

**POLITICAL PATRONAGE ON THE OPERATIONALISATION OF PUBLIC  
PROCUREMENT LAW IN KENYA**

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**A Thesis Submitted in Fulfillment of the Requirements for the Award of Degree of  
Doctor of Philosophy in Law of the University of Nairobi**

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## DECLARATION

This thesis is my original work and has not been presented for a degree in any other university.

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**DEDICATION**

To my loving parents, the late *Mzee* Henry Njuguna, popularly known as Sir Henry and my mother Esther Wanjiru Njuguna; I share this work with both of you for always encouraging me to achieve my goals and for having unwavering confidence in my abilities even during challenging times. You provided infinite compassion and support from which I drew the values of a life-long respect for education. To my dear wife, Nancy Njuguna, our loving children: Njuguna, Kamau and Wanjiru, I thank you for your love, support and patience during the entire process of this study. And to the people of Kenya, who for years have stood for a just society of men and women; those who have risked their lives in fighting for reforms, and to those who continue to advocate for good governance, integrity, transparency and accountability, this study hails you for your selflessness and dedication.

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## ABSTRACT

The overall objective of this study was to investigate the influence of political patronage on the workings and delivery of the Public Procurement Law in Kenya. Literature reviewed illustrates that achievements have so far been made in creating the necessary legal, policy and institutional frameworks for efficient and proper management of the public procurement sector.<sup>1</sup> The Public Procurement and Disposal Act, 2005 (hereafter PPDA, 2005)<sup>2</sup> has created institutions like the Public Procurement Oversight Authority (PPOA) and the Public Procurement Administrative Review Board (PPARB) to oversee the administration of this sector.<sup>3</sup> Other enabling legislations like the Anti-Corruption and Economic Crimes Act, 2003, the Public Procurement Regulations, 2006/2009, and the Public Officer Ethics Act, 2003,<sup>4</sup> among others, support the objectives of the PPDA. In spite of all these reforms, the country still experiences runaway corruption among other major challenges in the sector. The study is premised on the hypothesis that the PPDA has largely failed to deliver as envisaged due to political patronage. The study opines that the law does not operate in a vacuum. Its operations and delivery depend on both the intra-system (the legal, policy and institutional frameworks) and the surrounding (political) environment. This study is framed to show that political patronage (intervening/aggravating variable), works to impair law, policy and institutions (provided by the PPDA) through leadership and political patronage in unmerited, ethnically, nepotically or politically influenced appointments, and corruption in the public sector. The main theoretical framework underpinning the study is the intersection between moral and legal philosophy and the role of law in social, economic and political engineering.<sup>5</sup> Theories explaining human conduct and the sociological school of thought where law is a tool for social engineering have been examined. The study employed a mixed method approach of investigative descriptive survey design and desktop research and was conducted in Nairobi County. The population of the study was the entirety of public procurement process comprising of all the public procurement entities, watchdog organisations and potential suppliers. Stratified random sampling was used to select 367 respondents and non-probabilistic purposive sampling technique to select heads of departments/supply chain departments in various public entities who participated in the study. The study used questionnaires and conducted interviews to collect primary data from respondents. The research also reviewed information from secondary sources such as relevant case laws, books, Hansard and Committee Reports of Parliament, internet sources, statutes and government policy documents. Quantitative data was analysed using the Statistical Package for Social Sciences (SPSS) computer software, results tabulated in bar graphs and frequency distribution tables and an in-depth analysis of the results conducted along the study objectives. Qualitative data was analysed thematically along the study objectives. Following the systems theory, the research interrogated the intra-system elements (law, policy & institutions) and established that there exist minor challenges in law as currently constituted and the institutions therein. However, those challenges were found to be minor and could not have contributed to the failure witnessed in the sector. As per the systems theory, the study interrogated the environment (outer system) in which the law works and political patronage emerged as the major challenge to the workings and delivery of public procurement law in Kenya<sup>6</sup> as it exploits legal, institutional and policy weaknesses to impair the functioning of the law. It emerged that lack of political goodwill among the leadership and the failure to adequately back the law and provide a conducive environment in which the rule of law thrives are some of the

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<sup>1</sup> Africa News Service, 'Gaps in Graft War Revealed', April 30 2007 Issue

<sup>2</sup> Accessed from [www.fsdkenya.org](http://www.fsdkenya.org) on March 24, 2017

<sup>3</sup> Accessed from [www.ppoa.go.ke](http://www.ppoa.go.ke) on March 24, 2017

<sup>4</sup> Accessed from [www.acauthorities.org](http://www.acauthorities.org) on March 24, 2017

<sup>5</sup> Lobban, Michael, "A Treatise of Legal Philosophy and General Jurisprudence", 2016.

<sup>6</sup> Also refer to New York University School of Law, 'Comparative Law Research', at <http://www.nyulawglobal.org/globalex/index.html> accessed on March 12, 2017

main challenges facing the law. These findings bring into question our moral and cultural values as a people. As a country, we may be having a problem because of breakdown in our moral, values and cultural system. It might be that our culture encourages corruption, impunity, lack of respect for the rule of law and acquisition of illicit wealth to an extent that we have embraced these vices as a way of life. To address the challenges, the study recommends a new effort or initiative to be directed at managing the political leadership in the country to align it to the letter and the spirit of Article 10 and Chapter 6 of the Constitution, 2010.<sup>7</sup> The political leadership should, at all times be seen to act in the best interest of the sovereign. State and public officers and all other persons, while interpreting the Constitution or any other law, public policy decisions, should take into account the principles<sup>8</sup> of patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability; and sustainable development.<sup>9</sup> Public authority should be exercised on the basis of public trust. Selection to any public position should be made on the basis of personal integrity, competence, suitability, objectivity, impartiality in decision making, no nepotism, favoritism or corrupt practices, selfless service, honesty and accountability to the public among other virtues. If the Public Procurement Law is to deliver its mandate, the spirit of the Constitution on *Leadership and Integrity* must be strictly operationalised.<sup>10</sup> Parliament should repeal the Leadership and Integrity Act, 2012 to make it conform to the spirit and letter of Chapter 6 of the Constitution, 2010.<sup>11</sup> The new law should provide for a very high ethical threshold for those who aspire to hold public offices. Parliament can also enact new laws and strengthen the existing ones to make political patronage-related corrupt practices more serious crime and even contemplate introducing death penalty for such crimes. The government should develop a strong national culture and value system which Kenyans can identify with as a people. The Ministry of Education can incorporate a value system in its curriculum to be taught in schools and colleges in the country. The government can also partner with other stakeholders like the religious community and other non-governmental organisations (NGOs) to teach moral values during Sunday school programmes and madrasas among others.

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<sup>7</sup> Republic of Kenya, 'The Constitution of Kenya', [2010].

<sup>8</sup> See Richard J. Estes, M. Joseph Sirgy (Eds.), "The Pursuit of Human Well-Being: The Untold Global History" Springer Nature, 2017

<sup>9</sup> The Constitution of Kenya, "Article 10: National Values and Principles of Governance" [2010], [www.kenyalaw.org](http://www.kenyalaw.org), accessed on September 7, 2017.

<sup>10</sup> See Center for Multi-Party Democracy accessible at <http://www.cmd-kenya.org/index.php/about-us>

<sup>11</sup> See [cmd-kenya.org](http://www.cmd-kenya.org)

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## ACRONYMS AND ABBREVIATIONS

AG	Attorney General
APP	Affirmative Procurement Policy
BEE	Black Economic Empowerment
CBK	Central Bank of Kenya
CBK	Central Bank of Kenya
CEOs	Chief Executive Officers
CFA	Collateral Financial Agreement
CFC	Competition Federal Commission
CITCC	Comision Intersecretarialpara la Transparencia y el Combate a la Corrupcion
CJ	Chief Justice
COTU	Central Organization of Trade Unions
CPI	Corruption Perception Index
CTB	Central Tender Board
CTB	Central Tender Board
CTC	Central Tender Committee
DfID	Department for International Development
DG MARKT	Directorate General of Internal Market and Services
DoD	Department of Defence
DPP	Director of Public Prosecutions
DTCs	District Tender Committees
EACC	Ethics and Anti-Corruption Commission
FSD	Financial Sector Deepening
GDP	Gross Domestic Product
GDP	Gross Domestic Product
GIL	Goldenberg International Limited
GoK	Government of Kenya
GPA	Government Procurement Agreement
HELB	Higher Education Loans Board

IFMS	Integrated Financial Management System
IG	Inspector General
IILJ	Institute for International Law and Justice
IPAR	Institute of Policy Analysis and Research
JSC	Judicial Service Commission
KAA	Kenya Airports Authority
KACA	Kenya Anti-Corruption Authority
KADU	Kenya African Democratic Union
KANU	Kenya African National Union
KCB	Kenya Commercial Bank
KDF	Kenya Defence Forces
KPA	Kenya Ports Authority
KPC	Kenya Pipeline Corporation
KRA	Kenya Revenue Authority
LPO	Local Purchase Order
LSK	Law Society of Kenya
LSO	Local Service Order
MDs	Managing Directors
MFPA	Mexican Federal Policy of Anti-corruption
MoE	Ministry of Energy
MTB	Ministerial Tender Board
MTCs	Ministerial Tender Committees
MUHURI	Muslim for Human Rights
MW	Megawatts
NAFTA	North American Free Trade Agreement
NCPB	National Cereals and Produce Board
NPS	National Police Service
NSIS	National Security Intelligence Service
NSSF	National Social Security Fund
NYU	New York University
OECD	Organization for Economic Co-operation and Development

OMCs	Oil Marketing Companies
PAC	Public Accounts Committee
PCB	Public Complaints Bureau
PDEC	Procurement Directives of the European Community
PIC	Public Investments Committee
PPAB	Public Procurement Advisory Board
PPARB	Public Procurement Administrative Review Board
PPCRAB	Public Procurement Complaints, Review and Appeals Board
PPD	Public Procurement Directorate
PPDA	Public Procurement and Disposal Act
PPOA	Public Procurement Oversight Authority
PPPF	Preferential Procurement Policy Framework
PPPs	Public Private Partnerships
PROMAP	Public Administration Modernization Program
PWC	PricewaterhouseCoopers
TI	Transparency International
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
US	United States
WTO	World Trade Organization
WTO	World Trade Organization
ZACC	Zambia Anti-Corruption Commission
CITCC	<i>Comisión Intersecretarial para la Transparencia y el Combate a la Corrupción en la APF</i> (In English, this translates as: Inter-ministerial Commission for Transparency and against Corruption in Federal Public Administration).

## OPERATIONAL DEFINITION OF TERMS

Corruption	Refers to any abuse of a position of trust in order to gain an undue advantage and may include bribery, extortion, cronyism, nepotism, patronage, graft, and embezzlement. <sup>12</sup> Similarly, corruption is also used in this study to cover such crimes as abuse of public office, breach of trust, conflict of interest, misappropriation and embezzlement of public funds, theft and plunder of public resources and any offence involving dishonesty, in connection with any other tax, rate or impost levied under any Act or dishonesty relating to elections of any persons to public office. <sup>13</sup>
Political Economy	Refers to interdisciplinary studies drawing upon economic, legal, and political frameworks in explaining how political institutions, the political environment, and the economic system influence public procurement in Kenya. <sup>14</sup>
Public Procurement	Covers specification of the kind and quality of goods or services to be acquired or disposed; investigation of the market for supply, and contracts with potential suppliers or buyers; placing an order or contract, including negotiation of terms; supervising delivery and performance, and taking necessary action in the event of inadequate performance; payment; and dealing with any disputes that arise from the process for public good. <sup>15</sup>
Framework	Is the interconnectivity between the different elements of a system. <sup>16</sup>

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<sup>12</sup> Republic of Kenya, 'Kenya Anti-Corruption Commission Corruption Perception Survey,' [Nairobi: KACC, 2010] 8.

<sup>13</sup> Republic of Kenya, *The Anti-Corruption and Economic Crimes Act (2003)*. Kenya Gazette Supplement No. 3 of May 2, 2003, p. 54. Nairobi: Government Printer. This is a descriptive definition of corruption as provided for in the Act.

<sup>14</sup> Organization for Economic Co-operation and Development, *The Political Economy of Public Procurement (2004)*, p.48. Paris: OECD Secretariat.

<sup>15</sup> Republic of Kenya, *The Public Procurement and Disposal Act, 2005*, Kenya Gazette Supplement No. 77 (Acts No. 3 of October 26, 2005), p.54-55. This definition of the public procurement is borrowed from the Act.

<sup>16</sup> See the Systems Theory.

**Procurement Reforms** These are institutional and legal changes that have been instituted in the past to streamline the management of public procurement sector in Kenya.<sup>17</sup>

**Political Patronage** Political patronage in the context of this thesis refers to leadership influence in the public procurement sector. This influence can either be negative or positive depending on how it is exercised. It symbolises control, management and directing of public resources and the manipulation of public sector by the ruling class. It is also the complex and undercover influence of politics on the key sectors of public service such as public procurement.<sup>18</sup> It is used to explain how political institutions, the political environment, and the economic system influence public procurement.

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<sup>17</sup>M.P. Lewa, 'Management and organization of public procurement in Kenya: A review of proposed changes', [Nairobi: Institute of Policy Analysis and Research (IPAR), 2007], *Discussion Paper No. 092* p.8.

<sup>18</sup> Department for International Development (DfID) & The World Bank, 'A study on the main lessons of procurement and public administration reform efforts,' [London: Joint Publication of DfID & The World Bank Group, 2010] 3.

## CHAPTER ONE

### 1.0 INTRODUCTION

#### 1.1 Background of the Problem

This study attempts to investigate the influence of political patronage on the operationalisation of Public Procurement Law in Kenya.<sup>19</sup> It focuses on how the political leadership in this country influences the workings and delivery of the Public Procurement and Disposal Act (PPDA).<sup>20</sup> PPDA ‘An Act of Parliament to establish procedures for efficient public procurement and for the disposal of unserviceable, obsolete or surplus stores, assets and equipment by public entities and to provide for other related matters’.<sup>21</sup> Public procurement is a crucial component of a county’s public administration that links the financial system with economic and social outcomes.<sup>22</sup> Public procurement entails the purchase of works, goods and services in the correct amount, from the correct source and at the best cost by the government.<sup>23</sup>

Public procurement is the principal means through which a government meets its developmental needs such as the provision of essential services, physical infrastructure and the supply of essential commodities.<sup>24</sup> It has been used by many governments all over the

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<sup>19</sup>See also Humphrey Kimani Njuguna, “The Influence of Political Patronage on the Operationalization of Public Procurement Law in Kenya”, 2012, available online at <http://www.ipca.org/IPPC5/Proceedings/Part6/PAPER6-14.pdf>, accessed August 22, 2017.

<sup>20</sup> The Public Procurement and Disposal Act, 2005, 3 Kenya Gazette (KG) 44-132, available online at [www.kenyalaw.org](http://www.kenyalaw.org), accessed March 20, 2015.

<sup>21</sup>See PPDA, 2005, 52

<sup>22</sup>P.R. Schapper, and J.N. Veiga-Malta, ‘Public Procurement Reform in Latin America and the Caribbean,’ [Washington, D.C.: World Bank, 2011], 124 WBS 2.

<sup>23</sup> Peter M. Lewa, ‘Management and organization of public procurement in Kenya: A review of proposed changes’ [Nairobi, Institute of Policy Analysis and Research (IPAR) Discussion Paper No. 092, 2007] 1. Also see Financial Sector Deepening (FSD-Kenya), ‘*Procurement and Supply in Kenya: The Market for Small and Medium Enterprises*’ Student Paper, Kenyatta University, [July, 2008], available online at [www.fsdkenya.org](http://www.fsdkenya.org), accessed March 27, 2017. Information available at [www.fsdkenya.org](http://www.fsdkenya.org) shows that, “public sector procurement is usually categorised into two, namely project specific procurement and general consumable procurement. In project specific procurement, works, goods or services are procured for a specific goal, such as, the building of a new road, factory, hospital and equipment, whereas general consumable procurement provides for items that are required for a government department or authority to function, such as: security, vehicle parts, fuel, road maintenance, and stationery.”

<sup>24</sup> R. Vinod, ‘Transparency in government procurement: Issues of concern and interest to developing countries’, 2006, 35 *JWT* 496, available online at [www.iilj.org](http://www.iilj.org), accessed March 27, 2017.

world to support the development of domestic industries, overcome regional economic imbalances, and support minority or disadvantaged communities.<sup>25</sup>

It cuts across almost every sector of planning, program management, and budgeting.<sup>26</sup> The size of public procurement varies between 5 to 8 percent of Gross Domestic Product (GDP) in industrialized countries.<sup>27</sup> In most developing countries, it accounts for a significant proportion of the GDP; as much as 60% in some cases.<sup>28</sup> In Kenya, public procurement consumes about 60 percent of the country's annual budget.<sup>29</sup> It is estimated that public procurement amounts to between 10-20 percent of the country's GDP.<sup>30</sup> By managing such a margin of the GDP of annual government budget of emerging economies like Kenya, a public procurement system that optimizes value-for-money has a wide range of socio-economic benefits.<sup>31</sup>

On the face value, public procurement in Kenya seems to be working well, but underneath lies a serious problem which this study hypothesizes could be due to political patronage resulting into under-performing institutions and endemic corruption which is threatening to erode the gains made so far in the sector.<sup>32</sup> Irregular processes of awarding tenders form

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<sup>25</sup>J.M. Migai-Akech, 'Development partners and governance of public procurement in Kenya: Enhancing democracy in the administration of aid' [2007]7 NYU IILJ 19, available online at [www.iilj.org](http://www.iilj.org) and <https://www.baselgovernance.org/>, accessed on March 27, 2017. One of the objectives of PPDA [2005] under Section 2 of the PPDA, 2005 is to promote local industries.

<sup>26</sup>Paul R. Schapper and Joao N. Veiga Malta, 'Public Procurement Reform in Latin America and the Caribbean', 2011, 1.

<sup>27</sup> Peter M. Lewa, and Susan K. Lewa, "Public Procurement Reform In Emerging Economies: A Case Study Of Kenya", Handbook of Business Practices and Growth in Emerging Markets, 2009, 2

<sup>28</sup>See R.E. Kirsten Jensen and Marie Louise Refsgaard, 2012, 47.

<sup>29</sup>*Ibid* at supra note 14.

<sup>30</sup>Washington Odhiambo & Paul Kamau, 'Public Procurement: Lessons from Kenya, Tanzania, and Uganda' [Paris, 2009]208 Organization for Economic Co-operation and Development (OECD) 8, [www.iilj.org](http://www.iilj.org) and [www.jkuat.ac.ke](http://www.jkuat.ac.ke), accessed on March 24, 2017

<sup>31</sup>See Paul R. Schapper and Veiga-Malta [2011] 2. Public Procurement often constitutes the largest domestic market in developing countries.

<sup>32</sup>Preface of the Report of the Departmental Committee on Administration and National Security on the Matter of the Inquiry into the Tender for the Proposed National Surveillance, Communication, Command and Control System for the National Police Service. The Departmental Committee on Administration and National Security is a Committee of the National Assembly of Kenya constituted under Standing Order 216 and is mandated to, inter-alia, "investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments."

bulk of corruption in the public procurement.<sup>33</sup> This position is qualified by the outcome of successive corruption perception surveys conducted by the Ethics and Anti-Corruption Commission (EACC) of Kenya between 2010 and 2015.<sup>34</sup>

The reports consistently indicate that over 70 percent (by value) of corrupt practices in Kenya occur in the public procurement sector.<sup>35</sup> Other statistics compiled by the Mars Group -a civil society organization- on corruption in the public procuring entities between 2004 and 2010 show that the Country lost an estimated Kshs.700billion (£5bn) through flaws in public procurement.<sup>36</sup> Ongoing and concluded public procurement-related cases can also be used to show that pilferage in the sector has reached endemic levels. H. E. President Uhuru Kenyatta in his *State of the Nation Address* to Parliament on March 26, 2015 confirmed that corruption is a serious challenge in the public sector in Kenya.<sup>37</sup> His speech read in part, *“There is no doubt that Kenya is firmly on the path of transformation. However, my administration and this nation are confronted by both the reality and perception of pervasive corruption. As I have stated previously, and as warrants emphasis, corruption is the greatest threat to our security, fundamental rights and social-economic transformation. I share in the frustration of Kenyans at the slow pace and lack of results from the mechanisms created to help us tackle this monster.”*<sup>38</sup>

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<sup>33</sup> The Mars Group, ‘The Cost of Grand Corruption in Kenya between 2004-2010’, 2011, pp.1-3. These are not mere allegations but statistics which have been done by qualified and high-standing economists in this country. Also see The Ethics and Anti-Corruption Commission of Kenya, ‘Report on the State of Corruption in Kenya’, 2013 & 2014. A number of corruption related cases mainly involving public procurement have been listed as reported and taken up by EACC, undergoing investigations, pending in court or concluded.

<sup>34</sup> See EACC, ‘Corruption Perception Surveys 2010, 2011, 2012, 2013, 2014 and 2015’, available online at <http://www.eacc.go.ke/docs/National-Ethics-and-Corruption-Survey-2015-REPORT-4March2016.pdf> and [www.jmvb.or.ke](http://www.jmvb.or.ke), accessed on March 22, 2016. These surveys were conducted in various public entities in the Republic of Kenya and which consistently rate procurement-related corruption in public entities as a major problem in Kenya’s public sector reform programme.

<sup>35</sup> See EACC, ‘Corruption Perception Survey’ [2010, 2011, 2012, 2013, 2014 & 2015] available online at <http://www.eacc.go.ke/docs/National-Ethics-and-Corruption-Survey-2015-REPORT-4March2016.pdf>, accessed April 7, 2016

<sup>36</sup> See The Mars Group, ‘Estimates for Grand Corruption in the Country,’ 2011, pp.3-4.

<sup>37</sup> “President Uhuru Kenyatta Speech during State of the Nation Address at Parliament [document]”, Africa News Service, March 26 2015 Issue

<https://www.google.com/search?q=President+Uhuru+Kenyatta+Speech+During+State+of+the+Nation+Address+At+Parliament+%5Bdocument%5D.,+Africa+News+Service,+March+26+2015+Issue&hl=en&gbv=2&sa=X&ved=0ahUKEwiJr67fmYjTAhWFJMAKHTgxCqAQgwMIFA#spf=1>, accessed on April 7, 2015.

<sup>38</sup> “President Uhuru Kenyatta Speech during State of the Nation Address at Parliament [document]”, Africa News Service, March 26 2015.



A sustained public pressure on the Government to act on runaway corruption within its ranks saw the Director of Public Prosecution (DPP), in February 2016, release a list of eighty eight (88) ‘high profile’ corruption cases, majority of which were on public procurement.<sup>39</sup>The list was termed ‘high profile’ because the names involved were of senior State officers and public officers. There was an official admission to that effect by H.E. President Uhuru Kenyatta:

It has come to my attention that the conduct of various State and Public Officers within Ministries, State Departments, State Corporations and Agencies falling under the ambit of the National Executive and the Public Service has fallen far short of the demands of the Constitution and the expectations of Kenyans with regard to Ethics and Integrity. My office continues to receive numerous briefs, reports and complaints from citizens of blatant breaches of ethical standards, instances of pilferage and out-right theft involving civil servants, state and public officers. These unsavory, unethical and corrupt practices continue to be perpetuated and thrive in spite of various reminders and warnings.<sup>40</sup>

In March 2015, one hundred and seventy five (175) high ranking public and state officers within ministries, state departments, state corporations and agencies were asked to step aside on allegations of corruption in procurement of goods, works and services, abuse of office and incompetence to pave way for investigations.<sup>41</sup>Among those implicated were who-is-who in government including Cabinet Secretaries, Principal Secretaries, a number of Governors and Senators, Members of Parliament and other high ranking government officers.

Acknowledging that there is a problem in our public procurement sector as statistically enumerated above, a relevant question one would ask at this point is: why has the problem of corruption, fraud, pilferage, and plunder of public resources as aforementioned persisted

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<sup>39</sup> The Office of the DPP, ‘List of 88 High Profile Corruption Cases’ [2016] app. F

<sup>40</sup> See Republic of Kenya, ‘Executive Order No.6 on Ethics and Integrity in the Public Service issued by H.E. President Uhuru Kenyatta’ [March, 2015] 1-6, [www.devolutionplanning.go.ke](http://www.devolutionplanning.go.ke), accessed on May 15 2016

<sup>41</sup> See among other cases:-Republic of Kenya v The Judicial Commission of Inquiry into the Goldenberg Affairs & 2 others *ex parte* Hon. Professor George Saitoti, [2006] High Court Misc. Civil Application NO. 102, eKLR, available online at [www.kenyalaw.org](http://www.kenyalaw.org), accessed on 29-11-2014; Criminal Case No. CR 113/05/04/Anti-Corruption Case No. 8 of 2005 in the Award of a Contract to Anglo-Leasing and Finance Limited in “AG Moves to Stop LSK from Suing Him on Graft”, Africa News Service, March 5 2005 Issue

in the sector despite the existence of a decade-old, fairly strong and progressive Public Procurement Law in Kenya? The identified challenges in the sector has been used to lay claim or argue that, in spite of the legal, policy and institutional reforms so far undertaken in the sector, Public Procurement Law has largely failed to deliver as anticipated.<sup>42</sup>

This study presupposes that-: for anyone to properly interrogate the challenges facing the public procurement sector, he/she must go beyond the three frequently researched ‘elements’<sup>43</sup> of procurement system namely: legal, policy and institutional frameworks and interrogate the environment in which the law operates. In so doing, one can develop a better understanding of how the elements relate to each other individually and to the environment in which they function in order to deliver optimum results.<sup>44</sup>

A critical analysis of the various elements/pillars of the public procurement will show that the law is the main intra-system framework/pillar which provides for the general policy directions and key institutions which directs and controls public procurement in the Country. While looking at the legal component, therefore, one cannot avoid touching on the other two components of institutional frameworks and policy directions in the sector. Then relate the intra-system elements to the environment in which they operate (leadership and management).

This study, therefore, proposes a holistic approach to looking at the problem but the focus will mainly be on the less studied yet crucial element of leadership/management function in the sector and how it supports or undermines the delivery of the Public Procurement Law. Hence, the framing of the topic of the present study as: ‘*Political Patronage on the Operationalisation of Public Procurement Law in Kenya*’. In so doing, political patronage is viewed as a negative leadership/management style which works against the Act (the key

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<sup>42</sup>See EACC, “Corruption Perception Surveys 2010-2015” available online at [www.eacc.go.ke](http://www.eacc.go.ke), accessed April 7, 2016

<sup>43</sup> Denote the components of public procurement which corresponds to the elements of a system which influence the efficacy and efficiency of the system.

<sup>44</sup>See Harry B. Wolfe, 2013, pp.1047.

pillar/element in the public procurement system) to weaken the system and allow corruption, pilferage, fraud and bid-rigging among others to thrive.<sup>45</sup>

In this study, it is argued that the elements of the intra-system namely: the legal, policy and institutional framework, cannot function optimally on their own without the input of a dedicated, professional and ethical leadership which should guarantee a favourable working environment in which the law (key pillar of the intra-system elements) thrive and flourish.<sup>46</sup> As expounded by Teichman,<sup>47</sup> one cannot divorce public procurement from political leadership and power since it is a managerial function of government.<sup>48</sup> This supports the thesis advanced by Kelsen in his *General Theory of Law and State* that law is a social fact and that the environment in which it operates has a bearing in its workings and delivery.<sup>49</sup>

Against this background, the study made an attempt to review the leadership and management function of the public procurement in this country vis-à-vis the provisions of Chapter Six of the Constitution, 2010 on ‘*Leadership and Integrity*’,<sup>50</sup> and Article 10 of the Constitution on the “*National Values and Principles of Governance* which binds all

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<sup>45</sup> More information on the key pillars/elements in the public procurement system are accessible at [www.kism.or.ke](http://www.kism.or.ke)

<sup>46</sup> Moaman Mohamed Al-Busaidy, R. El-Haddadeh and V. Weerakkody, “Evaluating the institutional factors affecting e-government implementation”, 2014, Brunel University, School of Information Systems, Computing and Mathematics.

<sup>47</sup> Doron Teichman, “Non-legal Sanctions and Damages: An Economic Analysis”, 2011, pp.3.

<sup>48</sup> Doron Teichman (2011) 4.

<sup>49</sup> *see* Kelsen ‘General Theory of Law and State’ in Gardner, J., “Nearly Natural Law”, *The American Journal of Jurisprudence*, 2007, available online at [www.utulsa.edu](http://www.utulsa.edu), accessed January 27, 2016.

<sup>50</sup> Republic of Kenya, ‘The Constitution’, 2010, 73 KLR 51, available online at [www.kenyalaw.org](http://www.kenyalaw.org), accessed on September 19, 2015. Chapter Six of the Constitution [2010] on Leadership and Integrity under Article 73(1) on the *Responsibilities of Leadership* provides that, “Authority assigned to a State officer (a) is a public trust to be exercised in a manner that (i) is consistent with the purposes and objects of this Constitution, (ii) demonstrates respect for the people, brings honor to the nation and dignity to the office, and promotes public confidence in the integrity of the office; and (b) vests in the State officer the responsibility to serve the people, rather than the power to rule them.” Article 73(2) provides “the guiding principles of leadership and integrity which include – (a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections; (b) objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices; (c) selfless service based solely on the public interest, demonstrated by – (i) honesty in the execution of public duties, and (ii) the declaration of any personal interest that may conflict with public duties; (d) accountability to the public for decisions and actions; and (e) discipline and commitment in service to the people”. This information is also accessible from [www.eacc.go.ke](http://www.eacc.go.ke)

State organs, State officers, public officers, civil servants and all persons whenever they apply or interprets the Constitution, enacts, applies or interprets any law, or makes or implements public policy decisions”.<sup>51</sup>

To further put the present study in its right context, a brief background review was undertaken to provide the historical development of the law, policy and institutional frameworks in this area. This is necessary to help the reader understand and appreciate where the country is coming from in terms of legal, policy and institutional reforms, and whether or not, we have been able to realise the objectives of the said reforms.

## 1.2 Historical Context

Globally, management and control practices in public procurement have evolved over time with a lot of changes taking place in the last three decades. In the early 1980s, many governments embarked on a wide range of public sector reforms in their financial administration and management of procurement of works, goods and services.<sup>52</sup> This happened as a result of a worldwide concern about the critical role of public procurement in economic development,<sup>53</sup> growth of democratic space, and the need to present effective responses to the issues raised.<sup>54</sup> At the international level, the two main objectives of the

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<sup>51</sup> Republic of Kenya, “The Constitution”, [2010] 73 KLR 51, available at [www.kenyalaw.org](http://www.kenyalaw.org), accessed on January 27, 2016. Article 10 of the Constitution on *National Values and Principles of Governance* provides that, “the national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them – (a) applies or interprets this Constitution, (b) enacts, applies or interprets any law, or (c) makes or implements public policy decisions. (2) The national values and principles of governance include – (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; (c) good governance, integrity, transparency and accountability; and (d) sustainable development.” Also see [www.cmd-kenya.org](http://www.cmd-kenya.org) and [www.servat.unibe.ch](http://www.servat.unibe.ch), accessed on August 21, 2017.

<sup>52</sup> P. Trepte, ‘Regulating procurement: Understanding the ends and means of public procurement regulations’, Oxford University Press, 2004, pp.66, available online at <http://trove.nla.gov.au/work/17783061>, accessed on January 9, 2016. Further information on procurement of works, goods and services for public use is available online at [www.kism.or.ke](http://www.kism.or.ke), accessed on August 22, 2017

<sup>53</sup> Peter M. Lewa and Susan K. Lewa, “Public Procurement Reform In Emerging Economies: A Case Study of Kenya”, Handbook of Business Practices and Growth in Emerging Markets, 2009.

<sup>54</sup> See Paul R. Schapper and Veiga-Malta, “Modern governments are now a complex service organizations and major economic players”, 2011, available online at <http://webcache.googleusercontent.com/search?q=cache:FiZ5FdqmpbkJ:documents.worldbank.org/curated/en/371061468229175620/pdf/664260WP00PUBL0remment0July20110Web2.pdf+&cd=1&hl=en&ct=clnk>, accessed December 8, 2015

reform process were and still remain; “to promote a culture of performance and to make the public sector more responsive to the needs of government; by increasing the organizations’ accountability, promoting efficiency and effectiveness, introducing participative decision-making and adopting a customer focus.”<sup>55</sup>

These reforms have contributed to an extraordinary growth in public procurement law and regulations globally. To professionally manage the procurement cycle, laws and regulations are required to ensure the process delivers as envisaged.<sup>56</sup> Many governments have adapted their legislative frameworks to “explicitly reflect the modern context, and to provide for accountability in an environment in which professional skills rather than prescribed procedures may prevail.”<sup>57</sup> Many countries have crafted their procurement laws along the model of United Nations Commission on International Trade Law (UNCITRAL)<sup>58</sup>, the Government Procurement Agreement (GPA)<sup>59</sup> of World Trade Organization (WTO) and the Procurement Directives of the European Community (PDEC). These frameworks seek to drive behaviors towards adherence to standards and best practices that directly link public procurement to policies of good governance.<sup>60</sup>

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<sup>55</sup>International Journal of Public Sector Management, Volume 14, Issue 4 (2006-09-19)

<sup>56</sup>See Peter M. Lewa, 2007, pp.4.

<sup>57</sup>Refer to Paul R. Schapper and Veiga-Malta, 2011, pp.2. The standards and results-based approaches have the scope and flexibility to drive many organizational goals as well as stronger governance, largely because of the ways in which accountability is measured and assigned.

<sup>58</sup> UNCITRAL Model Law was accessed on January 13, 2016 from [www.ilo.org](http://www.ilo.org). Information available at [www.iccwbo.org](http://www.iccwbo.org) indicates that, “The Model Law on Public Procurement contains procedures and principles aimed at achieving value for money and avoiding abuses in the procurement process. The text promotes objectivity, fairness, participation and competition and integrity towards these goals. Transparency is also a key principle, allowing visible compliance with the procedures and principles to be confirmed. The 2011 Model Law replaced the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services.”

<sup>59</sup>See B. Hoekman, “The World Trade Organization’s Agreement on Government Procurement: Expanding Disciplines, Declining Membership?” [Washington, D.C.: World Bank, 2009] 39-41. The Agreement on Government Procurement of the World Trade Organization (WTO), commonly known as the GPA, establishes a framework of rights and obligations for government procurement among the WTO members that have signed it. Under the Agreement, suppliers of goods and services in other signatory countries have to be treated no less favorably than domestic suppliers in procurement covered by the Agreement, and that their laws, regulations and procedures relating to government procurement have to be open, transparent and fair.

<sup>60</sup>Refer to Schapper and Veiga-Malta, 2011, pp.2 on *standards and results based procurement system*.

Regionally, the five East African countries (Uganda, Kenya, Tanzania, Rwanda and Burundi)<sup>61</sup> have also undertaken major reforms in their public procurement sectors in the last two decades. In the mid-1980s, reforms in the public procurement became urgent due to the growing scrutiny and pressure from within and outside these East African states to reform their procurement systems.<sup>62</sup> This was meant to improve efficiency and effectiveness in service delivery to the people.<sup>63</sup> Various stakeholders expressed their dissatisfaction with the systems due to exorbitant taxes, rampant corruption and misdirection of resources, poor services, bad infrastructure, high risks and rising public debt.<sup>64</sup> In reaction to these concerns, the governments of the five countries recognized the need to review their public procurement systems. Uganda, Rwanda, Burundi and Tanzania all have enacted legislations to manage their public procurement systems.

In Kenya, public procurement regime can be traced back to 1955 during the colonial days<sup>65</sup> when the Central Tender Board (herein after referred to as CTB) was established through a circular from Treasury.<sup>66</sup> However, a defined form of procurement and supplies system was set-up in 1959 when the Supplies and Transport Department was established in the Ministry of Works.<sup>67</sup> Each ministry was given a vote to order their requirements from the departments of Supplies and Transport and the Government Printer.<sup>68</sup> In 1960, the Treasury issued the Ministry of Works, Stores and Services with Fund Regulations meant to provide

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<sup>61</sup> Details of the East African States from [www.documents.pageflip-flap.com](http://www.documents.pageflip-flap.com), accessed on December 17, 2015

<sup>62</sup>Walter Odhiambo and Paul Kamau, "Public Procurement: Lessons From Kenya, Tanzania And Uganda", OECD Technical Paper No. 208, Unclassified DEV/DOC(2003)06 available at [www.oecd.org/officialdocuments/publicdisplaydocumentpdf/](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/)?, accessed on February 9, 2016. The reforms were part of a wider world wide reform instituted by international agencies in early 1980s aimed at easing international trade and creating increased governance and transparency in emerging economies.

<sup>63</sup>*Ibid.* The UN General Assembly in the 1980s began to push for reform of public procurement through enactment of the UNCITRAL model law.

<sup>64</sup>*Ibid.*

<sup>65</sup>*The History of Public Procurement in Kenya*, available at [www.slideshare.net](http://www.slideshare.net), accessed on April 3, 2016.

<sup>66</sup>Jerome Ochieng and Mathias Muehle, 'Development and Reform of the Kenyan Public Procurement System' [2012] 6 JPP 1763, available online at [www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf](http://www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf), accessed on September 22, 2015.

<sup>67</sup>Jerome Ochieng and Mathias Muehle, 2012, available online at [www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf](http://www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf), accessed on September 22, 2015. The Department dealt with purchasing and supplies services in public procurement.

<sup>68</sup>*Ibid.*

for common-user services.<sup>69</sup> These Regulations established the Supplies Branch as a division that deals with procurement of common-user items for government ministries, departments and agencies.<sup>70</sup>

When Kenya got independence, it continued with the colonial procurement system where local purchases were determined by individual entities while international procurement was conducted by Crown Agents.<sup>71</sup> This went on until 1974 when there was the first major change through a circular from Treasury which transferred the functions of the CTB Secretariat from the Ministry of Works to the Treasury.<sup>72</sup> In 1978, the Government issued the Supplies Manual which was backed by circulars that were issued by the Treasury (Ministry of Finance) when need arose.<sup>73</sup> In 1982, the Government issued the “*District Focus for Rural Development Strategy*” Document.<sup>74</sup> This strategy relied on districts as the centers for “planning, implementation and management of rural development”.<sup>75</sup>

This was a decentralised form of public procurement which saw procurement divided into Districts’ Tender Committees (DTCs) which dealt with small tenders, Ministerial Tender Committees (MTCs) which handled slightly bigger tenders that were beyond the DTCs’ level, and the Central Tender Committee (CTC) that oversaw big tenders with values of twenty million (20,000,000) Kenya Shillings and above.<sup>76</sup> CTC Board was the overall body

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<sup>69</sup>See Jerome Ochieng and Mathias Muehle, 2012, 6 JPP pp.1764 on Fund Regulations, available online at [www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf](http://www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf) accessed on September 22, 2015.

<sup>70</sup> The Supplies Branch still exist to-date under the Ministry of Public Works while the Government Press exists under the Office of the President and continues to provide printing services to the government. More information available from [www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf](http://www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf) accessed on September 22, 2015.

<sup>71</sup>See Jerome Ochieng and Mathias Muehle, 2012, pp.1764, available at [www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf](http://www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf) accessed on September 22, 2015.

<sup>72</sup> Jerome Ochieng and Mathias Muehle, 2012, available at [www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf](http://www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf) accessed on September 22, 2015. Membership remained inter-ministerial but the level was raised to that of deputy secretary with alternates remaining as under-secretaries. The chief executive officer was the secretary and the secretariat was managed by supplies officers.

<sup>73</sup>See J.M. Migai-Akech [2006] 1-2.

<sup>74</sup>See Jerome Ochieng and Mathias Muehle, 2014, pp.1764 on District Focus for Rural Development, accessed on September 22, 2015 at [www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf](http://www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf).

<sup>75</sup>See Jerome Ochieng and Mathias Muehle, 2014, pp.1765 on District Focus for Rural Development, accessed on September 22, 2015 at [www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf](http://www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf).

<sup>76</sup>*Ibid.*

in charge of public procurement in the country.<sup>77</sup> Further reorganisation of public procurement was undertaken in 1983 by bringing back the CTB to the Treasury and taking the Supplies Branch to the Ministry of Works.<sup>78</sup> In the restructured format, the CTB's main responsibility was to award and manage contracts.<sup>79</sup>

In 1997, the World Bank carried out a review of the country's public procurement system<sup>80</sup> to identify weaknesses in the system that reduced effectiveness of financial management and Government's ability to deliver services.<sup>81</sup> In 1998, the Government of Kenya with the help of the World Bank launched the Public Procurement Reform Programme to address the weaknesses identified by the review.<sup>82</sup> In 2001, the Public Procurement Regulations were issued under the Exchequer and Audit Act.<sup>83</sup> This marked the initial results of the reforms. The Regulations brought together all the circulars that were managing the public procurement system, scrapped off the CTB and created the MTCs, Procurement Appeals Board (herein after referred to as PPCRAB) and the Public Procurement Directorate (herein after referred to as PPD) to oversee the process.<sup>84</sup>

Although enacting regulations<sup>85</sup> was a great milestone in the administration and management of public procurement in the country, it could not forestall problems such as: overpricing, unstructured authorisation of expenditure levels, unregulated contract variations, unfair and non-transparent competition, and irregular application of

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<sup>77</sup>*Ibid.*

<sup>78</sup>*Ibid.*

<sup>79</sup>*Ibid.* The CTB's importance was underscored in a 1985 circular issued by Treasury. The Circular elevated membership level to that of deputy secretary with alternates as under-secretaries. It had a bigger procurement budget.

<sup>80</sup> The World Bank, "A Review of Kenya's Public Procurement System," 1997, accessed on February 17, 2015 at [www.pdf.usaid.gov](http://www.pdf.usaid.gov)

<sup>81</sup>PPOA, 'A Review of the Country's Public Procurement System' [2011] 5 PJ 2.

<sup>82</sup>See Jerome Ochieng and Mathias Muehle [2014] 1767, [www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf](http://www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf), accessed on September 22, 2015. Public Procurement Reform Programme was officially launched on 25th November, 1998.

<sup>83</sup>See Republic of Kenya, 'The Exchequer and Audit (Public Procurement) Regulations' [2001], in Jerome Ochieng and Mathias Muehle [2014] 1767, [www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf](http://www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf), accessed on September 22, 2015.

<sup>84</sup>See Republic of Kenya, 'The Exchequer and Audit (Public Procurement) Regulations' [2001], in Jerome Ochieng and Mathias Muehle [2014] 1767, [www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf](http://www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf), accessed on September 22, 2015

<sup>85</sup>*Ibid*



procurement methods.<sup>86</sup> Other identified weaknesses included: uncontrolled low value procurement of items, non-delivery of goods, lack of legal permanence and enforcement, too much delays in the procurement process, poor procurement records and documentation, and conflict of interest among players in the procurement system.<sup>87</sup> The Regulations were amended in 2002.<sup>88</sup>

In 2002, the country embarked on drafting new public procurement legislation with the view to address the challenges above. Drafters used the UNCITRAL Model Law on Procurement of Goods, Construction and Services with Guide to Enactment [1995] to develop the text of the legislation.<sup>89</sup> After an extensive discussion of the drafts with relevant stakeholders, the Public Procurement and Disposal Act (PPDA)<sup>90</sup> was approved by Parliament and gazetted in 2005.<sup>91</sup> The Act became operational on January 1, 2007 after the Minister for Finance approved and gazetted the Public Procurement and Disposal Regulations of 2006.<sup>92</sup> The Act created the general procurement rules, system of committees and units within each procuring entity and key institutions in the public procurement system such as the Public Procurement Oversight Authority (PPOA), the Public Procurement Administrative Review Board (PPARB) and the Public Procurement

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<sup>86</sup>See Jerome Ochieng and Mathias Muehle [2014] 1768, [www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf](http://www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf), accessed on September 22, 2015.

<sup>87</sup>See Jerome Ochieng and Mathias Muehle, 2014, pp.1768, available online at [www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf](http://www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf), accessed on September 22, 2015.

<sup>88</sup>*Ibid.*

<sup>89</sup>See UNCITRAL Model Law on Procurement of Goods, Construction and Services with Guide to Enactment [1995] in Jerome Ochieng and Mathias Muehle, 2014, pp.1768, available online at [www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf](http://www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf), accessed on September 22, 2015

<sup>90</sup>Republic of Kenya, ‘The Public Procurement and Disposal Act’ [2005], available online at [www.kenyalaw.org/PPDA-2005/pdf](http://www.kenyalaw.org/PPDA-2005/pdf), accessed on May 11, 2015.

<sup>91</sup>See Jerome Ochieng and Mathias Muehle, 2014, pp.1768, available online at [www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf](http://www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf), accessed on September 22, 2015. The Public Procurement and Disposal Act [2005] establishes “procedures for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by public entities to achieve the following objectives: to maximize economy and efficiency; to promote competition and ensure that competitors are treated fairly; to promote the integrity and fairness of those procedures; to increase transparency and accountability, to increase public confidence in those procedures; and to facilitate the promotion of local industry and economic development”, available at [www.ijssse.org](http://www.ijssse.org)

<sup>92</sup> Republic of Kenya, “the Public Procurement and Disposal (PPD) Regulations of 2006” in Jerome Ochieng and Mathias Muehle, 2014, pp.1769, available at [www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf](http://www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf), accessed on September 22, 2015. Also see Kempe Ronald Hope, “Corruption and Governance in Africa”, Springer Nature, 2017.

Advisory Board (PPAB).<sup>93</sup> The Act spells out responsibilities of PPOA which include: ensuring that procurement procedures are complied with, to monitor public procurement systems and recommend improvements, to assist in the implementation and operation of the procurement systems<sup>94</sup> and to initiate public procurement policy and amendments to the Act.<sup>95</sup>

The PPAB as an institution is supposed to oversight the Authority and generally ensure that the Authority functions as provided in law.<sup>96</sup> Further, the Board approves the estimates of the revenue and expenditures of the Authority and recommends the appointment or termination of the Director General (DG).<sup>97</sup> As a tribunal, the Review Board (PPARB) is charged with the legal responsibility to promote and uphold fairness in the public procurement system through judicious and impartial adjudication of matters arising from disputed procurement proceedings as a major alternative to the court system.<sup>98</sup> The Review Board also has a responsibility of offering legal advice to the procurement stakeholders concerning conflict and proceedings during filing and/or hearing of a review.<sup>99</sup>

The Act further outlines the procurement methods to be used, time limits and advertising rules, what the tender documents contains and technical specifications, procedures for submission, receipt and opening of tenders, tender evaluation and award criteria, and the complaints system format and procedure.<sup>100</sup> The PPDA and Regulations thereof cover

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<sup>93</sup> Jerome Ochieng and Mathias Muehle, 2014, 1769, available at [www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf](http://www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf), accessed on September 22, 2015.

<sup>94</sup> The Public Procurement and Disposal Act, 2005, 3(60), available online at <http://www.ppoa.go.ke/2005-08-24-14-47-43/the-act> or [www.eacc.go.ke](http://www.eacc.go.ke), accessed on September 22, 2015

<sup>95</sup> More information available online at [www.pdf.usaid.gov](http://www.pdf.usaid.gov), accessed on September 22, 2015

<sup>96</sup> The Public Procurement and Disposal Act [2005] 3(66), in Jerome Ochieng and Mathias Muehle, 2014, pp.1770, available online at [www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf](http://www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf), accessed on September 22, 2015.

<sup>97</sup>The Public Procurement and Disposal Act [2005] 3(66), in Jerome Ochieng and Mathias Muehle, 2014, pp.1770, available online at [www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf](http://www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf), accessed on September 22, 2015.

<sup>98</sup> The Public Procurement and Disposal Act [2005] 3(67), available online at [www.kenyalaw.org:8181](http://www.kenyalaw.org:8181). Also see EACC, "Corruption Perception Surveys 2010-2015", available online at [www.eacc.go.ke](http://www.eacc.go.ke), accessed on April 7, 2016.

<sup>99</sup>*Ibid.*

<sup>100</sup> The Public Procurement and Disposal Act [2005] 3(67-99) in Humphrey Kimani Njuguna, "Challenges to Effective Participation of MSEs in Public Procurement Market in Kenya," (Ph.D. Thesis, Jomo Kenyatta

goods, works and services for all procurement using national funds. Both documents are published and widely distributed.<sup>101</sup> The legal framework is usually supported by a series of Standard Tender Documents (STDs).<sup>102</sup> The Kenyan procurement system involves several steps such as identification of requirements, procurement planning, definition of requirements, determination of source, evaluation and selection of tender, contract award, contract implementation, storage, payment for goods and services and disposal.<sup>103</sup>

Public procurement is also anchored in the Constitution of Kenya vide Article 227<sup>104</sup> promulgated in 2010. Chapter twelve of the Constitution provides for good financial management of public resources which should be undertaken in a transparent, prudent, accountable and cost effective manner<sup>105</sup>. Part of good financial management is the budget execution and spending.<sup>106</sup> This is why Article 227 on Public Procurement, which is part of budget spending, was introduced under Chapter Twelve on Public Finance. Article 227 of the Constitution of Kenya which provides for the Procurement of Public Goods and

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University of Agriculture and Technology, 2015), [www.jkuat.ac.ke/student-papers/pdf](http://www.jkuat.ac.ke/student-papers/pdf), accessed on May 14, 2016.

<sup>101</sup> Humphrey Kimani Njuguna, 2015, pp.229, available online at [www.jkuat.ac.ke/student-papers/pdf](http://www.jkuat.ac.ke/student-papers/pdf), accessed on May 14, 2016. Also *see* PPOA, ‘PPDA [2005], PPAD Act [2015] & The Public Procurement Regulations’ [2001-15] <http://ppoa.go.ke/2015-08-24-14-47-43/Public-Procurement-Regulations>, accessed 7th January, 2017.

<sup>102</sup> PPOA, ‘Standard Tender Documents’, 2016, available online at <http://ppoa.go.ke/2015-08-24-14-47-43/standard-tender-documents>, accessed 20th December, 2016. Also *see* Humphrey Kimani Njuguna, 2015, available online at [www.jkuat.ac.ke/student-papers/pdf](http://www.jkuat.ac.ke/student-papers/pdf), accessed on May 14, 2016.

<sup>103</sup> PPOA, ‘Public Procurement Procedures’, 2016, available online at <http://ppoa.go.ke/2015-08-24-14-47-43/procurement-procedures>, accessed on January 17, 2016. Also *see* EACC, “Corruption Perception Surveys 2010-2015”, available online at [www.eacc.go.ke](http://www.eacc.go.ke), accessed on April 7, 2016.

<sup>104</sup> Article 227 of the Constitution [2010] on the Procurement of Goods and Services states that; “(1) when a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. (2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following- (a) categories of preference in the allocation of contracts; (b) the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination.” This information can also be accessed from [www.constituteproject.org](http://www.constituteproject.org)

<sup>105</sup> Republic of Kenya, “The Constitution”, 2010, available online at [www.kenyalaw.org/constitution-of-kenya-2010/pdf](http://www.kenyalaw.org/constitution-of-kenya-2010/pdf), accessed on May 14, 2016. Article 201 of the Constitution of Kenya provides for the Principles of Public Finance as follows: “(a) there shall be openness and accountability, including public participation in financial matters; (d) public money shall be used in a prudent and responsible way; and (e) financial management shall be responsible, and fiscal reporting shall be clear.” Also *see* Jerome Ochieng and Mathias Muehle, 2014, pp.1770, available online at [www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf](http://www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf) and [www.katibasasa.org](http://www.katibasasa.org), accessed September 22, 2015.

<sup>106</sup> *See* Jerome Ochieng and Mathias Muehle, 2014, pp.1771, available online at [www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf](http://www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf), accessed on September 22, 2015.

Services states that, “(1) when a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. (2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented ....”<sup>107</sup> In order to satisfy sub-section (2) above, the PPDA was repealed by the Public Procurement and Asset Disposal Act, 2015 which commenced on January 7, 2016.<sup>108</sup> The Act was repealed mainly to make public procurement conform to the new structures of devolved government as outlined in Article 227(2) of the Constitution.<sup>109</sup> The evolution of Public Procurement Law in Kenya is illustrated in Table 1.1

**Table 1.1: History of Procurement Reforms in Kenya**

<b>Year</b>	<b>Event</b>
1963-1969	(i) Local purchasing determined by individual procuring entities. (ii) Issuance of procurement circulars from time to time. (iii) International Procurement conducted by Crown Agents
1969-1978	(i) East African Supplies Manual (ii) Treasury/Ministry of Public Works/Office of the President Circulars.
1978 – 2001	(i) 1997: Government initiates public procurement reform with support of the World Bank. (ii) 1998: Official launch of Public Procurement Reform Programme (iii) Kenya Supplies Manual and Circulars.
2001-2006	(i) 2001: Public Procurement Regulations issued by Minister for Finance.

<sup>107</sup> Republic of Kenya, “The Constitution”, [2010], available online at [www.kenyalaw.org/constitution-of-kenya-2010/pdf](http://www.kenyalaw.org/constitution-of-kenya-2010/pdf), accessed on January 12, 2016.

<sup>108</sup> The Public Procurement and Asset Disposal Act, 2015, available online at [www.kenyalaw.org](http://www.kenyalaw.org), accessed on March 2, 2016.

<sup>109</sup> Republic of Kenya, “The Constitution of Kenya”, 2010 available online at [www.kenyalaw.org/constitution-of-kenya-2010/pdf](http://www.kenyalaw.org/constitution-of-kenya-2010/pdf), accessed on May 14, 2016. Article 227(2) states that, “An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following—

a) categories of preference in the allocation of contracts;  
b) the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination;  
c) sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation; and  
d) Sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment laws and practices” Related information is available online at [www.teazones.co.ke](http://www.teazones.co.ke), accessed on August 7, 2017.

Year	Event
	(ii) 2001-2006: Exchequer and Audit Act (Public Procurement Regulations, 2001/2006). (iii)2003: Independent Procurement Review.
2005	Public Procurement and Disposal Act, 2005 enacted
2006	Public Procurement and Disposal Regulations, 2006 passed by Parliament.
2007	PPDA, 2005 operationalised. MAPS: BLI Score 66% - strengths and weaknesses.
2007	2007-Present: Supplies Practitioners Management Act, 2007 issued and in use.
2009	PPD (Public Private Partnership) Regulations issued.
2010	Constitution of Kenya promulgated with provisions for Procurement and Disposal under Article 227, and a proposal to review procurement law.
2011	PPD (Preference and Reservations) Regulations issued.
2015	The Public Procurement and Asset Disposal Act [2015] operationalised on 7 <sup>th</sup> January, 2016

Source: PPOA, “Evolution of Public Procurement Law in Kenya”, *Procurement Journal No. 5 of 2011*, available online at [www.ppoa.go.ke](http://www.ppoa.go.ke), accessed 10<sup>th</sup> August 2015<sup>110</sup> and the *Public Procurement and Asset Disposal Act [2015]*<sup>111</sup>

In a new policy direction, the 2015 Act also seeks to entrench affirmative action for youth, women and persons with disabilities in the administration of public procurement. Section 157(10) provides that, “...every procuring entity shall ensure that at least thirty (30) percent of its procurement value in every financial year is allocated to the youth, women and persons with disability”.<sup>112</sup> The new Act seeks to promote preference and reservations for small and micro enterprises and other disadvantaged groups, citizen contractors, women, youth, persons with disabilities, minorities and marginalized groups in the public procurement at the county.<sup>113</sup> However, this study submits that the new Act is not

<sup>110</sup>Public Procurement Oversight Authority, 2011, 5 PPJ 1. This table provides a summary of Evolution of Public Procurement Law in Kenya as outlined in Victor Mosoti, “Reforming the Laws on Public Procurement in the Developing World: The Example of Kenya”, *International and Comparative Law Quarterly*, 2005; and in the *PPOA Procurement Journal*, 2011, 5(1).

<sup>111</sup> The Public Procurement and Asset Disposal Act, 2015, available online at [www.kenyalaw.org](http://www.kenyalaw.org), accessed March 2, 2016.

<sup>112</sup>*Ibid.*

<sup>113</sup> See Public Procurement and Asset Disposal Act, 2015 Part III, Section 33(2)(f)] on County Government Responsibilities, available online at [www.kenyalaw.org](http://www.kenyalaw.org), accessed March 2, 2016.

substantially different from the repealed Act in a way that could alter the grounding and reasoning behind the present study. The alterations made in the 2015 Act do not in any way alter the facts as expounded herein neither do they alter the reasoning behind the problem which the present study sought to investigate. Hence, both the repealed and the new Act can be used interchangeably in the present study without changing the issues under investigation.

The outlined historical development of public procurement in Kenya demonstrates that a lot has been achieved as far as legal, policy, and institutional reforms in the sector are concerned. The sector is now adequately regulated after the government fully operationalised the PPDA<sup>114</sup> and the public procurement having been entrenched in the Constitution vide Article 227.<sup>115</sup> The necessary institutional frameworks such as the PPOA, PPAB and PPARB are in place and appear to be working relatively well.<sup>116</sup> Following all these reforms, and as expounded earlier on in the systems theory, the public procurement system in Kenya is expected to operate at maximum efficiency levels with minimum challenges and optimum output/results. However, that is not the case as demonstrated by the numerous procurement-related corruption challenges still reported in the sector as outlined earlier in this study. This is an indication that there's a problem in the sector. Then, why the failure in spite of the numerous efforts made so far to reform the public procurement system? This outlines the research gap which the present study seeks to fill.

### **1.3 Statement of the Problem**

From 2001 to date, there has been a good attempt to put in place a fairly good legal order to govern, direct and control public procurement sector in Kenya.<sup>117</sup> The country has

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<sup>114</sup>Peter M. Lewa, 'Analysis of Legal and Institutional Frameworks in Public Procurement,' 2007, pp.27.

<sup>115</sup>See H.N. Kimani, J. O. Odek, & A. Waris, "The Influence of Corruption on the Operationalisation of Public Procurement Law in Kenya", 2016, *International Journal of Human Resources and Procurement*. Vol 5 (7), available online at [http://www.ijssse.org/index.php?option=com\\_content&view=article&id=769&Itemid=1](http://www.ijssse.org/index.php?option=com_content&view=article&id=769&Itemid=1), accessed on January 27, 2017.

<sup>116</sup>See Jerome Ochieng and Mathias Muehle, 2014, pp.1779.

<sup>117</sup> Peter M. Lewa, and Susan K. Lewa, "Public Procurement Reform in Emerging Economies: A Case Study of Kenya", *Handbook of Business Practices and Growth in Emerging Markets*, 2009

witnessed the enactment of the Exchequer Regulations<sup>118</sup> followed by the PPDA (now repealed).<sup>119</sup> The hallmark was the promulgation of the Constitution, 2010, with provisions for the *Procurement of Public Goods and Services* vide Article 227. The Constitution [2010] also required the PPDA to be reviewed to conform to the provisions of Section 227(2).<sup>120</sup> This was done and the Country has a new Public Procurement and Asset Disposal Act [2015]<sup>121</sup> which was operationalised in January 2016.

Alongside these procurement legal reforms, there are other supportive legislations like the Anti-Corruption and Economic Crimes Act, No. 3 of 2003,<sup>122</sup> Public Officer Ethics Act, 2003,<sup>123</sup> the Political Parties (Amendment) Act, 2012,<sup>124</sup> the Ethics and Anti-Corruption Commission Act No. 22 of 2011,<sup>125</sup> Leadership and Integrity Act, 2012,<sup>126</sup> among others which strengthen the above procurement legal regime. The country in addition has set up

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<sup>118</sup>Republic of Kenya, ‘The Exchequer and Audit (Public Procurement) Regulations,’ [Nairobi, Government Printer, 2001], [www.kenyalaw.org](http://www.kenyalaw.org) accessed on December 7, 2014. Also see Peter M. Lewa, and Susan K. Lewa, “Public Procurement Reform in Emerging Economies: A Case Study of Kenya”, Handbook of Business Practices and Growth in Emerging Markets, 2009

<sup>119</sup>Republic of Kenya, “The Public Procurement and Disposal Act,” (Nairobi, Government Printer, 2005), accessed from [www.kenyalaw.org](http://www.kenyalaw.org) on January 22, 2013.

<sup>120</sup>Republic of Kenya, “The Constitution of Kenya”, (Nairobi, Government Printer, 2010), <http://www.kenyalaw.org> accessed on January 22, 2013.

<sup>121</sup>Republic of Kenya, ‘The Public Procurement and Asset Disposal Act,’ [Nairobi, Government Printer, 2015]. <http://www.kenyalaw.org> accessed on September 11, 2016.

<sup>122</sup> Republic of Kenya, Anti-Corruption and Economic Crimes Act, No 3, 2003. An Act of Parliament to provide for the prevention, investigation and punishment of corruption, economic crime and related offences and for matters incidental thereto and connected therewith, accessible at [www.kenyalaw.org/#q=anti+corruption+and+economic+crimes+act+2003+kenya](http://www.kenyalaw.org/#q=anti+corruption+and+economic+crimes+act+2003+kenya). Also see Meaghan Campbell and Frederick C. Stapenhurst, “Using Networks for Capacity Enhancement – Lessons from Anti-corruption Parliamentary Networks”, [2005] 10, World Bank Institute, [www.apnacafrica.org](http://www.apnacafrica.org), accessed on January 9, 2017.

<sup>123</sup>Kenya Law Reports, ‘The Public Officer Ethics Act,’ [2003] KLR CAP 183 <http://www.kenyalaw.org/#q=public+officer+ethics+act+no+4+of+2003>. See Meaghan Campbell and Frederick C. Stapenhurst, [2005] 10, [www.apnacafrica.org](http://www.apnacafrica.org), accessed on January 9, 2017. Also see [www.wds.worldbank.org/publications/documents/reports](http://www.wds.worldbank.org/publications/documents/reports), accessed on January 9, 2017.

<sup>124</sup>Kenya Law Reports, “The Political Parties (Amendment) Act,” Nairobi, Government Printer, 2012, accessed on April 19, 2013 at <https://www.kenyalaw.org/#q=political+parties+act+2012>. Also see Meaghan Campbell and Frederick C. Stapenhurst, [2005] 10, [www.apnacafrica.org](http://www.apnacafrica.org), accessed on January 9, 2017.

<sup>125</sup> Kenya Law Reports, “The Ethics and Anti-Corruption Commission Act No. 22 of 2011”, National Council for Law Reporting, accessed on January 13, 2016 at <https://www.kenyalaw.org/#q=the+ethics+and+anti-corruption+commission+act+2011>. Also see Meaghan Campbell and Frederick C. Stapenhurst, 2005, 10, [www.apnacafrica.org](http://www.apnacafrica.org), accessed on January 9, 2017.

<sup>126</sup> Kenya Law Reports, “The Leadership and Integrity Act”, 2012, 2, Council for Law Reporting, accessed on January 13, 2016 at <https://www.kenyalaw.org/#q=leadership+and+integrity+act+2012+kenya>. This is “An Act of Parliament to give effect to, and establish procedures and mechanisms for the effective administration of Chapter Six of the Constitution and for connected purposes”.

institutions to help operationalise the above procurement legal reforms like the EACC, PPOA, PPARB and other related institutions. As noted above, the Constitution, 2010, was a major milestone in the reform agenda – the country now has a fairly independent Judiciary with its fidelity stemming from the people and only subject to the law as contained in Article 159 and 160.<sup>127</sup> Similarly, the executive is now institutionalised as pronounced in Article 130, 131 and 132.<sup>128</sup> The President now shares executive authority with the Deputy President and the Cabinet contrary to the old constitutional order where he had absolute executive control as contained in Section 23-26<sup>129</sup> of the old constitutional order.

The Constitution, 2010, was people driven and therefore a product of social fact. It recognises the place of leadership in today’s legal order if the law has to play its rightful role in economic, social and political re-engineering. Article 1 of the Constitution [2010] vests all sovereign power of the Republic on the people<sup>130</sup> to be exercised in accordance with the Constitution directly through the people or through their democratically elected representatives.<sup>131</sup> This power is delegated under Article 1(3) to the State organs of Parliament, Legislative Assemblies in the County Government, National Executives and executive structures in the County Government, Judiciary and independent tribunals.<sup>132</sup> Article 10 of the Constitution further entrenches the moral philosophy in the legal order which demands strict adherence to national values and principles on governance

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<sup>127</sup>Republic of Kenya, “The Constitution”, [2010] 159, 160 KLR 101, <http://www.klrc.go.ke/index.php/constitution-of-kenya/129-article-159-160-judicial-authority-and-legal-system>, accessed on August 13, 2016.

<sup>128</sup>Republic of Kenya, “The Constitution”, [2010] 130, 131,132 KLR 80, <http://www.klrc.go.ke/index.php/constitution-of-kenya/article-130-131-132-principles-and-structure-of-the-national-executive>. Also available at [www.ustawi.info.ke](http://www.ustawi.info.ke), accessed on August 13, 2016.

<sup>129</sup> Republic of Kenya, “The Constitution”, [1994], <http://www.kenyalaw.org/constitution-of-kenya/article-23-26-executive-authority>, accessed on January 7, 2016.

<sup>130</sup>See Constitution of Kenya, 2010, Article 1 on Sovereignty of the People, accessible from [www.kenyalaw.org](http://www.kenyalaw.org) or [www.cickenya.org](http://www.cickenya.org), accessed on January 7, 2016.

<sup>131</sup> Information on Governance and Accountability sourced from [www.westfm.co.ke](http://www.westfm.co.ke), on April 18, 2016.

<sup>132</sup>See Constitution of Kenya, 2010, Article 1(3) which states that, accessible from [www.kenyalaw.org](http://www.kenyalaw.org) which states that, “Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution – (a) Parliament and the legislative assemblies in the county governments; (b) the national executive and the executive structures in the county governments; and (c) the Judiciary and independent tribunals.



issues.<sup>133</sup> State officers, public officers and any other person, whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law, makes or implements public policy decision, they should do so and be bound by the said values and principles.<sup>134</sup> These values and principles include among others: patriotism, national unity, the rule of law, democracy, human dignity, equity, inclusiveness, good governance, integrity, transparency and accountability.<sup>135</sup>

Chapter six of the Constitution, 2010, on *Leadership and Integrity* further underscores this social fact phenomenon.<sup>136</sup> According to Article 73(1), the authority assigned to a State officer is one of public trust to be exercised in accordance to the Constitution and must demonstrate at all times respect and honor to the people of Kenya.<sup>137</sup> From this chapter, the *Guiding Principles of Leadership and Integrity* include: selection on the basis of competence and suitability, objectivity and impartiality in decision making, personal integrity, and ensuring that decisions are not influenced by favouritism, improper motives, nepotism or corrupt practices among others<sup>138</sup>. The extent to which the country has been

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<sup>133</sup>The Constitution of Kenya, 2010, Article 10 on the National Values and Principles of Governance, accessed on September 22, 2016 from [www.kenyalaw.org](http://www.kenyalaw.org), states that, “The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them – (a) applies or interprets this Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions”.

<sup>134</sup> The Constitution of Kenya, 2010, Article 10 on the National Values and Principles of Governance, accessed on September 22, 2016 from [www.kenyalaw.org](http://www.kenyalaw.org) and [www.katibainstitute.org](http://www.katibainstitute.org)

<sup>135</sup> The Constitution of Kenya, 2010, Article 10, [www.kenyalaw.org](http://www.kenyalaw.org); [www.cmd-kenya.org](http://www.cmd-kenya.org) and [www.katibainstitute.org](http://www.katibainstitute.org), accessed on September 22, 2016. Also *see* “Parliamentary Vetting a Check on Impunity [opinion]”, Africa News Service, March 28 2011 Issue

<sup>136</sup>The Constitution of Kenya, 2010, <http://www.klrc.go.ke/index.php/constitution-of-kenya/119-chapter-six-leadership-and-integrity>, accessed on September 22, 2016. See also the Responsibilities of a Public Officer as defined by “Parliamentary Vetting a Check on Impunity [opinion]”, Africa News Service, March 28 2011 Issue and at [www.icpak.com](http://www.icpak.com), accessed on September 22, 2016.

<sup>137</sup>The Constitution of Kenya, 2010, Article 73(1), [www.kenyalaw.org](http://www.kenyalaw.org); [www.katibainstitute.org](http://www.katibainstitute.org); and [www.cofek.co.ke](http://www.cofek.co.ke), accessed on September 22, 2016, states that, “(1) Authority assigned to a State officer- (a) is a public trust to be exercised in a manner that- (i) is consistent with the purposes and objects of this Constitution; (ii) demonstrates respect for the people; (iii) brings honour to the nation and dignity to the office; and (iv) promotes public confidence in the integrity of the office; and (b) vests in the State officer the responsibility to serve the people, rather than the power to rule them”.

<sup>138</sup> The Constitution of Kenya, 2010, Article 73(2), the Guiding Principles of Leadership and Integrity, [www.kenyalaw.org](http://www.kenyalaw.org) and [www.theclearinitiative.org](http://www.theclearinitiative.org), accessed on September 22, 2016.

able to operationalise and implement the spirit and the letter of this integrity threshold<sup>139</sup> in the Constitution forms part of the discussion of this thesis. If the legal order has to play its rightful role as envisaged in this Constitution, then this gap must be addressed more so as it relates to public procurement and financial management in the public sector.

From the above, it has been noted that the country has the necessary procurement legal order, institutions and reforms thereof. However, the question at this juncture is whether these reforms, both in law and institutions, have brought the desired results in the public procurement sector. This study holds otherwise. Some of these institutions like EACC have largely remained moribund since their inception. This country has witnessed major scandals in the public procurement sector many of which have never been resolved to date such as: Anglo-Leasing security contracts, the acquisition of land for use as a cemetery by the then City Council of Nairobi in 2010 where there was a loss of Ksh 300 million, Triton Oil Scandal, the maize scandal of 2008/09 among others. President Uhuru Kenyatta in his executive order of March 2015 and his infamous list of shame of 29 March 2015 of 175 senior government officers tabled before Parliament alluded to this challenge. The DPP released a list of 88 high profile cases on 16<sup>th</sup> February 2016 all largely procurement related. Further, the EACC perception survey from 2010 to date indicates that 80 percent of all reported cases are on public procurement.

#### **1.4 Hypothesis**

This study proceeds on the premise that Public Procurement Law in Kenya has largely failed in its workings and delivery due to political patronage. Borrowing from the Systems Theory discussed earlier, when all the elements of an intra-system are working well both individually, and as part of a whole, then it follows that the system may only experience minor challenges with minimum impact on the outcome.<sup>140</sup> The analogy of the Theory is

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<sup>139</sup> Osaore Omoruyi Aideyan and B. Osunde Ideho, "Political Openness in Post Authoritarian Sub-Saharan Africa (SSA): Domestic and External Pressure to Conformity", *Journal of Third World Studies*, Vol. 32, No. 2, Fall 2015 Issue

<sup>140</sup> See Systems Theory as proposed by Ludwig von Bertalanffy, 'General System Theory' [George Braziller, Inc., 1968] 4, accessed on September 17, 2014 from [www.knowledgerush.com](http://www.knowledgerush.com). Ludwig who was a biologist in the 1940s emphasized that, "real systems are open to, and interact with, their environments, and that they can acquire qualitatively new properties through emergence, resulting in continual evolution.

applied in this context to understand the functioning of the public procurement system in Kenya<sup>141</sup> which comprises of the legal, institutional and policy frameworks<sup>142</sup> as the elements of the system which operate in a political environment managed by the executive.

It follows from the Theory that, with the three elements of the public procurement system working relatively well, the output is expected to be at optimum levels with minimum challenges if a conducive environment prevails.<sup>143</sup> This is supposed to be true for any kind of a system. But is it true with the public procurement system in Kenya today? Has the system achieved optimum value for money? This study holds the view that the contrary is true.

From the Systems Theory, when the intra-system is working well, a major and/or serious failure or malfunction may basically be attributed to an external force, factor or element.<sup>144</sup> In the public procurement, the external influence can be attributed to the environment in which the three elements of legal, policy and institutional frameworks operate. The environment includes the managers of the system who operate in a political framework with its own value system.

## **1.5 Overall Objective**

The overall objective of this study was to investigate the influence of political patronage on the workings and delivery of Public Procurement Law in Kenya. In an attempt to understand why the law is not functioning as it should, this study sought to introduce the element of political patronage to explain this failure. The study holds the view that, after all the reform efforts undertaken so far in the public procurement sector in Kenya, any

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Rather than reducing an entity to the properties of its parts or elements, systems theory focuses on the arrangement of and relations between the parts which connect them into a whole.” See [www.sokl.joensuu.fi](http://www.sokl.joensuu.fi)

<sup>141</sup> Victor Mosoti, “Reforming the Laws on Public Procurement in the Developing World: The Example of Kenya”, *International and Comparative Law Quarterly*, 2005, Vol. 54, Issue 3, pp. 621-650 accessed from <https://doi.org/10.1093/iclq/lei020>

<sup>142</sup> “Register of Commission Documents: Communication from the Commission to the European Parliament, the European Council and the Council”, *European Union News*, Dec 6 2016 Issue

<sup>143</sup> See *Systems Theory* by Ludwig von Bertalanffy [1968].

<sup>144</sup> See *Systems Theory* by Ludwig von Bertalanffy [1968].

further weakness (es) in the system can most likely be attributed to other factors other than legal, policy and institutional frameworks.

### **1.5.1 Specific Objectives**

**Specifically, this study sought to:**

1. Establish how political patronage (corruption, ethnicity and nepotism) affect the policy, legal and institutional frameworks for public procurement in Kenya;
2. Examine the role policy, legal and institutional reforms play in addressing political patronage in the public procurement sector in Kenya;
3. Establish if the reforms are sufficient to address the problem of political patronage in public procurement
4. Establish if there are further reforms needed in law, institutions and policy which can strengthen the delivery of public procurement sector in Kenya

From the point of view that the law operates in an environment and not a vacuum,<sup>145</sup> an understanding of that environment may hold the key to unlock the problems facing the Public Procurement Law.

### **1.6 Research Questions**

The present research sought to answer the following key study questions:

- a) To what extent does political patronage (corruption, ethnicity and nepotism) affect the policy, legal and institutional frameworks for public procurement in Kenya?
- b) What role has policy, legal and institutional reforms played in addressing political patronage in the public procurement sector in Kenya?
- c) Have these reforms been sufficient to address the problem of political patronage in public procurement?
- d) Are there further reforms needed in law, institutions and policy which can strengthen the delivery of public procurement sector in Kenya?

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<sup>145</sup> A Treatise of Legal Philosophy and General Jurisprudence, 2016.

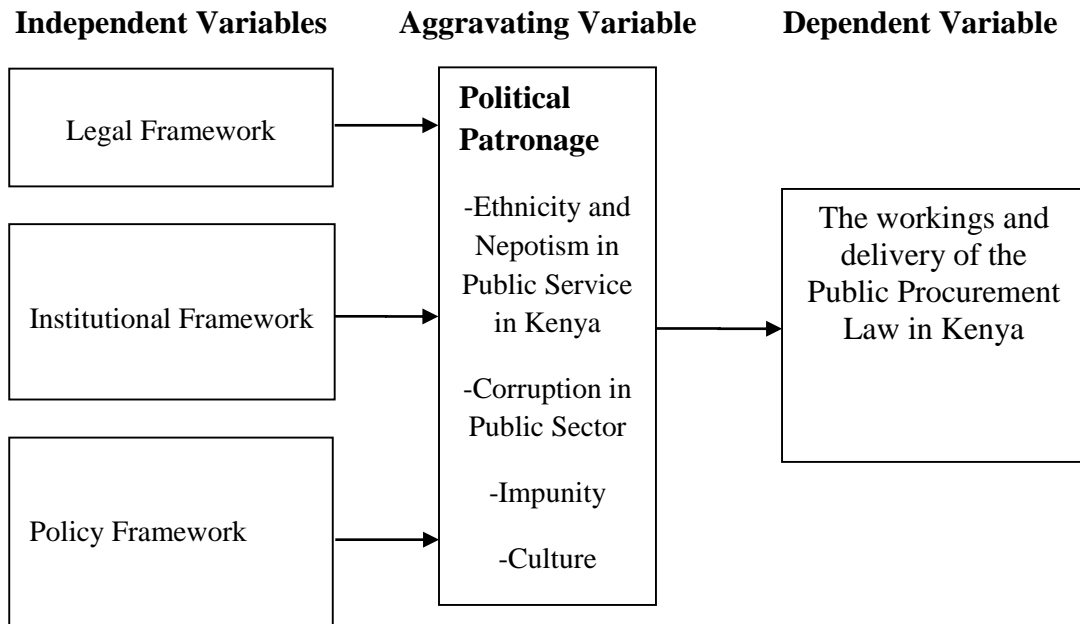
### 1.7 Conceptualisation of the Study

Conceptualisation of the present study revolves around the interrelationship between variables. **Independent variables** are the legal, policy and institutional frameworks. Political patronage is the **aggravating factor/variable** which works through ethnicity, nepotism, corruption and culture in the public sector in Kenya to impair the workings and delivery of the law. This study took the view that there is a thread linking political patronage and the failure of the Public Procurement Law to deliver as anticipated. The political patronage systems are usually concealed under the legal, institutional and policy frameworks of public service and are normally hard to detect.

The **aggravating/intervening variable** in this study is the political patronage. This patronage in the context of this thesis refers to political leadership influence which can either be negative or positive in the public procurement sector. It is symbolised by directing, controlling and management of public and financial resources. It is basically manipulation of public sector operations by the ruling class. It is used to explain how the political environment influences the functioning of the public procurement sector.

The **dependent variable** is the perceived failure of the workings and delivery of Public Procurement Law in Kenya as anticipated. This study supposes that political patronage negatively interferes with the operations of the institutions and law rendering them largely ineffective resulting into the aforementioned challenges. The study assumes that if the political leadership (the management function) provides a conducive environment for the law, policy and institutions to thrive, then there would be optimum results. This is what would result into best practice in the sector.

**Figure 1.1: Conceptual Framework**



### 1.8 Justification of the Study

The Constitution [2010] and the PPDA together with other enabling laws such as the Kenya Anti-Corruption Commission Act, 2012,<sup>146</sup> Anti-corruption and Economic Crimes Act, 2002, the Public Officer Ethics Act, 2003, the Government Financial Management Act, 2004, and the Political Parties Act, 2011, were partly enacted for among other reasons, to streamline the management of public procurement processes in Kenya.<sup>147</sup> The PPDA also created the necessary institutional frameworks such as the PPOA, PPAB, and PPARB. However, as indicated by the aforementioned cases, these reforms in law, policy and institutions have largely failed to deal with the challenges in this sector. The said challenges, particularly the fraudulent tender awards, necessitate the conduct of further

<sup>146</sup>Kenya Anti-Corruption Commission Act [2012], accessed from [www.kenyalaw.org](http://www.kenyalaw.org), also available at [www.eacc.go.ke](http://www.eacc.go.ke)

<sup>147</sup> Transparency International, "Taming Corruption in Public Procurement Sector in Kenya" 2012, accessed on June 3, 2014 at [www.transparency.org.pk](http://www.transparency.org.pk) and the Acts of Parliament retrieved from [www.kenyalaw.org](http://www.kenyalaw.org). Also see Peter M. Lewa, and Susan K. Lewa, "Public Procurement Reform in Emerging Economies: A Case Study of Kenya", Handbook of Business Practices and Growth in Emerging Markets, 2009

research to establish the reasons behind the failure. In view of this, the current study is significant in a number of ways.

First, the study explored the role of political patronage in the management of the public procurement sector. It is envisaged that the findings of the study have both theoretical and practical implications for the future of the public procurement sector in Kenya. The research provided the basic understanding of how political patronage works to impair the functioning of law, policy and institutions in the public procurement sector.

Second, the study is expected to contribute to the advancement of knowledge about the role political leadership (environment) play in the success or failure of the law, policy and institutions in the public procurement sector. The current study adopted a holistic approach to investigate the problem facing the public procurement sector in Kenya and the findings are more robust, extensive and reliable in highlighting the weaknesses which political patronage uses to impair the functioning of the law, policy and institutions. In so doing, the study has managed to trace the thread which links the problem to the culture and the value system in our society and how the society leadership can inculcate positive values which induce behaviour change.

Third, the findings of this study are expected to be of significance to stakeholders in the public procurement sector who need to understand the current situation in the sector, what ails the sector and how to address some of the challenges identified. This research came up with vital information on how the legal, policy and institutional frameworks (intra-system elements) in the public procurement sector function and how political patronage (extra-system elements/environmental factors) exploits the weaknesses in law, policy and institutions to impair the workings and delivery of the law. Data from this study may be used by the government and other interested parties to initiate further reforms in the sector. A positive connection between political patronage and the public procurement system will assist the central and county governments to formulate policies which address how public procurement can be conducted in a political environment such as the one prevailing in the country.

Finally, the results of this study can be used as a basis for conducting other related studies and provide relevant information to other scholars who may wish to conduct further research in the area of public procurement in future.

### **1.9 Limitations and Delimitations of the study**

This is an investigative and exploratory research that focused on institutions and organizations considered to possess critical information and knowledge in the area of the public procurement. Some of the respondents were unwilling to open up and freely discuss cases of corruption in the public procurement sector for fear of victimization. Such mistrust was experienced at the EACC Headquarters in Nairobi when one of the officers, refused to be interviewed in the presence of a research assistant. However, in cases where respondents may have given incorrect information, moderations were done in order to correct such inconsistencies. Those who expressed fear of discretion were interviewed outside their offices in areas of their comfort and were assured of confidentiality.

### **1.10 Assumption of the study**

This study opined that there is a connection between political patronage and the presumed failure of the workings and delivery of Public Procurement Law in Kenya. The research assumed that since the country now has the necessary reforms both in law and institutions, then the challenges facing public procurement in Kenya is leadership and integrity issues which manifest itself through political patronage.

### **1.11 Chapter Breakdown**

#### **Chapter One - Introduction**

This chapter introduced the study by providing a brief background to the problem, historical perspective, and the research problem which was investigated. The chapter also provides the major hypothesis to be tested, objectives of the study, research questions, conceptualization of the study, justification, limitations and delimitations, assumptions and the broad chapter breakdown.



## **Chapter Two – Theoretical Framework and Literature Review**

This chapter provides the theoretical framework of the study. It explores the role of law in socio-economic and political engineering in the public procurement sector. It reviews the interconnectivity between public procurement as a management function in the public service and other disciplines like economics, finance, management, administration and psychology. The chapter also reviews different literature related to legal, policy and institutional frameworks in the public procurement sector and related reforms setting the stage for the present study by outlining the available research gaps in the study area.

## **Chapter Three – Research Methodology**

This chapter outlines the various methods used to investigate the influence of political patronage on the operationalisation of Public Procurement Law in Kenya in order to achieve the objectives of this study. It outlines the research design used in the study, the location of the study, the population of the study, sampling techniques used and the sample size. It also provides the research instruments used to conduct the study, the process of data analysis and presentation and the logistical and ethical considerations made in the study.

## **Chapter Four - Data, Analysis and Interpretation**

Chapter four forms the core of the study findings as it provides data, analysis and interpretation based on the conceptual framework model/study objectives. Quantitative data obtained from the field are presented in tables, frequencies and percentages while qualitative data are also discussed. The chapter has organised the data, analysis and interpretation in a logical sequence following the research objectives. Various cases which illustrate political patronage in the public procurement sector are provided in the chapter to help illustrate how political leadership interferes with the smooth operations of the law, policy and related public institutions in the public procurement sector. Also provided herein is the way forward on how to solve political patronage challenges facing public procurement system in the country.

**Chapter Five - Best Practices From Other Jurisdictions**

Chapter five provides a comparative analysis of best practices of public procurement systems in other jurisdictions namely: Malaysia, South Africa, Mexico and the European Union with an objective of contrasting these systems with the Kenyan Public Procurement legal order. This chapter compares and contrasts good public procurement practices from other jurisdictions from which Kenya can borrow to improve its system.

**Chapter Six - Summary of Findings, Conclusions and Recommendation**

Finally, Chapter Six outlines the findings of the study in a summarised form, conclusions and recommendations aimed at promoting harmonious functioning of the law, policy, and institutions in the public procurement sector. The chapter also explores the political and leadership environment which encourages efficiency and accountability in the public procurement sector. It also makes recommendations for further research.

## CHAPTER TWO

### 2.0 THEORETICAL FRAMEWORK AND LITERATURE REVIEW

#### 2.1 Introduction

Part one of this chapter reviews the theories which inform the present study. The study proposes a holistic approach to looking at the problem under investigation. In order to achieve this, the study proposes the use of Systems Theory which separates the investigation in two levels; a look at the intra-system elements and an investigation of the extra-system elements (environment/leadership function). Further, theories explaining the role of law in socio-economic and political engineering in the public procurement sector have been discussed. The study views corruption in the public procurement sector as a moral issue and, therefore, theories explaining the intersection of law and morality have been reviewed. This research also looks at corruption as a social issue and, hence, the inclusion of a sub-section on the sociological school of thought. Again, public procurement being a management function in the public service, involves other disciplines like economics, finance, management, administration and psychology. This informs the inclusion in this chapter of theories like Institutional Theory, Principal-Agent Theory, Theory of Cognitive Dissonance, and Legitimacy Theory.

Part two of this chapter provides thematically and methodologically different literature related to legal, policy and institutional frameworks in the public procurement sector and related reforms. Various scholarly works in the area of public procurement have been reviewed herein and the gaps which have not been addressed in those studies outlined to put the present study in its right context.

#### 2.2 Theoretical Framework

Teichman, posits that law does not operate in a vacuum because, in the end, it is closely tied to power.<sup>148</sup>This is an indication that one cannot divorce public procurement from power and politics. Borrowing from Teichman,<sup>149</sup> the present study proceeds on the thesis

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<sup>148</sup>Doron Teichman, 'Non-legal Sanctions and Damages: An Economic Analysis' [2011] 1.

<sup>149</sup>Doron Teichman, [2011] 2.

that Public Procurement Law does not function in a vacuum. It operates alongside government policy on public procurement and institutional frameworks on one hand and in an environment which is supported by the leadership/management on the other hand. This results into some form of a system. The study, therefore, proposes the use of the ‘systems approach’ propagated by Ludwig von Bertalanffy<sup>150</sup> to unravel the connection between the different elements of the public procurement system and its output/delivery mechanism.

### 2.2.1 Systems Theory

The concept of ‘systems theory’ states that the internal state of the system, and the state of its surroundings, defines uniquely the next state it will go to.<sup>151</sup> Systems theory lends itself particularly well to analysis about the ‘fundamental concept of a system’ through deductive reasoning. In a ‘systems approach’, emphasis is given to finding ways and means for realising and considering alternative solutions and to choose those promising optimisation at maximum efficiency and minimal cost in a tremendously complex network of interactions.<sup>152</sup>

The use of ‘systems approach’ is not limited to complex issues of science only. Various professions frequently ask for application of the ‘systems approach’ to pressing problems such as organised crime and juvenile delinquency, urban blight, air and water pollution, traffic congestion, and city planning among others.<sup>153</sup> Carter<sup>154</sup> and Boffey<sup>155</sup> designated ‘systems model’ as a ‘revolutionary concept’ which can be used across the various

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<sup>150</sup> Ludwig von Bertalanffy, ‘General System Theory’ [George Braziller, Inc., 1968] 4, available online at [www.knowledgerush.com](http://www.knowledgerush.com), accessed on September 17, 2014

<sup>151</sup> W. R. Ashby, ‘Can a Mechanical Chess-Player Outplay its Designer?’, 2012a, 3 *British Journal of Philos. Science*, 44.

<sup>152</sup> David Pouvreau, “On the history of Ludwig von Bertalanffy’s “general systemology”, and on its relationship to cybernetics - Part II: Contexts and developments of the systemological hermeneutics instigated by von Bertalanffy”, *International Journal of General Systems*, 2014.

<sup>153</sup> David Pouvreau, 2014. Also see Harry B. Wolfe, ‘Systems Analysis Model,’ 2013, 129 *Trans. N.Y. Acad. Sci.*, Series II (8), 1043-1049.

<sup>154</sup> L. J. Carter, ‘Systems Approach: Political Interest Rises,’ [2006] 253 *Science* 1222-1224.

<sup>155</sup> Philip M. Boffey, ‘Systems Analysis: No Panacea for Nation’s Domestic Problems,’ 2007, pp.258 *Science* 1028-1030 in Troncale, L. Raphael, “The future of general systems research: obstacles, potentials, case studies (Essay)”, *Systems Research and Behavioral Science*, Sept-Oct 2009 Issue

disciplines to enhance a better understanding of ‘what’, ‘why’, ‘where’, and ‘how’ problems occur in our day-to-day life and how to solve them.

Applying the systems theory model of research in the present study, the study defines the field of research in public procurement to include the intra-system elements (legal order, institutions, and policy) and the outer-system element(s) (leadership/management function in public procurement) which directs the intra-system elements. All these elements in the system, individually and as part of a whole, contribute to the delivery of the objectives of the public procurement as outlined in Article 227(1) of the Constitution, 2010<sup>156</sup> and Section 2 of the PPDA.<sup>157</sup>

To undertake a comprehensive inquiry/investigation into the performance of the Public Procurement Law, one needs to follow the systems theory model which provides an opportunity to examine the elements of a system functioning individually and as part of a whole to deliver results (output) as propagated by Ludwig von Bertalanffy.<sup>158</sup> According to the ‘systems theory’, if any of the element(s) of a system malfunction(s), the end result would be a reduced output/delivery.<sup>159</sup> However, the biggest challenge in any system is how to properly diagnose where the problem actually exists.<sup>160</sup>

To address this challenge, Boffey<sup>161</sup> suggests that one needs to look at all the elements in an intra-system individually. In the present case, we need to look at the legal order - PPDA

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<sup>156</sup>Republic of Kenya, “the Constitution”, 2010, 227 KLR 143, available online at [www.kenyalaw.org](http://www.kenyalaw.org), accessed on 13<sup>th</sup> January, 2016. Article 227 states that, “When a State or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.”

<sup>157</sup> The Public Procurement and Disposal Act [2005] 3 KG 52, accessed at [www.kenyalaw.org:8181](http://www.kenyalaw.org:8181) on January 12, 2014. Section 2 of PPDA, 2005, states that, “The purpose of this Act is to establish procedures for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by public entities to achieve the following objectives – (a) to maximise economy and efficiency; (b) to promote competition and ensure that competitors are treated fairly; (c) to promote the integrity and fairness of those procedures; (d) to increase transparency and accountability in these procedures; (e) to increase public confidence in those procedures; and (f) to facilitate the promotion of local industry and economic development.”

<sup>158</sup>See Ludwig von Bertalanffy [1968] 11.

<sup>159</sup>See Ludwig von Bertalanffy [1968] 13.

<sup>160</sup>See Ludwig von Bertalanffy [1968] 23.

<sup>161</sup>Philip M. Boffey, 2007, 1029.

(repealed), policy, and institutions which run public procurement in the country to determine the performance of each. Then pair them with the element(s) in the outer-system (in this case leadership/management function) to determine the overall effect on the output (in this case the performance of public procurement in Kenya). The one with the highest net effect or impact can then be singled out as the main contributor to the challenge or failure of the system.

### **2.2.2 Moral versus Legal Philosophy**

The main theoretical framework underpinning the study is the intersection between moral and legal philosophy and the role of law in social, economic and political engineering.<sup>162</sup> Theories explaining human conduct and the sociological school of thought where law is a tool for social engineering have been examined. Since corruption is considered a moral issue, theories of good governance have been used to underpin the study.

Finnis emphasises that the philosophy of law should be consistent with moral or ethical philosophy.<sup>163</sup> This study holds that leadership and integrity in the management of public resources is a moral issue that borders on personal behavior characteristics. It is the role of the law to enforce institutional morality in the human elements of the system. Unfortunately, the PPDA (repealed) and the corresponding new Act has failed to enforce institutional morality in public procurement system to eradicate corruption and related challenges.

Law and morality are intimately related not as a matter of accident but as a matter of necessity. This necessary intimate relationship consists that law would make no sense at all where there is no morality or at least some basic moral sensitivities and

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<sup>162</sup> Michael Lobban, A. Treatise of Legal Philosophy and General Jurisprudence: A History of the Philosophy of Law in The Common Law World, 1600–1900, 2016.

<sup>163</sup> See Finnis, pp.73. According to Finnis, it has been argued that in close-knit and primitive societies, the inhabitants make no distinction between what is morally right and the way they think it right to do things. They do not understand outside their own practices, looking at them from an external standpoint to judge whether they are correct or not; rather, they just ‘do what comes naturally’, typically treating their rules as timeless and revealed and enforced by their gods. In short, they lack a critical perspective on the standards of behavior they uphold.

perceptions.<sup>164</sup>The sacred codes, enactments and acts of the law become meaningless if they are stained by the actions of those who do not honor the ethics of their professions.<sup>165</sup> The value of the law is in how those who have been given the trust to uphold it carry out their duties.<sup>166</sup>

Its strength and honor lie not in the beauty of courthouse architecture, high-tech facilities or in the fancy clothes of powerful advocates, but in the actions of the law keepers.<sup>167</sup> Dworkin observes that legal reasoning is an exercise in constructive interpretation.<sup>168</sup> He is of the view that our lives are sustained and energized by legality and so we should attempt to understand this so as to combine the various components of our society into a more meaningful whole.<sup>169</sup>

Morality becomes a central justification for the law because it defines the law as being just and good.<sup>170</sup> If a law is meant to protect or promote equality, then it should be seen as being fair in order to help further progress in a society. Legal rules and principles serve to protect rights within the legal order and enable individuals in society to have their own social space.<sup>171</sup> Dworkin sees these principles as key in giving the law, structure and support.<sup>172</sup> In doing this, he shows that, while equality is central to such theories, these theories also are about a complex relationship between rights, freedoms and legality.<sup>173</sup>

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<sup>164</sup> Joseph M. Nyasani, 'Legal Philosophy: Jurisprudence,' [Nairobi: Consolata Institute of Philosophy, 2001] 4.

<sup>165</sup> S. Guest, A. Gearey, J. Penner, and W. Morrison, *Jurisprudence and legal theory*. [London: University of London Press, 2004] 37.

<sup>166</sup>*Ibid.*

<sup>167</sup>*Ibid.*

<sup>168</sup> R. Dworkin, 'Law's empire', [Oxford: Hart Publishing, 1998] 56. In his work, 'What is Equality', Dworkin looks at the challenges of looking at equalization through welfare and promotes his own idea regarding the equality of resources.

<sup>169</sup>*Ibid.*

<sup>170</sup>Guest, *et al.*, 2004, pp.41.

<sup>171</sup>*Ibid.*

<sup>172</sup>*Ibid.*

<sup>173</sup>*See* Dworkin, 1998, pp.58.

Dworkin also provides a good critique on equality which shows why thinking on jurisprudence should be seen to achieve far more than a focus on the type of equality that law should provide.<sup>174</sup> This line of thought gave the current study a foundation to lay a claim that, the law cannot work on its own; it takes the effort of everyone in the society to ensure the success of the law. The province of jurisprudence in the current study is a critical and reform-minded effort to understand law and its social, political, and economic effects.

According to Austin, the approach to understanding law is loosely grouped under the title 'legal realism'.<sup>175</sup> He argues that law can only be understood in terms of its practical effects, and that law was what the courts actually did and said.<sup>176</sup> He further argues that analytical jurisprudence is attaining clarity on the categories and concepts of law, including the morality of law, its effectiveness, its use and abuse, or its location in historical development.<sup>177</sup> He asserts that it is important to understand how to use law as a technique of rational governance.

Legal positivists reckon that most of the important theoretical work on law prior to Austin had treated jurisprudence as though it was merely a branch of moral theory or political theory: asking how the state should govern and where governments were legitimate and under what circumstances citizens had an obligation to obey the law.<sup>178</sup> However, it is maintained that those who adhere to legal positivism do not deny that moral and political criticism of legal systems are important. This thread between the legal regime, institutional frameworks and the political patronage of public procurement in Kenya has largely been understudied and is a gap that the current study sought to fill.

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<sup>174</sup>*Ibid.* His literature helps to understand what law is supposed to do in our lives and the decorum with which legal gate-keepers are supposed to conduct themselves.

<sup>175</sup> J. Austin, 'The province of jurisprudence determined: Lecture II. Edited by Hart, H.L.A. Essays in Jurisprudence and Philosophy', [Oxford: Clarendon Press, 1995] 41, available online at <http://www.fcthighcourtelibrary.com> and [www.londonexternal.ac.uk](http://www.londonexternal.ac.uk), accessed on May 14, 2016.

<sup>176</sup>*Ibid.* Also see Michael Lobban, 2016, pp.271.

<sup>177</sup>*Ibid.*

<sup>178</sup> Jeremy Bentham, (1782) *Of Laws in General*. Ed. H.L.A. Hart, 1970. London: Athlone Press.



### 2.2.3 Sociological School of Thought

#### (a) Legal Positivism

This study was closely guided by Finnis's Natural Law Theory.<sup>179</sup> Finnis makes an essential claim about law; that it is a social institution whose purpose is to regulate the affairs of the people. He argues that law should contribute to the creation of a community in which all people can flourish and realise the different basic values.<sup>180</sup> Seen this way, law becomes a moral project.<sup>181</sup> This provides a clear connection between moral philosophy and legal philosophy. Whether one's description of law is correct or not will in part depend on whether his/her moral views are correct, for those views will inform the way in which he/she conceives the project of law.<sup>182</sup> However, Finnis denies that positivism provides a full or accurate picture of law.<sup>183</sup> While he welcomes the insights into the nature of law that have originated with positivists, he denies that these insights provide a sufficient theory of law.<sup>184</sup>

Legal positivism has a long history and a broad influence. It has antecedents in ancient political philosophy and is discussed, and the term itself introduced, in mediaeval legal and political thought.<sup>185</sup> The modern understanding owes little to these forbears. Its most important roots lie in the conventionalist political philosophies of Hobbes and Hume, and its first full elaboration is due to Jeremy Bentham (1748-1832)<sup>186</sup> whose account Austin adopted, modified, and popularized.<sup>187</sup> For much of the next century an amalgam of their views, according to which law is the command of a sovereign backed by force, dominated legal positivism and English philosophical reflection about law.<sup>188</sup> By the mid-twentieth century, this account had lost its influence among working legal philosophers.<sup>189</sup> Its

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<sup>179</sup> J. Finnis, 'Natural Law and Natural Rights,' [Oxford, Clarendon Press, 1980] 71.

<sup>180</sup> J. Finnis, 1980, pp.72.

<sup>181</sup> See J. Finnis, 1980, pp.73.

<sup>182</sup> J. Finnis, 1980, pp.74.

<sup>183</sup> *Ibid.*

<sup>184</sup> See J. Finnis, 1980, pp.75.

<sup>185</sup> John Finnis, "The Truth in Legal Positivism," in *the Autonomy of Law*, ed. Robert P. George. [Oxford, Clarendon Press 1996] 196.

<sup>186</sup> Jeremy Bentham, (1782) *Of Laws in General*. Ed. H.L.A. Hart, 1970. London: Athlone Press.

<sup>187</sup> John Finnis, 1996, pp.197.

<sup>188</sup> Finnis, 1980, pp.76

<sup>189</sup> *Ibid.*

emphasis on legislative institutions was replaced by a focus on law-applying institutions such as courts, and its insistence of the role of coercive force gave way to theories emphasizing the systematic and normative character of law.<sup>190</sup>

Some of the most important architects of this revised school of positivism are the Austrian jurist Hans Kelsen (1881-1973) and the two dominating figures in the analytic philosophy of law, H.L.A. Hart (1907-92) and Joseph Raz among whom there are clear lines of influence, but also important contrasts. Legal positivism's importance, however, is not confined to the philosophy of law.<sup>191</sup> It can be seen throughout social theory, particularly in the works of Marx, Weber, and Durkheim, and also among many lawyers, including the American "legal realists" and most contemporary feminist scholars.<sup>192</sup> They may have disagreed on many other points, but many of these philosophers acknowledge that law is essentially a matter of social fact.

The view that the existence of law depends on social facts does not rest on a particular semantic thesis, and it is compatible with a range of theories about how one investigates social facts, including non-naturalistic accounts.<sup>193</sup> To say that the existence of law depends on facts and not its merits is a thesis about the relation among laws, facts, and merits, and not otherwise a thesis about the individual relate.<sup>194</sup> Hence, most traditional "natural law" moral doctrines including the belief in a universal, objective morality grounded in human nature do not contradict legal positivism.<sup>195</sup> The only influential positivist moral theories are the views that moral norms are valid only if they have a source in divine commands or in social conventions.<sup>196</sup> Such theists and relativists apply to morality the constraints that legal positivists think hold for law.<sup>197</sup>

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<sup>190</sup>*Ibid.*

<sup>191</sup>Hans Kelsen, *'Pure Theory of Law'*, trans. M. Knight.[Berkeley, University of California Press, 1967] 223.

<sup>192</sup>*Ibid.*

<sup>193</sup> Kenneth I. Himma, "The Instantiation Thesis and Raz's Critique of Inclusive Positivism," [2001], 20 *Law and Philosophy*, pp.61-79

<sup>194</sup> Kenneth I. Himma [2001] 65

<sup>195</sup>*Ibid.*

<sup>196</sup> Kenneth I. Himma [2001] 67

<sup>197</sup>Hans Kelsen [1967] 225

The most influential criticisms of legal positivism all flow, in one way or another, from the suspicion that it fails to give morality its due.<sup>198</sup> A theory that insists on the facticity of law seems to contribute little to an understanding that law has important functions in making human life go well, that the rule of law is a prized ideal, and that the language and practice of law is highly moralised.<sup>199</sup> Accordingly, positivism's critics maintain that the most important features of law are not to be found in its source-based character, but in law's capacity to advance the common good, to secure human rights, or to govern with integrity.<sup>200</sup> It is a curious fact about anti-positivist theories that, while they all insist on the moral nature of law, without exception they take its moral nature to be something good.<sup>201</sup> The idea that law might of its very nature be morally problematic does not seem to have occurred to them.

### **(b) Legal Positivists versus Moralists**

It is beyond doubt that moral and political considerations bear on legal philosophy. As Finnis says, the reasons we have for establishing, maintaining or reforming law include moral reasons, and these reasons therefore shape our legal concepts.<sup>202</sup> Once one concedes, as Finnis does, that the existence and content of law can be identified without recourse to moral argument, and that "human law is artifact and artifice; and not a conclusion from moral premises,"<sup>203</sup> the argument is largely irrelevant to the truth of legal positivism. This mirrors also Lon Fuller's criticisms of Hart.<sup>204</sup>

Apart from some misplaced claims about adjudication, Fuller has two main points. First, he thinks that it isn't enough for a legal system to rest on customary social rules, since law could not guide behavior without also being at least minimally clear, consistent, public, prospective and without exhibiting to some degree those virtues collectively called "the

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<sup>198</sup> Tom Campbell, "*The Legal Theory of Ethical Positivism*", [Dartmouth: Aldershot, 1996]. 54

<sup>199</sup> Tom Campbell, [1996]. 55

<sup>200</sup> Kenneth I. Himma [2001] 69

<sup>201</sup> Tom Campbell, [1996]. 56

<sup>202</sup> Finnis, John (1996) 204.

<sup>203</sup> Finnis, John (1996) 205.

<sup>204</sup> Lon Fuller, "Positivism and Fidelity to Law: a Reply to Professor Hart," [1958] *Harvard Law Review*, 71(630).

rule of law.”<sup>205</sup> It suffices to note that this is perfectly consistent with law being source-based. Even if moral properties were identical with, or supervened upon, these rule-of-law properties, they do so in virtue of their rule-like character, and not their law-like character.<sup>206</sup> Whatever virtues inhere in or follow from clear, consistent, prospective, and open practices can be found not only in law but in all other social practices with those features, including custom and positive morality.<sup>207</sup>

According to Joseph Raz, these virtues may be minor; there is little to be said in favour of a consistent, clear, prospective, public and impartially administered system of racial segregation.<sup>208</sup> Fuller’s second worry is that, “if law is a matter of fact, then we are without an explanation of the duty to obey”.<sup>209</sup> He asks how “an amoral datum called law could have the peculiar quality of creating an obligation to obey it”.<sup>210</sup> One possibility he neglects is that it doesn’t. The fact that law *claims* to obligate is, of course, a different matter and is susceptible to other explanations.<sup>211</sup> But even if Fuller is right in his unargued assumption, the “peculiar quality” whose existence he doubts is a familiar feature of many moral practices. Joseph Raz asks us to compare promises: “whether a society has a practice of promising, and what someone has promised to do, are matters of social fact”<sup>212</sup>. Yet according to Leslie Green, “promising creates moral obligations of performance or compensation”<sup>213</sup>. An “amoral datum” may indeed figure, together with other premises, in a sound argument to moral conclusions.<sup>214</sup>

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<sup>205</sup>*Ibid.*

<sup>206</sup> Tom Campbell, [1996]. 59

<sup>207</sup> Kenneth I. Himma [2001] 71

<sup>208</sup> Joseph Raz, “*Ethics in the Public Domain: Essays in the Morality of Law and Politics*,” [Oxford: Clarendon Press, 1995] 96.

<sup>209</sup> Lon Fuller, “Positivism and Fidelity to Law: a Reply to Professor Hart,” [1958], *Harvard Law Review*, 71(633).

<sup>210</sup>*Ibid.*

<sup>211</sup> Leslie Green, “Law and Obligations,” in Jules Coleman and Scott Shapiro, eds. *The Oxford Handbook of Jurisprudence and Philosophy of Law*. [Oxford: Clarendon Press, 2001] 231.

<sup>212</sup> Joseph Raz, [1995] 105.

<sup>213</sup> Leslie Green [2001] 237

<sup>214</sup>*Ibid.*

While Finnis and Fuller's views are compatible with the positivist thesis, the same cannot be said of Ronald Dworkin's important works (Dworkin 1978<sup>215</sup> and 1986<sup>216</sup>). Positivism's most significant critic rejects the theory on every conceivable level. Dworkin denies that there can be *any* general theory of the existence and content of law; he denies that local theories of particular legal systems can identify law without recourse to its merits, and he rejects the whole institutional focus of positivism.<sup>217</sup> A theory of law is for Dworkin a theory of how cases ought to be decided and it begins, "not with an account of political organization, but with an abstract ideal regulating the conditions under which governments may use coercive force over their subjects"<sup>218</sup>. Force must only be deployed, he claims, in accordance with principles laid down in advance. According to Dworkin, a society has a legal system only when, and to the extent that, it honors this ideal, and its law is the set of all considerations that the courts of such a society would be morally justified in applying, whether or not those considerations are determined by any source.<sup>219</sup>

To identify the law of a given society one must engage in moral and political argument, for the law is whatever requirements are consistent with an interpretation of its legal practices (subject to a threshold condition of fit) that shows them to be best justified in light of the animating ideal.<sup>220</sup> In addition to those philosophical considerations, Dworkin invokes two features of the phenomenology of judging, as he sees it. He finds controversy among lawyers and judges about how important cases should be decided, and he finds diversity in the considerations that they hold relevant to deciding them.<sup>221</sup> The controversy suggests to him that law cannot rest on an official consensus, and the diversity suggests that there is no single social rule that validates all relevant reasons, moral and non-moral, for judicial decisions.<sup>222</sup>

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<sup>215</sup>Ronald Dworkin, '*Taking Rights Seriously*' [Cambridge MA: Harvard University Press, 1978].

<sup>216</sup>Ronald Dworkin, '*Law's Empire*' [Cambridge MA: Harvard University Press, 1986] 207.

<sup>217</sup>Ronald Dworkin, [1978] 114.

<sup>218</sup>Ronald Dworkin, [1978] 116.

<sup>219</sup>Ronald Dworkin, [1978] 117.

<sup>220</sup>*Ibid.*

<sup>221</sup>*Ibid.*

<sup>222</sup>Ronald Dworkin, [1978] 118.

Dworkin's rich and complex arguments have attracted various lines of reply from positivists. One response by Tom Campbell denies the relevance of the phenomenological claims.<sup>223</sup> According to Campbell, controversy is a matter of degree, and a consensus-defeating amount of it is not proved by the existence of adversarial argument in the high courts, or indeed in any courts.<sup>224</sup> As important is the broad range of settled law that gives rise to few doubts and which guides social life outside the courtroom.<sup>225</sup> As for the diversity argument, so far from being a refutation of positivism, this is an entailment of it.

Positivism identifies law, not with all valid reasons for decision, but only with the source-based subset of them.<sup>226</sup> It is no part of the positivist claim that the rule of recognition tells us how to decide cases, or even tells us all the relevant reasons for decision.<sup>227</sup> Positivists accept that moral, political or economic considerations are properly operative in some legal decisions, just as linguistic or logical ones are. *Modus ponens* holds in court as much as outside, but not because it was enacted by the legislature or decided by the judges, and the fact that there is no social rule that validates *modus ponens* is true but irrelevant.<sup>228</sup> The authority of principles of logic or morality is not something to be explained by legal philosophy; the authority of Acts of Parliament must be; and accounting for the difference is a central task of the philosophy of law.<sup>229</sup>

Other positivists respond differently to Dworkin's phenomenological points, accepting their relevance but modifying the theory to accommodate them. Inclusive positivists such as Waluchow,<sup>230</sup> Coleman,<sup>231</sup> Soper<sup>232</sup> and Lyons<sup>233</sup> argue that the merit-based

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<sup>223</sup> Tom Campbell, "*The Legal Theory of Ethical Positivism*", [Dartmouth: Aldershot, 1996]. 62

<sup>224</sup> *Ibid.*

<sup>225</sup> *Ibid.*

<sup>226</sup> Kenneth I. Himma, "The Instantiation Thesis and Raz's Critique of Inclusive Positivism," 2001, pp.20 *Law and Philosophy*, pp.63

<sup>227</sup> *Ibid.*

<sup>228</sup> Kenneth I. Himma [2001] 64

<sup>229</sup> H.L.A. Hart, "Positivism and the Separation of Law and Morals," [1958], 71 *Harvard Law Review* 593 repr. in his *Essays in Jurisprudence and Philosophy* (1983). Oxford: Clarendon Press.

<sup>230</sup> See W.J. Waluchow, "*Inclusive Legal Positivism*", [Oxford: Clarendon Press, 1994].

<sup>231</sup> Jules Coleman, "Negative and Positive Positivism," [1982], 11 *Journal of Legal Studies* 139.

<sup>232</sup> Philip Soper, "Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute" [1977], 75 *Michigan Law Review* 473.

<sup>233</sup> David Lyons, "*Moral Aspects of Legal Theory*," [1982], 7 *Midwest Studies in Philosophy* 223

considerations may indeed be part of the law, if they are explicitly or implicitly made so by source-based considerations. For example, Canada's constitution explicitly authorises for breach of Charter rights, "such remedy as the court considers appropriate and just in the circumstances."<sup>234</sup> In determining which remedies might be legally valid, judges are expressly told to take into account their morality.<sup>235</sup> As a result, they may develop a settled practice of doing this whether or not it is required by any enactment; it may become customary practice in certain types of cases. According to Lyons, reference to moral principles may also be implicit in the web of judge-made law, for instance in the common law principle that no one should profit from his own wrongdoing.<sup>236</sup>

Inclusivists claim that such moral considerations are part of the law because the sources make it so. Therefore, Dworkin is right when he asserted that, "the existence and content of law turns on its merits".<sup>237</sup> He might have been wrong on his explanation of this fact but that is for another study to interrogate. Legal validity depends on morality, not because of the interpretative consequences of some ideal about how the government may use force, but because that is one of the things that may be customarily recognised as an ultimate determinant of legal validity.<sup>238</sup>

According to Lyons, it is the sources that *make* the merits relevant.<sup>239</sup> However, the present study does not share in some of the views held by the inclusivists. First, it is not plausible to hold that the merits are relevant to a judicial decision only when the sources make it so. It would be awkward to think that justice is a reason for decision only because some source directs an official to decide justly. In legal decisions, especially important ones, moral and political considerations are present of their own authority; they do not need sources to propel them into action.<sup>240</sup>

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<sup>234</sup> Leslie Green, "Positivism and Conventionalism," [1999], 12 *Canadian Journal of Law and Jurisprudence* pp. 37.

<sup>235</sup> *Ibid.*

<sup>236</sup> David Lyons, 1982, pp 247

<sup>237</sup> Ronald Dworkin, 1978, 121.

<sup>238</sup> David Lyons, 1982, pp 248

<sup>239</sup> *Ibid.*

<sup>240</sup> *Ibid.*

Second, the study concurs with an assertion by Jules Coleman that, even though there may be moral language in judicial decisions, this does not establish the presence of moral tests for law.<sup>241</sup> Sources come in various guises and what may sound like moral reasoning in the courts is sometimes really source-based reasoning. For example, when the Supreme Court of Canada says that a publication is criminally “obscene” only if it is harmful, it is not applying J.S. Mill’s harm principle.<sup>242</sup> Perhaps what that court means by “harmful” is that it is regarded by the community as degrading or intolerable.<sup>243</sup> Those are source-based matters, not moral ones. According to Leslie Green, this is one of the many appeals to positive morality.<sup>244</sup> Hence, positive morality may be a source of law.

It is important to note that law is dynamic and a decision that applies morality itself may be a source of law, in the first instance for the parties and possibly for others as well. Over time, by the doctrine of precedent where it exists or through the gradual emergence of an interpretative convention where it does not, this gives a factual edge to normative terms.<sup>245</sup> Thus, if a court decides that money damages are in some instances not a “just remedy” then this fact will join with others in fixing what “justice” means for these purposes.<sup>246</sup> This process may ultimately detach legal concepts from their moral analogs.<sup>247</sup> Thus, legal “murder” may require no intention to kill, legal “fault” no moral blameworthiness, and “equitable” remedy may be manifestly unfair.<sup>248</sup>

Having these complications in mind, however, we can’t deny that there remains a great deal of moral reasoning in adjudication. Courts are often called on to decide what would be reasonable, fair, just, and cruel among others by explicit or implicit requirement of statute or common law, or because this is the only proper or intelligible way to

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<sup>241</sup> Jules Coleman, “Negative and Positive Positivism,” [1982], 11 *Journal of Legal Studies* 139.

<sup>242</sup> Leslie Green, [1999], pp. 39.

<sup>243</sup> Leslie Green, [1999], pp. 39.

<sup>244</sup> *Ibid.*

<sup>245</sup> *Ibid* at pp 40.

<sup>246</sup> *Ibid.*

<sup>247</sup> *Ibid.*

<sup>248</sup> *Ibid.*



decide.<sup>249</sup> Hart sees this as happening pre-eminently in hard cases in which, owing to the indeterminacy of legal rules or conflicts among them, judges are left with the discretion to make new law.<sup>250</sup> However, “discretion,” may be a potentially misleading term here. First, discretionary judgments are not arbitrary: they are guided by merit-based considerations, and they may also be guided by law even though not fully determined by it.<sup>251</sup> According to Raz, judges may be empowered to make certain decisions and yet under a legal duty to make them in a particular way, say, in conformity with the spirit of preexisting law or with certain moral principles.<sup>252</sup>

Second, Hart’s account might wrongly be taken to suggest that there are fundamentally two kinds of *cases*, easy ones and hard ones, distinguished by the sorts of reasoning appropriate to each.<sup>253</sup> A more perspicuous way of putting it would be to say that there are two kinds of *reasons* that are operative in every case: source-based reasons and non-source-based reasons.<sup>254</sup> Law application and law creation are continuous activities for, as Kelsen correctly argued, *every* legal decision is partly determined by law and partly underdetermined.<sup>255</sup> There must always be more or less room for discretion, so that the higher norm in relation to the lower one can only have the character of a frame to be filled by this act.”<sup>256</sup>

This is a general truth about norms. There are infinitely many ways of complying with a command to, for example “open the window”. One can decide to open it quickly or slowly, with one’s right hand or left, among other ways. The fact still remains that the window has been opened. Thus, according to Kelsen, even an “easy case” will contain discretionary elements.<sup>257</sup> Sometimes such residual discretion is of little importance; sometimes it is

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<sup>249</sup> H.L.A. Hart, “Positivism and the Separation of Law and Morals,” [1958], 71 *Harvard Law Review* 593 repr. in his *Essays in Jurisprudence and Philosophy* (1983). Oxford: Clarendon Press.

<sup>250</sup> *Ibid.*

<sup>251</sup> Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* [Oxford: Clarendon Press, 1995], pp. 239

<sup>252</sup> See Raz 1995, pp. 240

<sup>253</sup> *Ibid.*

<sup>254</sup> *Ibid.*

<sup>255</sup> Hans Kelsen, “*Pure Theory of Law*”, trans. M. Knight, [Berkeley: University of California Press, 1967].

<sup>256</sup> See Kelsen, [1967] 349.

<sup>257</sup> *Ibid.*

central; and a shift from marginal to major can happen in a flash with changes in social or technological circumstances.<sup>258</sup> That is one of the reasons why some scholars have rejected the concept of a strict doctrine of separation of powers. Austin called it a “childish fiction” according to which judges only apply and never make the law and with it any literal interpretation of Dworkin’s ideal that coercion be deployed only according to principles laid down in advance.<sup>259</sup>

It has to be said, however, that Hart himself does not consistently view legal references to morality as marking a zone of discretion. In a passing remark in the first edition of *The Concept of Law*, he writes, “in some legal systems, as in the United States, the ultimate criteria of legal validity explicitly incorporate principles of justice or substantive moral values ...”<sup>260</sup> This thought sits uneasily with other doctrines of importance to his theory. For Hart also says that when judges exercise moral judgment in the penumbra of legal rules to suppose that their results were already part of existing law is “in effect, an *invitation* to revise our concept of what a legal rule is ...”<sup>261</sup>

Later, however, Hart comes to see his remark about the U.S. Constitution as foreshadowing inclusive positivism (soft positivism). However, Hart’s reasons for the shift of opinion are obscure.<sup>262</sup> He remained clear about how we should understand ordinary statutory interpretation.<sup>263</sup> For instance, where the legislature has directed that an applicant should have a “reasonable time” or that a regulator may permit only a “fair price”, he asserts that these grant a bounded discretion to decide the cases on their merits.<sup>264</sup> This said, why then does Hart and others like Waluchow and Coleman come to regard constitutional adjudication differently? Raz was interested to know if there is any reason to think that a

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<sup>258</sup> *Ibid.*

<sup>259</sup> John Austin, “*The Province of Jurisprudence Determined*” [1832]. Ed. W. E. Rumble, [Cambridge: Cambridge University Press, 1995].

<sup>260</sup> H. L. A. Hart, (1994, first edition 1961), “*The Concept of Law*”, 2<sup>nd</sup> ed. ed. P. Bulloch and J. Raz, Oxford: Clarendon Press.

<sup>261</sup> *Ibid.*

<sup>262</sup> See Leslie Green, “The Concept of Law Revisited,” [1996], 94 *Michigan Law Review* 1687.

<sup>263</sup> *Ibid.*

<sup>264</sup> H. L. A. Hart, [1994, first edition 1961] 271.

constitution permitting only a “just remedy” requires a different analysis than a statute permitting only a “fair rate”<sup>265</sup>

According to Waluchow, whereas some of these philosophers may think that constitutional law expresses the ultimate criteria of legal validity, because unjust remedies are constitutionally invalid and void *ab initio*, legally speaking they never existed.<sup>266</sup> Thus, morality sometimes determines the existence or content of law. If this is the underlying intuition, it is misleading, for the rule of recognition is not to be found in constitutions.<sup>267</sup> The rule of recognition is the *ultimate* criterion (or set of criteria) of legal validity.<sup>268</sup> If one knows what the constitution of a country is, one knows some of its law; but one may know what the rule of recognition is without knowing *any* of its laws.<sup>269</sup> For example, one may know that acts of the Bundestag are a source of law in Germany but may not be able to name or interpret even a single one of them. And constitutional law is itself *subject* to the ultimate criteria of systemic validity.<sup>270</sup> According to Leslie, whether a statute, decision or convention is part of a country’s constitution can only be determined by applying the rule of recognition.<sup>271</sup>

Similarly, the provisions of the 14<sup>th</sup> Amendment to the U.S. Constitution are not the rule of recognition in the U.S., for there is an intra-systemic answer to the question why that Amendment is valid law. The U.S. Constitution, like that of all other countries, is law only because it was created in ways provided by law, that is, through amendment or court decision or in ways that came to be accepted as creating law, such as, constitutional convention and custom.<sup>272</sup> Constitutional cases thus raise no philosophical issue already present in ordinary statutory interpretation, where inclusive positivists seem content with the theory of judicial discretion. According to Harris, it is open to them to adopt a unified

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<sup>265</sup> Raz 1995, pp. 244

<sup>266</sup> W.J. Waluchow, “*Inclusive Legal Positivism*”, [Oxford: Clarendon Press, 1994], 477.

<sup>267</sup> *Ibid.*

<sup>268</sup> *Ibid.*

<sup>269</sup> W.J. Waluchow, 1994, pp.478

<sup>270</sup> Leslie Green, 1996, pp.1689

<sup>271</sup> *Ibid.*

<sup>272</sup> J.W. Harris, “*Law and Legal Science: An Inquiry into the Concepts Legal Rule and Legal System*”, [Oxford: Clarendon Press, 1979]. 101

view and treat every explicit or implicit legal reference to morality in cases, statutes, constitutions, and customs, as establishing moral tests for the existence of law.<sup>273</sup> Having considered all the differing views on this subject, perhaps it is time to consider the wider question: why not regard as law everything referred to by law?

Hart observes that exclusive positivists offer three main arguments for stopping at social sources.<sup>274</sup> The first and most important is that it captures and systematizes distinctions we regularly make and we have good reason to continue to make.<sup>275</sup> In this case, one assigns blame and responsibility differently when he/she thinks that a bad decision was mandated by the sources than one would do when he/she thinks that it flowed from a judge's exercise of moral or political judgment. For example, when considering who should be appointed to the judiciary, many would be concerned not only with their acumen as jurists, but also with their morality and politics, and would take different things as evidence of these traits. These are deeply entrenched distinctions, and are difficult to abandon.

The second reason for stopping at sources is that this is demonstrably consistent with key features of law's role in practical reasoning. The most important argument to this conclusion is due to Raz<sup>276</sup>. Raz asserts that, although law does not necessarily have legitimate authority, it lays claim to it, and can intelligibly do so only if it is the kind of thing that could have legitimate authority.<sup>277</sup> It may fail, in certain ways only, for example, by being unjust, pointless, or ineffective.<sup>278</sup> But law cannot fail to be a candidate authority, for it is constituted in that role by our political practices.<sup>279</sup> According to Raz, practical authorities mediate between subjects and the ultimate reasons for which they should act.<sup>280</sup> He opines that authorities' directives should be based on such reasons, and are justified

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<sup>273</sup>*Ibid.*

<sup>274</sup> H.L.A. Hart, "Positivism and the Separation of Law and Morals," [1958], 71 *Harvard Law Review* 593 repr. in his *Essays in Jurisprudence and Philosophy*, [Oxford: Clarendon Press, 1983].

<sup>275</sup>*Ibid.*

<sup>276</sup> See Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* [Oxford: Clarendon Press, 1995], pp. 244

<sup>277</sup>*Ibid.*

<sup>278</sup>*Ibid.*

<sup>279</sup>*Ibid.*

<sup>280</sup> Raz, [1995], pp. 245

only when compliance with the directives makes it more likely that people will comply with the underlying reasons that apply to them.<sup>281</sup> However, that can be done only if it is possible to know if the directives require independent of appeal to those underlying reasons.<sup>282</sup> Social sources can play mediating role between persons and ultimate reasons, and because the nature of law is partly determined by its role in giving practical guidance, there is a theoretical reason for stopping at source-based considerations.

The third argument challenges an underlying idea of inclusive positivism, what Kelsen called the Midas Principle. “Just as everything King Midas touched turned into gold, everything to which law refers becomes law...”<sup>283</sup> According to Kelsen, it follows from this principle that “it is possible for the legal order, by obliging the law-creating organs to respect or apply certain moral norms or political principles or opinions of experts to transform these norms, principles, or opinions into legal norms, and thus into sources of law”.<sup>284</sup> He regarded this transformation as effected by a sort of tacit legislation.<sup>285</sup> If sound, the Midas Principle holds in general and not only with respect to morality, as Kelsen makes clear. For example, suppose the Income Tax Act penalizes overdue accounts at 8% per annum, an official can determine the content of a legal obligation only by calculating compound interest. At this point, a relevant question to ask is: does this make mathematics part of the law? A contrary indication is that it is not subject to the rules of change in a legal system: neither courts nor legislators can repeal or amend the law of commutativity.<sup>286</sup>

The same may be found to be true for other social norms, including the norms of foreign legal systems. A conflict-of-laws rule, which is part of the Canadian legal system, may direct a Canadian judge to apply Mexican law in a Canadian case.<sup>287</sup> Although Canadian

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<sup>281</sup> *Ibid.*

<sup>282</sup> *Ibid.*

<sup>283</sup> See Hans Kelsen, “*Pure Theory of Law*”, trans. M. Knight, [Berkeley: University of California Press, 1967], 352.

<sup>284</sup> See Hans Kelsen, “*General Theory of Law and State*”, [1945], trans. A. Wedberg, repr., [New York: Russell and Russell, 1961], 132

<sup>285</sup> *Ibid.*

<sup>286</sup> *Ibid.*

<sup>287</sup> Joseph Raz, “*The Authority of Law*”, [Oxford: Clarendon Press, 1979], 152-54

officials can decide whether or not to apply it, they can neither change nor repeal the rule of Mexican law, for, an explanation for its existence and content makes no reference to Canadian society or its political system.<sup>288</sup> In like manner, moral standards, logic, mathematics, principles of statistical inference, or English grammar, though all properly applied in cases, are not themselves the law, for legal organs have applicative but not creative power over them. Therefore, the inclusivist thesis tends towards an important, but different, reality; that law is an open normative system since it adopts and enforces many other standards, including moral norms and the rules of social groups.<sup>289</sup> However, there is no guarantee for adopting the Midas Principle to explain why or how it does this.

#### **2.2.4 Institutional Theory**

The institutional theory is the traditional approach that is used to examine elements of public procurement.<sup>290</sup> A key proponent of this theory is W. Richard Scott who believes that institutional theory attends to the deeper and more resilient aspects of social structure.<sup>291</sup> It considers the processes by which structures, including schemas, rules, norms, and routines, become established as authoritative guidelines for social behavior.<sup>292</sup> According to Scott, it inquires into how these elements are created, diffused, adopted, and adapted over space and time; and how they fall into decline and disuse.<sup>293</sup> Although the ostensible subject is stability and order in social life, students of institutions must perforce attend not just to consensus and conformity but to conflict and change in social structures.<sup>294</sup>

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<sup>288</sup> See Joseph Raz, [1979], 153

<sup>289</sup> *Ibid.*

<sup>290</sup> See W.P. Obanda, “*Fighting corruption in tactical procurement: PHD dissertation*,” [2010] 19

<sup>291</sup> W. Richard Scott, “*Institutional Theory: Contributing to a Theoretical Research Program*”, [Oxford UK: Oxford University Press, 2004], pp. 1

<sup>292</sup> *Ibid.*

<sup>293</sup> *Ibid.*

<sup>294</sup> W. Richard Scott, “Institutional theory.” [2004b], pp. 408-14 in *Encyclopedia of Social Theory*, George Ritzer, ed. Thousand Oaks, CA: Sage.

Scott identifies three pillars of institutions as regulatory, normative and cultural cognitive.<sup>295</sup> The regulatory pillar emphasizes the use of rules, laws and sanctions as enforcement mechanism, with expedience as basis for compliance.<sup>296</sup> The normative pillar refers to norms and values with social obligation as the basis of compliance.<sup>297</sup> The cultural-cognitive pillar rests on shared understanding which include: common beliefs, symbols, and shared understanding among others. Borrowing from this theory, public institutions in Kenya are guided by rules and regulations such as the PPDA, Article 227 of the Constitution of Kenya, Public Procurement Regulations, 2002/2006/2009, and guidelines directing procurement activities. From the three pillars of institutions propounded by Scott, organizational culture, social influence, organizational incentives and enforcement are identified as antecedents of compliance to procurement rules.<sup>298</sup>

### **2.2.5 Principal-Agent Theory**

According to Health and Norman, the principal-agent theory is an agency model developed by economists that deals with situations in which the principal is in a position to induce the agent, to perform some task in the principal's interest, but not necessarily the agent's.<sup>299</sup> Donahue explains that procurement managers including all civil servants concerned with public procurement must play the agent role for elected representatives.<sup>300</sup> In the opinion of the researcher, this is where there may be a problem for a public administration system. Just as Health and Norman rightly observes, the interests of the principal may not necessarily be in sync with those of the burden which the law or an office places on the shoulder of the agent.

This theory is relevant to the present study since it lays the basis for investigating the role of politics in public administration. Public procurement which is public administration

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<sup>295</sup> *Ibid.*

<sup>296</sup> *Ibid.*

<sup>297</sup> *Ibid.*

<sup>298</sup> *Ibid.*

<sup>299</sup> J. Health, & W. Norman, "Stakeholders theory, corporate governance and public management", [2004] *Journal of Business Ethics*, Vol.53, pp.248

<sup>300</sup> J.E. Donahue, "*The Privatisation Decision: Public Ends, Private Means*", [Basic Books, New York, NY, 1989], pp.213

function is controlled by managers who are considered stewards for politicians. As cited by Krawiec<sup>301</sup> and Langevoort,<sup>302</sup> compliance may represent a principal-agent problem. A public officer acting for the principal may choose to ignore relevant considerations or choose to consider irrelevant issues as a basis for making administrative decision in order to meet the interests of his/her principal. In doing so, the office in which the agent is serving may suffer irreparable damage or loss as a result of using wrong premise to base administrative decisions.

### 2.2.6 Theory of Cognitive Dissonance

Festinger proposed the theory of cognitive dissonance.<sup>303</sup> According to cognitive dissonance theory, a powerful motive to maintain cognitive consistency can give rise to irrational and sometimes maladaptive behaviour.<sup>304</sup> Cognitive dissonance is described as the feeling of uncomfortable tension that comes from holding two conflicting thoughts in the mind at the same time. Dissonance is a healthy element of identity formation and is most powerful when it is about one's professional self-image.

This theory led to a number of derivations about opinion change following forced compliance. From this theory, it is inferred that when someone is forced to comply, dissonance is created between their cognition (I did not want to do this) and their behavior (I did it). Forced compliance with laws can therefore culminate into cognitive dissonance.

To enforce public procurement rules, constant control and monitoring is inevitable. However, Huberts, Jeroen and Carole asserts that this can reduce employee trust and have a demoralising effect on government employees, many of whom chose to work in government precisely for the opportunity to exercise their judgment on behalf of the

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<sup>301</sup>K.D. Krawiec, "Cosmetic compliance and the failure of negotiated governance", [2003], *Washington university law quarterly*, Vol.81 (2), 487.

<sup>302</sup>D.C. Langevoort, "Monitoring: The behavioral economics of corporate compliance with law," [2002], *Columbia Business Law Review*, Vol.71, 71-118.

<sup>303</sup>I. Festinger, [1957]. Theory of cognitive dissonance. Evanston, III: Row Peterson Prayas Energy Group, *The Bujagali Power Purchase Agreement: An independent Review*. [Berkeley, CA: International Rivers Network, 2002].

<sup>304</sup> Festinger [1957]



public.<sup>305</sup> According to Lager, the concentration of control and structuring of activities negatively affects government employees' motivation.<sup>306</sup> Sutinen and Kuperan propounded the socio-economic theory of compliance by integrating economic theory with theories from psychology and sociology to account for moral obligation and social influence as determinants of individuals' decisions on compliance.<sup>307</sup>

### 2.2.7 Legitimacy Theory

Lisa also adds that psychological perspectives provide a basis for the success or failure of organizational compliance.<sup>308</sup> According to Wilmshurst and Frost, the legitimacy theory postulates that the organization is responsible to disclose its practices to the stakeholders, especially to the public and justify its existence within the boundaries of society.<sup>309</sup> This theory, which focuses on the relationship and interaction between an organization and the society, provides a sufficient and superior lens for understanding government procurement system.<sup>310</sup> From this theory, the perceived legitimacy of the public procurement rules has been identified as one of the antecedents of public procurement compliance behavior.

### 2.2.8 The Concept of Culture and its relationship to Morality and Law

The guidelines that describe how we as people should behave and how a society should function together are referred to as values. There is a common understanding that morality is closely tied to a society's value system. Values are "among the building blocks of culture" and cultural values drive a society's performance and actions.<sup>311</sup> They are the beliefs, practices, symbols, specific norms, and personal values that individuals in a society

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<sup>305</sup>L. W. J. C. Huberts, M. Jeroen & L.J. Carole, "*Ethics and Integrity of Governance: Perspectives across Frontiers*", [Cornwall: Edward Elgar, 2008].

<sup>306</sup>J. M. Lager, "Overcoming Cultures of Compliance to Reduce Corruption and Achieve Ethics in Government", [2009], *McGeorge Law Review*, 20, 41-47.

<sup>307</sup>J. G. Sutinen, & K. Kuperan, "A socio-economic theory of regulatory compliance", [1999], *International Journal of Social Economics*, Vol 26, Issues 1/2/3, pg. 174.

<sup>308</sup>I. Lisa, "Compliance culture: A conceptual framework", [2010], *Journal of management and organization*, 19(7), 704.

<sup>309</sup>T. Wilmshurst & G. Frost, "Corporate environmental reporting: a test of legitimacy theory", [2000], *Accounting, Auditing, and Accountability Journal*, 13(1), 13.

<sup>310</sup>W. S. Hui, R. O. Othman, O. Normah, R. A. Rahman & N. H. Haron, "Procurement issues in Malaysia", [2011], *International Journal of Public Sector Management*, 24(6), pp.569.

<sup>311</sup>G. Hofstede, *Culture's consequences: International differences in work-related values*, Beverly Hills: Sage, 1980.

share.<sup>312</sup>Our values tell us what is good and what is bad and provide daily instruction about how we should function<sup>313</sup>. Values tell society leaders, policymakers, and individuals how to behave, as well as serve as guiding principles for life.<sup>314</sup>Culture is the context in which we live and the manner in which we are socialized and the idea of cultural values refers to what drives our performance and our actions.<sup>315</sup> Cultural values are the beliefs, practices, symbols, specific norms, and personal values that we share as a society.<sup>316</sup>

The impact of cultural values on the way of life of a society cannot be understated.<sup>317</sup>Psychologists, social scientists, and educators have paid more attention in recent years to the importance of cultural values and the influence they have on lifestyles and behaviors in various societies.<sup>318</sup> Each discipline has defined values based on its own perspective, and different methods have been used to measure and study cultural values specific to the culture's unique discipline.<sup>319</sup> The way in which various cultures interpret their cultural values is a choice they are entitled to make based on what they deem as important for their particular groups<sup>320</sup>.

Geert Hofstede examined cultural values across more than 50 countries and suggests that five dimensions of values form together to represent each culture.<sup>321</sup>Hofstede's cultural dimension discusses the cultural relevance in shaping a society's way of life.<sup>322</sup> The five

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<sup>312</sup> G. Hofstede, 1980

<sup>313</sup> L. Sagiv & S.H. Schwartz, "Value priorities and subjective well-being: direct relations and congruity effect", *European Journal of Social Psychology*, p. 177-198, 2000.

<sup>314</sup> S.H Schwartz, "Value Orientations: Measurement, Antecedents and Consequences across Nations," [Sage, pp.169-203, 2007].

<sup>315</sup>*Ibid.*

<sup>316</sup> Lilach Sagiv and Shalom H. Schwartz, "Cultural values in organisations: Insights for Europe", *European J. International Management*, Vol. 1, No. 3, 2007, pp.176–190.

<sup>317</sup>David G. Curry, John E. Meyer and John M. McKinney, "Seeing *versus* Perceiving: *What you see isn't always what you get*". *J. of Professional Safety*, Vol. 3. No. 5, June, 2006, [www.asse.org](http://www.asse.org), accessed on August 21, 2017.

<sup>318</sup> Robert T. Carter, "Cultural Values: A Review of Empirical Research and Implications for Counseling", *Journal of Counseling and Development* Vol. 70, No. 1, 1991, pp. 164-173.

<sup>319</sup> Robert T. Carter, 1991.

<sup>320</sup> Robert T. Carter, 1991.

<sup>321</sup> G. Hofstede, "Culture's Consequences: Comparing Values, Behaviours, Institutions, and Organizations Across Nations", *International Journal of Cross Cultural Management*, Vol. 4, Issue 1, pp.448-456, 2001. 2001

<sup>322</sup> G. Hofstede, 2001

dimensions of culture include: power distance, uncertainty avoidance, individualism versus collectivism, masculinity versus femininity, and long term orientation.<sup>323</sup> However, of particular interest to this study is the discussion on power distance. Power distance refers to “the extent to which people expect and accept that power is distributed unequally and people should generally accept hierarchy as the appropriate way to govern society.”<sup>324</sup> In this case, the leaders at the top receive the utmost respect and the rest below them have a responsibility to obey them.<sup>325</sup> They are expected to communicate to the subjects the values they stand for and the subjects have a responsibility to obey.<sup>326</sup> If leaders communicate wrong values down the hierarchy, then the value system of the subjects will reflect the same weakness (es).<sup>327</sup>

Closely tied to this dimension is the principle of cultural mismatch which occurs when the culture of the learning environment (created by the leadership) is different from that of the home culture of the learner (subjects).<sup>328</sup> Where this condition is prevalent, enthusiasm for learning and self-confidence in the ability to learn could be negatively affected due to the cultural mismatch between what their leaders tell them to do and what they believe is the right thing to do. Hofstede believes that these cultural dimensions can address many changes in society and that what one perceives is then shaped by his or her experiences and the cultural values to which his or her society adheres.<sup>329</sup> This is corroborated by Schwartz who asserts that the ways in which societies are organised express their underlying cultural values<sup>330</sup>. In many societies, cultural values emphasises on success, self-assertion, drive, cooperation, equality, and concern for others.<sup>331</sup>

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<sup>323</sup> G. Hofstede, 2001

<sup>324</sup> G. Hofstede, 2001

<sup>325</sup> G. Hofstede, 2001

<sup>326</sup> G. Hofstede, 2001

<sup>327</sup> G. Hofstede, 2001

<sup>328</sup> Hollins and Oliver (1999)

<sup>329</sup> Hofstede, 2001

<sup>330</sup> S.J. Schwartz, B.L. Zamboanga, L. Rodriguez, & S.C. Wang, “The structure of cultural identity in an ethnically diverse sample of emerging adults”, *Basic and Applied Social Psychology*, 29, 2010; pp.159–173.

<sup>331</sup> S. J. Schwartz, B.L. Zamboanga, L. Rodriguez, & S.C. Wang, 2010

This review is an important stage in making ‘the holistic case’ for the impact of culture on our lives.<sup>332</sup> Values determine what individuals find important in their daily life and help to shape their behavior in each situation they encounter.<sup>333</sup> Since values often strongly influence both attitude and behavior, they serve as a kind of personal compass for individual conduct in the society. By understanding our values we can get a better understanding of what is driving us to engage in certain behavioral patterns.<sup>334</sup> This can be a good framework for understanding moral problems facing the public procurement sector in Kenya.

If a person values honesty, hard work, and discipline, for example, he/she will likely make an effort to exhibit those traits in the community where he/she lives. This person may therefore be a more efficient member of the community and a more positive role model to others than a member with opposite values. This is perhaps what we lack in Kenya; we have the wrong role models in our leaders. We have leaders who have been accused of serious economic crimes, abuse of office, corruption and impunity among other vices. Without conscience, they compete for leadership positions and ascend to power, something which sends a negative message to the society and especially to the youth who grow up believing that corruption, abuse of office, negative ethnicity, impunity and lack of respect for the rule of law is fancy, trendy and normal. One can be accused of these vices and still walk freely without any serious reprimands by the law to an extent that it has become a culture and way of life in Kenya.

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<sup>332</sup> R.E. Nisbett, K. Peng, I. Choi, & A. Norenzayan, (2001), “Culture and systems of thought: Holistic versus analytic cognition”, *Psychological Review*, 108(2), 2001, pp.291-310.

<sup>333</sup> R.E. Nisbett, K. Peng, I. Choi, & A. Norenzayan, (2001)

<sup>334</sup> R.E. Nisbett, K. Peng, I. Choi, & A. Norenzayan, (2001)

### 2.3 Literature Review

The importance of an efficient public procurement to a country cannot be understated. It is a relatively new phenomenon in the field of public service delivery.<sup>335</sup> Countries have made public procurement a work-in-progress as they make efforts to put in place legal, policy and institutional frameworks to streamline the management of the sector.<sup>336</sup> However, these reforms should be based on a reliable and valid data obtained through a rigorous academic and professional research. Thai in a research paper entitled ‘*Public Procurement Re-examined*’, drew attention to the academic neglect of public procurement.<sup>337</sup> He says that, although public procurement is perceived as a major function of government, and that governmental entities, policy makers and public procurement professionals have paid a great attention to its improvements or reforms, it has been a neglected area of academic education and research.<sup>338</sup>

A. Flynn and P. Davis reaffirmed the same position more than a decade later when they established that, in spite of its centrality and history in public administration, public procurement for a long time, resided on the periphery of management science.<sup>339</sup> Its entry into the academic ranks is relatively a new development. Perhaps, it is for the same reasons that many universities and colleges all over the world began offering degree, diploma and certificate courses in public procurement within the past decade and a lot of research in this area is emerging and in-exhaustive.<sup>340</sup> However, the last decade has seen a steady increase in the volume of research conducted in the field of public procurement both at the local, regional and international level.

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<sup>335</sup> Antony Flynn and P. Davis, ‘Theory in Public Procurement Research,’ *Journal of Public Procurement* (2014) 15(3), 161-193

<sup>336</sup> *Ibid.*

<sup>337</sup> K.V. Thai [2001] 13 K.V. Thai, ‘Public Procurement Re-examined,’ [Pr Academics Press, 2001], *Journal of Public Procurement, Volume 1, Issue 1, 9-50.*

<sup>338</sup> K.V. Thai [2001] 13

<sup>339</sup> A. Flynn and P. Davis [2014] 167

<sup>340</sup> Tracey, Michael, and Roger Neuhaus. "Purchasing's role in global new product process development projects", *Journal of Purchasing and Supply Management*, 2013. Also see C.M. Harland, H. Walker, W.E. Phillips, N.D. Caldwell, T.E. Johnsen, L.A. Knight, & J. Zheng, ‘Public Procurement: Is it a Discipline?’, [2006], *International Journal of Relations and Production Management*, 29 (5): 836-869.

The progression of the field is evident within the academia, political and policy areas as it is now linked to concerns over social inclusion, economic growth, and environmental management and sustainability.<sup>341</sup> Since the 2007 global financial crisis, pressures on public finances have forced a reappraisal of the role of public procurement, with many arguing that it should be leveraged for domestic economic growth and job creation.<sup>342</sup> Whichever way one looks at it, the profile of public procurement has risen and is greater than at any time in history.

The present study undertook a quick review of accessible literature in the field of public procurement and established the extent to which the various aspects of this inquiry have been previously undertaken. There was a wide range of literature that had the potential to inform this study with respect to the legal, policy and theoretical framework on which the study is grounded. However, the review established that little has been accomplished in the specific area of environment (leadership and management) under which public procurement law, policy and institutional frameworks operate.

P.M. Boffey, a major proponent of a holistic approach into an inquiry, insist that one must look at all the elements in a system in order to accurately assess the successes, weaknesses, opportunities and threats facing the system.<sup>343</sup> The systems approach has become a popular way of a practical philosophy, thinking and a methodology of inquiry/investigation into the daily happenings/phenomena in life.<sup>344</sup> However, a review of available literature indicates that past scholarly works in the area of public procurement have mainly focused on various aspects of law, policy and institutional frameworks in the sector. This leaves out another major component of a procurement system namely the environment in which

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<sup>341</sup> S. Arrowsmith, (2010). "Horizontal Policies in Public Procurement: A Taxonomy," [2010], *Journal of Public Procurement*, 10 (2): 149-186. Also see Loader, Kim. "Is local authority procurement supporting SMEs? An analysis of practice in English local authorities", *Local Government Studies*, 2016.

<sup>342</sup> G. Murray, "Public Procurement Strategy for Accelerating the Economic Recovery," [2009], *Supply Chain Management: An International Journal*, 14 (6): 429-434.

<sup>343</sup> See Philip M. Boffey, 'Systems Analysis: No Panacea for Nation's Domestic Problems,' [2007] 258 *Science* 1030. Also see L. Raphael Troncale, "The future of general systems research: obstacles, potentials, case studies (Essay)", *Systems Research and Behavioral Science*, Sept-Oct 2009 Issue

<sup>344</sup> N. Kock, and F. Murphy, 'Developing a Knowledge and Information Flow-Based Methodology for Redesigning Processes,' [Naval Postgraduate School, External Acquisition Research Program, 2001], 231

the other components operate. The results of both online and library searches on this particular topic shows that there is lack of focused literature on how environment can influence the performance of the other elements (law, policy and institutional frameworks) in a public procurement system.

Perhaps the study which came close to interrogating public procurement from a system perspective was G. Callendar and D. Mathews's "*Government Purchasing: An Evolving Profession?*" which examined the elements of a public procurement from a 'system in action' approach.<sup>345</sup> This approach treats public procurement as a dynamic process whose whole scope consists of five core elements namely: procurement regulations, policy making and implementation, institutional frameworks, management and authorisation function/operations, and feedback.<sup>346</sup>

According to Callendar and Mathews, the 'procurement regulations' element established by policy makers and management executives, forms the institutional framework within which public procurement professionals (contract officers, buyers, or procurement officers), and program managers implement their authorized and funded procurement programs or projects.<sup>347</sup> The contract officers, buyers, or procurement officers are accountable to policy makers and management executives in a systematic and regulated environment.<sup>348</sup> The system should then generate feedback which goes to the policy makers, procurement professionals and management for possible adjustments or improvements.

The organisational/institutional structure may be very complicated or simple depending on the size of government and the policies being pursued. In the US where this study was conducted, most state and large local governments have procurement divisions either

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<sup>345</sup> G. Callendar & D. Mathews, "Government Purchasing: An Evolving Profession?", *Journal of Public Budgeting, Accounting & Financial Management*, [2007] 12(2), 272-290. Also see R.G. Rendon, "Supply management in American public administration: Towards an academic discipline?", *Journal of Purchasing and Supply Management*, 2016.

<sup>346</sup> G. Callendar & D. Mathews [2007] 275

<sup>347</sup> G. Callendar & D. Mathews [2007] 275

<sup>348</sup> *Ibid.*

within their finance or administrative services departments; only a few ones have a procurement function or officer.<sup>349</sup> In other countries, special institutions/bodies have been formed to streamline and manage public procurement.

Just like all the other elements in a system, the feedback element is very important for a sound procurement system.<sup>350</sup> Feedback may indicate the need for adjustments to or improvements in all procurement system elements.<sup>351</sup> In some cases, feedback may indicate that procurement regulations or policies and/or agency procurement standards are no longer current or suitable, and adjustments or reforms are needed.<sup>352</sup> In other cases, feedback may show that the procurement cycle is not working effectively, and needs to be improved in areas such as prompt payments, uses of new technology such as e-procurement and purchase cards.<sup>353</sup> Through continuous evaluation of what is required in the performance of the whole procurement system, what is happening to it and what results from it, policy makers and management can make required adjustments or reforms where necessary.<sup>354</sup>

The authors of this study seem to have paid little attention to detail and depth in analyzing the interrelationships between individual elements of the system. What they have provided for is an elementary review of a system of public procurement. How each element influences the output and the system's reaction to provide a feedback in a 'two-way' system approach was not the subject of this particular study. The study was done in the USA which has a geographical and other characteristic difference with Kenya. Furthermore, public procurement is a very dynamic area and a lot has changed since the study was conducted a decade ago. The study may not address itself to the most current concerns of the public procurement sector. Therefore, the scholarly work by Callendar and Mathews can only be used to lay ground for interrogating how the environment (leadership and management) as an element in a procurement system affects the functioning of the other elements of the

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<sup>349</sup> G. Callendar & D. Mathews [2007] 276

<sup>350</sup> G. Callendar & D. Mathews [2007] 277

<sup>351</sup> *Ibid.*

<sup>352</sup> *Ibid.*

<sup>353</sup> *Ibid.*

<sup>354</sup> *Ibid.*



system namely: law, policy and institutional frameworks and the resultant output. This is a research gap which the present study sought to fill.

With regard to the regulation of public procurement and how the law has developed over time, a number of scholars have written books, journal articles and other research publications which can inform the present study. S. Arrowsmith's '*National and International Perspectives on the Regulation of Public Procurement: Harmony or Conflict?*'<sup>355</sup> provides an analysis to the enormous economic power of public procurement and its susceptibility to corruption. The writer explains why public procurement has come under increasing regulation over the recent past and why a new international system to regulate public procurement is rapidly evolving. The book lists conventional conditions leading to rapid growth of regulation which include: trade agreements, domestic policies, and international organisations such as the World Bank among others.<sup>356</sup> The author provides an in-depth analysis of how the procurement award process must be managed to achieve its goals in today's global market economy.

Arrowsmith further asserts that regulating public procurement educates government officials, trade lawyers, and students on how to comply with existing and emerging regulatory schemes in order to get value for money, avoid wastage of public funds and combat corruption.<sup>357</sup> However, the present study questions the veracity of such an assertion in the wake of numerous procurement-related corruption scandals which have been reported in the public sector in spite of the tight legal regime. If indeed regulations can stop corruption and ensure value for money in public procurement, then a country like Kenya with a solid legal framework- the PPDA (repealed) and the new Act- ought not to experience challenges of the magnitude and scale witnessed in the sector over the last couple of years. Finally, the author clarifies the important distinctions between the realities of public procurement in industrialised, developing, and transitioning economies. This

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<sup>355</sup> S. Arrowsmith, 'National and International Perspectives on the Regulation of Public Procurement: Harmony or Conflict?' In S. Arrowsmith, & A. Davies (Eds.), "Public Procurement: Global Revolution", [London, UK: Kluwer Law International, 1998], 3-26.

<sup>356</sup> See also The World Trade Organization, "Legal Economic and Political Analysis," [2005] 27.

<sup>357</sup> Arrowsmith [1998] 24

offers useful insights into the local public procurement system given that Kenya falls under the developing economies which have been analysed extensively in the book.

A study by Tom Lodge on *Political Corruption in South Africa* conducted in 2008 looked at what constitutes political corruption, its prevalence in the Government of South Africa and the historical legacy.<sup>358</sup> The study established how a deliberate effort by Native Affairs Department in the 1950s made concerted effort to fill as many administrative posts as possible with National Party supporters while in the 1960s, Broederbond infiltration of agricultural cooperatives and the Land Bank ensured that political considerations would predominate in credit allocations.<sup>359</sup> These forms of patronage and favouritism were mainly geared to the strategic goals of Afrikaner nationalism and did not, at least at their inception, involve personal gain and individualised relationships. So the study did not look at political patronage within the background of leadership and integrity and its influence on corruption in the public sector in South Africa.

Another study conducted by Victor Levine in Accra Ghana looked at *Political Corruption: The Ghana Case*.<sup>360</sup> It established what constitutes political corruption, the aggravating factors and how to deal with official corruption. However, it did not look at the management of public resources within the background of political leadership and the exercise of political power.

P.M. Lewa's *Management and organization of public procurement in Kenya: A review of proposed changes* is an assessment of the legal, policy and institutional framework for management of public procurement and an effort to identify possible weaknesses and or omissions in the pieces of legislation that exist in the country.<sup>361</sup> The author gives an

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<sup>358</sup> T. Lodge, 'Political Corruption in South Africa', *African Affairs* [2008] 97(157-187). Also see Lance van Sittert, "'Political Corruption' and the Moral Economy of Apartheid: The Case of Dawie Walters, the 'Lobster King of South Africa'", *South African Historical Journal*, 2015.

<sup>359</sup> Deborah Posel, *The Making of Apartheid, 1948-1961* [Oxford University Press, Cape Town, 2008] 117

<sup>360</sup> Victor Levine, *Political Corruption: The Ghana Case*, [Stanford University Press, 2011] 192.

<sup>361</sup> P.M. Lewa, 'Management and organization of public procurement in Kenya: A review of proposed changes', [Nairobi: Institute of Policy Analysis and Research (IPAR), 2007], *Discussion Paper No. 092* p.6. Also see Africa News Service "*Gaps in Graft War Revealed*", Africa News Service, April 30 2007 Issue

analysis of policy concerns which the study sought to address which include: how to increase efficiency and effectiveness in public procurement system, how to strengthen legal and regulatory frameworks so as to make them consistent with the principles of sound procurement management, and how to enhance institutional capacity and entrench professionalism.

P.M. Lewa provides a good review of why and how public procurement should be regulated.<sup>362</sup> He made a good attempt to analyse the development of legal and institutional frameworks in the public procurement sector and the characteristics of actors and institutions. The study concludes that, in order to achieve the expected changes in the sector, the PPDA (repealed) and the regulations thereof should be implemented fully and amendments made to the law to enhance efficiency and delivery. The analysis provided in this paper on the development of law, policy and institutions is useful to the present study when analysing where the country has come from in terms of procurement reforms, where it is currently and where it needs to go. However, the review does not include the aspect of the environment in which the law, policy and institutions operate. Also, the study was conducted ten years ago and the findings may have been overtaken by events.

Similarly, K. Waiganjo looked at ‘The Legal and Institutional Framework for Effective Implementation of the Public Procurement and Disposal Act of 2005’.<sup>363</sup> The study mainly focused on the legal and institutional framework provided for the management of public procurement in the country. The study established that the powers given to the Minister for Finance to appoint members of the PPAB subject to the approval of Parliament is wide discretion and can be abused.<sup>364</sup>

Again, there was no connection between legal, policy and institutional framework with leadership and integrity issues in the management function of public resources. From the

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<sup>362</sup> P.M Lewa [2007] 10

<sup>363</sup> Kimotho Waiganjo, ‘The Legal and Institutional Framework for Effective Implementation of the Public Procurement and Disposal Act of 2005’ [2006] 26. Also see Peter M. Lewa and Susan K. Lewa, “Public Procurement Reform in Emerging Economies: A Case Study of Kenya”, [2009], *Handbook of Business Practices and Growth in Emerging Markets*.

<sup>364</sup> *Ibid.*

foregoing analysis, it can be deduced that previous studies conducted in the area of public procurement in Kenya were mainly focused on the legal, policy and institutional weaknesses in the sector. However, very little has been done on the environment (leadership/management) in which those other three intra-system elements (legal, policy and institution frameworks) operate. This is the gap which the present study sought to fill.

The research is grounded on the findings of a separate study by DfID& the World Bank on the main lessons of procurement and public administration reform efforts.<sup>365</sup> The study established that public procurement sector reforms in developing countries have historically gone through three main phases: increased emphasis on the importance of capacity building, focus on fiscal stability, and actual quality of public services delivered.<sup>366</sup> This in effect alienates the more complex and usually undercover influence of politics on the key sectors of public service such as public procurement.<sup>367</sup> This study supposes that for anyone to properly interrogate challenges in this sector, one must go beyond the three frequently researched elements of public procurement system namely: legal, policy and institutional frameworks and interrogate the political environment in which the law operates.

A possible reason for this knowledge gap is that procurement reforms have traditionally been seen as a technical and administrative process mainly undertaken by legal experts and technical advisors. From this angle, its inherent political nature has often been ignored and the underlying incentive structure affecting support for reforms is largely overlooked by these policy makers.<sup>368</sup> While such reformers may be broadly aware of the political patronage factors in the procurement regime, this knowledge has remained largely absent from their analysis and research with little explicit effort to determine how it might affect the outcome of the said procurement reforms.<sup>369</sup> In many countries, procurement reforms

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<sup>365</sup>UK Department for International Development (DfID) and World Bank, 'A Study on the Main Lessons of Procurement and Public Administration Reform Efforts' [2010] 3(20).

<sup>366</sup>See DfID and World Bank [2010] 3(21).

<sup>367</sup>*Ibid.*

<sup>368</sup> OECD, 'Managing Public Financial Management (PFM) Reforms', [2013] 9(42) accessed on 20<sup>th</sup> October, 2016 at <http://www.oecd.org/dataoecd/9/42/43417892.pdf>

<sup>369</sup>*Ibid.*

have been triggered by external pressures and corruption scandals from within.<sup>370</sup> This has often lead to hasty and piecemeal reforms focusing more on adding controls and legislations as opposed to developing a thorough understanding of the underlying causes of the problems and feasible options in addressing these challenges.<sup>371</sup>

In this context therefore, the procurement reform agenda becomes essentially a way of addressing corruption risks for public officials to solicit or accept bribes at the various stages of procurement processes as well as strengthening internal and external controls to ensure enforcement and attendant sanctions.

## **2.4 Conclusion**

This chapter made an attempt to construct a theoretical framework for the study. The chapter has adopted a holistic approach of examining the problem from a systems point of view. The study has used the Systems Theory to conduct an investigation based on the intra-system elements (policy, law and institutions) and the extra-system elements (leadership/management function). The chapter has also reviewed the role of law in socio-economic and political engineering in the public procurement sector. By using theories which explain the intersection of law and morality, the study has demonstrated the role of morality in law in a modern society.

The sociological school of thought has been reviewed herein to assist the reader understand the centrality of morality in law. Public procurement being a management function in the public service, theories like Institutional Theory, Principal-Agent Theory, Theory of Cognitive Dissonance, and Legitimacy Theory from other disciplines like economics, finance, management, administration and psychology have been examined and applied to complete a harmonised theoretical framework to underpin the study. The chapter has also looked at the concept of culture and its relationship to morality and law. An attempt has been made to define values, connect morality and law, and establish the place of moral values and culture in enhancing positive behavior in the society.

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<sup>370</sup>OECD, 'Aid, Rents and the Politics of the Budget Process', [2008] 7(78).

<sup>371</sup> OECD [2008] 7(79)

This chapter has also reviewed different literature related to legal, policy and institutional frameworks in the public procurement sector and related reforms. Past scholarly works by K.V. Thai; G. Callendar & D. Mathews; S. Arrowsmith; T. Lodge; P.M. Lewa; K. Waiganjo; UK Department for International Development (DfID) & World Bank; OECD; P.M. Boffey; and N. Kock & F. Murphy have been reviewed. The study has managed to outline research gaps in the reviewed literature to put the present study in its contextual map.

Literature reviewed shows that a lot of past studies in the public procurement sector were focused mainly on legal, policy and institutional frameworks leaving out a major component of the system namely the environment (leadership and management). The study posits that if the environment is conducive, the delivery and the workings of the law are enhanced. In such an environment, the ability of the law to achieve the intended objectives is achievable and the law can then be used as a tool of social engineering to deliver social and economic justice.

From the reviewed literature, public procurement is about spending the tax payers' money. The law envisages a situation where the government has a moral and legal obligation to deliver social, political and economic justice in their spending of public resources in keeping with the principles of transparency and accountability as expounded in Section 2 of the PPDA (repealed) or the corresponding section in the new Act,<sup>372</sup> Chapter 6 of the Constitution,<sup>373</sup> and all other enabling laws. This study revolves around this interconnectivity of law and society in upholding social and economic justice for public good.

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<sup>372</sup>See Objects of the PPDA (repealed) under *Purpose of the Act*, p.52-53 or the corresponding Section 3 of the new PPADA, 2015.

<sup>373</sup>See Chapter 6 of the Constitution, 2010, on Leadership and Integrity.

## CHAPTER THREE

### 3.0 RESEARCH METHODOLOGY

#### 3.1 Introduction

This section outlines the various methods used to investigate the influence of political patronage on the operationalisation of Public Procurement Law in Kenya in order to achieve the objectives of this study. The Systems Theory which underpins this study suggests a holistic approach in addressing the statement of the problem. In line with the Systems Theory, in order to diagnose where the root cause of the problem under investigation, the study should interrogate public procurement as a system comprising of the intra-system elements (policy, law and institutions) and the extra-system elements/the environment in which the intra-system elements function (leadership/management function).

Literature reviewed has shown that there is a gap in that the existing literature on public procurement sector focuses mainly on legal, policy and institutional frameworks leaving out a major component of the system; namely the environment (leadership and management). The study posits that if the environment is conducive, the delivery and the workings of the law are enhanced. In such an environment, the ability of the law to achieve the intended objectives is achievable and the law can then be used as a tool of social engineering to deliver social and economic justice. It focuses on research design, study locale, target population, sample and sampling procedures, research instruments, data collection procedures and data analysis.

#### 3.2 Research Design

The study employed a mixed method approach of investigative, descriptive survey design and desktop research to investigate the influence of political patronage on the operationalisation of the PPDA. The study was alive to the nature of research in this area which is regarded as sensitive and therefore, closely guarded. This explains why investigative approach was part of the research design. A descriptive survey which was also part of the design aims at obtaining pertinent and precise information concerning the

current status of phenomena and whenever possible to draw valid general conclusion from the facts discovered.<sup>374</sup>

A descriptive survey aims at obtaining information from a representative sample of the population and from that sample the study is able to present the findings as being representative of the population as a whole.<sup>375</sup> The mixed method design was applied in collecting data on the influence of political patronage on the legal, policy and institutional framework in public procurement sector; effects of ethnicity, nepotism, and corruption on public procurement; and ways of addressing challenges facing the workings and delivery of the Public Procurement Law. The design is considered appropriate for the study because it allows the researcher to describe, record, analyze and report conditions as it exists in the field.<sup>376</sup>

### **3.3 Location of the Study**

This study was conducted in Nairobi and mainly focused on the public and private sector organizations involved in public resource management oversight duties, administration of justice, law and order. Nairobi being the Capital City of Kenya is the hub of all procurement entities in the country and is the headquarters of all government ministries and almost 90 percent of other state agencies. Therefore, any data obtained from a sample with such characteristics is believed to be adequately representative of the entire population under study.

### **3.4 Population of the Study**

The population of a study is defined as the members of a real or hypothetical set of people, events or objects the study wishes to generalize the results of the research.<sup>377</sup> The population of the study was the entirety public procurement process comprising of all the

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<sup>374</sup> C.R. Kothari and Garg Gaurav, 'Research Methodology - Methods & Techniques,' [New Age International, 3<sup>rd</sup> Edition, Reprint 2014] 23.

<sup>375</sup> *Ibid.*

<sup>376</sup> J. Aluko Orodho, 'Techniques of Writing Research Proposals & Reports in Education and Social Sciences', [Nairobi: Kenyatta University Press, 2010] 7.

<sup>377</sup> R.W. Borg and J.P. Gall, *Educational and Social Sciences Research: An Introduction* (8<sup>th</sup>ed), [New York, Longman Publishers, 2014].



public procurement entities, watchdog organizations and potential suppliers. However, taking into account the magnitude of the public procurement market in Kenya, this population was difficult to handle. As mentioned in page two of this study, this market handles 60 percent of the annual budget not to mention, the magnitude and multiplicity of tenderers in this scenario. The study narrowed down to a manageable sample size that was representative of the population.

The study targeted owner-managers for information because they are the decision makers in businesses which are interested in doing business with the government and are actively involved in their day to day operations. Since enterprises can be managed by managers employed to do so by the owners of the enterprise, they were seen as most appropriate to give out the required information by this study. Also, since the owners of the enterprises, that is, the entrepreneurs may act as managers of their businesses. In this sense, those who managed their own businesses were found to be information rich for the purpose of this study and therefore were targeted as respondents for the study.

### **3.5 Sampling and Sample Size**

Sampling is a means of selecting a given separate number of subjects from a defined population as representative of that population.<sup>378</sup> Orodho defines sampling as the procedure a study uses to gather people, places or things to study.<sup>379</sup> Any statement made about a sample should also be true of the population. From the characteristics of a carefully selected and representative sample, one can make certain inferences about characteristics of the population from which it is drawn.<sup>380</sup> In this study, there was need to select a sample due to various limitations which could not allow researching the whole population.<sup>381</sup>

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<sup>378</sup>See Orodho, 2010

<sup>379</sup>See Orodho, 2010.

<sup>380</sup>C.R. Kothari, 'Research Methods and Techniques', 2010, New Delhi: Wiswa Prskashan.

<sup>381</sup>See C.R. Kothari &Gaurav Garg, 2014

It is estimated that about 8,000 private enterprises do business with the public sector every year in Nairobi.<sup>382</sup> When dealing with populations of less than 10,000 elements, the sample size is determined using the normal approximation to the hyper-geometric distribution.<sup>383</sup> This approximation is usually taken to be highly accurate when the population is not very large and the sample size is relatively small.<sup>384</sup> The formula for calculating sample size for a hyper-geometric population is as follows:<sup>385</sup>

$$n = \frac{NZ^2pq}{E^2(N-1) + Z^2pq}$$

Where n = Required sample size

p and q = Population proportions which are set at 0.5 each

N = Population size

Z = Level of confidence

Typically the level of confidence for surveys is 95% in which case Z is set to 1.96.

E = Sets the margin of error of the sample proportion. This was set at 5% or 0.05.

The study had a population of less than 10,000

This being a hyper-geometric population, the sample was, therefore, worked out as follows:

$$\begin{aligned} n &= \frac{NZ^2pq}{E^2(N-1) + Z^2pq} \\ &= \frac{8,000(1.96)^2(0.5)(0.5)}{0.05^2(8,000-1) + (1.96)^2(0.5)(0.5)} \\ &= \frac{7683.2}{20.9579} \\ &= 366.601616 \approx 367 \end{aligned}$$

Therefore, this study interviewed a sample of 367 owner-managers of privately owned businesses in Nairobi as respondents. They were considered to be well informed on the

<sup>382</sup>PPOA, "Annual Report, 2013-2014", 2015, Government Printer, Nairobi.

<sup>383</sup>See C.R. Kothari, 2010.

<sup>384</sup>*Ibid.*

<sup>385</sup>*Ibid.*

challenges facing the public procurement system having participated in public tendering before.

The study also used the non-probabilistic purposive sampling technique to select heads of departments/supply chain departments in various public entities who participated in the study. This was done due to the sensitive nature of information touching on the elements of corruption, ethnicity, and political patronage in public procurement sector. The study relied on informants/respondents from Parliament of Kenya, EACC, PPOA, PPARB, Mars Group, legal firms and other institutions which were interviewed on the functioning and weaknesses of the Public Procurement Law, institutional failures, political interference in the process, and the necessary legal reforms. Their identities were concealed in the current study for fear of victimization at their work-stations. To obtain more information on corruption in public procurement, this study further relied on data from a seminar on corruption prepared by Transparency International (TI).<sup>386</sup> Twenty-five participants who attended the seminar were drawn from both public and private sector organizations in the country.

### **3.6 Research Instruments of the Study**

The study used mixed methods to investigate Political Patronage on the Operationalisation of Public Procurement Law in Kenya. Questionnaires and an interview schedule were used to collect primary data from respondents as contained in appendices A, B & C. They were developed, piloted in Nairobi and administered to the named persons in public and private sector organizations. Officers in various public organizations namely Parliament of Kenya, EACC, PPARB and PPOA were interviewed and their responses recorded down. Tenderers were asked to fill the study questionnaires. The researcher also attended and recorded the proceedings of the aforementioned seminar. The study also reviewed information from secondary sources such as relevant case laws, books, Hansard and Committee Reports of Parliament, internet sources, statutes and government policy documents.

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<sup>386</sup> Transparency International (TI)-Kenya, Seminar on Corruption and Development of Anti-Corruption Manual' [Panafric Hotel in Nairobi, August, 2012] 1-123.

### **3.7 Data Analysis and Presentation**

Data analysis is the representation of data gathered during a study.<sup>387</sup> This study gathered both quantitative and qualitative data which were coded and analyzed using Statistical Package for Social Sciences (SPSS) computer software version 21. SPSS software was used because of its ability to appropriately create graphical presentations of questions, data for reporting, presentation and publishing. SPSS is able to handle large amount of data and given its wide spectrum of statistical procedures purposefully designed for social sciences, it was also quite efficient.<sup>388</sup> The analyzed data was presented in the form of frequency distribution tables and bar graphs where necessary.

Descriptive statistics were used to analyze the data in frequency distributions and percentages which were presented in tables and figures. Qualitative data was analyzed thematically by categorizing them along themes which were guided by the research hypothesis, objectives and research questions to establish links between data and major patterns that emerged from the research. Discussions and presentations of the analyzed data were done in tables of frequency distribution, percentages and bar graphs. Measures of dispersion were used to provide information about the spread of the scores in the distribution.<sup>389</sup> A comprehensive document analysis particularly data from judicial decisions and relevant case laws, those from Parliament and other independent commissions like the EACC were undertaken. This was done thematically in conformity with the hypothesis, research objectives and questions.

### **3.8 Logistical and Ethical Considerations**

Prior to the actual field study, a permission to conduct research was sought from the School of Law, University of Nairobi and also from the National Commission for Science, Technology and Innovation (NACOSTI). The researcher met the prospective respondents to explain the intentions of the study and cultivate a positive rapport. Respondents were assured that information collected from them was for the sole purpose of the present study

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<sup>387</sup>See Orodho [2010] 27.

<sup>388</sup>See K. Martin and Acuna, C., *SPSS for Institutional Researchers*, 2012. Pennsylvania: Bucknel University Press.

<sup>389</sup>*Ibid.*

and for no other use. Interview schedules were also structured with respondents' privacy and psychological needs in consideration.

### **3.9 Conclusion**

This chapter outlines the research design used in the study, the location of the study, the population of the study, sampling techniques used and the sample size. Also provided in this chapter are the research instruments which were used to conduct the study. The research has also outlined a clear process of data analysis and presentation which was used and the logistical and ethical considerations which were made in the study.

## CHAPTER FOUR

### 4.0 DATA, ANALYSIS AND INTERPRETATION

#### 4.1 Introduction

This chapter presents the results of the study—data, analysis and interpretation based on the conceptual framework model/study objectives. The study sought to establish how political patronage as an intervening variable derails the workings and delivery of Public Procurement Law in Kenya. The medium through which this patronage works were identified as legal, policy and institutional frameworks, ethnicity and nepotism and corruption in public sector. The study further sought the extent to which the new constitutional principles of good governance can help to address political patronage-related challenges facing the Public Procurement Law in Kenya. Quantitative data obtained from the questionnaires were presented in tables, frequencies and percentages as shown hereafter. Qualitative data was presented in discussions.

#### 4.2 General and Demographic Information

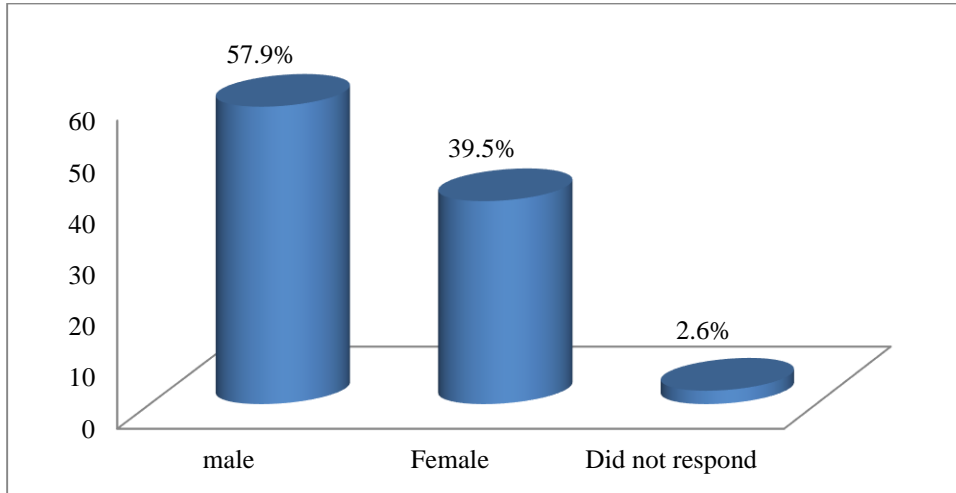
Response rate is the extent to which the final data set includes all sample members and it is calculated as the number of people with whom interviews are completed, divided by the number of people in the sample, including those who refused to participate and those who were unavailable. A sample of 367 was selected using proportional stratified random sampling technique. A total of 367 questionnaires were distributed to various tenderers respondents in Nairobi County. Out of the sample covered, 311 were responsive representing a response rate of 88.9%. This is above the 50% which is considered adequate in descriptive statistics.<sup>390</sup> In order to establish brief background information, respondents were asked to state their gender, age, level of formal education attained, nature of their businesses, size of business and age of business.

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<sup>390</sup> See Olive Mugenda & A. Mugenda, 'Research Methods: Quantitative and Qualitative Approaches,' [Nairobi: Acts Press, 2012]. 69.

### 4.2.1 Gender

The study sought to establish the gender distribution of the respondents and the findings are presented in Figure 4.1.

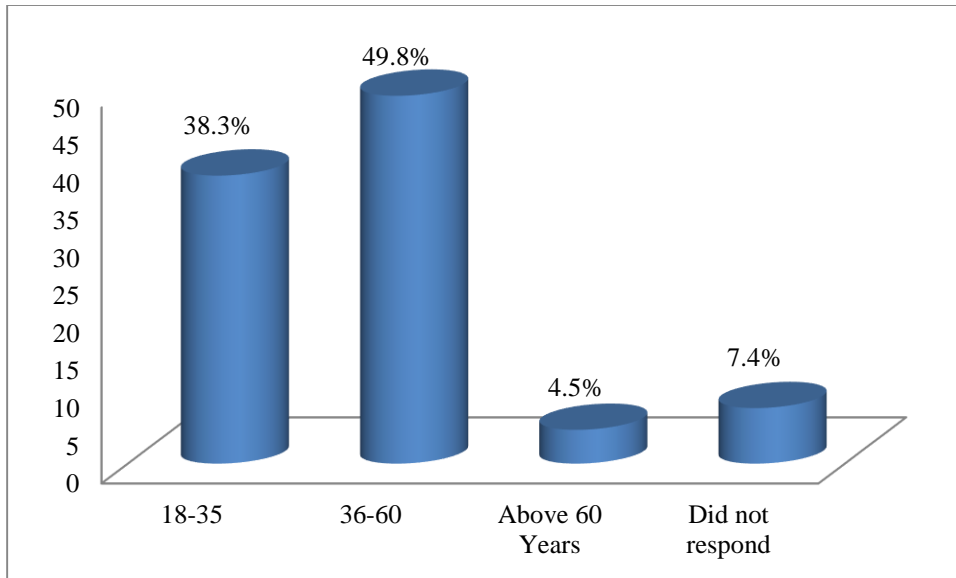


**Figure 4.1:** *Gender of the Respondents*

From the results, both male and female respondents participated in the study as shown in Figure 4.1. The results show that 180 (57.9%) were male, 123 (39.5%) were female and 8 (2.6%) did not respond. The results indicate that the two genders were adequately represented in the study since there is none which was more than the two-thirds. However, the statistics show that the male gender could be dominating the influence of political patronage on the operationalisation of public procurement law in Kenya. Hence, the percentages further raise the issue of gender equity in public procurement but that is not the focus of the present study.

### 4.2.2 Age

Age is a standard demographic component of a research in any social issue. The aim of inclusion of age component in this study is to determine if age has an influence on political patronage on operationalisation of procurement law in Kenya or whether the entire population shares the same practice and views. In order to establish the age distribution of tenderers in the study location, ages of the respondents who participated in this study were recorded as shown in Figure 4.2.



**Figure 4.2: Age of the Respondents**

A total of 288 respondents answered this question and the findings show that 155 (48.9%) of the tenderers were aged between 36 to 60 years, 119 (38.3%) were aged 18 to 35 old while 14 (4.5%) were aged above 60 years and 23 (7.4%) did not respond. This shows that those who were interviewed are adults who are capable of making independent judgments and the results of a research process involving them is deemed to be valid. Again, the results shows that any policy biased towards addressing the issues affecting operationalisation of public procurement law in the country must be age-inclusive and should go beyond the youth age of 18-35 years regarded as youth and cover those above 35 years since they are a significant number in the country.

#### **4.2.3 Highest Level of Education**

The respondents were asked to state their highest level of formal education attained and the results were as captured in Table 4.1.



**Table 4.1: Level of Formal Education Attained**

Level of Education	Frequency	Percentage
KCPE/CPE	16	5.1
KCSE/O-Level	42	13.5
A-Level	43	13.8
Certificate	34	10.9
Diploma	81	26.0
Bachelors Degree	62	19.9
Masters	11	3.5
PhDs	16	5.1
Declined to respond	6	1.9
<b>Total</b>	<b>311</b>	<b>100</b>

As presented in Table 4.1 above, (26.0%) had diploma education, 19.9% with bachelors' degree education and 13.8% with A- Level education while 13.5% with KCSE/O-Level education and less than 5.1% each with other levels as shown in Table 4.1. Education plays an important societal role in understanding public procurement issues. A highly educated respondent population is necessary in a highly professional and technical study area such as that on the public procurement and law. With 56.5% of the respondents having Diploma education and above, the study was able to involve people with a fairly good understanding of law and public procurement issues in the country. Hence, the results of the study are believed to be reliable and objective.

#### **4.2.4 Nature of Business**

The respondents were asked to state the nature of businesses they were doing and the results were as shown in Table 4.2.

**Table 4.2: Nature of Business**

Nature of Business	Frequency	Percentage
Service	88	25.8
Trade	134	39.3
Manufacturing	105	30.8
Declined to respond	14	4.1
Total	341	100

Table 4.2 shows that a majority (39.3%) of the respondents were traders, 30.8% were engaged in manufacturing businesses, 25.8% were in the services industries and 4.1% did not indicate which sectors they were operating under.

#### **4.2.5 Size of Business**

Respondents were asked to indicate the size of business they operate and the results were captured as shown in Table 4.3.

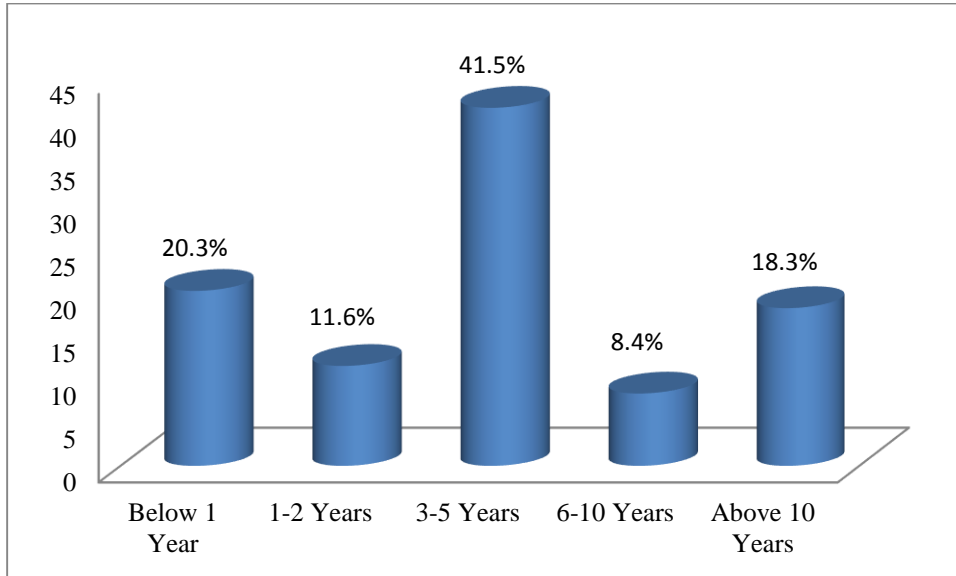
**Table 4.3: Size of Business**

Business Size	Frequency	Percentage
Micro Enterprise	45	14.5
Small enterprises	83	26.7
Medium Enterprises	109	35.0
Large scale enterprises	55	17.7
Declined to respond	19	6.1
Total	311	100

A total of 311 respondents answered this question and the results of the analysis shown in Table 4.3 below indicate that a majority (35.0%) of the respondents had medium-size enterprises, followed by 26.7% with small enterprises while 17.7% were with the large scale enterprises.

#### 4.2.6 Age of the Business

The study sought to establish the duration the respondents had taken in the management of their businesses and Figure 4.3 presents the findings.

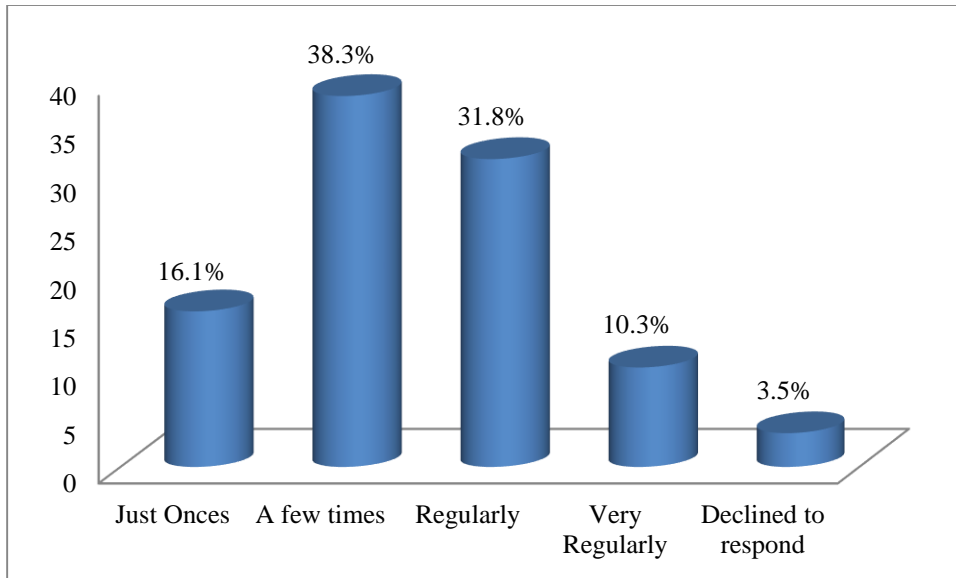


**Figure 4.3: Age of the Business**

The findings show that a majority (41.5%) of the respondents had been in business for 3-5 years, followed by 20.3% who had been there for a period of below one year, 18.3% for a period of over 10 years and 11.6% had been there for a period of 1-2 years. Only 8.4% of those interviewed had been in business for 6-10 years. From the findings, a majority of the respondents had been in business for less than 5 years.

#### 4.2.7 Frequency in tendering

The respondents were further asked to indicate how often they participated in the government tendering and procurement processes and Figure 4.4 present the findings.



**Figure 4.4: Frequency of Participation in Public Tendering**

The study established that a majority (38.3%) had participated a few times, 31.8% had participated regularly, 16.1% participated just once and 10.3% very regularly as shown in Figure 4.4 above. This trend was confirmed by government practitioners who were interviewed by this study. This is partially linked to the functioning of the Public Procurement and Disposal Act of 2005 and other supportive Regulations that control public procurement market in Kenya.

### 4.3 Reliability Analysis

Reliability of a measure indicates the extent to which it is without bias (error free) and hence ensures consistent measurement across time and across the various items in the instruments.<sup>391</sup> It is therefore, an indication of the stability and consistency with which the instrument measures the concept and helps to assess the goodness of a measure. In this study, Cronbach's alpha which is a reliability coefficient was used to indicate how well the items in the set are correlated to each other.<sup>392</sup>

<sup>391</sup>John A. Orodho, *Essentials of Educational and Social Sciences Research Methods*, 2010. Nairobi: Masola Publishers..

<sup>392</sup>L.J. Cronbach, *My Current Thoughts on Coefficient Alpha and Successor Procedures*, 2004. Washington, D.C: Educational and Psychological Measurement.

The Cronbach's alpha was computed in terms of the average inter-correlations among the items measuring the concepts. Cronbach's alpha was used to measure reliability. This was done on the 8 topical dimensions that were of interest in this study. For validity tests factor analysis was used to reveal whether the dimensions were indeed tapped by the items in the measures. Table 4.4 presents the findings.

**Table 4.4: Cronbach Reliability Analysis**

<b>Dimensions</b>	<b>Number of Items</b>	<b>Cronbach's Alpha</b>
Challenges facing legal reforms	7	0.580
Weakness of the public procurement law	7	0.724
Tender requirement challenges	6	0.642
Ways of addressing procurement challenges	9	0.842
Procurement related malpractices	8	0.795
Ways of patronage manifestation	7	0.840
What encourages corruption in public procurement	6	0.797
Ways of addressing weaknesses in public procurement	9	0.867

As shown in Table 4.4 above, the Cronbach's alpha results were ranging between 0.580 and 0.867 and therefore the construct were acceptable. An examination of the item-to-total correlations revealed no items that detract from the scale. Further examination of item statistics identified no items that suppress the alpha level. Based on the statistical analyses, the instrument appears to be a fairly reliable measure to establish the influence of political patronage on the operationalisation of public procurement law in Kenya.

#### **4.4 The Influence of Leadership on Law, Institutions and Policy in the Public Procurement**

The development of the law and related reforms in public procurement sector in Kenya has not been without challenges.<sup>393</sup> This study sought to identify some of the challenges facing

<sup>393</sup> Annika Engelbert, Nina Reit & Laurence Westen, "Procurement Methods in Kenya: A Step Towards Transparency?", *European Public Private Partnership Law Review*, 2012.

legal reforms in the sector. To establish the challenges, descriptive analysis was done on 7 items to investigate the variable relationship between the items and establish patterns of responses. Table 4.5 presents the findings.

**Table 4.5: Factor Analysis and description of Challenges Facing the Public Procurement Law**

<b>Dimensions</b>	<b>Analysis N</b>	<b>Mean</b>	<b>Std. Dev</b>
Lack of respect for the rule of law	285	1.80	0.94
Impunity in the public sector	285	2.10	1.01
Lack of political goodwill to undertake the necessary procurement reforms	285	2.02	0.96
Shortcomings of the Public Procurement Law	285	2.40	1.10
Institutional weaknesses in public procurement sector	285	2.30	1.07
Weaknesses of Public Procurement Administrative Review Board	285	1.90	0.98
High Court weaknesses in procurement appeal cases	285	1.70	0.87

As shown in Table 4.5, the 7 items were analyzed from the 285 respondents and the mean was between 1.70 and 2.40 from a five point Likert scale where 1 was strongly agreed and 5 strongly disagreed. The standard deviation was between (0.87) and (1.10). The study further established the trend of responses on the challenges facing the Public Procurement Law based on percentages. The response given was based on the Likert scale through which the respondents rated the extent to which they agreed with the given aspects which were indicators of the identified factors on a scale of 1 – 5 where 1 was strongly agree and 5 was strongly disagree and Table 4.6 presents the findings.

**Table 4.6 Challenges Facing the Public Procurement Law based on Percentage**

<b>Challenges Facing the Public Procurement Law</b>	<b>SA</b>	<b>A</b>	<b>U</b>	<b>D</b>	<b>SD</b>
Lack of respect for the rule of law	46.0%	38.5%	10.7%	2.3%	2.6%
Impunity in the public sector	27.5%	49.7%	13.4%	5.9%	3.6%
Lack of political goodwill to undertake the necessary procurement reforms	31.3%	42.5%	19.2%	4.0%	2.7%
Shortcomings of the Public Procurement Law	27.3%	36.8%	25.4%	10.4%	4.7%
Institutional weaknesses in public procurement sector	23.6%	45.1%	26.8%	11.3%	3.3%
High Court weaknesses in procurement appeal cases	22.1%	39.8%	27.5%	12.1%	4.4%
Weaknesses of Public Procurement Administrative Review Board	19.7%	40.6%	28.1%	13.1%	3.9%

#### **4.4.1 Lack of Respect for the Rule of Law**

Lack of respect for the rule of law and political interference in public procurement was cited as the greatest challenge facing the implementation of PPDA of 2005 by 46.0% of the respondents. When there is perceived weakness in the law or institutions thereof, it is a leeway for political patronage either positively or negatively. This finding was corroborated by case law and documented evidence in the public domain which highlight patronage on key institutions charged with the responsibility of over sighting the work of the executive. Analysis of some of the case laws and documented evidence is presented here below.

##### **(a) Appointment of Inspector General of the National Police Service in March 2015**

Pursuant to Article 245(2)(a) of the constitution which states that, “The Inspector General is appointed by the President with approval of Parliament...” and Section 12(1) &(2) of the

National Police Service Act, 2014, the President has the discretion to nominate a candidate to the post of IG while parliament has the role to vet the nominee. In this case, the vetting of the IG was done by a joint Committee of the Departmental Committee on Administration and National Security of the National Assembly and the Standing Committee on National Security & Foreign Relations of the Senate in February, 2015<sup>394</sup>.

During the vetting exercise, it was established that the nominee for the post of IG had a first degree which is not recognized in Kenya as required by Section 11(3) of the National Police Service Act, 2011. The chairman of the Commission for Higher Education in Kenya appeared before the Committee undertaking the vetting and submitted that the candidate in question indeed had no valid first degree. However, the Committee went out of its way to approve the nominee against the provisions of Section 11(3) of the National Police Service Act, 2011.<sup>395</sup> Two members of the Committee interviewed by this study confided that, a meeting was held in a city hotel in the evening preceding the debate on the report of the vetting of the IG candidate in Parliament. In that meeting, it was alleged that members were whipped into supporting the ‘preferred government’ candidate. Perhaps, this explains why the candidate sailed through in Parliament despite the glaring anomaly in his academic qualifications. This clearly points to a case of arm-twisting of Parliament by the Executive.

One may wonder the relevance of the case to this study. The study takes the position that public procurement entails the acquisition of goods, works and services for public use<sup>396</sup> and therefore, employment of public officers falls within this ambit. This study further submits that, when the government procures the services of a person without proper

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<sup>394</sup>See the Report of the Joint Committee of the Departmental Committee on Administration and National Security of the National Assembly and the Standing Committee on National Security & Foreign Relations of the Senate in February, 2015. Nairobi. Also see Africa News Service, “*Senate, MPs Committees Approve Boinett As IG*”, Africa News Service, March 4 2015 Issue

<sup>395</sup> Washington International University where the nominee candidate for the post of IG got his first degree is not recognized by the Council for Higher Education Accreditation (CHEA) which is the American equivalent of the Commission of University Education. The University is also not recognized by the Distance Education and Training Council (DTEC) in the USA which is the body responsible for accreditation of institutions in the country. This observation was made upon clarification from the Chief Executive Officer of the Commission for University Education.

<sup>396</sup>Mawuko Dza, Rod Gapp, and Ron Fisher, "Taking the professionalism out of the profession: a study of procurement and Africa", *International Journal of Procurement Management*, 2015.



qualifications, that person is likely to be compromised in their discharge of duties. The person may also procure services without due consideration to the law because they are a product of a similar process. Such a person owes their allegiance to the executive and may not independently execute the functions of their office since they may be taking instructions from those who influenced their appointment to the position.

This case illustrates political patronage and manipulation of the institution of Parliament in its oversight duties by the executive using the ethnic card in disregard of the existing law. The study takes cognisance of the provisions of Article 10 of the Constitution [2010] on *National Values and Principles* and Chapter 6 on *Leadership and Integrity*. This brings out strongly the influence of political environment to the functioning of the law and institutions thereof in line with the objectives of the research.

**(b) Kenya Airports Authority (KAA) v Anhui Construction Engineering Group of China of March 2012**

Informants at the PPAB highlighted this observation and quoted the case of *Kenya Airports Authority (KAA) v Anhui Construction Engineering Group of China of March 2012*.<sup>397</sup> Issues relating to this case were also a subject of a parliamentary debate where MPs questioned the role of the Transport Minister in the tender row.<sup>398</sup> According to the Parliamentary Hansard, the Minister was taken to task to explain his interest in the said tender after he allegedly ordered for the termination of the procurement proceedings against the provisions of the PPDA, 2005.

While responding to the issues raised on the floor of the house, the Transport Minister quoted the KAA Act which gave him powers “to approve any individual capital work whose estimated cost exceeds Sh.10 million” and may “give general directions to the Board relating to the operation of the undertakings of the Authority”. However, Section 5(1) of the PPDA, 2005 states that “if there is a conflict between this Act or the regulations made

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<sup>397</sup> Facts to this case are discussed in great detail under Section 5.4.3 is on the case of Kenya Airports Authority (KAA) v Anhui Construction Engineering Group of China of March 2012

<sup>398</sup> Kenya Parliament Hansard, *Debate on the Tender for the Construction of Green Terminal at the JKIA*. (August 28<sup>th</sup>, 2012).

under this Act and any other Act or regulations, in matters relating to procurement and disposal, this Act or the regulations made under this Act shall prevail.” Hence, the provision of KAA Act which gives the minister powers “to approve any individual capital work whose estimated cost exceeds Sh10 million” was in conflict with the PPDA and was thus null and void as regards this particular Tender for the Construction of Greenfield Terminal at the Jomo Kenyatta International Airport.

The PPDA of 2005 has clearly outlined those responsible on matters of procurement in all public entities. This mandate touches on the control of the entire procurement process. From the Act, procurement is purely a ‘managerial function’ as opposed to the hitherto position where the minister and the governing boards of state entities had both supervisory and executive authority over a procurement process.<sup>399</sup> From the foregoing, the PPD Act, 2005, therefore, limits the role of a minister to policy direction and once the line ministry approves a project or seeks cabinet approval for a project, it is the responsibility of the procuring entity to constitute a Tender Committee<sup>400</sup> to undertake and direct the procurement process. The Act may have taken this position in order to control and contain the political patronage and abuse of power witnessed previously in the management of public resources in the public procurement sector.<sup>401</sup>

The aforementioned position was affirmed by the Attorney General who advised KAA management against annulling the tender because such a move would have negative legal consequences because it lacked the backing of the law.<sup>402</sup> Initially, the KAA Board of Directors had supported the decision to award the tender to the Chinese firm but midway, with the exception of the Managing Director, they changed their position and supported

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<sup>399</sup>See Section 26(4)...(10) of the PPDA, 2005 on the establishment of the Tender Committees in terms of structure, composition, and procedure.

<sup>400</sup> Section 26(4) states that “a public entity shall establish a tender committee, procurement unit and such other bodies as are required under the regulations for the purpose of making such decisions on behalf of the public entity as are specified in this Act and the regulations.”

<sup>401</sup> In support of this view, one should take note of scandals like Anglo Leasing Security contracts, Goldenberg scandal, and other corruption related cases that may have informed the enactment of the Law.

<sup>402</sup> This was according to an informer from the Public Procurement Appeals Board who had the opportunity to hear and review the case of Kenya Airports Authority (KAA) v Anhui Construction Engineering Group of China of March 2012.

the minister who was calling for termination of the tender process. In a later press release, the KAA Board of Directors in trying to exonerate the minister reiterated that, “it is incorrect and unethical to insinuate that the Minister for Transport colluded with the KAA Board Chairman to cancel the procurement process”.<sup>403</sup>

This tender row led to the temporary illegal sacking of the then KAA Managing Director by the KAA Board of Directors because of the stand he took which was in apparent conflict with the Board’s position in regards to this matter. It took the intervention of the court and other stakeholders like Parliament for the Board to reverse its decision in an attempt to contain the rising public discontent in regards to this matter.<sup>404</sup>

When this case came before the Public Procurement and Review Board, the Board held that, “although the contract was not in place as such, it existed in legal sense.” The Review Board observed that KAA Management Board had erred in terminating the procurement proceedings and hence it had no choice but to proceed and sign the contract or face legal consequences. This case provides a classic example of how the political class and by extension, their appointees represented in this case by the KAA Board of Directors interfere with the workings and delivery of the Public Procurement Law against its envisaged objectives.

In this case, Procurement Law is clear with no ambiguity on the procurement process. The attempt to derail the process by the Minister through the KAA Board, therefore, serves an illustration of the influence of the executive and by extension the political elite to influence the law and the institution of KAA against the clear provisions of the law. This by extension hinders the workings and delivery of the said Law as postulated in the study framework and objectives.

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<sup>403</sup> This was in a paid-up advert by the KAA Board of Directors published by the Daily Nation issue of 23<sup>rd</sup> August, 2012.

<sup>404</sup> In Case No. 210 of 2012, Mr. Gichuki v KAA Board of Directors and the AG which never proceeded to full hearing after he was reinstated by the Board out pressure from various stakeholders.

#### 4.4.2 Lack of Political Goodwill in Support of Public Procurement Reforms and Institutions

Lack of political goodwill in undertaking comprehensive and far-reaching public procurement reforms and institutions was cited as the second greatest challenge facing the implementation of PPDA of 2005 by 31.3% of the respondents. In order to qualify this position, a scrutiny of the procurement reform trajectory is necessary. The Constitution, 2010, PPDA (repealed) and other related reforms took over two decades to actualize and solidify. This was a relatively long period taking into account the importance of this law in the management of public resources in the country. As noted elsewhere, public procurement takes about 60 percent of the country's projected annual budget.<sup>405</sup> It took a lot of prodding from the donor community, the civil society, and the general citizenry for the government to embrace legal, policy and institutional reforms in this sector.<sup>406</sup>

At one time, the donor community even made it an aid-conditionality in the 1990s and there were varied sanctions imposed on the country.<sup>407</sup> When these reforms finally came, they trickled in slowly starting with the Exchequer Regulations of 2001, the enactment of the PPDA (which came into force on 1<sup>st</sup> January 2007) and the accompanying regulations and finally the Constitutional anchorage of the procurement law in 2010<sup>408</sup>.

Closely tied to these procurement legal reforms was the broader constitutional review agenda which took equally long to be actualised. The constitution review process was fairly bumpy, and was characterized by political interference, varied interest and unending squabbles. The importance of this constitutional process was among others, to streamline the management of public resources in the country which encompasses public procurement

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<sup>405</sup>J.M.M. Akech, *Development Partners and Governance of Public Procurement in Kenya: Enhancing Democracy in the Administration of Aid*, 2005, Research Paper, NYU School of Law, Institute for International Law and Justice. Also see Peter M. Lewa and Susan K. Lewa, "Public Procurement Reform in Emerging Economies: A Case Study of Kenya", *Handbook of Business Practices and Growth in Emerging Markets*, 2009.

<sup>406</sup>*Ibid.*

<sup>407</sup>See Migai-Akech, 2005, 5(2).

<sup>408</sup>Article 227 of the New Constitution requires that, "when a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective".

systems. From the foregoing, lack of political goodwill and commitment to public sector reforms was and still remains a major obstacle in the management of public institutions.

This study further analysed the operations of the Ethics and Anti-Corruption Commission (EACC) as a means of showing how political patronage has interfered with the workings and delivery of independent offices which are critical in the management and oversight of public resources. It relies on a Petition No. 07 of 2015 regarding the removal of the chairperson and a member of the Ethics and Anti-corruption Commission (EACC) presented before Parliament under Standing Order No. 225. The Petition signed by one Oriaro Geoffrey, states that the chairperson, Mr. Mumo Matemu and a member, Ms. Irene Keino of the Ethics and Anti-Corruption Commission (EACC): “are in serious violation of the Constitution and Ethics and Anti-Corruption Act, the Anti-Corruption and Economic Crimes Act, and the Penal Code; have shown gross misconduct in performance of their functions and duties as Commissioners; and are incompetent in the management of the Commission.”<sup>409</sup>

The Petitioner prayed that:-“this House resolves that this Petition discloses grounds for removal of the named Chairperson and Commissioner under Article 251(a)(b) and (c) of the Constitution; and the National Assembly recommends to H.E. the President to appoint a tribunal to investigate the named Chairperson and Commissioner in accordance with the provision of Article 251(4) of the Constitution”.<sup>410</sup> Parliament received the petition, ascertained its compliance to the law, adopted it and recommended to the President the formation of a tribunal to investigate the said officers. Like others before him, Mr. Matemu left unceremoniously and so were the other commissioners who served with him. The story is the same for the short-lived chairman of the Commission who replaced him a Mr. Kinisu.

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<sup>409</sup> Republic of Kenya, in the Matter of Article 251 of the Constitution of Kenya and in the Matter of National Assembly Standing Order No. 230, Petition for Removal of Mumo Matemu and Irene Keino as Chairperson and Member Respectively of the Ethics and Anti-Corruption Commission (EACC), Petition No. 07 of 2015. Also see All Africa, “MPs Want Matemu, Keino Dismissed From EACC”, All Africa, April 22 2015 Issue

<sup>410</sup> See Republic of Kenya, Petition No. 07 of 2015, p. 1-2. Also see Africa News Service, “Parliament Report On EACC Chiefs Ouster Due in 14 Days”, Africa News Service, March 20 2015 Issue

In the eyes of Kenyans, the Commission is now perceived as a career destroying institution that requires divine intervention and that perhaps informs the hiring of a retired cleric as the new chairperson.

This study established that the EACC and its predecessors like the ACCK have never been allowed to work freely. An interview with key informants from EACC confirmed that, no chair of the Commission has ever exited the office gracefully. They were kicked out unceremoniously due to vested interests arising from the high profile corruption-related cases that they handled at the Commission. From John Harun Mwau to Aron Ringera, Patrick Lumumba, Mumo Matemu and Kinisu, all exited in disgrace.

From the foregoing, the study takes the position that, even the new-look leadership at the EACC may not deliver unless the underlying problem of political patronage is uncovered and dealt with because of the immense socio-economic and political vested interests in the institution. Further, the study is of the view that unless leadership in this country embraces the constitutional principles of good governance, more so as propagated in Article 10, Chapter 6 and Article 252, the objectives and delivery of such institutions like EACC are unlikely to be achieved. On the face value, such institutions and manpower therein may not have a problem per se but the challenges of non-performance may be attributed to the external influence of the political elite.

The high rate of turnover of the top leadership at the Commission is therefore, an indication of interference in the workings of the Commission leading to its inability to deliver on its mandate. This is a key institution which is supposed to help in enforcing the provisions of PPDA by investigating and prosecuting those who act outside the law. If it is moribund, then the law is helpless and prone to abuse.

#### **4.4.3 Political Patronage and Impunity in the Public Sector**

Political patronage and impunity in the public sector was cited as the third greatest challenge facing the implementation of PPDA of 2005 by 27.5% of the respondents. A review of certain sections of the Kenyan Constitution (repealed in 2010) vis-à-vis some

decisions of the past political leadership in the country was undertaken in order to corroborate these findings. Provisions of the repealed Constitution is used in this illustration out of an understanding that some of the weaknesses facing the public sector today stems from a weak yesterdays' constitutional order. In the repealed Constitution, Sections 23, 24 and 25 on the Executive Authority of the Government of Kenya bestowed absolute powers to the holder of the Office of the President of the Republic of Kenya. According to Section 23(1), "the executive authority of the Government of the Kenya shall vest in the President and, subject to this Constitution, may be exercised by him either directly or through officers subordinates to him".

Article 24 stated that, "subject to this Constitution and any other law, the powers of constituting and abolishing offices for the Republic of Kenya, of making appointments to any such office and terminating any such appointment, shall vest in the President". Clause 25(1) stated that, "save in so far as may be otherwise provided by this Constitution or by any other law, every person who holds office in the service of the Republic of Kenya shall hold that office during the pleasure of the President".

These provisions gave the holder of the office of presidency absolute executive authority over the management of public affairs and a direct control of who was appointed to hold which office in the Republic. This privilege was grossly abused in the successive regimes with many appointments to public offices in the country based on political affiliation, tribal and economic considerations and other connections to the appointing authority in total disregard of professionalism and meritocracy.<sup>411</sup> Majority of these appointments were made to reward loyalty, cronyism and to maintain control of public resources in government departments by the executive.

This therefore led people who presided over the management of public resources to be forced to toe the line and fulfill the wishes of the appointing authority. This could perhaps be the source of the network corruption and impunity that has engulfed public service

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<sup>411</sup>See Peter Anyang Nyong'o, 'State and Society in Kenya: The Disintegration of National Coalition and the Rise of Presidential Authoritarianism,' [1989] African Affairs 88(351).

institutions in Kenya since independence. This may have provided the leeway through which the executive has maintained control in the management of public procurement in the country through proxies.

Under the old Constitution, appointments to institutions supposed to fight corruption like the Judiciary, EACC, and the Police Service among others, were done by the same powers making it fairly difficult to prosecute high level corruption cases in the country. There are instances when cases filed in court were prematurely terminated by the Attorney-General while exercising powers bestowed on him under Section 26(3) of this Constitution which stated that, “the Attorney-General shall have power in any case in which he considers it desirable so to discontinue at any stage before judgment is delivered in any such criminal proceedings instituted or undertaken by himself or another person or authority.”

In the case of *The Republic of Kenya v Goldenberg International Ltd. and five others in the matter of Goldenberg-related criminal cases against businessman Kamlesh Mansukhlal Damji Pattni and five former senior Government and Central Bank of Kenya (CBK) officials*,<sup>412</sup> the then Attorney-General Amos Wako, moved to terminate the cases on February 25, 2003. This was in a move believed to have been prompted by the presidential appointment of a Judicial Commission of Inquiry into the controversial saga of the Sh.19.3 billion Goldenberg scam.<sup>413</sup> This happened against a backdrop of serious doubts in the minds of many Kenyans who felt that, the AG was not interested in the prosecution of Goldenberg related cases because they touched on who-was-who in the former President Moi’s regime.<sup>414</sup>

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<sup>412</sup>High Court Misc. Application No. 264 of 2001. Also see Africa News Service, “Wako Stops All Goldenberg Cases”, Africa News Service, Feb 26 2003 Issue

<sup>413</sup> Boniface Kaona, *Kenya: Wako Stops All Goldenberg Cases*, (February 26, 2003). The Standard Newspaper, p.1-2. Also see Africa News Service, “AG Enters Nolle Prosequi in Goldenberg Cases”, Africa News Service, Feb 25 2003 Issue

<sup>414</sup> In a nutshell, Goldenberg Affair was a series of business deals or alleged business deals revolving round various economic schemes to wit, Export Compensation, Pre-shipment Finance, Retention Accounts, Forex Cs, Spot and Forward Contracts, cheque kiting and outright theft. The transactions were allegedly either illegal or irregular and were regarded as fraudulent. See High Court Misc. Application No. 264 [2001], *supra* note 171.



In one of the Goldenberg Commission of Inquiry sessions,<sup>415</sup> a former chairperson of the Law Society of Kenya (LSK), expressed displeasure regarding the Attorney-General's earlier stand on a private prosecution of those alleged to have been principals in the Goldenberg scandal. Dr. Willy Mutunga, in a replying affidavit stated the position of the Law Society of Kenya as follows:

Protracted delays in these proceedings leading to mention followed by mentions, adjournments followed by adjournments and eventually dramatic withdrawal of all the cases by the Attorney-General will result. My Lords, I think history has vindicated the position of the Law Society of Kenya. My Lords, history recalls also that the Attorney-General then signed a preliminary objection that the Law Society of Kenya had no *locus standi*, and the same was upheld by the presiding Magistrate Uiter Kidullah who said in her ruling: 'The only knowledge the Law Society of Kenya seems to be acquiring is that relating to stealing from clients and telling them to pay exorbitant fees on the pretext that so much is needed for the trial magistrate or Judge.'<sup>416</sup>

Another former LSK chairman, Mr. Ahmednassir Abdullahi, submitted to the Goldenberg Commission of Inquiry as follows:

Second, we must appreciate and investigate why the Government, despite its enormous resources and legal powers failed to prosecute the principals of this crime. The role played by the office of the Attorney-General which in a way led to the formation of this Commission of Inquiry, must in our view be appreciated, addressed and investigated. My Lords, third, it is the view of the Law Society of Kenya that you must consider why the courts initially ruled in favour of the Central Bank and then continued to rule against it for the past eight years when the facts have remained constant.

In a way, therefore, Section 26(3) of the old Constitution, by giving the Attorney General unchecked discretion to terminate cases at any stage, encouraged impunity in governance and public administration. This is because there was no constitutional checks-and-balances to ensure that the AG only acts in the best interest of the public.

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<sup>415</sup>See Republic of Kenya, *Report of the Judicial Commission of Inquiry into the Goldenberg Affair*, (2005, October). p.26 and/or Appendix "A" of the Report.

<sup>416</sup>Text opening session of the Goldenberg Commission of Inquiry by the Law Society of Kenya, Appendix C, P.175.

Mr. Ahmednassir Abdullahi's prayer for the Commission of Inquiry to determine why the courts initially ruled in favor of the Central Bank and then continued to rule against it when the facts have remained constant, is an indication that there could have been patronage of the judicial process in looking into the Goldenberg scandal. Abdullahi further stated as follows:

My Lords, the previous Government, through the Attorney-General, exhibited pathological fear not to solve the Goldenberg case, and the Law Society of Kenya welcomes this Commission that will hopefully provide answers to the thousands of questions that remain unanswered over the Goldenberg scam. For the last ten years, the Goldenberg cases, whether civil or criminal, have jammed the congested corridors of our judicial system. Case after case often came to our courts usually on the same issue, but at times leading to different results. The cases have muddled the jurisprudence of our courts. For those of you who were students of jurisprudence of the Goldenberg cases, you will recall that initially during the tenure of Hon. Chief Justice Cockar, the decisions of court went one way and the Central Bank won most of the cases. However, when the late Justice Chesoni assumed the office of the Chief Justice, the jurisprudence of the courts went the very opposite direction, and the Central Bank lost most cases, notwithstanding the fact that the Judges remained the same and the facts were constant. Justice Chunga's tenure as Chief Justice was a mere continuation of Justice Chesoni's tenure in so far as those issues are concerned....<sup>417</sup>

In this submission, it can be deduced that the past leaderships in the judiciary influenced the outcome of Goldenberg-related cases. This could also be the case in many other criminal and civil cases that came before the courts in which the State had interest. From the foregoing, this study is of the view that under the old constitutional dispensation, executive control was absolute and vested in the Presidency. The resulting authority and by extension the political patronage was therefore, legal and official. This gave the Executive and the political elite the power to micro-manage institutions with finality. However, the Constitution (2010) has attempted to address some of these challenges by considerably checking the powers of the executive in the appointment of public officers.

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<sup>417</sup>See *Report of the Judicial Commission of Inquiry into the Goldenberg Affair*, (2005, October). p.26 and/or Appendix "A" of the Report.

Under the current constitutional dispensation, there has been an attempt to institutionalize executive authority as opposed to the old constitutional order where the President had all the powers to make appointments to public offices without checks and balances.<sup>418</sup> In the Constitution, the President exercises the executive authority of the Republic with the assistance of the Deputy President and Cabinet Secretaries.<sup>419</sup> While doing so, the President is required to uphold the spirit of the Constitution and the rule of law.<sup>420</sup> By law, the President is required to make appointments to public offices after approval by Parliament effectively eliminating roadside declarations that used to characterize public appointments in the past.<sup>421</sup>

*Muslims for Human Rights (MUHURI) & 2 Others V Attorney-General & 2 Others [2011] in the High Court Petition No. 7 of 2011 at Mombasa* in the matter of alleged contraventions of *Fundamental Rights and Freedoms* enshrined and protected under the provisions of the Constitution of Kenya, namely Article 1, 2(1), (2), (4), 3(1), 4, 10,11,12(1), 19, 20, 22, 23, 165, 258 and 259 by the President of the Republic while he nominated for appointment, Mr. Justice Alnashir Visram as Chief Justice, Prof. Githu Muigai as Attorney General, Mr. Kioko Kilukumi as Director of Public Prosecutions (DPP) and Maj. General Michael Gichangi as the Director General of National Security Intelligence Services (NSIS).<sup>422</sup>

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<sup>418</sup> Article 130(1) and (2) on the National Executive Authority states that, “The national executive of the Republic comprises the President, the Deputy President and the rest of the Cabinet and that the composition of the national executive shall reflect the regional and ethnic diversity of the people of Kenya”.

<sup>419</sup> Article 131(1) on the Authority of the President as the Head of State and Government states that, “the President shall exercise the executive authority of the republic with the assistance of the Deputy President and Cabinet Secretaries”. Also see Africa News Service, “*What Democracy Should Mean in the Conduct of National Defence [opinion]*”, Africa News Service, Nov 7 2011 Issue

<sup>420</sup> Article 131(2) states that, “the President shall uphold the spirit of the Constitution and the rule of law”.

<sup>421</sup> Article 132(2) on *Functions of the President* indicates that appointments to public offices are to be made with the approval of the National Assembly.

<sup>422</sup> *Muslims for Human Rights (MUHURI) & 2 Others V Attorney General & 2 Others [2011] in the High Court Petition No. 7 of 2011 at Mombasa* in the matter of Articles 1, 2(1) (2) (4) 3(1), 4, 10, 12(1)(A),19, 20, 22, 23, 165, 258 and 269 of the Constitution of Kenya; and in the matter of: alleged contravention of fundamental rights and freedoms under the Constitution of Kenya 2010 to wit contrary to Articles 10,19,21,22,23; and in the matter of: contravention or breach of the Constitution of Kenya to wit, Article 258; and in the matter of: the interpretation, implementation and enforcement of the Constitution of Kenya to wit Article 259; between Muslims for Human Rights (MUHURI) [1st Petitioner], Khelef Abdulrahman Khalifa [2nd Petitioner], and Ndungu Wainaina [3rd Petitioner] Versus the Hon. Attorney General [1st Respondent], the Judicial Service Commission [2nd Respondent], and the Director General, National Security Intelligence Service [3rd Respondent].

The Petitioners prayed for: a) a declaration that the 1<sup>st</sup> Respondent has the duty to advise the Executive, especially the President that they are bound by the Constitution at all times and regarding all matters of state; b) a declaration that the 2<sup>nd</sup> Respondent is obligated to originate through a competitive process of a name or names of persons recommended to be nominated by the President, with the requisite consultation with the Prime Minister during the transitional period recognized under the Constitution ; c) a declaration that the President and the Prime Minister must consult on the state appointments established by the Constitution and that in event there is no concurrence in the consultations, a written memorandum be presented to Parliament with the details on convergence and divergence; d) a declaration that the reappointment of Maj. General Michael Gichangi as the Director General of the 3<sup>rd</sup> Respondent<sup>423</sup> is singularly unlawful, illegal and unconstitutional in that it failed to adhere to the Constitution of Kenya and instead was based on the statute which is overtaken by the Constitution; and e) an order that the position of Director General, NSIS be advertised and filled in accordance with the Constitution and more particularly Article 232(1)(g),(h), (i) and (2) thereof.

Justice M.K. Ibrahim, in his ruling dated and delivered at Mombasa on 23<sup>rd</sup> day of February, 2011, made the following orders:

.... a) do hereby dismiss the purported Conservatory Orders sought against the 3<sup>rd</sup> Respondent, the Director General, NSIS in Prayer 1 of the application. b)..... a Conservatory Order be and is hereby issued against the publication of the names of Mr. Justice Alnashir Visram, as a person nominated for consideration as the Chief Justice of the Republic of Kenya..... For the avoidance of doubt, it follows that it is hereby ordered that the Attorney General and the Judicial Service Commission whether acting on their own respectively or jointly or through their servants, and/or agents or otherwise howsoever be restrained and a Conservatory Order is hereby granted restraining them or each of them from acting in pursuance of implementing and/or enforcing the said appointment or any consequential purported validation and/or approval by any person, body or authority acting in pursuance of or subsequent to the said appointment

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<sup>423</sup> Maj. General Michael Gichangi was reappointed by His Excellency President Mwai Kibaki on 15<sup>th</sup> January, 2011 through a Gazette Notice No. 450 published in the Kenya Gazette Notice of 21<sup>st</sup> January, 2011. See Appendix D.

herein..... c) .....a Conservatory Order be and is hereby issued restraining the 1<sup>st</sup> Respondent on behalf of the Government of Kenya from presenting or in any way publishing names of any person including those of Prof. Githu Muigai and Kioko Kilukumi as persons nominated to fill the position of Attorney General or Director of Public Prosecutions respectively ..... For the avoidance of doubt, it follows that it is hereby ordered that the Attorney General whether acting on his own or through his servants and/or agents or otherwise howsoever be restrained and a Conservatory Order is hereby granted restraining them or each of them from acting in pursuance of implementing and/or enforcing the said appointments or any consequential purported validation and/or approval by any person, body or authority acting in pursuance of or subsequent to the said appointments.....

The president was forced to withdraw his nominees for the positions of Chief Justice (CJ), Director of Public Prosecutions, Attorney-General and the Controller of Budget due to the fact that he did not follow the due process of law while nominating people to serve in those offices. The ruling stated that, “all persons, institutions or public officers are bound by the provisions of the Constitution. Therefore, the appointments referred to herein above were made without due regard to the Constitution”. In annulling the appointments, the Judge held that:

.....in failing to uphold the Constitution with regard to appointments of State officers as stated above, in the context of competitive sourcing of candidates for nomination, active, meaningful and principled consultations during the transitional period recognized by the Constitution, then any nomination and purported appointment is illegal, unlawful and unconstitutional thus null and void.<sup>424</sup>

The Court held that:

.....by the time of the appointment of the Hon. Justice Alnashir Visram as a person to take up and fill the office of the Chief Justice of the Republic of Kenya, the legislation for the vetting of Judges who are in office to continue to serve in the Judiciary had not been passed, or enacted or legislated by Parliament..... This court takes judicial Notice of the fact that

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<sup>424</sup> Article 23 of Schedule 6 of the Constitution which deals with the vetting of Judges provides as follows:- “23 (1) Within one year after the effective date, Parliament shall enact legislation, which shall operate despite Article 160, 167 and 168 establishing mechanisms and procedure for vetting, within a time-frame to be determined in the legislation, the suitability of all judges and magistrates who were in office on the effective date to continue to serve in accordance with the values and principles set out in Articles 10 and 159.”

no Judge including the Hon. Justice Alnashir Visram has been vetted in accordance with the Constitution..... It is therefore important to determine.....: (i) whether the President could in law under the Constitution appoint the Hon. Justice Alnashir Visram as the Chief Justice of Kenya before the law for vetting of Judges had been passed; (ii) whether the President could in law under the Constitution appoint the Honorable Alnashir Visram before he was vetted as to be able to continue to serve as a Judge in the first place before he was legible to be appointed as the Chief Justice; and (iii) whether such an appointment in the circumstances was in accordance with the values and principles set out in Articles 10 and 159 and including but not limited to the principles of non-discrimination, equity and inclusiveness vis-à-vis the other Judges of the Court of Appeal and the High Court who have equal and similar rights to aspire for and fairly compete for the office of the Chief Justice of the Republic of Kenya.

A declaration that the nomination of the named person to the office of the Chief Justice was unlawful, illegal, unconstitutional null and void *ab initio* implies that His Excellency the President did not comply with and/or adhere to the provisions of Section 24(2) of Schedule 6 of the Constitution of Kenya 2010 when he appointed the Hon. Justice Alnashir Visram to the office of the Chief Justice of the Republic of Kenya.

Similarly, when the nomination of the named persons to the offices of the Attorney General and Director of Public Prosecutions were annulled, it implies that the President also failed to comply with and/or adhere to and be guided by the provisions of Section 29 (1) and (2) of the 6<sup>th</sup> Schedule of the Constitution of Kenya, 2010, when he appointed Prof. Githu Muigai and Mr. Kioko Kilukumi to the offices of the Attorney General and Director of Public Prosecutions respectively.

In this ruling, the Court upheld the principle of fidelity to the Constitution.<sup>425</sup> This ruling further implied that, the *National Values and Principles of Governance*,<sup>426</sup> as set out in

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<sup>425</sup> The Attorney General is bound by the Constitution under Article 156 (6) to promote, protect and uphold the Rule of law and to defend public interest.

<sup>426</sup> The National Values and Principles of government include: a). patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; b) human dignity, equity, social justice, inclusiveness, equality, human rights, non- discrimination and protection of the marginalized; c). good governance, integrity, transparency, and accountability; and d). Sustainable development.

Article 10 of the Constitution,<sup>427</sup> bound the President, the Prime Minister and Parliament in considering the ultimate appointment of state officers to the offices of the Chief Justice, Attorney General and the Director of Public Prosecutions. Article 10 of the Constitution binds all State organs, State Officers, public officers, and all persons to interpret the Constitution correctly.

This matter led to wide public and national debate and was a subject of debate and proceedings in the National Assembly. Parliament also returned a *NO* verdict over the same matter and ordered that the names be taken back to the appointing authority. While doing so, Parliament demanded strict adherence to the letter and the spirit of the Constitution.

The Judicial Service Commission and a special committee chaired by the Secretary General of Central Organization of Trade Unions (COTU), were mandated to spearhead a competitive selection process for the Chief Justice and Director of Public Prosecutions respectively as per the requirement of the law.<sup>428</sup> This process culminated into the appointment of a new CJ, the DPP and the Controller of Budget. The President and the Prime Minister later consulted to appoint the new Attorney General.<sup>429</sup> In all these appointments, there were adequate consultations, public participation and vetting to the satisfaction of the public.

The foregoing analysis shows the extent to which the Constitution (2010) has altered the management of public affairs in the country by ushering in the principles of transparency and accountability in the public service. Appointments to these offices are now characterized by a competitive process with an attempt to meet the stringent requirements of Chapter 6 of the Constitution on Leadership and Integrity. Those aspiring for these

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<sup>427</sup> Article 10 of the Constitution provides as follows:- “National Values and Principles of governance in this Article binds all state organs, State Officers, public officers and all persons whenever any of them: a. applies or interprets this Constitution; b. enacts, applies or interprets any law; or c. makes or implements public policy decisions.

<sup>428</sup> Article 166(1) of the new Constitution on the Appointment of the CJ and Article 228 on the appointment of Controller of Budget.

<sup>429</sup> This is in accordance to Article 229 of the Constitution and the National Accord that required the President and the Prime Minister to consult on all principal appointments.

offices are now required to submit certificates of compliance from EACC, Kenya Revenue Authority (KRA), Certificate of Good Conduct from the police, clearance certificate from Higher Education Loans Board (HELB), clearance from Credit Bureau among other requirements. The Constitution has ushered in a new era of the management of public affairs in the country.

The Muslim for Human Rights Case serves to illustrate the extent to which the Executive and by extension the political elite are prepared to go out of their way to influence public appointments to their favor irrespective of the provisions of the law. This manipulation can only be explained by their intent to protect their perceived interests in those key institutions for purposes of control, direction and management of the same. It is hoped that this new era that promotes the rule of law and enhances transparency and accountability in the management of public affairs as illustrated by competitive recruitment processes, where public participation and approval has been embraced, should be replicated at all levels of civil service in the country.

#### **4.4.4 How Political Patronage/Leadership Undermines the Workings and Delivery of Institutions in Public Procurement**

Various weaknesses were identified in the public procurement-related institutions that seem to affect their delivery. These weaknesses were made worse when infiltrated by vested interests from the political elite. 23.6% of the respondents cited this as a major challenge. This finding was corroborated by cases of non-performing enabling institutions like the EACC, the Judiciary and the PPARB among others.

##### **(a) A Review of the Performance of the EACC**

This study undertook a review of the EACC as established by the new Constitution<sup>430</sup> and operationalised by the Anti-Corruption and Economic Crimes Act, 2003. As noted

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<sup>430</sup>Article 79 of the new Constitution states, “Parliament shall enact legislation to establish an independent ethics and anti-corruption commission, which shall be and have the status and powers of a commission under Chapter 15, for purposes of ensuring compliance with, and enforcement of, the provisions of Chapter 6 on Leadership and Integrity.”



elsewhere in this study, it is hereby submitted that, EACC has never delivered as per its envisaged mandate.<sup>431</sup>The blame game has been that the Attorney-General under the old constitutional order and now the Director of Public Prosecutions (DPP) under the Constitution (2010) have been frustrating the efforts of the Commission by their inability to prosecute cases forwarded to them.<sup>432</sup>On this account, EACC is on record as having sought prosecutorial powers to circumvent this challenge. Whichever the case, this Commission has greatly failed the Kenyan people. Since its inception, the Commission has remained largely moribund and ineffective in its mandate to deal with corruption cases in this country.<sup>433</sup>

The judiciary has had its share of the blame as well. Most of the high level procurement-related corruption cases have ended up flopping for lack of evidence contrary to public knowledge and awareness.<sup>434</sup> Even the performance of the special Anti-Corruption Courts has been lackluster and still leaves a lot to be desired.

#### **(b) A Review of the Performance of the PPOA and PPOAB**

The PPOA performance has also been wanting in terms of policy formulation and oversight duties. Hardly is the Authority ever heard and felt in matters of public procurement, yet it is essentially supposed to be the mouth piece in this sector.<sup>435</sup> From the two informants, PPOA has remained largely a department of the Ministry for Finance. This means that it lacks independence which greatly compromises its envisaged role in the development of procurement policies because of the patronage from the Ministry.

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<sup>431</sup> The Anti-Corruption and Economic Crimes Act, 2003 was enacted to provide for the prevention, investigation and punishment of corruption, economic crime, and related offenses.

<sup>432</sup> Migai Akech, "Abuse of power and corruption in Kenya: Will the new Constitution enhance government accountability?", *Indiana Journal of Global Legal Studies*, Wntr 2011 Issue. Also see KACC Corruption Perception Report of 2009 which indicated that the Attorney General had declined to prosecute majority of the cases forwarded to him citing lack of evidence contrary to the position taken by the Commission.

<sup>433</sup> The Petition for the Removal from Office of the Chairperson and Vice Chairperson of the Ethics and Anti-Corruption Commission was adopted by the National Assembly in April, 2015.

<sup>434</sup> See High Court Misc. Application No. 264 of 2001. at supra note 171. See also Anti-Corruption Case no. 8 of 2005 terminating the Anglo-Leasing and Finance Limited related cases.

<sup>435</sup> Section 9(a) to (e) is on the mandate and functions of the Authority. Among these functions is the monitoring, evaluation, providing advisory opinion, and ensuring that the procurement processes are complied with among state entities.

Alongside this criticism, the Oversight Advisory Board has also been largely ineffective and therefore, unable to discharge its functions as established under Section 23 of the Act.<sup>436</sup> Appointments to the Board are done through selection of names forwarded to PPOA from various professional bodies in the country and representatives of specific government ministries. According to the PPOA sources who informed this study, the Minister for Finance still has a leeway to appoint the people he wants to the Board. This study was informed that the Minister can easily lobby for the people he wants appointed to the Board by simply using the representative from his office and that of the AG Chambers and the DG of PPOA.

PPOA is heavily underfunded yet its mandate and expectations are high. The feeling from the study informants is that for it to function effectively, it would require strong funding and capacity building to the equivalence of other commissions like the EACC since they play more or less the same functions and role. One informant indicated that in most cases, the EACC requests the Authority to conduct investigations on their behalf on matters relating to public procurement. The study established that the PPOA is currently operating on a budget of about Kshs. 400 million as allocated in the 2015-2016 financial year.<sup>437</sup> This challenge is likely to increase with the new devolved structure of governance where the Authority is expected to have its presence in the 47 Counties.<sup>438</sup>

### **(c) High Court Weaknesses in Handling Procurement Appeal Cases**

High Court weaknesses in handling procurement-related appeal cases were cited as a challenge facing the implementation of PPDA by 22.1% of the respondents. This can be understood from an informant interview with a staff of the PPARB at the PPOA who expressed concern and misgivings that there is no dedicated High Court established to

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<sup>436</sup> Section 23 of the Act states, “The functions of the Advisory Board are: to advise the Authority generally on the exercise of its powers and the performance of its functions; to approve the estimates of the revenue and expenditures of the Authority; to recommend the appointment or termination of the Director-General in accordance with this Act; and to perform such other functions and duties as are provided for under this Act.”

<sup>437</sup> Republic of Kenya, ‘The National Budget for 2015/16 Financial Year,’ [2016] 3(129) accessed on 17th May 2016 at <http://www.kenyatreasury.gov/7/24/1094738/budget-estimates-2015-2016.pdf>

<sup>438</sup> *Ibid.*

handle procurement contract appeals. The informant gave an example of the Children's Court established to hear child-related cases or the Special Anti-Corruption Courts which preside over corruption-related cases at the High Court.<sup>439</sup> Section 100(2) of the Act provides for the right to judicial review in procurement cases where an aggrieved party may move to the High Court to contest the decision of the Review Board.<sup>440</sup> Section 100(4) stipulates that a judicial review should be determined by the High Court within thirty days.<sup>441</sup> While the Act stipulates that procurement appeal cases lodged before the Court should be dispensed within the duration of one month, the High Court has argued that their calendar cannot be determined from outside.

If procurement-related appeals were made before a special division of the High Court specifically mandated to hear procurement appeals, it then would be possible to expedite the cases and ensure judgments passed by courts of law are not rendered stale by the strict timelines stipulated in the Act. Currently, any appeals before the High Court follow the court time lines which stretch the cases beyond the one month stipulation.

In the case of NHIF vs MERIDIAN (2013) involving Richard Langat & 5 Others,<sup>442</sup> the judicial review application judgment was delayed because of Justice Isaac Lenaola's absence.<sup>443</sup> There are many other such cases of delayed justice in various courts of law throughout the country. This is a major weakness in the Kenyan Judiciary which has seen justice delayed not only in procurement-related cases but also in other categories. Justice delayed is justice denied.

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<sup>439</sup> Informant Number 1 is a senior member of staff at the Public Procurement Oversight Authority whose real names have been concealed to avoid victimization by the Authority.

<sup>440</sup> Section 100(2) of the PPDA states: Any party to the review aggrieved by the decision of the Review Board may appeal to the High Court and the decision of the High Court shall be final.

<sup>441</sup> Section 100(4) of the Act states: If judicial review is not declared by the High Court within thirty days from the date of filing, the decision of the Review Board shall take effect.

<sup>442</sup> NHIF vs MERIDIAN ACC 12/2013 Petition Application No. 363/2014; a conspiracy to defraud NHIF Kshs.126 million by entering into a contract to provide a medical scheme to civil servants involving Richard Langat & 5 Others.

<sup>443</sup> Further hearing of the case was been set for 30<sup>th</sup> March, 2016.

Further, appellants seeking stay of execution of contracts in the High Court are required to pay a fee.<sup>444</sup> Whereas this might have been a noble idea to discourage interested parties from delaying public procurement unnecessarily, which is a common phenomenon in the currently available appeals process at the Public Procurement Appeals Board (PPAB), it can also be used to defeat the course of justice. The cost as prescribed may be unaffordable to ordinary tenderers seeking a judicial review. Some of the latest projects falling prey to a disjointed and corrupt public procurement system include: procurement at the huge Olkaria Geothermal plant and the construction of Greenfield Terminal at the Jomo Kenyatta International Airport. The Geothermal project has been subjected to delays as companies haggle for a tender to supply electric rigs for drilling of wells in the proposed 280 MW power station.<sup>445</sup>

**(d) Weaknesses of the Public Procurement Administrative Review Board (PPARB)**

A further 19.7% of the respondents indicated that weaknesses of the PPARB were negatively impacting on the implementation of PPDA of 2005. The PPARB as currently constituted poses a major challenge to the envisaged procurement legal reforms.<sup>446</sup> The members of the Board lack security of tenure since they are seconded by their Professional Associations from which the Minister selects the members. From one of the informants, they lack the necessary legal expertise and experience to deal with the complexity of matters before them. The size and nature of public procurement would demand a competent Review Board which should ideally be a division of the High Court with equal powers and privileges. As noted above, this inadequate capacity is likely to negatively influence operations of the Appeals Board as devolved system of government continues to take effect.

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<sup>444</sup>See Section 106(3) states: A request for review shall be accompanied by the prescribed fee.

<sup>445</sup>See The Standard Newspapers (2012, 31<sup>st</sup> July) editorial column at *supra* note 106.

<sup>446</sup>Section 25 of the PPDA, 2005 states, “The Public Procurement Complaints, Review and Appeal Board established under the Exchequer and Audit (Public Procurement) Regulations, 2001 is continued under this Act as the Public Procurement Administrative Review Board (PPARB); The composition and membership of the Review Board shall be in accordance with the regulations; and the Authority shall provide administrative services to the Review Board.”

According to the study's informants, the tribunal has been overwhelmed by the magnitude and complexity of the cases brought before it due to its inadequate capacities as cited above and the restricted timelines within which it is supposed to conclude such cases.<sup>447</sup> The operations of the this Tribunal is further affected by the failure of High Court to comply with section 100(1) &(4) of the Act which gives the High Court judicial review powers on decisions of the Tribunal by dissatisfied parties. Such reviews are supposed to be concluded within 30 days of filing.<sup>448</sup> According to the informants, the High Court has never complied with this timeline arguing that it is a court of original jurisdiction with supervisory powers and as such, it cannot take instructions from insubordinate courts and tribunals.

This study holds the view that substantial reforms have been undertaken both in law, institutions and policy in the public procurement sector in Kenya. However, taking into account the dynamics of an ever changing society, no reforms can be perfect. The political patronage element in this study not withstanding therefore, there exist room for further reforms in law, policy and institutions therein. This observation is corroborated by the recent reforms in the Constitution in public procurement in relation to 30 percent affirmative action requirement on youth, women and persons with disabilities. We have also witnessed a replacement of the PPDA [2005] with the PPAD Act [2015] as per the requirements of Article 227 of the Constitution [2010].

From this analysis therefore, it is clear that the development and operationalisation of public procurement law has had its own challenges. The political leadership prefers amorphous and opaque procurement system, with weak or no legal and institutional framework, which provide easy opportunity for controlling public resources meant for the sector. The 'old order' has always preferred the *status quo* of the management of public resources. The study has further established technical shortcomings in the current PPDA as currently instituted that may require further reforms.

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<sup>447</sup> Section 97(1) of the PPDA states, "The Review Board shall complete its review within thirty days after receiving the request for the review. Section 97(2) states, "In no case shall any appeal under this Act stay or delay the procurement process beyond the time stipulated in the Act or the regulations".

<sup>448</sup>Section 100(4) of PPDA states, "If judicial review is not declared by the High Court within thirty days from the date of filing, the decision of the Review Board shall take effect".

The success of the institution of law greatly depends on the will of the political leadership to promote the culture of obedience to the law. Their actions greatly determine whether or not the citizens observe the tenets of fidelity to the law. If the leadership chooses to strictly enforce the law, then there will be the tendency to abide by the law among the populace. However, if there is laxity in the enforcement of the law, then there is a tendency by the citizenry to break or flout the rules. This in effect renders the law hollow. A good law will fail if not backed by the necessary moral support from the leadership. This outlines the connection between legal and moral philosophy as outlined in the theoretical framework informing the study.

#### **4.5 Political Patronage vis-à-vis Ethnicity and Nepotism in Public Procurement in Kenya**

In a bid to establish the extent to which ethnicity, nepotism and political patronage is entrenched in the public procurement in Kenya, a descriptive analysis was done on 7 related items and the variable relationship between the items were established together with the patterns of responses. Table 4.15 presents the findings.

**Table 4.7: Descriptive Analysis of Patronage Manifestation in Public Procurement**

<b>Dimensions</b>	<b>Analysis N</b>	<b>Mean</b>	<b>Std. Dev</b>
Unmerited appointment and hiring of public officers	254	1.61	0.942
Public officers taking directive from elsewhere	254	2.02	0.831
Tenderers having relatives, friends and cronies	254	1.76	0.912
Manipulation of tendering process for specific people	254	1.98	0.982
Public officers having secret proxy companies	254	2.03	1.036
Weak institutional framework for accountability	254	2.55	1.217
Existence of untouchable powerful cartel	254	2.20	1.069

From Table 4.15, a total of 254 respondents answered the question. The findings show that the average range from 1.61 to 2.55 on a Likert scale where 1 represented strongly agree and 5 strongly disagree. The standard deviation was from a low of 0.831 to a high of 1.217. In a bid to establish the extent of patronage manifestation in public procurement in Kenya,

the respondents were asked to state the extent to which they agreed with ways in which patronage manifest in public procurement and Table 4.20 presents the findings.

**Table 4.8: Ways in which Patronage Manifest in Public Procurement**

<b>Ways Patronage Manifest in Public Procurement</b>	<b>SA</b>	<b>A</b>	<b>U</b>	<b>D</b>	<b>SD</b>
Unmerited appointment and hiring of public officers	59.9%	27.6%	6.7%	3.7%	2.0%
Public officers taking directive from elsewhere	23.4%	57.5%	14.4%	2.7%	2.0%
Tenderers having relatives, friends and cronies	47.7%	36.4%	12.9%	0.3%	2.6%
Manipulation of tendering process for specific people	34.0%	38.0%	20.2%	6.1%	1.7%
Public officers having secret proxy companies	38.1%	35.5%	19.1%	3.3%	4.0%
Weak institutional framework for accountability	22.7%	28.0%	21.0%	22.7%	5.6%
Existence of untouchable powerful cartel	28.6%	35.7%	23.5%	9.5%	2.7%

As shown in Table 4.16, a total of 59.9% of the respondents agreed that unmerited appointment and hiring of public officers was a way patronage manifested in public procurement. A further 23.4% cited incidences of public officers taking directive from elsewhere (external influence) while 47.7% thought that tenderers having relatives, friends and cronies in various public procurement entities get leaked confidential information regarding specific tenders (bid rigging) as a way of patronising the process. The findings show that 34% of the respondents think that manipulation of the tender process gave undue advantage to specific candidates. 38.1% of the respondents view public officers having secret proxy companies which they use to tender as a way of patronizing the process while, 22.7% indicated that weak institutional framework which cannot hold perpetrators to account is another way. According to 28.6% of the respondents, the existence of untouchable powerful cartels in the public procurement sector, who are well connected politically is a common way of patronising the sector.

For decades, ethnicity and nepotism has been a challenge in the public sector in Kenya. Historically, the immediate post-colonial public service that the first Kenyan independent government inherited from the British was modeled according to the Westminster-

Whitehall tradition.<sup>449</sup> This was a public service that was guided by the professional ethics of impartiality, effectiveness and discipline in the management of public affairs.<sup>450</sup> Its primary function was to implement government policies efficiently and effectively, and in undertaking this function, it was expected to be non-partisan.<sup>451</sup> This type of public service fitted appropriately in the immediate post-colonial political system that Kenya adopted after independence.

At independence, Kenya adopted a parliamentary system of government whereby the Prime Minister was the head of government; the prime minister and his cabinet were answerable to parliament; the judiciary was independent; and the political process was based on competitive party politics involving more than one political party.<sup>452</sup> Besides these arrangements, the constitution also comprehensively devolved state power into a three-tier system of government that comprised the central government at the national level, regional governments and local authorities at the local level.

The immediate post-colonial public service is widely praised for its impressive ethical standards. However, it also had its own challenges. Odhiambo-Mbai [2003] identified three major weaknesses that plagued the service.<sup>453</sup> First, it was racially constituted as its top leadership was reserved almost exclusively for the white population; the middle grades were mainly occupied by the Asian community while the lower and subordinate positions were left for Africans.<sup>454</sup> Second, salaries and other benefits were discriminatory too. The white employees earned higher salaries and enjoyed better benefits followed by the Asians, while Africans earned lower salaries and got poor benefits.<sup>455</sup> Third, due to its historical background as colonial machinery, the public service put a lot of emphasis on the

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<sup>449</sup> G. Hyden, 'An African Governance Barometer? Measurement and Monitoring Issues' A Paper Prepared for the Workshop on the theme: *Indicators for Ministry Progress towards Good Governance in Africa* [Addis Ababa, Ethiopia; 20-22 September, 1999]. 2(48)

<sup>450</sup> C. Odhiambo-Mbai, Public Service Accountability and Governance in Kenya since Independence.

*African Journal of Political Science*, [2003] 8 (1), 118.

<sup>451</sup> *Ibid.*

<sup>452</sup> Odhiambo-Mbai, [2003] 118.

<sup>453</sup> Odhiambo-Mbai, [2003] 121.

<sup>454</sup> *Ibid.*

<sup>455</sup> Odhiambo-Mbai, [2003] 119.



maintenance of law and order as its key function as opposed to a more development-oriented.<sup>456</sup> This was widely seen as a variance with the actual public service needs of the independent government.

The independent government made an effort to address the above mentioned challenges in the public service by adopting a strategy called *Africanisation* or *Kenyanisation*. However, the strategy is believed to have been implemented haphazardly and ended up undermining accountability in the public service.<sup>457</sup> The implementation of the policy assumed an ethnic, nepotism and patrimonial dimensions where the first Africans who were appointed into the high-level positions that were left behind by the departing senior white colonial public servants were drawn mainly from the members of the then president's ethnic community.<sup>458</sup>

There was even further nepotism where the government was accused of giving the positions mainly to those who had close relations with those who controlled the State power.<sup>459</sup> Although it can be argued that most of those who were appointed to key positions had some level of experience in the areas in which they were appointed, a significant number of them were not qualified to fill those positions when they were appointed. This in effect undermined the principle of meritocracy in appointments and promotions in the public service. The present study sought to use this unfortunate historical development in the country's civil service to illustrate how political patronage invaded the service and why the review is relevant to this study. When one is appointed into a high position in public service without due regard to merit, he or she is similarly likely to ignore meritocracy when appointing or recommending a junior officer for promotion.<sup>460</sup> Consequently, it can be concluded that the wide-spread disregard for meritocracy as a major criterion in appointments and promotions and the patronage which has pervaded the public service over the years has its roots in the *Africanisation* policy. This can also inform our knowledge of where we are as a nation today.

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<sup>456</sup>*Ibid.*

<sup>457</sup> Peter Anyang Nyong'o, "State and Society in Kenya: The Disintegration of National Coalition and the Rise of Presidential Authoritarianism," [1989] *African Affairs* 88 (351).

<sup>458</sup>*Ibid.*

<sup>459</sup>*Ibid.*

<sup>460</sup>*See* Odhiambo-Mbai [2003] 119.

The beginning of *Africanisation* also coincided with certain major changes in the country's political system. Between 1964 and 1968, the government began a systematic amendment of the country's independence Constitution.<sup>461</sup> These constitutional amendments were mainly aimed at transferring State powers from the other branches of government, namely: the legislature and the judiciary to the executive, especially the presidency.<sup>462</sup> The change into a presidential and a unitary system of government under a single political party, together with the systematic constitutional amendments between 1964 and 1968 resulted into the concentration of State powers in the executive.<sup>463</sup>

The State powers were mostly exercised by the senior officials of the central civil service, government agencies and parastatal organisations.<sup>464</sup> This resulted into a very powerful civil service and parastatal organisations where the senior officers of these organizations became exceedingly influential more than the members of the legislature and the judiciary.<sup>465</sup> This power politics in the public service -referred to as political patronage in the present study-made it difficult for the legislature and the judiciary to offer checks and balances to the service. Naturally, it is difficult to have a less powerful entity watch over a more powerful one. Often, the latter will defy the earlier; this is what neutralised the Westminster-Whitehall tradition upon which the Kenya's independence public service was based.

The KANU ruling elite Africanised the senior positions in the public service mainly with those who were related or close to them to ensure that State power was held firmly in the hands of those who had direct loyalty to the person of the president and other individuals in the ruling class.<sup>466</sup> The main aim of this strategy was to establish a secure authoritative rule and unfortunately, it was successfully achieved after the 1969 general

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<sup>461</sup> C. Gerzel, 'The Politics of Independent Kenya, 1963 – 68,' [Nairobi: EAPH, 1970] 223.

<sup>462</sup> See Gerzel [1970] 228.

<sup>463</sup> See Odhiambo-Mbai [2003] 120.

<sup>464</sup> *Ibid.*

<sup>465</sup> *Ibid.*

<sup>466</sup> *Ibid.*

elections.<sup>467</sup> However, the control and exercise of authoritative power alone by this category of public servants was not a guarantee that their direct loyalty to the person of the president and other members of the ruling elite would be sustained permanently.

To ensure that the loyalty of this new crop of public servants to the person of the president was guaranteed and the status-quo was maintained, it was also necessary to make them have a stake in the economy. The 'Africanisation' of the economy provided the best opportunity for achieving this goal.<sup>468</sup> Thus, in 1970 the president appointed a commission to investigate the appropriate structure and remuneration of the public service. The commission which was headed by the then Governor of Central Bank, Duncan Ndegwa, after undertaking its task, submitted its report to the President in May, 1971.

One of the key recommendations of the commission was that, public servants could hence forth be allowed to own private property and run businesses.<sup>469</sup> This recommendation was a major departure from the known universal principle that does not allow professional public servants to own private property or engage in business because of the apparent conflicting interest. The Report further recommended that office of an Ombudsman be established to investigate and monitor the performance of public servants.

How the government was going to ensure that public servants did not abuse their positions in the process of trying to acquire private properties or run their own businesses became impossible, especially when the office of the Ombudsman also failed to be established. At any rate, permitting public servants to own private properties and run businesses resulted into corruption and abuse of public office that have continued to plague the public service to date.

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<sup>467</sup>*Ibid.*

<sup>468</sup>See Anyang Nyong'o [1989] p.79. para. 4.

<sup>469</sup>See Odhiambo-Mbai [2003] para. 2, p. 121, on appointment of Ndegwa Commission by the then President of the Republic of Kenya *Mzee* Jomo-Kenyatta.

Up to 1970, it was a necessary requirement that civil servants did not engage in trade or any other business.<sup>470</sup> This requirement, which was inherited from the colonial government, seems to have been based on solid assumption that it was not possible for a civil servant to give his best if he was serving two masters, namely; the public and his own material interests. Since the Ndegwa report broke this requirement, none can stand up and argue that efficiency of individual civil servants who took uncontrolled advantage of this relaxation of tradition was not adversely affected.<sup>471</sup>

Four years later, a presidential committee chaired by S. N. Waruhiu to investigate the state of the public service confirmed Nyamu's fears when the report stated:

We have received overwhelming evidence to the effect that some public servants utilize government facilities in order to benefit themselves. Some are said to tender for government supplies and to see to it that their tenders are always successful, while others are said to be in the habit of accepting rewards for work that they are paid to do by the government. We have been told that most salesmen particularly in the field of the now popular turn-key projects offer reward to public servants who become obliged to see that decisions are made in favor of those who offer rewards. It has also been suggested that in purchasing, commissions are paid through bank accounts maintained by Public Servants abroad.<sup>472</sup>

Civil servants paid for work which they are supposed to do and those who receive or give bribes engage in acts of corruption according to the PPDA, 2005. Nevertheless, that was the kind of public service that President Moi inherited when he took over power after President Kenyatta's death in 1978.

Initially, when he assumed the presidency, President Moi promised to eradicate corruption and abuse of office in the public service.<sup>473</sup> However, he soon discovered that eradicating the vice was easier said than done. In August 1982, just four years into his presidency and

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<sup>470</sup> H.J. Nyamu, 'The State of the Civil Service Today,' [Nairobi: Government Printers, 1975] 117.

<sup>471</sup> *Ibid.*

<sup>472</sup> Republic of Kenya, 'Report of the Civil Service Review Committee 1979-80 - The S. N. Waruhiu Report,' [Nairobi: Government Printer, 1980] 103. Also see D. Himbara, "*The failed Africanization of commerce and industry in Kenya*", World Development, 1994.

<sup>473</sup> K. Kibwana, S. Wanjala and Okech-Owiti, eds., 'The Anatomy of Corruption in Kenya: Legal Political and Socio- Economic Perspectives', [Nairobi: LARION, 1996] 43

before he could consolidate himself in power, a section of the army staged a coup attempt against his leadership. Following that failed coup attempt, an amendment to the then Constitution was made introducing Section 2A which made Kenya officially a one party state. This created an imperial presidency whose word became law.

This constitutional amendment had a devastating effect to the growth of democracy and related matters of governance. While the 1982 uprising was swiftly crushed, after the coup attempt, it dawned on the President that his immediate priority was to consolidate himself in power.<sup>474</sup> In order to do this, he resorted to the patron-client relations strategy that his predecessor had successfully used in the 1960s. The strategy involved recruiting the key positions of the public service mostly from those who were either closely related to him personally, those from his ethnic community or to his close confidants and turning a blind eye as they enrich themselves by abusing their public offices.<sup>475</sup>

In implementing this strategy, President Moi lacked the overwhelming opportunities and support that his predecessor had enjoyed. First, unlike President Kenyatta who hailed from a more populous community that was endowed with a large number of public servants that had been inherited from the colonial period, Moi hailed from the minority Tugen community that had also largely lagged behind during the colonial period.<sup>476</sup> Second, when President Kenyatta took over power, he had at his disposal a lot of public resources, especially the former white owned farms that he could give out to public officials in key positions in order to buy their loyalty. When Moi came to power, most of such public resources had generally dwindled and he had little ‘carrot’ to dangle for support.<sup>477</sup>

Given the circumstances, if President Moi had to appoint those who “were closely related to him to key positions in the public service then, he was bound to appoint people with lesser qualifications and experience than had been the case during Kenyatta’s period.

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<sup>474</sup>*Ibid.*

<sup>475</sup>See Kibwana *et al.*, [1996] 47.

<sup>476</sup>J.D. Barkan ‘The Rise and Fall of a Governance Realm in Kenya’ in Goran Hyden and Michael Bratton, eds., *Governance and Politics in Africa*, [Boulder and London: Lynne Rienner Publications, 1992] 61.

<sup>477</sup>J.D. Barkan [1992] 62.

Second, if he had to continue to buy the loyalty of those he appointed to key positions in the public service then, he was bound to look for resources elsewhere. He solved the challenge by appointing people with inferior qualifications and experience mostly from his wider Kalenjin community to key positions of the public service.<sup>478</sup> As leadership tact, he chose to turn a blind eye to the widespread culture of public officials using their positions to allocate themselves government land, commercial plots and houses, and to acquire easy loans from government controlled financial institutions without appropriate collateral.

This is evidenced in the Ndung'u Commission Report on Irregularly Acquired Public Land which state that powerful individuals illegally and irregularly allocate themselves government houses and acquire public land in the country.<sup>479</sup> The issue of ethnicity and tribalism is still a major challenge in this country to date. According to the report, many state and public service jobs are occupied by the five major tribes.<sup>480</sup> And of these, the two tribes associated with the President and his deputy are believed to have benefited more from public appointments than the rest. The Office of the President, the Ministry of Finance and the Attorney General Chambers are the worst hit according to the NCIC Report. This three government departments were accused of having hired their staffs mainly from two ethnic communities closely associated with the ruling government.<sup>481</sup> This goes against the principles of Article 10 and Chapter 6 of the Constitution. All these practices generally undermine transparency and accountability in the public sector.

Going by the above facts, from President Jomo-Kenyatta to all the other successive regimes thereafter, there has been a perceived close correlation between the political elite and the manner in which public resources are directed, managed and controlled. All these regimes have been accused of using ethnic and nepotism card to reward their loyalists and by extension, politically patronise public resources. Ethnicity and nepotism, therefore, has acted as a silent policy for the ruling elite as a way of perpetuating their control and hold on to power. This silent policy, therefore, becomes part and parcel of executive control and

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<sup>478</sup>*Ibid.*

<sup>479</sup>See Ndung'u Commission Report, Annexes Vol.1 p. 796-974; Vol. 2 Annexes p. 590-680.

<sup>480</sup>National Cohesion and Integration Commission, 'The Ethnic Divide in Kenya' [2015] 2(117).

<sup>481</sup>NCIC, [2015] 2(128).

falls within the objectives of this study. The silent ethnic and nepotism policy has historically grown to be so strong as to defy the legal order and institutions therein with impunity.

#### **4.6 Political Patronage and Procurement-related Scandals in the Public Sector in Kenya**

The present study sought to establish the relationship between political patronage and the level of corruption and nepotism in public procurement sector in Kenya. To achieve that, the respondents were asked to state how often their firms faced challenges related to illegitimate business practice, irregular payment and corruption in Government tendering and Table 4.9 presents the findings.

**Table 4.9: Frequency of Corruption Related Challenges in Public Tenders**

<b>Frequency of Challenges</b>	<b>Frequency</b>	<b>Percentage</b>
Never	52	20.4
Seldom	34	13.3
Sometimes	105	41.2
Frequently	51	20.0
Very Frequently	4	1.6
Constantly	9	3.5
<b>Total</b>	<b>255</b>	<b>100</b>

Table 4.9 indicates that 41.2% of the respondents sometimes experienced corruption-related challenges while 20.4% never experienced such challenges at all. The study established that twenty percent (20%) of the respondents frequently experienced corruption challenges while 13.3% seldom had such challenges in tendering process. From the results, a majority (66.3%) of the respondents experienced corruption-related challenges when seeking to do business with the government. At 66.3%, these results indicate that the problem of corruption is definitely a serious phenomenon in Kenya.

Corruption is a complex and multifaceted phenomenon with multiple causes and effects, as it takes on various forms and functions in different contexts. The outcome of this study item confirms what other scholars have written on corruption and its many forms and faces. The phenomenon of corruption ranges from the single act of a payment contradicted by law to an endemic malfunction of a political and economic system.<sup>482</sup> The problem of corruption is usually seen as a structural problem of politics, economics, or as a cultural and individual moral problem.

The complex nature of corruption has made most observers agree that it pervades many societies and that there are no quick-fix solutions to it.<sup>483</sup> The “Source Book” of Transparency International does for instance maintain that public programmes, government organizations, law enforcement, public awareness and the creation of institutions to prevent corruption are nothing but elements in a long-term process that needs to be supported from above and below and that also needs attitude changes at all levels.<sup>484</sup> It has also been noted that corruption does not disappear as countries develop and modernize, but that it takes on new forms.<sup>485</sup>

Samuel Huntington noted that where political opportunities are scarce, corruption occurs as people use wealth to buy power, and where economic opportunities are few, corruption occurs when political power is used to pursue wealth.<sup>486</sup> By looking at the different kinds of resources transferred, a distinction has been made between corruption in economic terms and corruption in social terms. Economic corruption takes place in a market-like situation and entails an exchange of cash or material goods, which is basic to corruption.<sup>487</sup> This is a strict definition of corruption, reflected in the regulations that stipulate limits to what amount can be “given” before it is considered a bribe. Transfers are not only in cash or

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<sup>482</sup> Jens Chr. Andviy; Odd-Helge Fjeldstad; Inge Amundsen; Tone Sissener; and Tina Soreide, *Research on Corruption: A Policy Oriented Survey*, [NORAD, 2000] 201.

<sup>483</sup> *Ibid.*

<sup>484</sup> J. Pope, P. Langseth & R. Stapenhurst, “The Role of A National Integrity System in Fighting Corruption”, [Washington, D.C.: EDI, World Bank, 1997], 179

<sup>485</sup> *Ibid.*

<sup>486</sup> S.P. Huntington, (1993) “Democracy’s Third Wave”, in Diamond, L., & Plattner, F. M., (eds), 1993, *The Global Resurgence of Democracy*, Baltimore and London: John Hopkins University Press.

<sup>487</sup> Médard, [1998] 308.



other tangibles. However, the exchange takes place in a social setting with a number of cultural and moral meanings.<sup>488</sup>

Understood this way, corruption is a form of social exchange. Social corruption is conventionally understood as an integrated element of clientelism.<sup>489</sup> Clientelism often implies an exchange of material benefits but cannot be reduced to this, because clientelism has a wider cultural and social implication.<sup>490</sup> Clientelism, nepotism, ethnic and other favoritism are all variants of corruption, in social terms.<sup>491</sup> To establish the level of procurement related malpractices, a descriptive analysis was done on 7 items which denote procurement malpractices/corruption to investigate the variable relationship between the items and establish patterns of responses. Table 4.10 presents the findings.

**Table 4.10: Descriptive Analysis of Procurement-Related Corruption**

<b>Dimensions</b>	<b>Analysis N</b>	<b>Mean</b>	<b>Std. Dev</b>
Rigging, fixing and collusion in awarding tenders	239	1.72	0.934
Favouritism due tribal, gender or political affiliation	239	1.95	0.915
Restricting a tender without sufficient ground	239	2.05	1.001
Accepting tenders after the deadlines	239	2.34	1.163
Interference of the tendering process by individuals	239	1.52	0.839
Unethical business practice among competitors	239	1.88	0.871
Unwarranted/fraudulent termination of procurement	239	1.66	0.859
Corruptly influencing a tender appeals process	239	2.28	1.041

Table 4.10 shows that a total of 239 tenderers responded to this particular item under study. From the findings, the average ranged from 1.52 to 2.34 from a Likert scale where 1 represented strongly agreed and 5 strongly disagreed. On the other hand the standard deviation was from a low of 0.839 to a high of 1.163.

<sup>488</sup>*Ibid.*

<sup>489</sup>*Ibid.*

<sup>490</sup>*Ibid.*

<sup>491</sup>*Ibid.*

To further establish the trend of responses on procurement related malpractices faced during Government procurement process based on percentages, the response given was based on the Likert scale. The respondents rated the extent to which they agreed with the given aspects which were indicators of the identified factors on a scale of 1 – 5 where 1 was strongly disagree and 5 was strongly agree and Table 4.11 presents the findings.

**Table 4.11: Procurement-related Corruption**

<b>Procurement Related Malpractices</b>	<b>SA</b>	<b>A</b>	<b>U</b>	<b>D</b>	<b>SD</b>
Rigging, fixing and collusion in awarding tenders	54.5%	25.4%	15.8%	3.3%	1.0%
Favouritism due tribal, gender or political affiliation	34.1%	48.6%	11.5%	3.7%	2.0%
Restricting a tender without sufficient ground	38.6%	35.2%	18.1%	6.4%	1.7%
Accepting tenders after the deadlines	26.1%	38.0%	20.0%	10.2%	5.8%
Interference of the tendering process by individuals	62.8%	25.3%	8.5%	2.4%	1.0%
Unethical business practice among competitors	34.3%	52.9%	6.7%	4.7%	1.3%
Unwarranted/fraudulent termination of procurement	51.4%	34.5%	11.4%	1.4%	1.4%
Corruptly Influencing a tender appeals process	54.7%	23.0%	31.9%	10.9%	0.4%

As presented in Table 4.11 above, 54.5% of the respondents agreed that one of the greatest procurement-related malpractice is bid rigging/fixing and collusion in awarding tenders, 34.1% indicated that it includes favouritism due to tribal, gender or political affiliation and 38.6% cited restricting a tender without sufficient ground to restrict or single source. The study further revealed that 26.1% agreed that procuring entities accept tenders after the deadlines for submission, 62.8% cited interference of the tendering process by senior public officers, politicians and well-connected individuals; 34.3% agreed that there are unethical business practices among competitors to increase their chances of winning tenders. The study found out that 51.4% of the respondents consider unwarranted/fraudulent termination of procurement proceedings under section 36 (1) of the Public Procurement and Disposal Act as rampant while 54.7% agreed that corruptly influencing a tender appeals process was a common malpractice.

Given an understanding of corruption as a particular state-society relationship, the genesis of corruption is consequently found at the two fields of interaction between the state and the society namely: at the national and the international arena.<sup>492</sup> Corruption takes place at the meeting point between the state and the various non-state actors.<sup>493</sup> On one side is the corrupt state official; on the other side is the supplier of bribes. The state officials can be anyone from the president down the political and executive hierarchy (bureaucratic corruption) to the most remote public servant.<sup>494</sup> The many possible non-state counterparts include the general public, any non-governmental and non-public individual, corporate and other organizational entities.<sup>495</sup> Many theories and conceptualizations of corruption call attention to the corrupt individuals and organizations that initiate and participate in corruption, and the advantages they gain.

Internationally, the globalization of markets, finances, and numerous other transactions have expanded the opportunity of collusive and concealed transactions, including between the various non-state players and the “host” governments and their representatives.<sup>496</sup> Multinational companies, for instance, buy concessions, preferences and monopolies; kickbacks are offered on tenders, loans and contracts; and development projects are sometimes eased through by including travels, financial and other fringe benefits for local officials.<sup>497</sup> Corrupt host countries are sometimes particularly attractive for certain businesses from abroad.<sup>498</sup> However, international actors in business, politics and development cooperation can be responsible for advancing corruption or reforms.<sup>499</sup>

Foreign-sponsored bribery tends to be held by many observers in developing countries as the most significant contributing factor to corruption.<sup>500</sup> Nationally, corruption takes place in the different branches of government like the executive, legislative and judicial organs,

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<sup>492</sup>Moody-Stuart, 1997, p.111.

<sup>493</sup>See Jens Chr. Andvietet *al.* 2000, p.13.

<sup>494</sup>See Jens Chr. Andvietet *al.*, 2000, p.14.

<sup>495</sup>*Ibid.*

<sup>496</sup>See Moody-Stuart (1997)

<sup>497</sup>See Moody-Stuart, 1997, p.112.

<sup>498</sup>Bayartet *al.*, 1999, p. 67.

<sup>499</sup>See Rose-Ackerman (1999)

<sup>500</sup>*Ibid.*

and also in the political and administrative institutions like the civil service, county governments and parastatals.<sup>501</sup> These institutions can be corrupted because of overlapping and conflicting authority, political power-struggles over access to scarce resources, manipulated flows of information, and personal relationships of dependence and loyalty.<sup>502</sup> In particular, a weak separation between civil service and party politics, a weak professionalization of state entities, lack of administrative accountability and transparency, and deficient political control and auditing mechanisms increases corruption in these institutions.<sup>503</sup>

Public officials colluding with cronies and business associates to skew procurement processes in their favor are rife.<sup>504</sup> A network of cowboy contractors who do shoddy work, inflate bills and make huge claims for public projects that are either poorly executed or not done at all exists.<sup>505</sup> Section 27 of the PPDA (repealed) or the corresponding section in the new Act gives accounting officers the responsibility for establishing the tender committees and carry out procurement within their entities. The discharge of this responsibility can work well as long as there is no conflict of and vested interest in the procurement process.<sup>506</sup> However, one cannot rule out vested interests in the process.<sup>507</sup>

#### **4.6.1 Probe Reports and Cases Illustrating Instances of Alleged Corruption in the Public Procurement**

The following probe reports and cases were reviewed to illustrate instances of alleged corruption in the public procurement in recent times and the interplay between law and politics in the sector.

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<sup>501</sup> *Ibid.*

<sup>502</sup> Doig and Theobald, 2000, p.3.

<sup>503</sup> *See* Doig and Theobald, 2000, p.4.

<sup>504</sup> The Standard Newspapers (2012, 31<sup>st</sup> July). Speedy reform of public procurement law needed: The Standard Newspapers Editorial Column. Nairobi: The Standard Group Ltd.

<sup>505</sup> *Ibid.*

<sup>506</sup> Peter M. Lewa (2007), p. 15.

<sup>507</sup> *Ibid.*

**(a) The Procurement of Electronic Voting Devices for the 2013 General Election by the Independent Electoral and Boundaries Commission (IEBC)**

In the matter of *The Procurement of Electronic Voting Devices for the 2013 General Election by the Independent Electoral and Boundaries Commission (IEBC)*,<sup>508</sup> the Public Accounts Committee (PAC) of the National Assembly moved in to audit the procurement of Biometric Voter Registration (BVR) kits that had been procured for the March 2013 general election, by the IEBC. This was informed by the massive failure of the BVR kits on the Election Day and suspected misappropriation of funds and mismanagement of their procurement. The special audit and the Committee hearings exposed massive procurement irregularities aided by lack of a procurement plan.<sup>509</sup> BVR procurement for instance saw tender opening minutes not duly signed, financial and technical proposals were opened at the same time contrary to the law; and the CEO appointed members in the evaluation committee from the due diligence team that travelled to India to evaluate one of the bidders.<sup>510</sup> The procurement stalled after the vested interests failed to budge.<sup>511</sup>

The procurement was then taken over by Government which saw advice by the Attorney General ignored. The procurement was direct, costing the country a principal loan amount of Kshs. 6,480,000,000.00, plus interest of Kshs. 1,592,829,037.41, loan insurance of Kshs. 988,250,009.00 and a brokerage fee of Kshs. 2,494,559,058.55. The total cost of the tender is 11,555,638,104.96.<sup>512</sup> On EVIDs kits, the mismanagement of procurement continued unabated. Technical advice by experts on the viability of the use of EVIDs kits in the 2013 general election was ignored by the IEBC.<sup>513</sup> No due diligence was done on the successful bidder and the kits were deployed uninspected contrary to the law. This led to massive failure by the kits on Election Day.<sup>514</sup>

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<sup>508</sup>The National Assembly, The Report of the Public Accounts Committee (PAC) on the Special Audit Report of June 2014; Over the Procurement of Electronic Voting Devices for the 2013 General Election by the Independent Electoral and Boundaries Commission (IEBC), March, 2016.

<sup>509</sup> PAC Report (March, 2016) p. 11.

<sup>510</sup>*Ibid.*

<sup>511</sup>*Ibid.*

<sup>512</sup>*Ibid.*

<sup>513</sup>*Ibid.*

<sup>514</sup>*Ibid.*

The contract was then varied by more than 10% in contravention of procurement laws.<sup>515</sup> No evidence of written approval by the tender committee of the IEBC was available on record. There is also no evidence to prove that a variation on the contract price was based on the prescribed price raising the question of legality of the decisions taken in respect of the material sections of the Act. Kshs. 250 million was paid to a supplier without a valid contract.<sup>516</sup> Further, on the Electronic Results Transmission, mobile phones were un-procedurally procured using quotation method, at Kshs. 17,847,049.00, WAN was directly procured<sup>517</sup> from Safaricom Ltd at a cost of Kshs. 6,132,013. It is not true that Safaricom Ltd was the only service provider who could offer the said services to IEBC. The decision to procure WAN from Safaricom was therefore against the provisions of Section 74(2) of the Act since Kenya has other competent WAN service providers who could provide the same services. The Report also indicates that Kshs. 480,516 was paid to Airtel for services not rendered.<sup>518</sup>

The main lesson from this case is that in 2013 general elections in Kenya, a whopping over Kshs. 11 billion went to waste because the BVR kits which were procured never worked. The procurement process ignored the law and the technical advice from the AG and to date, the culprits have never been held to account pointing to a possible protection by the powers that be. From the facts of this case, it's a classic example of a case where a few individuals blatantly defraud the public for personal gain in total disregard to the provisions of the law and the interest of the country at large.

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<sup>515</sup> Section 47 of the PPDA, 2005 states: An amendment to a contract resulting from the use of open tendering or an alternative procurement procedure under Part VI is effective only if – (a) the amendment has been approved in writing by the tender committee of the procuring entity; and (b) any contract variations are based on the prescribed price or quantity variations for goods, works and services based.

<sup>516</sup>*Ibid.*

<sup>517</sup> Section 74 of the PPDA, 2005 provides that: (2) A procuring entity may use direct procurement if the following are satisfied – (a) there is only one person who can supply the goods, works or services being procured; and (b) there is no reasonable alternative or substitute for the goods, works or services.

<sup>518</sup>*See* PAC Report (March, 2016) p. 11.

**(b) The Tender for the National Surveillance, Communication, Command and Control System for the National Police Service**

This follows a decision by the Government of Kenya in April 2014 to single source procurement of the national surveillance, communication, command and control system for the National Police Service (NPS) from Safaricom Limited at a total cost of eighteen billion, seven hundred and eighty one million, two hundred and fifty one thousand, eight hundred and forty four shillings (Ksh. 18,781,251,844.00).<sup>519</sup> The procurement was necessitated by the need to replace the obsolete communication system which had become a great challenge to service delivery, having been installed three decades ago.<sup>520</sup> The project comprises four components; Digital Trucking Radio Network, Central Command Operation Center, Installation of a Video Surveillance System, and Internet Connectivity to Police Stations.<sup>521</sup>

In this procurement process, the government was accused of single sourcing against the provisions of Section 74 (3) which states that “a procuring entity may use direct procurement if the following are satisfied: there is an urgent need for the goods, works or services being procured; because of the urgency the other available methods of procurement are impractical; and the circumstances that gave rise to the urgency were not foreseeable and were not the result of dilatory conduct on the part of the procuring entity”.<sup>522</sup> Facts of the case which the present study sought to address include: whether or not security is an emergency issue in Kenya; if it was impractical to go through an open tender which is supposed to last for 30 days if it is not challenged at the PPARB or in a court of law; and if the circumstances that gave rise to the urgency were not foreseeable.

The justification for the choice of the procurement method was that “... the country is currently experiencing upsurge of security challenges among them serious crimes such as; terrorism, robbery with violence, abductions and kidnappings, and carjacking and car

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<sup>519</sup> Republic of Kenya, *Report of the Departmental Committee on Administration and National Security on the Matter of the Inquiry into the Tender for the Proposed National Surveillance, Communication, Command and Control System for the National Police Service (NPS)*, July 2014.p.11.

<sup>520</sup>*Ibid.*

<sup>521</sup>*Ibid.*

<sup>522</sup> Republic of Kenya, the Public Procurement and Disposal Act, 2005. Nairobi: Government Printer.

thefts. The spate of the aforementioned criminal activities in the country was beginning to adversely affect the economy especially tourism and investment throughout the country”.<sup>523</sup>

This study is of the opinion that the justification given by the Procuring Entity for choice of procurement method does not lie within the circumstances envisaged under Section 3 of the PPDA, 2015 cited earlier and therefore does not satisfy Section 74(3) of the Act. This argument is grounded on the reasoning that security issue is a recurrent problem in Kenya and may not qualify to be an emergency. A number of high casualty attacks have been reported in this country over the last two decades. Terrorists have previously attacked the US Embassy in Nairobi (1998), the Paradise Hotel in Kikambala Mombasa (2004), Westgate Shopping Mall in Nairobi (2013), Mpeketoni Mombasa (2014), a Nairobi-bound Passenger Services Vehicle (PSV) from Mandera County (2014), Garissa University College (2015), Kenya Defense Forces (KDF) AMISOM Camp in Al Adeh Somalia (2016) and many other relatively smaller attacks which have occurred in Nairobi, Mombasa, Wajir, Garissa and Mandera Counties. There is also the perennial problem of bandit attacks in the North Rift region and many other ethnic related attacks witnessed in many parts of this country in the last couple of years.

Urgent need is defined under Section 3 of the PPAD Act as “the need for goods, works or services in circumstances where there is eminent or actual threat to public health, welfare, safety, or of damage to property, such that engaging in tendering proceedings or other procurement methods would not be practicable”.<sup>524</sup> In view of this, this study concludes that the Government should have undertaken an open tender procurement process instead of single sourcing as there was no emergency to warrant violation of the law. It took over a month, from the date the government invited a proposal from Safaricom Limited and the actual date of tender award. Security is always an issue in any country and should never be used to circumvent procurement laws to aid fraudulent practices. This study also asserts

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<sup>523</sup>See Republic of Kenya, July 2014, at supra note 58, 59 and 60, Annex 2, p.7.

<sup>524</sup>*Ibid.*



that Parliament also failed in its oversight duty when it approved the irregular tender and points to a possible case of arm-twisting by the Executive, and hence political patronage.

**(c) The controversial hire of an Aircraft for the Deputy President (2013)**

This matter refers to an official tour by the Deputy President to Congo Brazzaville, Ghana, Nigeria and Gabon in a hired aircraft between 16<sup>th</sup> and 19<sup>th</sup> May 2013.<sup>525</sup> The Deputy President undertook the tour on behalf of the President, in his official capacity as the President's principal assistant, in accordance with Article 147 of the Constitution.<sup>526</sup> The delegation numbered fourteen in total, including the Deputy President himself and the total cost of the tour is recorded as being twenty one million, one hundred and sixty seven thousand, five hundred and seventy nine and twenty cents (Kshs.21, 167,579.20).<sup>527</sup>

The issue which came up for determination before the PAC of the National Assembly of Kenya was if the government procurement regulations, procedures and practices were breached in the process of hiring the aircraft. The findings of the Committee indicate that the procurement regulations, procedures and practices were breached in the process of hiring the aircraft. The report indicates that there was no Inspection and Acceptance Committee established for the procurement, and so the aircraft was not inspected as required. This was reckless and exposed the Deputy President and the rest of the delegation to potential risk. It was established that the supplier, EADC Ltd, quoted to supply a Global Express 6000 aircraft but instead delivered a Challenger 850. This variation was found to be irregular and illegal.

The Committee also established that at the time of initiating the procurement, the Office of the Deputy President was not exchequered for this expenditure. This occasioned desperate efforts to shift funds from other vote heads and to seek extra exchequer from treasury. Initiating government procurement in the absence of an exchequer is in breach of

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<sup>525</sup> See Republic of Kenya, *Report on the Hire of an Aircraft for the Deputy President for an Official Tour of Four African Nations in May, 2013*. This is an Inquiry Report by the Public Accounts Committee (PAC) of the National Assembly of Kenya Presented and Adopted by Parliament in April, 2014. p.x.

<sup>526</sup> *Ibid.*

<sup>527</sup> *Ibid.*

procurement regulations. It was also found out that no contract was signed between the Office of the Deputy President and the supplier, EADC Ltd, for the aircraft hire. An incomplete Local Service Order (LSO) was irregularly used to initiate payment to the supplier, and four (4) LSO and one Local Purchase Order (LPO) leaves mysteriously disappeared in suspicious circumstances, raising real fears of intended fraud.

The Report also indicated that there was a deliberate attempt to exploit the haste with which the trip was arranged and use it as a cover to defraud government and the taxpayer. The highly suspicious disappearance of the LSOs and LPO, coupled with the failure by the Office of the Deputy President to institute any investigations into this grave matter, and the subsequent hurried transfer of the two officers directly involved in the procurement of the aircraft hire, all point to attempted fraud and a deliberate subsequent effort aimed at a cover-up. The Deputy President's office in Kenya is not just any other office - constitutionally, it is the second highest office in terms of authority and executive control.<sup>528</sup> The facts that no action has been taken to date in spite of all the glaring facts and anomalies in this case points to a possible political patronage in the whole procurement process.

#### **(d) Goldenberg Scandal**

In 2004, a commission of inquiry was constituted by the then President of the Republic of Kenya to investigate the conditions under which the country lost billions of shillings of tax-payers' money in a gold export compensation racket involving government officials and Goldenberg International Ltd.<sup>529</sup> The Goldenberg affair led to a loss of tax payers' money approximated at Kshs. 6 billion through illegal transactions involving government officials and exporters.<sup>530</sup> It involved a series of business deals of dubious or non-existent gold exports through Goldenberg International Limited (GIL) and Exchange Bank Ltd between 1991 until 1993 when the scandal was exposed by a whistle blower, David

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<sup>528</sup> Authority of the office of the DP

<sup>529</sup> See Goldenberg International Case at *supra* note 125.

<sup>530</sup> Republic of Kenya, The Report of the Judicial Commission of Inquiry into the Goldenberg Affair (The Goldenberg Report), 2004. p.30.

Munyakei, then an employee of Central Bank.<sup>531</sup> The business deals revolved around various economic schemes, export compensation, pre-shipment financing, retention accounts, foreign accounts and cheque-kiting.<sup>532</sup>

Attempts have been made by the previous regimes to investigate the Goldenberg scam including a setting up of a parliamentary committee to no avail.<sup>533</sup> As a result of these successive failures to arrive at the truth, a commission of inquiry was appointed by the government in 2003 to look into the Goldenberg affair.<sup>534</sup> The mandate of the Commission was relatively wide and included: “to inquire into the origins of, acceptance and implementation by the CBK of the Rediscounting Facility for Pre-Export Bills of Exchange; to inquire into the rediscounting facility which caused loss to the CBK; to inquire how monies fraudulently paid to the GIL were allegedly used by companies and individuals to fraudulently earn profits by speculating in convertible foreign exchange certificates; and to inquire into the effect the Goldenberg-related civil and criminal litigation had on the administration of justice in Kenya. Others included: to inquire into the beneficiaries of the Goldenberg scandal; to inquire and trace any local or international assets acquired directly or indirectly with the monies fraudulently obtained through Goldenberg; to inquire into the financial detriment the scandal had on the economy of Kenya; and inquire into the identity of those involved and recommend necessary action.”<sup>535</sup>

The Commission carried out public hearings and submitted its report to then President Mwai Kibaki in October, 2005. The report listed the names of the alleged perpetrators and the role they played in the scandal and made various recommendations. The Commission found out that apart from the criminal cases in which the role of the Attorney-General had been considered, approximately eight other Goldenberg-related cases had been filed at the High Court in Nairobi. All of the eight cases were tax-related. The Commission also

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<sup>531</sup>See Kenya Human Rights Commission, *Lest we Forget: The Faces of Impunity in Kenya*, KHRC Report of August, 2011, p.30.

<sup>532</sup>See Kenya Human Rights Commission Report (2011), at note 307.

<sup>533</sup>*Ibid.*

<sup>534</sup> President Kibaki through Gazette Notice No. 1237 and 1238 of February 24, 2003 and Gazette Notice No. 7593 of October 29, 2003 appointed commissioners to look into the Goldenberg affair.

<sup>535</sup>See Republic of Kenya, 2004, p.31 at *supra* note 357.

established that the architect of this scandal, Mr. Kamlesh Pattni and his associated companies had used the court process to stop attempts to recover tax from him.

Mr. Pattni was granted an injunctive relief after the judiciary failed and/or neglected to prosecute the substantive suits to completion. He obtained injunctions that rendered suits pending indefinitely. Injunctions were in some cases, the losing party would go to the Court of Appeal and there, too, there would be an array of applications with the effect that none of the Goldenberg cases was ever completed. The Commission found that:

The 'Goldenberg Affair' serves to illuminate in real terms the institutional, structural and procedural weaknesses prevailing in our court system and how a party can effectively exploit them to defeat the very purpose of the system of administration of justice.

Curiously, the Commission did not point out what these weaknesses were and how they could be dealt with. Further, the Commission's report was silent on the question of how Mr. Pattni and his cronies managed to subvert the cause of justice and to literally capture and control the courts. Some of the questions that the commission needed to have addressed but were never raised were as follows: who were the players within the corridors of justice that aided and abetted Goldenberg International Ltd in its underhand operations? why is it that the courts could not dispense with the needless rounds of applications, adjournments and objections, and deal with the substantial issues before them? what price was paid by those who benefited from these maneuverings within the courts? was there bribery involved in the temporary injunctions that seemed to favor Goldenberg International? and was the transfer of various judicial officers in the course of hearing Goldenberg-related cases merely coincidence or part of a more sinister plot to sink the 'Goldenberg Affair' deeper into a web of mystery and incomprehension?

The Report failed to investigate the impact of Goldenberg-related cases on the administration of justice. It appears like the Commission merely raised a few questions and left the bulk of investigations unexplored. Identities of the shareholders, directors and other beneficial owners of all entities involved in the transaction should have been obtained to establish the real owners and beneficiaries of the 'Goldenberg Affair'.

The Commission's findings based on the concept of a legal or juristic person, epitome for instance in the case of *Salomon vs. Salomon* (1897) that decrees the separate and distinct legal existence of a company.<sup>536</sup> This principle that a company is distinct from the directors who run it and the shareholders, who own it, is often abused to conceal fraud and corruption related issues. Just as in the case of *Salomon vs. Salomon* (1897),<sup>537</sup> it would have been prudent for the Commission to look beyond the veil of incorporation and unmask the individuals involved.

The Commission was expected to proceed on the basis that corporate personality is really legal fiction, the company being considered as a person under the law yet having no physical existence. A company exists, deals, and acts through its human controllers who are the mind and soul of the company. As such, a company may be guilty of criminal offences if its controllers commit them. Whereas there are few references to the directors and shareholders in a number of the companies mentioned in the report as having been involved in the 'Goldenberg Affair', one does not get the sense that the Commission made any serious, focused and/or deliberate attempt to discharge the burden of this particular mandate.

It is instructive that the other shareholder and Director of Goldenberg International Ltd and Exchange Bank Limited was the then Director of Intelligence, James Kanyotu. However, there was need to establish whether he was acting on his behalf or as a proxy. The Commission did not establish this. The Commission also did not get to establish whether Uhuru Highway Development Ltd, related to the then Grand Regency Hotel (now Laico

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<sup>536</sup>*SALOMON v SALOMON & Co* [U.K. 1897] Accessed at [www.thelawteacher.net](http://www.thelawteacher.net) on Feb 02, 2015. This is a case filed after Mr. Solomon's family owned limited company went into liquidation; the liquidator argued that the debentures used by Mr. Salomon as security for the debt were invalid, on the grounds of fraud. The judge, Vaughan Williams J. accepted this argument, ruling that since Mr. Salomon had created the company solely to transfer his business to it, the company was in reality his *agent* and he as *principal* was liable for debts to unsecured creditors.

<sup>537</sup> In the *SALOMON v SALOMON & Co* [U.K. 1897] case, the High Court and the Court of Appeal in the UK ruled against Mr. Salomon, on the grounds that he abused the privileges of incorporation and limited liability, which the Legislature had intended only to confer on "independent bona fide shareholders, who had a mind and will of their own and were not mere puppets". The lord justices of appeal variously described the company as a myth and a fiction and said that the incorporation of the business by Mr. Salomon had been a mere scheme to enable him to carry on as before but with limited liability.

Regency Hotel) at the centre of Goldenberg and its proceeds, had among its shareholders the then President of the Republic of Kenya as at 12<sup>th</sup> February, 1985.

Perhaps, due to the involvement of the then President in these deals, the Commission avoided that line of enquiry. Consequently, the issue was not investigated conclusively and the powerful individuals involved exposed. A number of legal and administrative actions have been taken against some of the alleged perpetrators. However, a number have obtained court orders to have their names expunged from the report. For instance, in 2006, the High Court expunged the name of Hon. George Saitoti, the former Vice President and Minister for Security from the list of those accused of involvement in the Goldenberg scandal.<sup>538</sup> This is believed to have happened as a result of behind-the-scene push by some powerful forces in government to have the names of some of these alleged perpetrators expunged.

From the facts of this case, the Goldenberg Scandal is an illustrative case known to have implicated who-is-who in the then President Daniel Moi regime. Notable personalities mentioned in this case included the President himself, his Vice President then, and the then Director of Intelligence among others. The personalities involved were therefore, not ordinary Kenyans. This perhaps explains why to date, the matter has never been successfully prosecuted in spite of the public glare and attention coupled with the magnitude of public loss.

The study holds that there could only be one possible explanation for this judicial failure to prosecute and bring to justice this public plunder – political patronage on the matter. This hidden hand of influence in the way cases are decided/derailed was part of the subject of interrogation in this study.

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<sup>538</sup>See the judgment of the Constitutional Court in High Court Misc. Civil Application NO. 102 OF 2006 Republic vs The Judicial Commission of Inquiry into the Goldenberg Affairs & Others ex parte Hon Professor George Saitoti, p.67.

**(e) MFI Office Solutions Ltd v Kenya Ports Authority (Case No. 32/2007)**

This was an appeal against the decision of the Corporation tender committee of the Kenya Ports Authority (KPA) in the matter of tender No. KPA/005/2007PM (Operation of Printing Shop). In this case, the procuring entity admitted that section VI on the technical specifications was retained despite the amendments on the tender document through an addendum. There was an accusation that this addendum was never circulated as intended and it was only availed to a particular candidate to the disadvantage of the other tenderers.

The procuring entity evaluated the tenders based on the schedules of requirements under Section v. The technical evaluation was based on the requirements set out under clause 2.32 of the tender documents. One of the factors considered was performance details of the equipment used. Whereas there were technical specifications at schedule VI for the digital machines, there were no corresponding technical specifications for offset machines.

The Review Board ruled that since the procuring entity was not procuring equipment, it ought to have specified in the tender document that the evaluation of the tender would be performance-based. Part of the ruling stated that:

The procuring entity should have provided an evaluation criterion based on performance and not on the equipment. This way, it would have been open to the bidders to offer any type of the machine, whether offset or digital, so long as it would have met the job performance requirements.

Taking into consideration all the inconsistency, the procuring entity was found to have acted irregularly and the appeal was successful hence cancellation of the award of the tender and an order that the procuring entity re-tender using clear specifications. From an informant at the Review Board, the procuring entity never retendered as directed by the Board. MFI Office Solutions Ltd, the winner of the nullified tender, actually went ahead and supplied the equipment in total disregard of the ruling.

It was also established that MFI Office Solutions Ltd. had been awarded that particular tender three times before. In trying to establish why this particular company was fraudulently awarded this tender, the informant reported that the tenderer was indirectly

associated to the then Managing Director of Kenya Ports Authority. This perhaps explains why the procuring entity was reluctant to honor the ruling of the Review Board to retender. The insider dealings in procurement of equipment for the Printing Shop at the Kenya Ports Authority and the apparent conflict of interest thereof are indications of corruption, impunity and to an extent, abuse of executive authority in the Corporation's hierarchy of command and therefore, within the boundaries of this study.

**(f) Riley Falcon Security Services Ltd & Total Security Surveillance Ltd v Kenya Pipeline Company Ltd (Cases No. 53/2009 and 54/2009)**

Reviews against the decision of the Tender Committee of the Kenya Pipeline Company Ltd in the matter of expression of Interest No: SU/QT/306N/09 for provision of security services for the year 2009/2010. Several grounds were raised in the Application for Review but the present study is interested in the following four grounds: that the tender document which the Procuring Entity presented to the Board for review is not the same document that was used during the evaluation by the Tender Committee of the Procuring Entity; that the tender document presented to the Board could have been clandestinely substituted by the Applicant with assistance of a person(s) working with the Procuring Entity; and the documents presented before the Board bore all the necessary signatures which were all matching with the other tender documents signed by the Procuring Entity's tender committee members, and the stamp of the Procuring Entity's Internal Audit Department in the document of the Applicant resembles those of the other candidates, which meant that the document presented before the Board by the Procuring Entity must have been signed and backdated to the date on the stamp by officers of the Procuring Entity.

In this matter, the Review Board scrutinized the tender documents that were placed before it and made the following observations, "all the tender documents including that of the applicant bore green colored stamp by the procuring entity's Internal Audit Department; all the documents including that of the applicant were duly signed by four officers on the 21<sup>st</sup> July, 2009 which was the tender opening date; and the board noted that all the



signatures in all the tender documents were the same and that the different officers were using different pens to sign the documents.”<sup>539</sup>

The Review Board determined that could only be possible if the officers of the Procuring Entity colluded with the Applicant to backdate the documents. The fact that the tender documents could have been substituted raised serious issues on how the Procuring Entity secured its tender documents during the procurement process. The Board observed that, “It is the duty of a Procuring Entity to ensure that it takes measures to protect the integrity of the entire procurement process.” By submitting that a document was substituted during a tender process raises serious concerns and goes against Section 2(c) of the Act<sup>540</sup> on integrity and fairness of procurement procedures.

Another ground for determination was that the Applicant was disqualified from proceeding to the second stage of evaluation on the grounds that it failed to submit a valid CCK License as required in the tender documents whereas, another candidate M/S Riley Falcon Security Services Ltd, was allowed to proceed without a valid license. The question for determination was why Riley Securities Services Ltd was not disqualified and yet it did not meet a mandatory requirement. The two companies provided similar documents (an expired license from CCK and a receipt showing payments made to CCK for the renewal of license) yet the validity of the documents were determined to be different. Taking into account the above matter, the Board found that this ground of appeal was successful.

The verdict of the Review Board read “*In the circumstances, whichever way the Review Board looks in this matter, it is clear that the entire tender process was flawed and the integrity of the officers handling the whole tender process is questionable. Accordingly, the Review Board finds that the entire procurement process is tainted with irregularities*”

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<sup>539</sup>Riley Falcon Security Services Ltd & Total Security Surveillance Ltd v Kenya Pipeline Company Ltd (Cases No. 53/2009 and 54/2009).

<sup>540</sup> Section 2 of the Act states, “The purpose of this Act is to establish procedures for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by public entities to achieve the following objectives; .....(c) to promote the integrity and fairness of those procedures.....”

*and is completely flawed and therefore, annuls the entire procurement process and order that the retender be done.*<sup>541</sup>

The line of question that the Review Board took and determined clearly indicates that there was an attempt by Kenya Pipeline Company employees to collude with a prospective bidder to defraud the company through forged documents and undue influence in the process arising from insider trading. Fraud is a form of corruption as outlined elsewhere in this study.

**(g) The Illegal and Irregular Allocation of Public Land in Kenya**

In 2003, the President of the Republic of Kenya established a Commission of Inquiry to look into the illegal and irregular allocation of public land in the country since independence. The Commission was established through a Gazette Notice No. 4559 of July, 4, 2003. It was chaired by Paul Ndung'u, a senior Nairobi Advocate and was mandated to inquire into the following issues: the legality of allocation of public land to private individuals and/or corporations; to collect information on the nature and extent of unlawful and irregular allocations; prepare a list of all lands unlawfully acquired or irregularly allocated, to whom they were allocated, date of allocation and other particulars to the subsequent dealings in the concerned lands; and ascertain any persons or corporations to whom such land was allocated; and identify any public official involved. Others were to recommend legal and administrative measures needed for the restoration of such land; recommend legal action in case these lands were not able to be restored to their proper title; recommend criminal investigation or prosecutions of and against the concerned persons; and recommend legal and administrative measures which should be taken in the future.<sup>542</sup>

The Commission completed its task after nine months and thereafter, presented its report to the President in June, 2004. The report was published on December 16, 2006 following

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<sup>541</sup> Public Procurement Administrative Review Board, *Case Files 2006-2012*. Decided cases obtained from PPOA.

<sup>542</sup> The terms of reference for the Judicial Commission of Enquiry into the Illegal and Irregular Allocation of Public Land was accessed from the Ndung'u Report of 2006.

massive agitation by the civil society and other actors. Several properties were identified as having been irregularly allocated to various individuals and institutions.<sup>543</sup> Individual beneficiaries of these irregular allocations were identified. The list largely consisted of names of political elite and high ranking government officials in Kenya.

Criminal investigations and prosecutions were recommended against the perpetrators in accordance with the terms of reference of the Commission.<sup>544</sup> However, to date, the report has never been implemented in spite of the millions of tax payers' money spent in the inquiry. This is an indication of lack of political goodwill to prosecute corruption and by extension, an effort to perpetuate impunity in this country.

#### **(h) The Maize Importation Scandal of 2010/2011**

The audit firm of Price Waterhouse Coopers (PWC) was mandated by the Office of the Prime Minister then and the Ministry of Finance to carry out an independent forensic investigation into the alleged irregularities in the implementation of the subsidized maize scheme at the National Cereals and Produce Board (NCPB). The task was to investigate and give recommendations to the concerned ministries as to the manner in which the subsidized maize scheme, intended to cushion the poor Kenyans against high food prices, was mismanaged by both government and parastatal officials.

The scheme as conceived by government involved sale of maize from the Strategic Grain Reserve to millers by the NCPB at fixed prices to avoid exploitation from middle men and other business people and the millers would then avail the maize meal for sale at subsidized prices.<sup>545</sup> However, in March 2009, there was a major public outcry arising from the massive mismanagement of the subsidized maize scheme. Officials at NCPB and the Ministries of Agriculture and Finance were accused of involvement in irregular sale of the maize. The PWC audit was commissioned in the face of unrelenting public pressure on government to unearth the goings on in relation to the scheme.

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<sup>543</sup>See Kenya Human Rights Commission, *Lest we Forget: The Faces of Impunity in Kenya*, KHRC Report of August, 2011, p.30.

<sup>544</sup>*Ibid.*

<sup>545</sup>See Kenya Human Rights Commission Report [2011] p.31.

PWC presented its report in December 22, 2009. Several high profile individuals and senior government officers were found culpable.<sup>546</sup> Some were suspended, others were reportedly being investigated, but largely, little has been done or is likely to be done with regard to the losses which arose from the maize scandal. Those who were suspended were later reinstated to their positions or transferred to other dockets in government essentially ruling out any possibility of ever recovering public funds which were lost in the process.

**(i) Irregular Acquisition of Cemetery Land in Nairobi**

Former City Council of Nairobi v Sammy Kirui, Mary Ngethe, Alender Musee and 11 Others, 141/316/10-ACC No. 19/2010 in the Matter of Conspiracy to Defraud, Abuse of Office and Fraudulent Acquisition of Public Property[ongoing]. The City Council of Nairobi wanted to purchase land for a cemetery and the Town Clerk requested the Ministry of Local Government for financial support because the Council did not have funds.<sup>547</sup> The Ministry asked the Council to procure the land and funds would be availed to them. The criteria agreed was that: land must be within Nairobi Metropolitan region; it must be easily accessible by the public; and the soil depth reaches a minimum of 1.8m (6ft) deep.

During the procurement process, these requirements were overlooked and the land acquired did not meet any of them. Efforts by some officials to have the procurement process stopped were met with a lot of resistance and little or no attention was paid to them. The advice of the Director of City Planning on the tender documents and search for land for use as a cemetery was not considered during the entire process of procurement. The tender was awarded to M/S Naen Rech Company Ltd, the sixth lowest bidder, without due diligence.<sup>548</sup> The entire process was marred by procurement irregularities and fraudulent deals that led to the loss of approximately Kshs. 290,694,250.00 by the City Council of Nairobi.<sup>549</sup>

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<sup>546</sup>*Ibid.*

<sup>547</sup> Former City Council of Nairobi v Sammy Kirui, Mary Ngethe, Alender Musee and 11 Others, 141/316/10-ACC No. 19/2010 in the Matter of Conspiracy to Defraud, Abuse of Office and Fraudulent Acquisition of Public Property.

<sup>548</sup>*See* Kenya Human Rights Commission Report, 2011, p.32.

<sup>549</sup>*Ibid.*

Parliament also conducted its own independent probe into the cemetery saga and published a report.<sup>550</sup> This report was compiled by the Parliamentary Departmental Committee on Local Authorities after its own investigations on the procurement of land for a cemetery by the City Council of Nairobi.<sup>551</sup> The Office of the Speaker ordered the Committee to investigate and file a report on the procurement of the Cemetery Land by the Council after a question by private notice was asked by Hon. Mithika Linturi to the Minister for Local Government.<sup>552</sup>

The report was tabled in Parliament in January, 2010 with detailed information on the role played by each individual and with the Committee's observations and recommendations. It noted in particular that the land was not suitable for a cemetery and there were also massive illegalities and irregularities in the entire procurement process.<sup>553</sup> It also recommended investigation of the matter by the Kenya Anti-Corruption Commission. However, very little has happened to date. Curiously, some of those who were implicated in the scandal have been reinstated to their previous positions in government. The public was dissatisfied with the way this scandal was handled so far. The public feeling was that justice had been derailed.

#### **(j) The Triton Oil Scandal of 2010/2011**

Kenya Pipeline Corporation (KPC), a state corporation under the Ministry of Energy (MoE) has a mandate to store and transport petroleum products from Mombasa to Nairobi, Nakuru and Eldoret on behalf of Oil Marketing Companies (OMCs) in the country. In July 2009, the OMCs and KPC entered into a Transport and Storage Agreement (TSA) where KPC would store and transport petroleum products for the OMCs and OMCs would, in

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<sup>550</sup>The departmental Committee on Local Authorities Report on the Procurement of Cemetery Land by the City Council of Nairobi.

<sup>551</sup> The Departmental Committee is established pursuant to Standing Order 198(1). Its mandate pursuant to Standing Order 198(3) is to investigate, inquire into, study and make reports and recommendations on the mandate, management, activities, administration, operations and estimates of the assigned Ministries and departments in question.

<sup>552</sup>See Kenya Human Rights Commission Report, [2011] p.33.

<sup>553</sup>*Ibid.*

turn, meet their obligation under the agreement.<sup>554</sup> To operationalise this arrangement the parties entered into a collateral financial agreement (CFA).

Through what appears to be dubious dealings with KPC staff, Triton Oil, a small player in the oil industry and which was not part of the CFA agreement was allowed to draw oil from KPC system without paying for it. In total, 126.4 million litres worth over \$ 90 million had allegedly been released to Triton without the consent of financiers.<sup>555</sup>

In light of this development, the MoE instructed KPC to engage the services of an independent audit firm (PricewaterhouseCoopers) to vet the activities of the OMC and submit its findings to the ministry. The scope of the report was to investigate: the extent of the irregularities and non-compliance with the CFA; with respect to the Triton to investigate the parties involved and the extent of their culpability; investigate KPC's legal position and ascertain its level of compliance under the CFA and highlight any breaches or irregularities observed; and to investigate the appropriateness of the CFA for contractual and business relationship between KPC and the OMCs.

KPC being a public entity shouldered the loss in this scam and to date the scandal has never been resolved to the disadvantage of the Kenyan tax payer. The main architect of this scandal, who was the Managing Director of Triton Oil Ltd, flew out of the country under very suspicious circumstances and efforts to extradite him have also not been successful. When the corrupt go scot-free, it encourages impunity as others also take cue and engage in corruption knowing too well, they too will escape the arm of justice. Non-prosecution is bad precedence in the war on corruption and for the future of justice in this country.

Corruption is, therefore, a major challenge in the procurement process and is one of the major challenges in the workings and delivery of the Public Procurement Law as illustrated

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<sup>554</sup> PricewaterhouseCoopers Report, An audit report into the affairs of the Triton Oil Corporation in regard to the importation, storage, and sale of petroleum products worth 2 billion shillings that was under the custody of KPC and was financed by KCB on behalf of the product importers, (2011). The audit was commissioned by the Office of the Prime Minister of the Republic of Kenya.

<sup>555</sup> Africa Center for Open Governance, Analysis of the Triton Oil Scandal, [Nairobi: AFRICOG, 2011] 39.

in the above decided and unresolved procurement-related corruption cases. However, this study asserts that corruption is a moral issue whose answers may not lie in legislation alone. It is a culture which has pervaded the Kenyan social, political and economic fabric and may not be solved through legislation. It can best be approached through moral transformation of the mindset of the people.

If the society inculcates the spirit of sanity and moral good in the minds of the subjects, self-control can be achieved. It would help to differentiate wrong from the good and isolate the evil in the mind. If that is achieved, then the people can refrain from corruption not because they have been coerced by use of a law, but simply because it is the right and moral thing to do. This ties the findings of this section to the theoretical framework of this study which is the intersection of moral and legal philosophy in social engineering. The study further sought to establish why many people in this country never react to issues of corruption and the reasons were as presented in Table 4.12.

**Table 4.12: Reasons for not Reporting Instances of Corruption in Tendering Process**

<b>Reasons</b>	<b>Frequency</b>	<b>Percentage</b>
No action taken	195	62.5
I don't feel secure enough	103	34.2
I fear intimidation by the accused	106	35.2
I fear losing business opportunities	69	22.9
Person involved is known to me	63	20.9
I was promised some benefits	38	12.7

A majority (62.5%) of the respondents indicated that they don't report cases of corruption because even if they reported, no action would be taken against the accused. A further 35.2% said they could not report corruption instances because they fear intimidation by the accused while 34.2% don't feel secure enough to expose cases of corruption. It was revealed that 22.9% of the respondents fear losing business opportunities from the procuring entities involved while 20.9% indicated that those involved in corruption were

known to them and therefore, they can't report them. Only a small minority at 12.7% admitted that they were compromised by a promise of some form of benefit if they drop the cases.

#### 4.6.2 What Encourages Corruption in the Public Procurement?

In order to establish what encourages corruption in public procurement sector in Kenya, a descriptive analysis was done on 6 items related to corruption in the public sector along the Ronald Hope Kempe model<sup>556</sup> to investigate the variable relationship between the items and establish patterns of responses and Table 4.13 presents the findings.

**Table 4.13: Descriptive Analysis of the Things that Encourage Corruption in Public Procurement**

<b>Dimensions</b>	<b>Analysis N</b>	<b>Mean</b>	<b>Std. Dev</b>
Lack of political goodwill	255	1.65	0.972
Tribal and political manipulative culture	255	1.98	1.053
Deliberate efforts to weaken legal institutions	255	1.78	1.003
Lack of respect for the rule of law	255	1.81	0.966
Little survival outside public procurement	255	1.96	1.125
Unmerited appointment to public service	255	2.13	1.095

From Table 4.13 above, a total of 255 tenderers gave their responses to the items under study. From the findings, the average ranged from 1.65 to 2.13 on a Likert Scale where 1 represented strongly agrees and 5 strongly disagrees. On the other hand the standard deviation was from a low of 0.966 to a high of 1.125.

To further establish the things that encourage corruption in the public procurement sector, the respondents were asked to state the extent to which they agreed with certain statement based on the Likert Scale. The respondents rated the extent to which they agreed with the

<sup>556</sup>Ronald Hope Kempe, "Corruption and Governance in Africa", Springer Nature, 2017.



given aspects which were indicators of the identified factors on a scale of 1–5 where 1 was strongly agree and 5 was strongly disagree and Table 4.14 presents the findings.

**Table 4.14: Things that Encourage Corruption in Public Procurement**

<b>What encourages Corruption in the Public Procurement Sector</b>	<b>SA</b>	<b>A</b>	<b>U</b>	<b>D</b>	<b>SD</b>
Lack of political goodwill	59.6%	25.5%	7.6%	6.0%	1.3%
Tribal and political manipulative culture	38.6%	36.1%	15.4%	6.7%	3.2%
Deliberate efforts to weaken legal institutions	52.7%	25.4%	16.6%	4.1%	1.7%
Lack of respect for the rule of law	46.8%	27.8%	14.6%	8.1%	3.1%
Existence of little survival outside public procurement	46.4%	27.8%	14.6%	8.1%	3.1%
Unmerited appointment to public service	33.6%	33.6%	17.1%	13.4%	2.3%

As shown in Table 4.14 above, 59.6% of the respondents indicated that lack of political goodwill by the leadership to decisively deal with corruption encourages corruption in the public procurement. This finding is in agreement with a study done by Shleifer & Vishny in 2008 which established that the biggest cause of corruption is undoubtedly the political leadership at the helm of affairs in a country who benefit from such acts.<sup>557</sup> According to Shleifer & Vishny, political factors play a critical role in increasing corruption as the political leaders preside over a complex set of political structures.<sup>558</sup>

A further 52.7% thought that it was due to deliberate efforts by those in leadership to weaken institutions and legal and justice system to save their kin, friends and cronies from prosecution. 38.6% cited tribal and political manipulative culture in the public sector as a cause while 46.8% said it was due to lack of respect for the rule of law. 46.4% agreed that existence of little means of survival outside public procurement encouraged corruption

<sup>557</sup> Shleifer Andrei, and Robert W. Vishny, "Corruption," *Quarterly Journal of Economics*, 108, 2008, 599–617.

<sup>558</sup> *Ibid.*

while 33.6% view unmerited appointment to public service based on ethnic or political consideration and not qualification or experience as a cause.

#### 4.6.3 Ways of Addressing Corruption and Ethical-Related Challenges

To establish ways of addressing corruption-related challenges in the public procurement sector in Kenya, descriptive analyses was done on 9 related items in order to establish the variable relationship between the items and patterns of responses. Table 4.15 presents the findings.

**Table 4.15: Descriptive Analysis of Ways of Addressing Corruption Challenges**

Ways	Analysis N	Mean	Std. Dev.
Leadership to create political goodwill	229	1.69	1.061
Culture change to tame culprits	229	1.99	0.908
Respect the rule of law and uniform application	229	1.85	0.999
Harsh punitive measures	229	2.03	1.038
Proceeds of corruption to be returned to public	229	1.93	1.060
Government to expand economic advancement	229	1.86	0.938
Appointment to public service should be on merit	229	2.00	1.126
Encourage transparency and accountability	229	2.18	1.162

As shown in Table 4.15, a total of 229 tenderers responded to this particular item under study. From the findings, the average range is 1.69 to 2.18 on a Likert scale where 1 represented strongly agree and 5 strongly disagree. On the other hand the standard deviation was from a low of 0.908 to a high of 1.162.

In a bid to establish ways of addressing challenges of corruption in the public procurement sector, the respondents were asked to state the extent to which they agreed with pre-identified statements on ways of addressing corruption based on the Likert Scale. The respondents rated the extent to which they agreed with the given suggestions which were indicators of the identified factors on a scale of 1 – 5 where 1 was strongly agree and 5 was strongly disagree and Table 4.16 presents the findings.

**Table 4.16: Ways of Addressing Corruption Challenges in Public Procurement**

<b>Ways of addressing Corruption, Nepotism and Ethnic Challenges in Public Procurement Sector</b>	<b>SA</b>	<b>A</b>	<b>U</b>	<b>D</b>	<b>SD</b>
Country's leadership to create political goodwill	59.7%	23.6%	9.2%	3.6%	3.9%
Culture change necessary to tame corruption and tribalism and political manipulation	31.3%	43.7%	19.7%	3.5%	1.8%
Respect the rule of law and uniform application	45.9%	33.5%	14.2%	2.5%	3.9%
Harsh punitive measures against those flouting public procurement regulation	36.4%	31.8%	21.7%	7.0%	3.1%
Proceeds of corruption to be returned to public coffers	42.0%	30.2%	19.4%	4.2%	4.2%
Government to expand economic advancement	41.5%	32.7%	19.0%	4.6%	2.1%
Appointment to public service should be on merit	44.0%	29.9%	15.1%	6.0%	4.9%
Encourage transparency, accountability and good governance in public finance management	36.2%	27.6%	21.5%	8.5%	6.1%

As presented in Table 4.16, a majority (59.7%) of the respondents suggested that the country's leadership should create a political goodwill to decisively deal with corruption in the public sector. This is followed by 46.7% who want the government to strengthen institutional and legal frameworks in the public procurement sector to deliver justice in case of economic crimes committed against the people of Kenya. Further results show that 45.9% suggest that the rule of law should be respected and application of the law should be uniform. 44% of the respondents want appointment to the public service done purely on merit and the ability to deliver services to the people. 42% want proceeds of corruption to be followed and returned to public coffers (retributive justice). 41.5% suggest that the government should expand other means of economic advancement outside the public procurement. Another 36.4% want harsh punitive measures to be meted against those flouting public procurement regulations while 36.2% suggest that transparency, accountability and good governance in public finance management should be encouraged. Thirty one point three percent (31.3%) proposed culture change as the necessary ingredient to tame runaway corruption in the public procurement sector.

## **4.7 Addressing Challenges Facing Public Procurement in Kenya**

This section attempts to establish how principles of good governance can address the challenges identified in the study as facing the workings and delivery of Public Procurement Law in Kenya. Emphasis is given to some of the principles of good governance and institutional accountability. Arising from the discussion of the results, the following are the suggested as ways of addressing the challenges facing the workings and delivery of the Public Procurement Law in Kenya.

### **4.7.1 Enhancing Public Service Accountability**

Moore defines democracy "...as a sub-species of a broader concept: the accountability of state to society."<sup>559</sup> By broadening his thinking beyond procedural definitions of democracy, Moore provides us with a good starting point for examining the multiple relations of accountability that hold state authorities accountable to the public. Accountability, in essence, is the exercise of counter power to balance arbitrary action.<sup>560</sup> Brinkerhoff develops a typology for analyzing accountability in which he breaks accountability into 'answerability', and 'enforcement'.<sup>561</sup>

Answerability refers to the obligation to provide information and explanations concerning decisions and actions. Enforcement is the ability of overseeing actors to apply sanctions if they don't like the answers they are getting. He distinguishes between accountability that is applied by actors located within and outside the state. Those within are enabled to apply sanctions to other institutions or agents within the state. This 'horizontal accountability' is the essence of separation of powers that defines a democratic system. The ability to apply sanctions from outside the state, or 'vertical accountability' involves the array of means by which the public can sanction state actors. Brinkerhoff points out that accountability from outside the state is characterized by relations with 'accountability agents' within the state. For instance, when a journalist exposes a corruption case,<sup>562</sup> the impact of the exposure

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<sup>559</sup> Moore (1997: 3).

<sup>560</sup> Agrawal and Ribot (1999:478).

<sup>561</sup> Brinkerhoff (2001:2-5).

<sup>562</sup> Brinkerhoff [2001] 4.

will depend on the judicial system following through with prosecutions.<sup>563</sup> According to Olowu, “public accountability is the requirement that those who hold public trust should account for the use of the trust to citizen or their representatives”.<sup>564</sup> He further observes that “public accountability signifies the superiority of public will over private interests and tries to ensure that the former is supreme in every activity as well as the conduct of a public official”. Similarly according to Laleye, “public accountability refers to sanctions and procedures by which public officials may be held to account for their actions”.<sup>565</sup>

From the two definitions, accountability refers to the notion that public officials should be held responsible for their actions while in office. However, for public officials to be held responsible for their actions while in positions of authority, there must be certain norms and values that they shall be required to observe. At the same time, there must be clear frameworks for reward and sanctions to hold them accountable.

The required norms and values for regulating and monitoring unethical behavior of public officials comprise the written and unwritten codes of conduct. But whether written or unwritten, ethical codes of conduct for regulating accountability in the public service may be classified into four categories. The first category consists of personal self-imposed ethics. This category of ethical codes stem from personal beliefs and convictions on what is right and wrong way of conducting oneself in respect of conducting public affairs. The second is the group of self-imposed ethics. This category of ethical codes are group-agreed right or wrong way which should be practiced by any member of the group (or profession) when serving society.

The third category are the written ethical rules or conduct for public servants that are not enacted by the legislature, but do have administratively implemented sanction against offenders and machinery for imposing sanctions. They include civil servants codes of regulations, standing orders and standing instructions issued through circulars. The final

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<sup>563</sup> C.F. Blair [2000] 82

<sup>564</sup> Dele Olowu [1993]117

<sup>565</sup>Mouftau Laleye [1993]

category of ethical codes is of course the enacted statutes or Acts of the legislature or provision of a country's constitution.<sup>566</sup>

Whether written or unwritten, ethical codes of conduct generally promote the values of impartiality, objectivity, integrity, efficiency, effectiveness and discipline of public servants when acting in the public interest in general and when exercising discretionary powers in particular.<sup>567</sup> Generally, ethical codes of conduct are aimed at checking “outright bribery and corruption; patronage; nepotism; embezzlement; influence peddling; use of one's position for self-enrichment; bestowing of favors on relatives and friends; moonlighting; partiality; partisanship; absenteeism; abuse of public property; leaking and/or misuse of government information, all of which are currently widespread in a number of public service institutions in Sub-Saharan Africa including Kenya.<sup>568</sup>

To ensure that ethical codes of conduct for public servants actually work, they must be entrusted to specially established institutions that can implement or administer them effectively. Such institutions include the supervisory or managerial positions in the executive arm of government; the agents of law and order like the police and prisons; quasi-legal agents, for example, the Ombudsman or an anti-corruption authority; the judiciary; the legislature; and other constitutionally established offices. For example, the new Constitution and the Judicial Service Act compel the JSC to ensure that the Judiciary is run in a transparent and accountable manner. Further, the Judiciary is under the law accountable only to the people. As a derivative of transparency and accountability, the recruitment of judicial<sup>569</sup> and other public officers, at least according to the Constitution and the Judicial Service Act, 2011, mandatorily requires the process to be open to the public, and that the process is done in a competitive and transparent manner.<sup>570</sup>

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<sup>566</sup>Barlow, [1993].

<sup>567</sup>Rasheed, [1993] 287.

<sup>568</sup>Rasheed, [1993] 299.

<sup>569</sup> Part V of the Judicial Service Act sets in greater detail the procedure for the appointment of both judicial and non-judicial staff of the judiciary. The First Schedule of the Act in great detail expounds upon the procedure that must be adhered to during the recruitment process.

<sup>570</sup> Article 172(2) reads as follows: “In the performance of its functions, the Commission shall be guided by the following:

It must, however, be noted that the primary consideration for appointment in the civil service should be based on competitiveness. The JSC has taken a lead in sealing loopholes and addressing corruption in general. This was evident for instance, during the recruitment of the Chief Justice, the deputy Chief Justice, judges of the Supreme Court and the High Court Judges, and other senior judicial officials that followed the Constitution to the letter. It was a record setting example to the rest of the world, as Kenya is touted to be the first country that has recruited a chief justice through an open and public participatory process.

It is clear that in terms of the recruitment of public officers, the government must strictly comply with the criterion set out in the Constitution and other statutes. Arising from its conceptualization, accountability is considered a key determinant of the state of governance and eventual workings and delivery of the country's laws. Thus, strict observation of accountability in the management of public affairs promotes good governance while the lack of it is the major course of bad governance.<sup>571</sup>

#### **4.7.2 Promoting Good Governance in Public Procurement**

Governance, according to the United Nations Development Programme (UNDP) refers to “the exercise of political, economic and administrative authority in the management of a country's public affairs at all levels. It incorporates the complex mechanisms, processes and institutions through which citizens and groups articulate their interests, mediate their differences and exercise their legal rights and obligations”.<sup>572</sup> On the other hand, Hyden finds this definition inadequate. This is because, from the definition, it is “difficult to reign in on what the concept really refers to, and impossible to create a set of manageable measures.”<sup>573</sup>

Given these “limitations”, Hyden defines governance to mean “the conscious stewardship of regime structures (rules) with a view to regulating the public realm, such as the arena in

- 
- a. Competitiveness and transparent processes of appointment of judicial officers and other staff of the judiciary;
  - b. The promotion of gender equality”

<sup>571</sup>Polidano and Hulme [1997].

<sup>572</sup>UNDP [1997].

<sup>573</sup>Goran Hyden [1999].

which state and society actors operate and interact to make authoritative decisions... .”<sup>574</sup> It refers to “the way a political system is constituted, and the way fundamental values and norms are understood and acted upon at different levels in society”.<sup>575</sup> Despite Hyden’s criticism, it is quite apparent that there are no major differences between Hyden’s definition of governance and that of the UNDP. Indeed, from the two definitions, it can safely be concluded that the concept of governance refers to authoritative management of public affairs, at all levels and in all sectors, by those who are entrusted with positions of leadership in the society.

Governance can be good or bad; it is good when the governed can reap the positive benefits they expect from their government, but it is obviously bad when the opposite is the result. Towards the end of the 1980s, the international donor community together with the domestic opposition groups in a number of Sub-Saharan African countries reached the conclusion that bad governance was the major cause of the inefficient and ineffective delivery of public services, and lack of development in the region. Bad governance was considered to be characterized by an autocratic political system, abuse of human rights, corruption, and inefficient organization and management of public institutions.

From the early 1990s, to improve the efficient and effective public services delivery and promote economic growth and development, domestic opposition groups, supported by the international community in a number of Sub-Saharan African countries began to demand good governance.<sup>576</sup> The notion of good governance that these groups demanded was characterized by competitive party politics (or liberal democracy), accountability and transparency in the management of public affairs, respect for human rights, privatization of non-performing public institutions, and organizational and structural reforms of the public service.

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<sup>574</sup>*Ibid.*

<sup>575</sup>See Goran Hyden [1999] 103.

<sup>576</sup>See UNDP [1997]219.



Given this notion of good governance, a number of scholars<sup>577</sup>, the international donor community, and even the domestic opposition groups in Sub-Saharan African countries began to assume that multipartism is equal to accountability, and accountability equals good governance, which in turn, equals economic growth and development. Although there is a lot of merit in these assumptions, it is not always true that democratization is equal to accountability, and that accountability is in turn equal to good governance.

Indeed, if this were the case then, the situation in Sub-Saharan Africa after over twenty years since the restoration of multipartism raises a serious problem. The problem is that either Sub-Saharan African countries have so far failed to democratize or that democratization does not equal accountability, which in turn, does not equal good governance. This is because since the re-introduction of multipartism in the region, the evidence on the ground indicates that widespread abuse of public office by public officials is still largely the norm.

According to Anyang Nyong'o, good governance "simply means good and competent management of public affairs, with or without encompassing all the major tenets of democracy".<sup>578</sup> Thus, it is quite possible that an autocratic or undemocratic regime can generally promote good governance and thereby achieve rapid economic growth (and/or development) for a society. A number of scholars who subscribe to this view cite the cases of South East Asian countries, namely; Singapore, Hong Kong, Taiwan and South Korea, to prove their point. Lately, the success stories of these countries have been questioned based on their sustainability. The critics of these economies argue that, although they have experienced rapid economic growth and development, such growth could turn out to be synthetic because they lack sound democratic foundation since they are autocratic based. Even though it is possible for an undemocratic regime to promote good governance, it is almost impossible for a regime to be considered democratic when its leaders cannot be held accountable for their public actions by the governed. Moreover, any regime that is always accountable to the governed will, as a matter of course, promote good governance. Thus,

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<sup>577</sup>Jabbara and Dwivedi [1989]; Polidano and Hulme [1997] 417

<sup>578</sup> Anyang Nyong'o [2002] 79

the equation that is likely to hold in most of the cases is the one that considers democratization as equal to accountability, and that accountability equals good governance.<sup>579</sup>

The most commonly cited means of holding the state accountable to the public-the aspect of ‘vertical accountability’ also called ‘downward accountability’-is electoral processes. “...fair and competitive elections were a key factor in developing public accountability in the most successful cases.”<sup>580</sup> As a key accountability mechanism, public service needs to be carefully scrutinized. While it is a very important organ of governance, it may not be well-structured or sufficient to guarantee quality services to the people. Public service systems must be analyzed for how candidates are recruited, suffrage, term lengths, and means of recall, among others.<sup>581</sup> Many public officials are not accountable to the people, even when the civil service system is well-crafted. Elite capture and other problems constantly emerge.<sup>582</sup>

There is wide agreement that “...accountability of local governance institutions constitutes a major problem of public sector management”.<sup>583</sup> Governments in Africa generally create local institutions that are upwardly accountable to the central state.<sup>584</sup> For example, many public institutions are constituted mainly by actors effectively appointed by central government. In the old constitutional order, candidates for local elections could only be chosen by political parties, and hence they could have been more accountable to the parties than to the local populations that ‘elect’ them.<sup>585</sup> Even when independent candidates are admitted to local elections, there are many ways that local elite or political parties are able to capture the electoral process, bringing the local accountability of leaders into

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<sup>579</sup>Polidano and Hulme [2001]

<sup>580</sup>Crook and Sverrisson, 2001, pp.50 observed in their study of decentralization’s effects on poverty reduction.

<sup>581</sup>Prud’homme (2001) and Ribot, 1999, pp.267.

<sup>582</sup> World Bank [2000:109,121]; Smoke (2000:17-9); Ribot [2001]; and Crook and Sverrisson (2001).

<sup>583</sup>Olowu [2001] 51.

<sup>584</sup>Oyugi [2000], Ribot [1999], Wunsch and Oluwu [1995], Mawhood [1983], Crook and Sverrisson [2001].

<sup>585</sup>Jesse C. Ribot, “Integral local development: “accommodating multiple interests” through entrustment and accountable representation”, *International Journal of Agricultural Resources Governance and Ecology*, 2001

question.<sup>586</sup> Nonetheless, elected representatives are one important building block in the construction of accountable public service so critical in public procurement management in the country.<sup>587</sup>

In Kenya, the levels of accountability among public officials in the management of public affairs consistently declined since independence to the early 2000s when the government embarked on enacting legislations necessary for good governance and accountable use of public resources.<sup>588</sup> This was as a result of the pressure by the donor community, civil society groups and other progressive forces including the citizenry. This led to a regime change in 2002 and since then, in spite of the various challenges, the country has experienced improved economic growth and development.<sup>589</sup> Since the enactment of progressive laws, the delivery of services to the ordinary citizen has continuously improved.<sup>590</sup>

As a country, Kenya must seriously address issues of governance for it is core to efficient management of public resources. If the country has to address issues of governance head on, the operationalisation of the Constitution and the enabling statutes like the Political Parties Act, 2011, and the Public Officer Ethics Act, 2003, among others should be a core duty to all state actors and the general citizenry. Notice has been taken of the general reluctance of the ruling elite to uphold the spirit and letter of the Constitution regarding issues of governance. However, this study takes the view that for the country to fix issues of governance, it has to fully implement and operationalize the Constitution and other enabling statutes including Public Procurement laws which are at the core of public resource management.

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<sup>586</sup>Jesse C. Ribot [2001] 94.

<sup>587</sup>*Ibid.*

<sup>588</sup> Informant Interview from Efficiency Monitoring Unit at the Ministry of Finance held in August, 2012.

<sup>589</sup>*Ibid.*

<sup>590</sup>*Ibid.*

### 4.7.3 Promoting the Rule of Law

From our previous discussion and analysis, this study has established a general reluctance by the ruling elite to respect and uphold the rule of law. It is the view of the study that upholding the rule is a necessary prerequisite if Public Procurement Law is to work and fulfill its required mandate. The study suggests the enhancement of the following:

#### (a) Enhancing Independence of the Judiciary

Both the Constitution and the Judicial Service Act create measures that not only give the judiciary complete autonomy but also put in place processes and procedures that enhance that independence. Article 159 of the Constitution provides the starting point to this objective.<sup>591</sup> This Article, in light of the enduring historic struggle to reform a corrupt and easily manipulated judiciary, heralds a seismic shift in terms of putting the people at both the helm of the institution and as the substratum of the judiciary.<sup>592</sup> In both instances, the people are the only entity that gives legitimacy and to whom ultimately the courts are accountable to. The independence of the judiciary and judicial officers is further fortified and indeed expounded upon in Article 160(1) of the Constitution.<sup>593</sup> The Judicial Service Act in Section 3(a) also upholds the independence of the judiciary.<sup>594</sup>

The emphasis and importance placed on judicial independence by both the Constitution and the Judicial Service Act is principally informed by the role played by the judiciary in its historic betrayal of the aspiration of the Kenyan people. The Judiciary especially during the agitation for multi-party democracy decisively cast its support and fate with the government and continuously acted against the progressive forces that wanted to reform

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<sup>591</sup> Republic of Kenya, 'The Constitution,' [2010], Article 159(1) of the Constitution states: "Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this constitution".

<sup>592</sup> See Ahmednassir Abdullahi, [2011] 4.

<sup>593</sup> Republic of Kenya, 'The Constitution,' [2010]. Article 160(1) states: 'In the exercise of judicial authority, the judiciary, as constituted by article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority'

<sup>594</sup> Section 3(a) of the Judicial Service Act states that the judiciary "shall uphold, sustain and facilitate a judiciary that is independent, impartial and subject only to the provisions of the constitution and the law".

the country.<sup>595</sup> However, from recent developments, the new JSC appears to be committed to ensure that the judiciary plays its rightful role as set out in the Constitution. This can be attested to by the high independence levels currently exhibited by individual judges in their rulings, which in many instances, appears to have gone against the wishes of the government. The government has lost a number of cases in the past as independent minded judge's rule without fear or favor to uphold the spirit and letter of the Constitution.<sup>596</sup>

It is worth noting that the majority of the judicial officers and political actors in the country are remnants of the former regimes and thus pose great danger during this era of implementation and internalization of the values of the new Constitution. Macharia Gaitho rightly captures the danger posed by these forces in trying to scuttle the reform process, when he said:

The orphans and remnants of Nyayoism are not amused and are already signaling that they will mount a vicious fight back to ensure a more pliable nomination for the top job in the Kenyan judiciary. For them it is not merely that Dr. Mutunga is an outsider, but one who represents a clear and present danger to their very existence. Reactionary elements from the Moi regime have thrived and prospered in president Kibaki's administration because a conservative mindset would not countenance real change. The barons of mega corruption, economic sabotage, and crimes against the people were pleasantly surprised that the transition from Moi to the Kibaki regimes didn't at all subset their comfort zones. They had the political protection and a friendly judiciary that would not demand accounting for their obscene wealth, land grabbing and promotion of ethnic cleansing as a political tool. They simply cannot countenance a Chief Justice who might want to create a brave and independent judiciary that will operate without paying obeisance to the mighty and powerful.<sup>597</sup>

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<sup>595</sup> Makau Mutua, 'Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya', [2001], *Human Rights Quarterly* 23(1), 110. For a historic appreciation of the subservient role the judiciary played during the multi-party agitation in 1990s.

<sup>596</sup> Examples of cases which the Government has lost in the recent past include the annulment of the appointment of Alnasir Visram as CJ, Kioko Kilukumi as DPP, Prof. Githu Muigai as Ag, Mr. Kirwa as Controller of Budget; appointment of Mumo Matemu as Director of Ethics and Anti-Corruption Commission; appointment of 47 County Commissioners; *Mombasa Republican Council v the state* in a case in which the state lost a bid to have MRC declared illegal group; and a warrant of arrest for Omar Al Bashir (President of Sudan) if he ever sets foot in Kenya among others.

<sup>597</sup> Macharia Gaitho, 'Reformist Chief Justice Should Expect Vicious Fight from Nyayoism Remnants,' [2011] 12.

To confirm Macharia Gaitho's fears, a court order stopping the vetting of judges and magistrates was issued by a High Court judge in Nairobi in October 2012 and which brought the activities of the Vetting of Judges and Magistrates Board to a halt. This High Court decision shows that the process of judicial reforms in Kenya is still under threat from pro-status quo judicial officers who prefer the old ways of 'doing business' in the judiciary. Since the judiciary is the only arm of government which is strongly undergoing proper reforms and transformation, the JSC must ensure that the judiciary is staffed with competent personnel. Judges for the old political and legal order should be thoroughly scrutinized and weeded where necessary through the vetting process.

In the past, the judiciary in Kenya was accused of wide-spread corruption to a point where many Kenyans had lost faith in this arm of the government.<sup>598</sup> Corruption in the administration of justice was a serious impediment to the rule of law in Kenya.<sup>599</sup> To address this problem, the NARC Government set up an "Integrity and Anti-Corruption Committee of the Judiciary in Kenya, 2003" to implement a policy known as "radical surgery".<sup>600</sup> The Committee's report popularly known as the Ringera Report of 2003 cited credible evidence of corruption on the part of 5 out of 9 Court of Appeal judges (56%), 18 out of 36 High Court judges (50%) and 82 out of 254 magistrates (32%).<sup>601</sup> The findings of the Committee revealed an urgent need for further radical judicial reforms with the principal objective of ensuring full judicial independence and accountability in Kenya.<sup>602</sup> However, this never went far as the NARC Government, which came into power on a platform of zero-tolerance to corruption, soon found itself entangled in the vice. Top

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<sup>598</sup> Justice George Kanyeihamba, Cecilia Jiminez, Clement Nwankwo, and Philip Kichana, *A Report of the review of the state of judicial independence and accountability in Kenya following the political and government changes in 2002* by the Kenyan Section of the International Commission of Jurists (ICJ-Kenya), [2005] 1, available online at <http://www.icj-kenya.org/index.php/icj-mission-report>, accessed on 22<sup>nd</sup> March, 2012.

<sup>599</sup> *Ibid.*

<sup>600</sup> See the ICJ-Kenya, 2005, pp.1.

<sup>601</sup> Report of the Integrity and Anti-Corruption Committee of the Judiciary of Kenya (Vol.1) [The Ringera Report] submitted to the Hon. Justice Johnson Evan Gicheru, 2003, 31, available online at [http://www.marshgroupkenya.org/Reports/Government/Ringera\\_Report.pdf](http://www.marshgroupkenya.org/Reports/Government/Ringera_Report.pdf), accessed on 21<sup>st</sup> March, 2015.

<sup>602</sup> See ICJ-Kenya Report [2005] 3.

government officials were accused of abetting, engaging in, and/or benefiting from proceeds of corruption.<sup>603</sup>

The promulgation of the Constitution in 2010 heralded a renewed attempt to reform various institutions of governance in the country. The Judiciary was to be reformed to conform to Chapter 10 of the Constitution which provides for a new *Judicial Structure and Appointments*.<sup>604</sup> Consequently, the country has been in a process to reconstitute the judiciary through a public participatory process which saw the Chief Justice, the Deputy Chief Justice, Judges and other officers of the judiciary hired after the effective date of the promulgation of the Constitution in 2010 go through a competitive process.<sup>605</sup> The process has since been completed by the vetting of the judges and magistrates under the Judges and Magistrates Vetting Act, 2011<sup>606</sup> which was undertaken by the Judges and Magistrates Vetting Board as provided for in the Constitution.<sup>607</sup> The Sixth Schedule to the Constitution provided in Article 23 for Parliament to enact legislation establishing mechanisms and procedures for vetting the suitability of all judges and magistrates in office on the 27 August, 2010.<sup>608</sup> The Act established an independent Board known as the Judges and

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<sup>603</sup> Refer to Aglo-Leasing Security Contracts Cases [2003/2004]. Also *see* Africa News Service, “Government Out to Bring Back Single Party Rule”, Africa News Service, Dec 13 2006 Issue

<sup>604</sup> Chapter 10 of the Constitution of Kenya [2010] provides as follows: a) The Judicial Authority; b) Independence of the Judiciary; c) Judicial Offices and Officers; d) System of Courts; e) Appointment of Chief Justice, Deputy Chief Justice, and other Judges; f) Tenure of Office of the Chief Justice and other Judges and their removal from office; g) Subordinate Courts; and h) Establishment of the Judicial Service Commission.

<sup>605</sup> This process is still on-going under the Judges and Magistrates Vetting Act, 2011. Through this process, a number of judges including a Supreme Court Judge, and others in the Court of Appeal and the High Court, have since been declared incompetent to serve in the bench due to their past poor performance, corruption, ineptitude, arrogance, delayed judgments, and other malpractices that obstruct fairness and justice in the judiciary.

<sup>606</sup> The Vetting of Judges and Magistrates Act, 2011 came into effect on 22 March, 2011.

<sup>607</sup> *See* Article 23 of the Six Schedule to the Constitution which provides for Parliament to enact legislation establishing mechanisms and procedures for vetting the suitability of all judges and magistrates in office on the 27 August, 2010.

<sup>608</sup> The Sixth Schedule to the Constitution, which deals with transitional matters, accordingly provides in Article 23 that: “(1) Within one year after the effective date Parliament shall enact legislation which shall operate despite Articles 160, 167 and 168, establishing mechanisms and procedures for vetting, within a timeframe to be determined by the legislation, the suitability of all judges and magistrates who were in office on the effective date to continue to serve in accordance with the values and principles set out in Article 10 and 159. (2) A removal, or a process leading to the removal of a judge from office by virtue of the operation of legislation contemplated under subsection (1) shall not be subject to question in, or review by, any court.

Magistrates Vetting Board whose function was “to vet judges and magistrates in accordance with the provisions of the Constitution and the Act.”<sup>609</sup>

The Board received a total of 363 complaints against Court of Appeal judges and 1057 complaints against High Court judges. The complaints received were categorized based on the statutory criteria, namely: professional competence; written and oral communication skills; integrity; fairness; temperament; quality of judgment; delayed judgment; bias; and corruption. After a vetting process that lasted four years, the Board released its report in March 2016, in which it declared four (44%) of the nine Court of Appeal judges and nine (20%) of the forty four High Court judges as unsuitable to serve in the bench due to their past poor performance, corruption, ineptitude, arrogance, delayed judgments, and other malpractices that obstruct fairness and justice in the judiciary. Thus, the Board found 40 (75%) judges to be suitable and 13 (25%) to be unsuitable. The high number of judges found unsuitable to serve in the judiciary due to their poor past records illustrates how deep the problems have been in the judiciary.

At the time of drafting this thesis, the term of the Board has ended. However, we have had fresh accusations against members of the bench warranting a way forward. A case in point is where a Supreme Court Judge Hon. Justice Tunoi was accused of having received a 200 million shilling bribe to influence the decision of the Supreme Court in favour of a litigant in Election Petition No 18/2014 arising from the 2013 general election in Kenya. A tribunal was formed to investigate the judge through a Kenya Gazette Notice No. 1084.<sup>610</sup> However, the Tribunal was terminated following the said judge’s retirement at the age of 70 years.

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<sup>609</sup> The Constitution declares that the Board must vet the suitability of the judges in accordance with the values and principles set out in Articles 10 and 159. Article 10 includes amongst its binding national values and principles: the rule of law, democracy and participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability. Article 159 enunciates three guiding principles of justice: it should be done to all irrespective of status; it should not be delayed; and that it should be administered without undue regard to procedural technicalities.

<sup>610</sup>The Kenya Gazette Notice No. 1084, *Appointment of Chairperson and Members of a Tribunal to Investigate the Conduct of Justice Philip Kiptoo Tunoi, Judge of the Supreme Court of Kenya*, Vol.CXVIII-No.17, February 23, 2016.



Going forward, the country needs to decide whether it would be prudent to make the vetting of judges and magistrates a continuous process done at an interval of time, say after every five years, to ensure the judiciary does not slide back into the previous state. Perhaps, it would also be important to consider expanding the scope of vetting to include all the officers serving in the judiciary and beyond including all persons functioning in the courts and supportive sectors such as the advocates, paralegals, police, the prosecution, probation officers and prison officers.

Further, it was established that the Kenyan Judiciary was grossly understaffed in the past. Before the beginning of reforms in the sector in 2011, it had 44 High Court Judges and 10 Judges of the Court of Appeal and 346 magistrates. These judicial officers served a population of 40 million. With a small staff compliment such as this, it was impossible for the judiciary to discharge its functions and deliver justice in line with Article 159 of the Constitution. It is principally because of the understaffing as well as the increased number of litigants that there have been so many backlogs of cases in the Kenyan courts.

To address capacity challenges, the JSC started a massive recruitment of judicial officers in the country in 2011/2012 financial year which has seen the appointment of new judges in the Supreme Court, Court of Appeal, and the High Court.<sup>611</sup> The study established that in early 2012, the JSC recommended to the President the appointment of 28 new judges as High Court judges. This greatly helped to address acute shortage of judges that has hampered the dispensation of justice in the country for decades.

The JSC further initiated and indeed petitioned the office of the Attorney-General to amend the Judicature Act which limited the number of High Court judges to 70, and 15 judges to the Court of Appeal. Once this limitation is repealed, the number of judges and magistrates is set to increase tremendously in an effort to take justice closer to the people of Kenya. It is now a legal requirement that all the 47 Counties in the country must have High Courts.

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<sup>611</sup> Judicial Service Commission, *Judiciary Score-Card Annual Report issued by the Chief Justice*. (October, 2012).

The welfare of judicial employees was also found to be very crucial in an effort to stamp out corruption in the Judiciary and to achieve the envisioned reforms thereof. The JSC has already started the process of reviewing the remunerations of judges and other judicial officers and was expected to forward the same to the Salaries and Remuneration Commission as per the requirements of the Constitution<sup>612</sup>.

Financial autonomy for the judiciary was also established as a very important component of judicial independence. Article 173 of the Constitution creates the Judiciary Fund administered by the Chief Registrar of the Judiciary. The fund is a charge on the consolidated account of the government and frees the finances of the judiciary from the control and manipulation of the executive arm of government.<sup>613</sup> The Treasury thus does not have a final say on the budget of the Judiciary.

In conclusion, if Kenyans play their rightful role as expected of them by the Constitution, then the Judiciary can substantially get rid of some of the corrupt and incompetent officials who previously betrayed their trust, frustrated and even scuttled their wish for a judiciary that is free from the vices of corruption and political interference.<sup>614</sup> The dream for a better Kenya and an accountable judiciary can be attained if we have an independent judiciary that is free from the corrupt influences and the political control of the executive. An independent judiciary which is adequately funded and staffed is crucial in upholding the rule of law and by extension overseeing the delivery of socio-economic justice in the management of public resources.

### **(b) Upholding the Spirit of the Constitution**

Read as a whole, the Constitution, 2010, was a brave attempt to address all the socio-economic and political ills that had plagued the country since independence. There was an acceptance that most of these ills were as a result of bad governance. Comparing the old

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<sup>612</sup> Under Article 172(1)(b) the JSC is mandated "to review and make recommendations on the conditions of service of judges and judicial officers others their remuneration".

<sup>613</sup> Under Article 173(3) (4) the Chief Registrar prepares the annual budget of the judiciary, places before the JSC for approval and then transmits it to parliament for approval.

<sup>614</sup> See Ahmednassir Abdullahi, (2011).p.5 at *Supra* note 272.

and the new constitutional order in Kenya, the hitherto unfettered powers of presidency and the executive have been watered down considerably. However, it should not be lost on Kenyans that the presidency, its inner circles and those close to the power would want to maintain the former *status quo* in regard to matters of governance. The appointment of the 47 County Commissioners by the executive despite the court ruling otherwise is a good illustration to this hold on to power against the requirements of the new constitutional order<sup>615</sup>.

There have been other cases where the executive authority has tried to flex their muscle. As indicated earlier in the High Court Petition No. 16 of 2011 in the matter of the nomination for approval and eventual appointments to the offices of the Chief Justice, Attorney General, the DPP and the Controller of Budget under the Constitution, 2010. The decision by the executive to arbitrarily appoint the holders of these offices without following the due process was equally challenged.

Full implementation of the Constitution, 2010 offers Kenyan citizens an opportunity to tackle integrity challenges that have hindered strict operationalisation of procurement law and other related laws in this country. The citizenry are encouraged to jealously guard against mutilation of the peoples' Constitution and ensure that the government is kept under pressure to deliver the reforms contained in this supreme law. The new constitutional order is indeed useful in addressing corruption challenges in the country. Chapter six of the Constitution envisages a very high threshold of requirements for all those aspiring to hold public offices. Read together with other enabling statutes like the Political Parties Act, 2011, the Public Officer Ethics Act, 2003, Elections Act, 2012 among others, the spirit of this Chapter is to make it a lot harder for the political elite to plunder and mismanage public resources. Constitutionalism is, therefore, seen as key to unlocking issues of good governance, and sound management of public resources.

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<sup>615</sup> High Court Petition No. 208 of 2012, Center for Education Rights Awareness and others vs the Attorney General.

**(c) Reforming the PPDA, 2005**

Public Procurement and Disposal Act of 2005 operationalised in 2007 has had its own share of challenges. Several weaknesses have been cited in the Act by the present study and many other past studies which have reviewed this particular law. Article 227 of the Constitution, 2010, also puts the burden on Parliament to enact a law which prescribes a framework within which policies on public procurement are implemented.<sup>616</sup> Consequently, the PPDA, 2005 was repealed to the Public Procurement and Asset Disposal (PPAD) Act, 2015 which commenced on 7<sup>th</sup> January, 2016. The main aim of repealing the 2005 Act was to make it conform to the new constitutional order. Save for a few changes which have been included like the 30% procurement reserve for youth, women and persons with disability; county government's responsibilities with respect to public procurement and asset disposal; and Quality Based Selection for assignments and professional services regulated by Acts of Parliament among others, the principles largely remain the same as in the previous Act. There were no major alterations in content and structure of the new Act which can change the grounding, facts and arguments advanced in the present study.

For instance, termination of procurement proceedings under Section 36 of the PPDA has been a subject of intense legal debate as scholars seek to interrogate whether it is reasonable and just. In Miscellaneous Application No. 1260 of 2007, the High Court ruled against section 36(1) which allow that “a procuring entity may, at any time, terminate procurement proceedings without entering into a contract” and section 36(6) which provide that “termination of a procurement proceeding shall not be reviewed by Review Board or a Court”.<sup>617</sup> Similarly, the present study also established that discretionary powers provided for in Section 36(2) to terminate procurement proceedings has been abused in certain

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<sup>616</sup> Article 227(2) states in part, “An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented...”

<sup>617</sup> See Republic v Public Procurement Administrative Review Board & 2 others Ex-parte Selex Sistemi Integrati [2008] eKLR. The procuring entity, the Kenya Civil Aviation Authority, terminated a tender after award but before the signing of the contract with the vendor, Selex Sistemi. The High Court ruled that a procuring entity cannot terminate a contract after notification of award and that the Act cannot restrict one from seeking judicial review.

instances by corrupt public officers to their advantage. In spite of the evidence against unfettering discretion in the repealed Act, the new Act has no cure for the same.

This study holds the view that even the leeway provided by the 30 percent affirmative action for the youth, women and persons with disability may also end up being abused by corrupt public officers. They may be tempted to use that provision to front enterprises associated with their relatives and cronies, who are well within the definition of a youth, women or persons with disability, to accrue personal gain. In such a case, the ordinary folks may not benefit much and the intention of the law may be defeated.

#### **4.8 Conclusion**

The ruling and political elite as seen above prefer to maintain the *status quo* than to have a competitive procurement system that could put them on a level playing field with other competitors. This is, as Michael Holman argues, a “dance-of-make-believe”. The real agenda of the “dancing partners” is to hold on to the economic, political and socio-cultural *status quo* in Kenya. From the foregoing discussion, the study holds that there is still room for improvement of the law and institutions to make them more responsive to the emerging challenges in the procurement sector. This notwithstanding the challenges posed by the political elite in the sector.

In this regard, it is clear that Kenyans should wait for no ‘savior’ from the political elite. They should instead brace themselves and participate to change the way this country is governed. Going by the above cited cases, this participative role of the citizens in matters of governance is becoming increasingly clear as more Kenyans move to court to challenge the various arbitrary decisions of the executive. Conclusively, the famous Greek philosopher Aristotle (384-322 BC) once noted: “people do not take great offence at being kept out of government...what irritates them is to think that their rulers are stealing public money”.

## CHAPTER FIVE

### 5.0 BEST PRACTICES FROM OTHER JURISDICTIONS

#### 5.1 Introduction

This chapter provides a comparative analysis of best practices of public procurement systems in other jurisdictions namely: Malaysia, South Africa, Mexico and the European Union with an objective of contrasting these systems with the Kenyan Public Procurement legal order. Malaysia was chosen because at independence, the economy of Kenya and Malaysia were at par. Currently, the economy of Malaysia is three times bigger than that of Kenya. It would be important to establish what they did differently which has supported such a speedy growth. Also, it was important to pick a country from Asia for regional balance and Malaysia was a good choice. The European Union was chosen for study because of its success story in the management of public procurement in spite of its large membership base and the size of its market. Again, EU was selected to represent Europe in the study.

Mexico was chosen first for regional balance to represent the American continent and second, as a country which has seen its economy grow relatively faster than Kenya. Lastly, South Africa was chosen to represent the African continent outside Kenya and being a country which enacted its public procurement law well ahead of Kenya and has had a slightly longer period of operationalisation of the law as compared to Kenya. The country is also grappling with challenges in its public procurement system and it would be interesting to learn how they are managing the challenges. The aim of the chapter was to compare and contrast these practices with the Kenyan model and see what Kenya can borrow from them.

This chapter has also looked at the extra-territoriality and enforcement of procurement rules. This can help the county to reform its laws to punish Kenyans or nationals of other countries who commit economic crimes against the people of Kenya outside the borders of this country. Currently, Kenya has no such laws which make it difficult for the country to

apprehend and charge those who commit economic crimes which affect the Kenyan people while out of our borders.

## **5.2 European Union Procurement System**

Although some EU countries have slightly different values relating to public procurement, majority of them agree on the major procurement principles namely; transparency, anticorruption, competitiveness, and accountability. By implementing these principles through lawmaking and holding accountable those who break them, the EU maintains an effective anticorruption policy and is subject to several transparency Acts such as the GPA and European Contract Law and several WTO agreements such as the WTO Plurilateral Agreement on Government Procurement. These agreements ensure the EU's commitment to serve and protect these values.

### **(a) Transparency**

The first principle believed to be essential to procurement success in the EU is transparency. As included in EU policy, the principle of transparency requires clarity with regard to decision-making, actions, and policies at both the national and international level, in public, mixed, and private institutional settings as to: their position in the overall context of institutional decision-making; the organizational context in which they are set; the allocation of powers within that structure; the actual process of their establishment, including the parameters according to which it takes place; and their content, including their status.<sup>618</sup>

The EU is constantly looking for ways to improve their transparency, even though theirs is one of the more transparent systems in the world. Following this trend, the "Transparency Initiative" was recently launched to enable Europe to speak for itself through greater openness and more effective tools.<sup>619</sup> Since then, many groups such as the Society of

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<sup>618</sup> Excerpted from: Sophie van Bijsterveld, "Transparency in the European Union: A Crucial Link in Shaping the New Social Contract between the Citizen and the EU," Tilburg University, accessed February 29, 2012, at [www.ip-rs.si/fileadmin/user\\_upload/Pdf/clanki/Agenda\\_-\\_Bijsterveld-Paper.pdf](http://www.ip-rs.si/fileadmin/user_upload/Pdf/clanki/Agenda_-_Bijsterveld-Paper.pdf).

<sup>619</sup> This information was revealed at: EPIN Think Tank's Task Force meeting of October 20-21, 2005, Brussels.

European Affairs Practitioners, the European Public Affairs Consultancies Association, and the Alliance for Lobbying Transparency and Ethics Regulation have all adopted codes of conduct with the core objective being to promote greater transparency of procurement activities.<sup>620</sup>

**(b) Anticorruption**

Corruption in the EU is very hard to pinpoint due to the inconsistencies among member states arising from their varied corruption laws. Some EU countries are virtually corruption free, whereas others are almost completely immersed in it. In 2007, the EC called upon the professional associations of notaries, lawyers, accountants, auditors, and tax consultants to continue to tighten up their self-regulatory regimes. Perhaps the biggest setback to EU procurement and the obliteration of corruption is Italy, which has consistently been ranked as unsatisfactory.

Fortunately, from the new EU public procurement directives that focus on the opening up of the internal market and increasing cross-border competition, Article 45 contains a new provision for the mandatory exclusion of candidates for participation in a criminal organization, corruption, fraud, or money laundering and similar other activities. Contracting authorities must exclude such candidates if they are aware of such anomalies. It also requires member states to assign competent authorities to supply contracting authorities with the relevant information about such anomalies.

This initiative was hoped to put a concentrated effort on Italy to tackle corruption within its system. Kirstine Drew, an authority on anticorruption observed that “in the UK, even though, in principle, legal persons can be convicted for corruption, the difficulty of establishing a ‘controlling mind’ means that in practice it is unlikely that companies will be prosecuted.”<sup>621</sup> Specifically, if corruption was to increase within the United Kingdom, abolishment of such corruption would take longer than requested. It was established that

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<sup>620</sup>*Ibid.*

<sup>621</sup> Drew, Kirstine, “Compliance with Anti-Corruption Laws through Access to Public Procurement: Sanctioning or Voluntary Self-Regulation,” Unicorn Anti-corruption Network, 1-15, accessed June 26, 2012, at [www.againstcorruption.org/reports/2004-12-UK-CorrEUPubProc.doc](http://www.againstcorruption.org/reports/2004-12-UK-CorrEUPubProc.doc).



there exists a significant time gap within the EU between the conviction and the actual disqualification of companies involved in corruption, as described by the following:

An EU study on public procurement and organized crime found that there is no consistency on the period of time for exclusion. Some member states only allow exclusion from the current tender (Austria, Denmark, Finland, Ireland, the United Kingdom, the Netherlands, and Sweden); others allowed for indefinite exclusion (France, Greece, and Italy); whilst others for a set period of time (Belgium, Germany, Portugal, Spain, and Luxembourg) but varying, for example, from 3-10 years in the case of Belgium to five years or less in the case of Spain.<sup>622</sup> This represents an issue of inefficiency. Although the process of implementing anticorruption measures may require some re-evaluation, the amount of actual corruption was not one of the most pressing factors of the EU's procurement activity.

A strong anticorruption belief in the EU is that the market and not the state should pick the winner in a situation where favoritism between buyers and suppliers is not allowed. The EU has already taken many measures to combat corruption by producing a great deal of legislation to support the effort. A few examples of such legislation are as follows: Article 29 of the Treaty on European Union mentions preventing and combating corruption as one means of achieving a European area of freedom, security, and justice; the 1997 "Action Programme on Organized Crime" calls for a comprehensive anticorruption policy based on preventive measures; the 1998 Vienna Action Plan and the Tampere European Council in 1999 identified corruption as a particularly important area where action was needed; and the "Millennium Strategy on the Prevention and Control of Organized Crime" reiterated the need for approximation of national legislation to develop multidisciplinary EU policies and urged member states to ratify EC anticorruption instruments.<sup>623</sup>

Examples of the EU's efforts to directly tackle corruption include: two conventions on the protection of the EU's financial interests and the fight against corruption involving officials of the EC or officials of EU member states; and the European Anti-Fraud Office,

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<sup>622</sup>See Drew, Kirstine, 2004, note 316.

<sup>623</sup>*Ibid.*

established in 1999, which has inter-institutional investigative powers.<sup>624</sup> Therefore, although EU member states are not currently required by international law to comply with anticorruption methods, they do identify their collective interests as wanting to mitigate corruption.

Transparency International, a global institution dedicated to fighting corruption, publishes a “Corruption Perceptions Index” (CPI) report annually which ranks 180 countries by their perceived levels of corruption as determined by expert assessments and opinion surveys. A CPI score of “10.0” indicates a highly reputable system with little or no corruption and a score of “0” designates a highly corrupt system.

The 2007 CPI report identified European countries as having CPI scores between 4.0 and 10.0. Countries like the United Kingdom, Sweden, Finland, and Slovenia were identified as having the most transparent systems, whereas others (such as Poland and Greece) leaned more toward the 4.0 side of the scale. The western EU countries focused on in this report all maintained between a 7.9 and a 10.0.<sup>625</sup> From the foregoing analysis, even with varied corruption laws among member states, there is a real commitment to fight corruption in the region.

### (c) Competitiveness

EU procurement organizations urge businesses to learn to compete and to become more competitive. They believe that competition is a major drive to creativity and innovation which happen to be the major pillars to the growth and development of entrepreneurial economies.<sup>626</sup> To enhance competitiveness, the EU protects efficient markets from bid-rigging and inflated prices. In general, competitiveness helps to perpetuate the acquisition process as well as development and growth of such economies. A sound public

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<sup>624</sup>*Ibid.*

<sup>625</sup>Data according to the 2007 Corruption Perceptions Index by Transparency International.

<sup>626</sup> See Roebing, Georg, “Experiences with Procurement Policy in the EU,” Delhi Seminar on Government Procurement, May 12, 2006, DG Trade. Available at [www.unctadindia.org/uploadFILE.asp?upFILE=NationalSeminarOnGovernmentProcurement11-12May2006\\_GeorgRoebing.pps](http://www.unctadindia.org/uploadFILE.asp?upFILE=NationalSeminarOnGovernmentProcurement11-12May2006_GeorgRoebing.pps). See also Knight, *et. al.*, note 1.

procurement legal regime should promote a market-driven economy with an aim of delivering value for money for all goods, works, and services procured.

#### **(d) Accountability**

Accountability is ideally the backbone of every nation's procurement process and it is essential for ensuring that each step in the process is closely monitored. It makes certain that those who carry out procurement tasks fulfill their obligations to abide by the corresponding rules and regulations, and that those who do not receive the proper disciplinary action.

Louise Knight observes that under accountability, "procuring public entities and their officers must be accountable for the effectiveness, efficiency, and legal and ethical manner in which they conduct procurements. They can be asked and should be able to explain at all times their way of operating."<sup>627</sup> This way, no "shady" practices can go undetected. The EU exemplifies accountability in their procurement practices by creating an environment of transparency and competitiveness where opaque practices are difficult to come by.<sup>628</sup>

The European Anti-Fraud Office, in particular, seeks out fraud and other irregular activities and assures responsibility to the citizens of Europe.<sup>629</sup> Another example includes numerous EU-led regional workshops held internationally. One such workshop, "Promoting Transparency and Accountability of Local Governments and Detering Corruption in Public Contracting and Procurement," was held in Bali, Indonesia, in June 2009.<sup>630</sup> Through these two initiatives (implementing the Anti-Fraud Office and holding conferences with other nations in order to promote accountability and transparency), among many others, it is evident that the EU accountability is of the utmost importance.

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<sup>627</sup> Knight Louise, Christine Harland, Jan Telgen, Khi V. Thai, Guy Calendar, and Katy McHen, *Public Procurement: International Cases and Commentary*, New York, NY: Routledge, 2007.

<sup>628</sup> See Roebing, Georg, "Experiences with Procurement Policy in the EU," Delhi Seminar on Government Procurement, May 12, 2009, DG Trade. Available online at [www.unctadindia.org/uploadFILE.asp?upFILE=NationalSeminarOnGovernmentProcurement11-12May2006\\_GeorgRoebing.pps](http://www.unctadindia.org/uploadFILE.asp?upFILE=NationalSeminarOnGovernmentProcurement11-12May2006_GeorgRoebing.pps). See also Knight, *et. al.*, pp. 371.

<sup>629</sup>Sourced from [http://ec.europa.eu/anti\\_fraud/index\\_en.html](http://ec.europa.eu/anti_fraud/index_en.html).

<sup>630</sup> Details about this specific conference can be viewed here: [www.transparency.org/content/download/7491/46708/file/Procurement\\_Workshop\\_Updated\\_190606.pdf](http://www.transparency.org/content/download/7491/46708/file/Procurement_Workshop_Updated_190606.pdf).

One of the greatest achievements of the EU in recent years was found to be the creation of the European Single Market. This market is headed by the EC, more specifically, the sector of the EC headed by the Internal Market and Services Directorate General (DG MARKT). This institution was established in January, 1993 and its main role is “to coordinate the Commission’s policy on the European Single Market, which aims to ensure the free movement of people, goods, services, and capital within the Union.”<sup>631</sup> The DG MARKT is also responsible for implementing the EU legal framework. So far, this institution has helped create 3.2 million jobs and 944 billion Euros of “extra prosperity.”<sup>632</sup>

Another crucial agency involved in public procurement within the EU is the European SOLVIT system, an organization dedicated to resolving problems that arise within the internal market.<sup>633</sup> This international entity has headquarters in each of the EU member states and facilitates international problem-solving and handles procurement complaints from both citizens and businesses. Also, its network is available online, adding to the success and progress of e-procurement.

### **5.3 Mexico’s Public Procurement System**

Mexico’s public procurement system has come a long way in recent years. Since 2000, Mexico has sought a great amount of reformation in their procurement policies and legislation. Procurement activities in Mexico are overseen by the cabinet position of the Ministry of Public Function (SFP), as well as other government agencies such as the Ministry of Finance (SHCP).

In March 2000, two specific laws governing purchasing processes came into effect: the Law of Public Works and Related Services and the Law of Acquisitions, Leases, and Services of the Public Sector. This legal framework controls the three methods for purchasing goods and services in Mexico: by public tender, by direct award, or by invitation. Mexico’s revenue from their government procurement is becoming increasingly

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<sup>631</sup> DG Internal Market and Services,” European Commission, accessed June 26, 2012, at [http://ec.europa.eu/dgs/internal\\_market/index\\_en.htm](http://ec.europa.eu/dgs/internal_market/index_en.htm).

<sup>632</sup>*Ibid.*

<sup>633</sup>*Ibid.*

more vital to their economy. This is due to the fact that in 2007, government procurement amounted to over \$35 billion, of which 30 percent was for the purchase of goods, 45 percent for services, and 25 percent for construction services.<sup>634</sup>

Mexico's entire public procurement market was found to be separated into two levels: federal (government agencies and parastatal companies) and sub-federal (comprised state governments and municipal authorities). Since the sub-federal level is autonomous under Mexico's constitution, it has full power in creating and implementing its own rules. Based on the Law of Acquisitions, Leases, and Services and the Law of Public Works, Mexico's procurement process of open-tendering may be either national (where only Mexican citizens can participate) or international (where foreigners and citizens can both participate).<sup>635</sup>

New reforms in Mexico, such as the New Public Management, were shaped by its political environment, which determined the possibility of implementing such reforms.<sup>636</sup> Its procurement environment was found to be that of growth and reformation. Even though it was still developing, Mexican procurement system offered a promise of increasing competition. It was most apparent that its identified core procurement principles came from internal forces, international pressure and coercion. This was due to Mexico's rocky economic past where it lacked the internal infrastructure and resources to reinforce/protect these principles. Mexico's identified important procurement principles include: transparency, open-tendering, non-discrimination, and anticorruption.

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<sup>634</sup> Adrian Orta, 'Update on Mexican Government Procurement Laws,' [U.S. Commercial Service, 2007] accessed December 29, 2013, at [www.buyusa.gov/mexico/en/mexican\\_government\\_procurement\\_laws.pdf](http://www.buyusa.gov/mexico/en/mexican_government_procurement_laws.pdf).

<sup>635</sup> See Orta, Adrian (2007).

<sup>636</sup> Franco-Barrios, Adrian, "Building a Transparent and Honest Government in Mexico. Institutional Reforms and Anticorruption Policy," Interministerial Commission for Transparency and Against Corruption in the Federal Public Administration, 1-45, accessed June 26, 2008, at [www.competition-regulation.org.uk/conferences/mrcarr03/afbarrios.pdf](http://www.competition-regulation.org.uk/conferences/mrcarr03/afbarrios.pdf).

International agreements appeared to greatly influence these procurement principles. For example, Mexico was subject to many agreements such as the GPA that emphasized principles of transparency and accountability. Similarly, Mexico's principles of non-discrimination and anticorruption were derived directly from NAFTA, where each country is required to uphold the responsibility of implementing these two principles. More specifically, according to the NAFTA, no country will treat a locally established supplier in less favorable terms than those granted to another locally established supplier on the basis of degree of foreign participation or ownership, nor shall they discriminate against a locally established supplier on the basis that the goods or services offered by such supplier are goods or services originated in a third country.

Mexico's procurement principles were not intrinsically created, but were rather encouraged by international entities. This means that since such values were not originally internalized, their implementation may be less evident in some areas. The creation of the Federal Law of Transparency, as well as the Access to Public Government Information Act, makes the enforcement of these principles possible, though relatively difficult to be carried out.

#### **(a) Transparency**

One report from the U.S. International Monetary Fund states that, "in recent years, Mexico has made considerable progress in improving transparency in public finances. Major initiatives include reform of the budget process...overhaul of public procurement" and "strengthening of internal control and external audit."<sup>637</sup> Many different forms of legislation have recently been created to improve Mexico's transparency. Examples of this are the "National Index of Transparency and Good Governance" by *Transparencia Mexicana*, an organization that conducts surveys and inspections,<sup>638</sup> and the CITCC,<sup>639</sup> a

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<sup>637</sup>Loser, Claudio and Teresa Ter-Minassian, "Report on the Observance of Standards and Codes Fiscal Transparency Module," International Monetary Fund, 2002, available at [www.imf.org/external/pubs/ft/scr/2002/cr02200.pdf](http://www.imf.org/external/pubs/ft/scr/2002/cr02200.pdf).

<sup>638</sup> This assessment is based on a personal English translation of the Spanish language Web site: [www.transparenciamexicana.org.mx/ENCBG/](http://www.transparenciamexicana.org.mx/ENCBG/).

<sup>639</sup>CITCC is an acronym for: *Comisión Intersecretarial para la Transparencia y el Combate a la Corrupción en la APF*. In English, this translates as: Inter-ministerial Commission for Transparency and against Corruption in Federal Public Administration. More information can be found at: [www.programaanticorruccion.gob.mx](http://www.programaanticorruccion.gob.mx).

program initiated in 2001 to help Mexico's progression to a fully transparent and honest government.

The CITCC is responsible for the "Transparency Index"—an index created to identify links with society, as well as to evaluate the anticorruption efforts made by federal agencies. However, the only problem with such government initiatives is that they lack visible accountability. On the other hand, the creation of online resources such as Mexico's *Compranet* makes all bidding and procurement activity available to the public. With *Compranet*, anyone is able to freely view the tendering process between buyers and suppliers. The main objectives of this e-procurement system, as it relates to transparency, are "to make the process of government purchasing more efficient and transparent, and to provide public information on the procurement process."<sup>640</sup> Therefore, these advancements in technology have enabled accountability and implementation for transparency in Mexico.

#### **(b) Anticorruption**

All over Mexico, despite periodic anticorruption drives, corruption continues to be one of the nation's worst problems. Several federal programs initiated to target and mitigate corruption include: the Mexican Federal Anticorruption Policy (MFPA), the Public Administration Modernization Program (PROMAP), and the Federal Competition Commission (CFC). In addition, Mexican President has taken personal measures to fight corruption. He was touted as one of the few world leaders who have taken corruption head on in their administrations by instituting various anticorruption measures.

The different measures have their own components. The first program, MFPA, created new institutions, such as the Federal Law for Public Procurement, whose goals, in terms of achieving anticorruption, were "characterized by institutional reforms, outlining responsibilities, functions, objectives, and goals for every federal agency."<sup>641</sup> These initiatives marked a good start for anticorruption measures in the country.

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<sup>640</sup>Talero, E., "Mexico's *Compranet* Pilot Project," June 12, 2001, The World Bank Group, accessed April 18, 2012, at [http://siteresources.worldbank.org/INTEGOVERNMENT/Resources/702478-1129947675846/talero\\_eProcurement.pdf](http://siteresources.worldbank.org/INTEGOVERNMENT/Resources/702478-1129947675846/talero_eProcurement.pdf).

<sup>641</sup>See Franco-Barrios, Adrian [2011]119

Under MFPA, “these policies and actions contributed, in some way or another, to reduce potential risks of corruption in the management of public agencies and services,” but still lacked major reforms.<sup>642</sup> Therefore, between 1995 and 2000, PROMAP was established to reform MFPA. This program had two aims: “to transform the MFPA into an effective and efficient organization with strong culture of service in order to satisfy the social needs,” and “to combat both corruption and impunity through preventive actions and the steady and effective execution of corrective actions.”<sup>643</sup>

In addition to the measures undertaken before then, CFC implemented plans which targeted corruption in business. A great amount of this corruption was attributed to monopolies. Designed to promote competition, the CFC “is active in fighting monopolies in the Mexican economy.” *Televisa* (Mexico’s media monopoly and *de facto* ministry of public image and opinion of the government and the system), is one such monopoly<sup>644</sup> which is believed to be one of the backbones of Mexico’s corrupt system.<sup>645</sup> Another monopoly responsible for ongoing corruption is Telmex, Mexico’s main phone company. The main reason CFC was implemented was to “help the Mexican people tighten the screws on the monopolies.”<sup>646</sup>

The Mexican President announced a six-point plan to “tackle the bribes, kickbacks, and robbing of government coffers that continued to plague Mexico.”<sup>647</sup> Since then, he has implemented measures to ban government officials from receiving official gifts, and has recently removed all 284 of Mexico’s top federal police officers from their jobs, forcing them to prove they will not be corrupted again.<sup>648</sup> As seen by Mexico’s CPI score of 3.5, it

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<sup>642</sup>*Ibid.*

<sup>643</sup>*Ibid.*

<sup>644</sup> “Mexico Country Profile,” Business Anti-Corruption Portal, June 2008, Global Advice Network, accessed June 26, 2011, at [www.business-anti-corruption.com/normal.asp?pageid=308](http://www.business-anti-corruption.com/normal.asp?pageid=308).

<sup>645</sup> Schwartz, Rami, “The Common Enemy,” Mexico Editorials, 2006, La Palabra.com. Accessed June 26, 2008, at <http://esp.mexico.org/lapalabra/una/25198/the-common-enemy>.

<sup>646</sup>*Ibid.*

<sup>647</sup> See “Anti-Corruption Plan Announced in Mexico by Calderon Official,” *Sign on San Diego*, December 10, 2006, accessed March 7, 2012, at [www.signonsandiego.com/uniontrib/20061210/news\\_1n10mexico.html](http://www.signonsandiego.com/uniontrib/20061210/news_1n10mexico.html).

<sup>648</sup> “In Anti-Corruption Move, Mexico Forces Top Police to Prove Trustworthiness or Lose Jobs,” *International Herald Tribune*, June 25, 2007, accessed March 7, 2012, at [www.iht.com/articles/ap/2007/06/25/america/LA-GEN-Mexico-Police-Shake-up.php](http://www.iht.com/articles/ap/2007/06/25/america/LA-GEN-Mexico-Police-Shake-up.php).



is obvious that these drastic measures for reform are extremely critical in combating corruption, even if their progress is slow in coming. The lack of a firm infrastructure caused Mexico to lag behind in resources that could be extremely helpful toward reinforcement of its procurement principles. However, the fact that Mexico has signed numerous treaties, created an e-procurement system dedicated to transparency, and elected a president that enforces anticorruption and non-discrimination measures provides hope for Mexico's public procurement future.

Global Integrity, a non-profit organization dedicated to tracking governance and identifying corruption worldwide, releases reports each year that track many different countries in several different areas, including procurement. Global Integrity issues each country a score between 1 and 100 based on their Global Integrity Index, which is an "entry point for understanding the anticorruption and good governance safeguards in place in a country that should ideally prevent, deter, or punish corruption."<sup>649</sup>

The results of the 2007 report on government procurement ranks the United States first with a score of 93, Mexico second with a very near score of 91, and Italy ranks at the bottom.<sup>650</sup> This shows that Mexico's current measures implemented toward procurement reform are evidently working and effective. The 2007 report also attributed a "Very Strong" title to Mexico's procurement system, and only a "Strong" to such countries like Canada. In the area of judicial accountability, Canada, Mexico, and the United States were all identified as "Very Weak." This report and others from similar organizations represent the associated vulnerability of each country in relation to their overall procurement environment.

The first step towards mitigating corruption is to acknowledge that it exists. This is a step that all of the targeted regions have publicly identified. Mexico was found to ruthlessly deal with corruption in government obtaining among the members of its government and

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<sup>649</sup> "Frequently Asked Questions," For Journalists Webpage, Global Integrity, 2008, accessed June 26, 2012, at [www.globalintegrity.org/journalists/faq.cfm](http://www.globalintegrity.org/journalists/faq.cfm).

<sup>650</sup> Current statistics from Global Integrity are available at: <http://report.globalintegrity.org>.

hence, procurement agencies in Mexico are the least involved in corruption.<sup>651</sup> This was evident in the fact that Mexico received one of the highest possible ratings in the procurement category by Transparency International. Therefore, even though there is still some level of corruption in the Mexican government (evidenced by its CPI score of 3.5), the procurement sector has little to do with it.

From the Mexican procurement system, it can be deduced that it is impossible to separate the operationalisation of any public procurement law from the workings of a political system. The Mexican procurement model and its operationalisation is a classic example of a strong link that exists between the institution of the law and the political leadership of a country. This Mexican model indicates that the existence of a strong political goodwill has contributed greatly to the success story of the country's procurement system.

#### **5.4 Malaysia's Public Procurement System**

All public procurement in Malaysia is conducted by the Ministry of Finance through the Government Procurement Management Division, which issues all Federal Central Contracts.<sup>652</sup> Federal and state agencies are required to purchase from these contracts, although government-owned companies are not bound by the government's procurement procedures. Malaysia's procurement policies support the government's objective of seeking to achieve developed-nation status by stimulating local industry through maximum use of local materials, resources and technology transfer, supporting Bumiputera (local language for indigenous groups) business and promoting local service industries. Accordingly, some tenders are strictly restricted to Malaysian bidders in varying with contract size. Bumiputera Malaysians enjoy an additional preference factor.

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<sup>651</sup> See Morris, Stephen D., "Corruption and Mexican Political Culture," *Journal of the Southwest*, 45 (2003), accessed April 18, 2012, at [www.questia.com/googleScholar.qst](http://www.questia.com/googleScholar.qst); jsessionid = HRgf9NKFpvvF5212PJnd0xFwRy5Z12h2yyvg BTTTxBzxrDczbvX! -722841119?docID = 5006072313.

<sup>652</sup> Fred Owegi and Eric Aligula, *Public Sector Procurement in Kenya: The Need for a Coherent Policy Framework*. Kenya Institute for Public Policy Research and Analysis (KIPPRA) Discussion Paper No.62 (December, 2006).

Public procurement in Malaysia is legislated under several Acts, including the Contract Act (1949), which provides legal validity for ministries to represent government in making procurements; and the Financial Procedure Act (1957), which outlines the mode of control and management of public finances, and lays out procedures for collection and payment of public monies and procedures for purchase, custody and disposal of public property. Procurement is, additionally, controlled through treasury instructions, including central contract circulars.

Complaints on other aspects of government procurement are brought before the Public Complaints Bureau (PCB) located in the Prime Minister's Department, or the Permanent Committee on Public Complaints, which decides what action, ought to be taken by the ministry. The Auditor General also has authority to monitor and audit procurement procedures and to order corrective actions where necessary.

Malaysia's public procurement policies are aligned with the aspirations contained in the National Development Policy and Vision 2020, which spells out strategies to help the country attain developed nation status by the year 2020. Thus, procurement and other policies are specifically formulated to stimulate the growth of local industries, support and encourage the involvement of Bumiputera entrepreneurs, and enhance the capability of local institutions and industries.

Malaysia has also implemented an electronic procurement system for online processing of government procurement. This has helped reduce the time taken to procure goods for the government, reduce cases of corruption and improve efficiency. Consequently, all government procurement information is made available through the Treasury's website. As a result of good governance, and greater level of transparency and accountability in the management of public procurement in the country, Malaysia has been able to achieve rapid socio-economic growth and development. Indeed, Malaysia's economy was at the same level with Kenya's at independence in 1963. However, Malaysia was able to achieve rapid growth and development in the 80s and 90s and its economy is currently estimated to be about three times that of Kenya.

Malaysia's economic progress is believed to be as a result of a leadership that has worked ceaselessly to streamline public resource management in the country. Consequently, a culture of transparency and accountability has been the hallmark of public procurement management in the country. From this analysis, Malaysia operates a hybrid procurement system that consists of legal regime and executive control from executive, indicating that the law cannot in itself deliver all the necessary reforms in procurement sector.

Malaysian public procurement regime is also inward looking and is skewed towards the development of local entrepreneurship. This has worked well for the country. It takes the leadership of a country to lay a solid foundation required for prudent management of public resources. Therefore, Kenya can borrow a leaf from Malaysia and institute further reforms in its procurement system.

### **5.5 South Africa's Public Procurement System**

The main objective of public procurement policy in South Africa is to achieve good governance through efficient management of the system and elimination of waste and corruption.<sup>653</sup> Further, it aims to support the country's overall economic objectives, and serve as an instrument for attaining other objectives which include: implementation of an affirmative programme for local entrepreneurs, promote employment intensive practices, and affirming marginalized sectors of society in construction projects and the development of an Affirmative Procurement Policy (APP).<sup>654</sup>

APP enables organs of the state to operationalize policies in a targeted, transparent, visible and measureable manner when engaging in economic activity with the private sector, without compromising principles of fairness, competition, cost efficiency and inclusion.<sup>655</sup> APP has two components, namely; a development component ensuring that

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<sup>653</sup> Republic of South Africa, *Ministry of Finance: Objective s of Public Procurement*. Accessed on May 13, 2013, available online at [www.ministryoffinance.gov.za/publicprocurementobjects/objects.pdf](http://www.ministryoffinance.gov.za/publicprocurementobjects/objects.pdf), accessed on May 14, 2016.

<sup>654</sup> *Ibid.*

<sup>655</sup> APP involves the recognition that procurement may be used as an instrument of government policy, and that participation of targeted groups/individuals/communities/ enterprises can be secured using a development objective.

the target group is capable of participation and a structured participation component ensuring that the target group is actually engaged in the provision of goods/services/works.<sup>656</sup> The Green Paper on Public Procurement Reforms aims at making the tendering system easily accessible to local entrepreneurs, and at greater policy co-ordination across the different levels and departments of government.

Besides its Constitution, South Africa's public procurement is governed by several pieces of legislation, including: the broad-based Black Economic Empowerment (BEE) Act 2003, which establishes a code of good practice informing development of qualification criteria for issuance of licenses/concessions, sale of state-owned enterprises, PPPs, and implementation of a Preferential Procurement Policy; The Construction Industry Development Board Act, 2000, which applies to all organs of state involved in construction industry-related procurement; and The Preferential Procurement Policy Framework (PPPF) Act of 2000, which establishes the manner in which preferential procurement policies are to be implemented.

The PPPF Act was enacted with the aim of providing socio-economic opportunities to enterprises and individuals historically excluded from equitable participation in the economy. As part of the government's promotion of procurement reforms, the Act also aimed at introducing uniformity in public procurement, besides providing guidelines for government acquisition policy. Thus, the cross-sectoral PPPF provides for creation of categories of preference in the allocation of contracts, as well as the protection and/or advancement of disadvantaged groups. Effectively, it leverages government purchasing power in support of its broad BEE policy objectives, as well as of small enterprise development.

As a result, direct preference is accorded to 'targeted' enterprises to tip the scale in their favor on small contracts with a value below predetermined financial threshold. Targeted enterprises are, thus, able to participate in public procurement either directly as prime

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<sup>656</sup> Abridged from: <http://www.info.gov.za/greenpapers/2009/publicproc.html>

contracts or as joint venture partners with large firms, or indirectly as sub-contractors, suppliers, service providers and manufacturers to prime contractors in the supply chain. Targeted procurement 'un-bundles' or 'unpacks' procurement contracts to make them accessible to targeted enterprises. In 2003, South Africa adopted a strategy to promote uniformity in the procurement reform processes.

The concept of supply chain management and uniformity in the implementation thereof, are some of the initiatives under this strategy, which was followed by development of an Integrated Financial Management System (IFMS) master plan including e-procurement, to fully support the adoption of the proposed integrated supply chain management function. Albeit corruption-related challenges in public procurement system, South Africa has to a larger extent been able to streamline the management of its public procurement sector. This sector has largely been seen by South Africans as relatively transparent and accountable in the way government contracts are issued and executed. As a result of this and many other factors, South Africa has been able to maintain relatively high economic growth and development in the continent.

In comparison, South Africa is ahead of Kenya in public procurement reforms and related legal order. From the analysis, South Africa's public procurement legal regime is slightly different from the Kenyan model. Whereas the objective of procurement reforms in Kenya was to increase good governance, transparency and efficiency, and to eliminate corruption and mismanagement in public procurement, in South Africa, procurement reforms were intended to democratize the procurement process and use procurement to achieve socio-economic goals. However, just as in Kenya, the principles of public procurement in South Africa have been given constitutional status. But one notable achievement in South Africa in relation to anti-corruption provisions is that suppliers who engage in corruption are subject to a mandatory debarment and South Africa maintains an open register of debarred companies and business enterprises. Perhaps this is one lesson that Kenya can borrow from South Africa.

From the case studies outlined here above, there are lessons Kenya can borrow to improve its public procurement regime. A major lesson from these comparative analyzed studies is that Kenya must be willing and ready to fix its governance issues particularly on matters related to political leadership. In this regard, the workings and delivery of the Constitution particularly Chapter six on *Leadership and Integrity* may have a direct bearing on the future of public procurement in the country.

As we have seen in Malaysia, Mexico, the EU and South Africa, the principles of public procurement are nearly the same. From the above comparative analyses, the countries which have succeeded in their public procurement have their political leaders lead from the forefront to make the system work. This is what is referred to as positive political patronage which works for the law as established by this study. The political leadership in those countries have taken it upon themselves to back the law to ensure no one distorts the process and that the process achieves its aims and objectives. Perhaps this is how the Asian Tigers have managed to rise from a similar GDP with Kenya in 1963 to where they are today. The heartbeat of the political elite should be in tandem with the spirit of the law if the legal order is to deliver.

## **5.6 Extra-Territoriality and Enforcement of Procurement Rules**

Jurisdiction can only be properly asserted if it is based on an accepted theory or principle of jurisdiction.<sup>657</sup> Five theories of criminal jurisdiction have been accepted universally and include: territorial, protective, nationality, universal, and passive personality.<sup>658</sup> The “territorial theory” allows for jurisdiction over conduct that takes place within the territorial boundaries of a state.<sup>659</sup> The “nationality theory” bases jurisdiction on the allegiance or nationality of the perpetrator of the offenses as prescribed by the state of his allegiance, no

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<sup>657</sup>See French Law No. 70-1320 of Dec. 31, 1970 (codified at C. Santiq Publique, Art. L. 627), provides for prescriptive adjudicatory and enforcement jurisdiction over attempts to violate and combinations (“entents” or “associations”) with a view to violate French narcotics laws.

<sup>658</sup>Harvard Research in International Law, *Jurisdiction with Respect to Crime*, 29 AM. J. INT’L L. 474 (1935).p.1110.

<sup>659</sup>See *Harvard Research*; Restatement (Second) of Foreign Relations Law of the United States, §§ 6-7 (1962). Both provide that while states may validly prescribe rules affecting the conduct of people outside their territorial limits, they may only enforce those rules within their own territory.

matter where the offenses take place.<sup>660</sup> The “protective principle” or “injured forum theory” emphasizes the effect or possible effect of the offense and provides for jurisdiction over conduct deemed harmful to specific national interests of the forum state.<sup>661</sup> The “passive personality principle” extends jurisdiction over offenses where the victims are nationals of the forum state.<sup>662</sup> The “universal theory” allows jurisdiction in any forum that obtains jurisdiction over the person of the perpetrator of certain offenses considered particularly heinous or harmful to mankind generally.<sup>663</sup> These theories represent the possible bases for a state to claim jurisdiction over actions committed abroad.<sup>664</sup>

This study has established that corruption is endemic in the public procurement process in many jurisdictions throughout the world. This raises the issue of extra-territorial enforcement of procurement legislation. Some developed countries have passed legislation criminalizing violation of procurement and tendering laws outside their national territories. As posited in the Permanent Court of International Justice in the Lotus Case, [S.S. “Lotus” (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10], every state has the freedom to adopt principles of extra-territorial jurisdiction it deems suitable to its interests, provided such jurisdiction does not, in any way, conflict with international law.<sup>665</sup> Far from laying down a general prohibition to the effect that states may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules. Extra-territorial laws exist in the UK, USA and the European Union.

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<sup>660</sup>See Harvard Research in International Law (1935) at *supra* note 355. p. 1111.

<sup>661</sup>*Ibid.*

<sup>662</sup>*Ibid.*

<sup>663</sup>*Ibid.*

<sup>664</sup>See *Lauritzen v. Larsen*, 345 U.S.571 (1953); *Note, Jurisdiction*, 15 Tex. INTL LJ. 379, 404 n.3 (1980); *Empson, The Application of Criminal Law to Acts Committed Outside the Jurisdiction*, 6 AM. CRIM.L.Q. 32 (1967); *George, Extra-territorial Application of Penal Legislation*, 64 MICH. L. Rev. 609, 613 (1966).

<sup>665</sup>Minodora D. Vancea, “Exporting U.S. corporate governance standards through the Sarbanes Oxley Act: Unilateralism or coope”, *Duke Law Journal*, Nov 2003 Issue



For instance, The United States Jurisdiction over Extra-territorial Crime has developed the parameters under which the US can assert its jurisdiction extra-territorially.<sup>666</sup> United States courts have asserted jurisdiction over extra-territorial conspiracies to commit crimes, even when no actual effect has occurred within United States territory, and have articulated the assertion as being on the basis of the objective territorial theory.<sup>667</sup> Section 402 of the *Restatement Draft* (from Lotus, 1927) provides in relevant part: subject to Section 403, a statute may, under international law, exercise jurisdiction to prescribe and apply its law with respect to (1) (a) conduct a substantial part of which takes place within its territory; (b) civil (not criminal) jurisdiction; (c) conduct outside its territory which has or is intended to have substantial effect within its territory; (2) the conduct, status, interests or relations of its nationals outside its territory; or (3) certain conduct outside its territory by persons not its nationals which is directed against the security of the state or certain state interests.

This provides the bases of jurisdiction in which the United States Jurisdiction over Extra-territorial Crime is anchored. The *Restatement of the Foreign Relations Law of the United States (Restatement Draft)* sub-parts (1)(a) and (1)(b) relate to the traditional notions of subjective and objective territoriality.<sup>668</sup> The objective territorial principle applies to extra-territorial offenses whose effects are intended to and actually occur within the territory of the state asserting jurisdiction. Sub-part (1)(c) does recognize an ‘extension’ of the traditional objective territorial principle to include intended effects within ambit by providing for jurisdiction to be asserted for “conduct outside [the asserting state’s] territory which has or is ‘intended’ to have substantial effect within its territory.”<sup>669</sup> This law has helped United States to deal with crimes committed outside its territories involving US nationals or nationals of other countries but which affects its security or other interests directly or indirectly.

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<sup>666</sup>See *Extra-territorial Jurisdiction in Criminal Law*, 13 HARV. INTL L.J. 346 (1972).

<sup>667</sup> S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. ser.A, No. 10 (judgment of Sept. 7, 1927); *Restatement Draft* p. 403.

<sup>668</sup>Henkin, *Restatement of Foreign Relations Law of the United States* § 401 (Draft No. 2, 1981).

<sup>669</sup>See Henkin (1981), p.112.

Extra-territorial jurisdiction has been approved, for example, in the case of a violation outside the United States of a penal clause in an absentee voting statute.<sup>670</sup> American nationals, assisting in the illegal immigration of alien contract laborers have been prosecuted on the basis of nationality jurisdiction.<sup>671</sup> Even a murder which a United States national committed on an uninhabited Guano island was considered proper subject matter for a United States court.<sup>672</sup> The same philosophy as that which motivates the US to apply nationality jurisdiction, namely the accused's likelihood of escaping justice altogether, should motivate Kenya's interest to apply the same principle especially when dealing with corruption.

The United Kingdom's Bribery Act 2010 (the "Bribery Act") has implications for British companies operating abroad. The Bribery Act is in some respects similar to the USA Foreign Corrupt Practices Act (FCPA). The UK Act applies to bribing of foreign public officials in procurement processes. The scope of the Bribery Act is found to be wider than that of FCPA in the following major respects: its definition of the offense of bribery and application of the "expectation Test". For instance, the Bribery Act catches bribes offered or given to *any* person. To commit the *offence of bribing another person* under the Bribery Act, the briber must intend to bring about or to reward improper performance of a function or activity which is determined by an objective standard. According to the Bribery Act, the function or activity may be within the private or public sector, and the test of whether it has been improperly performed is "*a test of what a reasonable person in the United Kingdom would expect in relation to the performance of the type of function or activity concerned*" (the "Expectation Test" as provided under Section 5(1) of the Bribery Act).

An *offense of bribing a foreign public official* is committed under the Bribery Act by a person if (i) he intends to influence the foreign public official in his capacity as such, and (ii) he intends to obtain or retain business (or an advantage in the conduct of business) and (iii) the payment/advantage is not permitted or required by the written law applicable to

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<sup>670</sup>State v. Maine, 16 Wis. 398, 421 (1863).

<sup>671</sup>United States v. Craig, 28 Fed. 795, 801 (1886).

<sup>672</sup>Jones v. United States, 137 U.S. 202 (1890).

the foreign public official. Whereas, it is an offence under the Bribery Act to request, to agree to receive, or to accept a bribe, in the FCPA, it is only the persons giving or offering a bribe and not the accepting person/party who is penalised.

This study takes note of some two Kenyan nationals who are facing economic crime charges committed extra-territorially in the Virgin Islands. The two are currently fighting against their extradition to face economic crime charges in the Virgin Islands through a High Court Petition. No. III of 2013 – Samuel Kimichu Gichuru and Chrysanthus Barnabus Okemo versus the AG; Director of Public Prosecution and Chief Magistrate’s Court. This petition arose from the original order in the case of DPP versus Samuel Gichuru and Chrysanthus Barnabas Okemo CR. 40 926 of 2011 where a judgment was delivered against them. They are accused of stashing proceeds of economic crime in Kenya in offshore accounts in the Virgin Islands. Whereas the case facing the two Kenyans is a matter of interest to Kenya, the country has been reduced to a “bystander”. Its laws do not provided for jurisdiction over economic crimes that takes place outside the territorial boundaries of the state. This puts the country in an awkward situation where it has to extradite its own citizens to face trial in a foreign country.

Kenya should enact an anti-bribery law or foreign corruption practice law which can deal with Extra-territorial jurisdiction in matters of economic crimes committed by either Kenyan nationals or nationals of other countries against the Kenyan people. The case of Nicholas Smith and Christopher Smith of the Smith and Ouzman Company v. the UK [L.Q. 1058 of 2010] can be used to illustrate the inadequacy of the law in Kenya in dealing with Extra-territorial economic crimes committed outside the jurisdiction of the state.

Serious Fraud Office (SFO) through the Bribery Act, charged Smith and Ouzman (S&O), a printing company based in Eastbourne UK, with paying bribes to Kenyan Interim Independent Electoral Commission (IIEC) and Kenya National Examination Council (KNEC) officials totalling to £433,062.98 in order to win business contracts and to ensure repeat business. SFO submitted that the defendants used inflated commission payments to overseas agents to mask bribes that were to be passed on to public officials involved in the

awarding of contracts for printing ballot papers for IIEC and certificates for KNEC. The two brothers of the Smith and Ouzman Company were found guilty by a British court in the case popularly referred to as “Kenyan Chickengate” and were appropriately sentenced in February 2016. While the UK has managed to convict its citizens involved in the scandal, Kenya is yet to convict its citizens who were accused of receiving the said bribe from Smith and Ouzman Company officials. If the country had such a robust Extra-territorial regime as the UK, perhaps the corrupt IIEC and its successor IEBC and KNEC officials would have been forced to face justice by now. This study proposes the enactment of extra-territorial/anti-bribery law which can deal with economic crimes committed outside this country by Kenyan nationals or foreigners, but which affects the economic or security interests of Kenya.

## CHAPTER SIX

### 6.0 SUMMARY OF FINDINGS, CONCLUSIONS AND RECOMMENDATION

#### 6.1 Summary of the Study Findings

The success of the institution of law greatly depends on the will of the political leadership to promote the culture of obedience to the law. Their actions greatly determine whether or not the citizens observe the tenets of fidelity to the law. If the leadership chooses to strictly enforce the law, then there will be the tendency to abide by the law among the populace. However, if there is laxity in the enforcement of the law, then there is a tendency by the citizenry to break or flout the rules. This in effect renders the law hollow. A good law will fail if not backed by the necessary moral support from the leadership. This outlines the connection between legal and moral philosophy as outlined in the theoretical framework informing the study.

This study proceeded on the premise that Public Procurement Law in Kenya has largely failed in its workings and delivery due to political patronage. The Systems Theory was used to show that when all the elements of an intra-system are working well both individually, and as part of a whole, then the system may only experience minor challenges with minimum impact on the outcome. But when the output has a major challenge, and the intra-system elements are working relatively well, then you need to investigate the surrounding environment and for this study, it is the political environment in which the law and institutions operates. The study, therefore, investigated political patronage as the force derailing the workings and delivery of the PPDA.

In this study, the intra-system elements included reforms in the law, institutions and policy. From the literature reviewed, substantial work has been done in reforming and improving these intra-system elements. The larger part of these reforms in law dates back to 2001, the Exchequer Regulations [2001], PPDA [2005], Constitution [2010] and the PPAD Act [2015]. Alongside these reforms, there have been other enabling legislations and institutions. However, it was established that with all the said reforms, the workings and delivery of public procurement law was still wanting and remained a big challenge.

The study cited numerous cases and scandals to corroborate this position. The study also noted institutional failure like the EACC, the lackluster performance in the Judiciary and Parliament among other institutions. In all these failures, the political establishment was perceived to have greatly contributed either directly or indirectly.

As expounded by the systems theory, therefore, the workings and delivery of the public procurement sector in Kenya was found to heavily depend on the political environment. This environment was under the control of the political elite and by extension the executive arm of the government in power. The control emanates from the huge public procurement market in terms of the magnitude and size of the resources which accounts for about 60 percent of the annual budget and 20 percent of the GDP. It was established that political leaders fight for power in order to control the enormous amounts of resources in public procurement.

From the stakeholder and informant interviews, case law reviews and desktop research, the failure of the workings and delivery of public procurement law in Kenyan was greatly attributed to the negative political patronage. The study did establish some weaknesses in the law and institutions in spite of the good work done so far on reforms in this area. However, the said weaknesses can be improved on since no law or institution can be perfect in a dynamic society. Suffice to say, the greatest shortcoming that can be attributed to the failure of the law is the interference from the political elite working against the spirit of the law.

From the foregoing analysis, public procurement law and institutions thereof can be said to be sufficient following the reforms cited above. The study observed that it is not now the absence of the law, institutions or policy that poses a major challenge as it was before 2001. In other words, the challenges that were there before 2001 have largely been cured. It is the emerging challenges that now pose the renewed threat to the workings and delivery of the law, institutions and policy. The emerging challenges have been attributed majorly to the influence of the political elite and by extension, the executive and are what this study refers to as political patronage.

This political influence has been witnessed to operate regardless of the provisions of the law as cited in the various cases mentioned in the study such as the KAA v the Anhui Engineering Construction Co. of China where the then Transport minister issued directives contrary to the provisions of the PPDA [2005]. The study also identified the Muslims for Human Rights (MUHURI) & 2 Others v Attorney-General & 2 Others [2011] where the then President attempted to appoint State officers contrary to the provisions of Article 10, Section 24(2) of the Six Schedule and Section 29(1)&(2) of the Constitution, 2010.

Other notable cases include the IEBC BVR kits tender scandal in 2013 general election where there was single sourcing against the provisions of Section 74 of the PPDA [2005]. Alongside this is also the tender for the *National Surveillance, Communication, Command and Control System for the National Police Service* where Parliament failed in its oversight duty and allowed single sourcing against Section 74 of the PPDA [2005]. The cited cases illustrate political patronage acting with impunity to disrupt the workings and delivery of the Public Procurement Law.

This study established the reasons behind this political patronage and impunity thereof as emanating from the nature, size and magnitude of public procurement market. As established herein, public procurement is the single largest market in any economy and more so, in a developing country like Kenya. It is said to account for up to 60 percent of the annual budget. Anybody, therefore, would desire to do business with the government. For political elite, this market offers a lifeline in terms control, direction and management. Ascending to power, therefore, is synonymous with control of this market. Denying the political elite the right to control and direct this market is a real threat to their power. This explains why political leadership undermines the letter and the spirit of the Public Procurement Law because the two are basically pulling in opposite directions.

This political patronage that has been established in this study is a negative influence on the aims and objectives of the Public Procurement Law. It is, therefore, seen as the emerging major challenge presently and into the future if the law is to function efficiently.

This challenge manifest itself by way of corruption and corrupt practices in the public sector as established in the study, and the perpetuation of ethnicity and nepotism seen as a silent policy for the ruling elite in all the successive regimes. It has also been seen as the source of weaknesses and failure in the institutions like EACC, PPOA, PPARB and the lackluster performance of the Judiciary. It is also said to be the unseen hand behind the major scandals in the sector some of which have been cited herein this study, and which have never been conclusively prosecuted.

## **6.2 Conclusions of the Study**

The study has established that political patronage is the emerging major challenge to the delivery of public procurement law in Kenya. Alongside this, it was noted that there exists minor challenges in law as currently constituted and the institutions therein. However, the latter are considered minor and cannot to a larger extent have contributed to the failure witnessed in the sector on their own. Indeed, the political patronage has been found to have exploited these weaknesses to aggravate the challenges.

These study results concur with the hypothesis and the systems theory that the major challenge lies outside the law, policy and institutions. To address the above challenge, the study recommends a new effort or initiative to be directed at managing the political leadership in the country to align it to the letter and the spirit of the law. The study noted a brave attempt to address leadership and governance issues in the country through the Constitution, 2010. This Constitution was largely people driven and therefore, a product of social fact. The spirit of this Constitution emanates from this social fact phenomenon and a good reflection of this is Article 1 which bestows the sovereign authority of the Republic to the people. This authority is supposed to be exercised directly by the people or through their democratically elected representatives.

The resulting political leadership should therefore, at all times be seen to act in the best interest of the sovereign. This is closely corroborated by Article 10 on National Values and Principles where State and public officers and all other persons, while interpreting the Constitution or any other law, public policy decisions, should take into account the



principles of patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability; and sustainable development. The aforementioned principles are supposed to be the constitutional national guidelines for any public officer undertaking their duties on behalf of the sovereign. It is therefore, the national code of conduct for all State officers, public officers and civil servants and by extension, the political elite.

As a community or society, we should strive to encourage positive values and discourage negative influences that affect behavior. All individuals possess a moral compass, defined via values, which direct how they treat others and conduct themselves. If a person values honesty, then he or she will strive to be honest and a person who value transparency will work hard to be transparent. People who lack strong or ethical values may participate in negative behavior that can hurt the community. As we gain a greater understanding of our values we can free ourselves to either change an ‘outdated’ or otherwise unwanted value, or we can come up with new behaviors that will help us to arrive at the desired value with fewer consequences. Often times we find that we are stuck in a pattern of behaviors that are not helping us to achieve a desired value or at times, we carry values that are forced on us or that which we are manipulated into carrying.

Training programs (school and college curriculum), societal codes of conduct, and ethics committees can inform members of a community of the types of behavior that the community finds acceptable and unacceptable. While these efforts will not necessarily change an individual’s values, they can help them decide not to participate in unethical behavior in the community. Leaders must emphasise not only a community member’s responsibilities, but also what the community expects with respect to values and ethics. Ethics statements and vision statements are useful tools in communicating to a people what their community stands for and why.

A system of punishments and rewards can also help foster the type of values a society wants to see in its members, essentially filtering behavior through conditioning. If people see that certain behaviors are rewarded, then they may decide to alter their behavior and in turn alter their values. The relevance of this discussion to the present study is that, when the society appears to reward negative ethnicity, corruption and impunity, then we encourage the populace to engage in the vices. However, by putting into place a system of punishment and rewards, we can deter vices like negative ethnicity, corruption, lack of respect for the rule of law and impunity among others.

In addition, a gap sometimes exists between a person's values and behavior. This gap can stem from a conscious decision not to follow a specific value with a corresponding action. This decision can be influenced by how deeply this value affects the person's character and by the surrounding environment. In a nutshell, when we create conducive environment which nurtures good values, we lay ground for positive behavior change. It is subjectively useful for a community to instill and develop positive values to create certain cultures such as transparency, accountability, anti-corruption, and respect for the rule of law. These positive changes in behavior show that people learn from their environments and that culture plays a large part in creating behavior change. Leaders are tasked with managing this positive culture and understanding how each member of the community is affected by cultural influences in the environment.

Chapter six of the Constitution, 2010 gives constitutional guidelines on *Leadership and Integrity* to State Officers, public officers and civil servants where at all times, they are supposed to exercise their authority on the basis of public trust as enumerated in Section 73(1). The said public trust should demonstrate respect for the people, bring honor to the nation, promote public confidence and integrity among others. Section 73(2) cites the guiding principles of leadership and integrity to include: selection on the basis of personal integrity, competence, suitability, objectivity, impartiality in decision making, no nepotism, favoritism or corrupt practices, selfless service, honesty and accountability to the public among other virtues.

The intension of this chapter was to provide leadership that was going to be accountable to the people by providing a very high threshold on ethical standards for those aspiring for various positions of leadership in the country. Section 80 of the Constitution, 2010 required Parliament to enact a legislation to operationalise this chapter; hence, the enactment of the Leadership and Integrity Act, 2012 which watered down the intentions of this Chapter. From this Statute, for one to ascend to any State office, the mandatory requirements outside academic qualifications include certificate of compliance from KRA, certificate of good conduct from the Directorate of Criminal Investigations (CID), a clearance certificate from the Higher Education Loans Board (HELB) and a clearance certificate from Credit Reference Bureau (CRB). This Statute downgraded the spirit, intention and objectives of this Chapter.

The Statute was a death knell to the golden opportunity provided by the Constitution, 2010 to fix political patronage challenges in this country. The Constitution has also institutionalised the Judiciary, Parliament, Executive and public service. Under the old constitutional dispensation, these institutions were largely under the control, direction and management by the President. In the current constitutional dispensation, these institutions are supposed to be independent and subject only the law. For instance, Article 159 & 160 gives the Judiciary complete autonomy deriving its power from the people and only subject to law. Similarly, the executive under Article 31 is exercised on behalf of the Republic by the President, Deputy President and the Cabinet. It is therefore, a shared responsibility as opposed to the yester years.

Chapter five on *best practices from other jurisdictions* has looked at the public procurement systems in Malaysia, South Africa, Mexico and the European Union with an objective of comparing and contrasting these systems with the Kenyan system. The principles of anti-corruption, transparency, accountability and competitiveness were found to be common to all the reviewed jurisdictions. The same is true for Kenya and the said principles are outlined in Article 227 of the Constitution, 2010 and PPDA (repealed) and the corresponding new Act. The only major difference lies on the operationalisation of the same. Whereas the leadership in the reviewed jurisdictions provide conducive environment

and the necessary political goodwill to support the law, in Kenya, the opposite is true. Political leaders were found to interfere with the smooth operations of the law, institutions and policy through underhand dealings, manipulation of the procurement process and influence peddling. These practices have developed into a culture where leaders struggle to ascend to positions of leadership in order to control resources mainly in the public procurement sector.

### **6.3 Recommendations of the Study**

In order to fix the political patronage challenges in the public procurement sector as established in the study, the elusive leadership and integrity issues should be revisited. The Constitution, 2010 made an attempt to entrench responsible leadership in this country as shown above. However, the country seems to have lost the war when it came to operationalisation and implementation of the same. If the Public Procurement Law is to deliver its mandate, then the spirit of the Constitution on *Leadership and Integrity* must be strictly and fully operationalised by the Government.

Leadership and Integrity Act, 2012 which was supposed to be the enabling Statute for Chapter 6 should be repealed by Parliament and made to conform to the spirit and letter of this Chapter. The new law should provide for a very high ethical threshold for those who aspire to hold public offices besides their qualifications. The proposed new law should consider introducing a thorough lifestyle audit on candidates who aspire to hold public offices along the model adopted by the Judges and Magistrates Vetting Board. Such an audit should not be a onetime affair when one seeks to ascend to a position of leadership. It should be a continuous exercise carried out periodically, let's say annually or after five years, to evaluate the performance of individual officers and weed out those whose performance are questionable.

The study recommends that the political leadership in the country right from the presidency should create conducive environment which nurtures good values and lay ground for positive behavior change. The leaders should instill and develop positive values in our people and help to nature cultures such as transparency, accountability, anti-corruption,

and respect for the rule of law. They should be a good role model in the society and at all times they should engage in activities which promote the culture of obedience to the rule of law and financial discipline. While they serve in public offices, their actions should bring honor, respect, and dignity.

The Ministry of Education should develop a curriculum on morals and value system unique to the Kenyan people and which should be taught in all schools and colleges. To achieve this, the government can partner with non-governmental organizations (NGOs), civil society groups and the religious community (Sunday schools and *madrasas*) to implement the programme. Every Kenyan should be obligated to identify with these values at all times.

Even though study has established that the problem affecting the workings and delivery of the public procurement law mainly lies in the environment in which the policy, law and institutions work, there is still room for improvement on the intra-system elements. The study recommends that Parliament should enact and strengthen new laws to make political patronage related corruption and corrupt practices more serious crimes. These crimes should be considered alongside capital offences because of the negative impact they have on the economy. The study views these crimes as crimes against humanity tantamount to economic genocide and they should be dealt with as such.

#### **6.4 Suggestions for Further Research**

This study focused on political patronage vis-à-vis the workings of Public Procurement Law in Kenya. As the study progressed, ethical issues on political leadership emerged. However, for this study the said ethical considerations were only relevant to the study as far as public procurement is concerned. The study suggest that an attempt should be made to look at the broader ethical and integrity issues and how they impact on governance and the rule of law in this country.

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## APPENDICES

### APPENDIX A

#### QUESTIONNAIRE FOR TENDERERS

The researcher is a Ph.D student in the School of Law of the University of Nairobi undertaking a study on **The Influence of Political Patronage on the Operationalisation of Public Procurement Law in Kenya**. You are, therefore, encouraged to feel free to answer the questionnaire as frankly as possible. Responses given will be used for the sole purpose of this research and will be treated with utmost confidentiality. All personal data will remain confidential and will not be referred to in the study. Do not write your name in this questionnaire. Place a tick (✓) on the appropriate choice which you think is the answer or more correct response to the question or provide a response in the blank space left after each question.

#### **PART A: BACKGROUND INFORMATION**

1. Gender: Male [  ] Female [  ]
2. Age: 18-35 Years [  ] 35 – 60 Years [  ] Above 60 Years [  ]
3. Level of formal education attained:  
 KCPE/CPE [  ] KCSE/ O- level [  ] A-level [  ] Certificate [  ] Diploma [  ]  
 Bachelor Degree [  ] Masters [  ] Ph. D [  ]
4. Nature of Business (tick as appropriate)  
 Services [  ] Trade [  ] Manufacturing [  ]  
 Others (specify).....
5. Size of business  
 Micro Enterprise [  ] Small Enterprise [  ] Medium Enterprise [  ] Large-Scale  
 Enterprise [  ]
6. Age of the business:
 

a) Below one year [ <input type="checkbox"/> ]	b) 1-2 years
c) 3-5 years [ <input type="checkbox"/> ]	d) 6-10 years
e) Over 10 years [ <input type="checkbox"/> ]	

7. How often do you participate in public tendering? (tick as appropriate)
- a) Just once
- b) A few times
- c) Regularly
- d) Very regularly

**PART B: IMPACT OF LEGAL AND POLICY REFORMS ON PUBLIC PROCUREMENT**

**To help determine how legal reforms impact on public procurement sector and the challenges thereof, please respond as necessary.**

8. Are you aware of the existence of the Public Procurement and Disposal Act of 2005?
- (a) Yes  (b) No  (c) Not sure
9. In your own view, are the rules and regulations governing public tendering strictly followed by public procuring entities?
- a) Yes  (b) No  (c) Unsure
10. Do you believe that the legal and policy framework in place has improved the management of public procurement in Kenya?
- (a) Yes  (b) No  (c) Unsure
11. How has the Public Procurement Law impacted on government tendering? Use the Likert Scale as shown below to tick (✓) as appropriate:
- 1 = Strongly agree
- 2 = Agree
- 3 = Neither agree nor disagree
- 4 = Disagree
- 5 = Strongly disagree

<b>Impact of the Public Procurement Law on Government Tendering</b>	<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>5</b>
(a) Opened up government tenders for wide participation through affirmative action					
(b) Reduced instances of favouritism, corruption, and manipulation in the tendering process					
(c) Encouraged competition among tenderers					
(d) Reduced bureaucracy in the tendering process					
(e) Any other (specify)..... .....					

12. The development of the law and related reforms in public procurement sector in Kenya has faced numerous challenges in the past. This study seeks your help to identify some of the challenges facing legal reforms in the sector.

Use the Likert Scale as shown below to tick (√) as appropriate:

1 = Strongly agree

2= Agree

3 = Neither agree nor disagree

4 = Disagree

5 = Strongly disagree

<b>Challenges Facing Legal Reforms in the Public Procurement Sector</b>	<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>5</b>
(a) Lack of respect for the rule of law					
(b) Impunity in the public sector					
(c) Lack of political goodwill to undertake the necessary procurement reforms					
(d) Shortcomings of the Public Procurement Law					
(e) Institutional weaknesses in public procurement sector					

(f) Weaknesses of Public Procurement Administrative Review Board					
(g) High Court weaknesses in procurement appeal cases					
(h) Any other (specify)..... .....					

13. Rate the following instances where you think Public Procurement Law has failed to meet your expectation as a tenderer? Use the Likert Scale to tick (√) as appropriate.

1 = Strongly agree

2= Agree

3 = Neither agree nor disagree

4 = Disagree

5 = Strongly disagree

<b>Weaknesses of the Public Procurement Law</b>	<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>5</b>
(a) The law has loopholes which have been exploited by corrupt public officers to rig tenders in favour of certain individuals or enterprises for selfish gains					
(b) The law provides for too many procedural requirements to be fulfilled by the tenderers					
(c) Strict timelines provided for in tender procedure locks out many legible tenderers					
(d) The law gives procuring entities fettering discretion to terminate procurement proceedings before entering into a contract which creates a loophole for abuse and corruption in the process					
(e) Public tendering has become expensive because of the many statutory requirements like the bid bonds, performance bonds and tender security which are charged expensively by various financial institutions					

(f) The appeals process is too technical, expensive and out of reach of the majority					
(g) The 30% affirmative action for youth, women and persons living with disabilities is discriminatory and an avenue of patronage as corrupt public officers use the loophole to corruptly award tenders to their proxies, cronies, friends and relatives.					
(h) Any other (specify)..... .....					

14. Which of the following tender requirement(s) has been a challenge in your quest to participate in government tendering? Tick (√) as appropriate

<b>Requirement</b>	<b>Very often</b>	<b>Often</b>	<b>Rarely</b>	<b>Very rarely</b>
(a) Requirement to produce audited bank accounts for a specific period of time				
(b) Past experience in similar jobs				
(c) Tender security, bid bonds and bank guarantees				
(d) Business profile				
(e) Proof of physical location and address				
(f) Requirement to produce samples of products with tender documents				
(g) Any other (specify) .....				

15. In your own view, how can the challenges identified in No.12 and 13 be addressed?

Use the Likert Scale as shown to tick (√) as appropriate:

1 = Strongly agree

2= Agree

3 = Neither agree nor disagree

4 = Disagree

5 = Strongly disagree

<b>Ways of Addressing Challenges Facing Public Procurement</b>	<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>5</b>
(a) Full implementation of the legal and policy framework is needed					
(b) Revise the current Act to make it conform to the current needs of government and tenderers					
(c) Affirmative action towards local industries is critical for improving access to public procurement					
(d) Educate tenderers about the tendering procedure					
(e) Improve networking and group tendering (consortia) among local tenderers to improve their chances of winning.					
(f) Tenderers should improve on innovation and quality of products, works and services they offer					
(g) Encouraged competition among tenderers					
(h) Reduce bureaucracy in the tendering process					
(i) Improve circulation of public tender information					
(j) Any other (specify)..... .....					

**PART C: CORRUPTION, ETHNICITY, NEPOTISM AND POLITICAL PATRONAGE IN PUBLIC SERVICE IN KENYA**

16. How often has your firm or any other firm known to you faced challenges related to illegitimate business practices, irregular payments and corruption in government tendering?

(a) Never [ ] (b) Seldom [ ] (c) Sometimes [ ] (d) Frequently [ ]

(e) Very frequently [ ] (f) Constantly [ ]



17. Using the Likert Scale, rate the following procurement malpractices which affect you as a tenderer? Tick (√) as appropriate:

1 = Strongly agree

2= Agree

3 = Neither agree nor disagree

4 = Disagree

5 = Strongly disagree

<b>Procurement-related malpractices</b>	<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>5</b>
(a) Bid rigging/fixing, collusion and corruption in awarding tenders					
(b) Favouritism due to tribal, gender or political affiliation					
(c) Restricting a tender when there are no sufficient grounds to restrict or single source					
(d) Procuring entities accepting tenders after the deadline for the submission of tenders, proposals or quotations					
(e) Interference of the tendering process by senior public officers, politicians and well-connected individuals					
(f) Unethical business practices among competitors to increase their chances of winning tenders					
(g) Unwarranted/fraudulent termination of procurement proceedings under Section 36(1) of the Public Procurement and Disposal Act of 2005					
(h) Corruptly influencing a tender appeals process					
(i) Any other (specify)..... .....					

18. Use the Likert Scale as shown below to illustrate how corruption, nepotism and ethnic patronage manifest in public procurement. Tick (√) as appropriate.

1 = Strongly agree

2= Agree

3 = Neither agree nor disagree

4 = Disagree

5 = Strongly disagree

<b>Ways in which patronage manifests in public procurement</b>	<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>5</b>
(a) Unmerited appointments and hiring of public officers					
(b) Public officers taking directives from elsewhere (external influence)					
(c) Tenderers having relatives, friends and cronies in various public procuring entities who leak confidential information regarding specific tenders (bid rigging)					
(d) Manipulation of tendering process to give undue advantage to specific candidates					
(e) Public officers having secret proxy companies which they use to tender for the same jobs					
(f) Weak institutional framework which cannot hold perpetrators to account					
(g) The existence of untouchable powerful cartels who are well connected politically in the public procurement sector					
(h) Any other (specify)..... .....					

19. Have you ever reacted against corruption by raising the issue with any relevant authority?

a) No [    ]    b) It has happened [    ]    c) Several times [    ]

20. If you have experienced any instance of corruption but never reported it to the relevant authorities, can you give the reason(s) that influenced your decision? Tick as appropriate.

- a) Even if I reported, no action will be taken against the accused  
[ ]
- b) I don't feel secure enough to expose cases of corruption  
[ ]
- c) I fear intimidation by the accused or the public procuring entity involved  
[ ]
- d) I fear losing business opportunity from the procuring entity involved  
[ ]
- e) The person involved is known to me  
[ ]
- f) I was promised some benefits if I drop the case  
[ ]
- g) Any other (specify).....

21. Why do you think corruption has persisted in public procurement sector despite all the efforts to fight it? Use the Likert Scale below to tick (✓) as appropriate:

- 1 = Strongly agree
- 2 = Agree
- 3 = Neither agree nor disagree
- 4 = Disagree
- 5 = Strongly disagree

<b>What encourages corruption in the public procurement sector</b>	<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>5</b>
(a) Lack of political goodwill by the leadership to decisively deal with corruption in the sector					
(b) Tribal and political manipulative culture in the public sector					
(c) Deliberate effort by those in leadership to weaken the institutional, legal and justice system to save their kin, friends and cronies from prosecution					
(d) Lack of respect for the rule of law					

(e) The existence of very little means of survival outside public procurement					
(f) Unmerited appointments to public service based ethnic or political considerations and not qualifications or experience					
(g) Any other (specify)..... .....					

22. How can nepotism, ethnic and corruption-related challenges in the public procurement sector be addressed? Use the Likert Scale to tick (√) as appropriate:

- 1 = Strongly agree
- 2 = Agree
- 3 = Neither agree nor disagree
- 4 = Disagree
- 5 = Strongly disagree

<b>Ways of addressing corruption, nepotism and ethnic-related challenges in the public procurement sector</b>	<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>5</b>
(a) The country's leadership should create a political goodwill to decisively deal with corruption in the public sector					
(b) Culture change is necessary to tame the spiralling rate of corruption, tribalism and political manipulation of the system					
(c) Strengthen institutional and legal frameworks to deliver justice in case of economic crimes committed against the people of Kenya					
(d) Respect the rule of law and the law should be applied uniformly across the social classes when tackling corruption					
(e) Harsh punitive measures be meted against those found to flout public procurement regulations					

(f) Proceeds of corruption must be followed and returned to the public coffers (retributive justice)					
(g) The government should expand other means of economic advancement outside the public procurement					
(h) Appointments to the public service should be based purely on merit and ability to deliver services to the people					
(i) Encourage transparency, accountability and good governance in the management of public finance					
(j) Any other (specify)..... .....					

## APPENDIX B

### QUESTIONNAIRE FOR GOVERNMENT OFFICERS

The researcher is a PhD student in the School of Law of the University of Nairobi undertaking a study on The Influence of Political Patronage on the Operationalisation of Public Procurement Law in Kenya. You are, therefore, encouraged to feel free to answer the questionnaire as frankly as possible. Responses given will be used for the sole purpose of this research and will be treated with utmost confidentiality. All personal data will remain confidential and will not be referred to in the study. Do not write your name in this questionnaire. Place a tick (✓) on the appropriate choice which you think is the answer or more correct response to the question or provide a response in the blank space left after each question.

#### Part I: Background Information

1. ....Ministry/Department
2. Position of officer.....
3. What is your highest level of education?
  - (a) Primary ( ) (b) Secondary ( ) (c) College ( ) (d) University ( )
  - (e) Any Other (Specify) .....
4. When did you join the Ministry/Department?
  - a) 0 – 5 Years ( ) (b) 6 – 10 Years ( ) (c) 11 – 15 Years ( )
  - (d) 16 – 20 Years ( ) e)Above 20 Years( )
5. What are your terms of employment?
  - a) Permanent ( )      b)      Contract ( )
6. What are your main duties and responsibilities in the Ministry /Department?  
 .....

**Part A: To help determine how legal reforms impact on public procurement sector and the challenges thereof, please respond as necessary.**

1. Are there legislations which has been enacted by Parliament to control public procurement in the Ministry/Department?(a) Yes ( ) (b) No ( ) (c) Unsure ( )
2. If yes, then name the legislation(s) as applicable to your Ministry/Department  
.....
3. Is there a policy or policies governing procurement of goods and services in your department?  
a) Yes [ ] (b) No [ ] (c) Unsure [ ]
4. If yes, then state the policy  
.....
5. Are the rules and regulations governing public procurement strictly followed while procuring goods and services at your Ministry/Department?  
a) Yes [ ] b) No[ ] (c) Unsure [ ]
6. If No, give reasons  
.....  
.....
7. Are there systems that have been put in place to ensure strict adherence to the laid down policies and regulations governing public procurement at the Ministry/Department?  
(a) Yes [ ] (c) Unsure [ ]  
(b) No [ ]
8. If the rules and regulations are not properly followed in procuring goods and services, then what are the repercussions?  
(a) Those responsible face disciplinary actions  
(b) Nothing happens to those responsible  
(c) Other consequences (Please specify).....
9. In your own opinion, are the systems put in place to control public procurement adequate?  
(a) Yes [ ] (c) Unsure [ ]  
(b) No [ ]

**Part B: To establish how ethnicity and nepotism affect public procurement sector in Kenya, this study is seeking your opinion as under. Please tick or answer as appropriate**

10. Kindly indicate who appoints the following chief officers in your Ministry?

- i) Minister.....
- ii) Assistant Minister.....
- iii) Permanent Secretary.....
- iv) Under Secretaries.....
- v) Chief Accountant.....
- vi) Head of procurement department.....

11. Do you know if there is a criterion for appointing such officers in your Ministry?

- a) Yes [ ]
- b) No [ ]
- c) Not Sure [ ]

12. If Yes above, explain.....

13. Do you have a Tender Committee in your Ministry/Department?

- a) Yes [ ]
- b) No [ ]
- c) Not sure [ ]

14. If yes, who appoints the members?

- (a) The Minister [ ]
- (b) The Permanent Secretary [ ]
- (c) The Board of Directors [ ]
- (d) Any Other (Specify).....

15. Are there rules which govern the appointment of such officers?

- b) Yes [ ] (b)No [ ] (c) Unsure [ ]

16. If yes, indicate the rules

.....  
.....



17. In your own opinion, are the rules and regulations guiding the appointment of senior procurement officers strictly followed by the appointing authority?

- (a) Yes [ ] (b) No [ ] (c) Unsure [ ]

18. If yes or no, give reasons

.....  
.....

19. What in your assessment are the main consideration(s) for one to be appointed to such positions?

- (a) One's professional qualifications and ability to serve [ ]  
(b) On the job experience that one has [ ]  
(c) One's political and social connections [ ]  
(d) One's economic ability [ ]  
(e) All of the above [ ]  
(f) Others (specify).....

20. Do you know what informs senior appointments in the Department of Procurement at the Ministry/Department?

- (a) Performance and experience [ ]  
(b) Relevant qualifications [ ]  
(c) Political interests of key players [ ]  
(d) Economic interests underlying procurement of goods and services [ ]  
(e) Nepotism and cronyism in public service [ ]  
(f) Tribal balancing [ ]  
(g) Corruption and bribery [ ]  
(h) All of the above [ ]  
(i) Any other (specify).....

21. In your opinion, do you think the appointment of key government officers is merit oriented?

- (a) Yes [ ] (b) No [ ] (c) Unsure [ ]

22. If Yes or No, give reasons

.....

23. In your own view, do these appointments affect the quality of service delivery by the government?
- a) Yes
- b) No
- c) Not sure
24. Can you outline how these appointments affects service delivery by the government? (Tick as necessary)
- (a) It locks out the best brains that can help transform public service
- (b) It provides avenue for the executive to fill public service jobs with relatives and tribesmen
- (c) It opens doors for the executive to fill sensitive positions with their cronies in order to control resources through proxy
- (d) Perpetuates the culture of corruption and impunity in public sector in Kenya
- (e) Any other (Specify).....

**Part C: To investigate how corruption affects the management of public procurement sector in Kenya, you are requested to respond to the following questions:**

25. How frequently do you think corruption is part of the business culture in your Department/Ministry of operation?
- a) Never  (b) Seldom  (c) Sometimes  (d) Frequently
- e) Often  (f) Always
26. How often would you assume that procurement firms operating in the Department/Ministry are confronted with challenges related to illegitimate business practices, irregular payments and corruption?
- a) Never  (b) Seldom  (c) Sometimes  (d) Frequently
- e) Often  (f) Constantly
27. Is it likely that the introduction of procurement laws has reduced the opportunities for corruption in your Department/Ministry?
- (a) No  (b) Seldom  (c) Sometimes  (d) Frequently

(d) Often [ ] (e) In general, yes [ ] (f) I do not know [ ]

28. Do you ever notice that firms that do business with the Ministry/Department make use of business practices that most likely deviate from the official codes of conduct?

(a) Never [ ] b) Seldom [ ] c) Sometimes [ ] d) Frequently [ ]  
e) Often [ ] f) Always [ ]

21. Has your Department/Ministry ever lost any revenue due to corruption?

a) No [ ] b) Probably not [ ] c) Probably [ ] d) Certainly [ ]  
e) I do not know [ ]

22. Have you ever reacted against corruption by raising the issue at a higher management level?

a) No [ ] b) It has happened [ ] c) Several times [ ]

**Part D: In order to establish ways of fixing the Influence of Political Patronage on the workings and delivery of the Public Procurement Law in Kenya, this study seeks your views as follows:**

23. In your own view, how can the Ministry deal with political patronage in procurement sector?

.....

24. In your own opinion, how can we deal with negative ethnicity and nepotism in public sector in Kenya?

.....

25. In your view, how can the challenges of corruption and impunity be addressed in public procurement sector in Kenya?

.....

26. Other than the areas discussed above, is there an area that you feel should be addressed to make Public Procurement Law in Kenya deliver?

a) Yes [ ]  
b) No [ ]  
c) I don't [ ]

27. If yes, then state as appropriate;

.....

## APPENDIX C

### QUESTIONNAIRE FOR WATCHDOG ORGANIZATIONS

The researcher is a PhD student in the School of Law of the University of Nairobi undertaking a study on The Influence of Political Patronage on the Operationalisation of Public Procurement Law in Kenya. You are, therefore, encouraged to feel free to answer the questionnaire as frankly as possible. Responses given will be used for the sole purpose of this research and will be treated with utmost confidentiality. All personal data will remain confidential and will not be referred to in the study. Do not write your name in this questionnaire. Place a tick (✓) on the appropriate choice which you think is the answer or more correct response to the question or provide a response in the blank space left after each question.

#### **Part I: Background Information**

1. Name of Organization.....
2. Position of officer.....
3. Sex: a) Male [ ] b) Female [ ]
4. Duties and responsibilities of the officer;  
.....  
.....

#### **Part II: To help determine how legal reforms impact on public procurement sector and the challenges thereof, please respond as necessary**

5. Have you heard of Public Procurement and Disposal Act of 2005?  
a) Yes [ ] b) No [ ]
6. Do you know of a policy or policies governing procurement of goods and services in the public sector?  
7. Yes [ ] (b) No [ ] (c) Unsure [ ]
8. If yes, then state the policy:.....
9. How does compliance with rules and regulations governing public procurement affect the sector?  
(a) Encourage openness, transparency, and accountability in public spending [ ]  
(b) Promote realization of value for money in public sector

spending [ ]

(c) Eliminate tender corruption and misuse of public resources [ ]

(d) Any other (Please specify)

.....

10. In your own view, are the rules and regulations governing public procurement strictly followed in public organizations?

a) Yes [ ] (b) No [ ] (c) Unsure [ ]

11. Have the legal and policy framework in place helped to streamline the management of public procurement in Kenya?

(a) Yes [ ] (b) No [ ] (c) Unsure [ ]

12. If No, what is the problem?.....

a) There is still rampant corruption in public procurement sector [ ]

b) Favoritism is common during appointment of officers [ ]

c) Loss of billions of shillings each year in procurement-related corruption [ ]

d) Government still procures sub-standard goods and services [ ]

e) Any other (Specify).....

**APPENDIX D**  
**TEXT OPENING SESSION OF THE GOLDENBERG COMMISSION OF**  
**INQUIRY BY THE LAW SOCIETY OF KENYA**

**The Chairman of the Law Society of Kenya** (Mr. Ahmednassir Abdullahi): My Lord, Justice Samuel Bosire of the Court of Appeal of Kenya; my Lord, Justice D. Aganyanya of the High Court of Kenya, Commissioner Peter le Pelley, Senior Counsels, the hon. Attorney-General, my Learned friends, distinguished guests, ladies and gentlemen; the Law Society of Kenya is honored to be invited to make a statement at the opening ceremony of this Commission of Inquiry. As the Law Society of Kenya, we hereby register our utmost satisfaction with both the idea behind this Commission of Inquiry and its membership.

My Lords, my I recall for the record that the Law Society of Kenya first asked the Attorney-General as early as 1993 to prosecute all the parties that were behind the Goldenberg scandal. Repeated requests to the Attorney-General yielded no positive results. The Law Society of Kenya, conscious of the huge public demand for judicial redress over the Goldenberg matter, took the decision to represent public interest by drafting four charges against the persons suspected of being the principal players of the Goldenberg scam. The Law Society of Kenya sought leave of the court to privately prosecute the case, and the Attorney-General applied to the court to be enjoined in the proceedings as *amicus curiae*.

My Lords, as history shows, once he was so enjoined, the Attorney-General, in the supporting affidavit filed in court and sworn by Bernard Chunga, the then Chief Public Prosecutor was opposed to the application by the Law Society of Kenya and stated that the hands of the Attorney-General were tied by what he termed: "Lack of an investigation report disclosing evidence sufficiently sustainable in court to prove criminal charge". He further said that the Attorney-General had insisted that he be furnished with evidence relating to the intended private prosecution against the principals in the Goldenberg scandal.

My Lords, the Law Society of Kenya was taken aback by the position of the Attorney-General and his opposition to the intended private prosecution. The then Chairman of the Law Society of Kenya, Dr. Willy Mutunga, in a replying affidavit stated the position of the Law Society of Kenya as follows:- "Protracted delays in these proceedings leading to mention followed by mentions, adjournments followed by adjournments and eventually dramatic withdrawal of all the cases by the Attorney-General will result".

My Lords, I think history has vindicated the position of the Law Society of Kenya. My Lords, history recalls also that the Attorney-General then signed a preliminary objection that the Law Society of Kenya had no *locus standi*, and the same was upheld by the presiding Magistrate Uiter Kidullah who said in her ruling: "The only knowledge the Law Society of Kenya seems to be acquiring is that relating to stealing from clients and telling them to pay exorbitant fees on the pretext that so much is needed for the trial magistrate or Judge". So much water has passed under the bridge, but the public demand for judicial settlement of the Goldenberg scam remains strong today as it was when the public first learnt of it. We have given the above background in order to express the expectation of the Law Society of Kenya and the general public with regard to this scam and also to inform those who are guilty of this scam and their protectors that their time probably is up. For ten years, the Attorney-General has failed to make any meaningful prosecution to solve the criminal aspect of the Goldenberg cases, and to call a spade a spade, we must admit that his weak action to prosecute and big omissions not to prosecute stand for or provide, in the opinion of the Law Society of Kenya, a monumental example of how not to excise the constitutional function of an Attorney-General.

My Lords, the previous Government, through the Attorney-General, exhibited pathological fear not to solve the Goldenberg case, and the Law Society of Kenya welcomes this Commission that will hopefully provide answers to the thousands of questions that remain unanswered over the Goldenberg scam. For the last ten years, the Goldenberg cases, whether civil or criminal, have jammed the congested corridors of our judicial system. Case after case often came to our courts usually on the same issue, but at times leading to different results. The cases have muddled the jurisprudence of our courts.

For those of you who were students of jurisprudence of the Goldenberg cases, you will recall that initially during the tenure of hon. Chief Justice Cockar, the decision of the court went one way and the Central Bank won most of the cases. However, when the late Justice Chesoni assumed the office of the Chief Justice, the jurisprudence of the courts went the very opposite direction, and the Central Bank lost most of cases, notwithstanding the fact that the Judges remained the same and the facts were constant. Justice Chunga's tenure as the Chief Justice was a mere continuation of Justice Chesoni's tenure in so far as those issues are concerned.

My Lords, it is our hope as the Law Society of Kenya that this Commission will do a good job in the discharge of its mandate and we hope that it will solve the metrics of deceit and deception that surrounded the factual quagmire and the legal conundrum. My Lords, in this regard, the Tribunal as part of its mandate must address, in the view of the Law Society of Kenya, three issues: First, it will be wrong for the Commission to see the Goldenberg issue just as an economic crime. Yes, it is an economic crime, but that is just one facet of the puzzle. The economic aspect and how it ruined our economy is very important, but we must not lose sight of the broader picture. My Lords, secondly, we must appreciate and investigate why the Government, despite its enormous resources and legal powers failed to prosecute the principals of this crime. The role played by the office of the Attorney-General which in a way led to the formation of this Commission of Inquiry, must in our view be appreciated, addressed and investigated. My Lords, thirdly, it is the view of the Law Society of Kenya that you must consider why the courts initially ruled in favor of the Central Bank and then continued to rule against it for the past eight years when the facts have remained constant. At a proper stage, the Law Society of Kenya will seek to participate in this Inquiry.

With those few remarks, I thank you for giving the Law Society of Kenya and me an opportunity to state the above. I assure you of my members' full support of this challenging assignment. May I wish you the best of luck. Thanks, and God bless the Commission.



**APPENDIX E**

**GAZETTE NOTICE NO. 450 APPOINTING MAJ. GEN. MICHAEL GICHANGI  
AS DIRECTOR GENERAL OF NSIS**

“THE CONSTITUTION OF KENYA  
THE NATIONAL SECURITY INTELLIGENCE SERVICE ACT (NO. 11 OF 1998)”

IN EXERCISE of the powers conferred by Section 6(1) of the National Security Intelligence Act, I, Mwai Kibaki, President and Commander-in-chief of the Kenya Defence Forces of the Republic of Kenya, appoint – MAJ. GENERAL MICHAEL GICHANGI to be Director-General of the National Security Intelligence Service for a period of five (5) years with effect from 15<sup>th</sup> January 2011.

Dated the 15<sup>th</sup> January 2011.

MWAIKIBAKI  
PRESIDENT

## APPENDIX F

### HIGH PROFILE CORRUPTION CASES RELEASED BY THE OFFICE OF THE DPP

Source: Republic of Kenya, “*High Profile Corruption Cases Released by the Office of the DPP*”, Justice and Legal Affairs Committee  
-Kenyan National Assembly, March 2016)

	<b>SUBJECT</b>	<b>CASE NO, COURT &amp; ODPP’S REF. NO.</b>	<b>ALLEGATION/OFFENCE</b>	<b>ACCUSED</b>	<b>STATUS OF JUDICIAL REVIEW AND OTHER APPLICATIONS</b>	<b>STATUS OF THE CRIMINAL CASE</b>
1.	ANGLO-LEASING TYPE CASES	ACC2/2015 JUDICIAL REVIEW APPLICATION NO.78 OF 2015	CONSPIRACY TO COMMIT AN ECONOMIC CRIME IN THE PROCUREMENT OF SECURITY EQUIPMENT WORT 40,000,000EUROS FRAUDULENT ACQUISITION OF PROPERTY,	HON. DAVID MWIRARIA & OTHERS	JUDICIAL REVIEW APPLICATION DISMISSED	HEARING 28TH -31ST MARCH 2016
2.	ANGLO LEASING TYPE CASES – AGREEMENT FOR SUPPLY OF EQUIPMENT TO THE POSTAL CORPORATION OF KENYA	ACC 3/15	ABUSE OF OFFICE, ENGAGING IN PUBLIC PROCUREMENT WITHOUT PLANNING, BREACH OF TRUST	HON. CHRIS OBURE & OTHERS		FRESH MATTER HEARING 14TH-18TH MARCH 2016 HEARING DELAYED BY OBJECTION TO THE CHARGES BY THE DEFENCE
3.	ANGLO LEASING TYPE CASES-AGREEMENT TO COMPUTERIZE KENYA POLICE OPERATIONS – E-COPS-INFO TALENT	ACC4/15	CONSPIRACY TO DEFRAUD, ABUSE OF OFFICE FRAUDULENT ACQUISITION OF PUBLIC PROPERTY	HON. DAVID MWIRARIA & OTHERS	JUDICIAL REVIEW APPLICATION DISMISSED	FRESH MATTER HEARING 22ND TO 25TH FEBRUARY 2016
4.	NYS IRREGULAR ACTIVITIES ON THE IFMIS SYSTEM OF THE NYS	CR. CASE NO. 1905/2015	ALLEGATIONS OF STEALING AND CONSPIRACY TO STEAL NYS FUNDS	ENG. PETER MANGITI & 25 OTHERS		FRESH HEARING ON 22ND, 23 & 24TH MARCH, 2016

	<b>SUBJECT</b>	<b>CASE NO, COURT &amp; ODPP'S REF. NO.</b>	<b>ALLEGATION/OFFENCE</b>	<b>ACCUSED</b>	<b>STATUS OF JUDICIAL REVIEW AND OTHER APPLICATIONS</b>	<b>STATUS OF THE CRIMINAL CASE</b>
5.	PROCUREMENT PROCESS ACQUISITION OF CJ'SHOUSELAND	ACC 15/2015	ALLEGATION OF ABUSE OF OFFICE RESIDENTIAL PROPERTY HON. CHIEF JUSTICE OF SUPREME COURT	GLADY'S SHOLLEI & 6 OTHERS		FRESH HEARING ON 24TH TO 26TH MAY, 2016
6.	LANDISSUE IN MAVOK	ACC 28/2015	ABUSE OF OFFICE, WILLFUL FAILURE TO COMPLY WITH PROCUREMENT LAWS.	GLADYS SHOLLEI & 7 OTHERS.		HG ON 10TO 12TH MAY, 2016.
7.	ANGLO-LEASING CONTRACP FORENSIC LABORATORIES	CMCRC. NO. 338 OF 2009 HCRT. APPLIC. NO.680/2010	ABUSE OF OFFICE IN PROCUREMENT OF FORENSIC LABORATORY.	ZAKAYO CHERUIYOT	APPLICATION FOR PROHIBITION ALLOWED	PROHIBITION ORDERS ISSUED. DPP FILED AN APPEAL
8.	CEMETRY CASES. (CITYCOUNCIL OF NAIROBI	ACC 20/10 CMC MILIMANI PETITION NO. 156 OF 201 1	IRREGULAR PROCUREMENT OF CEMETERY LAND IN NAIROBI; 283 MILLION. ABUSE OF OFFICE	SAMMY KIRUI & OTHERS	PETITION DISMISSED IN MARCH 2012 AND APPEAL DISMISSED IN 2013	HG. 22ND_24TH MARCH 2016. LAST PROSECUTION WITNESS
9.	JAPAN CASE(MIN. OF FOREIGN AFFAIRS)NHIF	H.C. PETITION NO. 153/2013 & ACC 2/2013	IRREGULAR PURCHASE OF TOKYO EMBASSY PROPERTY WORTH 1.57 BILLION SHILLINGS.	THUITA MWANGI PERMANENT SECRETARY FOREIGN AFFAIRS & 2 OTHERS	PETITION DISMISSED. APPLICATION TO CALL OKYOBASED WITNESSES BY THE PROSECUTION DENIED	MATTER ADJOURNED FURTHER HEARING 22 <sup>ND</sup> FEB 2016 HEARING DELAYED DUE TO DIFFICULTY IN PROCURING TOKYO BASED WITNESSES.
10.	NHIF CLINIX	ACC 18/2013 CMC MILIMANI PETITION NO. 495 OF 2013	CONSPIRACY TO DEFRAUD NHIF KSHS. 96 MILLION BY ENTERING INTO A CONTRACT TO PROVIDE MEDICAL	RICHARD LANGAT & 5 OTHERS	JUDICIAL REVIEW APPLICATION DISMISSED	FRESH HEARING ON 17TH & 18TH FEBRUARY, 2016 CASE DELAYED BY JUDICIAL REVIEW

	SUBJECT	CASE NO, COURT & ODPP'S REF. NO.	ALLEGATION/OFFENCE	ACCUSED	STATUS OF JUDICIAL REVIEW AND OTHER APPLICATIONS	STATUS OF THE CRIMINAL CASE
			SCHEME TO CIVIL SERVANTS.			APPLICATION.
11.	NHIFCASES MERIDIAN	ACC 12/2013 PETITION APPL NO. 363/2014	CONSPIRACY TO DEFRAUD NHIF KSHS.126 MILLION BY ENTERING INTO A CONTRACT TO PROVIDE A MEDICAL SCHEME TO CIVIL SERVANTS.	RICHARD LANGAT & 5 OTHERS	PETITION DISMISSED.	FURTHER HEARING ON 30TH MARCH 2016 MATTER DELAYED BY JR APPLICATION AND JUSTICE LENAOLAS ABSENCE THUS DELAYING THE JUDGMENT.
12.	HON KIMUNYA (FORMER MINISTER)	ACC.4/14, ODPP/CAM/ 13/5/163	ABUSE OF OFFICE AND FRAUDULENT DISPOSAL AND ACQUISITION OF PUBLIC PROPERTY	HON. AMOS KIMUNYA	PARTHEARD FURTHER HEARING ON 23 & 24TH MARCH, 2016	JUDICIAL REVIEW APPLICATION HEARD AND DISMISSED
13.	HON. SIMAM	ACC 1/2012 (ELDORET) PET. NO.	CONSPIRACY TO DEFRAUD, ABUSE OF OFFICE AND FRAUDULENT ACQUISITION OF PROPERTY	HON. PERIS SIMAM AND FIVE OTHERS	PETITION HEARD AND DISMISSED IN MARCH 2013	DEFENCE HEARING ON 14/15MAY2016
14.	PETER MUEMA MBATHA (MACHA KO'S MCA)	ACC. 3/ 2014 MACHAKOS CMS COURT. CONSTITUTIONAL PETITION NO. 556/2014	FAILURE TO COMPLY WITH PUBLIC PROCUREMENT AND DISPOSAL ACT 2005 IN THE PROCUREMENT OF LAPTOPS FOR MACHAKOS COUNTY. (SINGLE SOURCING)	PETER MUEMA MBATHA & 5 OTHERS	PETITION WITHDRAWN ON 15 <sup>TH</sup> JULY 2015	HEARING SET 4TH & 6TH MAY, 2016.
15.	KENYA AIRPORTS AUTHORITY	ACC. NO. 5 OF 2010 PET. NO 66/2012	CONSPIRACY TO DEFRAUD KENYA AIRPORTS AUTHORITY (LAND 65 MILLION.)	JOSHUA KULEI & 8 OTHERS	PETITION DISMISSED	HEARING ON 8 <sup>TH</sup> -11 <sup>TH</sup> MARCH 2016 MATTER DELAYED BY

	<b>SUBJECT</b>	<b>CASE NO, COURT &amp; ODPP'S REF. NO.</b>	<b>ALLEGATION/OFFENCE</b>	<b>ACCUSED</b>	<b>STATUS OF JUDICIAL REVIEW AND OTHER APPLICATIONS</b>	<b>STATUS OF THE CRIMINAL CASE</b>
						HIGH COURT PETITION AND EXTRADITION PROCEEDINGS OF AN ACCUSED PERSON PRAKASH BUNDIA
16.	KENYA REINSURANCE	ACC 2/2014	FRAUDULENT ACQUISITION OF PUBLIC PROPERTY	FAUSTIN KINYUA		HG 6 <sup>TH</sup> -7 <sup>TH</sup> APRIL 2016
17.	ACC NO. 7550/2007		EMMANUEL FRANCIS			FURTHER HEARING 18 TH MARCH, 2016
18.	KENYA REINSURANCE	ACC NO. 35/2008	INQUIRY INTO ALLEGATIONS OF FRAUDULENT SALE OF KENYA RE-INSURANCE CORPORATION'S PROPERTY NO. LR1160/613T0 ROCKHOUND PROPERTIES LTD	1. JOHNSON JACKSON GITHAKA 2. JOHN FAUSTIN KINYUA 3. NJERI KIMINGI ROCKHOUND PROPERTIES		FURTHER HEARING 26 <sup>TH</sup> FEB 2016
19.	KENYA REINSURANCE	ACC 31/2008 2/2014		1. JOHN FAUSTINE KINYUA 2. CHARLES KINUTHIA		HG ON 6 <sup>TH</sup> & 7 <sup>TH</sup> APRIL2016
20.	KEMRI	ACC NO. 22/2009	INQUIRY INTO ALLEGATIONS OF FRAUDULENT TRANSFER OF KSHS.19.3 MILLIONS FROM KEMRI/CDC PROJECT ACCOUNT BY	DAVIES KOECH		FURTHER HEARING 10 <sup>TH</sup> 11 <sup>TH</sup> MARCH 2016

	<b>SUBJECT</b>	<b>CASE NO, COURT &amp; ODPP'S REF. NO.</b>	<b>ALLEGATION/OFFENCE</b>	<b>ACCUSED</b>	<b>STATUS OF JUDICIAL REVIEW AND OTHER APPLICATIONS</b>	<b>STATUS OF THE CRIMINAL CASE</b>
			FORMER DIRECTOR OF KEMRI DR. DAVY KOECH TO AFRICAN MEDICAL SERVICES TRUST (AMSET) ACCOUNT WHICH IS UNRELATED TO KEMRI WITHOUT AUTHORIZATION			
21.	KENYA PIPELINE	CF.141/515/2009	FRAUDULENT DISPOSITION OF MORTGAGED GOODS; CONSPIRACY TO DEFRAUD; OBTAINING BY FALSE PRETENCES; ABUSE OF OFFICE AND NEGLECT OF OFFICIAL DUTY BY A PUBLIC OFFICER	1.YAGNESH MOHANLAL DERVANI 2.MAHINDRA PATHAK 3.JULIUS KYALO 4.COLLINS OTIENO 5. TRITON		FURTHER HEARING 19 <sup>TH</sup> & 20 <sup>TH</sup> APRIL 2016
22.	NSSF	ACC, NO. 18/2009	AN INQUIRY INTO ALLEGATIONS THAT NATIONAL SOCIAL SECURITY FUND (NSSF) LOST KSHS. 1 .4 BILLION OF PENSION FUNDS THROUGH IRREGULAR TRADING IN SHARES THROUGH DISCOUNT SECURITIES LTD (DSL) FOR THE PERIOD 2004-2007	FRANCIS MOTURI ZURIELS AND 8 OTHERS THREE SENIOR OFFICIALS OF NSSF; CHAIRMAN; MD AND TWO SENIOR OFFICIALS OF DSL AND TWO		HG 29 <sup>TH</sup> FEB & 4 <sup>TH</sup> APRIL 2016
23.	MINISTRY OF EDUCATION	ACC NO. 11/2010		CHRISTINE CHACHA & CONCILIA ONDIEK		HEARING ON 15 <sup>TH</sup> MAY 2016

	<b>SUBJECT</b>	<b>CASE NO, COURT &amp; ODPP'S REF. NO.</b>	<b>ALLEGATION/OFFENCE</b>	<b>ACCUSED</b>	<b>STATUS OF JUDICIAL REVIEW AND OTHER APPLICATIONS</b>	<b>STATUS OF THE CRIMINAL CASE</b>
24.		NO.141/842/10-ACC NO. 44/2010		1. BONIFACE OKEROSI MISERA 2. CEPHAS KAMANDE MWAURA		FURTHER HEARING 22ND FEB 2016
25.	FORMER CITY COUNCIL OF NAIROBI	141/316/10-ACC NO. 19/2010	CONSPIRACY TO DEFRAUD, ABUSE OF OFFICE AND FRAUDULENT ACQUISITION OF PUBLIC PROPERTY	1.SAMMY KIRUI 2. MARY NGETHE ALENDER MUSEE AND 11 OTHERS.		SUBMISSIONS 19 <sup>TH</sup> -20 <sup>TH</sup> APRIL 2016
26.	MINISTRY OF EDUCATION	ACC NO. 141/306/10 18/2010	INQUIRY INTO ALLEGATIONS THAT KIMOSOP, AN ASSISTANT DIRECTOR OF EDUCATION, MISAPPROPRIATED KSHS.7,230,065 FOR THE WORLD BANK, GOVERNMENT FUNDED KENYA EDUCATION SECTOR SUPPORT PROGRAM (KESSP)	FRANCIS KIMOSOP		MN 2 <sup>ND</sup> MARCH, 2016
27.	MINISTRY OF EDUCATION	ACC NO 46/2010	INQUIRY INTO ALLEGATIONS THAT KENNETH KABETU, SENIOR EDUCATION OFFICER OF THE MINISTRY OF EDUCATION WAS ISSUED WITH AN IMPREST IN THE SUM OF KSHS.3,936,200	KENNETH KABETU		DEFENCE HEARING ON 31 <sup>ST</sup> MARCH 2016

	<b>SUBJECT</b>	<b>CASE NO, COURT &amp; ODPP'S REF. NO.</b>	<b>ALLEGATION/OFFENCE</b>	<b>ACCUSED</b>	<b>STATUS OF JUDICIAL REVIEW AND OTHER APPLICATIONS</b>	<b>STATUS OF THE CRIMINAL CASE</b>
28.	MINISTRY OF EDUCATION	ACC NO. 30/2011	CONSPIRACY TO COMMIT AN ECONOMIC CRIME	PATRICK LUMUMBA AGHAN		MENTION 24 <sup>TH</sup> MARCH, 2016
29.	MINISTRY OF EDUCATION	ACC NO. 13/2011	EMBEZZLEMENT OF MINISTRY OF EDUCATION FUNDS	ELIZABETH KALOKI		MENTION 9 <sup>TH</sup> MARCH, 2016
30.	MINISTRY OF EDUCATION	ACC NO. 27/2011	INQUIRY INTO ALLEGATIONS OF EMBEZZLEMENT OF KSH.3,446,300 OF MINISTRY OF EDUCATION	STEPHEN MBUGUA		FURTHER HG 7 <sup>TH</sup> MARCH 2016
31.	MINISTRY OF EDUCATION	ACC NO. 32/2011	EMBEZZLEMENT OF MINISTRY OF EDUCATION FUNDS	ELIZABETH KALOKI ASSISTANT DIRECTOR OF		HG.26 <sup>TH</sup> FEB 2016
32.		ACC 28/2011	FRANCIS OYUGI & ANOTHER			FURTHER HEARING 9 <sup>TH</sup> -10 <sup>TH</sup> MARCH, 2016
33.	MINISTRY OF EDUCATION	ACC 7/2012	ABUSE OF OFFICE	GRACE OMOLLO AOKO DIRECTOR, HUMAN RESOURCE DEVELOPMENT MINISTRY OF EDUCATION		FURTHER HEARING 28 <sup>TH</sup> -29 <sup>TH</sup> MARCH, 2016
34.	MINISTRY OF EDUCATION	ACC 13/2014	FRAUDULENT ACQUISITION OF PUBLIC PROPERTY	PERMINUS KAMAU & OTHERS		FURTHER HEARING 21 <sup>ST</sup> - 22 <sup>ND</sup> MARCH 2016
35.	MINISTRY OF TRANSPORT ORT	ACC 11/2015		ENG. MICHAEL MWANGI ENG. RAPHAEL WECHE Arch. PHILIP ONYANGO		HEARING 4 <sup>TH</sup> & 5 <sup>TH</sup> APRIL2016



	<b>SUBJECT</b>	<b>CASE NO, COURT &amp; ODPP'S REF. NO.</b>	<b>ALLEGATION/OFFENCE</b>	<b>ACCUSED</b>	<b>STATUS OF JUDICIAL REVIEW AND OTHER APPLICATIONS</b>	<b>STATUS OF THE CRIMINAL CASE</b>
				ENG. GILBERT MONGARE Eng. SYLUS WACH IRA, CHARLES OIKE Eng. MICHAEL KAMAU Eng. KATA MATEMU		
36.	MINISTRY OF LANDS	ACC 465/2012	FORGERY OF TITLES	DAVID KAMUNYA ZIPPORAH WANG ITHI KAWAFALLS LTD		FURTHER HEARING 26TH FEB, 2016
37.	ACC 29/2015	ACC 29/2015		ARCH GABRIEL MBURU		HG.15TH J7TH FEB2016
38.	GEOHERMAL DEVELOPMENT CORPORATION (GDC)	ACC NO 20/2015	WILLFUL FAILURE TO COMPLY WITH PROCUREMENT PROCEDURES	SILAS MASINDE PRAXI DIS NAMONI N ICHOLUS KARUME ABRAHAM CHIPCHIRCHIR PETER AYODO CALEB INDIATSI BRUNO MUGAMBI MICHEL MAINGI GODWIN MWANGAE		FRESH HEARING 4TH_7TH APRIL 2016

	<b>SUBJECT</b>	<b>CASE NO, COURT &amp; ODPP'S REF. NO.</b>	<b>ALLEGATION/OFFENCE</b>	<b>ACCUSED</b>	<b>STATUS OF JUDICIAL REVIEW AND OTHER APPLICATIONS</b>	<b>STATUS OF THE CRIMINAL CASE</b>
39.	KENYA MEAT COMMISSION	CR. C 812/2015 KAJIADO NO. SPMC; JUDICIAL REVIEW NO. 166 OF 2015	CONSPIRACY TO DEFRAUD 11 MILLION SHILLINGS FROM KMC COMMISSION	IRENE KAPCH EBAI MBITO OTHERS	STAY DENIED, JUDICIAL REVIEW APPLICATION TO BE ARGUED ON 27/1/2016.	PLEA TAKEN ON 9TH JUNE 2015. HEARING ADJOURNED DUE TO ABSENCE OF ONE ACCUSED PERSON; WARRANTS OF ARREST ISSUED MENTION ON 8TH DECEMBER 2015. WARRANTS STILL IN FORCE DIRECTIONS ON 23RD FEB, 2016 TO CONFIRM IF THE WARRANTS HAVE BEEN EXECUTED.
40.	MU RAN GA GOVERN OR	PET. NO. 194 OF 2015	FILING A FALSE SELF DECLARATION FORM TO THE EACC.	MWANGI WAIRIA	PETITION HEARD JUDGMENT TO BE DELIVERED ON SEPTEMBER 2015. 25TH  NOT DELIVERED JUDGE NOT SITTING  JUDGEMENT TO BE DELIVERED	PETITIONER HAS NEVER BEEN CHARGED INTERIM ORDERS GRANTED STAYING PROSECUTION AT THE LOWER COURT.

	<b>SUBJECT</b>	<b>CASE NO, COURT &amp; ODPP'S REF. NO.</b>	<b>ALLEGATION/OFFENCE</b>	<b>ACCUSED</b>	<b>STATUS OF JUDICIAL REVIEW AND OTHER APPLICATIONS</b>	<b>STATUS OF THE CRIMINAL CASE</b>
					ON NOTICE	
41.	CHEGE KAMAU DANIEL & 20 OTHERS VS- A.G; DPP & EACC	PET. NO. 203 OF 2015	SEEKING DECLARATION THAT THE 175 CORRUPTION CASESWERE ILLEGAL AS THEPRESIDENT IS INTERFERINGWITH INDEPENDENTOFFICES		MATTER CONSOLIDATED WITH ENG KAMAU'S & CHARITY NGILU'S CASE. MATTER COMING UP FOR HEARING ON 10TH DECEMBER, 2015. THERE ARE NO INTERIM ORDERS	MN. 25TH MARCH 2016.
42.	BOMET COUNTY OFFICIALS	PETITION NO.5 10 OF 2015.	IRREGULAR PROCUREMENT IN THE LEASING OF AMBULANCE SERVICES FROM KRC-EMERGENCY PLUS MEDICAL SERVICES LTD.	DR. STANLEY KIPLANGAT CHERUIYOT & OTHERS	PETITION UP MENTION 30TH CAME FOR ON NOVEMBER, 2015 AND THE COURT DECLINED TO GRANT INTERIM ORDERS OF STAY. PETITION PENDING HEARING.	HG. ON 2016. 2325TH MARCH
43.	MINISTRY	REV.NO.70 OF 2015 ACC.NO.35 OF	CONSPIRACY TO DEFRAUD MINISTRY OF ROADS. KSHS.	JOHN MOGUCHE	DEFENCE FILED REV.	MAGISTRATES COURT RULED

	<b>SUBJECT</b>	<b>CASE NO, COURT &amp; ODPP'S REF. NO.</b>	<b>ALLEGATION/OFFENCE</b>	<b>ACCUSED</b>	<b>STATUS OF JUDICIAL REVIEW AND OTHER APPLICATIONS</b>	<b>STATUS OF THE CRIMINAL CASE</b>
	OF ROADS PUBLIC WORKS			,BINLAW CONSTRUCTION COMPANY & ANOTHER	NO 70/20 15 CHALLENGING THE MAGISTRATES COURT DECISION HEARING DATE TO BE GIVEN ON NOTICE. MATTER HAS BEEN DELAYED DUE TO TRANSFER OF MAGISTRATE PREVIOUSLY HANDLING THE CASE	THAT MATTER SHOULD NOT START DE & NOVO FURTHER HEARING 10 <sup>TH</sup> AND 11 <sup>TH</sup> MARCH 2016
44.	COUNTY GOVERNMENT OF GARISSA	10/2015 GARISSA PET. 225/2015.	IRREGULAR LEASING OF AMBULANCE SERVICES BY GARISSA COUNTY	HON. NATHIF JAMA ADAN (GARISSA GOVERNOR)	THE GOVERNOR FILED A PETITION STOPPING HIS ARREST AND PROSECUTION ON 15TH JULY 2015. PROHIBITION ORDERS ISSUED AGAINST THE DPP	STAY ORDERS PROHIBITING CHARGING AND PROSECUTION IN FORCE;  PLEA HAS NOT BEEN TAKEN.
45.	KENYA MEAT COMMISSION	ACC. NO 9/2015 PETITION NO. 166/2015	CONSPIRACY TO DEFRAUD KMC 3 MILLION SHILLINGS  FRAUDULENT FALSE	ESTHER NJERI NGARI	INTERIM STAY GRANTED BY THE COURT OF APPEAL ON	PLEA TAKEN ON 9TH JUNE 2015 BEFORE ANTICORRUPTION COURT 2.

	<b>SUBJECT</b>	<b>CASE NO, COURT &amp; ODPP'S REF. NO.</b>	<b>ALLEGATION/OFFENCE</b>	<b>ACCUSED</b>	<b>STATUS OF JUDICIAL REVIEW AND OTHER APPLICATIONS</b>	<b>STATUS OF THE CRIMINAL CASE</b>
			ACCOUNTING BY SERVANT		11TH NOVEMBER 2015.	HEARING ON 22ND & 23RD SEPTEMBER.  MENTION ON 7/3/2016 FOR DIRECTIONS.  NB/ THIS CASE HAS BEEN DELAYED AS A RESULT OF ONE ACCUSED PERSON ABSCONDING: WARRANTS OF ARREST ISSUED.
46.	CENTRALBANK GOVERNOR	HC PETITION NO. 73/14	ABUSE OF OFFICE AND IRREGULAR AWARD OF TENDER	FORMER CBK GOVERNOR NJUGUNA NDUNG'U	STAY PROCEEDINGS GRANTED	JR DISMISSED  APPEAL NO. 333 OF 2014 LOGGED AND THE SAME IS PENDING HEARING PENDING HEARING IN THE COURTOF APPEAL DATE TO BE GIVEN ON NOTICE
47.	MINISTRY OFINFORMATION ANDTECHNOLOGY	PET. NO. 333/ ACC. NO. 19/2014	IRREGULARITIES IN PROCUREMENT OF KONZA RANCH/MALILI RANCH BY FORMER PS MR. BITANGE NDEMQ	BITANGE NDEMO & 8 OTHERS	PETITION DISMISSED ON 30TH OCTOBER 2015	HEARING DATE ON 22ND FEBRUARY 2016

	SUBJECT	CASE NO, COURT & ODPP'S REF. NO.	ALLEGATION/OFFENCE	ACCUSED	STATUS OF JUDICIAL REVIEW AND OTHER APPLICATIONS	STATUS OF THE CRIMINAL CASE
48.	MINISTRY OF YOUTH AND SPORTS	ACC.5/2015 HIGH COURT KISUMU CONSTITUTIONAL PETITIONS NO. 15,16,11 OF 2014	FRAUDULENT ACQUISITION OF PUBLIC FUNDS KSH.8.5M PROPERTY OF MINISTRY OF YOUTH AND SPORTS	ANDREW A. ORIWA ZACHARY N. OKORA LUKE MIDAMBA & 4 OTHERS	FILED WRITTEN SUBMISSIONS. REQUEST MADE BY THE APPLICANT FOR THE TRANSFER OF THE CASE FROM KIUMU,	PENDING FINAL DETERMINATION OF HIGH COURT CONSTITUTIONAL PETITION NO. 15,16,17 OF 2014.
49.		ACC 7/2015	<ul style="list-style-type: none"> <li>• CONSPIRACY TO COMMIT AN OFFENCE OF ECONOMIC CRIME</li> <li>• FRAUDULENT ACQUISITION OF PUBLIC PROPERTY</li> <li>• UTTERING A FALSE DOCUMENT</li> <li>• ABUSE OF OFFICE</li> </ul>	REGINA CHEPEMBOI, JIMMY MUTUKU KIAMBA, STEPHEN OGAGA OSIRO, LILIAN WANJIRU NDEGWA, NANCY WAITHERA KIRURI		FURTHER HEARING FROM 2ND .4TH AND 7TH .9 <sup>TH</sup> MARCH 2016
50.	NATIONAL YOUTH SERVICES	ACC 301/2016	NATIONAL YOUTH SERVICES MONEY LAUNDERING 791 MILLION	JOSEPHINE KABURA		SUMMONS ISSUED MENTION ON 8TH MARCH 2016
51.	NAIROBICOUNTY GOVERNMENT	ACC NO. 1/2016	CORRUPTLY OFFERING A BENEFIT OF KSHS 1 MILLION TO MIKE MBUVI	GEORGE WAINAINA NJOGU & ROSELINE OLUOCH		DIRECTIONS TO BE GIVEN ON 23RD FEB 2016
52.	EACC/EL/INQ/1/2015- (Gilgil Weigh Bridge File) <ul style="list-style-type: none"> <li>• Hon. Alfred Kiter and</li> </ul>	DPP/JRC/72/2015			<b>Petition No. 201/2015 (Nairobi Law Court)</b>	Application for slay pending in court. Hearing H.C.

	SUBJECT	CASE NO, COURT & ODPP'S REF. NO.	ALLEGATION/OFFENCE	ACCUSED	STATUS OF JUDICIAL REVIEW AND OTHER APPLICATIONS	STATUS OF THE CRIMINAL CASE
	Hon. Sujeev Kaur contravening of Chapter Six of the Constitution.				<b>(Alfred Keter &amp; Sonic Birdi —Vs- DPP &amp; Others)</b>	Petition No. 201/2015 rejected. Matter heard on 18th & 19th May, 2015. Petition withdrawn on 19th May 2015.
		ODPP/CAM/4/ 293	Cr. Case No. 742/2015. Rep vs. Alfred Kiptoo Keter & Bildi Sonic. (Naivasha Law Court)			Plea taken on 20th May 2015.
						Hearing 02 <sup>nd</sup> March 2016
53.	EACC/AT/INQ/3/2015 Embezzlement of funds by Nairobi City County Officials	ODPP/CAM/015/5/280	Acc. No. 07/2015 (Nairobi Law Court)  Rep. Vs. Regina Chepkemoi & 4 others			Hearing on 23rd June 2015. Case adjourned Adv. In C.A. Hearing 4th August 2015. <b>Hearing</b> 1 41h & 15 <sup>th</sup> September, 2015. <b>Hearing</b> 09th & 10th November, 2015 <b>Hearing</b> 07th 08th & Q9th December,

	<b>SUBJECT</b>	<b>CASE NO, COURT &amp; ODPP'S REF. NO.</b>	<b>ALLEGATION/OFFENCE</b>	<b>ACCUSED</b>	<b>STATUS OF JUDICIAL REVIEW AND OTHER APPLICATIONS</b>	<b>STATUS OF THE CRIMINAL CASE</b>
						2015 <b>Mention</b> 08th February 2016 <b>Hearing</b> 2nd, 3rd, 4th, 7th & 8th March 2016
54.					<b>Petition No. 197/2015 (Nairobi Law Court)</b>  <b>Jimmy Mutuku Kiamba — Vs-DPP &amp; Others.</b>	<b>Mention</b> 28th August 2015 for directions. Some amendment done. <b>Mention</b> 28th September, 2015. <b>Further Mention</b> 01 <sup>st</sup> December 2015 for directions Judge did not sit. Waiting hearing date.
55.	EACC/EL/ING/8/2014 - (Governor Mwangi Wairia — Muranga County File) - False information in self-declaration forms.	DPP/JRC/67/2015			Petition No. 194/2015; (Nairobi Law Court)  <b>(Hon. Francis Mwangi Alias Mwangi Wairia —Vs- DPP &amp; Others)</b>	Petition filed on 12th May 2015 at High Court. Petition No. 106/2013 between Patrick M. Mwangi & Another Vs. Francis Mwangi &



	SUBJECT	CASE NO, COURT & ODPP'S REF. NO.	ALLEGATION/OFFENCE	ACCUSED	STATUS OF JUDICIAL REVIEW AND OTHER APPLICATIONS	STATUS OF THE CRIMINAL CASE
						IEBC. Hearing 8th June, 2015. Hearing adjourned by EACC to 14th July 2015. Judgment on 25 <sup>th</sup> September 2015, not delivered. <b>Judgment on Notice</b>
			ODPP/CAM/015/5/290		Acc. No. /2015 Rep. Vs. Wairia Mwangi	Pending Charging
56.	EACC/FI/INQ/63/2013- (Youth Enterprise Fund File) Former CEO Juma Mwatate Procurement of Hatcheries. EACC/FI/INQ/51/2014-	ODPP/CAM/015/5/297	Cr. No.08/2015. (Nairobi Law Court) Rep. Vs. Juma Mwatate			Hearing: 12 <sup>th</sup> February 2016
57.	EACC/FI/INQ/51/2014- (Machakos File) - Purchase of pre-used Subaru and Toyota vehicles.	ODPP/CAM/015/5/300	Acc. No. 11/2015 (Machakos Law Court) Rep. Vs. Irene Wanjiru Kamciu and 4 Others			Mention: 8TH & 9TH JUNE, 2016
		DPP/JRC/99/2014			Petition No. 310/2014. (Nairobi Law Court) Dr. Alfred Mutua — Vs EACC, DPP, IG, AG	Ruling 05th February 2016

	<b>SUBJECT</b>	<b>CASE NO, COURT &amp; ODPP'S REF. NO.</b>	<b>ALLEGATION/OFFENCE</b>	<b>ACCUSED</b>	<b>STATUS OF JUDICIAL REVIEW AND OTHER APPLICATIONS</b>	<b>STATUS OF THE CRIMINAL CASE</b>
		ODPP/CA/016/09			Civil Application No. 31 /2016 (UR22/16) (Court of Appeal Nairobi) Dr. Alfred Mutua -Vs EACC, DPP, IG,AG	Appeal Hearing on 18th February 2016
58.	EACC/FI/INQ/117/2014- (Turkana File) - Rehabilitation of Kaputir — Loyapat — Kainuk Roads.	ODPP/CAM/015/5/301	Acc. No.4/2015 (Eldoret Law Court) Rep. Vs. Tioko Logiron & 5 Others.			Hearing 7th and 8th march 2016
59.	EACC/FI/INQ/111/2014- (Trans-Nzoia County File) - Renovation of the Speaker's Residence and erection of Perimeter Wall was overpriced.	ODPP/CAM/015/5/306	Acc. No.3/2015 (Eldoret law Court) Rep. Vs. Vitalis Wafula & Another.			Hearing on 24TH February 2016
60.	EACC/KSM/INQ/FI/04/2014 (Nyamira County File) - County Assembly Procured MCA's medical cover through single sourcing.	ODPP/CAM/015/5/308	Cr. 462/2015 (Nyamira Law Court) Rep-Vs- Nehemiah Nyabuto Nyakundi & 5 Others.			Hearing 24th February 2016.
61.	EACC/NYERI/FI/INQ/1/2014 (Rehabilitation of Embu Stadium by Embu County Secretary)	ODPP/CAM/015/5/315	Cr. Case No. 01/2015 (Embu Law Court) Rep. Vs. Margaret Kariuki & 5 Others.			Hearing 11 <sup>th</sup> , 12 <sup>th</sup> , 13 <sup>th</sup> & 25 <sup>th</sup> , 26 <sup>th</sup> , 27 <sup>th</sup> April 2016.
62.	EACC/FI/INQ/063/2015— (Irregular leasing of Kenya Veterinary Vaccine	ODPP/CAM/015/5/319	Acc. No.10/2015 (Nairobi Law Court) Rep — Vs — Dr. Geoffrey Kiprop Mutai			Hearing 18 <sup>th</sup> March 2016

	SUBJECT	CASE NO, COURT & ODPP'S REF. NO.	ALLEGATION/OFFENCE	ACCUSED	STATUS OF JUDICIAL REVIEW AND OTHER APPLICATIONS	STATUS OF THE CRIMINAL CASE
	Production Institute) (KEVEVAPI)		George Koigi Ndungu.			
63.	EACC/FI/INQ/1 41/2014 (Renovation of Kenyatta Stadium, Kitale — Tranzioa County to West End Co.)	ODPP/CAM/0 15/5/320	Acc. No. 05/2015 (Eldoret Law Court) Rep. Vs. Benjamin Ruto and 11 others			Hearing 151h, 6th March 2016
64.	EACC/MSA/FI/INQ/06/2013(Lamu West CDF Project Mgt Committee Account)	ODPP/CAM/015/5/325	Acc.No. 8/2015 in (Mombasa Law Court) Rep.Vs. Julius Ndegwa & 6 Others			Hearing 22nd, 23rd March 2016
65.	EACC/H/INQ/234/201 4 (Mokueni County Governor and Executive Committee)	QDPP/CAM/0 15/5/331	Acc. No. 10/2015 (Machakos Law Court) Rep. Vs. Alex Kyalo Mutuku & 7 Others			HEARING 21 /3/2016
66.	EACC/FI/INQ/1 10/2014— Public Land Parcel No. L.R. 3586/3 L.R 31187— Horatius Da Gama Rose of M/s. Muchanga Investment and Jost Konzolo of M/s. Telesource Corn. Ltd.	ODPP/CAM/01 5/5/337	Acc. No. 13/2015 (Nairobi Law Court)  HCCC No. 1180/2014 (Civil Case) to determine the ownership of land.			Mention 29th February 2016
		ODPP/JRC/ 107/201 5			Petition No. 305/2015 (Nairobi Law Court) Charity Kaluki Ngilu and 6	Ruling on 26t February, 201 6
67.	EACC/MSAFI/INQ/18/2014 — (Ganze File — Hon. Peter Safari Shehe and others on misappropriation CDF)	ODPP/CAM/015/5/338	Acc. No.7/2015, (Malindi Law Court) Rep. Vs. Hon. Peter Safari Shehe, Daniel Chiwayi Kiriba & 2 Others  Acc. No. 8/2015 (Malindi Law Court) Rep. V. Hon. Peter Safari Shehe & 4 Others			Hearing: 24 <sup>th</sup> -25th February 201 6. ACC. No. to be consolidated.

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			Acc. No. 9/2015 (Malindi Law Court) Rep. Vs. Hon. Peter Safari Shehe & 4 Others			
					Misc. Appi. No. 28/2015 (Malindi Law Court) Christopher N. Otieno, Davison M. Karisa Ngonyo, Geoffrey M. Peter, Nicholas M. Kiamba Vs.	Stay orders lifted. Marked SOG
68.	EACC/NYERI/H/INQ/01/2015 (Irregular procurement of technical audit services from Pleng (k) Ltd by county Government of Nyeri).	ODPP/CAM/U 15/5/343	Acc. No. 3/2015 (Nyeri Law Court) Rep. Vs. John Mwangi & 2 Others.			FURTHER HEARING 14TH MARCH, 2016
69.	EACC/GSA/FI/INQ/01/2015 (Irregular leasing to Ambulance Services by Garissa County)	ODPP/CAM/015/5/344	Acc. No. (Garissa Law Court) Rep. Vs. Nathif Juma Aden & 6 Others.			Pending Arrest and Charging.
		DPP/JRC/104/2015			Petition No. 225/2015 (Nairobi Law Court) Hon. Nathif Jama Adan Vs. DPP, EACC, IGP,	Judgment 1 <sup>st</sup> March 2016

	<b>SUBJECT</b>	<b>CASE NO, COURT &amp; ODPP'S REF. NO.</b>	<b>ALLEGATION/OFFENCE</b>	<b>ACCUSED</b>	<b>STATUS OF JUDICIAL REVIEW AND OTHER APPLICATIONS</b>	<b>STATUS OF THE CRIMINAL CASE</b>
70.	EACC/KSM/Fl/INQ/37/2015— Vihiga County Assembly Clerk and Senior Accountant.	ODPP/CAMJO15/5/361	Acc. No. Rep. Vs. Joseph Alusiola Musambayi & Pens Livango Ondari			Pending Arrest and Charging
71.	EACC/NYR/Fl/INQ/08/2014 — County Government of Isiolo (Gunny bags)	ODPP/CAM/015/5/363	Acc. No.11/2015 (Isiolo Law Court) Rep. Vs. Charles Gachini Mungai &			HG ON 18 <sup>TH</sup> FEB 2016
72.	EACC/OPS/INQ/13/15- CEO -Kenya Trade Network Agency	ODPP/CAM/015/5/365	Acc. No. 29/2015 (Nairobi Law Court) Wilson Norman Kabuga & Architect Gabriel Irungu Mburu			Hearing 15th. 1 6th, & 17th February 2016
73.	EACC/KSM/INQ/fl/03/2014 — Head of Supply Chain — County Government of Nyamira. (Peres Nyakirario Mose)	ODPP/CAM/015/5/383	Acc. No. (Kisii Law Court) Rep. Vs. Peres Nyakirario Mose			Pending Arrest and Charging
						Misc. Appl. No. 09/2015 Peres Nyakirario Mose Vs DPP, EACC, Transitional Authority & County Government of Nyamira
74.	EACC/Fl/INQ/01/2014— Tender Construction of Library and ICT Resource Center at Kiambu Institute of Science and Technology. (Principal Nicholas Muriithi	ODPP/CAM/015/5/384	Acc. No. Rep. Vs. Nicholas Muriithi Muriuki			Pending Arrest and Charging

	SUBJECT	CASE NO, COURT & ODPP'S REF. NO.	ALLEGATION/OFFENCE	ACCUSED	STATUS OF JUDICIAL REVIEW AND OTHER APPLICATIONS	STATUS OF THE CRIMINAL CASE
	Muriuki)					
75.	EACC/ELD/EI/INQ/09/2014 — Misappropriation of 28M	ODPP/CAM/015/5/404	Acc. No.			Pending
76.	EACC/ELD/FI/INQ.4/2014— Speaker of County Assembly of Elgeyo Marakwet — travelling allowances to Atlanta-Georgia USA.	ODPP/CAM/015/416	Acc. No. 07/2015 Rep — Vs — Albert Kipkogei Kochei (Judith Adero — Administrative Action)			Plea taken 30 <sup>th</sup> October 2015 Hearing 3 <sup>rd</sup> December 2015
					Petition No. 2/20 15 (Eldoret Law Court)	JR Application on 2nd December 2015 — stay orders granted - inter—parties Hearing on FEBRUARY 2016. Mention FEBRUARY 2015
77.	EACC/N KR/INQ/ FI/27/201 5 — Bomet County Government for leasing ambulance services.	ODPP/CAM/01 5/5/43 1	Dr. Stanley Kiplangat Cheruiyot & 13 others (Kericho)			Hearing on 23 <sup>rd</sup> to 25 <sup>th</sup> March 2016.
78.	EACC/FI/INQ/23/2015 — Geothermal Development Company - procurement of RIG Move Services,	ODPP/CAM/015/5/432	Acc. No. 20/2015 Rep. Vs. Silas Masinde Simiyu & 8 others			Hearing on 4th to 7th April. 2016.
79.	EACC/ISL/FI/INQ/INQ NO. 3/2015 — Isiolo County Government — Irregular Supplementary	ODPP/CAM/015/5/433	Godana Adhi Doyo & 3 others			Hearing 23 <sup>rd</sup> 24 <sup>th</sup> 25 <sup>th</sup> March 2016

	<b>SUBJECT</b>	<b>CASE NO, COURT &amp; ODPP'S REF. NO.</b>	<b>ALLEGATION/OFFENCE</b>	<b>ACCUSED</b>	<b>STATUS OF JUDICIAL REVIEW AND OTHER APPLICATIONS</b>	<b>STATUS OF THE CRIMINAL CASE</b>
	Appropriation Act 2014					
80.	EACC/EI/INQ/59/2015 — Kenya Pipeline Corporation — Irregular payment of 3CM to Redline Ltd — Autotransformers.	ODPP/CAM/015/5/434	Acc. No. 22/2015 Rep. Vs. Josephat Kipkoech-Sirma (Chief Engineer) and Ngatia Ndungu (Director Redline Ltd) and 5 others			Hearing on 18th - 22nd April 2016
81.	Allegation of irregular procurement of structuring cabling of NWCPC Office Block		Acc. No.21/2015 Rep — Vs — Ngubuini and 11 othe.			Hearing 25th 26th & 29th FEB. 2016.
82.	EACC/FI/INQ/1 18/2014 — A Ward of 11 160,000/ contract for rehabilitation of lodwar — Napwikar Moruese road by County of Government of Turkana	ODPP/CAM/01 5/5/492	Nancy Tatoi, Stephen Gole, David Gesuka, Wilfred Lokiyoto, Benson Logiel lokwang, Aposo Namoru, County Accountant, Joseph Kipngeno Kosgei, Paul Nabuin (Lomia Energy Ltd.)			Pending Charging
83.	EACC/FI/INQ/124/14 — Director Genaral of National Youth Service Dr. Nelson Githinji for abuse of office by servicing and maintaining private owned vehicle at Kshs. 497,335 paid by NYS.	ODPP/CAM/015/5/496	Republic Vs. Nelson Gitau Githinji, Nicholas Juma Makokha, Geofrery Kimani Kiriha. Acc. No. 3/2016			Mention: 3 <sup>rd</sup> March 2016
84.	Ministry of Information and ICT Irregularities in procurement of Konza Ranch/Malili Ranch, by former PS Mr. Bitange Ndemo		Acc. No. 19/2014 (Nairobi Law Court) Rep. Vs. Bitange Ndemo & 8 Others			Hearing 22nd to 24 <sup>th</sup> February 2016

	<b>SUBJECT</b>	<b>CASE NO, COURT &amp; ODPP'S REF. NO.</b>	<b>ALLEGATION/OFFENCE</b>	<b>ACCUSED</b>	<b>STATUS OF JUDICIAL REVIEW AND OTHER APPLICATIONS</b>	<b>STATUS OF THE CRIMINAL CASE</b>
85.	National Housing Corporation Allegation of abuse of office in allocation of houses by Managing Director & 5 other Senior Managers.	ODPP/CAM/01 3/5/138	Acc. No. 14/2013 (Nairobi Law Court) Rep. Vs. James Wagemu Ruitha & 5 Others			Hearing: 18 <sup>TH</sup> & 19 <sup>TH</sup> FEB, 2016.
86.	IEBC Officials (Irregular award of tender for procurement of electronic voter identification devices (EVID))	ODPP/CAM/013/5/145			Acc. No. 16/2013 (Nairobi Law Court) Rep. Vs. James Oswago & 3 Others	Hearing: 15 <sup>th</sup> & 16 <sup>th</sup> February, 2016
87.	Kitutu - Chache CDF (Kitutu Chache ME. Richard Momoima Onyonka in the purchase of Sugar for IDPs from Chemelil Sugar Co.)	ODPP/CAM/013/5/156	ODPP/CAM/013/5/156			Hearing 11th & 12 <sup>th</sup> MAY 2016
88.	Kenya Meat Commission (KMC) Allegations of irregular payment of 11.5 Million to Dr. Ibrahim Isaack, Managing Commissioner, Kenya Meat Commission.	ODPP/CAM/015/5/303	Acc. No. 09/2015 (Nairobi Law Court) Rep. Vs. Ibrahim Isaack & Others			ONE OF THE ACCUSED, EVANS NYAIRO, ABSCONDED, MENTION ON 7 <sup>TH</sup> MARCH FOR DIRECTION
					Petition	Court of Appeal Matter stayed until February 2016