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**SUPERVISOR: DR. JACKSON BETT.**

**THE IMPACT OF POLITICAL PATRONAGE ON IMPLEMENTATION OF PUBLIC  
PROCUREMENT LAW; SLAYING THE DRAGON OF MEGA CORRUPTION IN KENYA**

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**G62/11341/2018**

## DECLARATION

Except as stated by particular reference in the text, I, **Yasmin Josephine Mokaya**, declare that this research which I submit for the Masters of Law at The University of Nairobi is my original work. This research has not been presented at any other university in Kenya or anywhere else in the world for the award of Master's Degree.

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This thesis has been submitted to the University of Nairobi School for examination with the approval of Dr. Jackson Bett as the Supervisor.

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Date..... 22nd November 2021.....

## **DEDICATION**

To my late mom Jackline Nyaboke who not only ensured I received quality education but most importantly for teaching me the value of education.

To my loving husband Ovamba Daniel who gave moral and material support in writing this thesis.

And to my sibling, Dr.Diana Marion for always encouraging me the sky is the limit.

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A number of folks helped me tremendously while I was writing.

First and foremost, I want to express my gratitude to and appreciation for my supervisor. Jackson Bett, who worked diligently with me and whose advice I truly value. His knowledge of Public finance matters is unsurpassed. It was a wonderful honor to be under his supervision.

I would also like to thank my boys Terrence and Neville for their patience and understanding as I researched and wrote this thesis.

I would also like to express my gratitude to my pals who are going through the same thing, Angela, Ivy, Grace and the rest of class 2018.

## **LIST OF STATUTES**

1. Republic of Kenya, Public Procurement Regulations, (Nairobi Government Printer,2011)
2. Republic of Kenya, Public Procurement Regulation, (Nairobi, Government Printer,2009).
3. The Public Officer Ethics Act (Nairobi, Government Printer,2003)
4. The Public Procurement and Asset Disposal Act, (Nairobi Government Printer,2015
5. Prevention of corruption Act Cap 265 (Nairobi, Government Printer,1956
6. Anti-Corruption and Economic Crimes Act No.3 (2003) available at [www.kenyalaw.org](http://www.kenyalaw.org)

## **ABSTRACT**

Overtime, Kenya's government has made changes to the country's public procurement system. Two pieces of legislation govern public procurement: The Public Procurement Regulations of 2001 and the public procurement and Disposal Act of 2015. Three bodies were established under the Public procurement and Disposal Act, the public Procurement Oversight Authority (PPOA), the public procurement Advisory Board (PPAB) and the Public Procurement Complaints, Review and Appeals Board (PPCRAB). The PPAB and PPARB are separate bodies.

Public Procurement is the most vulnerable to corruption due to massive amounts of money involved. It has been at the center of several corruption scandals in this country. Billions of shillings have been squandered due to shady procurement arrangements, which are largely due to political favoritism.

As a result, the purpose of this study was to look into the impact of political patronage on Kenyan public procurement. The majority of Kenya's corruption taken place in public sector. It's simple to see why procurement is a hotbed of corruption because it accounts for over 60% of government revenue. Incoming governments have been known to utilize their position to sway the allocation of government contracts in order to acquire crony allegiance. While scandals imply that such tactics are pervasive, the corrupt practices have been attributed to widespread political favoritism in the public procurement industry.

## **DEFINITION OF TERMS**

**Political patronage:** Political patronage is the practice of dispersing state resources as a reward for political and electoral support. State resources can include public sector contracts or a prestigious role in the civil service. Political patronage is common in regions with a legacy of tribalism & localized power structures. It is often accompanied by the corrupt acts, such as nepotism, cronyism favoritism towards friends or trading influence.<sup>1</sup>

**Public procurement:** When the government or another public body purchases items from the market, this is referred to as public or government procurement. As a result, procurement is also an acquisition for public consumption, a statement that almost reveals public interest in procurement.<sup>2</sup>

**Corruption :** Corruption has been defined as abuse of entrusted power for private gain.<sup>3</sup>

**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>4</sup>

**Impact:** The action of one object coming forcibly into contact with another.

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<sup>1</sup> [www.ganitegrity.com/compliance-glossary/patronage/](http://www.ganitegrity.com/compliance-glossary/patronage/) accessed on 11/10/2021

<sup>2</sup> Trepte Regulating procurement: Understanding the Ends and means of public procurement Regulation (OUP 2004)pg27

<sup>3</sup> <http://www.transparency.org/en/what-is-corruption> accessed on 11<sup>th</sup> November 2021.

<sup>4</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.

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## CHAPTER 1

### 1.1 INTRODUCTION

On the surface, Kenya public procurement system appears to be functioning properly, but there is a serious problem, which the study believes is the result of political favoritism, resulting in underperforming institutions and widespread corruption<sup>5</sup>which threatens to wipe out the sector's achievements.<sup>6</sup>Multiple corruption perception polls conducted by<sup>7</sup>Kenya's Ethics and Anti-Corruption Commission (EACC) between 2010 and 2015 back up this claim.<sup>8</sup>

The public has pushed the government to address the issue of corruption within its ranks, and in February 2016, a list of 88 high-profile corruption cases, the majority of which involved public procurement, was released by the Director of Public Prosecutions. Due to charges of corruption in the procurement of commodities, works, and services, high-ranking public officials within ministries, state departments, state companies, and agencies have been requested to quit.<sup>9</sup>

Pilferage in the government sector has reached epidemic proportions, as evidenced by current and closed public procurement cases. President Uhuru Kenyatta admitted that corruption in the

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<sup>5</sup>Humphrey Kimani Njuguna, "The Influence of Political Patronage on the Operationalization of Public Procurement Law in Kenya, 2012, [http://www.ippa.org/IPPC5/proceedings/Part 6/Papers6-14.pdf](http://www.ippa.org/IPPC5/proceedings/Part%206/Papers6-14.pdf), accessed 6,06,2019

<sup>6</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. Under standing order 216.

<sup>7</sup> The Mars Group, "The cost of Grand Corruption in Kenya between 2004-2010, 2011 p.p 1-3 also see The Ethics and Anti-Corruption Commission of Kenya, Report on the State of Corruption in Kenya, 2013 & 2014.

<sup>8</sup> Corruption perception Surveys 2010, 2011, 2012, 2013, 2014 and 2015, <http://www.eacc.go.ke/docs/National-Ethics-and-Corruption-Surveys-2015-Report6/7/2019.pdf>

<sup>9</sup> 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.

public sector is a severe problem in his State of the Nation Address to parliament on March 26, 2015.<sup>10</sup>

This study takes a comprehensive approach to the problem, with a focus on political patronage and how it hinders public procurement delivery, weakens the system, and allows corruption to flourish.<sup>11</sup>

## **1.2 Background of the study**

Any Country economic development depends heavily on Public procurement. In Kenya it is the method by which the government spends the money it receives each year. For the purposes of implementing public service delivery. As a result, an economically inefficient public procurement system invariably undermines the government's economic growth strategy. In recognition of this critical function, Kenya's Constitution mandates that Parliament establish a framework under which procurement and asset disposal Rules would be executed. It specifies that any state organ or Public Institution procuring products or services must do so through a<sup>12</sup> fair, equitable, transparent, competitive and cost –effective system.

In previous Auditor General reports, anomalies in the use of Public funds, as well as blatant corruption in the Public Sector, have been frequently discovered. The majority of reported misappropriations are due to procurement requirements violations. Corruption has become a major impediment to Kenya's socio-economic progress, both at the national and local levels. The

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<sup>10</sup> President Uhuru Kenyatta Speech during State of the Nation Address at Parliament (document), Africa News Service, March 26 2015.

<sup>11</sup> Key pillars/elements in the public procurement system [www.kism.or.ke](http://www.kism.or.ke) accessed on 3<sup>rd</sup> August 2019

<sup>12</sup> Constitution of Kenya, article 227

Auditor General's most recent county reports for the fiscal year 2015/16 indicated widespread misappropriation of public funds due to insufficient financial controls and a failure to properly account for funds spent in various county legislatures. The audit cites anomalies such as failure to follow procurement laws, violations of the Public Finance Management Act, differences in revenue collection and the amounts taken to banks and abuse of office by county executives.

The direct costs of corruption include loss of public funds through misallocations of public funds, increased expenses, and worse quality goods, services and works. In the case of public works procurement, those who pay the bribes try to recoup their money by inflating prices, charging for work that was not completed, failing to satisfy contract specifications, lowering the quality of work, or using inferior materials.

The e-procurement platform was formally introduced in the country in August 2014. The platform is expected to improve procurement process transparency and accountability, reducing corruption in the sector. The full benefits of this platform have yet to be realized, with early assessments revealing attempts by the political class to manipulate the platform.

Transparency is more prevalent in the pre-tendering and tendering phases than in the post award phase. This is due to the fact that processes that are hidden from direct public scrutiny have the greatest potential for perversion. This demonstrates that the flagrant violations documented in the Office of the Auditor General's report are the consequence of Strategic behavior by officers in charge of the process and their counterparts in the supply chain.

### **1.3 Statement of the problem**

Kenya has made great progress in changing public procurement in the country over the years, all in the hopes of making the system more transparent, fair and less prone to corruption. Despite these commendable efforts, corruption continues to pervade all aspects of public procurement process, owing to political favoritism.

The majority of Kenya's corruption has occurred in public procurement.<sup>13</sup> Approximately sixty percent of government money is spent on procurement<sup>14</sup> which is why public procurement has been a hotbed of corruption. This research looks into how Kenyan procurement rules might be tightened to combat political favoritism in the acquisition of goods and services. The study tries to deliberate and provide a relationship between political patronage and shortcomings that has ended in widespread corruption. The study aims to show that corruption is caused by political favoritism as a result of institutional weakness.

### **1.4 General objectives**

The overall goal of this research is to look into the impact of political patronage on the implementation of Kenyan Public Procurement Law. The study tries to figure out why the Law is not working as it should.

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<sup>13</sup>The political Economy of Public Sector reform and privatization 234(Ezra N. Suleman and John Waterbury,eds,Boulder:Westview press,1990)

<sup>14</sup> Ministry of Finance, proceedings of the 1<sup>st</sup> National Public procurement Consultative Meeting, Safari park Hotel, Nairobi 13-15 May,2004 at 10

## **1.5 Specific objectives**

1. To figure out how political patronage and corruption interact.
2. To determine the role policy, legal and institutional reforms play in addressing political patronage in the public procurement sector in Kenya.
3. Examine if the reforms are sufficient to address the problem of political patronage in public procurement.
4. To propose the most relevant reforms to address the sluggishness with which procurement laws are implemented.

## **1.6 Research questions**

This research addresses the following questions;

1. What is the link between political patronage and corruption?
2. What role has policy, legal and institutional reforms played in addressing political patronage in the public procurement sector in Kenya?
3. Is there a need for legal, institutional, and policy reforms to improve the delivery of Public procurement in Kenya?
4. Have these reforms been sufficient to address the problem of political patronage in public procurement.

## **1.7 Hypothesis**

The theoretical postulates guiding this study are:

- i. Manipulation of the public sector operations by the ruling class. How the political environment influences the functioning of the public procurement sector?
- ii. The study assumes that if the political leadership provides a conducive environment for the law, policy and institutions to thrive, then there would be optimum results.

## **1.8 Methodology**

The study employed a mixed method approach and desktop research to investigate the influence of political patronage on public procurement. The study was alive to the nature of the research in this area which is closely guarded. The mixed method design was applied in collecting data on the influence of political patronage on the effects of ethnicity, nepotism, and corruption on public procurement. The design is considered appropriate for the study because it allow the researcher to analyze, describe as it is on the ground.

Data will be collected from both primary and secondary source. And the secondary sources will include review of literature from other authors and previous research studies related to this study. Existing national laws will be used.

### **1.9.1 Justification for the study**

First the study aids in determining the extent to which the variables under consideration, such as political patronage, culture, nepotism, ethnicity, institutional failings, and low public officers' remuneration, among others contribute to corruption in Kenya. The study looks at all of the above variables and suggests internal controls to close the vulnerabilities that lead to corruption.



Second, the study will allow researchers, the government, and other stake holders interested in resolving the issue of corruption in public procurement in Kenya to understand how the variables under investigation affects procurement.

Thirdly the study will add to the corpus body of knowledge about corruption that already exists. The government, students, scholars, researchers' and other stakeholders will have a better understanding of the causes that contribute to corruption's flourishing as well as the variables under investigation.

### **1.9.2 Theoretical Framework**

An overview of the primary schools of legal theory is required in order to build a theoretical framework for the current investigation. Legal positivism, Moral theory, and public choice and Principal Agent theory are among these schools.

#### **Moral theory vs Legal positivism**

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>15</sup>Theories explaining human conduct and the sociological, school of thought where Law is a tool for social engineering have been examined. Corruption is considered a moral issue.

This study holds that leadership and integrity in the management of public resources is a moral issue that borders on personal behaviour characteristics. It is the role of the Law to enforce institutional morality in the human elements of the system. The public procurement and Disposal

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<sup>15</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.

Act 2015 has failed to enforce institutional morality in public procurement system to eradicate political patronage challenges.

At every stage, moral problems intrude on the Law. To natural lawyers, a strict separation between morality and the Law-even in pursuit of analytical clarity is exceedingly improbable. The legal positivist seeks a value-free account of; law-its morality that the act of positing legislation can and should be governed by moral principles and rules: that moral norms are a question of objective rationality, not of whim, convention, or arbitrary judgement. Because it defines the Law as just and good, morality becomes a major justification for it.

Individuals in society can have their own social space thanks to legal norms and principles that defend their rights inside the system.<sup>16</sup>These principles, according to Dworkin, are crucial in providing the Law with structure and support.<sup>17</sup>

Legal realism, according to Austin, is a vague term for the approach to understanding law. He claims that law can only be understood in terms of its practical consequences, and that Law was defined by what the judges really did and said.<sup>18</sup>

Prior to Austin, most important theoretical work on Law was addressed as if it were merely a part of moral theory, according to legal positivists. The relationship between Kenya's legal system and political patronage of public procurement has received little attention, and this is what the current study aimed to fill.

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<sup>16</sup>Finnis,op cit,290 Matthew Kramer. Some rejoinders to Ronald Dworkin's ,Attacks on legal positivism (1999)12 Canadian Journal of Law and Jurisprudence 53.

<sup>17</sup>R. DworkinLaw,s empire (Oxford: Hart Publishing,1998)56

<sup>18</sup> Michael Lobban,2016,pp 271

## **Public Choice theory**

The public choice theory examines individual behavior in the procurement market place (i.e. rationality and self-interest) in order to better understand collective decision making in the public realm. Public choice, like Agency theory, asserts that political elite and government bureaucrats tend to pursue and act in self-interest rather than the common good and that they abuse public service by improving their individual private welfare at the expense of public good.

As a result, the public choice theory aims to shatter the myth that the political class, government, bureaucrats and other public decision makers are acting altruistically in the pursuit of common good. The theory and tools of economics are applied to the study of political behavior.

Modelling individual behavior as driven by the goal of utility maximization like the economic model of rational behavior which is based, assumes that people are guided primarily by their own interests and, more importantly, that the motivations of the people in the political process are no different than those of people in the steak, housing or car markets.

To put it another way, Public choice, simply applies the rational actor model of economic theory to the world of politics.<sup>19</sup>

## **Principal Agent theory**

This study's theoretical foundation is based on the agency theory. The paper looked at procurement law through this theoretical lens and attempted to solve the agency dilemma.

Agency theory, which assumes that agents are inherently <sup>20</sup>inclined to self-aggrandizement at the

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<sup>19</sup>Procurement theories <https://www.econlib.org/library/Enc> accessed on 3<sup>rd</sup> Jan 2019

<sup>20</sup> Abdullah (2009), accessible <http://www.eurojournals.com/MEFE.html> (accessed on 26<sup>th</sup> June 2019)

expense of the principal, has primarily been debated in the field of Economics. Aldo, s concept of bounded rationality<sup>21</sup> raises the risk that the actors will respond incorrectly in some scenarios.

According to Health and Norman, the principal-agent theory is an agency model developed by economist 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>22</sup> Donahue contends that procurement managers including all civil servants concerned with public procurement must play the agent role for elected representatives.<sup>23</sup>

Under the main agent perspective, the justification for public procurement restrictions is to remedy informational asymmetry, conflict of interest, the agency predisposition to abuse delegated discretionary powers and the agent's natural inefficiency.

A regulatory framework that restricts discretion and aligns the private selfish interests of individual procurement officials with the collective interests of dispersed citizens is advocated by a principal agent approach to public procurement.

This theory is important to the current research because it offers the groundwork for looking into the function of politics in public administration. Managers who are regarded stewards for politicians handle public procurement, which is a public administration job. Compliance, according to Krawiec<sup>24</sup> and Langevoort,<sup>25</sup> could be a principle agent issue.

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<sup>21</sup> *ibid*

<sup>22</sup> J. Health, & W. Norman Stakeholders theory, Corporate governance and Public management, (2004) Journal of Business Ethics, Vol. 53, pp. 248

<sup>23</sup> J. E. Donahue, The privatization Decision: Public Ends, Private means (Basic Books, New York, NY, 1989)

<sup>24</sup> K. D. Krawiec, "Cosmetic compliance and the Failure of negotiated governance, (2003) Washington University law quarterly, vol. 81 (2) 487

<sup>25</sup> D. C. Langevoort, Monitoring: The Behavioral economics of corporate compliance with Law, (2003) Columbia Business Law Review, Vol. 71-118

In terms of procurement, the agent is closer to the process and so has better knowledge of the market and the available suppliers. As a result, there is an informational asymmetry between the principals, resulting in a conflict of interest. This is a direct challenge to the procurement process in terms of market purchasing, but it could also have major contracting implications.

The agency relationship presents numerous potentials for intentional and unintentional exploitation. The obvious examples of deliberate exploitation for personal benefit are corruption and bribery.<sup>26</sup>

### **1.9.3 Literature review**

It is impossible to overestimate the value of a country's effective public procurement system. It's a first in the government service delivery field.<sup>27</sup> Countries have worked hard to develop legal, legislative and institutional frameworks to help with the sector's management.<sup>28</sup> In order to prevent corruption, the following review of literature intends to start a conversation regarding political patronage in public procurement in order to combat corruption.

Dr. Humphrey Njuguna's study On the operation of public procurement and political patronage included the following objectives. According to him, the law's goal was to investigate the influence of political patronage on Kenya's public procurement the law's functioning and execution. According to the research, Progress has been made in establishing the necessary legal, policy and institutional mechanisms for effective and proper management of the public procurement sector,<sup>29</sup> The public procurement and Disposal Act, 2015<sup>30</sup> established agencies to

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<sup>26</sup> For comprehensive account of corruption in government, Rose-Ackerman, Corruption and Government: Causes, Consequences and Reform (Cambridge, 1999)

<sup>27</sup> Antony Flynn and P. Davis, Theory in Public procurement Research, Journal of Public procurement (2014) (15) (3), 161-193

<sup>28</sup> *ibid*

<sup>29</sup> Africa News Service, Gaps in Graft war Revealed, April 30 2007 Issue

regulate this sector's administration, of this including the public procurement Oversight Authority (PPOA) and the Public Procurement Administrative Review Board (PPARB) to monitor the administration of this sector. Other supporting laws, such as the Anti-Corruption and Economic Crimes Act, 2003, the public procurement Regulations, 2006/2009, and the Public Officer Ethics Act, 2003<sup>31</sup>, also help the Sector achieve its goal. Despite of all these measures, the country's financial sector remains rife with corruption. He is one of the few authors who has focused solely on the topic of political patronage in procurement Law. He has progressed rapidly.

Njuguna Humprey Kimani's dissertation examines the impact of political patronage on Kenya's public procurement law implementation. He looks into how legal and policy reforms have helped to streamline the operation of the public procurement sector, as well as the extent to which the New constitutional principles of good governance will aid in tackling the sector's political issues in Kenya.

The impact of ethnicity, nepotism, and corruption on Kenya was investigated through a review of Literature was undertaken on legal changes in the public procurement sector, ethnicity, nepotism, and corruption influence on Kenya. Kenya has put in place the legislative and administrative mechanisms to streamline the public procurement business, according to the report. High ranking officials, heads of departments, and other senior officers, are also appointed by the executive. The executive branch was discovered to be abusing its power of appointment by placing cronies, relatives, friends, and tribe members to crucial posts such as public procurement. This creates a nexus in which the administration maintains control over public procurement

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<sup>30</sup> Accessed from [www.fsdkenya.org](http://www.fsdkenya.org) on January 7,2019

<sup>31</sup>Kimani H J,The influence of political patronage on the Operationalization of public procurement Law in Kenya, Accessed from [www.acauthorities.org](http://www.acauthorities.org) on January 8,2019

while putting Kenya's public procurement in jeopardy. Jeopardizing Kenya's public procurement Law.

According to Migai Aketch's article of Enhancing Democracy in the Administration of Aid, "common corrupt practices in public procurement include public officers often under the influence of powerful politicians and business men, only inviting preferred firms at the short-listing stage, designing tender documents to favor particular firms and releasing confidential information." Corruption was also made simpler due to the fact that the procurement system was run by junior bureaucrats who were helpless to deal with any concerns and hence open to manipulation by their senior and powerful leaders.

Public officials in Kenya are not prohibited from working in the private sector by law. Kenya's civil service, according to the survey, is by far the most important stepping stone for entrepreneurs since it provides them with access to public resources, particularly lucrative public procurement contracts.<sup>32</sup> To high-ranking government officials and legislators because conflicts of interest regulation are routinely disregarded and public officials' engagement in the private sector is frequently violated, the participation of public officials in the private are usually breached, the participation of government of officials in private sector has been a major source of public procurement corruption. Although the Author effectively described how political patronage encourages corruption in the aforementioned post, the essay did not dive deeply into the topic, and there are information gaps that I hope to remedy.

The authors of the article "Evaluation of Corruption in Public Procurement: A Kenyan Experience," Due to the large number of corruption reports, an empirical study is needed to

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<sup>32</sup>Migai Aketch, Development Partners and Governance of Public procurement in Kenya :Enhancing Democracy in the Administration of Aid,(2005)37 (4)New York University Journal of International Law and Economics 829

investigate the loopholes and amount of corruption in public procurement in order to acquire a clearer picture of the situation. The impact of political patronage on the corruption scandal is not mentioned in the text.

In an essay regarding development partners and public procurement governance Migai Aketch says that “Public procurement is the major mechanism vehicle for exercising political patronage, and it is a practice that is particular prevalent in Kenya. He claims that public procurement is where the majority of Kenya’s corruption occurs.

Finally, procurement changes have generally been viewed as a technical procedure carried out primarily by legal experts and technical advisors, which may explain the knowledge gap. Its fundamental the political nature has been largely disregarded by the policy makers, as has the underlying incentive structure determining reform support.<sup>33</sup> While such reformers may have a general understanding of the political patronage elements at work in procurement, this understanding has mostly been lacking from their analysis and study.

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<sup>33</sup>OECD, Managing Public Financial Management (PFM) Reforms (2013) 9 (42) accessed on 26<sup>th</sup> June 2019



## **CHAPTER BREAKDOWN**

### **Chapter One-Introduction to the First Chapter**

This chapter aims to introduce the research problem to be questioned and investigated, as well as the theoretical and conceptual links political patronage and corruption, the appropriate methodology to be used in discussing the research problem, the study's objectives, research questions, justification, limitations and the basic assumptions to be used in discussing the research.

### **Chapter Two- The Historical Foundations of Kenyan Procurement Law**

Kenya's Public procurement system has evolved from a crude structure with no monitoring to one that is legally regulated. Kenya is attempting to improve its public procurement system. As a foundation to my investigation, this research will describe the evolution of Kenya's Public procurement system from the independence to the turn of the millennium.

### **Chapter Three-The effects of political patronage on Kenyan Procurement Law**

Political patronage is mostly exercised through public procurement, a practice that is notably popular in Kenya. As a result, the connection between political patronage and the influence of corruption on procurement Law is examined in this paper.

### **Chapter four –An examination of public procurement corruption and the steps that must be followed to slay the dragon.**

The use of powerful positions in the political system to extort bribes, provides party members and followers with lucrative public sector positions, and shape political and economic institutions to benefit affiliated interest groups into the hands of party leaders, members, or

private individual associates has been defined as corruption in the public sector. This study looks at how political clout affects government contracting, demonstrating how elites use procurement to manipulate the procurement process and distribute crooked contracts.

### **Chapter Five-Findings, Conclusions and Recommendation**

Finally, Chapter Five will identify and propose strategies for fighting the corruption monster in Public procurement.

## 2.0 CHAPTER 2

### 2.0 ASSESSMENT OF THE PROCUREMENT SYSTEM IN KENYA

#### 2.1 Introduction

The below 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 operationalized the public procurement and Disposal Act.<sup>34</sup>The necessary institutional frameworks such as the PPOA, PPAB AND PPARB are in place and appear to be working well.<sup>35</sup>There are numerous procurement-related corruption challenges still reported in the sector. Why the failure in spite of the numerous efforts made so far to reform the sector. The below chronology demonstrates the development of Kenya's public procurement. It was necessary for the study to demonstrate how far we have come and the reforms in the sector.

Public procurement has attracted extraordinary attention in the last two decades, and it has risen to a pivotal place in public governance debates. The taxpaying public, the funders (donors), and the procurement recipients are all concerned about public procurement.<sup>36</sup>

Public procurement is typically the largest domestic market in developing countries.<sup>37</sup> Depending on how it is managed, the public procurement system may thus aid in the economic development of these countries.<sup>38</sup> Government procurement is, after all, the principal means by which governments meet developmental needs such as physical infrastructure and the provision of

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<sup>34</sup> Peter M.Lewa, Analysis of legal and Institutional frameworks in public procurement,2007,pp27

<sup>35</sup> Jerome Ochieng and Mathias Muehle,2014, pp.1779

<sup>36</sup>Arrowsmith.2005

<sup>37</sup> Wayne A. Wittig, Building value through public procurement: A focus on Africa 3(2002) (Available at [www.intracen.org/ipsms/tools/bdv.pdf](http://www.intracen.org/ipsms/tools/bdv.pdf) accessed on 2nd September 2019)

<sup>38</sup> Sue Arrow smith, National and International Perspectives on the Regulation of Public Procurement: Harmony or Conflict? In Public Procurement: Global Revolution 3 at 5 (Sue Arrow smith &Arwel Davies, eds, London:Kluwer Law International,1998).

necessary drugs.<sup>39</sup> Many countries use public procurement to encourage the growth of indigenous industry, regional economic imbalances, and minority or disadvantaged communities.

Because deploying the Public procurement system to attain these developmental aims necessitates the government exercising tremendous discretion, public procurement is frequently a contentious topic that requires a great deal of caution. This is especially true in developing countries, where the ability to award government contracts with discretion has been a source of significant political patronage, and procurement has functioned as a channel for illicit monies transfer from governmental to private hands.<sup>40</sup>

Governments are getting a lot of press these days for providing vital services such health, education, defense, and infrastructure all around the world. To meet demand for these services, governments purchase products and services from the marketplace. Governments acquire goods, services and suppliers on the open market, putting their demands alongside those of the private sector. Public procurement and other government market place operations have both economic and political repercussions. However, until recently, academic scholars and policy makers would have paid little attention to the topic of public procurement.<sup>41</sup>

When the government or another public body purchases items from the market, this is referred to as public or government procurement. As a result, procurement is also an acquisition for public consumption, a statement that almost reveals public interest in procurement.<sup>42</sup>

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<sup>39</sup>VinodRege, Transparency in Government Procurement: Issues of Concern and Interest to Developing Countries, 35 J. World Trade 489 at 496

<sup>40</sup> Patrick A. Low et al, Government procurement in Service in Law and Policy in Public Purchasing, supra note 1 at 225-226

<sup>41</sup> Wittig, 1998

<sup>42</sup> Trepte Regulating procurement: Understanding the Ends and means of public procurement Regulation (OUP 2004) pg 27

Planning, program management, and budgeting are all impacted by public procurement. In affluent countries, public procurement contributes for approximately 5% to 8% of GDP. It accounts up a substantial share of GDP in most emerging countries, up to 60% in some situations. In emerging economies, A public procurement system that optimizes value- for- money in annual government budgets by managing such a margin of GDP has a wide range of socio-economic benefits. Better value for money and better public service delivery derive from increased public procurement capacity. The system has the potential to cause harm, depending on how it is applied.<sup>43</sup>

Because it includes topics like procurement strategy, storage, distribution, contract monitoring and supplier management. <sup>44</sup>Procurement is synonymous with whole supply chain management. It is impossible to overestimate the importance of government procurement to a country's economy. The economic effects of Public procurement must be assessed against more sophisticated and long-term criteria than in private procurement.

Furthermore, when doing procurement, Other considerations must be taken aside from the economy. Accountability, non-discrimination among potential providers, and adherence to international commitments are only a few of the criteria used to determine whether or not international obligations have been met. As a result, all countries have enacted legislation to safeguard the public interests in public procurement. It's important to remember that, unlike private procurement, public procurement is a business activity carried out inside a political

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<sup>43</sup> Identification of requirements, procurement planning, Definition of requirements, determination of source, Evaluation and Selection of the vendor, contract award, contract implementation/delivery, Storage ,payment and Disposal.

<sup>44</sup>ibid

framework, with significant integrity, accountability, national interests and effectiveness considerations.<sup>45</sup>

## **2.2 Historical background**

Many developments have occurred in the previous three decades in terms of public procurement management and control procedures around the world. Many countries began a wide range of public sector changes in financial management and procurement of works, goods, and services in the early 1980s. The importance of government procurement in economic development was widely recognized, leading to this decision. The necessity to give adequate answers to the difficulties in economic development. The need to provide acceptable solutions to the difficulties that have been posed, as well as the extension of democratic space.<sup>46</sup> Internally, the two main goals of the reform process have remained the same: to create a performance culture and to improve productivity.

These reforms have resulted in a massive expansion of public procurement legislation and regulations around the world. To ensure that the procurement cycle is managed professionally and that the process delivers as planned, rules and regulation are required.<sup>47</sup> Many countries legal frameworks have been altered to expressly reflect the situation, and to provide accountability in a world where professional experience may trump specified procedures.<sup>48</sup> Many governments regulations have been affected by the United Nations Commission on International Trade Law (UNCITRAL)<sup>49</sup>, the Government Procurement Agreement (GPA)<sup>50</sup> the world trade

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<sup>45</sup> Ibid

<sup>46</sup> Peter Trepte, *Regulating procurement: Understanding the ends and means of public procurement regulations*; Oxford University press, 2004, pp2004

<sup>47</sup> Peter M. Lewa, 2007, pp4

<sup>48</sup> Paul R. Schapper and Veiga-Malta, 2011 pp.2

<sup>49</sup> UNCITRAL model law was accessed on 26<sup>th</sup> August 2019 from [www.ilo.org](http://www.ilo.org)

<sup>50</sup> B. Hoekman "The World Trade Organization's Agreement on Government Procurement: Expanding Disciplines, Declining Membership?" (Washington D.C World Bank, 2009) 39-41

Organizations (WTO) and the European community procurement Directives have all influenced how many governments are their procurement regulation (PDEC). These frameworks are intended to motivate staff to follow to industry best practices and standards..

### **2.3 Chronology of reform of public procurement regulation**

The Kenyan public procurement system dates to 1955,<sup>51</sup> when the Treasury issued a circular establishing the Central Tender Board (henceforth referred to as CTB).<sup>52</sup> When the Ministry of Works' Supplies and Transport Department was established in 1959, it established a specified procurement and supply system. Each ministry was given a vote on whether or not to order products and transportation from the supply and transportation departments, as well as the Government printer.

During the colonial and postwar centuries, the procurement system evolved from a basic stage to a vigorous, well-regulated system that meets worldwide standards. After the colonial era, came the post-colonial era (i.e. 1963-1978, 1978-2001, Era of reform 2001-2010 and the Era of the New Constitution to the present.) The era categorization will reflect advancements in the sector of public procurement. It will also demonstrate the influence of political systems and regimes on governments.

#### **The period 1963-1978**

The Treasury issued Fund Regulation to the Ministry of works, Stores and services in 1960 to provide for common-user services.<sup>53</sup> The Supplies Branch was established under these

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<sup>51</sup> The History of Public Procurements in Kenya, available at [www.slideshare.net](http://www.slideshare.net), accessed on 11<sup>th</sup> July 2019

<sup>52</sup> Jerome Ochieng and Mathias Muehle, Development and Reform of the Kenyan Public procurement system (2012) <http://www.ippa.org/IPPC5/Proceedings/Part7/Paper7-7>

<sup>53</sup> *ibid*

Regulations as a section in charge of procuring typical –user products for government department and agencies.<sup>54</sup>

In 1963, Kenya gained independence from British Colonial authority, and supply services, like all other structures, continued to operate as before when Crown agents managed government purchases until the 1970s. Another significant introduction was the topic of supplies. One of the fundamental problems of the document was that it never consolidated government procurement. There were a lot of Treasury circulars some of which supersede each other quickly.

- i. The Ministry of Public Works also sent out circulars informing departments on how to receive Supplies Branch.
- ii. The president office also sent out circulars.

Corruption and theft of public funds plagued the scenario described above. The supply manual did not cover any of the job. On public works and the president’s office collaborated.

### **1978-2001**

The World Bank performed a country-wide examination of public procurement in 1997 and identified the following flaws:

- Public Financial Management’s effectiveness has deteriorated.
- Inability of the Government to efficiently deliver services
- Obscure regulations that are not based on fair competition or openness make the system vulnerable to exploitation.<sup>55</sup>

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<sup>54</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.

<sup>55</sup> The Historical evolution of Public Procurement in Kenya, <https://procurement.uonbi.ac.ke/> accessed on 11<sup>th</sup> July 2019



There is no legislative framework in place to enforce procurement Regulations.

### **The Exchequer and Audit (Public Procurement) Regulations 2001**

In response to the World Bank's findings, the public procurement Reform program was established on November 25, 1998. At initially, the reforms had a noticeable impact. The public procurement Regulations were published in 2001, under the Exchequer and Audit Act. Ministerial Tender Committees and the Procurement Appeals Board (hereafter referred to as PPD) were established as supervisory authorities in place of the Central Tender Board. The PPD and PPCRAB were separate entities that operated in a large autonomous manner.

The Exchequer and Audit regulations of 2001 were a major step forward, they were unable to prevent difficulties. In 2002, a new government took office, committing itself at the outset to a policy of implementing Good Financial Governance principles and Anti-corruption measures.<sup>56</sup>

### **2.4 The Reform Era of public procurement 2001-2010**

The public procurement Regulations were enacted in 2001 under the Exchequer and Audit Act. This was the first sign that the reforms were having an effect. The Regulations consolidated all public procurement circulars, abolished the CTB, and established MTCs and a public procurement Directorate, to manage the process.<sup>57</sup>

The procedure will be overseen by the procurement Directorate. The country began crafting new procurement legislation to deal with the problems, the drafters relied on the UNCITRAL model

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<sup>56</sup>Ochieng J and Muehle M, Development and Reform of the Kenyan Public Procurement System (Fifth International Public Procurement Conference, Settle, 2012)

<sup>57</sup> The Exchequer and Audit (Public procurement) Regulations(2001), in Jerome Ochieng and Mathias Muehle (2014)1767, [www.ippa.org/IPPC5/Proceeding/part 7/-7.pdf](http://www.ippa.org/IPPC5/Proceeding/part%207/-7.pdf)

on commodities acquisitions, which was released in 2002. In 2005, parliament passed the Public Procurement and Disposal Act (PPDA), which was published in the Gazette.<sup>58</sup>

Extensive reforms in public procurement were adopted during the Golden Era, with far-reaching repercussions.

## **2.5 The Public Procurement and Disposal Act of (2005)**

The Public Procurement and Disposal Act oversees how the government purchases and disposes of commodities.

The Public Procurement and Disposal Regulation, 2006, took effect in 2007 after the Act was passed and published in 2005. Kenya's basic procurement law, along with its enforcement, paved the way for a more open market. It establishes the roles and responsibilities of the functions of the Public Procurement Oversight Authority (PPOA) and the Public Procurement Advisory Board, as well as their general directors.

The aforementioned Public Procurement Laws & Regulations, which went into effect in 2001, have drastically altered the landscape of Public procurement duties, taking the profession out of the shadows it had occupied in the 1970s and 1980s.

## **2.6 The New Constitutional Era (2010- to present)**

Kenya's Constitution establishes public procurement in Article 227. The Constitution's Chapter 12 mandates competent financial management of public finances in an open, responsible, and accountable way.

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<sup>58</sup> Jerome Ochieng and Mathias Muehle, 2014, pp1768 <http://www.ippa.org/IPPC5/Proceedings/PART7> accessed on 16<sup>th</sup> July 2019

Chapter 12 mandates transparent, responsible, accountable, and cost-effective financial administration of public funds. The acquisition of public goods and services is governed by Article 227 of Kenya's Constitution.

The preceding is a summary of Kenya's procurement law evolution. It traces its evolution from colonial times to the current Constitution's rules. The public procurement and oversight Authority are responsible for overseeing how public products and services are obtained.<sup>59</sup>

Since 2001, Kenya has made significant efforts to establish a robust legislative framework for administering and controlling public procurement business. Other supportive laws, such as <sup>60</sup>the above procedural legal regime has been strengthened by legislation such as the Anti-Corruption and Economic Crimes Act, No.3 of 2003,<sup>61</sup>Public Officer Ethics Act,2003 the Political Parties (Amendment) Act,2012, The Ethics and Anti-Corruption Commission Act No.22 of 2011, Leadership and Integrity Act,2012, and others, have strengthened the above procedural legal regime. Institutions such as EACC, PPOA, PPARB and others have been established to aid in the execution of the aforementioned procurement legislation amendments.

## **2.7 Importance of Public procurement**

For strong public services and good governance, effective public procurement is critical. Kenya's public sector spends more than shillings 300 billion annually on product and services required to perform public services. When the government uses taxpayer money, it must adhere to the highest professional standards to ensure that it obtains a good bargain and provides adequate,

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<sup>59</sup>Kuloba.I.S (2015) Milestones in the Reform of Public Procurement Regulation in Kenya: Training on Recent Development in Procurement Regulation, <https://www.academia.edu/milestones-in-the-reform-of-public-procurement-regulation-in-kenya>. Accessed on 16<sup>th</sup> July 2019

<sup>60</sup> Peter M. Lewa, and Susan K. Lewa, "Public procurement Reform in Emerging Economics: A Case Study of Kenya", Handbook of Business Practices and Growth in Emerging Markets,2009

<sup>61</sup> Anti – Corruption and Economic Crimes Act, No.3,2003

high-quality goods and services to suit user needs. The procurement process comprises the entire cycle of a contract, from contract definition to contract termination.

Procurers in both national and county government are required to follow the main principles of public procurement. Value for money, acceptable quality and service that meets the needs of the organization, and governance are all essential.

The procurement strategy and technique must be relevant and acceptable for the commodities being acquired, and it must be available on the market at a reasonable price. Procurement organizations are required to use procurement to achieve sustainable development goals while maintaining value for money and adhering to the public procurement legal framework.<sup>62</sup>

The purchase, renting, lease, licensing, tenancy, or other contractual means of acquiring any form of job, asset, service, or good is known as public procurement. Any other contractual mechanism is referred to as public procurement.<sup>63</sup> Article 227 of Kenya's Constitution governs the procurement of public goods and services. The public procurement and Disposal Act (PPDA) of 2005 and the Public Procurement and Disposal Regulation (PPDR) of 2006 established a solid and comprehensive legal framework for public procurement.

The PPDA lays forth specifies the advertising regulations and deadlines, as well as the content of tender documents and technical specifications, tender evaluation and award criteria, submission, receipt, and opening procedures, and the structure and sequence of the complaints system. Kenya has made great progress in overhauling its public procurement system over the years, with the goal of making it more transparent, equitable and less prone to corruption. Despite these valiant attempts, there is corruption in every aspect of public procurement process.

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<sup>62</sup> Milestone in the Reform of Public Procurement Regulations in Kenya/Isaac Kuloba-  
academia.edu><http://www.academia.edu>> accessed on 17<sup>th</sup> July 2019

<sup>63</sup> Section 3(1) of the public procurement and Disposal Act,2005

For a variety of reasons, public procurement is an important government function, to begin with, the sheer amount of procurement expenditures has a substantial economic impact that must be carefully handled. Indeed, in all countries around the world, financial operations of government procurement managers are estimated to be between 10%-30% of GNP. The efficient handling of such large procurements has<sup>64</sup> been a source of concern for policymakers and managers, as well as a barrier for those working in public procurement.

Second, public procurement has been utilized to fulfill a wide range of objectives, including economic, social and environmental objectives (Arrow smith, 1998: Thai, 2001). Third, for a variety of reasons, public procurement has a reputation for waste and corruption.

In many nations throughout the world, Public procurement is the largest domestic market, with spending averaging between 13% and 20% of the GDP. A good procurement system can help a country prosper economically. Corruption in public procurement results in massive waste of public funds, as well as the benefits that these funds should have provided.

Corruption in public procurement not only wastes money, but it also distorts the market and lowers the quality, long-term viability government initiatives and acquisitions. Procurement is a crucial economic activity for any government since it affects taxpayer's money is spent, yet it is also one of the most corruptible functions.

Integrity and openness in public procurement systems are ensured through a variety of control measures that ensure transparency and accountability. If sufficient control and audit procedures are not in place, flaws procurement system may not be discovered and corrected. An effective control and audit system, an effective appeals mechanism, a comprehensive information sharing

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<sup>64</sup>Callender & Mathews, 2000.

system that allows civil society and other interested parties to undertake social audits, and effective ethical and anti-corruption measures are just a few of the tools available.<sup>65</sup>

The Kenyan Government does not employ state –owned firms to create goods and services that government agencies require to need to function. As a result, the government is now in a better position. The procurement process is governed by the procurement Law and rules, which outline the necessary standards and procedures for the formation of contacts between public organizations and providers of goods, services works, as well as oversight, transparency, and accountability systems.

In the last decade, accountability in Kenya’s public procurement system has changed dramatically, from a system with no limits in the 1960s, to one governed by Treasury circulars in the 1970s, 1980s and 1990s, to the Public Procurement Regulations of 2006, which set new criteria for public procurement.<sup>66</sup>

## **2.8 Procurement in practice**

The procurement cycle and procurement regulations are not always mutually exclusive. Procurement entails the acquisition of goods from the market, but it is a multi-step process that begins with the recognition of a need for goods and ends with the final stage of ensuring completion (successful delivery or building). Several factors must be considered, including those related to government obligations (scope, quality and timing) finance arrangements (internal or market purchase); specifications setting: implementing the procurement method, such as contract cancellation, and so on. and so on. The supply management chain includes procurement

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<sup>65</sup> Assessment of the procurement system in Kenya, OECD and Public procurement Oversight Authority, October 2007 pg18

<sup>66</sup> Assessment of the procurement system in Kenya, OECD and public procurement Oversight Authority, October 2007 pg. 18.

and purchasing. The various steps of<sup>67</sup>the procurement cycle is frequently, if not always, carried out by distinct individuals.

Recognizing government mandates is frequently merely a policy decision that requires internal finance considerations. Alternatively, in the case of purchases essential for the day to day operation of government, it could simply be an issue of stockholding. The factors that influence decisions to purchase products and services from the market predate any concerns about the procurement process, even if they are directly related to the government's or departments overall budgeting objectives. The rationale for the purchase choice, on the other hand, may have direct ramifications for the procurement technique to be used. As an example, a sudden emergency (such as the collapse of a vital bridge) implies the need for immediate action and consequently, for the use of an exceptional procurement procedure which enables recourse to immediate reconstruction. Similarly, once a contract has been signed the ability of the contractor or supplier to carry out the contract has been signed, the ability of the contractor or supplier capacity to complete the contract as envisaged is generally, a matter for the applicable contract law. Failure to deliver or complete according to the provisions of the contract will result in the payment of liquidated damages or give rise to claims in damages for breach of contract. However, the precise terms of the contract, as they relate to the government's requirements and the suppliers capabilities, can be determined the pre contractual stage, during the course of preparation of the bidding documents or, where negotiations are permitted, during the course between the government and the supplier's negotiations.

As a result, the precise relationship between the procurement cycle and the role of procurement control is or may be hazy, and will largely rely on how societies approach the issue. The

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<sup>67</sup> Frequently as the result of internal budgetary, administrative or audit regulations

seemingly semantic gap between government procurement and government contracts may become crucial in this scenario. Even though they have the potential to influence or correct the balance of economic power between the contracting parties, it is conceivable that the concerns connected to the ultimate contract are more important. (such as the type of contract chosen, payment terms, contractual clauses, contract administration, and so on) have little to do with the problems faced by the governments as a buyer. The issues clearly need to be addressed by the procurement agent during the pre-contractual stage, those issues are not directly relevant to the conduct of the procurement process itself.<sup>68</sup>

## **2.9 The Instrumental Use of Procurement**

The government's economic actions in the market give it enormous power over the economy in the sectors where it operates. Such impact may be decisive where it is a dominating buyer. In the context of the buyer-seller relationship, it may use such power in a number of ways. In the first place, it may control access to its public contracts through the use of selection and qualification procedures, by reserving access to favored contractors and suppliers or by refusing access to certain undesirable contractors and suppliers, i.e. by controlling eligibility. Secondly, and notwithstanding free access to the procurement process, it may decide to award its contracts only in those cases where the proposed (tendered) contract fulfils certain requirements such as specific technical specification or standards or it may be contracts will only be awarded to contractors whose activities are based in certain regions for example.<sup>69</sup>The third possible broad mechanism is to attach conditions on the ultimate contract, subjecting its performance to certain procedural or substantive conditions such as the requirement to perform to certain procedural or

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<sup>68</sup>Trepte Regulating procurement: Understanding the Ends and means of public procurement Regulation (OUP 2004)oxford press

<sup>69</sup> Ibid pg 137



substantive conditions such as the requirement to perform the contract using the services of hirtheto unemployed workers or disabled workers, for example, commonly referred to as conditions of contract compliance. This latter possibility reflects the use of the procurement contract as a form of regulation rather than the procurement contract as a form of regulation rather than the procurement process.

### **2.9.1 Government Procurement's political Economy**

Kenya's public procurement is where the majority of the country's corruption occurs.<sup>70</sup> Procurement accounts for over sixty per cent of government revenue, so it's hardly surprising that it's been a hotbed of corruption.<sup>71</sup>

Regulations that are obscure and unaccountable have aided this malfeasance. Because indigenous resources were insufficient and most of the new administration's demands could only be met through outside sources, Until the early 1970s, the British firm Crown Agents handled most of Kenya's public procurement. After it, the government was formed.<sup>72</sup> It also hired procurement employees and supplied offices within it ministries and agencies. For their respective ministries and departments, these supply offices procured supplies.<sup>73</sup> supplies for their respective ministries and departments.

Regulation of public procurement has been delegated to the Ministry of Finance. As a result, there emerged a centralized public procurement system that was not governed by any laws. As a

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<sup>70</sup> The Political Economy of public sector reform and privatization 234 at 240

<sup>71</sup> Ministry of Finance, Proceedings of the 1<sup>st</sup> National Public Procurement Consultative Meeting, Safari Park Hotel, Nairobi 13-15 May, 2004 at 10. See Walter Odhiambo and Paul Kamau, Public Procurement: Lessons from Kenya, Tanzania and Uganda, OECD Working paper No. 208 13(2003)

<sup>72</sup> Odhiambo and Kamau, supra note 45 at 16

<sup>73</sup> Id

result, as part of its responsibilities, the Ministry issued regulations and directives in the form of circulars to the ministries and other public entities.

Public officials, frequently under the sway of influential politicians and businesses, were accused of only inviting favored firms, favoring some corporation during the short-listing stage, manipulating tender documents to benefit specific firms, and exposing sensitive information among the allegations.<sup>74</sup>The procurement system was run by junior bureaucrats, who had little power to fix errors.<sup>75</sup> Exacerbated the situation. Procurement was a concern.

To make problems worse, Kenyan Law allows government employees to engage in private business. Indeed, Kenya's most important launching pad is the civil service, senior government officials and legislators have access to public funds and lucrative public procurement contracts. Because the procedures established to avoid conflict of interest are virtually always breached, public official's engagement in public procurement, corruption in the private sector has been a key source of corruption.

Furthermore, Even if there were errors in the process, there was no way for unsatisfied bidders or the general public to challenge procurement decisions made by the various bidding boards, The system only allowed accounting professionals to appeal, and the procedure was riddled with flaws. Only accounting officers (usually permanent secretaries) in the relevant government ministries, departments and agencies are allowed to participate.<sup>76</sup> The court system had no role because the administrative appellate bodies' decisions were considered final.<sup>77</sup>

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<sup>74</sup>Odhiambo and Kamau, supra note 45 at 36: Report on Kenya Public procurement Systems, supra note 49 at 138 (observing that "There is rampant lack of observance of procurement ethics by the procurement officials.").

<sup>75</sup>Murithi Mutiga, Going Public, Sunday Standard, April 3, 2005 at 17 (Kenyan)

<sup>76</sup> Report on Kenya Public procurement Systems, supra note 49 at 79-80

<sup>77</sup> Id at 80

Aside from shortcomings in terms of openness and accountability, the method was also inefficient. Overspending was a feature, which was linked to accounting officers' poor planning and packaging of procurement contracts, their failure to check on existing inventory and lack of oversight and monitoring of project implementation.<sup>78</sup> It was not uncommon for the government to accept goods and services that did not meet the specifications. Indeed, no items or works were supplied in several circumstances. Contracts were also changed higher from the originally specified price in other cases, often with the knowledge of top government officials. As a result a building build by the National Health Insurance Fund cost more than twice as much as originally estimated.<sup>79</sup> Leads times have likewise been exorbitant. As an example, the Minister of trade recently stated that purchasing a paper shredder took his ministry nine months.<sup>80</sup>

These flaws have resulted in significant losses in government contracting.<sup>81</sup> As the local business community protested that inefficiencies in Public Procurement were contributing to an undesirable business environment, the demand for reform grew urgent.<sup>82</sup>

### **2.9.2 Conclusion**

Kenya's public procurement system has progressed from a rudimentary system with few laws to a legally regulated one that meets International standards. Kenya has been working to improve and modernize its public Procurement system since the millennium began.

In the 1970s, 1980s, and 1990s, the system was regulated by Treasury circulars, and since March 2001, the Exchequer and Audit (Public procurement) Regulations have provided an orderly, legally regulated procurement system. As a result of the efforts made as part of the wide public

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<sup>78</sup> Id at 140-143

<sup>79</sup> See Mutiga, *supra* note 55

<sup>80</sup> Kituyi Seeks Review of Procurement Law, *EAST AFRICAN STANDARD*, October 28, 2004 (Kenya).

<sup>81</sup> Transparency International, *Global Corruption Report* (2005)

<sup>82</sup> Odhiambo and Kamau, *supra* note 45 at 17

finance reform program, the public procurement and Disposal Act was enacted in 2005. The public procurement Oversight Authority (PPOA) was founded in 2007 as a regulatory organization for the development and oversight of the Kenya's public procurement system.

From Kenya's independence to the turn of the millennium this chapter describes the evolution of the Kenyan Public procurement system. The study also looked at the government of Kenya's reform initiatives since the turn of the century and charted a course for the next several years through the end of 2014.

## CHAPTER 3

### 3.0 THE IMPACT OF POLITICAL PATRONAGE IN PROCUREMENT LAW IN KENYA.

#### 3.1 Introduction

Political patronage is the practice of dispersing state resources as a reward for political and electoral support. State resources can include public sector contracts or a prestigious role in the civil service. Political patronage is common in regions with a legacy of tribalism & localized power structures. It is often accompanied by the corrupt acts, such as nepotism, cronyism favoritism towards friends or trading influence.<sup>83</sup> This research looks into a type of grand corruption that occurs when political leaders distribute state resources in exchange for political support. Politicians use their patronage power to appoint friends and relatives to civil service position, design privatization programs so as to ensure that state assets are sold to cronies, and manipulate the public procurement process to give friends and relatives preferential access to public contracts for goods, works, and services.<sup>84</sup> This last sort of corrupt transaction, in which politicians utilize their power over individuals and institutions participating in the procurement process to steer contracts to one side or the other is our focus here.<sup>85</sup>

The development of the Law and related reforms in public procurement sector in Kenya has not been without challenges. This study sought to identify some of the challenges facing legal reforms in the sector.

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<sup>83</sup> [www.ganitegrity.com/compliance-glossary/patronage/](http://www.ganitegrity.com/compliance-glossary/patronage/) accessed on 11/10/2021

<sup>84</sup> Grodeland 2010; Hamilton 2010

<sup>85</sup> Elizabeth David-Barrett Grand Corruption and Government change: an analysis of partisan favoritism in Public Procurement, European Journal on Criminal policy Research, 2019

The impact of political patronage on Kenyan Public Procurement Law is investigated in this study. <sup>86</sup>It examines how the country's political elites impact the Public Procurement and Disposal Act (PPDA).<sup>87</sup> Although Public procurement appears to be working well in Kenya, there is a severe problem behind it, resulting in under-performing institutions and widespread corruption, which threatens to destroy the sector's accomplishments thus far.<sup>88</sup> The majority of corruption in public procurement stems from irregular tendering processes.<sup>89</sup> Multiple perception polls conducted by Kenya's Ethics and Anti-Corruption Commission (EACC) between 2010 and 2015 back up this claim.<sup>90</sup>

Appointments in government; judicial, legal and policy frameworks, ethnic and tribal balancing politics, corruption and impunity in government, and the economic consequences of corruption are all examples of political patronage. According to this study, the country's political culture has eroded the public procurement and Disposal Act 2015, as well as the backup laws designed at streamlining the country's public procurement system, rendering them mainly worthless.

According to this research, this country is implementing suitable methods to solve the difficulties of public procurement using proper procedures, however it neglects to mention one crucial component required to achieve the goal. Kenya must gain a complete grasp of the nature of the

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<sup>86</sup>Humphrey Kimani Njuguna, "The Influence of political patronage on the Operationalization of Public Procurement Law in Kenya, 2012

<sup>87</sup> The Public Procurement and Disposal Act, 2005, 3 available at [www.kenyalaw.org](http://www.kenyalaw.org), accessed on 21<sup>st</sup> September 2019

<sup>88</sup> Preface of the Report of the Departmental Committee on Administration and National Security on the Matter of the Inquiry into

<sup>89</sup> The Mars Group, The Cost of Grand Corruption in Kenya between 2004-2010, 2011, pp1-3., Also The Ethics and Anti-Corruption Commission of Kenya, Report on the State of Corruption in Kenya, 2013 & 2014

<sup>90</sup> EACC, Corruption Perception Surveys 2010, 2011, 2012, 2013, 2014 and 2015 available <http://www.eacc.go.ke/docs/National-Ethics-and-Corruption-Survey-2015-REPORT-4> March 2016 pdf, accessed on 21<sup>st</sup> September 2019

obstacles that the government faces in implementing public procurement Law, which may go beyond the legislative and institutional structures in place so far.<sup>91</sup>

There are several potentials for purposeful and unintentional exploitation in the agency relationship. Bribery and corruption are evident examples of deliberate exploitation for personal benefit. This could be in the form of a monetary compensation, entertainment or the assurance of future employment. Corruption can take many different forms, and it is not always easy to spot. Favoritism in the form of nepotism is a significant problem even without bribes, but it is due to social pressure. Conflicts of interest involving procurement officer's family members; or friends 'stockholdings are another insidious form of corruption.<sup>92</sup>

The study takes a holistic approach to the topic, concentrating on the function of sector' leadership as well as how it aids or hinders the implementation of the Public Procurement Law. As a result, political patronage is regarded as a bad leadership style that undermines the Act by allowing corruption, pilferage, fraud and bid-rigging among other things proliferate.

In March 2015, (175) high ranking government and state officials were asked to resign from ministries, departments, state corporations, and agencies to enable for investigations into allegations of procurement corruption, abuse of office, and incompetence.<sup>93</sup> Senior government officials include Members of parliament, Cabinet Secretaries, principal secretaries, a handful of governors and senators, and other high ranking government officials.

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<sup>91</sup>Humphrey Njuguna, *The Influence of political patronage on the operationalization of Public Procurement Law in Kenya*

<sup>92</sup> Peter Trepte, *Regulating procurement understanding the Ends and means of public procurement regulation*, Oxford Press

<sup>93</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, Criminal Case No. CR 113/05/04 at [www.kenyalaw.org](http://www.kenyalaw.org) accessed on 28<sup>th</sup> August 2019, Criminal Case No. CR 113/05/04/Anti-Corruption Case No.8 of 2005.

The economic country's development of any country is heavily reliant on public procurement. It is the way by which the Kenyan government spends the annual revenue received for public service delivery. Kenya's Constitution requires parliament to design a framework under which procurement and asset disposal policies would be executed, in recognition of this essential role. The Constitution created a number of oversight institutions and processes to guarantee that these standards are met. Among the most essential are the office of the Auditor General, Parliamentary Oversight Committees, and the Ethics and Anti-corruption commission are all part of the office of the Auditor General.

Public procurement is one of the most corrupted areas. Bribery in government procurement is estimated to increase total contracts costs by 10-20 per cent to total contracts costs. Bribery costs at least USD 400 billion. each year since governments spend around USD 4 trillion on purchase of goods and services each year. (OECD,2009).

According to evidence, the government might save a quarter of its budget by implementing a strong procurement system. Considering the fact that government procurement amounts for 11% of the GDP. This is a big sum.<sup>94</sup>

A total of 3,124 reports were received by the Ethics and Anti-Corruption Commission, including 1,680 reports on irregularities in public procurement of goods and services and 1,124 reports on illegal acquisition and disposal of public property. The 2009 KACC National Enterprises Survey confirms the findings of the 2009 KACC National Enterprise Survey, which found that majority of enterprises pay bribes to obtain governmental contracts, with 40 percent of the respondents claiming that bribes account for 6-10 per cent of the tender prices are bribes. (KACC).

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<sup>94</sup> Bernard H.and Simon E.2005.International Cooperation and the Reform of public procurement policies. World Bank policy Research working paper 3720.



The Public Procurement and Disposal Act creates procedures for public agencies to purchase and dispose of obsolete or excess stores and equipment. Despite the 2015 public procurement and Disposal Act's passing and the implementation of a variety of restrictions, Kenyan public procurement is plagued by corruption scandals and billions of shillings in losses.

Government contracting, often known as public procurement, is a crucial tool for political elites attempting to extort resources from the government through corruption.<sup>95</sup>In OECD countries, public procurement contributes for an average of 29% of overall government spending. Controlling how these funds are distributed means exercising power over a significant resource, either for personal benefit or to establish and sustain customer relationships in exchange for their loyalty. Democracies, on the other hand, reduce such risks by requiring unelected officials to oversee the procurement process and assuring open contracting competition. The ability of political elites to use public procurement to form and maintain relationships with clients is thus dependent on their ability to exert political control over the bureaucracy and to circumvent institutional checks and balances.

The government and its agencies offer contracts to politically connected enterprises under dubious circumstances. As a result, public procurement economic competitiveness suffers. Political elites weaken the institutional structure that oversees public procurement in three ways, according to the paper: the formulation of the law, its implementation, and post award monitoring.

Clientelism is the practice of political elites allocating state resources in a particularistic manner in exchange for political support. The services provided vary, but they could involve cronyism in the privatization process, politicized civil service appointments, and public procurement fraud.

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<sup>95</sup> Hansson & Holmgren, 2011 :OECD, 2014: See also Rose-Ackerman, 1999, Schultz & Sereide, 2008).

Kenya has mainly failed to put the spirit and law of Public Procurement and Disposal Act of 2015, which was passed in 2015 resulting in a lack of transparency, accountability, and good governance.

As things are, the Law has failed to effectively tackle corruption and other problems in this area. As a result, it is vital to investigate the impact of political patronage on implementation of Kenya's Public procurement Laws.<sup>96</sup>

It is common for Public officials to collude with friends and business connections to skew procurement processes in their favor.<sup>97</sup> There is a ring of rogue contractors who do shoddy work, exaggerate rates, and file big claims for government projects that are never completed or handled improperly.<sup>98</sup>

### **3.2 The disregard for the Rule of Law**

One of the most significant impediments to public procurement reform is political influence. When there is a perception of weakness in the law or institutions, political patronage opens up, which can be good or bad. Several pieces of case law and documented evidence have backed the political patronage of key organizations in charge of regulating the conduct of the executives. The following are the results of the investigations and cases: Explicit Examples of Alleged Corruption in the Public procurement.

#### **(i) Arror and Kimwarer dam scandal**

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<sup>96</sup>Njuguna Humprey, The Influence of political patronage on the operationalization of public procurement Law in Kenya

<sup>97</sup> The Standard Newspaper (2012, 31st July) Speedy reform of Public Procurement Law needed: The Standard Newspaper Editorial Column. Nairobi: The Standard Group Ltd.

<sup>98</sup> Ibid

In the Arror and Kimwarer Dam controversy, Enterprises were paid Kshs.21 billion for the supply of goods and services. Payments were tracked to individual accounts and corporations after investigations, but no services or goods were provided by such firms.<sup>99</sup>

Eight persons have been arrested on fraud and corruption accusations related to the multibillion-shilling Arror and Kimwarer dam projects. Cabinet Secretary Henry Rotich was linked to the dam's scandal, in which taxpayers lost sh 21 billion to a bankrupt Italian corporation for the projects which never materialized. The tenders were given to the directors of CMC di Ravenna and Itenera of Italy, are among the defendants who have been arrested in connection with the scheme for allegedly paying top government officials.<sup>100</sup> According to the (DPP) Nordin Haji, a total of shs 19.7 billion in advance payment for the Kimwarer and Arror dam projects had been processed by January. Four years later, however, no proof of land acquisition for the projects has been discovered. According to the DPP, it was a well-executed conspiracy including government officials working in cooperation with private individuals and entities.<sup>101</sup>

## **(ii) The National Youth service scandal**

In recent days, the National Youth Service (NYS) has been embroiled in two scandals: in 2015, the country lost Kshs.791 in unaccounted funds, and in 2018, the country lost Kshs.13 Billion through theft by a shadowy network of dubious service providers.

## **(iii) Kenya power scandal**

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<sup>99</sup>Hassan Mugambi, How Ksh. 21 Billion vanished in Arror, Kimwarer dams scandal'Citizen Digital 28/2/2019

<sup>100</sup> Daily Nation, Eight arrested over Arror, Kimwarer dams scandal, Monday July 22 2019 accessed on 30<sup>th</sup> August 2019

<sup>101</sup> Daily nation,15 ways officials plotted to defraud Kimwarer and Arror dams funds, Tuesday July 23 2019 accessed on 30<sup>th</sup> August 2019

When roughly 350 power companies were barred from energy bids, a further sensational corruption case erupted. These companies were involved in Kenya Power & Lighting Company Ltd corruption schemes. This incidence of private-sector corruption was so serious that Kenya's Energy Minister, Charles Keter, had to keep an eye on it. He looked at the data from Kenya's Energy Minister an internal audit and determined that 350 of the 500 organization did not meet the pre-qualification requirements. Furthermore, such information exposed how certain staff were collecting bribes and favoring shady businesses.<sup>102</sup>

**(iv) The Deputy President's unusual hiring of an aircraft (2013)**

Between May 16<sup>th</sup> and 19<sup>th</sup>, 2013<sup>103</sup> the Deputy President's travelled by chartered plane to Congo Brazzaville, Ghana, Nigeria and Gabon. The Deputy President, in his function as the president's principal assistant, The Deputy President as mandated.<sup>104</sup> by Article 147 of the Constitution, Twenty one million, one hundred and sixty seven thousand, and five hundred and seventy nine and twenty cents (KSHS, 21,167,579.20) were spent on the tour.<sup>105</sup> The Deputy president was among the fourteen members of the delegation.

PAC of Kenya's National Assembly was debating whether the government procurement norms, methods, and practices were breached during the plane's employment process. The Committee's findings demonstrate that procurement norms, processes, and practices were broken during the aircraft hire. According to the investigation, the aircraft was not inspected as required because the purchase process did not include an inspection and Acceptance Committee constituted for the procurement.

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<sup>102</sup>Hassan Mugambi, How Ksh. 21 Billion vanished in Aror, Kimwarer dams scandal'Citizen Digital 28/2/2019

<sup>103</sup> Republic of Kenya, Report on the Hire of an Aircraft for the Deputy President for an official tour of four African Nations in May, and 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.

<sup>104</sup> Ibid

<sup>105</sup> ibid

According to the investigation, there was a deliberate attempt to exploit the speed of the flight in order to defraud the government and the taxpayers. Despite all of the evidence, no action has been taken, signaling possible political favoritism throughout the procurement process.

#### **(v) Goldenberg Scandal**

In 2004, Kenya's then- President, established a committee of investigation to investigate how the country lost billions of shillings in tax income. Government authorities and Goldenberg International Ltd are involved in a system of export compensation. Due to unlawful transactions involving government officials and exporters, the Goldenberg affair resulted a loss to tax payer. Between 1991 and 1993, when the scam was revealed by a whistleblower, David Munyakei, the Goldenberg case resulted in a loss of tax payers' money estimated Kshs 6 billion. Goldenberg International Limited (GIL) and Exchange Bank Ltd were involved in a series of commercial dealings involving shady or non-existent gold shipments.

#### **(Vi) The Maize Importation Sandal of 2010/2011**

Price Water Cooper (PWC) was commissioned by the prime Ministers' Office and the Ministry of Finance launched an independent forensic investigation into the National Cereals and Produce Board (NCPB) potential irregularities.

The NCPB would sell maize to millers at controlled rates in order to deter middle men and other business people from taking advantage of the system, and the millers would then sell maize meal at subsidized prices,<sup>106</sup> according to the government plan. In March of that year, the mismanagement of the subsidized maize scheme, on the other hand, sparked widespread public criticism. NCPB Officials, As well as the officials from the Ministries of Agriculture and Finance,

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<sup>106</sup> Kenya Human Rights Commission Report (2011)p31

have been accused of illegally selling maize. The PWC audit was commissioned in response to public pressure on the government to reveal the swindle. On 22<sup>nd</sup> of December 2009, PWC presented their report. Although several employees were allegedly suspended and probed, little has been done or will be done in response to the maize scandal's losses. Those who were suspended were subsequently reinstated or moved to different government docket, therefore removing any hope of ever recovering have their licenses suspended.

### **3.3 Ethnicity and Nepotism in public service**

According to Migai- Aketch, political patronage is used by employed unpopular administration to ensure that only a tightly defined and frequently ethnic constituency having access to government resources such as lucrative government contracting opportunities. He claims that using public resources is a tactic used by such governments to buy legitimacy and stay in power.<sup>107</sup>

Kenya's first independent government inherited a post-colonial public service modeled that was fashioned after the Westminster Whitehall tradition from the British.<sup>108</sup> This was a public service governed by professional impartiality, efficacy and discipline in the administration of public affairs. Its major responsibility was to efficiently and successfully implement government objectives, and it was intended to be non-partisan in so doing so.<sup>109</sup> This form of public service was well-suited to Kenya's immediate post-colonial political system.

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<sup>107</sup>Migai- Aketch (2005). Development Partners and Governance of Public procurement in Kenya: Enhancing Democracy in the Administration of Aid. A paper prepared for the Global Administrative Law Conference at the NYU school of Law on April 22-23 2005.

<sup>108</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, 199) 2.48

<sup>109</sup> Ibid

The service has three significant problems. The initial post-colonial public service has a reputation for having high ethical standards.<sup>110</sup>For starters, it was racially stratified, with almost all of the highest employment going to white people: the middle grades were, with almost all the highest- ranking occupations going to white people, Asians dominated the medium grades, and Africans dominated the lowest-ranking positions.<sup>111</sup>Second, there was pay disparity and other benefits discrimination. White personnel were paid more and had better benefits, followed by Asians, while Africans were paid less and had inferior benefits. Third, the public service, as a result of its origins as colonial machinery, lays a significant emphasis on maintaining law and order as its primary goal.<sup>112</sup>

In several Kenyan government organizations, the tribe has become a factor in decision -making, appointment, resource deployment, and advancement. Tribalism is now a big worry in many organizations, with an obvious lack of thought leading to an disproportionate distribution of staff around the country.<sup>113</sup>

### **3.4 Corruption in Kenya's governmental procurement sector and its consequences.**

Scholars usually begin discussions about corruption by emphasizing how difficult it is to define.<sup>114</sup> When analyzing political, social and economic factors may influence the number and type of corruption instances, for example, the number of prospective corruption cases increases. As a person's authority in the political and social system grows, as does the complexity of the

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<sup>110</sup>Odhiambo-Mbai (2003)121

<sup>111</sup> Ibid

<sup>112</sup> C. Odhiambo-Mbai, Public Service Accountability and Governance in Kenya since Independence African Journal of Political Science, (2003) 119

<sup>113</sup> Standard Newspaper commentary (Monday 21<sup>st</sup> June,2010).accessed on 10<sup>th</sup> September 2019

<sup>114</sup>Zimring F.E, and Johnson,D.T (2007).On the comparative study on corruption. In International Handbook of White-Collar crime and Corporate crime, eds.H.NPontell and G.Geis New York:Springer.Kaufmann, D,Vicente P.C (2005)Legal Corruption.

processes in place to check and balance it. When considering the number of times judgements must be made that affect the economic system is also essential.

The system's complexity has an impact on the number and of diversity of persons who play various decision-making roles. For example, in Public procurement, several players may combine their influence to form a web of interconnected ties in which individuals pursue a variety of goals. A fertile field for corrupt behavior is produced when there are no normative restrictions or other types of constraints on the exercise of power.<sup>115</sup>

Causes of corruption in public procurement include a variety of domestic and international economic, political, administrative, social and cultural variables.<sup>116</sup>Corruption is a symptom of larger dynamics, not an inherent kind of behavior. In socio-political systems, interactions, opportunities, strengths and weakness all play a role.

Part of the reason for persistent of corruption in Kenya is that institutions such as the legislature and the court, as well as several executives' bodies, have been weakened and or made into key perpetrators of corruption as well as conduits for corrupt operations. Furthermore, the rule of Law is not strictly enforced, nor are official law strictly followed.

The large quantities of money wasted as a result of fraudulent agreements in public procurement suggest that, despite much progress in streamlining the sector's management in Kenya, reforms have failed to limit the sector's runaway corruption.

Corruption frequently raises the cost and lowers the quality of goods and services acquired, as well as reducing the likelihood that the goods or services will meet the public's needs.

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<sup>115</sup>Marquette,H,Peiffer, C. (2015)Collective action and systemic corruption. Paper presented at the ECPR Joint Sessions of Workshops,University of Warsaw 29<sup>th</sup> March-2 April.p.7

<sup>116</sup>Muange& Chirchir,2016



Corruption in government procurement can be extremely damaging to a country's economy. Consumers face high costs. Businesspeople must repay what they have lost as a result of corruption and bribery. The proper implementation of public procurement reforms is also hampered by political influence in the procurement process.<sup>117</sup>

Corruption is a complicated phenomenon with many origins and effects that manifests itself in a variety of ways depending on the situation. Corruption can take numerous forms, ranging from a single illegal payment to a systemic breakdown of a political and economic system.<sup>118</sup> Corruption is usually viewed as a structural problem, and culture, as well as moral concern for individual.

The purpose of public procurement reform has mostly been to reduce and strengthen corruption risks. At various phases of the procurement process, the purpose is to reduce the likelihood of public officials to soliciting or receiving bribes. However, as this study demonstrates, the ruling elites who benefit the most face tremendous opposition and resistance. However, only a few studies have looked into the underlying political determinants of public procurement systems, as well as the influence of formal and informal arrangement.<sup>119</sup>

### **3.5 political support for Public Procurement Reforms and Institutions is lacking.**

The main problem facing the implementation of the PPDA of 2015 was described as a lack of political will to undertake substantial and far-reaching public procurement reforms and structures. Public procurement accounts for around 60 percent of the Country's annual budget.<sup>120</sup> Donors,

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<sup>117</sup>Solomon Kyalo "Corruption in Public procurement in Kenya: Causes, Consequences, Challenges and Cures

<sup>118</sup> Jens Chr. Andviy:Odd-HelgeFjeldtad:IngeAmundsen:ToneSissener:and Tina Soreide, Research on Corruption: A policy Oriented Survey ,(Norad,2000)201

<sup>119</sup>Njuguna Humprey Kimani, The Influence of political patronage on the operationalization of public procurement Law in Kenya.

<sup>120</sup>J.M.M.Aketch, Development Partners and Governance of Public Procurement in Kenya: Enhancing Democracy in the Administration of Aid,2005,Research Paper, NYU school of LAW, Institute of International Law and Justice.

civic society, and the general public all had to encourage the government to overhaul the sector's legal, policy and institutional framework.<sup>121</sup>

Constitution revision process was rocky, with political involvement, a wide range of interests, and never-ending squabbles. The significance of this Constitutional procedure was important for a several reasons, including streamlining the country's public resource management, which includes public procurement systems. As a result of the preceding, the administration of public institutions has been and continues to be hampered by a lack of political will and commitment to reforms in the public sector.<sup>122</sup>

### **3.6 patronage in politics Undermining public procurement institution 'ability to perform and deliver.**

Various flaws in the Public Procurement-related institutions have been uncovered, which have an impact on its implementation. These flaws are exacerbated the political elite's vested interests. The EACC, the Judiciary are examples of non-performing enabling institutions.

#### **a) Review of the EACC'S Performance.**

EACC claimed purpose has never been accomplished.<sup>123</sup>By refusing to investigate problems presented to them, the Attorney General under the old Constitution and now the Director of Public Prosecutions (DPP) under the old Constitution, have hampered the Commission's

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Also see Peter M.Lewa and Susan K.Lewa, Public procurement Reform in Emerging Economies: A case Study of Kenya, Handbook of Business Practice's and Growth in Emerging Markets, 2009.

<sup>121</sup> Ibid

<sup>122</sup> Ibid 22

<sup>123</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.

operations.<sup>124</sup> According to reports, EACC wanted prosecutorial authority to the challenge on this basis. The commission has mostly remained dormant and unsuccessful in carrying out its duty since its formation.<sup>125</sup>

**b) Review of the PPOA and PPOARB'S Performance.**

PPOA is inadequately underfunded, despite its lofty mandate and objective. The PPOA would require substantial funding on line with other commissions, such as the EACC, in order to function properly, as they perform similar responsibilities. This challenge is projected to worsen as a result of the new devolved governance structure, in which the Authority is expected to have more power. is rarely heard or felt in matters of Public Procurement, despite the fact that it is effectively the sector's mouth piece.<sup>126</sup>Because of the Ministry's support, PPOA lacks independence, which jeopardizes its performance.

**c) The Public Procurement Administrative Review Board's flaws (PPARB)**

In its current form, the PPARB is a substantial impediment to the proposed procurement legal changes.<sup>127</sup> Because Members of the Board are selected by their professional Associations, which the Minister selects, they do not have a fixed tenure. The informants said they lacked the legal abilities and experience needed to deal with the intricacy of the situations before them,

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<sup>124</sup>MigaiAketch, "Abuse of power and Corruption in Kenya Will the New Constitution enhance government accountability? Indiana Journal of Global Legal Studies, Wntr 2011 issue also KACC corruption perception Report of 2009.

<sup>125</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>126</sup> Section 9 (a) to (e) is on the mandate and functions of the Authority, monitoring ,evaluation, providing advisory opinion, and ensuring that the procurement processes are complied with among state entities.

<sup>127</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 Review Board shall be in Accordance with the regulations: and the Authority shall provide administrative services to the Review Board.

according to Dr Humphreys Njuguna's investigation, a competent Review Board would be required due to the size and nature of public procurement.<sup>128</sup>

## **Conclusion**

In Kenya, the Public procurement process is critical for guaranteeing effective control and supply of inputs, which is critical for any administration. It is crucial in promoting effective management and preventing the use of public resources to be tainted by corruption. Political patronage and corruption continue to be major roadblocks to the country's economic progress.

It is undeniable that the evolution of public procurement law has been fraught with difficulties. The political establishment backs an opaque procurement system with a shaky or non-existent legal and institutional structure that allows for easy control of public funds. Designed with the industry in mind. The political leadership's willingness to cultivate a culture of loyalty to the law is critical to the institution of Law's success.<sup>129</sup>

The situation in Kenya has remained unchanged after more than 40 years of independence. Patronage, corruption and tribalism, the evil trio appeared to be reasserting its retrograde influence in Kenya.

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<sup>128</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>129</sup>HumphreyNjuguna ,Political patronage on the operationalization of Public procurement law in Kenya.

## CHAPTER 4

### 4.0 PUBLIC PROCUREMENT: A CORRUPTION HIGH-RISK AREA

#### 4.0 Introduction

Corruption has been defined as abuse of entrusted power for private gain.<sup>130</sup> Grand corruption occurs when political leaders exchange state resources for political benefits. Politicians use their patronage power to appoint friends and relatives to civil service positions, design privatization programs to ensure that state assets are sold to cronies, and manipulate the public procurement process to give friends and relatives preferential access to government contracts for goods, works, and service. Our primary focus is on the corrupt exchange, in which politicians use their influence over individuals and institutions involved in the procurement process to steer contracts to preferred firms.

Public procurement is critical to every country's economic prosperity. It is the method by which the Kenyan government spends the money it receives each year to fund public services. As a result, government economic growth objectives are harmed by an economically inefficient public procurement system. Kenya, on the other hand, has had a lengthy history of dealing with public procurement corruption. The problem has been passed down from one administration to the next, but no meaningful measures to address the sin have been taken.<sup>131</sup> The goal of this study was to see how how political patronage has influenced corruption in Kenya's Public Procurement system.

One of the most vulnerable areas of government to corruption is public procurement. The complexity of the process, the close collaboration between government officials and businesses,

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<sup>130</sup> <http://www.transparency.org/en/what-is-corruption> accessed on 11<sup>th</sup> November 2021.

<sup>131</sup> Solomon Kyalo, Corruption in Public Procurement in Kenya: Causes, consequences, challenges and Cures, Stratford Peer Reviewed Journals &books.

and the many parties involved, In addition to the volume of transactions and the financial interests at stake. All of these factors contribute to the possibility of corruption.

#### **4.1 Different type of corruption.**

Corruption has several faces through which its harmful impacts are manifested. Some of the most prevalent forms of the phenomena will be illustrated in order to better comprehend it.

##### **a. Bribery**

Bribery levels vary by industry, country, and local circumstances.<sup>132</sup> Bribery occurs at different levels in different industries, countries, and communities.<sup>133</sup> Bribery rates vary depending on the industry, country, and circumstances in the area.<sup>134</sup> Bribes are paid in order to get something from the federal or local governments, with public officials abusing their position of authority. Bribes are commonly used to speed up bureaucratic procedures.

Bribers may be able to secure Political favors, protected markets and monopolies, and therefore dodge the full weight of the situation.<sup>135</sup> They are frequently considered in the same way as kickbacks but there is a key distinction: kickbacks are bribes paid as part of an agreed commission to compensate the person who is bribed for the promised action .They are most common in public procurement, where a corporation wins a contract, and then pays previously agreed- upon amount or percentage of the deal's worth to the public authorities who influenced the procurement process and awarded the contract.<sup>136</sup>

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<sup>132</sup>Cf. Transparency International (2018)

<sup>133</sup> Cf. U4 Anti-corruption Resource center (2015), p2

<sup>134</sup> Cf. The World Bank (1997), p.9ff

<sup>135</sup> Cf. Amundsen, I (1997), P.11

<sup>136</sup> Cf. Ware, g et al.(2007), p 11

## **b) Favoritism**

Favoritism is the habit of treating a group of acquaintance's, family members or friends with special consideration. Corruption of this type is particularly frequent in the public sector, when public officials and politicians utilize their position of power to gain access to state funds and resources.<sup>137</sup> Cronyism and nepotism, two types of favoritism based the giver-receiver relationship, can result from an unequal allocation of power and resources.

## **c) Embezzlement**

Person who holds office in a corporation, organization, or public institution for personal benefit is known as embezzlement.<sup>138</sup> It is possible for a trustworthy person to misappropriate public or private cash. Embezzlement is dangerous form of fraud and corruption because it is perpetrated by a trusted individual who takes advantage of his or her position for personal benefit, and can go undetected for months or even years.<sup>139</sup> Embezzlement and fraud are inextricably related.<sup>140</sup>

## **4.2 Public -sector corruption is rife**

Corruption in the Public sector is a state-society interaction in which non state actors such as politicians, are involved, sometimes known as non-state society, are on one side and the state, defined as anybody with the authority and power to distribute rights to public resources, is on the other. Political corruption, also referred to as big corruption is a threat to the government.

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<sup>137</sup> Amundsen, I.(1997),P11

<sup>138</sup> Anti-Corruption Research Centre (2018)

<sup>139</sup> ibid

<sup>140</sup>Dugan,M/Lopatka,J.(2014)

## **Political corruption**

The political elite and those with the power to influence, devise, enact, and enforce laws are at the highest level of government.<sup>141</sup> This type of corruption is extremely dangerous because the political elite or other high ranking public officials and politicians may invent, exploit, disregard, or even change laws and rules to benefit themselves, this sort of corruption is particularly dangerous.<sup>142</sup> This is referred to as state capture. It is also the most prevalent form of political corruption<sup>143</sup>.and it the most common type of political corruption. political corruption has the potential to impact procurement decisions, which is one of the most dangerous issues.<sup>144</sup>

Embezzlement, undue influence in the need's assessment, bribery of public authorities involved in the award process, or fraud in bid valuations, invoices or contract duties are all examples of unethical behavior. Conflict of interest in decision-making provide considerable corruption risks in many OECD countries, causing resource allocation to be distorted.

At both the national and subnational levels public corruption can occur. On the one hand, because politicians and government employees are positioned at the local level, decentralization may lessen the likelihood of corruption.

### **4.3 Corruption causes**

Corruption has different causes in different countries due to differences in policy, bureaucratic methods and political development.<sup>145</sup>The focus of this study will concentrate on some of the most commonly recognized sources of corruption.<sup>146</sup>

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<sup>141</sup>Amundsen,I. (1999),P.3

<sup>142</sup> Anti-Corruption Research Centre (2018)

<sup>143</sup>Matei,A/Popa,F. (2009),P.1

<sup>144</sup> European Parliament (2013)p.27

<sup>145</sup>Martini,M (2012),P3

<sup>146</sup> Aylin Kadriye, Corruption in Public Procurement, International Economics Relation.



**i. Transparency, Integrity and Accountability are all lacking.**

Corruption is a governance issue that can occur as a result of weak political, judicial and economic checks and balances.<sup>147</sup> This predicament is exacerbated by weak legal and regulatory frameworks, as well as restricted enforcement tools.<sup>148</sup> These conditions make it more difficult to implement and enforce laws, rules, and policies, and they degrade public sector transparency,<sup>149</sup> Integrity and accountability.<sup>150</sup> Corruption thrives in an environment devoid of openness, weak governance is the primary cause of lack of Integrity and accountability. Transparency enhances information, regulations, procedures, and activities disclosure. It also encourages public participation in decision-making processes.

Accountability relates to the idea that individuals who administer laws and regulations, whether in the public or private sector, are held liable for their actions, according to the concept of accountability. In the absence of openness and accountability violators on the other hand enjoy impunity and escape being held accountable. Finally, a loss of integrity leads to illegal acts as well as transgressions of moral and ethical principles.<sup>151</sup> According to Armstrong transparency, accountability, and integrity are critical elements in preventing corruption, while the UNDP sees them as key aspects in balancing monopoly and discretion.

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<sup>147</sup> United Nations Development Programme (2003),p.2

<sup>148</sup>United Nations Economic Commission for Africa (2016).p.16

<sup>149</sup> Armstrong, E(2005),P.2F

<sup>150</sup> ibid

<sup>151</sup> Center for International Private Enterprise (2011),P.3

## **ii Wages in the Public Sector are low.**

If public officials are underpaid, they may feel compelled and driven to seek additional income and supplement their pay by accepting bribes. Due to their difficult circumstances, which They is common in developing nations, they may be pushed to do so unwittingly.<sup>152</sup>

According to Rose-Ackermann, a higher pay may be considered as a premium that will be lost if increased salary might be viewed as a premium that can be lost if a public official is revealed to be corrupt, ensuring the official does not the risk of losing his or her job. However, this conclusion is based on the premise that every government employee is risk-averse, which may or may not be true in general, and ignores the potential that officials are greedy.<sup>153</sup> Significant wages, on the other hand, are linked with high opportunity costs associated with being found, which could increase the amount of bribes demanded by greedy and risk taking officials.<sup>154</sup>

## **iii Asymmetric Information and Conflict of interest**

Asymmetric knowledge and divergent interests among those involved are two of the most common causes of corruption, which can increase the chance of opportunistic behavior.<sup>155</sup> A symmetric information exists when one side has superior information when it comes to completing and/or performing a contract.<sup>156</sup> It is one of the main causes of the principal agent problem, which refers to circumstances in which describes situations in which the principal's and agent's interests are at odds: asymmetric information is available to the agent's benefit<sup>157</sup> while the principal, who needs a specific service from the agent, lacks sufficient information to

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<sup>152</sup>Lambsdorff, J (2005), P.20

<sup>153</sup> Rose-Ackermann, S. (2006), P.39

<sup>154</sup> Mauro, P (1998a), p.11

<sup>155</sup> Singh, J/Sirdeshmukh, D (200). P.52

<sup>156</sup> Do, Q-T. (2003), P.1

<sup>157</sup> Groenendijk, N.(1997), P 2008

monitor the agents' performance. There is a power imbalance between them as a result of this difference. This mismatch generates a power imbalance between the two parties, making it harder for the principal to gain the agents cooperation.<sup>158</sup>Corruption is possible due to the agent's authority and ability to misallocate the principal's resources.<sup>159</sup>When the agent takes advantage of this chance and acts in his or her own self-interest, breaching the principal's<sup>160</sup>interest and/or doing the assigned activity in a way that is counter to the principal's expectations, the principal is harmed.<sup>161</sup>

### **4.3 How to improve public procurement integrity and prevent Corruption**

Integrity risks arise at every stage of the public procurement process, necessitating the development of a comprehensive risk reduction and corruption prevention strategy. Only focusing on one stage of the process can lead to an increase in other stages. Similarly, tackling simply one form of risk may allow for the emergence of new sorts of integrity violations. Administrative compliance standards, for example, do not prevent the possibility of political meddling in the identification of needs during the bidding phase. During do the bidding phase, do not rule out the possibility of political interference in the identification of needs. Asset disclosures for professionals, may not be enough to defend against bid manipulation.<sup>162</sup>

Public Procurement highlights a number of mutually supporting principles that, whether directly or indirectly, can help to combat corruption and enhance good governance and accountability in public procurement. These are some of the principles.

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<sup>158</sup> UK Department for International Development (2015),p.15Kajsiu, B (2015).P.20

<sup>159</sup>Kajsiu, B (2015).P.20

<sup>160</sup>Persson,A.et al (2013).p452

<sup>162</sup> Preventing corruption in Public Procurement, OECD Report

- Integrity
- Transparency
- Accountability
- Participation of stakeholders
- Accessibility
- E-Procurement

**a) Integrity**

Integrity concerns exist at every stage of the public procurement process, necessitating the creation of a comprehensive risk reduction and anti-corruption prevention plan. Integrity measures that focus on one stage of the process may increase risks in other stages. Similarly, addressing simply one form of risk may allow for the occurrence of additional sorts of integrity violations. For example, administrative compliance processes do not eliminate the risk of political interference in the identification of needs during the bidding phase. Similar to asset disclosures for procurement workers, asset declarations for procurement personnel may not be sufficient to protect against bid manipulation or petty fraud.

Recognizing the need of integrity for effective administration and public trust, government set national integrity standards for all government employees, such as civil service law or a generic code of conduct that describes government workers anticipated behavior .A single government department responsible of developing, modifying and dissemination the code of conduct, and may offer individualized counsel, guidance, and practical examples to help with implementation.

The procurement process integrity can help to reduce the possibility of corruption. Integrity is a cornerstone for ensuring fairness, non-discrimination, and compliance in the public procurement process by adhering to ethical norms and moral principles such as honesty, professionalism and righteousness. As a result, any effort to eliminate public procurement corruption must begin with maintaining integrity.<sup>163</sup>

## **ii) Transparency**

Transparency in public procurement not only promotes accountability and ensures access to information, but it also helps level the playing field for small and medium-sized firms by allowing them to participate on an equal footing.

Although there is a clear link between transparency, integrity and anti-corruption in the government, In order for accountability to be successful, a number of conditions must be met. In order for people and civil society organizations to execute an oversight function as so-called watchdogs, Data availability must be linked with timeliness, data quality, processing capability, effective reporting and whistleblower protection.

At a minimum, sufficient and timely information on upcoming contracts, contract notices and the status of ongoing procurement processes should be made available. External parties may be able to assess public procurement processes using extra data such as average procurement length, exception rationale, and specific overview records by type of bidding method.

Ensure that the flow of public funds is visible throughout the public financial management cycle to promote transparency. It enables stakeholders to understand government goals and spending, as well as and policy makers to make informed procurement decisions.

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<sup>163</sup> Public works and Government services Canada (2016)<http://www.tpsg.pwgsc.ca/app-acq/cndt-cndct/context-eng.html> accessed on 30<sup>th</sup> September 2019

### **iii) Accountability**

Accountability is the relationship that exists when someone accepts responsibility for guaranteeing the delivery of conferred responsibilities and reports back to the person or body who conferred the responsibilities; it encompasses both the informal and formal controls that exist both internally and externally to organization.<sup>164</sup> The components of accountability are as follows:<sup>165</sup>

- a. who is accountable?
- b. what is one responsible for?
- c. Who is one responsible to? and
- d. What is the best way to ensure accountability?

The paper on International organization published by the international organizations Law Association (ILA) presents recommendation for norms and practices to ensure effective accountability. Good governance includes principles such as transparency, participatory decision-making, access to information, well-functioning international civil service, sound financial management, and reporting and evaluation good faith reporting and evaluation are among them, as are constitutionality, supervision and control; stating reasons for decision; procedural regularity; objectivity and due diligence .<sup>166</sup>

One of the most important qualities of successful governance is the ability to hold people in positions of public trust accountable for how they exercise and perform their responsibilities. The concept of people first consultation, setting service standards, enhancing accessibility, ensuring

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<sup>164</sup> Jocelyn Cheung, 'Police Accountability' 78 (3) Police Journal (2005) 1

<sup>165</sup> *ibid.*

<sup>166</sup> International Law Association, Final Conference Report: Accountability of International Organizations (International Law Association 2004).

civility, sharing information, openness and change, redress, and value for money are all components of the concept. As a result, the people first approach ensures that high professional standards in good governance and leadership are promoted<sup>167</sup> and maintained, as well as unbiased ,fair, equitable, and bias free service delivery that is efficient and effective.<sup>168</sup> These reasons place a burden on the state to ensure that its authority is regulated in an open and accountable manner.

Accountability and the rule of law are two ideals that reinforce each other.<sup>169</sup> The rule of law is a way for holding people accountable, and accountability is an integral part of the rule of Law. As a tool of implementation, accountability necessitates the rule of Law.<sup>170</sup> When the connection between the regulator and those who are regulated is based on mutual accountability, the regulatory regime is successful. Efforts to promote the rule of law are likely to reinforce and need measures to promote accountability, and vice versa.

### **Value and Goodness of Accountability in Public Procurement**

Because taxpayers support public procurement, it necessitates a higher level of accountability than private sector procurement. As a result, public procurement must be conducted in a transparent manner to ensure that the process is fair and that all vendors receive equal treatment.<sup>171</sup> The procedure must be transparent and accountable to the maximum extent possible.

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<sup>167</sup> *ibid.*

<sup>168</sup> *ibid.*

<sup>169</sup> Jeremy M. Farrall, 'Rule of Accountability or Rule of Law? Regulating the UN Security Council's Accountability Deficits: Rule of Accountability or Rule of Law?' 19(3) *Journal of Conflict and Security Law* (2014) 389, 405-406.

<sup>170</sup> Richard Mulgan, '*Accountability: An Ever-Expanding Concept?*' (Blackwell Publishers Limited 2000) 563.

<sup>171</sup> Steven G Chapman II and Keith Glatz, 'Accountability and Transparency in Public Procurement: American Recovery and Reinvestment Act of 2009 Goals versus Local Government Standards' <[www.ippa.org/IPPC4/Proceedings/04EconomicsofProcurement/Paper4-10.pdf](http://www.ippa.org/IPPC4/Proceedings/04EconomicsofProcurement/Paper4-10.pdf)> accessed 7 July 2019.

## **A Tool to Combat Corruption and Fraud**

Despite the fact that the vast majority of public procurement professionals are honest and hardworking, there are some who try to manipulate the system for personal gain. As a result, governments put in place mechanisms and controls to ensure the procurement function's overall integrity while also assuring fairness, accountability, and openness.<sup>172</sup> Effective safeguards and controls improve the procurement process 'overall openness and considerably minimize the risk of fraud and other nefarious activities. An effective control should enable for numerous parties to collaborate on cross-checks and provide continual feedback on the eventual success of the project.'<sup>173</sup>

Procurement codes covering topics such as competitive thresholds and requirements for competition; imposition of penalties for code violations; establishment of strong cross-functional evaluation committees; contract approval procedures and regular audits are just a few examples of accountability checks..<sup>174</sup> The Organization for Economic Cooperation and Development (OECD) (Principles for Integrity in Public Procurement) for checks such as clear assignment of responsibilities, a complex flow of approvals, and the use of controls that are proportionate to the risks involved.<sup>175</sup>

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<sup>172</sup> *ibid.*

<sup>173</sup> *ibid.*

<sup>174</sup> *ibid.*

<sup>175</sup> Principle 8 of the OECD Principles for Integrity in Public Procurement provides that:

'Governments should establish a clear chain of responsibility by defining the authority for approval, based on an appropriate segregation of duties, as well as the obligations for internal reporting. In addition, the regularity and thoroughness of controls should be proportionate to the risks involved. Internal and external controls should complement each other and be carefully coordinated to avoid gaps or loopholes and ensure that the information produced by controls is as complete and useful as possible.'



Financial audits aid in the detection and investigation of fraud and corruption, whereas performance audits examine conformity with exempt standards.<sup>176</sup>

The general public, as well as any other party involved in the process, would very certainly perceive opaque and unaccountable practices as corrupt.<sup>177</sup> To increase public scrutiny, external procurement audits should be made available to the general public.

#### **a) Enhancing Public Scrutiny**

Public information on public procurements, aids in ensuring that authorities use public resources responsibly and in the public interest by making audit reports available to civil society organizations, the media, and members of the public.<sup>178</sup> Civil society organizations and the general public should be involved in the oversight of high-value or complex procurements that represent a high risk of mismanagement, which would reduce corruption and fraud.<sup>179</sup>

#### **b) Curbing Political Interference**

Political interference, which can be utilized by elected officials and top management to influence public procurement, is an obvious concern.<sup>180</sup> Top managers' undue influence to bend the rules, puts procurement officials in a precarious situation, putting them in danger of losing their jobs.

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<sup>176</sup>OECD Principles for Integrity in Public Procurement <[www.oecd.org/gov/ethics/48994520.pdf](http://www.oecd.org/gov/ethics/48994520.pdf)> accessed 7 July 2019.

<sup>177</sup> Steven G Chapman II and Keith Glatz, 'Accountability and Transparency in Public Procurement: American Recovery and Reinvestment Act of 2009 Goals versus Local Government Standards' <[www.ippa.org/IPPC4/Proceedings/04EconomicsofProcurement/Paper4-10.pdf](http://www.ippa.org/IPPC4/Proceedings/04EconomicsofProcurement/Paper4-10.pdf)> accessed 7 July 2019.

<sup>178</sup> *ibid.*

<sup>179</sup> *ibid.*

<sup>180</sup> Steven G Chapman II and Keith Glatz, 'Accountability and Transparency in Public Procurement: American Recovery and Reinvestment Act of 2009 Goals versus Local Government Standards' <[www.ippa.org/IPPC4/Proceedings/04EconomicsofProcurement/Paper4-10.pdf](http://www.ippa.org/IPPC4/Proceedings/04EconomicsofProcurement/Paper4-10.pdf)> accessed 7 July 2019.

As a result, accountability systems and controls prevent the exercise of undue influence since senior managers are held accountable for their actions and judgements at the end of the day.<sup>181</sup>

### **c) Involvement of Stakeholder**

To increase government accountability and institutional trust. Direct social control has recently been established in several countries by involving individuals in critical stages of the procurement process. Communication with suppliers and trade associations on a regular basis can help to improve mutual knowledge of the forces that create public markets. Participation of Stakeholder in policy processes is also a key component of OECD instruments that encourage international cooperation.<sup>182</sup>

### **d) E-Procurement**

Increase transparency, make public tenders, more easily accessible by introducing information and communication technology into procurement, it is possible to eliminate direct engagement between procurement officials and enterprises, enhance outreach and competitive, and make it simpler to discover irregularities and corruption, such as bid rigging schemes, Internal anti-corruption controls and the detection of integrity violations are made easier by digitizing procurement procedures, which also provides audit service trails that could help investigators.<sup>183</sup>

## **Addressing Kenya's Public Procurement challenges**

### **4.4 Improving Accountability in the public sector**

In response to popular demand for more transparent and accountable government, many countries have made changes to their public sectors. The focus is on the public sector reform and

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<sup>181</sup> *ibid.*

<sup>182</sup> Chief Acquisition Officers Council (2014).available <http://cxo.dialogue.cao.gov/> accessible on 7<sup>th</sup> October 2019

<sup>183</sup> OECD report, preventing corruption in public procurement.

transformation in order to increase service delivery efficiency and effectiveness while maintaining stability. Furthermore, the government has been forced to build a strong command in leadership to direct the efficiency of the public sector without losing the value of new technology.

Since independence, the level of responsibility among Kenyan public officials in the conduct of public affairs has steadily decreased. Overtime, the country's annual economic growth rate has slowed. At the same time, the efficiency and efficacy which government services are given to regular citizen has declined. Unemployment and misery have spread across the country as a result of a combination of these two elements.

#### **4.5 Encouraging Good governance in government Procurement.**

Effective governance includes a bureaucracy filled with a professional culture that works in the public interest, the rule of Law, open processes, and a strong civil society that participates in public issues.<sup>184</sup>

Good governance concepts must be implemented in administration.<sup>185</sup> in order to increase citizen trust and political administrative system's legitimacy. Good governance is a value-laden concept that encourages ethical and problem-solving behavior while discouraging unethical or problematic behavior. Good governance refers to the set of agreed –upon rules and principles that regulate the relationship between government and citizens.

The link between public procurement and what is commonly referred 'good governance is gaining traction. Procurement policies that are effective allow the government to implement

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<sup>184</sup> Mertus,199,p.1351

<sup>185</sup> Christensen & Skaerbaek,2007, Salminen& Ikola-Norrbacka,2010/.

social, environmental and economic reforms. Public procurement fraud on the other hand, is a significant source of government corruption and financial loss.

The link between public procurement and what is commonly referred to as good governance is gaining traction. Procurement policies that are effective allow the government to implement social, environmental, and economic reforms. Public procurement fraud, on the other hand is a major source of corruption and financial loss for the government. On a global scale, public procurement is slowly developing towards a policy function, allowing procurement policy to be aligned with government policy. As a result, procurement generally reflects changes in governance, particularly enhanced stakeholder participation, openness, and accountability.<sup>186</sup>

#### **4.6 Promoting the Rule of Law**

In general, the governing class is opposed to upholding and obeying the rule of Law. The rule of Law must be followed if the public procurement law is to work and achieve its goal.. The following procedures should be followed, according to the report.

##### **(a) Supporting the Constitution's spirit**

The 2010 Constitutional Amendments give Kenyan voters the chance to address concerns of integrity that have inhibited the stringent enforcement of procurement laws. The new Constitution will help to address the country's corruption problems. The Constitution's Chapter 6 is helpful in combating corruption issues in the country.

All persons desiring to occupy public office must meet extremely high threshold criteria, according to Chapter 6 of the Constitution. The goal of this chapter, as well as other enabling Act

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<sup>186</sup>Public Procurement-a pillar of good governance? Wendy Philips & Guy Callender available at [www.researchgate.net/publications/27487779](http://www.researchgate.net/publications/27487779)

of 2011, the Public Officer Ethics Act,2003, Election Act,2012, is to make it significantly more difficult for the politicians to pillage and mismanage public monies.<sup>187</sup>

### **(b)Reforming the PPDA, 2015**

The public procurement and Asset Disposal (PPAD) Act of 2015 replaced 2005 Public Procurement and Asset Disposal Act. There have been no changes, with the exception of a 30% procurement reserve for children, women and persons with disabilities, county government standards in public procurement and asset disposal, quality-based assignments and Professional service selection, There were no substantial significant changes made.

According to this study, Affirmative action for minorities, women, and people with disabilities is 30 percent could be misused by dishonest public officials. They may be tempted to take advantage of that section by forming businesses with relatives and cronies who meet the criteria of adolescents, women, and people with impairments. Ordinary people may not profit much as they should in this situation, and the goal of the laws may be undercut.

### **(c) Enhancing Judiciary's Independence**

Both Judicial service Act and the Constitution both provide mechanisms to ensure the judiciary' complete autonomy while also setting procedures to increase its independence. Article 159b of the Constitution lays the groundwork for reaching this goal.<sup>188</sup>

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<sup>187</sup>Humprey Njuguna, Political patronage and operationalization of Public procurement in Kenya.

<sup>188</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 the Constitution.

The judiciary is principally informed by the stress and importance guided by the Constitution's and the judicial Service Act's the necessity of judicial independence is emphasized. This is informed by the judiciary's past betrayal of the Kenyans, particularly when it resolutely set its allegiance and fate with the government and continuously acted against the progressive groups seeking judicial reform during the fight for multi-party democracy.<sup>189</sup>

However, based on recent developments, it appears that the new JSC is dedicated to ensuring that the judiciary performs its constitutionally required function. This may be observed in the current high levels of independence demonstrated by individual judges present high degrees of independence in their decisions, The government has lost a number of cases because of independent-minded judges have interpreted the Constitution without fear or favor.<sup>190</sup>

#### **4.7 Conclusion**

This Chapter looks at the procedures and areas of Public procurement where corruption has thrived, as well as the solutions that can be employed to help reverse the trend. Kenyans have been accustomed to hearing that their taxes were utilized to enrich a small group of people. Kenya is one of the most corrupt countries in the world, according to Transparency International. Kenya was placed 144<sup>th</sup> out of 180, tied for first place with countries, Nigeria which had a comparable index score.<sup>191</sup>

In Kenya, Corruption has become the norm, infecting all levels of government, including the legislature, the judiciary and the executive. Corruption has spread throughout Kenyan society and is now prevalent. as a whole and has become pervasive. Institutions intended to regulate the

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<sup>189</sup>Makau Mutua,Justice under siege: The Rule of Law and Judicial Subservience in Kenya (2011) Human Rights Quarterly 23 (1),110. For a historic appreciation of the Subservient role the judiciary played during the multi-arty agitation in 1990,s

<sup>190</sup> Examples of cases which the Government has lost in the recent past include the appointment of AlnasirVisram as CJ,KiokoKilukumi as DPP,ProfGithu as Ag,MrKirwa as controller of Budget and appointment of 47 county commissioners.

<sup>191</sup><<https://tradingeconomics.com/kenya/corruption-rank>>

citizens interactions with government are now being abused to benefit public officials' politicians and bureaucrats, as well as immoral players and other unethical private actors, (individuals, groups, and businesses). Corruption thrives in Kenya because powerful people profit from it, and the existing government institutions lack the motivation and competence to combat it.<sup>192</sup>

Corruption is prevalent, and its economic implications are particularly severe in underdeveloped countries. Kenya has been impacted by this problem as a result of a significant loss of investors and foreign help. As a result, the country has implemented a variety of steps to combat corruption. Some of these efforts, such as economic and commercial liberalization, have made a dent in corruption. Others, such as criminal justice system, have run into several issues as a result of the country's socio-political framework.

Corruption is at an all-time high and has infiltrated every area of the economy. Foreign investors face higher business costs due to a weak legal system and frequent demands for bribes by public authorities. Kenya's long-term economic growth is hampered by widespread tax evasion, and state procurement fraud is pervasive. According to a recent research of media reportage of public financial theft incidents from the first two months of 2019, a total of shs48.2 billion was either mishandled, or uncounted for from 2009 to 2019.<sup>193</sup>

Kenya's anti-corruption apparatus is as ineffective as a sleeping cat that cannot capture a rat,<sup>194</sup> despite its breadth and efficiency. As a result of the Kenya's weak and corrupt public institutions, the country's anti-corruption plan is being inadequately executed.

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<sup>192</sup>Sr. Kempe Ronald Hope (2014) Kenya's corruption problem: causes and consequences, *Commonwealth & Comparative Politics*, 52:4, 493-512,

<sup>193</sup>Professor Peter Kagwanja, "How corruption is sinking the 'Kenya model' and Uhuru legacy" *Daily Nation*, March 10, 2019 <https://www.nation.co.ke/oped/opinion/How-corruption-is-sinking-Uhuru-legacy/440808-5017004-11w0ugn/index.html>

<sup>194</sup>Professor Peter Kagwanja, "How corruption is sinking the 'Kenya model' and Uhuru legacy" *Daily Nation*, March 10, 2019 <https://www.nation.co.ke/oped/opinion/How-corruption-is-sinking-Uhuru-legacy/440808-5017004-11w0ugn/index.html>

## **CHAPTER FIVE**

### **5.0 CONCLUSION**

Kenya's public procurement system has advanced since the Public procurement and Disposal Act was passed in 2015. This study clearly demonstrates that good procurement legislation will not be sufficient to achieve Kenya's public procurement reform goals.

Corruption usually increases the price and lowers the quality of goods or services purchased, as well as decreasing the possibility that the goods or services purchased will match the public's demands. Purchasing from the Government Corruption may be devastating to a country's economy

Corruption in public procurement is a global problem with serious financial and ethical ramifications. While many parties have a role to play in the battle against public corruption, governments are the most essential. Concerns concerning the impact of corruption and/or fraud on government procurement are developing in Kenya. Despite Kenya's public procurement reforms aimed at transforming the public procurement process, the social evils of corruption have become even worse. Procurement fraud and corruption are becoming increasingly common.

### **5.1 RECOMMENDATIONS.**

The following suggestions can be made based on the preceding observation:

- i. EACC, PPOA, DPP, The High court and the Public Procurement Administrative Review Board, should be strengthened and well-funded to ensure that the industry is successfully handled. Such institutions should be permitted to function without the government involvement.



- ii. The government should take action against officials accused of breaching the Law and engaging in activities during the procurement process to ensure that the procurement process is free, fair, and just.
- iii. Government institutions in charge of executing the Act should make sure that the legislation is followed.
- iv. Stiff penalties should be imposed for failure to comply with procurement standards.
- v. Procurement practitioners should get frequent training on Procurement laws, rules, and record keeping.
- vi. Increased transparency throughout the public procurement tendering cycle, as well as one of the prescriptions for avoiding corruption in government spending is to avoid wide confidentiality restrictions in procurement processes for raising alarms for difficult and substantial variances in ongoing tendering projects.
- vii. The study recommends that open contracting principles and data standards be adopted, as well as access to public procurement information that is transparent and equitable. To guarantee that public procurement standards are followed the government should enforce strong fines for infractions of procurement requirements, as well as capacity building for procurement practitioners.
- viii. Procurement violations resulting from a lack of access to records on process during the second stage of procurement cycle (tendering phase) can be remedied by implementing suitable record management tools and protocols for publishing procuring organizations.

- ix. For public procuring entities, suitable records keeping technologies and a more robust procedure are required.
- x. Internal audit systems inside Ministries, Departments and Agencies should be strengthened more heavily by the government.
- xi. The government must fully operationalize the Constitution in order to ensure that both the spirit and letter of the document are respected. This Constitution, in its current form, holds the key to controlling and managing political patronage in Kenya's public procurement administration.
- xii. The New Constitution's Chapter 6 on Leadership and Integrity needs to be completely implemented.
- xiii. The Commission on Ethics and Anti-Corruption Commission should be fully operationalized. Despite the fact that this commission exists, it has been largely dormant since its formation due to several underlying political agendas that have undermined its legitimacy.
- xiv. The concepts of good governance should be incorporated.

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