of work, conditions of contract, form and place for presenting bids, etc.

Generally, calls for tenders are published in the local daily newspapers (*Kenya Times*, *East African Standard* and *Nation*) to reach prospective bidders nationally. For works financed internationally, a lot of information can be obtained from the publications of the bodies providing the financial backing (such as *Development Business* published by the World Bank). The procurement entities are then required to release tender documents containing sufficient information to enable bidders to submit comprehensive proposals that will satisfy the requirements of the bid. Any request for interpretation or clarification of the bidding documents must be made in writing to the Tender Committee at least 15 days prior to the deadline for presenting bids. The Committee must answer such requests at least ten days prior to the deadline for presenting bids. However, a common complaints to the Procurement Appeals Board indicate that procurement entities seldom provide the necessary data and information or provide deficient or semi-finished documentation, which prevents bidders from preparing proper bids (Odhiambo and Kamau, 2003).

A Tender Committee is allowed to fix the period in which bids will be received, from a minimum of 28 days after the last advertisement in case of domestic tenders and a minimum of 42 days in case of international tenders. The Committee can, however, extend the deadline for receiving bids by publicly advertising to that effect. Such extensions are not uncommon, and are used in order to receive more bids, or to allow bidders more time to prepare their bids.
Bid Opening

Regulations 28 - 33 stipulate the way tenders are to be submitted, received and opened. Confidentiality in tender submission is emphasised in order to improve integrity of the procurement process. In this connection, the regulations provide that tenders should be submitted in sealed envelopes and placed in the invitation tender boxes. These boxes are required to have two locks whose keys should be kept by different officers and duplicates kept in a safe by the Accounting Officer or a person authorised by him. There are also clear instructions specifying steps to be taken in case tenders received by post are opened by mistake.

To prevent tampering or perception of interference, the regulations require tender document to be opened not later than two hours after the deadline for the submission. At least three representatives of the procurement agency must jointly open the tenders at the specified time and place, in the presence of tenderers or their authorised representatives, and keep minutes of the proceedings. Apart from these formal requirements the Public Procurement Regulations do not expressly requires tenders to be opened in public, but it is in the spirit of these provisions to do so, or else the information that must be supplied about the time and place of opening tenders becomes pointless. The public opening of tenders would meet the requirement of transparency in public adjudication procedures and also be in line with the provision of the UNICTRAL Model Law, 1995 (UN, 2000). Written minutes must be kept of the opening of tenders and must at least state the names of those present, the names of the tenderers, the date of submission, the total price of each tender, and any proposals they may contain of variations to the specifications.

At this juncture, tenders are reviewed and checked for completeness in accordance with the tender, award, and contract documents. As a matter of principle, the procuring entity may ask tenderers for clarification of their tenders as may be deemed necessary in order to assist in the examination and evaluation and may also adjust them technically and mathematically to make them objectively comparable. The procuring entity may deal summarily with mathematical review and adjustment of tenders. The mathematical review and any adjustment on tender documents that might follow in order to permit of objective comparison, must not in any way involve
any material alteration, nor may material formal errors be corrected or the tender completed in the course of such adjustments (Regulation 30). Incidentally, the regulations do not include any formal written requirements as to the adjustment procedure, an activity that would, in practice, further enhance transparency in the process.

Evaluation of Bids and Award

Regulation 30 lays down the basic elements on how a tender should be examined and evaluated. Where possible a tender should be evaluated for technical qualifications, followed by the commercial evaluation. A technical committee is responsible for drafting the technical report analysing and advising on the rating of the offer in relation to the given specifications. In order to aid the Tender Committee in making the award, the technical committee ranks the bids on merit points and indicates which bid it considers to be the best. This is merely a recommendation however, as the Tender Committee must make the final decision concerning award. There is no time limit within which the technical evaluation committee should submit the report, but tender committees are urged to indicate time within which this report should be submitted.

The Tender Committee may only consider the bids that adhere to the bidding documents and specifications. The award is to be made to the bidder who has presented the bid, which is in view of the Tender Committee most suitable in the interests of the agency and of the country. This may not necessarily be the lowest priced goods available, or the absolutely best quality available, but the best combination to meet the particular needs. 'Price' should be considered as the 'evaluated price' - meaning that additional factors such as operating costs, availability of spares, servicing facilities are taken into account (Pope, 2000: 206). The discretionary procedure makes it easier to properly assess and evaluate the merits and demerits of bidders. However, the criteria for selecting the most advantageous tender leave wide discretionary powers of interpretation. Because of their subjectivity, they give rise to potential irregularities, whether involuntary or deliberately fraudulent in decision making.
The establishment of fixed criteria such as awarding on the basis of the lowest bidder could be more objective and might alleviate suspicions resulting from discretionary selection. But in reality, the application of one system or the other may not be the choice of the procuring entity, but rather determined by special circumstances of each contract. Application of fixed criteria may be possible for contracts the object of which is perfectly defined and the procuring entity can describe the project to minute details, giving no room for bidders to introduce any variance. On the other hand, the procuring entity may, due to the complexity of the project, require technical assistance from bidders in designing the project.

Conditions may demand cancellation and repeating the tendering and adjudication procedures. These are when no tender meets the criteria and technical requirements specified in the invitation to tender and the tender documents, or when more advantageous offers can be expected because technical conditions have changed or competitive distortions of the market have been removed. In this case, the Committee is required to declare the original invitation to bids void, and reopen the bidding process and receive new bids, including new bids from the original bidders (Regulation 15). If no suitable bids are received at the end of this period, the bidding process is closed; however, the agency can call for a new invitation to bid. This practice may be open to objection if the proceedings are not conducted transparently in public. Moreover, there is no guarantee that information about competitive tenders, which will already be known to the tender officials, will not be transmitted to subsequent favourable tenderers.

When an award is made, the Committee informs the bidders in writing, and the bid bonds are returned to the unsuccessful bidders (Regulation 33). The successful bidder must maintain his bid bond in effect until signature of a contract; failure to sign the contract will result in the agency collecting automatically the amount of the bid bond. It is not clear whether a notice should be published after the award of a contract showing the name of the successful tenderer, the price of the successful tender, the highest and lowest tenders and the adjudication procedure. Such information would enable a dissatisfied tenderer to appeal against the award.

After adjudication, the procurement agency may award a contract split into several part contracts or award it as a whole for joint execution by two or more tenderers, provided that it has indicated this intention in the invitation to tender or the
tender. But a tenderer cannot be obliged to accept a part contract or to co-operate with others unless, in addition to a complete tender, it has also submitted proposals for variations to the specifications.

Not earlier than 21 days after adjudication the procurement agency must notify the successful tenderer that its tender has been accepted and simultaneously notify unsuccessful tenderers (Regulation 33). The successful tenderer must in any case be informed of the decision by direct notification. At the request of an unsuccessful tenderer, the procurement agency must provide the information, namely an explanation of the procurement practices and procedures; the name of the successful tenderer; the value of the successful tender, or the highest and lowest offers taken into account in the award of the contract; the principal reasons why the unsuccessful tender has been rejected; and the decisive characteristics and relative advantages of the accepted tender. The unsuccessful tenderer if dissatisfied has basic right to appeal against the award of the contract. Although the notification to award the contract is based on the Public Procurement Regulations, as a rule the contract subsequently signed is deemed a contractual relationship under private law. The requirement that the contract must be in writing may be waived if the products are procured directly, but in all other cases of procurement under must be in writing.

In principle the contract may be signed immediately it is awarded, but in practice, it is delayed until the period for an appeal has expired. An appeal against the award must be lodged within twenty-one days from notification date (Regulation 42). If granted, this makes it impossible to sign the contract until appellate proceedings are concluded.

If because of a divergence of views a written contract cannot be agreed in contract negotiations between the procurement agency and the contractor, the adjudication procedure would have to be cancelled. The question would then arise whether, on the grounds of urgency, an award by limited tendering would be permissible. The risk inherent in such a procedure is that a procurement agency might intentionally allow contract negotiations to fail in order to award the contract to another tenderer. The stage of contract negotiations in any case makes high demands upon the procurement agency, if it is to avoid the suspicion of discrimination and unfair treatment.
Accountability in Procurement

As discussed above, contract award regulations provide a comprehensive description of broadly uniform standards and specifications applicable for all organisations that aim to promote transparency. To enhance accountability in the procurement systems, regulations require that procedure be systematic and dependable, by maintaining a sound recording system that explains and justifies all decisions and actions taken. Generally, a good system of record keeping can facilitate monitoring compliance with these standards or deficiencies thereof.

Record of Procurement Proceedings

In order to ensure transparency in the procurement process and to enhance performance of auditing, the regulation places an obligation with the procuring entities to archive the documentation and files generated in the process of conducting procurement proceedings. Such records must be maintained for a period of six years from the conclusion of procurement proceeding and are available upon request, to candidates who participated in the proceedings but not accessible to the general public (Regulation 10). As regards the quality of information, the regulations requires only minimum information such as minutes of evaluation bids, recommendations and decision of procuring committees. Under certain circumstances, information may not be disclosed. These are instances when it would be believed that the disclosure would be contrary to law, impede law enforcement, not in the public interest, prejudicial to legitimate commercial interests or inhibit fair competition of the parties. Similarly, information relating to the examination and evaluation of tenders, proposals or quotations and the actual content of tenders, proposals or quotations other than summary of evaluation is restricted.

That the public has no access to information regarding procurement proceeding should raise concerns about transparency. The principles of transparency would require the state, not only to make such proceedings available, but also to actively publish and disseminate them. Another way to improve transparency would be to require procuring entities to clarify promptly in written form any issues raised by potential suppliers and contractors during pre-qualification stage in addition to
publishing all contract awards and notifying successful and unsuccessful bidders about the outcome of contract award decisions.

Dispute settlement

In general, Kenyan law provides for two types of legal proceedings depending on whether the dispute arises during the bidding process or award of a contract, or during the execution of a contract.

Within the scope of the Public Procurement Regulations, specific provisions for appeal by the party that considers itself unfairly treated by the procuring entity exist. Aggrieved bidders may appeal to an administrative review board called Public Procurement Complaints, Review and Appeals Board and the decision of the Board shall be final, unless a judicial review is requested (Regulation 42). A request for administrative review should be submitted to the Public Procurement Directorate who, unless otherwise decides, should convene a meeting of the Board within 21 days and inform interested parties including the procuring entity. The Appeals Board is obliged to deliver a decision within thirty days from the date it was notified.

The Public Procurement Regulations contain no provision for the reconsideration of an award, which, according to Kenyan law, is a final administrative act and cannot be rescinded. Once an award has been made, however, the bidder's ability to complain to the Bidding Committee is severely restricted (Regulation 40).

Failing to get any relief from the Appeals Board, the bidder is entitled to challenge the award through a judicial review within thirty days. A distinction must be made between legal disputes and technical ones. Technical disputes that arise during the execution of a contract are resolved by arbitration as is usually set forth in the contract. This is a legal procedure of administrative decisions. Operating within a separate court system established to review final administrative acts, arbitrators theoretically have the power to annul a final act, such as an award of a contract, where the administrative body has omitted or failed to fulfil the formalities required by law. The parties can mutually identify an arbitrator but when they fail to concur, the Chairman of the Chartered Institute of Arbitrators, Kenya Branch shall appoint one (Republic of Kenya, 2000b). Disputes of a legal nature are resolved by normal civil court proceeding, without prejudice to the employment of summary proceeding
against the contractor. Only legal deficiencies, as opposed to factual or technical disputes, may be raised in such proceedings.

A number of important questions that may arise regarding the issues of remedies are not addressed in the regulations. One is how to compensate for damages arising out of an act of corruption by procurement officials. For example, to an unsuccessful competitor who spends money on preparing an offer but who was not awarded the contract because the official who made the decision was corrupt. In case bribery occurs through a middleman/agent, who will be the person actually passing over the bribe from a business commission, who would be liable? Another important question is the problem of the contract, which was obtained through corruption. Is the main contract null and void or is it at the discretion of the government to void the contract? Another related issue is the relationship between corruption and the question of unfair competition. Could corruption be considered to be a kind of unfair competition and can law against unfair marketing practices be applied?

These are, however, not the only problems that essentially bedevil Kenya's procurement system. While official regulations and procedures may be basically sound, their application and enforcement may, in practice, be entirely different. Although it is difficult to craft regulations that cover all the loopholes, corruption and a variety of other factors can undermine an otherwise seemingly adequate systems as the discussion that follow will illustrate.

**Procurement Procedure and Practice**

**Procurement Methods**

Procurement regulation emphases the use of open tendering as the primary procedure for conducting public procurements so as to conform to procurement fairness and enhance transparency. In principle the procurement agency is free to decide on the basis of a contract's complexity whether to award a contract by open tender or use other methods such as restricted tendering, direct procurement, or request for proposals and quotations. But open tendering system is the key and broadly accepted principal underlying a modern procurement system (Republic of Kenya, 2000b). The legislation defines the circumstances under which these methods may be used and described the procedures to be applied. It also describes in detail the
steps involved in open tendering - preparation of invitations to tender and tender documents, advertisements, submission and opening of tenders, examination and evaluation of tenders, award and conclusion of contract.

In open public tendering, any interested supplier may submit a tender. Because the notice and tender documents invite tenders from all suppliers, this procedure can produce a large number of tenders. For the procurement agency, therefore, open tendering may involve a certain amount of expense. On the other hand, it is the best means of enforcing the law’s requirements of transparent procedures, promoting competition, and ensuring equal opportunities for all suppliers. After perusal and evaluation of the tenders the award, if any, is made in accordance with the criteria relevant for decision, followed by signature of the contract.

When procurement for readily available goods and services or for which there is an established market is below a certain threshold (currently Kshs.200,000, approx. US$2,564), procuring entities are allowed to use the 'request for quotations' method. This requires procurement officers to invite competitive quotations from at least three reputable suppliers using official forms and to have these quotations adjudicated by three responsible officers. In this procuring method, award is made on the basis of the lowest price.

Restricted tendering is another procurement method available for large and complex contracts as well as minor contracts. In the former case, the method is justified in view of the cost involved in preparing tenders for complex and specialised goods, works and services and the desirability of avoiding tenders from unqualified candidates. Building and construction contracts, for example, are often let through restricted tendering among candidates selected after pre-qualification. In the latter case, restricted tendering is justified by the disproportion between the value of the contract and administrative cost of organising an open tendering procedure.

In the restricted tendering method, procurement regulations require that invitation to tender be addressed in a non-discriminatory manner to not less than three pre-qualified candidates from the list maintained by procurement entities. Such a list must be kept under constant review, since the status and financial position of candidates on the list may change rapidly over time. All procurements under this method must be reported to the Public Procurement Directorate. But it is questionable
whether efficient competition is guaranteed when there are only three tenderers. Nor can the fact be overlooked that the procurement agency has considerable powers of discretion. Suppliers not invited to tender may appeal against their exclusion.

Direct or negotiated procurement is governed by regulation 19, which provides that a procurement agency may contact suppliers individually and award contracts to them without open or restricted tendering procedure. Since by definition it is a non-competitive method, it is largely discouraged and substantial reason for and justification of direct tendering is always expected. This method is allowed in exceptional situations such as those that arise in relation to catastrophes and goods, works or services are urgently required on the basis of emergency. This method of procuring from a single source can also be resorted to for technical reasons where it is established that only one supplier can meet the requirements. It may also be used for minor add-ons to existing contracts if, for unseen reasons, minor amplification or modification of the works is required.

The 'request for proposals' method is designed particularly for consulting services or other services for which it is not feasible for the procurement entity to formulate precise or final specifications. Such situations may arise in two types of cases. The first is when the procuring entity has not determined the exact manner in which to meet a particular need and therefore seeks proposals as to various possible solutions (e.g. it has not decided upon the type of design to be used for building a bridge). The second case is the procurement of high technology items such as sophisticated information technology equipment and services. In the latter case, it might be considered undesirable, from the standpoint of obtaining the best value for the procuring entity to proceed until it has had the opportunity to discuss with candidates and contractors as to the exact capabilities and possible variation of what is being offered.

It is worth noting that the other methods that do not rely on competitive procedures have, in many times, been avenues for abuse. Public contracting authorities may engage in corrupt procurement acts by claiming urgency, for instance, and undertaking negotiations instead of open tendering. However, not all direct negotiations contract are corrupt; under conditions of grounded circumstances, they may represent the most appropriate course of action.
In general, the public sector procurement framework in Kenya today is relatively comprehensive in comparison with the previously fragmented rules and guidelines. However, despite this fairly reasonable procurement structure that promotes transparency and clearly delegates responsibilities, irregularities and inconsistencies in the application of the rules governing procurement are evident.

The main risk that was identified was lack of transparency, accountability, and impartiality due excessive discretionary authority in the management of fiscal resources. This resulted in improper award of contracts and the authorisation of undeserving projects. In reviewing audit reports, a number of red flags were found indicating a pervasive pattern of malpractice in the procurement of goods and services. This was found in almost every phase of procurement: the decision to purchase; the selection of participants in tendering; the awarding of the contract; execution of the contracts; and the final payment. This is discussed in the following sections.

**Structural issues - Gaps in the System**

In practice, it is not possible to foresee all the contingencies because of complexity in public procurement or changing environment. This poses difficulties in prescribing and specifying tightly what ought to or ought not to be done sufficiently to cover every loophole for corruption. In many respects, this might require constant review and expansion of rules as unpredicted behaviours are continuously discovered. But constant expansion and elaboration of such rules to prevent abuse cannot go on indefinitely, since to do so would seriously impair the initiatives of agents or even increase opportunities for corruption. As such, some degree of discretion must therefore be left to the agents or those making procurement decisions. This very discretion, however, is what allows them to behave in ways other than those that promote the interests of the principal.

Proceeding analysis precisely shows this. It reveals how procurement officials and government contractors, motivated by corruption, exploit the weakness of the system though remaining legitimately within the rules. The analysis also reveals practices that disregard and deviate from procurement rules, often causing considerable distortions.
Issues in Contract Administration

Successive supplies management inspection reports of various procuring entities revealed a general deficiency in the quality and quantity of the staff in the supply units. Staffs available to carry out normal procurement tasks in many offices were usually junior non-specialist officers due to lack of qualified people with relevant knowledge. It was therefore, common for such officers to be unfamiliar with accurate sources of professional and technical guidelines in procurement such as Supplies Manuals and Treasury Circulars. In some cases the set-up of supplies organisation was poorly constituted in that there were no clear distribution of duties and in many instances boundaries of authority were not well defined making it possible for any officer to authorise a procurement transaction. Indeed, various administrators and external auditors interviewed during this study cited this as the main problem in procurement.

As a result, comments of poor record management were almost always observed in any inspection report. The reports noted, for instance, that stock control system was not being put in practice. While the procedures required that stores ledgers, stock control cards and other records are maintained, and in deed some stations maintained them, there was no consistent practice of recording all items received or issued out. Despite this lack of proper recording, Authority to Incur Expenditure (AIE) holders always sanctioned payments. Poor accountability gave rise to some dubious transactions and susceptibility to pilferage and misuse by the personnel entrusted with procurement.

Irregularities were also observed in the administration of contracts particularly in the processing and monitoring of contract variations, ineffective and inconsistent site inspections and the absence of systems to evaluate contractor's performance. Though these problems might largely be attributed to the lack of appropriate skills and incompetence in government personnel, poor or non-existent internal control systems, cases of deliberate actions to frustrate verification and conceal fraud could not be ruled out.

In contract variations, for example, the regulation sets out the limited conditions in which tenders could be varied before a contract was awarded. The
regulation also required the circumstance for such a variation to be recorded along with the name of the officer handling the matter. However, there was less guidance in respect of treatment of variations after a contract had been awarded. As a result, contract variations could be a major source of additional expense and disputation between procuring entities and contractors. They were also a major corruption risk as, without appropriate controls in place, opportunities could arise for misuse of public funds through false, misleading or excessive claims for variations.

Generally, there were two types of variations. There were those that represented a change in the scope of the original contract works, such as altered designs, extended construction works or extended service requirements and then there were those that resulted from difficulties encountered in fulfilling the original specifications of the contract, or latent conditions. In many contracts, a contractor would encounter conditions that were not ascertainable at the time of tendering which would prevent work being carried out to specification. Examples of such conditions might be overlooking of underground services or geological conditions being different to what was envisaged. If such conditions were encountered, this required the original specifications to be changed and an increase in contractor cost that included cost of delay.

Weaknesses in contract administration could enhance a contractor's opportunity to exaggerate additional costs incurred in the field. Inadequate control of variations often represented considerable costs particularly in road construction. In a recent complaint to both the Head of Public Service and the Minister for Public Works, the Association of Consulting Engineers of Kenya revealed wide disparity in costing of different city road projects (Opala, 1999). In their complaints, the engineers cited recent local examples. For example, the World Bank funded city centre road cost Kshs.69.6 million a kilometre while Industrial Area works were prices at Kshs.57.8 million a kilometre. Massive differences emerged while these figures were compared to works funded by Kenya Fuel Levy such as Kilimani/Kibera road repairs, which cost Kshs.9.9 million a kilometre. Although it might be argued that there is an essential difference between the cost of road construction and road repairs, a substantial disparity was still observed in comparison with neighbouring countries. According to road construction experts interviewed, a kilometre of Kenya road cost two times or three times more than that in Tanzania or Uganda. Since
procuring entities did not clearly record how they authorised variation or the nature and scope of contract variations once approved, this impacted on the level of transparency and accountability in this area.

In discussion with procurement officers, there was some disagreement about the value of undertaking investigations to reduce the potential occurrence of latent conditions. Some officers argued that the additional cost of investigation to reduce latent conditions could be more expensive than the variation generated when a latent condition would be discovered. Others argued that the risk of encountering latent conditions far outweighs the expense involved in making sure all design work and specifications were correct before proceeding to tender.

Variation was also used as a means of circumventing the tendering policy and procedures. For example, a contract amount could fall below the monetary limit where a tender selection process was required, but subsequent variations could increase the contract amount to above the monetary threshold for public tendering. There were also situations where variations were so substantial that this would constitute a new contract. While it was difficult to determine precisely when this point was reached, a perception could be created that a procuring entity actually avoided the compulsory tendering provisions.

With respect to site inspections, there were vast differences in site inspection procedures and practices. According to audit inspection reports, some procuring entities did not have formal site inspection policies that outlined the documentary procedures to be followed when conducting a site inspection. For instance, while many site inspectors maintain a diary, some procuring entities did not formally require their inspectors to do so. Some procuring entities gave the discretion to site inspectors' to determine what to record in a diary entry. Similarly, decisions about when it was appropriate to keep minutes of meetings were often left to the discretion of the site inspectors.

Audit inspection reports stated further that some procuring entities reportedly argued that maximum discretion should be given to contract administrators or site inspectors when determining the frequency of inspections and level of documentation required. The basis of the argument was that these public officials were best placed to
assess a contractor's standard of performance and to determine the required level of supervision.

Site inspections are important for services and construction contracts to ensure that procuring entities minimise the risk of contractors performing substandard work, which can represent a considerable cost. Some procuring entities did have in place systems for monitoring and reviewing contractor performance. For example, Public Works required quarterly performance reports for all of its contracts (Republic of Kenya, 2000b). Performance reports were also required for each contract at the date of practical completion, whenever performance became unsatisfactory, at the time of the issue of the final payment certificate, and at the termination of a contract. All aspects of an unsatisfactory performance report are discussed with a contractor at a formal site meeting before a report is submitted to the recommending officer. The contractor is also given a right of reply. Any contractor who receives an unsatisfactory performance report is required by Public Works to outline the measures it will take to overcome the problems identified. A recommendation not to do further business with a contractor can also be made. This recommendation can be subject to appeal by an independent panel.

However, this was, in practice, not enforced as illustrated by the following example. According to Opala (2000), a 58-kilometre road in western Kenya gave in to potholes barely two years since the contractor handed it over to the government. He quoted available official documents, which showed that financiers, government officials, consulting engineers and the contractor certified the work as satisfactory despite the apparent poor workmanship. Consequently, a rehabilitation work cost the government a further Kshs.1 billion (approx. US$12.7 million).

The failure to manage, review and assess the performance of contractors could be a major risk area for procurement. Although it might be quite demanding for supervising engineers to record problems experienced with contractors throughout the life of a contract, there are probably some stages in a project where site inspections are critical. For example, peak service delivery stages for service contracts and for construction contracts, progress points where it would be difficult to check an aspect of work once the project proceeds, such as prior to a major concrete pour. If systems are not in place to record poor contractor performance, problems experienced with contractors might go unchecked and be perpetuated if future contracts are awarded to
the same contractors. It may also be difficult for a procuring entity to exclude a contractor from future work based on previous poor performance if no documentary proof exists.

The Problem of Collusion

Collusion to thwart the competitive bidding process was a widespread problem in the procurement of goods, works and services. In the context of public procurement, collusion usually involved arrangements between public officials and prospective suppliers. Public agents receive payments from suppliers in exchange for using their discretion to make sure the preferred supplier obtained the contract or received higher price. Sometimes, fraudulent actions were confined to one side of the procurement transaction as when suppliers agreed among themselves to 'rig' before submitting their bids or when public officials misappropriated public property.

A common practice was through manipulation of competitive quotations for the purchase of goods and services for the amounts between Kshs.10,000 and 200,000/- (approx. US$128 and 2,564). Though the requirement of competitive quotations aimed to ensure that the government obtained a fair price, it was easily circumvented resulting in highly exaggerated prices. In some cases, procurement officers 'hawked' quotations in search of firm potentially offering bigger bribes. After striking a deal, preferred suppliers were allowed to put in names of more than one company to give the impression that there was competitive bidding. Evidence of collusion was however unmistakable. In some cases, similarities of handwriting, rubber stamps, ink or writing styles invariably showed that one vendor had filled all quotations. Thus, requiring three written quotes was not, in itself, a guarantee of ethical procurement outcomes. This is also illustrated by the following answer from a former procurement officer in interview for this research on why he arranged for contractors to submit dummy quotations:

Well, our policy asks for three written quotes if it is over Kshs.200,000/- (approx. US$2,564) so therefore if you quoted for example Kshs.150,000 (approx. US$1,923) and it was a fair price I would need another two quotes. If contractors didn't go out and quote, which happened on numerous occasions, you couldn't get them to go out or they just wouldn't go out, I asked them to do that so that we could get the works done.
He explained that he had arranged for many contractors to submit dummy quotes to ensure that a contractor apart from the one submitting the quotation would obtain the relevant work. He also agreed that he had arranged for particular contractors, or companies with which they were associated, to submit all three quotations. The purpose in doing so was to ensure that they would obtain the work and to *prima facie*, meet the policy and procedural requirements and so suspicions would not be raised.

Collusive arrangement among potentially competitive firms was also used to beat competition in open tendering, especially in the construction sector. A government contractor interviewed for this study explained how this was perpetrated. A government organisation would invite contractors to put in bids for a large infrastructure project. A powerful individual acting as a middleman would then enter into a deal with an influential contractor, promising him to deliver the project. They would negotiate fat kickbacks and commissions. To ensure that no other contractors outbid the preferred contractor, the middleman would invite all the big names in the construction industry and intimidate them into putting in bids that were higher than of the preferred contractor, thereby allowing the preferred contractor to emerge the winner. The rest of the contractors would then be promised other jobs. Thus, the whole thing would be arranged in a manner that any auditor looking at the bids would be duped into believing that there was competitive bidding in the project. Few weeks later and even before the work begins, the powerful individual would demand advance payments from the contractor. In the event that the organisation and particularly a parastatal claimed that it has no monies, the powerful individual would cause state-owned commercial banks to extend overdraft facilities to the parastatal so that he could be paid his commissions. Majority of road projects and large infrastructure projects were allegedly given out in this manner.

Sometimes, collusive schemes did not involve public officials, according to this informant. Suppliers formed sort of cartels and worked together in bid rigging schemes. Instead of reaching their bids independently, they would meet and essentially agree in advance who would submit the winning bid on a contract and how the benefits from the collusive efforts would be shared. Bid rigging took a variety of forms. One of the methods is what is referred to as 'bid suppression'. In this scheme, one or more of the competitors who would otherwise be expected to bid, or who had
previously bid, would agree to refrain from bidding or withdraw a previously submitted bid, so that the designated winning competitor's bid would be accepted.

In another scheme, competitors would agree to submit bids that were either too high to be accepted or contained special terms that would not be accepted by the procuring entity. Such bids were not intended to secure acceptance, but merely to give the appearance of genuine competitive bidding. This scheme was reportedly the most frequent as competitors were able to minimize suspicion. In the bid rigging schemes, competitors rotated and took turns to submit low bids.

Subcontracting arrangements were often part of bid-rigging schemes. Competitors who agreed not to bid or to submit a losing bid frequently received subcontracts or supply contracts in exchange from the successful bidder. In some schemes, a financially weak low bidder would agree to withdraw in favour of the next low bidder in exchange for a lucrative subcontract.

Another area where a great deal of cases of abuse took place was in the variations of contracts as this informant further explained. Powerful individuals would allegedly intimidate tender boards into varying prices of projects to allow them to continue earning commissions. The problem was rampant in the road sector, where powerful and politically well-connected contractors had been allowed to vary prices almost at will. In one prominent case reported in the media (Daily Nation, December 12, 2002), a contractor had sought to vary the contract price for the Sotik-Amala road in Western Kenya by a massive Kshs.790 million (approx. US$7.9 million). In another case from the same source, the Ministry of Public Works approved a variation of Kshs.205 million (approx. US$2.6 million), which prompted the Treasury to direct the Ministry to seek the Treasury's prior approvals in future before any contract alteration. A trick they often use is to agree to undertake the projects on the basis of old and cheap contract prices, knowing very well that they would use influence to vary the prices.

Monetary thresholds requirement was also open to abuse in the form of order splitting. This was a common practice cited in the inspection reports in which officers split orders to bring them within the desired ceiling and avoid having to go through the Central Tender Board. While this might as well have been a result of poor
planning, in most circumstances, this generally appeared to have been motivated by improper purposes calculated to circumvent the system.

Another way of manipulating the procurement process was to issue tender notices which were vaguely worded in that items required were not described adequately to enable the tenderer to submit their application without further enquiries to the advertiser. In other cases, the item would be described in such a manner that the specifications fitted only one particular brand, thus limiting the source of that particular brand. In one project for the construction of a bridge, tender documents specified that the steel Panel Bridge had to be Janson model (Opala, 2002). This restriction effectively excluded all other bridge manufactures and gave Janson of Holland monopoly to the project.

All procuring entities have a need to invoke emergency procurement procedures at some time, for example due to a disruption to an essential service, sudden disaster or public safety risk. But the use of emergency procurement procedure became another area of potential abuse. Emergency procurement usually involved bypassing normal procedures, such as obtaining a number of quotations or raising a purchase order prior to ordering. In such cases, Tender Boards approved *ex post facto* such procurement. Motivated by corruption, emergency procurement methods were often used to avoid competitive bidding procedures. The culture of emergency became an excessively wide practice that the Treasury became concerned and issued strict conditions for emergency purchase (Treasury Circular No. 3/85). On a number of occasions, procurement entities were shown to have waited until the last moment to advertise tenders with the result that the government was forced to pay high prices for urgent supplies such as foodstuffs and medical supplies for lack of timely expenses. In some instances, competing bids in the form of pro-forma invoices were found to have been submitted by the same supplier under different letterheads. According to the supplies management inspection reports the prices on the winning bid would typically be anywhere from 50% to 300% higher than prevailing market prices for the same items.

In practice, emergency orders could accrue to form a substantial part of a procuring entity's procurement budget. Further, this research has observed that some procurement entities did not have procedures in place to either, clearly define under which genuine emergency situations direct purchases are allowable, or to ensure
consistency in determining what work needs to be done urgently. Consequently, there was a risk that emergency ordering procedures could be used as a way of deliberately circumventing the scrutiny of tender committees.

Excess of purchase of store items without taking into account the usage and storage environment into consideration was yet another irregularity that was observed. The aim was largely to earn maximum commissions as a result of bulk purchases. In one case, the supplies management inspection reports showed that bitumen emulsion worth Kshs.20,000,000/- (approx. US$256,910) was purchased from one supplier and collected by various district representatives direct from the supplier against signatures whose authenticity could not be confirmed. Yet, there was a lot of bitumen emulsion lying at the headquarters.

Glaring cases of misappropriation and mismanagement, according to the supplies management inspections, were observed in the Ministry of Public works. In one case, the Chief Engineer released bitumen valued Kshs.53,148,750 (approx. US$681,394) allegedly on loan to private construction company between 1987 and 1989. He further released another quantity valued at over Kshs.100,000,000 (approx. US$1.3 million) to the Nairobi City Commission. The loaned bitumen had not been replaced or paid for as of 1993 during inspection. This was in total disregard to established procedures.

In another case, yellow road marking paint worth Kshs.2,363,840/- (approx. US$30,306) was allegedly bought and supplied to various districts road markings. However, physical inspection on the road revealed that only a small quantity of very low quality paint was actually used on the road. This indicated that collusion among suppliers and officers resulted in the government paying huge sums of money for goods that were not supplied.

The few examples cited above, which are some of the most obvious cases of abuse of reported by supplies management inspectors and the C&AG, illustrate the extent and trend of malpractice in public procurement. Auditors interviewed stated that although the abuses were uncovered during the investigation not much effort has been made to prosecute the individuals involved or recover the stolen funds.
Delay in Payments

Quite often, suppliers complained that government Ministries and Departments were very slow in effecting payments for goods and services supplied. This practice was not only inconvenient to the suppliers, most of whom had to carry bank overdraft facilities to be able to purchase the goods they sell to the government, but also created temptations to bribe in order to have the payments processed quickly. According to audit reports, it was a common practice for officers to "sit" on suppliers' invoices until a bribe was paid and it was not unusual to see payments pending for months for some suppliers, as other suppliers and contractors jumped the queue and get paid in weeks. This created partiality in the selection of bills to clear. Informal discussions with various suppliers revealed that many were willing to pay to induce officials to increase their efforts and process their payments. Others said they were discouraged to participate in government tenders and quotations due to these interminable delays and in some cases, suppliers would not accept government Local Purchase Order. Although written instructions (form S10) stipulate that payments should be made within 30 days of supply of the invoice (Treasury Circular 2/75), this was often not the case.

Violation of Procurement Procedures

A great deal of evidence exists about a high level of sophistication of players in procurement corruption and a complex web of relationships between individuals and institutions, which has evolved over the years. This network includes local representatives of foreign companies and their politically well-connected lobbyists. This evidence became apparent in interview with contractors and journalists who had a high level of information about the mechanisms of corruption in the procurement. Some of the sources interviewed were quite well-informed about the subject as they had first-hand experience having acted as agents or employees of big procurement companies and in the past, cut deals with government officials. One of the informants has considerably researched on procurement corruption in Kenya and is part of the anti-corruption intelligence network, which enables him to keep close tabs on the activities both at the local and international level.
Anecdotal evidence shows that until late 1980s, many local businessmen did not have capacity to broker large multimillion contracts. Foreign companies did every large road projects. The entry of local brokers in the game changed things a great deal. According to informants, the locals have now managed to keep European brokers away and directly take commissions from European suppliers. Presently, there exist many middlemen, including ministers and powerful politicians, who are allegedly paid monthly retainers by major European suppliers of machinery and equipment for lobbying for the contracts on their behalf. It is these local groups which negotiate fat kickbacks, advance payments, and commissions. Some of these middlemen have over the years mastered the operations of the government to the extent that they are able to collude with officers at the Treasury to provide funds for projects they have themselves created with accounting officers in other government ministries and European suppliers.

Some of the lobbyists are so powerful that they are able to influence the appointments of ministers and permanent secretaries. They are the ones who determine which project gets government funding and which European supplier is paid first. When funding is not forthcoming for a project in which they expect huge kickbacks, they are often capable - in collaboration with their European principals - of arranging finances from European commercial banks and getting the government to guarantee the loans. These days, they tend to design agreements that allow large advance payments, so that large proportion of the agreed kickback is payable at an early stage before there is any risk of the project being terminated or scaled down as a result of pressure from the donor community. But what is known anecdotally seem to be substantially supported by reports of C&AG. Some few examples such as the $86 million Eldoret Airport, the $60 million Presidential Jet projects reported in the fiscal year 1994/95, the supply of security equipment reported in fiscal year 1991/92 and the second generation identity cards project reported in the fiscal year 1995/96 illustrate this.

According to the informants and audit reports, these projects were allegedly put together and sold to the government by a little-known local middleman whose identity was not revealed despite having been the promoter and local agent for international companies who have done billions worth of controversial contracts in this country. He is said to have informed the Treasury that he found an international
financier, by the name ICF International Ltd, who were willing to fund the projects. Using his powerful connection, the middleman got the Treasury to hurriedly sign a financial agreement without approval of Parliament. The middleman and the alleged financial were paid US$115,396 in arrangement fees, but eventually, no money was forthcoming, forcing the Treasury to pay for the project from the Consolidated Fund (Republic of Kenya, 1996). We now turn to these cases in more detail.

**Presidential Jet Project**

Between Sept. 1994 and Dec. 1995 Treasury made payments totalling $46.8 million to Fokker Aircraft B.V. of Netherlands an aircraft manufacturing firm, which has since gone under liquidation, for purchase of a jet aircraft. The purchase was made under Defence Tendering Procedures, (which is exempted from normal procurement scrutiny). At the time of the payment, there was no budgetary provision approved by Parliament for the expenditure under the Vote. The total amount was therefore charged on the Consolidated Fund in complete disregard of Sec. 99 and 100 of the Constitution, which requires that authority of Parliament be obtained before any public expenditure.

At the time the contract for the purchase of the aircraft was signed, Treasury had already sought and agreed with an external financier on the funding of the purchase of the aircraft and that a loan agreement had been signed between the Treasury and International Finance Co. with whom another agreement had also been made for financing the Eldoret Airport Project (discussed below). This explanation does not, however, explain or in any way justify the disregard of the constitutional provisions regarding financing of government expenditure. It is also not clear that a project of this magnitude and significance would be conceived, planned, negotiated and implemented without first making necessary budgetary provision and obtaining Parliamentary approval for the necessary funding.

For some unexplained reason, however, the financier withdrew from the deal but after the firm had been paid a commitment fee of $115,396 in respect of the financing of the aircraft. This commitment fee was only payable for securing the financing of the project but it has not been refunded or recovered from the company. Despite several reminders, the contract agreement for the purchase was not made
available either to the C&AG for audit or to the PAC. The broker who fronted the fraudulent deal declined to appear before the PAC and was not apparently called for questioning during police investigation.

**Construction of Eldoret International Airport**

In relation to the construction of the Eldoret International Airport, an expenditure of approximately Kenya Pounds 134 million (approx. US$34 million) was illegally charged directly on the Consolidated Fund again in contravention with the provisions of Sec. 99 and 100 of the Constitution. The estimated cost of construction was put at Kenya Pounds 225 million (approx. US$58 million) by a firm of Consulting Engineers appointed by the Office of the President which also requested the Treasury to identify a donor or a financier for the project. It was revealed that most of the relevant records for the project were not made available for audit review. However, available information indicated that the contract for the construction and for equipment of Eldoret International Airport was awarded to a foreign company on single-sourcing basis. It was also learnt that another foreign construction company was appointed sub-contractor with the contract being executed in October, 1994 and *ex-post facto* authority for single sourcing being sought and given to the Treasury in December, 1994.

As indicated the amount was paid on behalf of the Office of the President and illegally charged directly on the Consolidated Fund in complete disregard of the constitutional requirements. Apart from the unconstitutional and illegal act of charging the expenditure to the Consolidated Fund, documentary evidence such as contract agreement, completion certificates, invoices, payment vouchers etc., in support of the payments were then not seen.

The land identified for the construction of the airport did not belong to the Government but was owned by a private company. At the time the contract was awarded and the contractor given possession of the site, the issue of land acquisition by the government has not apparently been addressed and finalised. But surprisingly, the government had apparently proposed to the owners of the land and the offer to exchange it with the land and assets of the Bacon Factory at Limuru, which again was not wholly owned by the government.
The records subsequently made available for audit verification in respect of the project show that the Eldoret International Airport was designed as part of a much wider economic infrastructure Development of the Urban Centre. The agreement between the Government and the contractors, which was also made available, indicated that payments were to be made on time basis with down-payment of $23.2 million due on signing of the contract and not later than December, 1994. Other payments were to follow a time-schedule laid down in the agreement with the first payment falling due 120 days after the down-payment, and the second payment falling due 30 days thereafter. The contract did not, however, specify the level of the project completion to be achieved or work to have been covered before payments are made. Out of the amount illegally charged on the Consolidated Fund, approximately Kenya Pounds 86.35 million (approx. US$22 million) was subsequently included in the Office of the President Vote and repaid to the Consolidated Fund. This left a balance of approximately Kenya Pounds 48 million (approx. US$12 million) still reflected in the Consolidated Fund and still illegally and unconstitutionally charged on the Fund.

The agreement signed with a financing company for the financing of the Eldoret Airport Project required the borrower to pay a commitment fee of $314,537, which was paid in Nov. 1994. However, since the financier did not provide the contract services because the firm pulled out of the project before securing the financing of the project, the rationale for the firm's retention of the commitment fee has not been established.

With regard to the acquisition of the land on which the airport is built, available information to the auditors indicated that a private valuer valued the land for Kenya Pounds 15.8 million (approx. US$4 million) on behalf of the vendor. In contrast, the Department of Lands considered its valuation to be Kenya Pounds 8.6 million (approx. US$2.2 million). It is not clear why the private valuation was accepted rather than the government valuation.

Supply of Security Equipment

The Auditor's report for 1991/92 draws attention to payment of $4,842,500 and Sterling Pounds 3,173,150 to two overseas firms and another payment of
$403,963 to locally-based international company for the supply of security equipment for the Administration Police Training College. The goods were not delivered and several demands to these firms either to supply the equipment or to refund the money were ignored. Consequently, the matter was handed over to the police for investigations. Investigations revealed that one of the firms had not been incorporated at the time of delivery. Further, it was revealed that the firm operated in PVC products and ceased trading and was finally wound-up nine months after incorporation, thereby making it difficult to pursue the matter. After much negotiation between the procurement entity and remaining firms, partial delivery (consisting of substituted but incomplete radio telecommunication units) was made six years later.

Contract for Second Generation Identity Cards

The Auditor's report of 1995/96 financial year shows that in Nov. 1993, a foreign government parastatal organisation was informed of Kenya Government's interest in the firm's proposal to supply of Improved National Identity Card System comprising various elements. Subsequently, samples submitted by the foreign company were acceptable, and apparently a recommendation was made in 1994 for the award of a contract to produce the new generation identity cards. In March 1994 Treasury involvement in the project was also sought so that the necessary arrangements could be put in place for the financing of the project.

A draft contract between the foreign government parastatal firm and the Government of Kenya was prepared and the contract price quoted as $32,549,400 or Kenya Pounds 89,587,665 at the then ruling exchange rate. However, except for the letter from the Office of the President indicating government's interest in the proposal from the company, no other information was available to show how the government's decision to acquire the second-generation identity cards was arrived. It is also not clear how the foreign firm was identified and contracted for supply of the service.

According to the report, available information obtained indicated that during the financial year under review, Kp.46,187,598 (approx. US$17 million) was paid to the Financial Secretary as reimbursement for payment made to the company in foreign currency on behalf of the Office of the President for services in connection
with the second generation identity cards. However it is not possible to confirm whether the services for which, as indicated above, government had so far paid, were procured from the most economical source. The procurement was also undertaken without proper financial planning as evidenced by the fact the Treasury involvement to arrange for financing the project was only sought in March 1994 while the agreement to commission the company for the job had been entered into earlier than Nov. 1993. The audit report also noted that the agreed contract price was highly inflated.

There are indeed many other documented examples of contracts that have been awarded in total disregard for procurement procedures, mainly involving authorisation of projects outside the budget. Construction sector is especially vulnerable to such discretionary public spending. Many such projects involved substantial amounts of money and were undertaken without first ascertaining whether sufficient funds were available. This was normally the cause of stalled or abandoned projects leading to massive waste of public funds. It can be discerned from these cases that the industrial organisation of corruption depended not only on complicity of top-level public officials, but also on the organisation and power of private actors.

That high-level state officials were involved in corrupt arrangements can also be gleaned from the way they selected projects with little economic rationale or concern for their usefulness. The Office of the President was a major culprit with a completion rate of 3% between 1991 and 1997 (Centre for Governance and Development, 2001). Many of these project awards happened at the highest government levels, as one respondent explained:

Almost every big company in road and building constructions have connection with the big house (State House). It is either the President has a share fronted by Joshua Kulei (his personal assistant), his sons or the clique that is around him. Mention them - Mugoya, which gets most of the work is owned by Gideon (the President's son), and the President himself supports Haibajan Singh. He got all contracts to build Nyayo Wards. Even Kirinyaga Construction, Biwott and perhaps with some Israeli's own HZ Construction and LZ Engineering. These companies and some others as well do not bother with the tendering process. They just go to state house with a project and the Permanent Secretary or the head of parastatal is called and instructed to discuss the project with contractor. Obviously, he too will be taken care of by the contractor. That is how they get their work.

I remember a case of an Asian contractor who took his friend to see the President at his home in Kabarak as that friend had a problem and he had an
appointment. Both were Asians. They left Nairobi very early and were at Kabarak at 6.00 a.m. After discussing the problem each donated Ksh.200,000/-. Then the President asked this Asian contractor what his business was and when the President learnt that he was a building contractor, he paused for a while and then told him, "We really need more hostels in Kenyatta University. I will tell the Permanent Secretary Works to get you the job". Truly, the Asian got the job and built quite many houses. Now he has a problem with the payment of his Ksh.60,000,000/- (approx. US$11 million) bill. He is tossed between the Treasury, Ministry of Works and Ministry of Education. They say that the work was not budgeted for and therefore, there are no funds.

In other words, the existing procurement regulations are impotent when State House complicity is involved. Some State House operatives have exploited their positions to award contracts irregularly. This came to light in 1998 when the Head of State reportedly directed that all tenders and contracts should be awarded through competitive bidding. This followed a revelation that there was mushrooming of cartels and interest groups around State House that lobbied for, and influenced the awarding of contracts and tenders without following the proper procedure in competitive bidding. The President was understood to have lost tolerance with the trend under which heads of public corporations were telephoned or issued with unofficial 'chits' to award tenders and contracts to undeserving firms for unreasonably high costs (Njau, 1998).

In 1990s, the media reported of a cartel of consultant engineers and contractors that dominated the road and construction industry so that projects were wrought with claims of overpricing and biased tendering (Opala, 1999). Powerful individuals in Kenya had designed techniques of rendering international competitive bidding ineffective. In a number of cases, the tendering specifications were deliberately drawn to favour preferred suppliers. Pre-qualifications - where contractors were short-listed without open tendering - was being used effectively to defeat competitive bidding. In some others, as was the case of the Turkwell Dam project, competitive bidding was totally ignored (ibid.). Contractors with a history of shoddy jobs repeatedly won government contracts.

The biggest weakness of the procurement regime at the time was its inability to prevent wheel-dealers from committing government to unbudgeted multi-million procurement contracts. These circumstances raised concerns in the Association of
Consulting Engineers in Kenya, which eventually petitioned both the head of the Public Service and the Minister for Roads and Public Works to intervene, proposing radical reforms to curb corruption and mismanagement in the industry (ibid.). According to Opala, key issues in their petition included reviewing the law to provided for stiffer penalties for contractors and engineers engaging in corruption, inflating costs and shoddy workmanship. The Association also proposed involvement of all stakeholders from the industry in the procurement process and formation of a special government technical audit to supervise and evaluate construction work.

**The Complex Mechanism of Corruption**

In many cases, corrupt acts involved more than one person. In almost all cases, some of those persons were holding responsible positions in government, while others functioned as outside agents, consultants, contractors or suppliers. Where foreign aid was involved, some could be in responsible positions within the donor agencies. These relationships, between those inside, and those outside the organisations, and at times, those within the donor agencies, were absolute requirements if corrupt acts were to be perpetrated. It was these individuals who were to create the documentation needed to hide fraudulent transactions through which government funds were to be diverted to their private accounts. The type and complexity of the project or product in question was an important factor. For example, the more high technology involved, or seemingly involved, the more attractive the project would be to potential beneficiaries. Technological mystification reduced the risk of being criticised for paying too much, as one interviewee put it, 'How many people, for instance, can say whether a particular fighter aircraft should cost $20 million rather than $22 million? Goods that are used up in consumption were also 'prime candidates for payoffs' as one interviewee said, because post-delivery inspection and assessment of quantities and qualities was difficult. He identified government hospital suppliers as one area where corruption was regularly reported.

How the funds were to be shared among the conspirators depended on who initiated the process, the level of participation, the methodology used to perpetrate the fraud and the degree of government or donor oversight. Activities included bid rigging, fraudulent invoicing, product substitution, over-invoicing, and where donor
personnel were involved, the approval of contract, procurement, disbursement and other authorisations. In many cases, the risk of exposure was so small that the perpetrators made minimal efforts to conceal their actions.

According to this interviewee, corrupt exchanges were also facilitated by introduction of easily convertible monetary instruments. He reflected that in the past, it was not uncommon to find contractors and government suppliers sitting in waiting rooms of ministers and Permanent Secretaries, carrying big briefcases. In the 1990s, wealthy businessmen wishing to contribute money to "a project of the president's choice" did not need to carry the cumbersome briefcases. Banks, mainly Asian-owned, had been issuing bearer certificates of deposits popularly known as BCDs in large denominations up to 5 million Kenya shillings (approx. US$91,000), and a contractor could walk into a government office carrying 100 million Kenya shilling (approx. US$1.8 million) in an envelope. This bearers certificate market which was first introduced in 1990 (Okumu, 1999) became very popular with individuals who wanted to conceal their identities and source of their wealth. But the government phased out the purchase of bearer certificates on January 1st, 2000 after shocking realisation that it was a conduit for money laundering (ibid.).

A fraudulent scheme had emerged which caused the government to lose billions of shillings through payment of fake pending bills. In the 2001/2002 financial year alone, the government issued special bonds amounting to 10 billion shillings to liquidate pending bills, many of whose validity were still questionable. A case in point, which attracted much media attention (Kisero, 2002), is the one where sometime in 1990, a Nairobi building contractor entered into some kind of agreement with the government to construct an annex for a government office building in Nairobi's business district. It was a multimillion-shilling project whose design included a tunnel to connect these government offices with the headquarters of another key public institution a few meters away.

The exact terms of the agreement between the government and the contractor are still not clear. But there is evidence that along the way, the government abandoned the idea and the building was never constructed. In fact, no work was done. Surprisingly, this contract raised a huge pending bill, which the Treasury was asked to pay. It is claimed that the contractor has presented the government with a 2.5 billion-shilling bill, more than ten years since the project was abandoned.
Understandably, the contractor has been lobbying intensely in high places to have his payment approved and paid, perhaps by a special Treasury bond. In another recent case, a construction firm associated with President Moi's family presented a bill of Kshs.1.9 billion for a job it allegedly never did (ibid.).

One of the many schemes for making money out of the government has been through pending bills. All one needed is to have had a contract with the government, which for one reason or another, stalled. This practice has been prevalent within the lucrative roads construction sector. All that a contractor needed to do was to keep construction equipment on site as long as possible. The contractor would then have the opportunity to charge excessive interest claims and penalty charges for as long as the project remained stalled. Three factors play into the hands of opportunistic contractors. First, standard government contracts contain clauses, which allow contractors to accumulate interest penalties for the stalled period arising from government failure. Secondly, the contracts do not have clauses, which allow the government to terminate projects even in situations where it is not in a financial situation to continue with the project. Thirdly, government field engineers who supervise projects collude with the contractors to introduce changes and variations in the contract. The longer the pending bill stays before being settled the better for the contractor. When the auditor finally come years later to authenticate how much work was actually done and whether the pending bill was a genuine claim, the road will have been washed away by rains, making it impossible to determine just how much work has been put in.

In 1998, the government tried to solve the problem of pending bills. At the time, the stock of pending bills was 22 billion shillings. On that year, the government engaged the services of a task force led by former Treasury Permanent Secretary Harry Mule, to scrutinise pending bills and determine the actual level of genuine pending bills (Kisero, 2002). The task force found that out of the stock of 22 billion Kenya shillings (approx. US$280 million) only bills amounting to 13.3 billion Kenya shillings (approx. US$170 million) deserved to be paid. It recommended that the government appoint external auditors to determine the authenticity of the remaining bills. The external auditors found out that of the remaining bills, only 3.2 billion Kenya shillings (approx. US$41 million) were authentic. The rest were supposed to be settled through court arbitration.
This was when special Treasury Bonds were introduced. The thinking was that instead of paying the pending bills through the budget and causing them to interfere with on-going government programmes, the Central Bank would issue the contractors with three types of long-term bonds. The government also made it clear that it would not accept any new pending bill that existed before 1998 (ibid.). An inter-ministerial committee, the Consultancy Implementation Committee (CIC) was formed and charged with the responsibility of authenticating pending bills before payments. Thus, nobody expected the stock of pending bills to accumulate to unsustainable levels again. But as it turned out, pending bill kept accumulating. Early in the year 2002, Finance Minister Chris Obure disclosed that the stock of pending bills had accumulated to 19 billion shillings (ibid.).

Curiously, the government under the KANU ruling partly secretly released billions of shillings to well-connected contractors to settle questionable pending bills without any consultation with the Consultancy Implementation Committee. Within four weeks alone, it had released 4.5 billion shillings by issuing special bonds to a group of contractors. This was puzzling because, according to interviews with the auditors, some of these bills have been pending unverified in government books for more than 10 years. This was hurriedly done in the run-up to the General Election and the timing of the payments raised speculations that the effort to raise money to fund KANU's campaign.

Summary

In this chapter it has been shown that public procurement in Kenya has undergone various changes since early 1970s. From being a small entity handled by the Crown Agents there is now an independent directorate overseeing procurement functions countrywide. From Treasury Circulars and fragmented directives as the legal basis for public procurement, there is now a codified legislation governing procurement in a uniform manner throughout the country. From a highly centralised procurement, responsibilities for procurement have been delegated to procuring entities with sufficient freedom, though sticking to formal government procurement rules.
This analysis has focused on the principal-agent problem in the procurement system in view of asymmetry of information. The essence of the legislation particularly with regard to corruption is to establish mechanisms that foster transparency and accountability. The primary procedure for awarding public procurement contracts as provided by the law is open tendering. Other procedures may only be applied by procuring entities under circumstances strictly defined by the law, with particular emphasis being placed on financial ceiling of the goods being procured. At best, procuring entities can promote this by simply embracing the principles of fairness and non-discrimination, and demonstrate this by making preferential use of competitive tendering and provide adequate justification when they use other procurement procedures.

Having prescribed the procedures, the legislation has also made provisions for proper enforcement of procurement rules and establishes mechanisms for dealing with instances that flout the public procurement regulations. In particular, the legislation has created a Public Procurement Directorate with a mandate to formulate procurement policies and oversee the national procurement system. Similarly, the legislation has created an independent system of protests and appeal to address complaints from aggrieved bidders and provide remedies against violations of the legislation. These two are used as instruments of control and to counteract corruption. But, the research has shown that as important as it is legislation cannot cover all loopholes for, due to their information advantage, procuring official and suppliers are able to collude and circumvent the regulations. This highlights another problem of adverse selection in terms of having honest and loyal officers to the employer.

Again, with the decentralisation of powers it seems in reality that overarching freedom to make crucial decisions on procurement has been given to a staff with little experience of public management from the perspective of management in public procurement. Given this large amount of freedom, there is a potential risk of increased shirking by agents. It seems there is need to put greater emphasis on monitoring mechanisms so that control can be kept regardless of the degree of freedom. To overcome the problem of weak internal control mechanisms, a solution is alternative source of information for the principal so as to identify appropriate incentive systems. At the same time, it is important to extend beyond the incentive mechanisms and identify a solution for which compensation and using salary as an
incentive will have little impact, such as high-level corruption. This entails designing adequate punishment systems for deliberate irregularities and effectively enforcing them. The next chapter discusses this point.
Chapter Four

INITIATIVES AGAINST CORRUPTION

Introduction

This chapter provides a detailed overview of anti-corruption measures operating in Kenya, essentially to identify the source of weakness of the formal institutions of governance and the challenges facing attempts to control corruption in general and the public procurement systems, in particular.

When analysing anti-corruption strategies, it is necessary to recognise that procurement corruption does not occur in isolation. This is because corruption is rather a result of flawed or deficient structures. Thus, most of the factors that trigger corruption in public procurement in Kenya are, at the same time, responsible for similar practices in areas like privatisation and tax administration. Consequently, many of the measures to combat procurement corruption would, at the same time improve the situation in other aspects of public performance. Therefore, conclusions drawn here about current measures against corruption might be generalised for other forms of corruption in Kenya.

Generally, legislation is perceived as essential in any counter-corruption strategy, at least for the purpose of defining what ought and what ought not to be done. However, in the last chapter we showed how, despite elaborately crafted public procurement regulations, corruption is rife in the procurement sector. In some situations, perpetrators exploited the weaknesses in the procurement regulation. In some other instances, the regulations were simply disregarded. This signifies that there are various points of vulnerability in the procurement process through which corrupt practices take place even with rigorous procedures in place. It further indicates that even the most well crafted legislation or policies can have little impact when promulgated into an institutional vacuum or an infrastructure incapable of implementation.
In reality, success of the established measures for controlling procurement corruption will not only depend on how skilfully and carefully they are produced, but also on how effectively the actual implementation is being undertaken. While the design of appropriate measures to reduce corruption is considered important, equal emphasis should be directed to the agencies implementing the policies. In this regard, attention needs to be drawn on the adequacy of the functions, organisation and powers, and mechanisms of checks and balances.

With respect to the law, we show that Kenya has the necessary legal and regulatory structure for fighting corruption. This begins with the constitutional structure, which provides a sound foundation on which a framework for institutional checks and balances can evolve. For example, section 30 of the Constitution vests in the parliament powers to discuss public issues and to legislate against abuse of powers by public officials (Laws of Kenya, 1998a). Members of Parliament can bring wrongdoing to light by demanding explanations from the government on plenary sessions. Parliamentary watchdogs through various committees such as the PAC and the PIC have powers to scrutinise government expenditures with the assistance of the C&AG. The Committees handle reports containing reviews of public expenditures in government ministries from the C&AG. Consequently, the Committees can summon and challenge public officials to explain reported violations regarding malpractice and corruption in the public sector (ibid.).

The constitution ensures the rule of law by guaranteeing independence of the judiciary and security of tenure for judges, although this security was briefly removed in 1988 by amending the constitution and then restoring it in 1990 (O'Brien and Ryan, 2000). According to the constitution, judges and magistrates have been given protection to decide cases according to the law and facts. Clearly, according to the present law, an environment exists for the rule of law to be upheld in Kenya. However, despite the constitutional and legal safeguards, the existing relationship between the judiciary and the executive particularly in the appointments erodes the independence of judicial officers in making decisions. Indeed, observers point out that judicial officers have often to look over their shoulders or at an appropriate member of the executive for a nod while making certain decisions (Kibwana, Wanjala and Owiti-Oketch, 1996).
The country has a legislative framework that prohibits corrupt activities and establishes sanctions. The primary statute is the Prevention of Corruption Act, Chapter 65 (Laws of Kenya, 1998b), which was initially enacted in 1956 and subsequently revised to widen its scope. Despite the existence of the legal and regulatory framework though, a number of difficulties arise. Enforcement of checks and balances has been undermined by poorly defined or conflicting mechanisms that shape the relationship between the principals and the agents. Parliament, for example, is empowered to authorise spending of public funds, but the same law also empowers the minister for finance to make alterations after parliamentary approval.

Moreover, the impact of the government's regulatory policies will depend in large part on its ability to monitor, audit and enforce its policies and programmes effectively (Andvig et al., 2000). This is largely affected by the ability to design appropriate incentives to motivate not only those implementing the mechanisms designed to govern behaviour of public officials, but also those with opportunistic behaviour to remain honest. Such incentives are essential in the entire system of bureaucratic recruitment, compensation and career stability. Andvig et al., however argue that to ascertain appropriate structures or monitoring mechanisms might not be as simple as it may sound. The government is subject to bounded rationality because of limited information for assessing corrupt behaviour. Furthermore, many of the policies that aim to achieve this goal demand extra resources and an obvious obstacle might be lack of public funds. It is necessary to emphasise that mere amendment or introduction of law is not enough. Implementation mechanisms are necessary and this means that resources have to be committed to pay those who will implement them. Thus, public officials who are expected to enforce anti-corruption measures may lack motivation or ability to take action due to incentive problems.

From a principal-agent perspective, therefore, the principals at all levels are largely disadvantaged due to information asymmetry and this constrains their power in controlling their agents. The ability to observe agents' behaviour is not a principal-agent problem peculiar to Kenya's public procurement. Multilateral development banks, for example, spend considerable staff time and administrative budget to supervise each lending operation, and particularly to monitor and approve procurement procedures and decisions. Yet according to Strombom (1998), recent
disclosures estimate that 20 percent or more of these funds in some countries may be lost through corrupt practices.

In a critical review, this chapter provides evidence that in the current stage of economic and political development in Kenya, formal institutions are neither well developed nor effectively institutionalised in the public service. Empirical evidence shows that although Kenya inherited a fairly sound institutional infrastructure at independence associated with modern state, in terms of a legal system and public service that was largely modelled after the English system, this image has changed (UNDP, 2001). Indeed, frequent amendments to the Constitution and other legal statutes has consistently weakened this infrastructure and provided impetus for the development of incompatible informal institutions, particularly the ones relating to presidential control over state institutions. The first section of this chapter reviews the monitoring mechanisms provided by the parliamentary oversight bodies and the government auditing system.

The government system allows excessive Executive discretion while the discretion-structuring rules are loosely defined and lack structures that effectively monitor the exercise of that discretion and hold decision makers accountable. The second section examines the reward and penalty mechanisms. Emerging evidence reasserts our argument that the political elite has consistently exploited their advantageous position to perpetuate and guard their interest and have vigorously resisted any attempt for reforms. Reluctance to strengthen the anti-corruption agency and weakening of the judicial system demonstrates these circumstances, which Chabal and Daloz (1999) call political instrumentalisation of disorder. The final section illustrates how the political elite has used the civil service system to consolidate their political power. Indeed, the presidential powers to appoint senior executives in public service and arbitrarily intervene in state institutions has rendered the Weberian rational-legal system of governance (Morrison, 1998) ineffective in Kenya.
Monitoring Mechanisms

Oversight Bodies

The significant role that the legislature plays in the fight against corruption is by being the public watchdog against government misuse. Under the Constitution the legislature has a critical oversight function with regard to public finance through two financial committees, i.e., the PAC and PIC. The two committees are a product of Section 56 of the Constitution (Laws of Kenya, 1998a), but are established specifically by Parliamentary Standing Orders No. 147 and 148 respectively. However, both standing orders merely define the committees' functions, without empowering either of them to act on their findings.

Regarding the operations of the oversight committees an MP who has been a member of the PAC provided a lot of insights during a number of informal interviews. The information obtained was however supplemented by reviewing relevant legal documents. As the MP explained, the committees examine appropriation accounts, and in Kenya where the Westminster parliamentary system is used, the C&AG is a core element of parliamentary oversight. Therefore, the C&AG attends all Appropriation Accounts meetings in person or sends in seniors representative from the office. In practice, the examination takes the form of comprehensive appraisal or evaluation of performance of the undertaking and invariably the Auditor General plays a key role in the financial committees. Generally, reports of the Auditor General form the basis of the committees' work, although they are not precluded from examining issues not brought out in his report. A particularly important input by the Auditor General is to furnish the committees with a memorandum of material points on the cases selected for detailed examination, which helps in framing of questionnaires for oral evidence of witnesses summoned by the committees. During examination of witnesses, the Auditor General again helps the committees in ascertaining the correct facts and provides additional information relevant to the examination. At times, the Auditor General intervenes on behalf of the committees to clarify and elucidate evidence taken from the witnesses. He scrutinises the notes that the ministries submit to the committees and helps the committees to check the correctness of facts and figures against his reports.
The legislator further explained that in reviewing the reports of the Auditor General, the committees do generally look for losses, wasteful expenditure and financial irregularities. When these are the result of negligence, the committees are empowered to summon evidence from all relevant sources and to question accounting officers (Permanent Secretaries and Department heads, to whom AIE is vested) about such irregularities. After the proceedings, the committees present their report to the parliament with their observations and recommendations. Various government ministries and departments are required to take action of such recommendations and inform the committees so that this can be discussed in subsequent meetings. In many cases however, there are inordinate delays by government departments in responding to the committees' recommendations.

However, delays by government ministries are not the only handicap facing the parliamentary oversight bodies. In practice there are a number of other serious constitutional restrictions on parliamentary ability to act especially as provided under Article 48 (Laws of Kenya, 1998a). Under this provision, Parliament cannot introduce or amend finance bills to increase taxes, budgetary allocations, unless through a Bill proposed by the government through the minister responsible for finance. It cannot even correct known cases of misallocation or under-allocations. Under article 100 (ibid.), the government can spend more money on selected budget items, introduce new budget items and spend money before informing Parliament provided it subsequently submits Supplementary Estimates. These powers are reinforced by section 5 (2) of the Exchequer and Audit Act, which allows the finance minister to suspend government budget, in part or wholly, without reference to either other ministers or Parliament (Laws of Kenya, 1987). These powers are open to potential abuse by the executive authority, for example of diverting public goods and services to preferred areas. Indeed, powerful politicians in KANU have been reported in the media as telling people openly that only those who support the ruling party will get development (Kisero, 2000).

Parliament is further inhibited by other factors such as budgetary traditions and practices, which allow for delegation of powers to the executive with very limited reporting. For example, under Article 100, 101, 102, 103 and, 104 of the Constitution (Laws of Kenya, 1998a), Parliament is empowered to authorise spending of public funds to meet various public purposes. However, under Article 100, the minister is
authorised to make alterations after parliamentary approval. This authority has significant implications on how and where public money is used. This article is widely used together with section 5(2) of Exchequer and Audit Act, making Parliamentary Authority on resource allocation mainly proactive. These provisions reveal shortcomings in constitutional protection of public funds. First, they undermine the authority of Parliament to allocate financial resources, making the actual allocation dependent, solely, on the finance minister. Secondly, they expose the budget to the predatory practices of the ruling elite who use it as an instrument of political power. Indeed, the provisions of the Constitution give the Executive inordinate discretion that seems to make the executive the real power to decide who gets what benefits, thereby subverting the role of the Parliament.

In addition to these limitations, the current institutional arrangements relegate the role of Parliament to post action on audit reports, which are as stated above, subject to long and frequent administrative delays. Thus, according to the legislator, after authorising expenditure, Parliament again becomes involved when the audit reports are filed, which can be as long as three years later. That is when a multi-party Parliamentary Committees review the reports from the C&AG and Auditor General of State Corporation, and consider testimony by witnesses from government departments and agencies, and then table the report to parliament for comments and action.

In analysing several records of deliberations of the PAC and the PIC, it is obvious that the supervisory role is limited to linking parliamentary approval to release of funds. It does not relate to quality of expenditure or realisation of results. In practice, the audits simply answer the question whether or not the money was spent for the purposes approved by Parliament, and that the necessary procedures were followed in releasing and spending of funds. As these explanations illustrate, the role of parliamentary oversight with regard to the quality of public spending is significantly limited. As long as the Executive fulfils the two conditions, the expenditure is considered to be in order, whether the money could have been better used to, say, buy medical supplies instead of buying Mercedes Benz cars for executives. Besides, as long as the tendering procedures are followed, it is does not seem to matter whether the expenditure based on value for money considerations or not. These critical omissions were noted in 1997 when the Public Expenditure Review (PER) report noted that 'Government investments may not generate a
commensurate level of Gross Domestic Product (GDP) growth because the cost of acquiring capital is far greater than the value of the capital created (Government of Kenya, 1997: xi). Unfortunately, there is no on-going implementation monitoring, or post-execution value-for-money audit in Kenya. As a result, the whole process of public finance management has not been managed in a manner that can enhance the public good.

In sum, Parliament plays the ceremonial role of getting the money out of the Consolidated Funds, but how and where the money is used, depends entirely on the Executive. This undermines the balance of power between the three branches and makes allocation of public money dependent on politics and not on economic returns. More fundamentally, this excessive discretion promotes a culture of dishonesty and insecure among elected leaders. As has been stated above, under Article 100 of the Constitution (Laws of Kenya, 1998a) the minister can introduce new expenditure items after the Budget is approved by Parliament. The minister can also spend more money on items of his choice and seek parliamentary approval, retrospectively. This renders the requirement of prior approval of financial expenditures irrelevant and ineffective.

Indeed, this ineffectiveness is illustrated by frequent reports of the C&AG relating to committing public expenditure in contract awards without parliamentary approval. Concerning domestic debt, the minister for finance is free to borrow in Kenya currency sums of money in such amounts on such terms and conditions as the minister may think fit and also use the money as he wishes (Laws of Kenya, 1976). This is the case because under the Internal Loans Act, Cap 420, there is no restriction on use of such debt proceeds. The minister is not even required to report the local indebtedness at any time. That excessive delegation of borrowing powers has encouraged excessive and illicit borrowing was clearly illustrated in a paper presented before Kenya Constitution Reform Commission (Kirira, 2002). According to this paper, external debt of December 2001 amounted to 44.6% of GDP, representing a slight decline, while domestic debt rose from 24.6% to 25.8% of GDP, an increase of Ksh.16.2 billion (approx. US$208 million) in six months, June to December 2001. A large portion of this money is tied to stalled projects and this sharp rise in domestic borrowing may be attributed to growing problem of the pending bills incurred through
gross irregularities in government contracts revealed by the 1997 study (discussed in the previous chapter).

**Audits and Supervision**

As noted previously, the office of the C&AG, which is the supreme audit institution in Kenya has a central role in monitoring government expenditure and, like the parliamentary watchdogs, faces problems mainly structural in fulfilling its mandate. The office has the legal mandate to audit state finances in central government, local authorities and other public-sector bodies and report the results of the audits to Parliament (Laws of Kenya, 1987). The C&AG is a constitutional appointment with tenure of office (Laws of Kenya, 1998), substantially independent, and reports directly to Parliament (through the Finance Minister). The Exchequer and Audit Act, Chapter 412 (Laws of Kenya, 1987) sets out the powers and functions of the Auditor General in terms of the Constitution and other legislation.

As provided for in the Constitution, the office is basically independent from both the executive and the legislature and is not be subject to any direction from them in the programming, planning and conduct of audits. It has freedom to set priorities and programme its work in accordance with its mandate and adopt methodologies appropriate to the audits to be undertaken. However, one of the structural problems is that the office is not financially independent as it depends on the Finance Minister for budgetary allocation. A subsidiary from this office that specifically audits corporations and government's investment activities and which operating as a department from the Ministry of Finance is the Auditor General (Corporations). This office is only partially independent, in that it is not a constitutional office and, therefore, the office-holder has no tenure of office.

According its legal mandate, the supreme audit is an instrument of accountability and has a dual role. First, it functions as an agency on behalf of the Legislature to ensures that the Executive complies with the law relating to public expenditure. In this regard, section 105 of the Constitution (Laws of Kenya, 1998a) and the Exchequer and Audit Act, Chapter 412 (Laws of Kenya, 1987) empower the C&AG to ensure that no money is issued from the Consolidated Fund Account except for the purposes approved by the Parliament. This is the main government account
into which all revenues are received and payments made. Secondly, as an agency for the Executive, its primary function is to oversee the management of public funds and ensure government departments and other public sector bodies achieve their financial objectives and manage their financial affairs according to sound principals and in accordance with the laid down procedures. It also audits government accounts annually for accuracy and regularities. This is usually known as regularity or compliance auditing. This role is intended to ensure efficiency and effectiveness in the management of government resources. Transactions are reviewed to determine if government departments and agencies have conformed to all pertinent laws and regulations. This process includes checking the spending authority to ascertain that resources are purchased and used properly and that effective management systems and controls are in place. The audit should bring to light not only cases of clear irregularity but also instances which in the auditor's judgement appear to involve improper expenditure or waste of public money or other resources. Such an audit goes beyond scrutinising the mere formality of expenditure to its wisdom and economy and to bring to light cases of improper expenditure or waste of public money.

To accomplish his work, the Constitution requires that the C&AG be given full access to all official documents, which relate to government transactions. Where he is dissatisfied with the manner in which expenditure has been incurred by a government department, the C&AG has statutory requirement under the Exchequer and Audit Act to raise a query on the Annual Appropriation Accounts for any department (Laws of Kenya, 1987). This device can be used to query the manner in which a government contract has been placed where the C&AG considers that proper procedures have not been followed. Depending on the response to the audit query, the C&AG may either qualify the certificate on the Appropriation Account for the National Assembly or make a special report for the Public Accounts Committee. To enforce regulations and build up credibility in its procurement procedures the government has reinforced the office of the C&AG by creating a Supplies Management Inspectorate in the Treasury, which carries out routine procurement audits in all procurement entities (Republic of Kenya, 1998). Like the C&AG the objectives of these audits are to verify compliance of regulations and procedures and to bring to the attention of the Accounting Officers and Chief Officers, deficiencies
that might be observed during inspections. Generally, the two audit bodies do not engage in ex-post work such as preparation or approval of the budget or pre-approval audit. The Directorate of Internal Audit carries out these duties.

This is the unit which has its officers stationed in government ministries to conduct internal audits and provide other internal audit services to the central government. In principal, it is required to take range of administrative measures which will ensure affective application of rules, regulations, controls, designed for the effective management of public funds and assets. Essentially, it is expected to review the systems and suggest ways to improve them for effectiveness and efficiency. In practice, however, it has been drawn to dealing with expenditure control at the expense of all other aspects of its function. It performs pre-audit approvals, and to some extent, investigation audits. The Directorate is also expected to perform post-auditing so as to verify if tendering and awarding procedures have been used in exactly the right instances, and if rules governing them have been observed during their application.

Despite the three-pronged approach to supervision of public expenditure, this study observed at least two main difficulties with regard to the quality of audit enforcement. First, the accounting and auditing infrastructure does, as with the entire civil service and the public service in general, suffer from an acute shortage of technically qualified staff at all levels. The principal reason for this is its inability to offer competitive salaries. Salaries are not only well below those in the private sector, but are frequently below the living wage (the minimum salary needed to feed and clothe a family). Salaries are so low that 'daylighting' is a common practice i.e., doing another full-time job during regular working hours. As such, it is a problem to recruit from the labour market and retain personnel who possess suitable academic qualifications and are equipped with appropriate training and experience commensurate with the nature, scope and complexities of the audit task. There is often a high exodus of individuals who gain qualification in accounting through private sponsorship or government scholarships to the private sector where compensation and fringe benefits are far much better. Currently, there are only a few at senior staff levels who are qualified accountants in line with other accounting bodies. Comprehensive and readily available statistics on the resource level for all the three auditing and inspection units could not be obtained during the fieldwork, as such
information was not compiled by the Kenya Bureau of Standards. However, there was adequate data information to highlight the significant deficiency in staffing. For instance, the United Nations study reported that the supreme audit institution in Kenya had a workforce of 492 in 1999 out of whom 386 were auditors (UNDP, 2001: 62). Statistics for the 2001 workforce in Directorate of Internal Audit was more comprehensive. As shown in the table 4.1 below, the workforce in the Directorate of Internal Audit comprised of 636 in 2001 and a large number of the staff were mainly clerical officers who were only proficient in examining accounts. The appointment of senior managers and audit directors is usually done on the basis of seniority and not professional qualifications. Being mainly administrative positions and due to low salaries in government, selection to these positions does not attract young ambitious officers who would promote professional ethos in auditing. As might be typically the case, the lower cadre does not also have high qualifications as many of those who achieve reasonable qualifications become easily absorbed in the market. In addition, the workforce is inadequate for the twenty-six or so government ministries.

Table 4.1. Workforce and Staff Category - Directorate of Internal Audit (2001)

<table>
<thead>
<tr>
<th>Staff Category</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Audit directors/managers</td>
<td>56</td>
</tr>
<tr>
<td>Auditors</td>
<td>150</td>
</tr>
<tr>
<td>Other professionals/Specialists</td>
<td>N/A</td>
</tr>
<tr>
<td>Clerical</td>
<td>16</td>
</tr>
<tr>
<td>Audit examiners</td>
<td>270</td>
</tr>
<tr>
<td>Total</td>
<td>636</td>
</tr>
</tbody>
</table>


The second problem relates to resources. The office suffers from inadequate funding, equipment and facilities, which hampers efficiency and ability to produce timely reports. The research revealed that though audit staff indicate that audits are carried out on annual basis, production of audit reports is usually late by at times, up to three years. The supreme audit is one of the least funded departments with an annual budget of about US$ 103,000 based on 1999/2000 estimates (UNDP, 2001:62).
Besides organisational problems, there is lack of adequate monitoring and follow-up of audit findings. There is a general view that flagrant abuses identified through auditing procedures are not prosecuted. Even where administrative action is recommended, the process to sanction an official is quite cumbersome. As such, control over public funds is then less effective when follow-up and action upon audit queries by the executive branch is slow or sometimes not at all. Another issue that leads to inefficiency is lack of external self-evaluation on the quality of the audit units themselves. The audit units do not have in place quality control system to review the efficiency and effectiveness of their internal standards and procedures. There are no systems and procedures to conduct systematic review of the quality of audit reports with the objective of verifying that auditing standards are being adhered to and used consistently.

In terms of a principal-agent analysis, the possible impact of the existing audit system in solving the problem of moral hazard (i.e., self-seeking behaviour) in the public service and thus, reducing potentialities for corruption is minimal. The general picture indicates that to a large extent, this is rather due to organisational weakness in the audit system. However, while significant failure of the existing auditing practice to deter corruption could be attributed to resource problem, political machination plays the major role as regards anti-corruption and judicial inefficiency. As the fight against corruption is generally a long-term effort, which is likely to span successive political regimes, overt progressive effort demonstrated by each regime is crucial. The contrary appear to have been the case in Kenya where there have been determined efforts to undermine the use of criminal justice system as an integral part of the mechanisms for deterring corruption. Viewed from this context, the significance of monitoring and penalty mechanisms in enhancing compliance to formal rules becomes thoroughly weakened as the discussion in the following sections illustrate.

Reward and Penalty Mechanisms

The Anti-Corruption Agency
Recent experiences in Kenya reveal challenges facing attempts to establish an effective and independent anti-corruption agency, leading one to question the government's resolve in the fight against corruption. Although the Prevention of Corruption Act, Cap. 65 (Laws of Kenya, 1998b) has been in operation since 1956 and amended eight times since its enactment (TI, 2001:83), there seem to have been no serious action against corruption until the early 1990, when the scale of corruption apparently reached alarming dimensions and intensity. It is particularly important to mention that pressure from the donor community substantially contributed to the establishment of the institution to fight corruption (Kibwana, Wanjala and Owiti-Oketch, 1996; O'Brien and Ryan, 2000).

The first visible step began with the amendment of the Act in 1991 that increased criminal sanction against bribery and resulted in the establishment of the first Anti-corruption bureau within the police in November 1993 'to undertake necessary measures to eradicate corruption in private and public sector' (Kantai and Mati, 2001: 6). At the time, the press was intensely exposing rampant corruption in Kenya's tax administration, commercial licensing, migration, land allocation and registration, provincial administration, public health institutions, registration of motor vehicles, employment in public as well as public projects. The spread of petty corruption had left its mark on the mentality of the population, which regarded it as the only means to attain the desired purposed. According to the press, and the *East African Standard* apparently being the most vocal among the print media, petty corruption had permeated all sectors of public service, including the rural areas. As the press revealed, corruption had engulfed law-enforcement and administrative structures and bribes were used everywhere - from issuing licences and permits to influencing court decisions. Press editorials observed that corruption and bribery was especially widespread in the land management structures to secure a desired apportionment and evaluation of land plots, and obtaining land lease titles (*East African Standard*, 25th October, 1993). Similar situations were encountered in the health care system, local administration, tax administration and many other sectors (*Daily Nation*, 1st April, 1993). However, there was cynicism about the government's motive. A report issued by the PACSC (Republic of Kenya, 2000a) suggested that the public saw the establishment of the anti-corruption bureau merely as a symbolic
reaction of the government to the prevalence of corruption that ultimately would influence public opinion and ensure the legitimacy of the ruling elite.

Although petty corruption was the most publicly mentioned form of corruption, high-level corruption was also on the rise. Notable among the high-level scandals exposed by the press was the Goldenberg scam (East African Standard, 16th August 1993), which intensified donor pressure on the government to show serious commitment in fighting corruption. This is one of the most sensational episodes in Kenya's corruption history in which the state was allegedly defrauded of millions of dollars in fictitious jewellery exports in 1990 by businesspeople and powerful government and political officials. Ironically, it has remained unresolved in Kenyan courts since 1994.

Immediately the Anti-Corruption bureau that came to be known as the 'Squad' was established, its officers started a countrywide crackdown on bribe-taking policemen and bribe-giving motorists. The operation was nicknamed 'Remove eye-log' (note the biblical 'removing log in ones eyes so as to see a speck in the brother's eyes') depicting how deeply corruption was rooted especially in the police. In interviews for this study, the former Director of the defunct Squad Mr. Stanley Mutungi said this about the crackdown. 'We wanted first of all to clean our own house and then move to other areas.' Other than a few more crackdowns against junior functionaries in the Customs Department and Motor Vehicle Registrar's office, there were no other reported actions by the squad, which lasted two years before it was disbanded on June 22, 1995, ironically following allegations of widespread bribery among its officers. After dissolution the officers, who had been seconded to the unit from the Police Force, were re-deployed back to their units. Incidentally, there is no evidence of any of them having been investigated for corrupt activities. The revelation of corruption by the anti-corruption czars provoked much discontent both within and outside the government, which brought the role of the police in the prevention of corruption under much disrepute. This viewpoint has a logical basis. Indeed, experience with successive corruption surveys show the police as the least appropriate institution to handle the challenge of preventing and curbing corruption. Like other state institutions, the police are swept by systemic corruption, but the police often tops the list of the corruption index (Kibwana, Wanjala and Owiti-Oketch, 1996; TI, 2002).
On December 1, 1997 the Prevention of Corruption Act was amended, again at the behest of the donors, to provide for the establishment of KACA. An amendment in 1996 (Legal Notice No. 332/1996) had, in the meantime increased the powers of the Authority to institute civil proceedings against any person involved in corrupt transactions and recover properly corruptly obtained (TI, 2001). This was in addition to special powers to investigate bank accounts of suspected persons and the possession by an accused of sums or property disproportionate to their known sources of income and which they cannot satisfactorily explain, for evidential purposes in corruption trial.

The Act (Laws of Kenya, 1998b) also provided stiffer penalties relative to the value of corruption transaction. Where the value of the bribe exceeded ten thousand shillings (equivalent of US$126.5), the person committing the offence was liable to imprisonment for a term between 5 and ten years. In case of bribe below this amount, the minimum sentence was one year and a maximum of five years. The penalties were higher in cases involving fraudulent tendering and contracting transactions or in cases of influence peddling. Under the provisions of Section 5 any corrupt transaction committed in relation to Government contracts made the perpetrator liable to imprisonment for up to fourteen years. The amounts paid in bribes could also be recovered and returned to the public body, and a person convicted may be banned from holding a public office, and from being registered as an elector for a period of seven years.

This Authority, however, did not become operational until 1999 when the President appointed a former police inspector and leader of political party, the Party of the Independent Candidate of Kenya (PICK), as its new director. Despite the measures taken to reinvigorate the anti-corruption law, a cross-section of the Kenya public expressed dissatisfaction and immediately questioned the appointment of the Director, mainly on the grounds of his qualifications and integrity (TI, 2001). The office was also dogged with financial and logistic problems as well as institutional and operational independence from the Office of the President. The initial annual budget was a meagre Kshs.31m (ibid.). Again, recruitment of the anti-corruption team was made entirely from the Police Department. This squad also did not last long; it was disbanded seven months later and the Director was suspended and subsequently
dismissed by the President following a judicial hearing by a tribunal appointed by the President, which recommended his removal for incompetence.

The main ground for his removal was that he had acted *ultra vires* by circumventing the provision of section 11(3) of the Prevention of Corruption Act, which required him to seek directions and consent from the Attorney General before prosecuting any case (ibid.). In this instance, the Director had obtained warrants of arrest against four top Treasury and tax department officials and eleven other people over an alleged tax fraud of about $3 million from wheat and sugar imports without consulting the Attorney-General. This precipitated a fierce war of words between the Director and the Minister for Finance, and a hurried termination of the cases in court by the Attorney General through a *nolle prosequi*, and the immediate suspension of the Director by the President. Subsequently, the director was dismissed.

In November 1999, the KACA was reconstituted on a more organised and firmer foundation. A Judge of the High Court was appointed as its Director and highly skilled officers including auditors, lawyers, engineers, and economists, recruited by the Public Service Commission and experienced police officers seconded from the police force. The new Director was credited for methodically and systematically increasing professionalism and operational capacity in the reconstituted anti-corruption body (ibid.). Ironically, when the anti-corruption agency finally charged senior government officials, including a cabinet minister with abuse of office, the Constitutional Court affected its operations when on December 22, 2000; the court declared KACA unconstitutional (Gachiengo and Kahuria v. Republic, 2000).

The Court ruled that the establishment of KACA clashed with the Kenyan Constitution, which states that only the Attorney General and the police could prosecute criminal offences. The Court therefore declared that the existence of KACA undermined the powers and authority of the Attorney General and the Commissioner of Police as conferred on them by the constitution, and consequently inconsistent with the Constitution. Section 10 and 11B of the Act were singled out as being in direct conflict with section 26 of the Constitution, which confers powers upon the Attorney General and the Commissioner of Police to prosecute criminal offences. Section 3 of the Constitution provides that if any other law is inconsistent with the Constitution, the Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void. This decision was openly criticised by legal
experts in Kenya who questioned the judiciousness of interpreting the Constitution against the public spirit of fighting corruption.

On the court's decision, the Attorney General issued a statement that the 'final determination as under [the] Constitution of Kenya there is no appeal against such [a] decision. The decision of the court, which is that KACA is unconstitutional, is binding and has to be respected and upheld. The government accepts the decision and will taken the decision into account in any modalities that will be put in place in the war against corruption' (Kantai and Mati, 2001:6). He nevertheless stated that all the cases which were instituted by KACA and which were pending would continue. However, the public expressed displeasure with the incompetence of legal draftsmen in the Attorney General's office. This seemed to spread cynicism on the government's ostentatious efforts to prevent corruption and especially high-level corruption. The public continued putting pressure through the media on the Parliament to immediately regularise this flow.

Between February and August 2001 the Attorney General produced several drafts of pieces of legislation, which were critiqued and opposed by legal experts and opposition members of parliament. First the Attorney General table the Constitution of Kenya (Amendment)(No. 2) Bill, 2001 to constitutionally entrench KACA and at the same time published the controversial Anti-Corruption and Economic Crimes Bill, 2001 which essentially granted amnesty for offences committed prior to December 1, 1997. This clause was vigorously protested in public debates and the Constitutional Amendment Bill was subsequently defeated in parliament on August 14, 2001. The Attorney General finally removed the offending clause and tabled the Bill afresh, which went through two readings, but the Eighth parliament was dissolved before the third reading and therefore it was not passed.

Given the growing polarisation in parliament, especially in that period leading to the elections, the government feared that it was not possible to pass a constitutional amendment to re-establish an independent KACA at the time. In the meantime, an alternative approach to deal with governance issues and ensure that all elements of the structure of the former KACA remained active and operationally autonomous was deemed necessary. Thus, the President created by an executive order, an Anti-Corruption Unit in the Kenya Police to take over all the corruption cases held by the Attorney General and continue to fight corruption. Consequently, the ACPU was
formed on September 13, 2001 with an initial multidisciplinary staff of 152 officers, recruited from the police and the former KACA. In the first four months of operation, the ACPU received and analysed 362 complaints, of which 117 cases were retained for in-depth investigations while the rest were referred to other investigative agencies or complaint authorities (Republic of Kenya, 2001a).

However, there is scepticism among the general public on the effectiveness of conventional law enforcement in dealing with the problem of corruption as the anti-corruption agencies have not made any significant impact on corruption since the first one was established in 1991 (Owino, 2000). This is invariably rooted in the weak political support rather than structural deficiency of the agencies. This paradoxically shows the political rhetoric denouncing corruption is not matched with concrete steps to eradicate it. In addition to lack of personal and top political support, structural deficiency further severely undermines the effectiveness of the anti-corruption agency.

Indeed, structural circumstances can substantially reduce the effectiveness of anti-corruption agencies in several ways. For an anti-corruption agency to operate effectively and efficiently, it is generally suggested that at least four fundamental conditions are essential (Langseth, Stapenhurst and Pope, 1997). The agency must be operationally, politically and financially independent, possess the powers to instigate investigations, have political support and finally, operate within a system where political leadership is perceived as honest and exemplary. These factors are considered below.

Generally, as Fombad (1999:244) argues, the extent of independence can be gauged from, among other things, the mechanism for the appointment of the chief executive of the agency, his tenure and powers. As regards the Kenyan anti-corruption agency, the significance of this can only be analysed in terms of the situation that obtained before the ruling of the Constitutional Court. According to the provisions of the Prevention of Corruption Act (Laws of Kenya, 1998b), the President had exclusive powers to appoint the director of KACA on the recommendations of the Advisory Board, which is also appointed by him under section 11 of the Act. Before the ruling of the Constitutional Court, the independence of KACA stemmed from the status of the director who represented a primary source of the Authority's powers being directly accountable and responsible before the President. In executing its
work, the Authority was not subject to any other supervision excepting that of the President. The independence of the Authority was reflected not only by the accountability and responsibility mechanism but also the procedure for appointment and dismissal of the director or the three assistant directors. Under section 11B of the Act the President appointed the director and assistant directors. The director, on the other hand, was also empowered to determine the organisational structure and the terms and conditions of employment of officers of the Authority and appointment of personnel, including hiring consultants. As for financial resources, the Authority had the discretion to solicit for donations including from external sources to boost its parliamentary allocations and accruals from its own transactions. All these funds are subject to audit under the Exchequer and Audit Act (Laws of Kenya, 1987), the direct solicitation from donors deviates from normal practice in which parent ministries receive donations on behalf of their departments. The director also had a renewable tenure of office for a term of four years, which the President could however terminate at any time if the conduct of the director fell under any of the conditions stipulated in section 2G, which included incompetence and incapability. This was the section the President invoked to remove the first director of KACA (discussed earlier) after being in the office for only seven months.

In addition to tenure of office, the ability of the KACA to operate independently depends not only on the President’s goodwill and personal commitment to the Authority’s mission, but also the ability and will of the Attorney General to expedite decisions to prosecute. Lack of resources has been a problem that has dogged the Attorney General Chambers for a long time and the Attorney General has even openly admitted that he does not have enough legal officers (Kantai and Mati, 2001). This lends some credence to the criticism that the Prevention of Corruption Act was hastily amended only to satisfy the donors but not as an efficient anti-corruption tool. The Anti-Corruption and Economic Crimes Bill, 2001, which failed to go through the final reading in parliament due to time lapse contained substantial amendments that aimed to rectify the anomalies mentioned above and thus give the anti-corruption agency powers to prosecute without reference to the Attorney General. If the Bill is re-introduced in parliament and adopted in the same form it will then address the shortcomings of the current legal framework.
Many analysts agree that a multi-pronged approach involving both proactive and reactive measures offers the best chance of bringing corruption under control (Fombad, 1999). This strategy originates from Hong Kong's Independent Commission against Corruption (ICAC) established in 1974, where the level of success is reported to be significantly high (Klitgaard, 1988; de Speville, 1997). The ICAC was established at the height of corruption in Hong Kong when almost the entire police force was in complicity with underworld criminal elements and drug trafficking, gambling and prostitution became a way of life, harming the country's reputation. At this time, various surveys noticeably proved that 70 percent of the reports and articles in the British press about Hong Kong were related to corruption (Klitgaard, 1988). The situation dramatically changed after a systematic implementation of anti-corruption measures on the establishment of the ACAC. The key elements of the approach are the investigation and prosecution of suspects, prevention of corruption, and the education of members of the public in order to enlist their support in fighting corruption. In Kenya, section 11(3) of the Prevention of Corruption Act (Laws of Kenya, 1987) tightly links the establishment of KACA with the three-pronged ICAC model. The primary objective of the Authority encompasses the fight against corruption in public and private sectors that entail to assign the Authority with repressive powers of prosecution of corrupt offences. At the same time efforts are made to implement preventive measures and above all, to change people's mentality and establish new moral values for public.

However, in assessing the transferability and adaptability of the 'Hong Kong Model' to other countries, Klitgaard (1998) cautions that such measures must always be weighed carefully before their implementation to ensure that their cost does not outweigh the cost of corruption itself. Another fundamental challenge in establishing anti-corruption agencies is to achieve its objectives adequately without creating another centre of bureaucratic corruption within the agency itself (as in the case of Kenya's first anti-corruption authority discussed above).

For instance, one of the main functions of KACA is to investigate all violations under the Prevention of Corruption Act and all other offences involving corrupt transactions. In this respect, the law gives KACA wide-ranging powers to facilitate its investigations. These powers are essentially similar to those that police have under the Police Act, and they consist of the power to obtain information, the
power of arrest, and the power of search and seizure. The powers to obtain information are especially quite extensive. Under the Act, any officer of KACA may require any person to appear before him or her and answer truthfully all questions put to such a person and record a statement provided that a person will not be compelled to answer incriminating questions. This recognises the fundamental legal principles of the rights of person not to incriminate himself. The relationship between the police who also have powers to carry out investigations into corruption and the KACA is clearly defined should a conflict arise on who shall conduct investigation. In this regard, section 11 authorises the director to assume any investigation or prosecution commenced by the police for an offence involving corruption.

The director also has under section 10 of the Act special powers to investigate any bank account, share account or purchase account of any persons suspected of committing an offence under the Act. These powers apply to the immediate members of the person's family, his trustees or agents. The section creates an offence for any person, who fails to produce any such account or document, or produces a false document or obstructs any authorised person to scrutinise or take copies of any relevant entry. When it is not clear whether possession by a public servant of unexplained or disproportionate resources or property can be a reasonable variable to suspect that someone has committed an offence, KACA has authority to engage informers and undercover operatives to establish this. In the light of above outline, it is apparent that the law has provided a relatively reasonable legal mechanism to combat corruption through criminal prosecution.

However, prosecuting corruption is one of the most difficult assignments one can undertake because of the complexity of corrupt transactions and the difficulty of proving them. Most corruption offences, in particular bribery, are consensual by definition and based on mutual interest. As a result, law enforcement agencies have major difficulties to collect reliable evidence on these offences. Traditional means and ways of obtaining information, which subsequently may serve as evidence, such as confession by the suspect and testimony by witnesses are rare, if they exist at all. In a large majority of cases, persons who have information on corruption offences would not report mainly because they would incriminate themselves or because of fear of possible consequences. The possibility of gathering sufficient evidence can be improved by covert investigation. This would entail the use of highly intrusive
measures such as telephone tapping, bugging, electronic surveillance and undercover agents. However, the gathering of evidence using these methods may be limited in scope due to cost and taking into account the nation's economic situation, KACA would be far under-resourced for such an undertaking. Moreover, the merits of protecting human rights weigh heavily against these highly intrusive and coercive measures. Similarly, although the Act gives special investigation and prosecution powers to KACA, for instance, to demand any information held by a public or private body relating to books of accounts, property inventories, bank statements or any other document, these powers have limitations, especially where information being sought is abroad.

As for political support to fight corruption, experience relating to establishment and entrenchment of an anti-corruption agency in Kenya highlights how political indifference has dampened efforts to fight corruption. One key illustration is the establishment of KACA, as has been stated above, was imposed on a reluctant government. Even if the Kenya Anti-Corruption agency were to have the necessary powers including political backing, it would still rely on the normal judicial machinery and the office of the Attorney General when bringing cases to trial. The effectiveness of the agency would ultimately depend on the integrity and efficiency of the prosecutor's office and the courts. Weaknesses in any of these areas can destroy the agency's public credibility, even though they are beyond its control. According to interview with KACA officers, the Attorney General and the courts have not been keen to implement the Prevention of Corruption Act. Private prosecutions against corrupt public officials have been dismissed by courts on narrow grounds of *locus standi* or terminated by the Attorney General through *nolle prosequi* (no prosecution) writs. The courts also seem to grant *de facto* immunity to corruption through lengthy procedures and manipulation of the judicial process, such as the Goldenberg case that has been pending in court since 1994. The problem of corrupt practices is compounded by lack of alternative mechanisms of dispensing justice as the official court systems have virtual monopoly.

**The Judicial System**

The principle of the rule of law, which means the expectation of equality of treatment under objective accessible rules, is the very foundation of all democracies.
However, the rule of law cannot be guaranteed by mere words on paper alone. It requires the willingness of government to abide by its constitutionally mandated limits, the legislature that promulgates law according to the constitution and a judiciary that can promote justice, adjudicate impartially and expeditiously, and recognise individual merit above status. This requires maintenance of judicial independence and impartiality and that is the reason why judges are given such privileged position in society. That is why also the judiciary is, arguably, the most important institution to enforce the rule of law. Consequently, judges enjoy security of tenure of office, guaranteed financial independence, and are treated with reverence and respect in their courtrooms.

In Kenya, as is many other judicial systems in democratic countries, judicial independence is guaranteed by the Constitution. The judiciary is separate from and independent of the other two branches of government, the Executive and the Legislative. Judicial independence is a guarantee that judges will make decisions free of influence and based solely on fact and law. From this perspective, the judiciary, from appellate judges to the magistracy, is supposed to be held in immense faith, especially in non-political matters.

Yet, in the eyes of many Kenyans, the judiciary appears unresponsive to the rule of law and particularly to the problem of corruption. During this research at least two elements that significantly affect the functioning of the judicial system were identified. First, the division of powers that guarantees judicial independence seems to be less obvious. The Head of State, as previously discussed, has exclusive discretion in the appointment and promotion of judges who are rarely vetted by the Judicial Service Commission. In such circumstances conflict of interests potentially occurs with respect to impartial dispensation of justice particularly in situations where the Head of State has partial interest. Indeed, frequent claims expressed by the public and reflected in a number of court decisions show that the judiciary suffers from excessive intervention by the political executive and the ruling elite to make decisions in their favour (Shaw and Gatheru, 1998). For instance, twice in eleven months, judicial decisions had the effect of derailing the institutional fight against corruption by stopping the operations of KACA, an action which observers blamed on powerful 'state capture' machinations (Kantai and Mati, 2001). Observers also point out to some other cases, which tend to raise suspicion that the judiciary being highly
politicised. The most recent example of this politicisation was the visit by a
delegation of judges to the State House at the height of the campaigns just before last
year's General Election. The judges were received at the State House by the then
President Daniel arap Moi and his preferred heir Uhuru Kenyatta. Leading a
delegation of judges at the height of campaigns seemed to underline some kind of
loyalty.

The history of the judicial system in Kenya and systematic changes that have
taken place illustrate how the top echelon in the Executive has progressively realigned
the judicial independence. In the first and second republics - the Kenyatta 1963-1978)
and Moi (1978-2002) regimes - the executive made a systematic effort to undermine
the independence of the Judiciary. So intense was the Executive's desire to control
the Judiciary that in 1988 it moved legislation to remove the security of tenure for
judges but this was later restored after extensive donor pressure (O'Brien and Ryan,
2000). This action of reinstatement alone, however, failed to fully restore the
independence of the Judiciary and the Executive continued to be confident in its
powers to influence the Judiciary in what one Kenyan legal scholar call the
'judicialisation of politics' (Muthoga, 2002: 5).

The second element relates to judicial rectitude, which means that the Executive
is nonetheless the only element exerting undue influence to the judiciary. Allegations
of corruption have dogged the judiciary. The Kwach Committee on the
Administration of Justice (1999) headed by Justice Kwach notes that judicial officers
are reported to have taken to bribery, corruption and drunkenness. The report
indicated that there existed corruption in the judiciary, taking various patterns,
generally to prevent the course of justice. These took the forms of inducing court
officials to lose or misplace case files, delay trials, judgements and rulings. There
was also actual payment of money to judges and magistrates to influence their
decisions. Press reports also carry news of judges and magistrates who have been
sued in courts for being in state of pecuniary embarrassments (Muthoga, 2002).
Indeed, at one time, the High Court declared one judge bankrupt on debts allegedly
incurred through gambling, but a powerful politician intervened and discharged his
debts. Ironically, this judge was later appointed the Chief Justice of Kenya.
Obviously, such officers are far too vulnerable to bribery and corruption to be in
position to deliver justice to the people.
A team of Commonwealth judges invited recently by the Constitutional Review Commission of Kenya (CRCK) to advice on reforms of judiciary reported of widespread complaints of corruption, and alarming allegations against the integrity and competence of the judiciary (Mugonyi, 2002). The legal panel called for significant reform of Kenya's judicial system and is quoted as having said that, 'Corruption in the judiciary is such a serious problem that a strong and immediate response is required under the present constitutional arrangements. We have to offer an avenue of hope for immediate respite from the cancer of corrupt elements within the judiciary' (ibid.:15). The panel, which solicited views from stakeholders in order to make suggestions on substantive reforms to the judiciary, reported about two forms of corruption. One was bribery of judges, magistrates and court officials. This was the most obvious. Another form of corruption was the exertion of political pressure or influence on a judge or a magistrate to decide a case other than in accordance with the law and evidence before the court.

The advisory panel drew two conclusions. The first one was that, was at the time constituted, the Kenyan judicial system suffered from a serious lack of public confidence, and, therefore, needed fundamental structural reforms. The team expressed concern that there was no transparent system of appointing judges and magistrates and found it unacceptable that even lawyers with disciplinary cases pending before the Law Society of Kenya had been appointed to high judicial office. This corroborated the earlier findings of the Kwach Committee on the Administration of Justice (1999). However, this report was publicly criticised by the Chief Justice as lopsided and vindictive although a local survey of public opinion had also placed the Kenyan judiciary sixth in the national bribery league (Transparency International, 2002). This, too, was despite admission by a magistrate and a member of the Kwach Committee who wrote the following in the Daily Nation about the status of corruption in the judiciary:

In the late 1980s and early 1990s, Kenyans wanted a multiparty system of government. This craving was expressed in many ways. The Establishment reacted quite strongly against this urge and used the judiciary to fight their war. The judiciary came heavily on those charged with sedition and related offences. Those arrested were subjected to torture in police hand and the judiciary supported such repression by making it impossible for the torture victims to raise complaints, to be represented, or to get a fair trial. When the
history of this country is written, it will show that some colleagues in the judiciary conspired with the police to have suspects attend court to take pleas before 8 a.m. or after 5 p.m.

The judiciary comes out clearly as being anti-people and always standing in the way of popular opinion. It is in this light that one can see the drastic recommendations that the Constitution of Kenya Review Commission (the Ghai Commission) has come up with. Those recommendations are a serious indictment on the judiciary. They are an added to those of many Kenyans who say they have no confidence in us. I was a member of the Kwach Committee on the Administration of Justice and we visited many courts and closely looked at our systems and structures. We concluded that there were many incidents of corruption and general ineptitude. I was chairman of the Kenya Magistrates and Judges Association. I tried to fight many of these ills and interference by the Executive. The Law Society of Kenya has complained about us, and so have many other professional bodies. On many occasions, opportunities have presented themselves to us to accept the reality and change, but we have stuck to the old and known ways. This is why the judiciary is at crossroads (Muchelule, 2002).

This admission clearly illustrates how the principal-agent relationship can be inverted with regard to the administration of justice. As an instrument of the people, the natural reaction would be to serve the interests of ordinary people. On the contrary, and as another high-ranking judicial officer had earlier noted, the administration of justice was so infiltrate by powerful political forces that it no longer served the interests of the people (Sunday Nation, July 12, 1998). Following image problem within the judiciary and distrust of judges and magistrates to uphold the rule of law ordinary people are inclined to turn to informal institutions to adjudicate disputes and solve other problems.

In sum, rectitude and political manipulation of the judiciary need not been seen in isolation, but as part of a bigger problem that has become part of the national character of the public service. To a large extent, the root of this problem arises from multiple and conflicting goals due to politicisation of the bureaucracy and the absence of incentives to motivate the activity of public servants (Dixit, 1997). The following section examines important structural feature in the civil service such as meritocratic recruitment, public sector salaries and other characteristics that invariably affect the performance.
The Public Service and Incentive Systems

The framework in which civil servants are governed is in the revised Code of Regulations issued in July 1992 (Republic of Kenya, 1992). Policies and measures covered in these regulations include standardised criteria for recruitment to the public service, absences, debt, criminal proceedings, improper use of stores, disciplinary proceedings, misuse of funds, acceptance of presents, contact with the press, participation in politics, probation and retirement.

In the Kenya's civil service structure, there is no unified system of human resources management and oversight. The personnel management functions are currently divided among different agencies. They include the Head of the Public Service, who is also the Permanent Secretary in the Office of the President and Secretary to the Cabinet; the Directorate of Personnel Management (DPM) located in the Office of the President; the Public Service Commission; the Judicial Service Commission; and operating Ministries and Departments. However, the Public Service Commission has overall responsibility for recruiting civil servants and implementing the associated rules of conduct (Laws of Kenya, 1985). This means that officers are not disciplined at the ministry level but disciplinary processes usually begin from individual ministries. This over-centralisation is likely to result in lack of diligence, speed and equity in enforcing the disciplinary process as officers may simply be transferred to other units, as is often the case.

Whereas the civil service regulations guide the appointment process for positions in the public administration, evidence shows that it has been thoroughly undermined by the presidential arbitrary powers to appoint senior executives in public service. In practice, top posts particularly in the State-Owned Enterprises (SOEs) and other public bodies serve as vast reservoirs of appointments based on nepotism, tribalism and political patronage rather than professional expertise. These institutions include public universities, social security agency, regulatory bodies and until the privatisation process in the 1990s 270 parastatals. According to O'Brien and Ryan (2000) the SOEs were not only sources of political power and jobs for constituents, but also direct source of widespread opportunities for rent extraction. In the absence of qualitative evidence on recruitment and promotion procedures it might be problematic to support political patronage claim. However, the fact that a proposal to divest some of these enterprises provoked hostile reaction from the Office of the
President reflects vested interest. The UNDP (2001) research, too, details how senior civil service jobs are regularly targeted for political patronage. The worst targets are offices of Permanent Secretaries whose positions were once occupied by tested career civil servants. Recently, for instance, the President single-handedly appointed a number of Permanent Secretaries including the Head of the Civil Service from outside the civil service, a move that increasingly demoralised career civil servants.

According to a recent research in Kenya by the United Nations' department of Economic and Social Affairs (UNDP, 2001), one of the major factors currently undermining the efficiency and effectiveness of the public service is its politicisation. The study concluded that the public service is by and large patrimonialised by the ruling elite, which uses public servants as controls to ensure their own permanence in power. The system of patrimonialising the public service, which comprises employees in the civil service, parastatal organisations, teachers, police, military and local authority employees, as has been previously discussed, is not a new phenomenon but was largely inherited from the colonial administration. In developing the public service, the colonial administration created a set of standards to regulate against undesirable behaviour and provide guidelines, which the public servants were expected to adhere in the course of their duties. The main source of this set of standards was the Code of Regulations (ibid. 36), but other pieces of legislation such as the Service Commission Act of 1955, Cap. 185 (Laws of Kenya, 1985) and later, the Official Secrets Act of 1968, Cap. 187 (Laws of Kenya, 1970) were also relevant. Since 1963, the Code of Regulations has been revised and updated regularly.

Like any other management tool, the effectiveness of these standards depends on whether they are implemented, understood and applied consistently. Naturally, public servants are expected to know these standards as they are expected to apply them to their work. The United Nations' report found out that in practice, few public officials are aware of the contents of these guidelines until when they are called for the purpose of disciplinary sanctions.

In 1979, the Code of Regulations was revised and a code of ethics for civil servants was introduced (Republic of Kenya, 1992). This required civil servants to declare their property and restricted their right to economic activity, but it was too limited and lacked effective implementation instruments. Public officials were obliged to declare only their own property as well as the property owned jointly with
their spouse. This meant that if official’s spouse owned assets that were not part of the common property, they did not have to be declared. Neither did the regulation say anything about the property owned by other members of the official’s close family—parents, children and siblings. This obviously left a lot of room for seeking and hiding rent. Another aspect was that employees of public institutions submitted their declaration to their superiors. This mechanism gave rise to the possibility of the official’s superior, who monitored the declaration, colluding with preferred subordinates. The regulation also did not provide for other methods of verifying the declaration other than accepting what had been submitted such as authorising the superior or any other body to confront the declarations with ‘standard of living’ of the officials. The problem with this mechanism was also compounded by the fact that government has countenanced conflict of interest activities in the civil service.

**Ethical Principles and Conflict of Interest**

Following the recommendation of the Commission of Inquiry: Public Service Structure and Remuneration Commission, 1970-71 headed by a former governor of the Central Bank of Kenya, Duncan Ndegwa (Ndegwa, 1971), Parliament passed a Bill that allowed civil servants to own and operate their own businesses. The idea behind the recommendations was not to enrich the civil servants per se, but to motivate the few educated African civil servants to remain in the service. At the time, it was feared that they would quit and go into business if they were not allowed to own some businesses that would supplement the little salaries that the government paid them. Besides, civil servants were thought to be among the few people with the skills necessary to run businesses at a time when the Government was keen to Africanise the economy. At the time, there was only a tiny cadre of well-educated African elite that was available to create both political and economic stability. This group easily formed into close networks and this was, indeed, the advent of the preponderant elite that is in power in Kenya today. The impact of this was that virtually every civil servant began to engage in private business, while spending less time doing official work.

The Ndegwa Report became unpopular because of the selective interpretation of its philosophy and its application that proceeded it. The United Nations' study (UNDP, 2001) argues that politicians and civil servants picked what was immediately
beneficial to them and ignored all the checks the report had proposed. Allowing civil servants into business was not even the first recommendation, but one that depended heavily on others that were ignored. Paragraph 31 of the 397-page report, for instance, required that Ministers, MPs and all public servants give the republic 'their undivided loyalty wherever and whenever it has claims on their services' (Ndegwa, 1971: 16). It stresses that such officers should not subordinate their duties to their private interests 'nor put themselves in a position where there is a conflict between their duty to the State and private interests (ibid.:17). Another condition the report insisted on was that the officials should not be associated with any activities that could raise suspicion that they were using their positions for private gain. The report wanted the government officials to keep off 'any occupation or business, which may prejudice their status as members of a public service' (ibid.). They were also required to maintain the professional and ethical standards. In paragraph 691, the Ndegwa Report recommended 'the urgent appointment of an Ombudsman as a means of preventing the abuse by civil servants of their powers' (ibid.:293). The Ombudsman was to have access to official documents relevant to any inquiry that may be required on a government official. This part was not taken up and no Ombudsman has been appointed to date.

This controversial measure has over its lifetime been subject to much criticism on the grounds of conflict of interest. One issue of concern is the ability of the public officials to balance between public and private interests. Civil servants are tempted to spend more of their time in private business and therefore devote less time to their official duties. Though civil servants earn meagre salaries in Kenya many have exploited their public office under the protection of this provision to make a lot of money. A recent legal tussle revealed that a former officer who joined the civil service as a District Officer in 1982, rose to the top rank of Provincial Commissioner but died after 14 years at 40 years had amassed a vast estate, which was reportedly worth Ksh.500m (US$8.5m). In addition to his expansive real estate property, he had shares and cash amounting to Ksh.30m ($0.4m) in several banks. It is said that cash amounting to Ksh.25m (US$0.3m) was found in his house when he died. Despite this vast wealth, it is speculated that the officer is not even in the top 10 of the exclusive club of Kenya's super rich civil servants (Daily Nation June 9, 2002).
However, permitting outside sources of income was justified as a means of providing alternative resources for already declining civil service wages, which has been more of a result of rapid growth in the public sector employment than in availability of resources. The rapid expansion of the civil service in the post-independent Kenya resulted in the deterioration of the terms and conditions of service. This was due to the huge amounts of funds required to meet government salaries and its inability to review annual salaries to cater for the actual cost of living. In addition, the government increasingly found it difficult to meet adequately some of the benefits, which constituted the terms and conditions of service for public servants, such as housing, health, and allowances (UNDP, 2001). Statistics show that the civil service employment had steadily grown at 7.4 percent from 160,000 in 1979 to a peak of 277,600 in 1989 (O'Brien and Ryan, 2000). Conversely, public sector real wages fell by some 65% between 1970 and 1994, despite civil service wages accounting for about 40% of ordinary revenue and 30% of total expenditure (ibid.). In the process, the government machinery became fragmented, created structural overlaps and duplication, which led to inefficiency and ineffectiveness. Indeed, this led to a demotivated staff, a decline in work efforts, absenteeism, moonlighting and daylighting. Demotivation also showed up in poor civil service management and a loss of sense of responsibility.

Initially, rapid growth in government employment was intended to support the expanding government intervention in economic activities, but poor recruitment control and ineffective budgeting and establishment control mechanisms led to the staff surplus (UNDP, 2001). According to the United Nations' study, recruitment did not follow laid-down machinery, and the civil service establishment was not properly synchronised with objective assessment of workload. This resulted in gross overstaffing at the lower level of service and acute lack of resources to hire staff to fill vacant positions in higher job groups and in areas where skill were scarce. The falling real wages also made it more difficult to fill professional and managerial positions.

The unstable economic growth and increased fiscal constrain arising from the total civil service wage bill and donor pressure called for a wide ranging review of the structure and functions of the civil service with a view to down-sizing and rationalising them. Due to political reasons, the government experienced significant problems in confronting this crisis in any fundamental way. Any move on
retrenchment or even the cessation of new hiring, was politically sensitive given the rapidly growing urban unemployment and, therefore, the government was using all manners of tactics to buy time and avoid action. By 1993, it became imperative for the government to take action and a Civil Service Reform Programme (CSRP) was launched with the support of the World Bank, UNDP and several bilateral donors. Although there was a substantial reduction in the civil service from its peak size of 271,325 in 1991 to 162,131 by 1999, this gain was offset by expansion in the employment of teachers (UNDP, 2001).

As a result of idle time among the civil servants, erosion of real wages and frequent contact with the public, systemic corruption became a major problem that urgently needed government intervention. In an effort to eradicate corruption the government published the Public Service (Code of Conduct and Ethics) Bill, 2001 which is awaiting parliamentary debate and approval (Kantai and Mati, 2001). Similarly, as part of the campaign against corruption, the government also launched a source book, Public Service Integrity Programme for corruption prevention in the public service (Republic of Kenya, 2002). A secretariat drawn from ministries and officials of the Directorate of Personnel Management, the Kenya Revenue Authority, the Attorney General's Office, the Police Department, and the C&AG's Office is expected to implement the programme. Under this programme, more than 970 Integrity Assurance Officers (IAO) have been trained to sensitise all staff in the ministries, departments, parastatals and local authorities on the causes and dangers of corruption, promote anti-corruption initiatives and ultimately to cultivate a culture of integrity throughout the public service. To supplement awareness efforts, the government has set up anti-corruption committees consisting of at least five officers in each government ministry to receive and review reports on prevention measures and take appropriate action while at the same time, develop prevention plans. However, internalising a programme like this depends very much on strong incentives and motivations in order to transform the attitudes of public servants. Generally, civil service pay is among such incentives.

**Civil Service and Pay Levels**

Naturally, opportunities for corruption exist because of the degree of discretion these officers have. Partly as a solution to this principal-agent problem, a
reasonable payment scheme can be made to compensate public officials on a scale at least equal to the income in the official's next best alternative occupation. Becker and Stigler (1974:6) echo this when they state, 'The fundamental answer is to raise the salaries of enforcers above what they could get elsewhere.... A difference in salaries imposes a cost of dismissal.... This cost can more than offset the gain from malfeasance'. In reality, however, the existing compensation for public officials at all levels in Kenya often fail to achieve this. Levels of official compensation have fallen below what might be considered realistic alternatives for the pool of qualified talent. According to the widely shared view among academic writers, policy makers, politician, and the general public alike, Kenya has been characterised as having a 'low pay' civil service, which, in turn, is responsible for the widespread corruption in government. The general view is that Kenyan public officials are among the most poorly paid in the world with official salaries hardly able to cover essential monthly needs. Articles in daily newspapers also share similar views. If public pay is well below the poverty line, as the prevailing view suggests, corruption becomes a survival strategy.

The claim that Kenyan civil servants are low paid, though widespread raises many questions. Salaries may be low, but relative to what or whom? Are government salaries low relative to international levels or to domestic alternatives? With the civil service, including the armed services and police but excluding teachers, of over 160,000, are all low paid or only those at certain levels? Research carried out by donor agencies and the United Nations has attempted to answer these questions. A caveat, however, is that reliable data on the structure of public sector wage, and the ratio of public wages to private sector wages is not readily available in Kenya. There is no systematic effort to collect information on this issue and, therefore, what is available are snapshots on the basis of sparse and disjointed data series obtained through efforts of individual researchers working for these organisations.

Empirical evidence on civil service pay in Kenya and other less developed countries support the argument that real wage levels for public sector employees has fallen relative not only to private sector wages but also to the civil service pay in the past. In a study of government documents drawn up to assess salary adjustment in Ghana, Kenya and Nigeria, Bennell (1981) concluded that in those countries, in every grade and every period studied, civil servants were paid less than they could be in
corresponding job in the private sector. This gap seemed to be wider for higher grades and appeared to be widening over time. Another more recent study to assess the quality of governance following civil service reform in Africa shows that in the late eighties and early nineties real wages fell at annual average rate of 2.2 percent (Haque and Aziz, 1998:14). According to the same survey, annual ratio of government to private sector fell by 3 percent during the same period. During this period, Kenya experienced high annual growth rates of employment. A number of factors precipitated this rapid employment increase. One was the high degree of government intervention in economic development and engagement in commercial activities through the many state-owned enterprises, which required a large supporting civil service. Another factor was political patronage, whereby supporters of those holding power were rewarded with civil service positions (Lienert and Modi, 1997).

The level affected most by erosion of real wage was the upper-grade staff due to wage compression, according to the United Nations study that compared public sector salary structure to government pay at different salary ranks (UNDP, 2001). The report indicates that Kenya has relatively high salary compression rates in the public sector compared to most of the sub-Saharan African countries (Table 4.2). That is, the lowest and the highest nominal incomes are very close to each other. The highest public official salary is 13.4% above the minimum official salary (UNDP, 2001). However, this comparison is based on nominal salaries and does not count for in-kind provisions and further benefits like free housing, domestic personnel, or car and driver. There are three aspects to the wage compression. First, because of non-existent indexation mechanisms there is no adjustment of salary with inflation. For example, when the Kenyan economy experienced a series of shocks in the late 1970s and early 1980s (O'Brien and Ryan, 2000), there was a general fall in real wages resulting in rapid erosion of purchasing power. Second, when wage increase is accorded, either higher percentage increases are granted to lower-level employees or the same nominal increment is provided to all staff. This results in particularly strong erosion of management-level salaries. Third, Kenya has deliberately allowed non-wage benefits to cushion the erosion of real wages.

Table 4.2. Comparative Central Government Salary Ranges in USS (1998)
A salary decompression policy that aims to stop flight of talent from the top echelons of the public service to the private sector as well as serving as promotional incentives for the rest of the public servants has been introduced by the government. Recently, adjustments have been made at the highest levels so as to decompress the range of salary disparity. Despite these adjustments, public sector salaries have not kept up with inflation and are not yet in parity with the private sector. Therefore, wage scheme simply does not compensate public officials sufficiently resulting in human capital flight. Since private sector cannot absorb the human capital, many look for opportunities outside the country. Naturally, inadequate compensation is an important motivation for self-serving interests. Opportunistic public officials consciously attempt to make up to these deficits by engaging in corrupt activities.

The consequence of low and declining government wages is skill migration both to the private sector and foreign countries. Kenya, like many other African countries, has been experiencing a high loss of professional and technical skill such as scientists, academics, doctors, engineers and others with university training to countries able to offer better salaries and terms. Given the relatively short supply of skill available, even a small number of human capital flight has consequences for institutional capacity. Organisation of the public sector as well as retention of skilled and motivated personnel has important policy implications for corruption.

<table>
<thead>
<tr>
<th>Country</th>
<th>Lowest salary (US$)</th>
<th>Highest salary (US$)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cameroon</td>
<td>794</td>
<td>4,436</td>
</tr>
<tr>
<td>Gabon</td>
<td>239</td>
<td>1,224</td>
</tr>
<tr>
<td>Ghana</td>
<td>462</td>
<td>5,480</td>
</tr>
<tr>
<td>Kenya</td>
<td>513</td>
<td>6,898</td>
</tr>
<tr>
<td>Madagascar</td>
<td>528</td>
<td>2,644</td>
</tr>
<tr>
<td>Namibia</td>
<td>4,411</td>
<td>50,483</td>
</tr>
<tr>
<td>Nigeria</td>
<td>228</td>
<td>9,138</td>
</tr>
<tr>
<td>Senegal</td>
<td>1,106</td>
<td>4,729</td>
</tr>
<tr>
<td>South Africa</td>
<td>4,964</td>
<td>60,273</td>
</tr>
<tr>
<td>Uganda</td>
<td>471</td>
<td>18,768</td>
</tr>
</tbody>
</table>

Source: UNDP (2001:29)
Researchers have shown that an appropriate response for dealing with corruption and rent-seeking may be the retention of appropriate incentives for skills and honest productive behaviour in the public sector (Haque and Sahay, 1996; Murphy, Schleifer and Vishny, 1991).

As Kenya continues through the period of significant structural change, the government recognises the need for an efficient management capable of formulating and implementing policies. This clearly depends on the government's ability to attract qualified personnel through improved civil service wages. Ironically, despite high wage bills, civil servants are often underpaid, especially professionals in the highest grades, making it difficult for government to retain the most competent employees. In order to achieve this, the government has moved some critical functions such as revenue collection under the Kenya Revenue Authority outside the public service system in order to offer better pay and other incentives. Meanwhile, reducing the total wage bill in relation to GDP by reducing the size of the civil service remains a sensitive issue.

**Summary**

This chapter has attempted to capture the most salient institutional circumstances that affect the control of corruption. The chapter gives a comprehensive and qualitative impression of the anti-corruption measures that are in place for fighting the phenomenon. The most visible measures tend to combine elements such as criminal justice and deterrence, oversight and monitoring functions and setting of standards and incentives for officials.

A review of anti-corruption reform shows that Kenya has the necessary legal framework for fighting corruption, which stems from the Constitution. The Constitution provides a sound foundation on which a framework for institutional checks and balances can evolve. For example, section 30 of the Constitution vests in the parliament powers to discuss public issues and to legislate against abuse of powers by public officials. MPs can bring wrongdoing to light by demanding explanations from the government during their plenary sessions. Parliamentary watchdogs through various committees such as the PAC and the PIC have powers to scrutinise government expenditures with the assistance of the C&AG. The Committees handle
reports containing reviews of public expenditures in government ministries from the C&AG. Consequently, the Committees can summon and challenge public officials to explain reported violations regarding malpractice and corruption in the public sector.

However, there are certain flaws in the Constitution, which hamper parliamentary powers to protect public funds from unscrupulous public officials. Most notable are the provisions that empower the executive authority to introduce new items on the budget before parliamentary approval, and the discretion to determine where to borrow money. Indeed the political elite in collusion with the top echelon in the civil service has taken advantage of this emasculation to satisfy their own ends. These fundamental flaws could perhaps be mitigated to some extent by improving the oversight controls, e.g. by establishing a parliamentary budget committee to monitor and scrutinise all proposed supplementary expenditure and sources of funds.

Evaluation of the appropriateness and quality of the criminal justice system indicates that the Constitution also encourages the promotion of the rule of law by guaranteeing the independence of the judiciary and security of tenure for judges. In this respect, judges and magistrates have been given protection to decide cases according to the law and facts. However, one of the criticisms levelled against the judiciary, as an instrument of the people, is that it has been so politicised that it does not serve the interests of the public. Similarly, the effectiveness of the anti-corruption agency has significantly been undermined by what is considered a perceived interference by powerful political and economic interests. Although there are general provisions of the law and particularly the Prevention of Corruption Act that proscribe corruption and prescribe sanctions, the framework is nevertheless insufficient to support the efforts in curbing corruption and bringing the phenomenon under acceptable limits. As is the case for many countries in transition to open, democratic societies, Kenya has had a difficult time in consolidating exceptional political will to fighting corruption efficiently.

A number of plausible explanations have been advance in this thesis why corruption spread against the existing legal background. One of the causes relates to the inherent problem of crafting a law that effectively cover all loopholes. A good example is corruptive collusion that went on in the public procurement despite what appeared to be a relatively sound public procurement legislation. Another and
perhaps the greater and more serious problems relates to the enforcement of legal provisions. Problems arise in effectively prosecuting and punishing corruption. First, the legal provisions related to acts of corruption seem to have been designed exclusively to depend on severe sanctions as the sole instrument to curb the phenomenon. Paradoxically, the reality is that far from legal proscriptions curbing corruption to any significant degree, the phenomenon continues to flourish. It thus seems safe to assert that severe sanctions are not enough, if taken alone, to bring about decreased corruption.

Considering the effectiveness of law enforcement, the negative influence of the Executive on the independence of the judiciary is especially obvious. Despite constitutional and legal safeguards, the existing relationship between the judiciary and the Executive particularly in the appointments erodes the independence of judicial officers in making fair and unbiased decisions, especially where the Executive is an interested party. There are several other means that the Executive has used to undermine judicial independence. These include deprivation of adequate budgets and certain benefits. Often, the weakened judiciary becomes vulnerable to powerful political elite. Some powerful unscrupulous individuals (and in most cases are protected by unofficial immunity) indeed exploit this weakness and use their influence, under the aegis of the top echelon in the executive, to pervert justice. Prosecuting acts of corruption in court does not serve as deterrence.

Perverting justice may include, at lower levels, interference with investigation authorities and influencing investigations in given cases, so that they never reach the court. Their proposals for prosecution and trial in courts of law may be reversed by decisions of non-commencement of criminal prosecution as the Attorney General's powers to enter *nolle prosequi* (no prosecution) and subsequent withdrawal from prosecution. The enforcement authorities lack the will and to a certain extent the power to implement the law. The anti-corruption agencies have been limited to controlling corruption in the ranks of the bureaucracy and their function has been constrained both in scope as well as jurisdiction. They have been ineffective even in this role, thereby resulting in low credibility and creation of perverse incentives to the public servants. Some other times it is the case that fighting corruption is exemplified by convicted petty offences that do not best represent the phenomenon, while grand corruption is only signalled in media headlines without legal action to be taken.
Consequently, there is lack of confidence and public cynicism regarding the political and legal means to combat and curb corruption. As shown above, there is no important lack of legal instruments, as a fairly complete legal background is in place. In regard to public perception of the political will to combat corruption, a recent survey indicated that Kenyans have the least confidence in political parties and politics in general (TI, 2002). This lack of confidence has its roots in the recent history of transition: privatisation, political scandals, and grand corruption highlighted by the media but almost never followed by prosecution and conviction. All this led to public resignation about the relative impossibility of fighting corruption and public belief that corruption has perverted all levels of government.

One important factor in the fight against corruption is the level of integrity in those who are engaged in public functions particularly those responsible for enforcing the laws. As a result, a major issue of concern is to build up public service integrity, accountability and transparency. There is wide consensus that managing the conduct of public servants would stem corruption from the 'demand side.' This research shows that the issue of ethics and the management of the conduct in the public service have been addressed but it is fraught with conflict of interest problems so long as civil servants are allowed to engage in private business while in office. This brings the crucial question of compensation. Comparative analysis of public service salary structure in relation to the private sector is not conclusive, as the government does not collect systematically basic data and statistics. However, using their ingenuity, researchers have been able to confirm the general view that civil servants in Kenya get what is known as 'capitulation wage' (Besley and McLaren, 1993). This is the wage that is below the opportunity cost, and civil servants are willing to work for this pay, knowing that they will be able to make additional income from their private business or corruption. Given the resource constraint that the government is facing this situation is not unexpected. Thus, improving the public service salary structure, both in terms of adjusting the compression of the levels, in keeping up with inflation and in comparison with the private sector is a difficult issue to resolve. While wage incentives has limited effect, there is also the age-old practice of patrimonialising the civil service. Many appointments especially top posts, which are the prerogative of the President, are filled in disregard of merit and professional expertise.
In the concluding chapter, it will be argued that simply criminalising corruption is unlikely to be an effective solution unless accompanied by measures that deal with underlying political, cultural and economic factors, some of which were examined in chapter two. To evaluate how formal mechanisms that constrain corruption are likely to be institutionalised in a political system, it is necessary to analysis the peculiarities of the political, economic and social relations that characterise a particular country.
Chapter Five

CONCLUSION

How significant is the role of formal institutions in controlling corruption and opportunistic behaviour in the public sphere? To what extent do informal institutions such as patron-client networks and reciprocal relations influence the outcome of formal institutions? These are the principal questions to which this thesis addressed itself. The discussion was pursued in light of major arguments that have dominated conceptions of the causes of corruption in the public sector. Contemporary literature argues that corruption arises from wide discretionary powers in the hands of public officials in the context of lax systems of accountability and transparency and perverse incentives in government employment (Rose-Ackerman, 1978; Klitgaard, 1988; USAID, 1997; World Bank, 1997). This argument is based on the premise that the more activities public officials control or regulate the more opportunities exist for corruption. Furthermore, the lower probability of detection and punishment, the lower the risk associated with corruption deals. In addition, the lower the salaries, the reward for performance, the security of employment, and professionalism in public service, the greater the incentives for public officials to pursue self-serving rather than public serving objectives (USAID, 1997).

According to these arguments, it is the state, with its elaborate systems of regulatory procedures that are necessary for allocation of public goods, which spawn discretionary powers giving rise to varying amounts of corruption (Bardhan, 1997). Since corruption arises from the public officials misusing their offices, the arguments suggest that the state has the primary role of fighting corruption and emphasise the application countermeasures by way of regulatory and incentive systems as a significant solution for controlling and curbing corruption. These arguments largely conceive corruption control in procedural terms and assume that once rules and incentives are introduced by the state, they will have an independent determining effect on the interests, strategies and behaviours of individuals. While this conception is significantly important, the arguments in the literature do not provide deeper insights of the complex institutional factors that motivate individuals to engage in
opportunistic behaviours. This thesis had contributed towards this understanding. The major contribution is that, in practice, individuals respond to a mix of formal rules and unwritten informal norms and to understand what often shapes individuals' incentives it is necessary to examine both formal and informal institutions.

As noted previously in this thesis, recent anti-corruption policies that have become fashionable both at the national and international level have largely been influenced by contemporary debate in the literature on corruption. This has significantly lead to formal solutions that emphasise administrative and legal remedies designed essentially to limit the discretion of public officials, for example, through carefully crafted rules and regulations, and production of more stringent laws and stricter enforcement of existing laws (Becker, 1968; Wade, 1982; Klitgaard, 1988). It has also led to fundamental economic reforms, which aim to remove the conditions that give rise to corruption in the first place. Such reforms seek to introduce more internal competition among government agencies, commercialise or privatise those activities of government that can no longer be justified as a public responsibility (Shleifer and Vishny, 1993; Rose-Ackerman, 1999). Another approach generally focuses on realigning incentives for bureaucrats to induce honesty (Ades and Di Tella, 1995).

Much of the literature supporting these policy interventions is informed by the principal-agent theory, which regards corruption as a top-down incentive-design problem and emphasises the need to restrain bureaucrats and politicians by changing incentive structures. This entails dealing with institutional factors that affect the decisions of individuals through compliance-enhancing policy measures (Groenendijk, 1997). These measures essentially apply the 'carrot and stick' principle in that they aim to intensify monitoring and control mechanisms while providing incentives for honest behaviour. However, the theory highlights the problems of divergent objectives of the principal and agent, and structural constraints of information asymmetries that compound the designing of incentive mechanisms, an inherent problem in the political economy. In essence, the principal-agent theory is concerned with formal mechanisms of control. However, as argued earlier, it is necessary to extend beyond the traditional principal-agent approach and explore the role of informal institutions as well. More specifically, research on corruption needed to focus on both formal and informal institutions (Andvig et al., 2000).
At the core of this thesis is the proposition that approaches to the control of corruption that rely solely on formal regulatory and incentives mechanisms will have limited impact on high-level corruption in political systems where informal institutions compete effectively against formal systems of governance. Kenya and indeed most 'hybrid' regimes (i.e., subscribing to both patrimonial and rational-legal ethos) of sub-Saharan Africa fall within this category (Chabal and Daloz, 1999).

On the basis of this hypothesis, the thesis developed a conceptual framework that incorporated theoretical insights from both cultural and institutional approaches to examine a number of theoretical and practical issues on corruption, and various policy strategies that have been adopted in fighting the phenomenon. Since corruption is a deviation from norms that entail rational decisions by those involved, the thesis first sought to establish how cultural traditions and values explain this rationalisation. In this regard, answers were sought from a number of preliminary questions. Does corruption in Kenya mainly represent habits inherited from the past or is it a manifestation of new kinds of behaviour? Which value systems permit a justification of corruption by those who practice it, and how is it anchored in ordinary everyday practice? What causes, or allows for the diffusion of such deviation? Invariably, debates within the modernisation and neo-patrimonial schools provided important insights into these questions.

Debates within the modernisation school usefully provided answers to the first question by explaining historical process of transformation. A common feature of theories in the modernisation school is that complex factors responsible for economic and political development and an increase in prosperity in the broader sense (e.g. wealth, education) lead to a plurality of interests coupled with corruption or at least results in changing values about corruption. As a typically developing country, which has experienced socio-economic and political changes during colonialism and post-colonial period, Kenya can easily be encapsulated by the notion of modernisation.

In applying the modernisation doctrine, it was possible to understand how in the context of the modernisation process, behaviour, which was accepted as legitimate according to traditional norms became unacceptable and corrupt when viewed from a modern perspective (Huntington, 1968). Another predisposing factor was the creation of new sources of wealth and power evolving a continuous bargain for inclusion in the political power sharing by the emerging capitalist class. According to Nye (1967),
this was how the minority Asian entrepreneurs in Kenya managed to gain and retain access to political decisions necessary for their commercial interest. Indeed, the rise of new governing elite in Kenya after independence was accompanied by a corresponding creation of new avenues of wealth and power with enormous possibility for widespread corruption for access to the resources they controlled. However, the modernisation theories only draw attention to the transformation process and its consequences on corruption, but they do not explain the social mechanisms of corruption or how actors rationalise corrupt practices (Sardan, 1999).

This line of argument is discussed in the neo-patrimonial literature, which distinctively focuses on informal aspects of political organisation and solidarity networks (Bayart et al., 1999; Chabal and Daloz, 1999; Sardan, 1999). The literature calls attention to the primacy of informal institutions in African political systems, which invariably subscribes to rational legal ethos of democratic rule as well. The preponderance of informal institutions has prompted scholars to argue that the state is merely a façade that masks the realities of deeply personalised political relations and that the formal institution of the state is an empty shell (Chabal and Daloz, 1999). Instead these political practices manifest political regimes variously called 'personal rule', 'the politics of the belly', 'prebedalism' and 'kleptocracy' (Andvig et al., 2000). The distinctive features of these regimes are personal relationships as the foundation of the political system, and rent-seeking behaviour by officials at the highest government levels that consequently fosters excessive state intervention in the national economy (Coolidge and Rose-Ackerman, 2000).

Many characteristics of neo-patrimonialism are evident in Kenya and, according to various studies, a predatory network of patronage and clientelism has been sustaining itself on state resources since the country attained independence in 1963 (Jackson and Rosberg, 1982; Barkan, 1984; Williams, 1987; Chabal and Daloz, 1999). According to Barkan (1984) post-colonial Kenya pursued a model of patrimonial bureaucracy, which emphasised control and exercise of power as an instrument of exchange. This system of patron-client capitalism invariably increased the level of inequality between individuals of different socio-economic status and fuelled patronage practices. But it is under kleptocratic rule, which became especially pronounced during President Moi's regime (1978-2002) that corruption is thought to have intensified and become more systemic (Republic of Kenya, 2000). In this
condition personal enrichment from public resources appeared to have been the primary goal of those in public offices and corruption became an integrated and essential aspect of the economic, social and political system. Major institutions and processes of the state were routinely dominated and used by both corrupt individuals and groups, in which case, most people had no alternatives to dealing with corrupt officials.

This thesis argued earlier that while the comparative and descriptive literature on modernisation and neo-patrimonialism provides considerable insights on the historical variations, nature and causes of corruption, none has attempted to link the causes to possible remedies in any analytical framework. Arguably, the most comprehensive theoretical analysis that links causes to remedies so far is in the neo-institutionalist school, of which the principal-agent theory is a part (Groenendijk, 1997). The theory has generated new and important advances for analysing individual and structural variables that interact to produce corruption and practical impact of a number of policy strategies that are employed to curb it. According to Groenendijk, the theory in principal examines corruption within the institutional context obtaining in a specific system and explicitly addresses factors that influence opportunistic behaviour of individuals. However, scholars have begun to point to the limitations of the principal-agent approach for focusing strictly on formal institutional design (O'Donnell, 1996). To overcome this limitation, this thesis broadened the scope of institutional analysis by incorporating insights from cultural and institutional approaches to examine both formal and informal constraints on corruption.

What implications do the theoretical approaches outlined above have for the anti-corruption policy in Kenya? The following section analyses and discusses empirical results described in chapters two, three and four in relation to these theoretical perspectives and supporting frameworks to elucidate how several factors coalesce to undermine the formal mechanisms for controlling corruption.

Conclusions About Research Questions

Recent political economy literature underscores the important role that formal institutions play in the promotion of governance and anti-corruption initiatives (Moe,
This literature posits that well-functioning formal institutions are essential parts of any anti-corruption strategy for they structure and constrain how individuals make decisions regardless of their preferences. Institutions are especially relevant in the public sector to regulate policy-making processes and in the implementation of policy decisions. Government bureaucracy is generally organised hierarchically and characterised by delegation with clear lines of responsibility and authority at all levels. In other words, the state plays its role by devolving its responsibilities upon bureaucrats and politicians in a multi-level set-up that comprise the public sector. This hierarchical relationship is primarily informed by the principal-agent theory, whose rudimentary elements emphasise delegation of authority in order to reduce transaction costs and to produce services more efficiently (Moe, 1984). This relationship is also important in the construction of the micro-economic explanations of corruption, as well as in designing institutional reforms to curb corruption.

In general, the bureaucracy sets its own agenda on how to discharge its mandate. However, it functions through a set of laws, rules and regulations that guide officials in making public decisions such as awarding government contracts, authorising public expenditure, allocating public resources, and so forth. The ability of the state to pursue its objectives in the most efficient way is, however, determined by the institutional environment in the public sector. A sound institutional framework provides the procedural means that facilitates the public sector to formulate and implement government policies (Tanzi, 2000). However, as stated previously, even the most well crafted rules can have little effect when promulgated into an institutional vacuum and an infrastructure incapable of implementation. The foundation of a sound institutional framework entails simple, clear and comprehensive regulation systems (Tanzi, 1998), effective monitoring and penalty mechanisms (Klitgaard, 1988) and appropriate incentive structure in the civil service (Rauch and Evans, 1999). This approach illuminates the potential role played by formal institutions in shaping the institutional environment in which corruption takes place. To examine the implications of the institutional framework on corruption we need to re-visit to one of the central questions in the thesis: How significant is the role of formal institutions in controlling high-level corruption in the public sector in Kenya?
To address the above question, the major area of focus was the Kenyan public procurement system described in chapter three, but the subject of analysis was government regulatory and incentive system, which was also discussed in chapter four. In reviewing the public procurement structure and regulations in chapter three it was noted that Kenya has an elaborate procurement framework that aims to improve efficiency and reduce malpractice in the system. Indeed, Kenya has evaluated and modernised its procurement laws and practices in line with the Model on Procurement on Goods and Construction adopted by the United Nations Committee on International Trade Law (Strombom, 1998). Not only has the country crafted its procurement regulations and guidelines based on the UNCITRAL model, but it has also adopted the World Bank guidelines, which are considered by some writers (e.g., Andvig et al., 2000) to be the broadest and most elaborate set of policies aimed at reducing procurement corruption.

While these rules and regulations are necessary for conducting government activities, it is argued that in practice it is inevitably difficult to foresee all contingencies in order to prescribe tightly and sufficiently measures that would cover every loophole for corruption. Therefore, some degree of discretion has to be allowed those individuals responsible for making procurement decisions, which in turn potentially elicits prospects for abuse. Our empirical research provides illuminating examples to illustrate that probably as a result of this latitude, opportunistic public officials and contractors were able to engage in corrupt activities albeit remaining within the limits of the rules. Public officials and prospective suppliers routinely colluded to thwart the bidding process. One common practice was to manipulate the competitive process so that the desired contractor won the tender. In relatively small purchases, procurement officers would arrange with contractors to submit dummy but highly inflated quotations alongside the legitimate quotation. In many such cases, procurement officials split quotations to beat monetary threshold requirements and thereby circumvent scrutiny of the Tender Boards. Another example illustrate that in large infrastructure contracts, a contractor would under-quote to secure a contract and later engage in wholesale contract variations by looking for new events or conditions to justify changes of initial projects or supplementary works, or skimp on the quality of work or quantity of material. Sometimes, powerful middlemen or women (but
mostly middlemen) were often involved in varying degrees to ensure that the preferred contractor emerged the winner.

These findings are consistent with the literature for, as Goodie and Stasavage (1998: 118) note, as discretion increases, potential opportunities for government agents to make 'favourable' interpretations of the rules and regulations for self-interest increase too. Other studies such as that of della Porta and Vannucci (2001) share this view that weakly defined control mechanisms can be exploited for corrupt motives. When the bureaucratic capacity of projecting and planning is inefficient, or forecasting the nature and dimensions of the initial project, public officials and contractors can manipulate decisions regarding modifications or additions. Similarly, as Andvig et al (2000) explains, supplementary work can be obtained by bribing the technical experts in the procuring entity to ignore work that is left out of the contract, or to delete parts of the contract once the contract has been won.

Empirical evidence outlined in chapter three also tends to show that formal institutions were neither well developed nor sufficiently integrated in the political and social system to insulate public officials from political pressure or constrain their discretion and impose accountability on the procurement process. Although there were some constitutional and parliamentary restrictions on public spending, it was still noted that powerful political elites were often able to circumvent these restrictions and commit the government to unbudgeted- for multi-million contracts. Anecdotal evidence and data gained from audit reports, Parliamentary Accounts and Investment committees, revealed the existence of a number of complex networks consisting of powerful brokers and senior civil servants with links to the centres of power, which oriented public demand on the basis of lucrative payoffs.

On a number of occasions, these networks managed to influence the government to commission projects of relatively little national importance via corrupt practices. For them, it was not even necessary that these projects were completed or brought into use, as demonstrated by many 'white elephant' projects around the country (Kibwana, Wanjala and Owiti-Oketch, 1996). Similarly, powerful politicians and senior administrators with prospective political desires would divert large quantities of public resources to their local areas on patronage basis, while at the same time receiving huge kickbacks. This situation is reminiscent of the condition in Italy in the early 1990s. della Porta and Vannucci, (1997) give examples of similar cases
in their research into political crisis in Italy. During this time, the entire political class of the country as well as broad sectors of the business community and government functionaries was implicated in illegal procurement activities.

While data on procurement corruption in Kenya is limited, a review of the available empirical studies show that corruption in the procurement system is calculated to be pervasive and a source of huge payoffs and an expanding waste of public resources. A survey conducted by the Centre for Governance and Development (2001) estimated the Kenya government to have lost more than Ksh.475 billions (US$6 billion) as a result of corruption between 1991-1997. Another survey carried out by Transparency International (2002) found that officials of Ministry of Public Works demanded the biggest bribes among the 52 governmental organisations surveyed, averaging Ksh37,500 (US$470) per bribe. Regarding the incidence of corruption in the government, a World Bank survey on Kenyan civil service revealed that 59% of procurement officers were corrupt, rating them together with officers in the accounts, as the most corrupt in government departments (World Bank, 1999). Data collected from official records and interviews for this study and discussed in chapter three show that beneficiaries from procurement corruption include private contractors who are awarded contracts through suspected tendering arrangements, procurement agents, powerful government officials and well-connected political elite. This tends to suggest that the underlying cause of corruption in the public procurement cannot be considered to be economic or cultural, but rather a product of opportunity arising from weak systems of accountability and transparency. Not surprisingly, given the value of corrupt transactions and the level at which the transaction occurred, the majority of those involved could not be considered to be poor.

Why, despite an elaborate regulatory system and procedural restrictions, does opportunistic behaviour persist in public procurement? What explains the limitations of the procurement regulations? Human nature inherently promotes self-interest and as the principal-agent theory explains, this innate human instinct results in a divergence of objectives between the principal and agent (Moe, 1984). As a consequence, the onus rests upon the principal to translate self-interest into a positive outcome for the benefit of both, but due to informational asymmetries, the principal is presented with challenging difficulties of crafting tight and all-embracing regulations.
Indeed, this appears to be the case with the procurement regulations in Kenya where, owing to these difficulties, a great amount of discretion allowed more opportunities for agents to potentially give 'favourable' interpretations of government rules and regulations. Generally, the principal has other options such as co-ordinated hierarchical control mechanisms through state institutions to mitigate these imperfections. These mechanisms aim to expose corrupt practices and punish those involved, whilst at the same time designing incentives that would induce and promote honesty (Becker, 1968; Klitgaard, 1988). In the search of optimal incentive schemes, formal principal-agent models often assume that the principal has full control over the legal framework, over rewards and penalties, i.e. over incentives that impact on the agent's actions.

However, these theoretical explanations are not actually borne out in practice as noted in Chapter four where problems were highlighted relating to practical implications for monitoring and penalties as well incentive systems on procurement corruption. Greater insight on how controls were circumvented in the procurement process and how contractors were able to produce inferior work as a result of corruption gradually emerged during the research. For example, an analysis of audit reports and information obtained from contractors pointed to the limitations of such audits and inspections in enhancing the detection of corruption. While improved accounting and auditing systems could constrain discretion, some of the contractors that were interviewed disclosed that these measures could not uncover corruption that relied on contractor-supervisor collusion to produce shoddy workmanship or withhold material. To improve detection, it would require effective on-site inspections and monitoring, but again the quality of inspection and auditing essentially depended on how truthful and honest the auditors or supervisors were.

Andvig et al, (2000) suggest that the problem of collusion can to some extent be dealt with by imposing external monitoring systems as a control mechanism on the internal auditor. But they nevertheless acknowledge that the principal cannot even then observe how hard the auditor or supervisor is working. Even if the principal designs an attractive incentive system for the internal auditor and links this to the number of cases reported by the auditor, the fundamental point is that the reward that motivates the auditor to report must, however, match the potential bribe from the agent. In some cases monitoring system might be very expensive where, as we have
pointed earlier, bribes in public procurement can be very large. The main point that is
drawn from this argument is that the lack of effective controls and monitoring systems
may also be part of the corruption structures within the procurement entities. In
Kenya, the auditing infrastructure is poor, the staff are poorly paid and it is unrealistic
to suppose that the officers may not be tempted by bribes and other favours such as
providing private services to the same clients they are supposed to monitor, to
supplement their wages.

These arguments support earlier findings by Mookhejee and Png (1995) into
the problems of monitoring in the context of optimal incentive arrangement for a
bureaucracy in which a pollution inspector has to monitor a company for compliance
with pollution regulations. Their study concluded that the quality of a monitoring
policy to identify and report corruption and fraud in a company might essentially be
compromised where the auditor may simply not work hard enough to detect
violations, or may not reveal them, in collusion with the corrupt agent. Lambsdorff
(2001) also gives examples of documented poor quality construction works in Beijing
West Rail Station, Nairobi-Mombasa road construction in Kenya and school
construction in Indonesia. Rose-Ackerman (1999) provides further evidence for low
quality investment in Korea and New York as a result of corruption.

Regarding the impact of anti-corruption policies that rely on regulation and
enforcement, it is also important to evaluate elements that influence a public official's
cost-benefit analysis to engage in corruption. Following Becker's (1968) classical
analysis of crime prevention, the agent's choice whether to behave honestly or
corruptly depends upon the opportunity and anticipated cost of the decision. If
expected gains are higher than expected costs, temptation for corruption will be
higher. Therefore, the probability of being detected is an important factor and it may
have less influence in the decision of a bureaucrat if the penalty is insignificant.
Similarly, the size of the penalty may be unimportant if the probability of being
detected and punished is minimal (Andvig et al, 2000). This is context-dependent on
the quality of monitoring and enforcement, the historical treatment of corrupt
activities, and the quality of the judicial framework.

Analysis of progressive bureaucratic interventions in corruption and the
historical antecedent of the anti-corruption policies strongly suggest the anti-
corruption movement in Kenya is fundamentally based on a weak foundation. For
instance, the anti-corruption agency did not originate from the political will to solve the problem of corruption, but was a result of pressure from civil society and donors. However, it remained politically and financially dependent on the executive for either strategic decisions or resource related issues. In such circumstances, it is ironical to expect enthusiastic resource support from the same political authority. It is also not surprising that the agency has never prosecuted any high profile individuals or businesses for corruption, leading to general cynicism towards the government’s anti-corruption commitment. Indeed, corruption alone has rarely been a justification for removing any senior member of the Kenya government from office. This failure potentially weakens the perception of punishment as deterrence and similarly reduces any perceived risk of unemployment, thus diminishing any the value that wage incentive scheme might have.

Wage incentive in the civil service is another policy proposal that aims to contribute to the reduction of bureaucratic corruption. There is considerable debate in the literature on the utility of wage incentive schemes in the government agencies as an incentive to reduce corruption. Some scholars believe that government agents are generally thought to engage in opportunistic behaviour because governments and public enterprises lack the high-powered incentives that are believed to prevail in the private firms (Mookhejee, 1997; Chand and Moene, 1999). According to this intuition, inadequate remuneration for public officials is widely regarded as being a motivating factor for corruption at least at the petty level, if not throughout the system (Gould and Amaro-Reyes, 1983; Palmier, 1983; Goudie and Stasavage, 1997; Langseth, Stapenhurst and Pope, 1997). Further, low public sector pay levels is believed to be responsible for public officials ceasing to place much value on the job they hold and encourage them to augment their income from outside sources, including engaging in corrupt practices.

On the other hand, higher salaries for officials improve performance of the officials in two important ways. Theoretically, higher wages reduce the temptation for officials to embark upon second jobs or accept payoffs as salary supplements because of the risks of losing high-paying jobs (Shapiro and Stiglitz, 1984). A wage premium may also increase the value of remaining in a job relative to outside job opportunities. Another advantage concerns the quality (in this case honesty) of those who are employed. Poor salaries in the public sector may attract incompetent or even
dishonest applicants, which result in an inefficient and non-transparent corrupt administration. In his analysis, Weiss, (1980) argues that higher quality workers are assumed to have higher reservation wages, i.e., equivalent to what they can earn elsewhere. If officials are paid wages comparable to those available for similar duties in the private sector, and are compensated according to performance, the potential gain from engaging in corruption may not be large enough in relative terms to make it worth the risk.

The basic argument is that individuals would be expected to assess the net potential gains from engaging in corrupt practices by comparing the anticipated gross benefits of such behaviour against the potential cost of doing so (Goudie and Stasavage, 1997). The higher the relative salary in the public sector, the more an official would lose if caught in corrupt activities. The argument, therefore, acknowledges that salary incentives must be viewed as operating from the perspective of deterrence. That is, generous salaries act as a powerful deterrent relating to the fear of its loss. Rijckeghem and Weder (1997) empirically explored this argument by examining the extent to which public sector salaries are linked to the amount of corruption. Using cross-country data, the authors find corruption, as perceived by businessmen, to be significantly higher in countries in which the public sector salaries are lower relative to manufacturing wages. This economic calculation view assumes that the economic benefit from wages will be large enough, and the cost of corruption so certain that the desire to engage in corrupt activities will be distinguished.

As noted previously, an incentive wage policy has been used in some countries to reduce corruption such as Hong Kong and Singapore (Bardhan, 1997) and Sweden (Lindbeck, 998), reportedly with some amount of success. Current reforms in Kenya, at least with the support of the World Bank, attempted to apply the efficiency wage theory particularly in sensitive areas such as customs and tax administrations, by increasing the level of salaries for the public employees in these areas (Bardhan, 1997). The Bank was also recently instrumental in the development of a core of very highly paid officials in Kenya dubbed the 'dream team' (which was paid ten times the regular salaries) to drive reforms in the country's public sector, including anti-corruption policy package (Andvig et al., 2000).

However, the theoretical claim on the issue of optimal government wage or its cost-effectiveness on corruption reduction has not been supported by empirical
evidence. A potential reason for this is the difficulty of isolating all causative variables with the data available. For instance, in monitoring and accounting it is expected that if there are no audit controls, civil servants will continue to be corrupt regardless of the wage they receive. In contrast, if there are intense controls, civil servants will tend to be honest, even if wages are low. Thus, the relationship between higher wages and corruption does not take into account the influence of variation in auditing intensity. Whilst higher wages are essential for the general welfare of employees, there is a general consensus that ensuring honesty in the civil service through pay incentives may be prohibitively expensive (Besley and McLaren, 1993; Rijckeghem and Weder, 1997).

Current debate, therefore, presents arguments that challenges the simplistic view that feasible pay rise will always solve the problem of corruption in the public sector. In their analysis that focused on the role of wage incentives in the tax administration, Besley and McLaren (1993) model three different wage regimes to explain the association between corruption and wages to the tax inspectors. First, there is a reservation wage that is equal to the opportunity cost, or the wage the tax collector could earn in an alternative employment. Second is the efficiency wage, which is strictly above the wage the tax collector could receive in his or her next-best alternative occupation. Third, there is the capitulation wage, which is below the opportunity cost, since at least the potential corruptible tax collectors would be willing to work for less than their opportunity wage, knowing that they will be able to make additional income from bribery. The insights of this model can, however, be applied directly to the monitoring and auditing problem in other public institutions such as procurement entities.

In this model, the reservation wage regime makes sense where monitoring is effective and dishonest tax collectors are dismissed when detected; thus, audit intensity plays a crucial role. The argument is that dishonest employees will always accept a bribe if they are paid a reservation wage, since it is assumed that this is the wage that they can earn anyway in alternative employment. However, if dishonest employees are caught and replaced, the fraction of dishonest employees will be weeded out, leading to an increase in honest employees. If the number of potentially dishonest employees is small, then the reservation wage is optimal since it will not be
worth paying high wages to motivate honest behaviour while dishonest ones are only a small minority (Andvig et al., 2000).

If employees are paid an efficiency wage, and monitoring is strong, wage incentives will be high enough to make them remain honest. Again, the efficiency and effectiveness of auditing is important. Logically, high wages attract higher quality workers who are inclined more to honest than dishonest tendencies. However, if the number of potentially corrupt employees is large but effective monitoring is good, the premium required for efficiency wage might be small, and in this case the efficiency wage is optimal. If on the other hand monitoring is weak and the workforce is highly corrupt, optimal efficiency wages might be too expensive. If the government pays capitulation wages, only dishonest employees will presumably be attracted to the job. In this case the government will be entirely saturated with a dishonest workforce that is actually being invited to supplement its income through corruption. Kenya, with its bloated civil service, declining wages, and latitude to engage in private business while still in office, is a typical example. Little would be gained by dismissing someone who is caught taking a bribe since it is known or expected that his/her replacement will also be dishonest. In this regime, the only alternative is successful monitoring.

The 'fair salary' hypothesis in bureaucratic wages has been empirically tested in recent studies. Rijckeghem and Weder (1997) examined whether corruption is eradicated when public sector salaries are at or above a level, which the civil servants consider as 'fair'. They found that the salary level necessary to drive out corruption would be unrealistically high, and interpreted this as weak evidence against fair salary hypothesis. This led them to speculate that while an increase in the wage level would reduce corruption, a very large increase will be necessary to reduce it to minimal levels. In other words, the fight against corruption, pursued exclusively on the basis of wage increase, can be very costly to the budget of a country and can achieve only part of the objective. The magnitude of the potential economic benefits from corrupt deals, for instance in the public procurement area, may dwarf the benefits gained from wages. Potential corrupt rewards for a single contract can in some cases exceed the legitimate lifetime salary earnings of an individual. In such cases, motivation for corruption is likely to overshadow the perceived costs, more especially because in many cases, the risks of punishment are relatively small.
Other studies on the relationship between civil service wages and corruption support this argument. Rauch and Evans (2000) use subjective measures for bureaucracies of 35 less developed countries and find that while meritocratic recruitment, internal promotion and career stability are important structural features for improving bureaucratic performance, there is no evidence that wages deter corruption. Treisman (2000) also shows an insignificant coefficient on wages in corruption regression in an analysis of a data set compiled from business risk surveys for the 1980s and 1990s by Schiavo-Campo et al. (1997).

Thus far, we have seen that policy strategies that involve rewards and penalties, i.e., to provide potential incentives for inducing honesty and increasing monitoring and penalty probability to discourage corrupt behaviour may not have a significant impact on corruption in the Kenyan procurement systems. This is largely attributed to socio-economic and political conditions in the country. First, considerable economic resources are required to provide an infrastructure that can offer an optimal level of wage to induce honesty and sustain an effective enforcement structure to contain opportunistic behaviour. As an economically underdeveloped country, Kenya is unlikely to achieve that level in the foreseeable future. Political economy theory supports the view that corruption and economic growth are synergistic and endogenous phenomena that influences and affects each other in a constant and dynamic way (Rose-Ackerman, 1999). If a country is poor, there will be fewer resources to set up an infrastructure to prevent and fight corruption. If there is poverty, there will be people whose basic needs will be difficult to meet which could lead to an abandonment of moral considerations in favour of corrupt activities. On the other hand, if a country has a corruption problem, there will be less trust, more uncertainty and therefore a perpetuation of corruption. However, the underlying causes of this form of corruption are rooted in the governance environment and not entirely attributed to economic hardship and an official's income might not have an effect on whether or not to engage in corrupt activities. Therefore, raising public sector wages, by itself, is unlikely to lead to a reduction in the incidence of corruption. Even if the infrastructure were to be improved, other countervailing factors such as patrimonial systems and solidarity networks existing the country severely weakens any formal anti-corruption efforts.
The source of these unfavourable institutions is largely attributed to the political structure of the country with the most prominent feature being the unlimited discretionary powers of the President to appoint senior executives in the public service. Although quantitative evidence was not available to support the argument, anecdotal evidence suggests that most of the senior officers in the civil service are members of the politically dominant group and this has a significant influence over the allocation of resources (O'Brien and Ryan, 2000). Under these circumstances, and given the political culture where ethnicity remains the most important factor in Kenyan politics (Throup, 1999), preferential treatment has allegedly benefited member of the elite group close to President Moi, who were drawn almost exclusively from the same ethnic background as the President himself. In general, this culture of patronage appointments to high offices increased the prospects of maintaining political power by ensuring that the President had those people in place who would perpetuate his political support.

These appointments had significant implications for the manner in which corruption was organised. Logically, the size and level of corruption is relative to the incentives and opportunities available. While many occupations offer some illicit opportunities, these opportunities are not evenly distributed. Some occupations clearly hold far greater possibilities to engage in corrupt practices than others. The attractiveness of the opportunities for bribery, for instance, appear to depend on the economic values of the services the holder of a particular job can offer in exchange for corrupt payments. The ability to acquire valued resources, or the discretion to confer benefits, is also not equally distributed across public officialdom. More of such opportunities are often likely to occur where policies are formulated and implemented, and especially in parastatal organisations as they are administratively outside the scrutiny of the central government machinery. Many patronage appointments as O'Brien and Ryan (2000) observe were made in parastatal organisations where the chief executives had greater latitude to exercise discretionary power without much institutional restraint. This in turn created new centres of power as businesspeople, members of solidarity networks, and brokers sought occupiers of those offices to gain access to the resources in their control.

Documentary sources and interviews with informants presented a clear picture of how informal networks organised high-level corruption with respect to
procurement of capital goods or goods for consumption and infrastructure project contracts. It can be discerned from the research sources that these networks are formidable, often involving senior government officials with policy implementation responsibilities on one hand, and government contractors on the other, with powerful lobbyists being in the middle. By ensuring that contracts are judiciously apportioned to the members of the cartel in some sort of queuing system, the lobbyists guaranteed the perpetuation of these informal networks. From the aspect of efficiency, however, this practice is less socially advantageous, since it creates incentives to force the government to take nonviable projects to reduce the queue and increase commissions.

But perhaps the major impairment to the formal procurement process was the involvement of the State House (the President's official residence) officials, and by extension the President's inner circle in the award of contracts unofficially. Our interviews with contractors and examination of media reports (Njau, 1998) revealed that the State House cartel manipulated the road and construction procurement to such a point that the tendering system was rendered almost ineffective. Invariably, this nature of corruption did not only act as an instrument to maintain political power by granting economic advantages to backers for political support, but also as a source of funding to sustain the already unstable political authority with low legitimacy. It is also worth noting that as the tenure of office for the government officials is uncertain and corruption agreements suffer from not having a credible enforcement mechanism, public officials preferred projects with shorter time horizons irrespective of their economic justification with 'up-front' commissions. This often lead to hurried and adverse selection of projects. When corruption is characterised by entrenched manipulation from above with little opposition and few meaningful demands for accountability, this logically influences the perception and thought process of those below about their ethical decisions on whether to engage in corrupt activities or not.

In sum, as Klitgaard (1988) concludes, it is the view of this research that, although most corruption hurts most people most of the time, some still benefit from it. Generally, the beneficiaries of corruption are those who control and distribute valuable resources. Distribution of national resources is generally under the control of public officials who possess and have the potential for exercising their discretionary power to extract bribes or other corrupt benefits. As Rose-Ackerman (1999) notes, corruption is a symptom of misuse of institutions designed to govern the
interrelationships between the citizens and the state for personal enrichment of public officials. In this regard, public officials pursue their self-interests in the context of various relationships established with other individuals while discharging their official functions. Therefore, when public institutions are rendered ineffective, private individuals and firms will seek out public officials for favours. Invariably, the beneficiaries to corruption will have little incentive to stop the activity. This will often result in subordination of formal rules to informal rules within political and bureaucratic system, so that informal institutions become the 'rules of the game'.

**Conclusions About the Research Problem**

Based on the qualitative findings discussed above, it is clear that the underlying factors that influence the outcome of anti-corruption policies are relatively important in the research on the subject. The central hypothesis from the outset has been that approaches that rely solely on formal regulatory and incentive mechanisms will have limited impact on high-level corruption in Kenya owing to an incentive-design problem. This problem arises from a number of factors that affect the incentive-design mechanism, among which the most important are structural and socio-economic constraints, and the divergence between formal and informal institutions. This negative influence merits further elaboration.

On structural constraints one may begin by examining the complex features of government. One of the basic characteristics of governmental organisations that inherently give public officials monopoly and substantial discretionary power is the structure of government functions. According to Banfield (1975: 595) the nature of governmental structures and 'numerous, unordered, vague and ambiguous, and mutually antagonistic if not downright contradictory' objectives 'preclude the possibility of a precise definition of its function. Thus, the nature of governmental structures and the complexity of its functions make it difficult to design precise standards for measuring outputs and monitoring outcomes. For example, by stating that the objectives of public procurement are to promote 'economy and efficiency' (Republic of Kenya, 2001) renders precise standards of measuring appropriate outcomes difficult to determine.
Consequently, public officials such as procurement specialists are allowed significant flexibility to exercise some discretion and make decisions based on their expert knowledge (Rose-Ackerman, 1999). To counter the possibility of misbehaviour by public officials, there is a tendency to impose elaborate procurement codes and other constraining rules. Inevitably, for a complex organisation such as government, it becomes clear that a constant expansion of procedural restrictions cannot go on indefinitely without impairing public officials' capabilities, and thereby leading to sub-optimal decisions. Due to the difficulties posed by the complex or changing environment, rules can nevertheless be specified too tightly and a trade-off exists between the discretion required to perform, and the specification of the behaviour needed to prevent abuse. This is the very discretion that enables public officials to behave in a manner that promotes their own interests.

Most policy proposals on corruption give little attention to implementation problems. Many of the recommended policies demand extra resources and an obvious obstacle might be lack of public funds. It is necessary to emphasise that a mere amendment to, or the introduction of legislation is not enough. Implementation mechanisms are necessary and this means that resources have to be committed to pay those who will implement them. Therefore, success of the established measures for controlling corruption will not only depend upon how skilfully and carefully they are produced, but also on how effectively the actual implementation is being undertaken. In this respect, it is important to consider that any realistic strategy must recognise that corruption is not a zero-sum game. Any attempt to bring corruption to a zero level would be too costly in terms of resources and in other ways. An optimal level should be reached where the marginal social costs of reducing it further would be equal to the marginal social benefit from that reduction.

While well-intentioned legal, administrative and institutional apparatus may exist, informal networks and political dominance can in reality hinder their efficiency. A public choice perspective shows that informal networks emanating from co-optation and patronage, which are central features of political life in Kenya (Jackson and Roseberg, 1982), undermine the impact of formal rules. There are two fundamental explanations to this. One of them is that the political and economic sphere is dominated by closely-knit horizontal networks of elite bureaucrats and businesspeople, which are held together by shared commitment of impersonal rules or
codes rather than formal rules. Writing about the social power of bureaucrats in Kenya, Hyden (1984) maintains that the bureaucracy is not so much considered to be an instrument for the pursuit of public policy as it is an avenue for promoting private ambitions and interests. This situation is often blamed on the recommendations of the Ndegwa Commission (Ndegwa, 1971), which allowed civil servants to have private businesses along with their private duties. Considering that at Independence, few people outside the civil service had the education and skills to run the private sector, many civil servants benefited from this policy at the expense of public interests. Hyden argues that as a result, many civil servants in senior positions have been engaging in private business and gradually become as interested in their own business as in the public office they occupy. Some finally resign from the civil service often to pursue political interests and run their businesses more effectively, but a large number still continue to run their business from the public office by employing managers or through proxies.

Another explanation is that the patrimonial system that links people of unequal class and kinship in networks of mutual assistance and support result in loyalty being directed to individuals in disregard for formal rules. These networks of patron-client relationship remain the fundamental state-society linkage and in the words of Jackson and Roseberg (1982:39) are essentially 'not only of mutual assistance and support, but also of recognised and accepted inequality between big men and lesser men'. In Kenya, particularly in the context of poverty and ethnic conflict, allegiance to personal loyalty such as one's family or ethnic, religious, or socio-economic identity outweighs allegiance to objective rules. A patronage system, in fact, represents a common means of securing advantage through personal rather than formal channels. In such cases, dominance of the ruling elite over public resources and disproportionate diversion of resources towards favoured localities invariably perverts the principal-agent relationship. While society is in theory the principal, the principal-agent problem in political patronage system is reformulated, where politicians design the incentive scheme through preferential transfer of national resources to induce electorate to do their binding, mainly re-election. Eventually, this problem of incoherent principal interest complicates the means by which a common standard of social preferences can be ascertained leading to a vague definition of what
constitutes public interest. This inevitably leads to low legitimacy of government and induces disregard for formal rules, thereby weakening formal institutions.

Institutional weakness increases the discretionary and arbitrary power of the executive in every phase of the process, which confers upon public officials authority to make public decisions oriented to their preferences. This discretionary power sometimes leads to opportunism in which case public officials may create artificial demand or distort procedures to increase the value of the public service, measured in the size of the bribe. Thus, access to channels of quick decision-making processes becomes important to those dealing with government public officials, and a willingness to purchase by corruption this 'privileged' access increases with the requirements for such channels.

**Implications for Theory**

It is apparent that the theoretical foundation upon which most policy-oriented analysis of corruption is conceptualised focuses on formal institutions. This is not surprising because the principal-agent theory, which provides academic tools for analysing corruption, was initially developed for the relation between contractual parties and was concerned with incentive design (Moe, 1984). Subsequently, researchers progressively modified fundamental components of the theory and developed conceptual frameworks for analysing the role played by government through its executives in designing incentives and defining penalties and in shaping the institutional environment in which corruption occurs.

Regarding contributions from principal-agency theory, the relative importance and dominance of this theory in contemporary corruption research is well acknowledged (Collins and O'Shea, 2000; Golden, 2000; Lambsdorff, 2001). Since its early application by Banfield (1975) in a comparative analysis of corruption between the public and private sector, and Rose-Ackerman (1978) to analyse different forms of bureaucratic corruption, numerous studies have applied the theory to analyse bureaucratic behaviour and corruption in public institutions. Some notable examples of contemporary studies illustrate that the principal-agent theory provides a robust analysis of a wide spectrum of corruption situations. In his analysis that uses various case samples drawn from the Philippines, Singapore, and Hong Kong, Klitgaard (1988) provides a framework for designing anti-corruption policies, and describes
through the case samples how policymakers were able to control corruption in those countries. Likewise, and while building on her earlier work, Rose-Ackerman (1999) applies a variety of analytic frameworks to many forms of government corruption to provide informed suggestions about how various anti-corruption reforms can accomplish their desired goals. In his principal-agent model, Groenendijk (1997) has shown that expensive monitoring and weak connections between the actions and outcome of the agent, may also apply to the relationship between elected representatives and the electorate in a representative democracy. Focusing on Italian cases, della Porta and Vannucci (1999) present a model for analysing corruption as a network of illegal exchanges, a model that serves as a theoretical approach to political problems bearing on democratic institutions.

However, despite numerous theoretical and empirical advances on the principal-agent models, some scholars have more lately, began to point out their limitations. Some critics notably Johnston (1996:7), argue that the principal-agent approaches are built within an economic paradigm and therefore view corruption explicitly in economic terms with little concern for its broader social and political implications. Johnston contends that the framework may fit awkwardly or not at all with other more broad-based forms of corruption such as 'extended patronage networks, or intra-elite forms such as cronyism and nepotism'. He seems to suggest that the application of the principal-agent approach is biased towards bureaucratic corruption and therefore takes out political corruption out of this framework. A counterpoint to this argument is that rather than treating corruption only in the context of opportunism by civil servants, it should viewed from a wider perspective as stemming from self-interests of politicians, bureaucrats, individuals and private firms (Coolidge and Rose-Ackerman, 1997). In this thesis, the conceptual framework was not only modified to take into account a multi-level principal-agent relationship but it also incorporated the complex network of informal institutions. In terms of our model, we have not only observed the conventional agency problems of adverse selection and moral hazards, but also how this problem is compounded by a perversion of relationships due to underlying influence of informal mechanisms.

The literature from a principal-agent perspective essentially regards corruption as a top-down, incentive-design problem. This is determined by a number of reasons (Andvig et al. 2000). The first key determinant concerns a conflict of interests or
divergent objectives between the principal and agent. Public officials (including politicians) almost by necessity are inclined to pursue their personal self-interest and not the objectives of the government. Further, there is informational asymmetry, which means that the principal cannot perfectly and costlessly observe the agent's actions and information. This is to the advantage of the agent. Imperfect information arises from adverse selection because of difficulties in identifying qualities relating to an individual's integrity during recruitment of the agent, and a moral hazard because of the principal's inability to observe the agent's opportunistic behaviour. This constrains and limits the power of control by the principal and gives agents a number of incentives and opportunities to engage in corrupt transactions. The third relates to the difficulties of establishing the incentive systems that foster the principal's goals. To ascertain appropriate enforcement mechanisms or incentive structures, the principal is subject to 'bounded rationality' because of limited information for assessing corrupt behaviour. Furthermore, the principal has to take into account the cost of monitoring as a point might be reached at which the principal will no longer gain utility from monitoring the agent, as the cost of monitoring will outweigh the benefits of compliance.

Consequently, the principal faces the problems of designing an institutional mechanism that mitigates the asymmetry information. One problem is how to screen and detect agents who may have a certain propensity for behaving dishonestly, i.e., how to solve the problem of adverse selection. The other, which is more central to the institutional analysis of procurement corruption, is how to design an incentive scheme that makes them choose to be honest, i.e., how to solve the problem of moral hazard. With regard to the second problem, the principal has two options. One is to provide incentives for honest behaviour. The other is to intensify monitoring and control and increase the probability of detection and punishment. Incentive theorists are thus concerned with the problem of informational asymmetry that compounds the design of mechanisms of control that would affect agents' preferences (incentives and penalties, recruitment and salaries, etc).

There are two fundamental problems that flow through this approach. First, the principal-agent approach assumes that the principals (politicians and top-level bureaucrats), who are supposed to implement anti-corruption policies on behalf of the abstract state, are themselves not corrupt and are at all times pursuing the interests of
the society. Corruption needs to be primarily perceived as a co-operation between actors usually involving some level of secrecy and spreading benefits to those who co-operate, and delivery of *quid pro quo*. In one set of co-operation, corruption is generally co-ordinated among legislators, bureaucrats and businesses, while another may involve legislator, bureaucrats and voters. Golden (2000:3) distinguishes these relationships as political corruption and political patronage, respectively. The relationship in the first category of co-ordination can be seen as a corruption market, which according to Andvig *et al.* (2000) is an integral part of the dominant elite extraction and rent-seeking practices. The practice in the second category can be driven by particularistic social pressures and becomes an avenue for the political elite to fulfil the expectations of their clients (Chabal and Daloz, 1999). This category is of particular importance in explaining the principal-agent relationship. The predominance of particularism potentially rises the possibility that the objectives of the agents (politicians and bureaucrats) may be substituted for those of the true principals. In this sense, the agents are able to reformulate and design incentives schemes through transfer of public resources and other forms of patronage to induce the principals (e.g., electorate) to do their bidding. With such incoherent principal interests, reward and penalty mechanisms are unlikely to function smoothly since arguments can arise over whether the official had indeed fulfilled a commonly accepted public interest. Numerous instances exist where the behaviour of officials, although dubious according to formal laws, draw approbation instead of sanctions because they are seen as fulfilling a more pragmatic, if narrower, set of values. Because the neo-patrimonial elites are the main profiteers of widespread corruption, they have limited political will for reform (Bayart, Ellis and Hibou, 1999; Chabal and Daloz, 1999) and are, therefore, inappropriate to implement anti-corruption policies.

Secondly, there is the presumption that the principal's objectives are clearly known and that all that remains is to find a design to attain such objectives most efficiently. In the political sphere, it is presumed that there is a common standard of public interest that the polity applies to the behaviour of politicians and bureaucrats. While this idea might apply to countries with a strong Weberian ethos, problems exist in aggregating social preferences in hybrid societies such as Kenya where informal institutions are not only in conflict with formal institutions, but also structure individual incentives in ways that are incompatible with formal rules. In Kenya, the
distinction between public office and private interest is more theoretical than real. Although formal bureaucratic systems do exist, there are social pressures on politicians and civil servants from the 'primodial public'; the network of traditional kinship and ethnic obligations to redistribute state wealth and job favours to members of their own community. What is usually called corruption is a complex network of redistribution organised in horizontal and vertical relations and most frequently bound up with important ties of reciprocity. The allocation of state property and employment on this basis spawns intricate and sometimes far-reaching networks of patron-client relations.

In contributing to the body of knowledge in the principal-agent theory, this thesis has shown that contrary to what Johnston (1996) argues and generally the common assumption in the literature, the use of principal-agent theory is not limited to formal institutions and bureaucratic corruption. This thesis argues that the theory has sufficient analytical power to explain a range of relationships in political life including how informal institutions influence and realign the agency relationship. As the current debate on corruption is not adequate for understanding the formal-informal institution nexus and how this relationship compounds the problem of corruption, this thesis has developed a framework that incorporated debates from various schools of thought and integrated them into institutional analysis on public sector corruption.

Consequently, this thesis has established that underlying all reforms and other incentive mechanisms for curbing corruption means a sufficient understanding of the interaction between formal and informal institutions. The importance of formal institutions in the control of corruption cannot be discounted, because well-functioning formal institutions are necessary in shaping the principal-agent relationships. But as this thesis has shown, at some stage in the evolutionary phase of a country's development especially in ethnically heterogeneous societies the network of real informal relationships and low social cohesion invariably blurs the sphere of public interests and objectives. This incoherence of public interest is a basic source of difficulties in identifying a principal in the real sense of the principal-agent perspective and a fundamental problem, which has lead to the obfuscation of the role of formal institutions in sustaining the fight against corruption.

In sum, this thesis has consistently shown that notwithstanding the analytical utility of the principal-agent theory, the anti-corruption approach that is informed by
this theory has not been particularly effective in controlling high-level corruption in Kenya. As noted previously, convergence of a number of structural and socio-economic circumstances contribute significantly to low effectiveness in the formal anti-corruption efforts. One of the major factors relates to the institutional infrastructure and implementation mechanisms. While the characteristics of governmental organisations and complexities of functions potentially give public officials substantial opportunities for opportunism, the same officials who might have benefited from such discretionary power have the responsibility to audit themselves. This situation, as previously discussed, is further compounded by incoherent public interests, which has complicated systems of checks and balance. From this point of view, the control or elimination of corruption requires the emergence of new centres of interest and power outside the bureaucratic system. A potential area for further research would be to identify these centres and to determine their role. Finally, it is worth noting that although the empirical referent in this research is Kenya, these findings may be generalisable to other countries that share similar socio-economic and political systems.
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