

## THE INFLUENCE OF POLITICAL PATRONAGE ON THE OPERATIONALIZATION OF PUBLIC PROCUREMENT LAW IN KENYA

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**ABSTRACT.** Public Procurement in Kenya has evolved from a crude system with no sound legal framework and institutional structure to a properly regulated system anchored in the New Constitution through Article 227. Major legal and institutional reforms have been undertaken to streamline the management of public procurement through enactment of laws that criminalize corruption and instill good governance based on the principles of transparency and accountability. However, studies still indicate that corruption is still common in public procurement and that the legal and institutional reforms instituted so far have largely failed to produce the necessary prudence and accountability in public procurement. Recent scandals on cemetery land in Athi River, Anglo-Leasing security contracts, maize importation scam, Free Primary Education (FPE) funds, sale of Grand Regency Hotel to Libyan investors, sale of Kenya's Embassy in Japan and many others which relate to corruption in public procurement have cost Kenya over KSh700bn (USD 8.24 billion) [Mars Group, 2011]. The huge sums of money lost through corrupt deals in public procurement implies that, even though a lot has been achieved in streamlining the management of the sector in Kenya, reforms undertaken have failed to contain runaway corruption in the sector. While reforms have increased emphasis on capacity building, fiscal and legal stability, and improved on quality of public services delivered, it has failed to address the more complex and usually undercover influence of politics on the key sectors of public service such as public procurement; hence, the need to unravel the influence of political patronage on the operationalization of Public Procurement Law in Kenya. This paper examines the role legal and policy reforms have played in streamlining the management of public procurement sector; determines how ethnicity and nepotism affect legal and institutional frameworks in the sector; establishes how corruption affects public procurement; and the extent to which the New Constitutional principles of good governance will help to address political patronage-related challenges facing the sector in Kenya. Literature is reviewed on legal reforms and challenges in Public Procurement sector; ethnicity and nepotism in Public Service; and corruption and its effects on Public Procurement sector in Kenya. The study found out that adequate legal and institutional structures have been established to streamline public procurement sector in Kenya. Further, it was established that the executive appoints chief officers such as Permanent Secretaries who in turn appoints heads of various departments and other senior officers. The executive were

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found to use their appointing authority to employ cronies, kin, friends, and members of their tribes to head crucial departments like public procurement to maintain indirect control. Such appointees are then used to perpetuate tender corruption through undue influence of procurement process, coercion, price inflations, supply mismanagement and theft. This provides a link through which the executive maintains control in public procurement and hinders effective operation of Public Procurement Law in Kenya. This study concludes that the principles of good governance as contained in Chapter 6 of the New Constitution of Kenya on *Leadership and Integrity*, if properly implemented, will help to address political patronage-related challenges facing public procurement sector in Kenya.

## INTRODUCTION

### 1.1 *Background to the problem*

In Kenya, until 2001, there was no sound legal framework and institutional structure governing the public procurement sector (Migai-Akech, 2005). He observes that the Government's procurement system was originally contained in the Supplies Manual of 1978, which was supplemented by circulars that were issued from time to time by the Treasury. The Director of Government Supply Services was responsible for ensuring the observance of the provisions of the Supplies Manual which created various tender boards for adjudication of tenders and their awards.

The public procurement system in Kenya has therefore evolved from a crude system to an orderly regulated, legal and constitutional regime. Kenya's public procurement system can be traced back to 1955 during the colonial days (Public Procurement Oversight Authority, 2009). It has been improved through a system regulated by Treasury Circulars in the 1960s to the 1990s to an orderly legally regulated procurement system from 2001 under the Exchequer and Audit (Public Procurement) Regulations and eventually, the Public Procurement and Disposal Act, 2005 before acquiring constitutional anchorage under Article 227 of the New Constitution of Kenya, 2010. Procurement Journal No. 5 of 2011 outlines the evolution of Public Procurement Law in Kenya as shown in table 1.1.

**Table 1.1: Evolution of Public Procurement Law in Kenya**

1960-1978	Treasury Circulars
1978 - 1983	Supplies Manual; Treasury Circulars
1983-2001	Supplies Manual; District Focus for Rural Development Strategy
2001-2007	Exchequer & Audit (Public Procurement) Regulations
From	Public Procurement and Disposal Act, 2005

2007	
2010	Public Procurement anchored in the New Constitution under Article 227.

*Source: Procurement Journal No. 5 of 2011*

Public Procurement Oversight Authority (2009) indicates that a review of the country's public procurement systems was undertaken in 1999 to establish the challenges facing procurement system then. The review established that: there was no uniform procurement system for the public sector as a whole; and it had no sanctions or penalties against persons who breached the regulations in the Supplies Manual, other than internal disciplinary action. Consequently application of the rules was not strict and many of the norms were not followed during acquisition or disposal of public assets. According to PPOA, dispute settlement mechanisms relating to the award procedures as set out in the Supplies Manual of 1978 were weak and unreliable for ensuring fairness and transparency. It further observes that records of procurement transactions in many cases were found to be inaccurate, incomplete or absent, which led to suspicions and dishonest dealings at the tender boards.

The systems had other institutional weaknesses that not only undermined its capacity for carrying out their mandates effectively but also led to a public perception that the public sector was not getting maximum value for money spent on procurement. In 1990s, Lewa (2007) indicates that there was a concern among Kenya's development partners, civil society, and the citizenry about the need to have a sound legislative and institutional framework to govern the public procurement sector in Kenya. Towards the end of 1990s, enactment of legal and institution frameworks which were necessary to streamline the management of public procurement sector in Kenya was a condition for development assistance from western countries, the World Bank and International Monetary Fund. The delay by the then KANU regime to enact a sound legal framework to guide the management of public procurement resulted in the suspension of aid to the country in 2000 by western countries, World Bank and International Monetary Fund. According to Odhiambo & Kamau (2003), Kenya's development partners in the west argued that the

absence of a sound public procurement law was responsible for runaway corruption in the sector.

Around 2001/2002, there was significant political development in Kenya. The National Rainbow Coalition (NARC) and other progressive forces were agitating for change which included zero tolerance to corruption. According to Lewa (2007), there was a major push to have a law to govern the procurement system in the public sector and to establish the necessary institutions to ensure that all procurement entities observed the provisions of the law for the purpose of attaining the objectives of an open tender system in the sector. This resulted in the establishment of the Exchequer and Audit (Public Procurement) Regulations 2001 which created the Public Procurement Directorate (PPD) and the Public Procurement Complaints, Review and Appeals Board (PPCRAB). The Exchequer and Audit Regulations of 2001 were amended in 2002 and were followed by the enactment of the Public Procurement and Disposal Act (PPDA) of 2005.

The changes made in public procurement sector led to the setting up of monitoring and supervisory bodies, the Public Procurement Oversight Authority (PPOA), the Public Procurement Advisory Board (PPAB) and the continuance of the Public Procurement Complaints, Review and Appeals Board as well as the Public Procurement Administrative Review Board (PPARB). Further, to effectively combat corruption in the country, strong anti-corruption laws and other enabling legislations were enacted. These include: Anti-Corruption and Economic Crimes Act, 2003, which establishes the Kenya Anti-Corruption Commission (KACC); Public Audit Act 2003; Government Financial Management Act, 2004; Privatization Act 2005; Witness Protection Act, 2006; and the Political Parties Act, 2007.

Besides enacting these laws, the country has established a number of institutions and watchdog agencies to fight corruption. These include: the Ministry of Justice and Constitutional Affairs; the Cabinet Committee on Anti-Corruption; Kenya Anti-Corruption Commission Advisory Board; The Judiciary/Special Anti-Corruption Courts; the State Law Office and the Directorate of Public Prosecutions (DPP); and the Efficiency Monitoring Unit. Others are the Parliamentary Finance Committee (PAC) and Public Investments Committee (PIC);

The National Anti-Corruption Steering Committee; and The Public Complaints Standing Committee (PCSC).

However, recent scandals such as the Anglo-Leasing security contracts, maize importation, Free Primary Education (FPE) funds, sale of Grand Regency Hotel to Libyan investors without following the due process of law, Triton Oil importation scam, sale of Kenya's Embassy in Japan and many other scandals which relate to corruption in public procurement is worrying (Mars Group, 2011). The Mars Group estimates that recent major grand corruption scandals have cost Kenya over KSh700bn (£5bn). It has reached a point where the citizenry are frustrated by the corruption and impunity exhibited by state officials in collaboration with other actors who misuse public resources despite the tightening legal regime. Migai-Akech (2007) indicates that the vigor and enthusiasm with which Kenyans fought corruption when NARC Government came to power in 2003 has faded away. The above quoted scandals remain unprosecuted in spite of the public outcry. Some of these cases, when brought before courts of law, are thrown out due to lack of sufficient evidence or on other technicalities (Kenya National Commission on Human Rights, 2011). This is an indication of corruption in the court system in Kenya.

As a country therefore, Kenya has largely failed to effectively harness the spirit and letter of Public Procurement and Disposal Act of 2005 and other related enabling legislations in delivering transparency, accountability, and good governance in public procurement sector. The law as it exists today has not been able to eradicate corruption and related challenges in this sector as anticipated. There is therefore, the need to look at the influence of political patronage on the operationalization of Public Procurement Law in Kenya. This study opines that fixing public procurement system should involve tightening the legal regime of public procurement, implementing more institutional reforms in the sector which should include the civic culture among civil servants that understands the reasons for these reforms, training the civil servants that will carry out the reforms in order to institute ethical control over the executive.

## **1.2 Statement of the Problem**

In spite of the legal and institutional reforms carried out in the public procurement sector in Kenya, Public Procurement Law has failed to eradicate corruption in the sector. KACC Perception Survey 2010 indicates that over 80 percent of corrupt practices in Kenya still occur in public procurement. Recent scams such as the Anglo-Leasing Security Contracts, maize importation, mismanagement of Free Primary Education (FPE) funds, sale of Grand Regency Hotel to Libyan investors, Triton Oil scam, sale of Kenya's Embassy in Japan and many other irregular deals in Government all relate to corruption and impunity in public procurement. The Mars Group (2011) estimates that recent grand corruption scandals have cost the country over KSh.700 billion (USD 8.24 bn).

This raises a fundamental legal question; why has the Public Procurement and Disposal Act, 2005 together with other supporting legislations largely failed to tame corruption and related irregularities in public procurement? If indeed the problems facing public procurement sector in Kenya were purely due to weak legal and institutional framework, as Kenyans were made to believe, then why is it that ten years after putting in place major legal and institutional reforms, the sector still experiences numerous procurement-related corruption challenges? This implies that fixing public procurement in the country needs to go beyond legal and institutional reforms.

DfID & World Bank (2010) notes that the public procurement sector reform in developing countries has historically gone through three main phases: increased emphasis on the importance of capacity building, fiscal stability, and focus on the actual quality of public services delivered. However, this in effect alienates the more complex and usually undercover influence of politics on the key sectors of public service such as public procurement, and hence the need to unravel the influence of political patronage on the operationalization of Public Procurement Law in Kenya.

## **1.3 Objectives of the Study**

The overall objective of this study was to investigate the influence of political patronage on the operationalization of Public Procurement Law in Kenya.

### **1.3.1 Specific objectives of the study**

This study explores the following specific objectives:

- a) To establish the role judicial and institutional failures have played in the management of public procurement sector in Kenya.
- b) To determine how ethnicity and nepotism affect legal and institutional frameworks in public procurement sector in the country.
- c) To establish how corruption affects public procurement sector in the country.
- d) To establish the extent to which the new constitutional principles of good governance will help to address political patronage-related challenges facing public procurement law in Kenya.

### **1.4 Research Questions**

The study was guided by the following questions:

- a) What role has judicial and institutional failures played in the management of public procurement sector in Kenya?
- b) To what extent does ethnicity and nepotism affect the management of public procurement service delivery in the delivery?
- c) How has corruption affected public procurement sector in the country?
- d) To what extent will the new constitutional principles of good governance help address political patronage related challenges facing public procurement law in Kenya?

### **1.5 Conceptual Framework**

Under the current study, the independent variable is the political patronage in public procurement. This study believes that there is a thread linking the country's executive to legal and institutional frameworks of public procurement that needs to be unraveled to address the undercover challenges facing public procurement whose

links can be traced to the political system of governance in the country. The political patronage systems are largely camouflaged under the institutional and legal frameworks of public service and as DfID & World Bank (2010) puts it, they are usually hard to detect.

The political patronage manifests itself in public appointments; judicial, legal and policy frameworks; politics of ethnicity and tribal balancing; corruption and impunity in public service; and economic influences of corruption. These are in effect the *intervening variables* in the current study. The dependent variable in the current study is operationalization of Public Procurement Law in Kenya. This study opines that the operations of Public Procurement and Disposal Act, 2005 and the backup laws meant to streamline the management of public procurement in the country have been undermined by the political culture in the country rendering them largely ineffective.

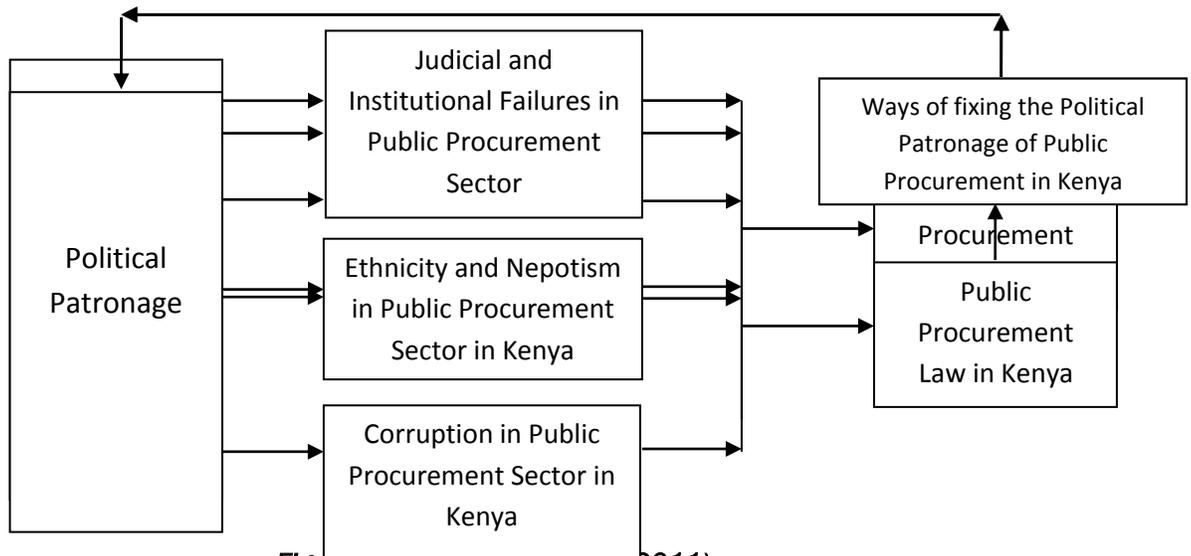


Figure 1.1: Researcher (2011)

**1.6 Justification of the study**

Previously, public procurement was administered through Treasury Manuals which had no legal backup either through an Act of Parliament or in the Constitution of the Country. Public Procurement and Disposal Act of 2005 together with other backup laws were thus

enacted to guide the management of public procurement in Kenya. However, more than ten years down the line, these laws are yet to effectively streamline this sector. Corruption, impunity and other related challenges are still rampant in public procurement sector. At the time of this study, KACC is under siege with its management standing disbanded. It is worth noting that since inception, KACC operations have been fairly unstable and uncertain. There is need therefore to establish why Public Procurement Law as currently constituted has largely failed to deliver as anticipated.

Data from this study may be used by the Kenya Government, other countries in Africa, and the developing world who largely share the same experiences in public procurement. Besides, the results of this study are expected to ignite debate among other interested stakeholders and policy reformers in this sector. This may help to initiate further positive reforms in the sector.

## METHODOLOGY

### **2.1 *Data Types, Sources and Analysis***

The study was undertaken by analyzing secondary data mostly collected through review of existing documentation and legislation. Documents reviewed include: reports of the Public Procurement Oversight Authority (PPOA), Kenya Anti-Corruption Commission (KACC), Mars Group Publications, case laws, journals, periodicals, newspaper reports, books and other secondary resource material. The research also reviewed Public Procurement and Disposal Act, 2005 and the provision on *Leadership and Integrity* in Chapter 6 of the New Constitution of the Republic of Kenya.

### **2.2 *Factors of Study***

The assessment was done by reviewing existing documentation and legislation concerning public procurement in Kenya, and the results are analyzed under the following three factors: legal reforms and challenges in public procurement sector, ethnicity and nepotism in public service, and corruption and its effects on public procurement sector in Kenya.

## ANALYSIS AND RESULTS

### **3.1 *Judicial and Institutional Failures in Public Procurement Sector in Kenya***

A lot has been achieved in reforming public procurement sector in the country through the many legal and institutional reforms undertaken so far. Moving from unknown (undefined) system with no proper regulatory framework to a known (well defined) system with legal and policy framework is a gain in itself. In the mid-1980s and 1990s, the need to reform public procurement in Kenya became urgent, as there was growing scrutiny and pressure from within and outside to reform the procurement process (Odhiambo & Kamau, 2003). The domestic push for reform came mainly from domestic procurement stakeholders and other progressive forces since the government's business operations or public procurement affect different elements

of society: the procurement entities, the business community, professional associations and the general public.

These stakeholders generally expressed dissatisfaction with the public procurement system which according to Odhiambo & Kamau (2003) included complains of misallocation of resources, inadequate infrastructure, inefficient services, high taxes, growing indebtedness and high risks. The concerns outlined by the two are broad and can be an evidence of a breakdown in administration and not just public procurement alone. However, they are clearly related to the manner and effectiveness of the public procurement process in the Country. In reacting to these concerns, the government reluctantly recognized the need for reviewing the public procurement process in order to address the various concerns raised in this sector.

Lewa (2007) indicates that external pressures from donors and multilateral organizations such as the World Bank, ITC, UNCTAD, and the WTO also played an important role in the reform process in Kenya. He observes that these organizations made public procurement reforms a condition for lending to many developing countries, including Kenya. In this regard, Odhiambo & Kamau (2003) reports that the demand by these organizations was mainly to harmonize the national procurement systems with international procurement guidelines provided by WTO, in order to make the processes more transparent and accountable. Considering the large sums of money spent in public procurement each year, this was seen as one way of delivering transparency and accountability to the citizenry, who for years, have suffered from poor service delivery as a result of corruption in public sector.

In 1986, a study was conducted by SGS Consultants to evaluate public procurement systems in Kenya (OECD, 2003). The major finding of the study was that public procurement was not operating efficiently and that the state was losing a lot of money through shoddy deals. The report strongly indicated the need for reforming the public procurement system in the country. However, it was not clear from the study if the problem was as a result of a flawed process, lack of civic education, or a cultural issue among public servants.

In 1997, the Government in collaboration with the World Bank commissioned another study to assess the country's procurement processes and systems (OECD, 2003). This study identified the need for a comprehensive review and implementation of a reform process in the procurement systems (Ministry of Finance and Planning, 1999). The study revealed that the public procurement system in Kenya lacked transparency and fair competition. The study further revealed that the procurement staff were not adequately trained and lacked the necessary skills and professionalism. Lack of a professional body that oversees and instill discipline among procurement officers also made them vulnerable to corruption. The review further established that: there was no uniform procurement system for the public sector as a whole; and that it did not have sanctions or penalties against persons who breached the regulations in the Supplies Manual, other than internal disciplinary action.

The review also established that the Supplies Manual that guided this sector did not cover procurement of works; the dispute settlement mechanisms relating to the award procedures as set out in the Manual were weak and unreliable for ensuring fairness and transparency; and records of procurement transactions in many cases were found to be inaccurate or incomplete while in some cases they were absent altogether, which led to suspicions of dishonest dealings at the tender boards. A major recommendation from these two studies was that reforms in public procurement systems were paramount if the government was to save resources and get value for money spent through this process.

Since then, the reforms undertaken in public procurement sector in Kenya include: the establishment of the Exchequer and Audit (Public Procurement) Regulations 2001 which created the Public Procurement Directorate (PPD) and the Public Procurement Complaints, Review and Appeals Board (PPCRAB); the amendment of the Exchequer and Audit Regulations in 2002; the enactment of the Public Procurement and Disposal Act (PPDA) of 2005; and the anchorage of public procurement in the New Constitution under Article 227 in 2010. PPDA, 2005 establishes procedures for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by public entities to achieve the following

objectives: to maximize economy and efficiency; to promote competition and ensure that competitors are treated fairly; to promote the integrity and fairness of those procedures; to increase transparency and accountability, to increase public confidence in those procedures; and to facilitate the promotion of local industry and economic development.

PPDA, 2005 further provides the general procurement rules outlining the choice of procurement procedure; conditions guiding the procurement process; qualifications to be awarded contract; and pre-qualification procedures. Also provided in the Act are the limitation on contracts with employees; specific requirements; termination of procurement proceedings; inappropriate influence on evaluations; participation in procurement; corrupt practice; fraudulent practice; collusion; conflicts of interest; confidentiality; procurement records; and inspections and audits relating to contracts. The Act expressly prohibits corrupt practices, fraudulent deals and collusion in public procurement exercises in the country. The Act also outlines the procedures for selection of procurement personnel, qualifications of office holders of senior management offices created by the Act, but is silent on individual qualifications of officers who run procurement on a day-to-day basis.

Besides the enactment of legislations dealing directly with public procurement, Kenya has enacted other enabling legislations meant to deliver transparency, accountability, and good governance in the management of public affairs. These legislations have indirectly strengthened the operations of public procurement law. These legislations include: Public Officer Act, 2003; Anti-Corruption and Economic Crimes Act, 2003; Witness Protection Act, 2007; and Magistrates and Judges Vetting Act, 2011 among others. The hallmark of these reforms was the enactment and promulgation of the New Constitution in August, 2010.

Public procurement practices follows Hughes (2005) five main steps of: assessing needs, service design, supplier short listing, supplier selection, and supplier performance evaluation. According to Csaba Csaki (2006), public procurement process is simplified by Varday (2005) as follows: preparation (determination of the object and quantity of the procurement task and decision about the needs);

proposal (forming the contracting strategy, developing the tendering documents, assessing proposals and awarding the contract); execution (delivery including necessary education and invoicing); and monitoring and analysis of the results (assessing whether original goals were met, collecting experiences and improving the procurement process).

While the legal framework in place may be good for regulating public procurement practices in the country, Finnis (1980) observes that the law does not function in a vacuum. Finnis makes an essential claim that the law is a social institution whose purpose is to regulate the affairs of people and thus contribute to the creation of a community in which all people can flourish, a community in which everyone can realize the different basic values. In this way, the law is a moral project and provides a clear connection between moral philosophy and legal philosophy and should be upheld by all actors.

Whether one's description of law is correct or not will in part, but very significantly depend upon whether one's moral views are correct, for one's moral views will inform the way in which one conceives of the project of law. In this way, good laws alone cannot deliver the expectations of Kenyans as far as public procurement reforms are concerned. The country was very positive and optimistic that the Public Procurement and Disposal Act (PPDA) of 2005 and other backup laws would help to end corruption and impunity in public procurement sector in Kenya. The law seems not to have addressed itself to the influence of political patronage on its workings. Many cases of corruption and impunity in public procurement have been reported despite the tightening legal regime in the sector.

Survival of corruption in a tightening legal regime can be understood when one interrogates Finnis' (1980) assertion that philosophy of law is continuous with general moral or ethical philosophy. In short, a critical perspective on the standards of behavior upheld by public officers is crucial in enhancing the operations of the law. Since corruption and impunity in public procurement sector is a moral issue that borders on personal behavior characteristics, it is the role of the law to enforce institutional morality in the human elements of the system. Without this, the law is bound to fail.

Further, one should note that public procurement is the expenditure arm accounting for 10 percent of the GDP as reported in PPOA (2010). This 'expenditure is basically taxpayers' money collected from them. The government therefore has a moral and legal obligation to deliver social and economic justice in their spending of these resources. This should be done along the principles of transparency and accountability as expounded in Section 2 of PPDA read together with Chapter 6 of the New Constitution on *Leadership and Integrity*. It is this interconnectivity of law and society in upholding social and economic justice for public good that should guide the necessary reforms in public procurement sector in Kenya.

While, it is true that the elaborate legal reforms put in place so far have streamlined to a large extent, the management of public resources in the country, public officers still manipulate the law to rig tenders and engage in corruption. Perhaps, this explains why procurement audits carried out in Kenya's public procurement system still disclose serious shortcomings ranging from inefficiency to runaway corruption (KACC, 2010). This indicates that PPDA, 2005 has largely failed to enforce institutional morality in public procurement system needed to eradicate corruption. The reasons behind this failure need to be established and for this study, political patronage plays a very central role in this failure.

### **3.2 Ethnicity and Nepotism in Public Service**

Migai-Akech (2005) observes that political patronage works in governments which tend to be unpopular with the citizenry to ensure that only their narrowly-drawn and often ethnic constituencies have access to public resources, such as lucrative public procurement contracts. According to him, public resources are therefore a means through which such governments "purchase" legitimacy to remain in power. A Standard Newspaper commentary (Monday 21<sup>st</sup> June, 2010) observes that tribe has become a factor in influencing decision-making, appointments, deployment of resources and promotion in many public sector institutions in Kenya. The commentary observes that tribalism is now a major concern in many institutions with a clear lack of consideration of regional balance in appointments or promotions leading to a growing disproportionate distribution of personnel in the country. It is a fact that all the major political parties

in Kenya including ODM, PNU, TNA, NARC\_Kenya just to name a few are all ethnic based. These parties determine the political direction of the Country in terms of resource distribution, and power-play.

This ethnic political manipulation is a form and major source of corruption and impunity with the benefiting tribe being increasingly seen to be associated to the person exercising authority and political power. According to the Standard Newspaper commentary, it is not just State Corporations, but many Government ministries and departments also appear insensitive to the need to ensure regional balance and merit in government appointments. The Country therefore requires a collective resolve of the entire population to deal decisively with this culture, not only in Government ministries, but also across State corporations and related institutions. According to the Newspaper commentary, it must not be a case of whimsical action of those in authority, but a resolute matter of public policy reorientation. This is because positions of employment in public institutions constitute critical national assets, which must not only be shared fairly, but also be seen to be based on merit and equity.

According to *Twaweza Kenya* (2012), a non-governmental organization involved in civic education, the reason why Kenya is not prudently and professionally running its national affairs is because its leaders have succeeded in making the 'dirty trio' of corruption, tribalism, and impunity a national culture. *Twaweza Kenya* further observes that leaders and administrators use corruption, tribalism, and impunity as official tools to attain wealth, power and hegemony over the citizens. The NGO further observes that "our leaders and administrators presume the citizens to be helpless and with no recourse. That is why the Ministry of Lands fraudulently gave titles to rogue companies facilitated by corrupt payments for government land in Syokimau. That is why the City Council of Nairobi and the County Council of Mavoko allowed genuinely hardworking Kenyans to build their lifetime dreams (houses) using money borrowed from banks, on plots of land with fake title deeds. That is why the City Council of Nairobi corruptly gave building permits to investors in prohibited areas in Eastleigh".

The leadership Kenya has had in recent years is not the leadership envisaged by the country's founding fathers and mothers. It has been

leadership to drive Kenyans into more poverty and eventual collapse. Corruption allows someone to gain benefits they do not deserve from public or other resources (*Twaweza Kenya, 2012*). Tribalism enables people in position to serve well only those from their tribe and from those that they derive unjustified economic and social benefits but serve other Kenyans poorly. Impunity is the product of corruption and tribalism individually or together. Once impunity is well established, corrupt public service providers and public officers know they are immune to prosecution for their unfair practices because if caught, they will buy their way out, be treated favorably or rescued by their political masters. In the worst scenario, they retreat to their tribes for protection.

### ***3.3 Corruption and its effects on Public Procurement Sector in Kenya***

International action against corruption has progressed from general consideration and declarative statements to legally binding agreements. While in the 80s and 90s, measures were focused relatively narrowly on specific crimes like bribery, the definitions and understanding of corruption have since become broader and so have the measures against it. Conventions such as United Nations Convention Against Corruption (UNCAC), the Inter-American Convention against Corruption (IACAC), the OECD Anti-Bribery Convention, and the African Union Convention on Preventing and Combating Corruption have also adopted a comprehensive approach and the mandatory character of many of their provisions give proof of this development.

Lewa (2007) notes that, while Uganda and Tanzania have openly embraced and implemented economic-wide reforms including procurement, Kenya's commitment has been found to be patchy and intermittent and as a result, reform is yet to take its intended effect in Kenya's procurement system. According to Lewa, in spite of many reform initiatives undertaken in the management of public sector in the last one decade, the bulk of corrupt practices in Kenya like Anglo Leasing Security Contracts of 2003-2005, Maize Scandal of 2009/10, sale of Grand Regency Hotel in 2009, Triton Oil Scandal of 2009/10 among others, all occurred in public procurement. This is corroborated by KACC report (2010). This could be an indication that

the legal and institutional reforms undertaken so far to streamline the management of public procurement sector in the country appears to have largely failed to deliver as anticipated.

This study believes that this country is addressing the challenges facing public procurement using correct means but has left out one key component needed to achieve the target, which is the political influence on public procurement sector in the country. It is necessary for Kenya to develop a thorough understanding of the nature of challenges facing the implementation Public Procurement Law in the country which may be beyond the legal and institutional frameworks that have been put in place so far. This is in line with World Bank (2007) study which found out that in many countries, procurement reforms have often been triggered by external pressures of corruption scandals, leading to hasty and piecemeal reforms that focus more on adding controls and legislations rather than developing a thorough understanding of the underlying causes of the problems and feasible options to address them. The role of political patronage in the workings of public procurement has not been adequately addressed, more so in developing countries where public procurement plays a critical role in economic growth and development.

Kenyans are frequently asked for bribes to gain access to services such as education and health care according to Transparency International's Global Corruption Barometer (2008). While, expressing concern about the significant increase in the level of corruption in both public and private institutions that year, TI reported in this study that 45% of respondents claimed to have paid bribes to speed up access to basic services compared to 29% in 2007. According to this report, this is a stark reminder that corruption remains a significant challenge to public service delivery in Kenya. According to the study, some parents paid as much as Kshs. 2,654 to secure admission for their children to private universities. Respondents also paid bribes to obtain employment, licenses or permit to avoid a brush aside with the law or some punitive measure.

TI (2008) indicate that, among the government departments that topped the corruption index in 2008 included Ministries of Health, Lands and Immigration, Provincial Administration, City Councils in Nairobi and Mombasa and public hospitals. The study also showed

that 90% of respondents who interacted with the police were asked for kick-backs while 84% bribed the Local Authority; 79% the Lands and Immigration ministries and 63% the Kenya Revenue Authority and the defunct Electoral Commission of Kenya (ECK). According to TI-Kenya, the fact that political class continues to benefit from the "rot in the system," the political will to prevent and punish corruption is not forthcoming. The study established that public service delivery in Kenya are prone to bribery and impunity entrenched by leadership, inefficiency in public sectors and policies that hamper Kenyans' ability to understand, monitor, and access the impact and process of service delivery.

TI (2008) believes that effective policies are those that give the people and the government the greatest, accessible and affordable services at the least cost in terms of fee and establishment. Unfortunately, TI study established that pervasiveness of corruption has turned Kenya into a nation of predominantly resigned citizens on matters of transparency and accountability in the management of public funds. However, the study recommended that Kenyan citizens should work to contain bribery through monitoring and influencing service and policy impact at the lowest local level. The TI study report was released at the same-time as a government of Kenya statement (Republic of Kenya, 2008: 1), which indicated that the war against corruption had taken ethnic and political dimensions. However, the government called on leaders to accept the fact that corruption is a crime and that its perpetrators act in their own selfish interest to the detriment of Kenyans.

OECD (2009) notes that public procurement is traditionally one of the government sectors most vulnerable to corruption, due to its size, complexity and the sums of money at stake that provide both incentives and opportunities for corrupt behaviors. The root cause of this corruption can be understood from Herbst (1990) perspective that public procurement constitutes the principal instrument for exercising political patronage, a practice that is especially prevalent in Kenya and many other African countries since there are very few means of economic advancement outside of the state. In Kenya, about 60 percent of government revenue is spent on procurement

and one can therefore understand why public procurement has been at the center of corruption.

Odhiambo and Kamau (2003) indicate that common corrupt practices in public procurement involve public officers, often under the influence of powerful politicians and businessmen, only inviting preferred firms, favoring certain firms at the short-listing stage, designing tender documents to favor particular firms and releasing confidential information. According to Migai-Akech (2005), this state of affairs is exacerbated by the fact that the procurement system is manned by junior officers, who are powerless to correct any anomalies and may easily be manipulated by their seniors and powerful politicians. The law should therefore address on how to deal with these seniors and powerful politicians in order to tame their negative influence in this sector. He further observes that corruption in public procurement is also facilitated by lack of transparency and elitist process of public procurement whose demands are invariably beyond the accessibility of ordinary tenderers.

Migai-Akech (2005: 20) observes that these deficiencies have contributed to huge losses in public procurement in Kenya. The Mars Group (2011) estimates that Kenya has lost some Kshs.700 billion (USD 8.24 bn) to shady procurement deals in the last five years. Odhiambo and Kamau (2003: 19) further indicate that inefficiencies in public procurement contribute to an unsuitable business environment which hurts local businesses. These inefficiencies lead to poor physical infrastructure and inefficient services (Migai-Akech: 20). Taken as a whole, these inefficiencies in the public procurement sector has had a direct negative impact to the economic growth and development.

Within this context, public procurement reform has essentially been about addressing corruption risks, with the view to reducing opportunities for public officials to solicit or accept bribes at the various stages of procurement processes as well as strengthening internal and external controls to ensure enforcements. Yet, as this study reveals, procurement reform usually affect the interest of well connected and organized groups in society, and the reform processes is therefore faced with major opposition and resistance among the ruling elites who are the major beneficiaries. However, very few

studies in the past have explicitly discussed the underlying political determinants of public procurement systems or the role of formal and informal arrangements and dynamics that may lead to change in procurement or budget processes in the country.

## CONCLUSION AND RECOMMENDATIONS

### ***4.1 Conclusion***

Public procurement sector in Kenya has achieved some level of success since the enactment of Public Procurement and Disposal Act, 2005. The main aim of the reforms as captured in Section 2 of the Act was to achieve the following objectives: to maximize economy and efficiency; to promote competition and ensure that competitors are treated fairly; to promote the integrity and fairness of those procedures; to increase transparency and accountability in those procedures; to increase public confidence in those procedures; and to facilitate the promotion of local industry and economic development. Further, the reforms were meant to harmonize the national procurement system with international procurement guidelines, in order to make the processes more transparent and to devolve procurement to local entities.

This study takes cognizance that Kenya now has a sound legal framework in place to govern the management of public procurement in the country. Further, the country as seen in this study has enacted enabling legislations to support this legal framework. To further strengthen the said legal order, there are several legal institutions which have been setup like the Ethics and Anti-Corruption Commission, National Cohesion and Integration Commission (NCIC), Constitutional Implementation Commission (CIC), Revenue Allocation Commission, Judicial Service Commission (JSC) and many others all meant to streamline the management of public affairs.

The enactment of the New Constitution has also been a milestone in this regard. This Constitution has empowered the citizenry who are now more informed and together with the civil society, are now actively involved in the push for accountability and good governance.

Through this Constitution, the country has witnessed hiring and vetting of judges through public participation. This has been the case for senior public officers. The Kenyan Parliament has increasingly become assertive and in some instances have vetoed certain decisions of the executive which was not there in the past. The Judiciary has equally become assertive and independent in their judgments. There are instances where the Bench has overturned the decisions of the executive on the grounds of their unconstitutionality.

From this study, it is clear that good procurement laws alone cannot deliver the expectations of Kenyans as far as public procurement reforms are concerned. As noted, many cases of corruption and impunity in this sector continued unabated even with the tightening legal regime. The results of the study indicate that the political influence and patronage of public procurement requires strict legal and ethical control. In this regard, we believe that the enactment of the Political Parties Act, 2007 may have been informed by these observations. Equally, this study takes note that Chapter 6 of the New Constitution dwells heavily on leadership and integrity of public officers. Special mention should be made that the New Constitution was made through a people driven process. This public participative process must have noted therefore the importance of integrity and ethical control of their leaders from their past performance.

Chapter 6 of the Constitution sets criteria of all those aspiring for various public offices as follows: the selection shall be on the basis of personal integrity, competence and suitability, or election in free and fair elections; objectivity and impartiality in decision making where nepotism, favoritism, improper motives, and corrupt practices are discouraged; public interest is demonstrated by honesty, integrity, accountability, and commitment to the service of the people. . Most importantly, such officers must meet the moral and ethical considerations as shall be laid down in an Act of Parliament. By the time of this study, this Act is yet to be enacted. This is a clear attempt of the Kenyan people to control the influence of their leaders in the management of public affairs. This being a people driven Constitution, is a further indication that the political patronage had been the main challenge in the management of public affairs and had to be controlled.

## 4.2 Recommendations

This study establishes the need to conduct a thorough study in which elements of political patronage are used to understand the underlying causes of procurement corruption in the public sector and map the sector's vulnerabilities, weaknesses, political patronage factors and drivers. Perhaps, the most important interest should be in looking at the actual reform process and the sequence of events that may lead to positive change in particular contexts by drawing operational lessons from past experiences on how to manage the politics of procurement reform processes. Against this background, emerging efforts to look at the political patronage aspects of public procurement constitute a promising trend to help understand the politics of procurement and address challenges and political barriers as they come up along public procurement reform process.

The study further makes the following recommendations:

- a) The country needs to fully operationalize the Constitution such that the spirit and letter of this document is fully upheld. This Constitution as currently constituted holds the key to the control and management of political patronage as regards the management of public procurement in Kenya.
- b) The checks and balances as provided for in the constitution and as expounded by the *Separation of Powers Doctrine* of Parliament, Executive and Judiciary should not only be upheld to the spirit and letter, but also enhanced to ensure none of these institutions exceeds their mandate as has been the case with the Executive arm of government in the past.
- c) Chapter 6 of the New Constitution regarding *Leadership and Integrity* should be fully operationalized by having Parliament enact enabling legislations as provided for in Section 80 of the Constitution.
- d) Ethics and Anti-Corruption Commission as established under Section 79 of the Constitution for purposes of ensuring full compliance with the requirements of leadership and integrity as enshrined in the Constitution should be fully operationalized. Although this Commission exist, it has been

mainly moribund since its inception because of the various underlying political interests undermining its authority.

- e) The various institutions created under the New Constitution like Magistrates and Judges Vetting Board, Judicial Service Commission, Police Service Commission, Constitution Implementation Commission, National Cohesion and integration commission among others should continuously be enhanced and strengthened to improve on the management of public affairs as anticipated in this Constitution. By extension, it is hoped that this will help to control the influence of political patronage on the management of public affairs in the country.

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