THE INFLUENCE OF CORRUPTION ON THE OPERATIONALISATION OF PUBLIC PROCUREMENT LAW IN KENYA

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ABSTRACT

The objective of this study was to investigate the interplay between political patronage and the influence of corruption on the operationalisation of the Public Procurement Law in Kenya. The main theoretical framework underpinning the study is the intersection between moral and legal philosophy and the role of law in social engineering. Theories explaining human conduct and the sociological school of thought where law is a tool for social engineering have been examined. Since corruption is considered a moral issue, theories of good governance have been used to emphasize the study. The study established that it is not the absence of the law that is the problem but lack of political goodwill. Instances were cited where institutions like Parliament, the Judiciary, PPOA, Ethics and Anti-Corruption Commission (EACC) and others, which are supposed to oversee the Executive, were found to be manipulated and compromised by the same Executive to rubberstamp irregular tender awards and unmerited appointments. An attempt was made to demonstrate that if public appointments are engineered against meritocracy, such appointees tend to owe their allegiance to those who influenced their appointments and work at their behest. If the law does not get the necessary moral and political support, then that law is largely dysfunctional. This is against the argument advanced by the positivist’s school of thought that, the law must be left to work on its own. This study concluded that it is the arm-twisting and compromise of institutions and individuals charged with the responsibility of ensuring the implementation of the law that hinders its workings and delivery.

Key words: Public Procurement, Corruption, Political Patronage, Procurement Reforms
Introduction

Public procurement is a crucial component that links the financial system with economic and social outcomes. It entails the purchase of goods, works and services in the right quantity, from the right source and at the right price by the government.\(^1\) It is the principal means through which a government meets its developmental needs such as the provision of essential services, physical infrastructure and the supply of essential commodities.\(^2\) Public procurement has been used by many governments all over the world to support the development of domestic industries, overcome regional economic imbalances, and support minority or disadvantaged communities.\(^3\)

It cuts across almost every sector of planning, program management, and budgeting.\(^4\) The size of public procurement varies between 5 to 8 percent of Gross Domestic Product (GDP) in industrialized countries.\(^5\) In most developing countries, it accounts for a significant proportion of the GDP; as much as 60% in some cases.\(^6\) By managing such a margin of the GDP of annual government budget of emerging economies, a public procurement system that optimizes value-for-money has a wide range of socio-economic benefits.\(^7\) Improved public procurement capacity results in greater value for money and increased public service delivery.\(^8\) Depending on how the system is managed, it has the potential to contribute to economic growth and the development of any nation.\(^9\) Weaknesses in the public procurement system undermine the delivery of socio-

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\(^1\) Peter M. Lewa, Management and organization of public procurement in Kenya: A review of proposed changes. Discussion Paper No. 092/2007, p. 1. Nairobi: Institute of Policy Analysis and Research (IPAR). Also see Financial Sector Deepening (FSD-Kenya), Procurement and Supply in Kenya: The Market for Small and Medium Enterprises, [2008, July]. ECI Africa: Woodmead. p. vi. Public sector procurement can be broken down into two categories, namely project specific procurement and general consumable procurement. In project specific procurement, goods, works or services are sought for a particular initiative, such as, a new road, a hospital, plant and equipment, whereas general consumable procurement relates to items that are required for a ministry or authority to perform its duties, such as: fuel, stationery, vehicle parts, road maintenance, and security.


\(^5\) Peter M. Lewa, 2007, at supra note 6,8, p. 2.


\(^7\) See Schapper and Veiga-Malta, 2011, p.2, at supra note 11, 19,22, & 25. Public Procurement often constitutes the largest domestic market in developing countries.

\(^8\) R.E. Kirsten Jensen and Marie Louise Refsgaard 2012, p. 48, supra note 13.

economic services to the people and increase the risk of investment in a country.\textsuperscript{10} There is need, therefore, for a solid legal, institutional and policy framework and a favourable political environment which encourages transparency and accountability in the management of the system.

Globally, management and control practices in public procurement have evolved over time with a lot of changes taking place in the last three decades. In the early 1980s, many governments embarked on a wide range of public sector reforms in their financial administration and management of procurement of goods, works and services.\textsuperscript{11} This happened as a result of a worldwide concern about the critical role of public procurement in economic development, growth of democratic space, and the need to present effective responses to the issues raised.\textsuperscript{12} At the international level, the two main objectives of the reform process were and still remain; “to promote a culture of performance and to make the public sector more responsive to the needs of government; by increasing the organizations’ accountability, promoting efficiency and effectiveness, introducing participative decision-making and adopting a customer focus.”\textsuperscript{13}

These reforms have contributed to an extraordinary growth in public procurement law and regulations globally. To professionally manage the procurement cycle, laws and regulations are required to ensure the process delivers as envisaged.\textsuperscript{14} Many governments have adapted their legislative frameworks to “explicitly reflect the modern context, and to provide for accountability in an environment in which professional skills rather than prescribed procedures may prevail.”\textsuperscript{15} Many countries have crafted their procurement laws along the model of United Nations Commission on International Trade Law (UNCITRAL)\textsuperscript{16}, the Government Procurement

\textsuperscript{11} P. Trepte, Regulating procurement: \textit{Understanding the ends and means of public procurement regulations}, 2004, New York: Oxford University Press, p. 66. Also see supra note 49 & 125.
\textsuperscript{12} See Schapper and Veiga-Malta, 2011, at supra note 11, 14, 22 & 25. Modern governments are now a complex service organizations and major economic players.
\textsuperscript{13} Ibid.
\textsuperscript{14} See Peter M. Lewa, 2007, Supra note 6, 8 & 12. p. 4.
\textsuperscript{15} Refer to Schapper and Veiga-Malta, 2011, p.2. See supra note 11, 14, 19 & 25. The standards and results-based approaches have the scope and flexibility to drive many organizational goals as well as stronger governance, largely because of the ways in which accountability is measured and assigned.
\textsuperscript{16} The Model Law on Public Procurement contains procedures and principles aimed at achieving value for money and avoiding abuses in the procurement process. The text promotes objectivity, fairness, participation and competition and integrity towards these goals. Transparency is also a key principle, allowing visible compliance with the procedures and principles to be confirmed. The 2011 Model Law replaced the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services.
Agreement (GPA)\textsuperscript{17} of World Trade Organization (WTO) and the Procurement Directives of the European Community (PDEC). These frameworks seek to drive behaviors towards adherence to standards and best practices that directly link public procurement to policies of good governance.\textsuperscript{18}

In Kenya, public procurement regime can be traced back to 1955 during the colonial days when the Central Tender Board (herein after referred to as CTB) was established through a circular from Treasury.\textsuperscript{19} However, a defined form of procurement and supplies system was set-up in 1959 when the Supplies and Transport Department was established in the Ministry of Works.\textsuperscript{20} The Treasury gave each ministry a vote to order their requirements from the department and the Government Printer.\textsuperscript{21} In 1960, the Treasury, for purposes of providing common-user services, issued the Ministry of Works, Stores and Services with Fund Regulations.\textsuperscript{22} These Regulations established the Supplies Branch as a division that deals with procurement of common-user items for government ministries, departments and agencies.\textsuperscript{23}

The post independent Kenya saw the continuation of the colonial procurement system where local purchases were determined by individual entities and international procurement was conducted by Crown Agents.\textsuperscript{24} This happened until 1974 when the first major shift came through a circular from Treasury, transferring the functions of the CTB Secretariat from the Ministry of Works to the

\textsuperscript{17}\textit{See} B. Hoekman, \textit{The World Trade Organization’s Agreement on Government Procurement: Expanding Disciplines, Declining Membership?}, 2009. Washington, D.C.: World Bank. The Agreement on Government Procurement of the World Trade Organization (WTO), commonly known as the GPA, establishes a framework of rights and obligations for government procurement among the WTO members that have signed it. Under the Agreement, suppliers of goods and services in other signatory countries have to be treated no less favorably than domestic suppliers in procurement covered by the Agreement, and that their laws, regulations and procedures relating to government procurement have to be open, transparent and fair.

\textsuperscript{18}\textit{Refer} to standards and results based procurement system in Schapper and Veiga-Malta, 2011, p.2, \textit{supra} note 11, 14, 19 & 22.


\textsuperscript{20}Jerome Ochieng and Mathias Muehle, \textit{Development and Reform of the Kenyan Public Procurement System}, 2012.\textit{Journal of Public Procurement}, p.1763. The Department dealt with purchasing and supplies services which was public procurement.

\textsuperscript{21}\textit{Ibid.}

\textsuperscript{22}\textit{See} Ochieng and Muehle, 2012, at \textit{supra} note 30, p. 1764 on Fund Regulations.

\textsuperscript{23} The Supplies Branch still exist to-date under the Ministry of Public Works while the Government Press exists under the Office of the President and continues to provide printing services to the government.

\textsuperscript{24}\textit{See} Ochieng and Muehle, 2012, at \textit{supra} note 30, 31 & 32 p. 1764
Treasury. In 1978, the Government issued the Supplies Manual which was supplemented by circulars from Treasury that were issued from time to time by the then Ministry of Finance.

Reforms initiated the public procurement sector in 1997 culminated in the adoption of the Public Procurement Regulations, 2001 under the Exchequer and Audit Act. These Regulations unified all the circulars that had governed the public procurement system, abolished the CTB and heralded the establishment of MTCs, Procurement Appeals Board (herein referred to as PPCRAB) and the Public Procurement Directorate (herein referred to as PPD) as oversight agencies. Although enacting these Regulations were a great milestone in the administration and management of public procurement in the country, it could not forestall problems such as: uncontrolled contract variations, overpricing, lack of a structured authorization of expenditure levels, lack of fair and transparent competition, and inappropriate application of procurement methods. Other prevalent problems included: non delivery of goods, uncontrolled low value procurement of items, poor procurement records and documentation, excessive delays in the procurement process, conflict of interest among players in the procurement system, and lack of legal permanence and enforcement. The Regulations were amended in 2002 but still very little was achieved.

In 2002, the country embarked on drafting new public procurement legislation with the view to address the challenges above. Drafters used the UNCITRAL Model Law on Procurement of Goods, Construction and Services with Guide to Enactment (1995) to develop the text of the legislation. After an extensive discussion of the drafts with relevant stakeholders, the Public Procurement and Disposal Act (PPDA) was approved by Parliament and gazetted in 2005. The

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25 Membership remained inter-ministerial but the level was raised to that of deputy secretary with alternates remaining as under-secretaries. The chief executive officer was the secretary and the secretariat was managed by supplies officers.
28 Ibid.
30 See Ochieng and Muehle, 2014, at supra note 29,30,31,33 & 36, p.1768
31 See PPOA at supra note 44 & 45 p.3.
32 Ibid.
33 See UNCITRAL Model Law at supra note 23.
35 Public Procurement and Disposal Act, 2005 establishes procedures for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by public entities to achieve the following objectives: to
Act became operational on 1st January, 2007 after the Minister for Finance approved and gazetted the Public Procurement and Disposal Regulations of 2006. The Act set forth the general procurement rules, system of committees and units within each procuring entity.

Public procurement is also anchored in the Constitution of Kenya vide Article 227. Promulgated in 2010, Chapter Twelve of the Constitution commits the Government to the principles of good financial governance (transparency, target-orientation and cost efficiency). Part of good financial management is the budget execution and spending. This is why public procurement, which is part of budget spending, was introduced under Part XII on Public Finance. The challenge now is to align the PPDA to conform to the provisions of Article 227(2) of the Constitution. At the time of drafting this thesis, the PPDA of 2005 stands repealed by the Public Procurement and Asset Disposal Act, 2015 which came into force on January 7, 2016. However, the 2015 Act is not substantially different from the previous Act in a way that could alter the grounding of the present study. It is noted here that the 2015 Act has been altered to take into considerations the devolved structure of the national and county governments.

The outlined history of public procurement in Kenya demonstrates that a lot has been achieved as far as legal, policy, and institutional reforms in the sector. The system is now adequately regulated after the government fully operationalised the PPDA and the public procurement having been

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.

37 Article 227 of the Constitution, 2010 on the procurement of goods and services states; “(1) when a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. (2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following—(a) categories of preference in the allocation of contracts; (b) the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination.
39 Article 227(2) states that, “An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following—-(a) categories of preference in the allocation of contracts; b) the protection or advancement of persons, categories of persons or groups previously disadvantaged by unfair competition or discrimination; c) sanctions against contractors that have not performed according to professionally regulated procedures, contractual agreements or legislation; and d) Sanctions against persons who have defaulted on their tax obligations, or have been guilty of corrupt practices or serious violations of fair employment laws and practices”.
40 Peter M. Lewa, 2007, at supra note 6,8,12,21& 26, p. 10 on Analysis of Legal and Institutional Frameworks in Public Procurement.
entrenched in the Constitution vide Article 227.\textsuperscript{41} The necessary institutional frameworks such as the PPOA, PPAB and PPARB are in place and working relatively well.\textsuperscript{42} The government has also established the necessary policy frameworks to streamline the administration and management of public procurement in the country.\textsuperscript{43}

On the face value, public procurement in Kenya seems to be working well, but underneath lies a serious problem of corruption which is threatening to erode the gains made so far in the sector.\textsuperscript{44} Irregular processes of awarding tenders form bulk of corruption in the public procurement.\textsuperscript{45} This position is qualified by the outcome of corruption perception surveys conducted by the Ethics and Anti-Corruption Commission (EACC) of Kenya between 2010 and 2014. The report indicated that over 70 percent (by value) of corrupt practices in Kenya occur in the public procurement sector.\textsuperscript{46}

Further statistics compiled by the Mars Group, a civil society organization on corruption in the public procuring entities between 2004 and 2010 show the country lost an estimated Kshs.700 billion (£5bn) through flaws in public procurement.\textsuperscript{47} Ongoing and concluded public procurement-related cases have been used to show that corruption in the public procurement sector in Kenya has reached endemic levels.\textsuperscript{48} There was an official admission to that effect from H.E. President Uhuru Kenyatta:

\textsuperscript{41}See PPOA, 2011, at supra note 44, 45, 50, 51 & 60, on the State of Public Procurement Reforms in Kenya.
\textsuperscript{42}See Ochieng and Muehle, 2014, p.1779 at supra note 30-32, 34, 37-42 & 49.
\textsuperscript{43}Ibid.
\textsuperscript{44}Preface of the Report of the Departmental Committee on Administration and National Security on the Matter of the Inquiry into the Tender for the Proposed National Surveillance, Communication, Command and Control System for the National Police Service. The Departmental Committee on Administration and National Security is a Committee of the National Assembly of Kenya constituted under Standing Order 216 and is mandated to, inter-alia, “investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments.”
\textsuperscript{45}The Mars Group, \textit{The Cost of Grand Corruption in Kenya between 2004-2010} (2011). Nairobi: The Mars Group. p. 1-3. These are not mere allegations but statistics which have been done by qualified and high-standing economists in this country. Also see The Ethics and Anti-Corruption Commission of Kenya Report on the State of Corruption in Kenya (2013 and 2014). A number of corruption related cases mainly involving public procurement have been listed as reported and taken up by EACC, undergoing investigations, pending in court or concluded.
\textsuperscript{47}See The Mars Group, Estimates for Grand Corruption in the Country, supra note 66, p.3-4.
\textsuperscript{48}See Republic of Kenya, \textit{Presidential Speech of H.E. President Uhuru Kenyatta During the State of the Nation Address at Parliament Buildings, Nairobi on Thursday, 26th March, 2015}. The President stated that, “There is no doubt that Kenya is firmly on the path of transformation. However, my administration and this nation are confronted
It has come to my attention that the conduct of various State and Public Officers within Ministries, State Departments, State Corporations and Agencies falling under the ambit of the National Executive and the Public Service has fallen far short of the demands of the Constitution and the expectations of Kenyans with regard to Ethics and Integrity. My office continues to receive numerous briefs, reports and complaints from citizens of blatant breaches of ethical standards, instances of pilferage and out-right theft involving civil servants, state and public officers. These unsavory, unethical and corrupt practices continue to be perpetuated and thrive in spite of various reminders and warnings.49

At the time of conducting this research, one hundred and seventy five (175) high ranking state and public officers within ministries, state departments, state corporations and agencies were asked to step aside on allegations of corruption, abuse of office and incompetence to pave way for investigations.50 Among those implicated were cabinet secretaries, principal secretaries, a number of governors and senators, members of parliament and other high ranking government officers. This implies that, in spite of the legal and institutional reforms so far undertaken in the sector, Public Procurement Law has largely failed to deliver as anticipated. This study presupposes that:- for anyone to properly interrogate the problem of corruption in the sector, he/she must go beyond the three frequently researched ‘elements’51 of procurement system namely: legal, policy and institutional frameworks and interrogate the environment in which the law operates.

THEORETICAL REVIEW OF THE INFLUENCE OF CORRUPTION ON THE OPERATIONALISATION OF THE PUBLIC PROCUREMENT LAW IN KENYA

The main theoretical framework underpinning the study is the intersection between moral philosophy and legal philosophy and the role of law in social engineering. Theories explaining human conduct and the sociological school of thought where law is a tool for social engineering

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51 Denote the components of public procurement which corresponds to the elements of a system which influence the efficacy and efficiency of the system.
have been examined. Since corruption is considered a moral issue, theories of good governance have been used to underpin the study.

**Moral Philosophy versus Legal Philosophy**

Law and morality are intimately related not as a matter of accident but as a matter of necessity. This necessary intimate relationship consists that law would make no sense at all where there is no morality or at least some basic moral sensitivities and perceptions. The sacred codes, enactments and acts of the law become meaningless if they are stained by the actions of those who do not honor the ethics of their professions. The value of the law is in how those who have been given the trust to uphold it carry out their duties.

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

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

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54Ibid.
56Ibid.
57Guest, et al., 2004, p.41.
On equality itself, he provides an interesting critique which illustrates why thinking on jurisprudence should be seen to amount to far more than a focus on the type of equality that law should provide.\(^5\) This line of thought gave the current study a foundation to lay a claim that, the law cannot work on its own; it takes the effort of everyone in the society to ensure the success of the law. The province of jurisprudence in the current study is a critical and reform-minded effort to understand law and its social, political, and economic effects.

According to Austin, the approach to understanding law is loosely grouped under the title ‘legal realism’.\(^6\) He argues that law can only be understood in terms of its practical effects, and that law was what the courts actually did and said.\(^7\) He further argues that analytical jurisprudence is attaining clarity on the categories and concepts of law, including the morality of law, its effectiveness, its use and abuse, or its location in historical development.\(^8\) He asserts that it is important to understand how to use law as a technique of rational governance.

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

Sociological School of Thought

This study was closely guided by Finnis’s Natural Law Theory.\(^9\) The essential claim that Finnis makes about the law is that it is a social institution whose purpose is to regulate the affairs of the people. He argues that law should contribute to the creation of a community in which all people

\(^5\)Ibid. His literature helps to understand what law is supposed to do in our lives and the decorum with which legal gate-keepers are supposed to conduct themselves.


\(^7\)Ibid.

\(^8\)Ibid.

can flourish and realize the different basic values. Seen this way, law becomes a moral project. This provides a clear connection between moral philosophy and legal philosophy.

Whether one’s description of law is correct or not will in part depend on whether his/her moral views are correct, for those views will inform the way in which he/she conceives the project of law. He denies that positivism provides a full or accurate picture of law. While he welcomes the insights into the nature of law that have originated with positivists, he denies that these insights provide a sufficient theory of law.

Legal positivism has a long history and a broad influence. It has antecedents in ancient political philosophy and is discussed, and the term itself introduced, in mediaeval legal and political thought. The modern understanding owes little to these forbears. It’s most important roots lie in the conventionalist political philosophies of Hobbes and Hume, and its first full elaboration is due to Jeremy Bentham (1748-1832) whose account Austin adopted, modified, and popularized. For much of the next century an amalgam of their views, according to which law is the command of a sovereign backed by force, dominated legal positivism and English philosophical reflection about law. By the mid-twentieth century, this account had lost its influence among working legal philosophers. Its emphasis on legislative institutions was replaced by a focus on law-applying institutions such as courts, and its insistence of the role of coercive force gave way to theories emphasizing the systematic and normative character of law.

Some of the most important architects of this revised school of positivism are the Austrian jurist Hans Kelsen (1881-1973) and the two dominating figures in the analytic philosophy of law, H.L.A. Hart (1907-92) and Joseph Raz among whom there are clear lines of influence, but also important contrasts. Legal positivism’s importance, however, is not confined to the philosophy of law. It can be seen throughout social theory, particularly in the works of Marx, Weber, and Durkheim, and also among many lawyers, including the American “legal realists” and most contemporary

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64 See J. Finnis 1980, at supra note 106, p.73.
66 Ibid at p. 197
feminist scholars. They may have disagreed on many other points, but many of these philosophers acknowledge that law is essentially a matter of social fact.

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

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

It is beyond doubt that moral and political considerations bear on legal philosophy. As Finnis says, the reasons we have for establishing, maintaining or reforming law include moral reasons, and these reasons therefore shape our legal concepts.\textsuperscript{68} Once one concedes, as Finnis does, that the existence and content of law can be identified without recourse to moral argument, and that “human law is artifact and artifice; and not a conclusion from moral premises,” the argument is largely irrelevant to the truth of legal positivism. This mirrors also Lon Fuller’s criticisms of Hart.\textsuperscript{70}

\textsuperscript{68}Finnis, John (1996), p. 204.
\textsuperscript{69}Finnis, John (1996), p. 205.
Apart from some confused claims about adjudication, Fuller has two main points. First, he thinks that it isn’t enough for a legal system to rest on customary social rules, since law could not guide behavior without also being at least minimally clear, consistent, public, prospective and without exhibiting to some degree those virtues collectively called “the rule of law.” It suffices to note that this is perfectly consistent with law being source-based. Even if moral properties were identical with, or supervened upon, these rule-of-law properties, they do so in virtue of their rule-like character, and not their law-like character. Whatever virtues inhere in or follow from clear, consistent, prospective, and open practices can be found not only in law but in all other social practices with those features, including custom and positive morality.

These virtues may be minor; there is little to be said in favour of a clear, consistent, prospective, public and impartially administered system of racial segregation, for example. Fuller’s second worry is that if law is a matter of fact, then we are without an explanation of the duty to obey. He asks how “an amoral datum called law could have the peculiar quality of creating an obligation to obey it”.71 One possibility he neglects is that it doesn’t. The fact that law claims to obligate is, of course, a different matter and is susceptible to other explanations.72 But even if Fuller is right in his unargued assumption, the “peculiar quality” whose existence he doubts is a familiar feature of many moral practices. Compare promises: whether a society has a practice of promising, and what someone has promised to do, are matters of social fact. Yet promising creates moral obligations of performance or compensation. An “amoral datum” may indeed figure, together with other premises, in a sound argument to moral conclusions.

While Finnis and Fuller’s views are compatible with the positivist thesis, the same cannot be said of Ronald Dworkin’s important works (Dworkin 197873 and 198674). Positivism’s most significant critic rejects the theory on every conceivable level. He denies that there can be any general theory of the existence and content of law; he denies that local theories of particular legal systems can identify law without recourse to its merits, and he rejects the whole institutional focus of positivism. A theory of law is for Dworkin a theory of how cases ought to be decided and it begins,

71Ibid.
not with an account of political organization, but with an abstract ideal regulating the conditions under which governments may use coercive force over their subjects. Force must only be deployed, he claims, in accordance with principles laid down in advance. A society has a legal system only when, and to the extent that, it honors this ideal, and its law is the set of all considerations that the courts of such a society would be morally justified in applying, whether or not those considerations are determined by any source.

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

Dworkin’s rich and complex arguments have attracted various lines of reply from positivists. One response denies the relevance of the phenomenological claims. Controversy is a matter of degree, and a consensus-defeating amount of it is not proved by the existence of adversarial argument in the high courts, or indeed in any courts. As important is the broad range of settled law that gives rise to few doubts and which guides social life outside the courtroom. As for the diversity argument, so far from being a refutation of positivism, this is an entailment of it. Positivism identifies law, not with all valid reasons for decision, but only with the source-based subset of them. It is no part of the positivist claim that the rule of recognition tells us how to decide cases, or even tells us all the relevant reasons for decision. Positivists accept that moral, political or economic considerations are properly operative in some legal decisions, just as linguistic or logical ones are. Modus ponens holds in court as much as outside, but not because it was enacted by the legislature or decided by the judges, and the fact that there is no social rule that validates modus ponens is true but irrelevant. The authority of principles of logic or morality is not something to be explained by legal philosophy; the authority of Acts of Parliament must be; and accounting for the difference is a central task of the philosophy of law.
Other positivists respond differently to Dworkin’s phenomenological points, accepting their relevance but modifying the theory to accommodate them. So-called “inclusive positivists” such as Waluchow, Coleman, Soper and Lyons argue that the merit-based considerations may indeed be part of the law, if they are explicitly or implicitly made so by source-based considerations. For example, Canada's constitution explicitly authorizes for breach of Charter rights, “such remedy as the court considers appropriate and just in the circumstances.” In determining which remedies might be legally valid, judges are thus expressly told to take into account their morality. And they may develop a settled practice of doing this whether or not it is required by any enactment; it may become customary practice in certain types of cases. Reference to moral principles may also be implicit in the web of judge-made law, for instance in the common law principle that no one should profit from his own wrongdoing. Such moral considerations, inclusivists claim, are part of the law because the sources make it so, and thus Dworkin is right that the existence and content of law turns on its merits, and wrong only in his explanation of this fact. Legal validity depends on morality, not because of the interpretative consequences of some ideal about how the government may use force, but because that is one of the things that may be customarily recognized as an ultimate determinant of legal validity. It is the sources that make the merits relevant.

To understand and assess this response, some preliminary clarifications are needed. First, it is not plausible to hold that the merits are relevant to a judicial decision only when the sources make it so. It would be odd to think that justice is a reason for decision only because some source directs an official to decide justly. It is of the nature of justice that it properly bears on certain controversies. In legal decisions, especially important ones, moral and political considerations are present of their own authority; they do not need sources to propel them into action.

Second, the fact that there is moral language in judicial decisions does not establish the presence of moral tests for law, for sources come in various guises. What sounds like moral reasoning in the courts is sometimes really source-based reasoning. For example, when the Supreme Court of Canada says that a publication is criminally “obscene” only if it is harmful, it is not applying J.S. Mill's harm principle, for what that court means by “harmful” is that it is regarded by the community as degrading or intolerable. Those are source-based matters, not moral ones. This is just one of many appeals to positive morality, i.e. to the moral customs actually practiced by a given society, and no one denies that positive morality may be a source of law. Moreover, it is
important to remember that law is dynamic and that even a decision that does apply morality itself becomes a source of law, in the first instance for the parties and possibly for others as well. Over time, by the doctrine of precedent where it exists or through the gradual emergence of an interpretative convention where it does not, this gives a factual edge to normative terms. Thus, if a court decides that money damages are in some instances not a “just remedy” then this fact will join with others in fixing what “justice” means for these purposes. This process may ultimately detach legal concepts from their moral analogs (thus, legal “murder” may require no intention to kill, legal “fault” no moral blameworthiness, an “equitable” remedy may be manifestly unfair, etc.).

Bearing in mind these complications, however, there undeniably remains a great deal of moral reasoning in adjudication. Courts are often called on to decide what would reasonable, fair, just, cruel, etc. by explicit or implicit requirement of statute or common law, or because this is the only proper or intelligible way to decide. Hart sees this as happening pre-eminently in hard cases in which, owing to the indeterminacy of legal rules or conflicts among them, judges are left with the discretion to make new law. “Discretion,” however, may be a potentially misleading term here. First, discretionary judgments are not arbitrary: they are guided by merit-based considerations, and they may also be guided by law even though not fully determined by it -- judges may be empowered to make certain decisions and yet under a legal duty to make them in a particular way, say, in conformity with the spirit of preexisting law or with certain moral principles. Second, Hart’s account might wrongly be taken to suggest that there are fundamentally two kinds of cases, easy ones and hard ones, distinguished by the sorts of reasoning appropriate to each. A more perspicuous way of putting it would be to say that there are two kinds of reasons that are operative in every case: source-based reasons and non-source-based reasons. Law application and law creation are continuous activities for, as Kelsen correctly argued, every legal decision is partly determined by law and partly underdetermined: “The higher norm cannot bind in every direction the act by which it is applied. There must always be more or less room for discretion, so that the higher norm in relation to the lower one can only have the character of a frame to be filled by this act.” This is a general truth about norms. There are infinitely many ways of complying with a

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75 See Raz 1994, pp. 238-53
76 See Kelsen, 1967, p. 349.
command to “close the door” (quickly or slowly, with one's right hand or left, etc.) Thus, even an “easy case” will contain discretionary elements. Sometimes such residual discretion is of little importance; sometimes it is central; and a shift from marginal to major can happen in a flash with changes in social or technological circumstances. That is one of the reasons for rejecting a strict doctrine of separation of powers -- Austin called it a “childish fiction” according to which judges only apply and never make the law, and with it any literal interpretation of Dworkin's ideal that coercion be deployed only according to principles laid down in advance.

It has to be said, however, that Hart himself does not consistently view legal references to morality as marking a zone of discretion. In a passing remark in the first edition of *The Concept of Law*, he writes, “In some legal systems, as in the United States, the ultimate criteria of legal validity explicitly incorporate principles of justice or substantive moral values …”.77 This thought sits uneasily with other doctrines of importance to his theory. For Hart also says that when judges exercise moral judgment in the penumbra of legal rules to suppose that their results were already part of existing law is “in effect, an invitation to revise our concept of what a legal rule is …”78 The concept of a legal rule, that is, does not include all correctly reasoned elaborations or determinations of that rule. Later, however, Hart comes to see his remark about the U.S. constitution as foreshadowing inclusive positivism (“soft positivism,” as he calls it). Hart's reasons for this shift are obscure.79 He remained clear about how we should understand ordinary statutory interpretation, for instance, where the legislature has directed that an applicant should have a “reasonable time” or that a regulator may permit only a “fair price:” these grant a bounded discretion to decide the cases on their merits. Why then does Hart and even more insistently, Waluchow and Coleman come to regard constitutional adjudication differently? Is there any reason to think that a constitution permitting only a “just remedy” requires a different analysis than a statute permitting only a “fair rate?”

One might hazard the following guess. Some of these philosophers think that constitutional law expresses the ultimate criteria of legal validity: because unjust remedies are constitutionally invalid and void *ab initio*, legally speaking they never existed (Waluchow). Thus, morality sometimes

77 See Raz, 1994, p. 204
78 Kelsen, 1958, p. 72.
79 See Green, 1996.
determines the existence or content of law. If this is the underlying intuition, it is misleading, for
the rule of recognition is not to be found in constitutions. The rule of recognition is the ultimate
criterion (or set of criteria) of legal validity. If one knows what the constitution of a country is, one
knows some of its law; but one may know what the rule of recognition is without knowing any of
its laws. You may know that acts of the Bundestag are a source of law in Germany but not be able
to name or interpret a single one of them. And constitutional law is itself subject to the ultimate
criteria of systemic validity. Whether a statute, decision or convention is part of a country's
constitution can only be determined by applying the rule of recognition. The provisions of the 14th
Amendment to the U.S. constitution, for example, are not the rule of recognition in the U.S., for
there is an intra-systemic answer to the question why that Amendment is valid law. The U.S.
constitution, like that of all other countries, is law only because it was created in ways provided
by law (through amendment or court decision) or in ways that came to be accepted as creating law
(by constitutional convention and custom). Constitutional cases thus raise no philosophical issue
already present in ordinary statutory interpretation, where inclusive positivists seem content with
the theory of judicial discretion. It is, of course, open to them to adopt a unified view and treat
every explicit or implicit legal reference to morality -- in cases, statutes, constitutions, and customs
-- as establishing moral tests for the existence of law. Although at that point it is unclear how their
view would differ from Dworkin’s. So we should consider the wider question: why not regard as
law everything referred to by law?

Exclusive positivists offer three main arguments for stopping at social sources. The first and most
important is that it captures and systematises distinctions we regularly make and we have good
reason to continue to make. We assign blame and responsibility differently when we think that a
bad decision was mandated by the sources than we do when we think that it flowed from a judge's
exercise of moral or political judgment. When considering who should be appointed to the
judiciary, we are concerned not only with their acumen as jurists, but also with their morality and
politics, and we take different things as evidence of these traits. These are deeply entrenched
distinctions, and there is no reason to abandon them.

The second reason for stopping at sources is that this is demonstrably consistent with key features
of law's role in practical reasoning. The most important argument to this conclusion is due to Raz\textsuperscript{80}.

\textsuperscript{80} See Raz, 1994
Although law does not necessarily have legitimate authority, it lays claim to it, and can intelligibly do so only if it is the kind of thing that could have legitimate authority. It may fail, therefore, in certain ways only, for example, by being unjust, pointless, or ineffective. But law cannot fail to be a candidate authority, for it is constituted in that role by our political practices. According to Raz, practical authorities mediate between subjects and the ultimate reasons for which they should act. Authorities' directives should be based on such reasons, and they are justified only when compliance with the directives makes it more likely that people will comply with the underlying reasons that apply to them. But they can do that only if is possible to know what the directives require independent of appeal to those underlying reasons. Suppose we agree to resolve a dispute by consensus, but after much discussion find ourselves in disagreement about whether some point is in fact part of the consensus view. It will do nothing to say that we should adopt it if it is indeed properly part of the consensus. On the other hand, we could agree to adopt it if it were endorsed by a majority vote, for we could determine the outcome of a vote without appeal to our ideas about what the consensus should be. Social sources can play this mediating role between persons and ultimate reasons, and because the nature of law is partly determined by its role in giving practical guidance, there is a theoretical reason for stopping at source-based considerations.

The third argument challenges an underlying idea of inclusive positivism, what we might call the Midas Principle. “Just as everything King Midas touched turned into gold, everything to which law refers becomes law … ”. Kelsen thought that it followed from this principle that “It is … possible for the legal order, by obliging the law-creating organs to respect or apply certain moral norms or political principles or opinions of experts to transform these norms, principles, or opinions into legal norms, and thus into sources of law”. He regarded this transformation as effected by a sort of tacit legislation. If sound, the Midas Principle holds in general and not only with respect to morality, as Kelsen makes clear. Suppose then that the Income Tax Act penalizes overdue accounts at 8% per annum. In a relevant case, an official can determine the content of a legal obligation only by calculating compound interest. Does this make mathematics part of the law? A contrary indication is that it is not subject to the rules of change in a legal system, neither courts nor legislators can repeal or amend the law of commutativity. The same holds for other

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81 See Kelsen, 1967.
82 See Kelsen1945, p. 132
social norms, including the norms of foreign legal systems. A conflict-of-laws rule may direct a Canadian judge to apply Mexican law in a Canadian case. The conflicts rule is obviously part of the Canadian legal system. But the rule of Mexican law is not, for although Canadian officials can decide whether or not to apply it, they can neither change it nor repeal it, and best explanation for its existence and content makes no reference to Canadian society or its political system. In like manner, moral standards, logic, mathematics, principles of statistical inference, or English grammar, though all properly applied in cases, are not themselves the law, for legal organs have applicative but not creative power over them. The inclusivist thesis is actually groping towards an important, but different, truth. Law is an open normative system: it adopts and enforces many other standards, including moral norms and the rules of social groups. There is no warrant for adopting the Midas Principle to explain how or why it does this.

RESEARCH METHODOLOGY

The study employed a mixed method approach of descriptive and investigative survey design and desktop research to investigate the influence of political patronage on the operationalisation of the PPDA. Descriptive research studies are designed to obtain pertinent and precise information concerning the current status of phenomena and whenever possible to draw valid general conclusion from the facts discovered. A descriptive survey aims at obtaining information from a representative sample of the population and from that sample the researcher is able to present the findings as being representative of the population as a whole. The mixed method design was considered appropriate for the study because it allows the researcher to describe, record, analyze and report conditions as it exists in the field. This study was conducted in Nairobi County and mainly focused on the public and private sector organizations involved in public resource management oversight duties, administration of justice, law and order. Nairobi was selected as the location of the study as it is the Capital hence the hub of the procurement entities. The population of the study was the entirety public procurement process comprising of all the public

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83 See Raz, 1975, pp. 152-54
85 Ibid.
procurement entities, watchdog organizations and potential suppliers. The study targeted owner-managers for information because they are the decision makers in businesses which are interested in doing business with the government and are actively involved in their day to day operations. It is estimated that about 8,000 private enterprises do business with the public sector every year in Nairobi County.\textsuperscript{87} Hence, the hyper-geometric distribution was used to determine the sample size as follows:\textsuperscript{88}

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

Where \( n \) = Required sample size
p and q= Population proportions which are set at 0.5 each
\( N \) = Population size
\( Z \) = Level of confidence

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

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

The study had a population of less than 10,000

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

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

\[
= \frac{8,000(1.96)^2(0.5)(0.5)}{0.05^2(8,000-1) + (1.96)^2(0.5)(0.5)}
\]

\[
= 7683.2
\]

\textsuperscript{88}See C.R. Kothari, 2010 at supra note 130
The study also used the non-probabilistic purposive sampling technique to select heads of departments/supply chain departments in various public entities to participate in the study. This was done due to the sensitive nature of information touching on the elements of corruption, ethnicity, and political patronage in public procurement sector. The study relied on informers from Parliament of Kenya, EACC, PPOA, PPARB, Mars Group, legal firms and other institutions which were interviewed on the functioning and weaknesses of the Public Procurement Law, institutional failures, political interference in the process, and the necessary legal reforms. Questionnaires and an interview schedule were used to collect primary data from respondents. The study also reviewed information from secondary sources such as relevant case laws, books, hansard and committee reports from Parliament, internet sources, statutes and government policy documents.

Data analysis is the representation of data gathered during a study.\(^{89}\) This study gathered both quantitative and qualitative data which were coded and analyzed using Statistical Package for Social Sciences (SPSS) computer software version 21. SPSS software was used because of its ability to appropriately create graphical presentations of questions, data for reporting, presentation and publishing. SPSS is able to handle large amount of data and given its wide spectrum of statistical procedures purposefully designed for social sciences, it was also quite efficient.\(^{90}\) The analyzed data was presented in the form of frequency distribution tables and bar graphs where necessary.

Descriptive statistics were used to analyze the data in frequency distributions and percentages which were presented in tables and figures. Qualitative data was analyzed thematically by categorizing them along themes which were guided by the research hypotheses to establish links between data and major patterns that emerged from the research. Discussions and presentations of the analyzed data were done in tables of frequency distribution, percentages, bar graphs and pie-charts. Measures of dispersion were used to provide information about the spread of the scores in the distribution.\(^{91}\) A comprehensive document analysis particularly data from judicial decisions and

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\(^{89}\)See Orodho, 2010 at supra note 126.


\(^{91}\)Ibid.
relevant case laws, those from Parliament and other independent commissions like the EACC were undertaken. This was done thematically in conformity with the research objectives.

RESULTS AND DISCUSSION

Procurement-related Corruption in the Public Sector in Kenya

The present study sought to establish the level of corruption, nepotism and political patronage in public service in Kenya. To achieve that, the respondents were asked to state how often their firms faced challenges related to illegitimate business practice, irregular payment and corruption in Government tendering and Table 1 presents the findings.

Table 1: Frequency of Corruption Related Challenges in Public Tenders

<table>
<thead>
<tr>
<th>Frequency of Challenges</th>
<th>Frequency</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Never</td>
<td>52</td>
<td>20.4</td>
</tr>
<tr>
<td>Seldom</td>
<td>34</td>
<td>13.3</td>
</tr>
<tr>
<td>Sometimes</td>
<td>105</td>
<td>41.2</td>
</tr>
<tr>
<td>Frequently</td>
<td>51</td>
<td>20.0</td>
</tr>
<tr>
<td>Very Frequently</td>
<td>4</td>
<td>1.6</td>
</tr>
<tr>
<td>Constantly</td>
<td>9</td>
<td>3.5</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>255</strong></td>
<td><strong>100</strong></td>
</tr>
</tbody>
</table>

Table 1 indicates that 41.2% of the respondents sometimes experienced corruption-related challenges while 20.4% never experienced such challenges at all. The study established that twenty percent (20%) of the respondents frequently experienced corruption challenges while 13.3% seldom had such challenges in tendering process. From the results, a majority (61.2%) of the respondents experienced corruption-related challenges when seeking to do business with the government. At 61.2%, these results indicate that the problem of corruption is definitely a serious phenomenon in Kenya.

Corruption is a complex and multifaceted phenomenon with multiple causes and effects, as it takes on various forms and functions in different contexts. The outcome of this study item confirms what other scholars have written on corruption and its many forms and faces. The phenomenon of corruption ranges from the single act of a payment contradicted by law to an endemic malfunction
of a political and economic system.\textsuperscript{92} The problem of corruption is usually seen as a structural problem of politics, economics, or as a cultural and individual moral problem.

The complex nature of corruption has made most observers agree that it pervades many societies and that there are no quick-fix solutions to it.\textsuperscript{93} The “Source Book” of Transparency International does for instance maintain that public programmes, government organizations, law enforcement, public awareness and the creation of institutions to prevent corruption are nothing but elements in a long-term process that needs to be supported from above and below and that also needs attitude changes at all levels.\textsuperscript{94} It has also been noted that corruption does not disappear as countries develop and modernize, but that it takes on new forms.\textsuperscript{95}

Samuel Huntington noted that where political opportunities are scarce, corruption occurs as people use wealth to buy power, and where economic opportunities are few, corruption occurs when political power is used to pursue wealth.\textsuperscript{96} By looking at the different kinds of resources transferred, a distinction has been made between corruption in economic terms and corruption in social terms. Economic corruption takes place in a market-like situation and entails an exchange of cash or material goods, which is basic to corruption.\textsuperscript{97} This is a strict definition of corruption, reflected in the regulations that stipulate limits to what amount can be “given” before it is considered a bribe. Transfers are not only in cash or other tangibles. However, the exchange takes place in a social setting with a number of cultural and moral meanings.\textsuperscript{98}

Understood this way, corruption is a form of social exchange. Social corruption is conventionally understood as an integrated element of clientelism.\textsuperscript{99} Clientelism often implies an exchange of material benefits but cannot be reduced to this, because clientelism has a wider cultural and social implication.\textsuperscript{100} Clientelism, nepotism, ethnic and other favoritism are all variants of corruption, in

\textsuperscript{92} Jens Chr. Andviy; Odd-Helge Fjeldstad; Inge Amundsen; Tone Sissener; and Tina Soreide, \textit{Research on Corruption: A Policy Oriented Survey}, (December, 2000), NORAD.
\textsuperscript{93}Ibid.
\textsuperscript{94} Pope (1997)
\textsuperscript{95}Girling (1997)
\textsuperscript{96} Huntington (1968)
\textsuperscript{97}Médard, 1998, p. 308.
\textsuperscript{98}Ibid.
\textsuperscript{99}Ibid.
\textsuperscript{100}Ibid.
social terms. To establish the level of procurement related malpractices, a descriptive analysis was done on 7 items which denote procurement malpractices/corruption to investigate the variable relationship between the items and establish patterns of responses. Table 2 presents the findings.

**Table 2: Descriptive Analysis of Procurement-Related Corruption**

<table>
<thead>
<tr>
<th>Dimensions</th>
<th>Analysis N</th>
<th>Mean</th>
<th>Std. Dev</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rigging, fixing and collusion in awarding tenders</td>
<td>239</td>
<td>1.72</td>
<td>0.934</td>
</tr>
<tr>
<td>Favouritism due tribal, gender or political affiliation</td>
<td>239</td>
<td>1.95</td>
<td>0.915</td>
</tr>
<tr>
<td>Restricting a tender without sufficient ground</td>
<td>239</td>
<td>2.05</td>
<td>1.001</td>
</tr>
<tr>
<td>Accepting tenders after the deadlines</td>
<td>239</td>
<td>2.34</td>
<td>1.163</td>
</tr>
<tr>
<td>Interference of the tendering process by individuals</td>
<td>239</td>
<td>1.52</td>
<td>0.839</td>
</tr>
<tr>
<td>Unethical business practice among competitors</td>
<td>239</td>
<td>1.88</td>
<td>0.871</td>
</tr>
<tr>
<td>Unwarranted/fraudulent termination of procurement</td>
<td>239</td>
<td>1.66</td>
<td>0.859</td>
</tr>
<tr>
<td>Corruptly influencing a tender appeals process</td>
<td>239</td>
<td>2.28</td>
<td>1.041</td>
</tr>
</tbody>
</table>

Table 2 shows that a total of 239 tenderers responded to this particular item under study. From the findings, the average ranged from 1.52 to 2.34 from a Likert scale where 1 represented strongly agreed and 5 strongly disagreed. On the other hand the standard deviation was from a low of 0.839 to a high of 1.163.

To further establish the trend of responses on procurement related malpractices faced during Government procurement process based on percentages, the response given was based on the Likert scale. The respondents rated the extent to which they agreed with the given aspects which were indicators of the identified factors on a scale of 1 – 5 where 1 was strongly disagree and 5 was strongly agree and Table 3 presents the findings.

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\(^{101}\)Ibid.
Table 3: Procurement-related Corruption

<table>
<thead>
<tr>
<th>Procurement Related Malpractices</th>
<th>SA</th>
<th>A</th>
<th>U</th>
<th>D</th>
<th>SD</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rigging, fixing and collusion in awarding tenders</td>
<td>54.5%</td>
<td>25.4%</td>
<td>15.8%</td>
<td>3.3%</td>
<td>1.0%</td>
</tr>
<tr>
<td>Favouritism due tribal, gender or political affiliation</td>
<td>34.1%</td>
<td>48.6%</td>
<td>11.5%</td>
<td>3.7%</td>
<td>2.0%</td>
</tr>
<tr>
<td>Restricting a tender without sufficient ground</td>
<td>38.6%</td>
<td>35.2%</td>
<td>18.1%</td>
<td>6.4%</td>
<td>1.7%</td>
</tr>
<tr>
<td>Accepting tenders after the deadlines</td>
<td>26.1%</td>
<td>38.0%</td>
<td>20.0%</td>
<td>10.2%</td>
<td>5.8%</td>
</tr>
<tr>
<td>Interference of the tendering process by individuals</td>
<td>62.8%</td>
<td>25.3%</td>
<td>8.5%</td>
<td>2.4%</td>
<td>1.0%</td>
</tr>
<tr>
<td>Unethical business practice among competitors</td>
<td>34.3%</td>
<td>52.9%</td>
<td>6.7%</td>
<td>4.7%</td>
<td>1.3%</td>
</tr>
<tr>
<td>Unwarranted/fraudulent termination of procurement</td>
<td>51.4%</td>
<td>34.5%</td>
<td>11.4%</td>
<td>1.4%</td>
<td>1.4%</td>
</tr>
<tr>
<td>Corruptly Influencing a tender appeals process</td>
<td>54.7%</td>
<td>23.0%</td>
<td>31.9%</td>
<td>10.9%</td>
<td>0.4%</td>
</tr>
</tbody>
</table>

As presented in Table 3 above, 54.5% of the respondents agreed that one of the greatest procurement-related malpractice is bid rigging/fixing and collusion in awarding tenders, 34.1% indicated that it includes favouritism due to tribal, gender or political affiliation and 38.6% cited restricting a tender without sufficient ground to restrict or single source. The study further revealed that 26.1% agreed that procuring entities accept tenders after the deadlines for submission, 62.8% cited interference of the tendering process by senior public officers, politicians and well connected individuals; 34.3% agreed that there are unethical business practices among competitors to increase their chances of winning tenders. The study found out that 51.4% of the respondents consider unwarranted/fraudulent termination of procurement proceedings under section 36 (1) of the Public Procurement and Disposal Act as rampant while 54.7% agreed that corruptly influencing a tender appeals process was a common malpractice.

Given an understanding of corruption as a particular state-society relationship, the genesis of corruption is consequently found at the two fields of interaction between the state and the society namely: at the national and the international arena.\(^{102}\) Corruption takes place at the meeting point between the state and the various non-state actors.\(^{103}\) On one side is the corrupt state official; on the other side is the supplier of bribes. The state officials can be anyone from the president down

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\(^{102}\)Moody-Stuart, 1997, p.111.

\(^{103}\)See Jens Chr. Andviyet \textit{et al.} 2000, p.13.
the political and executive hierarchy (bureaucratic corruption) to the most remote public servant.  

The many possible non-state counterparts include the general public, any non-governmental and non-public individual, corporate and other organizational entities. Many theories and conceptualizations of corruption call attention to the corrupt individuals and organizations that initiate and participate in corruption, and the advantages they gain.

Internationally, the globalization of markets, finances, and numerous other transactions have expanded the opportunity of collusive and concealed transactions, including between the various non-state players and the “host” governments and their representatives. Multinational companies, for instance, buy concessions, preferences and monopolies; kickbacks are offered on tenders, loans and contracts; and development projects are sometimes eased through by including travels, financial and other fringe benefits for local officials. Corrupt host countries are sometimes particularly attractive for certain businesses from abroad. However, international actors in business, politics and development cooperation can be responsible for advancing corruption or reforms. Foreign-sponsored bribery tends to be held by many observers in developing countries as the most significant contributing factor to corruption.

Nationally, corruption takes place in the different branches of government like the executive, legislative and judicial organs, and also in the political and administrative institutions like the civil service, local authorities and parastatals. These institutions can be corrupted because of overlapping and conflicting authority, political power-struggles over access to scarce resources, manipulated flows of information, and personal relationships of dependence and loyalty. In particular, a weak separation between civil service and party politics, a weak professionalization of state entities, lack of administrative accountability and transparency, and deficient political control and auditing mechanisms increases corruption in these institutions.

105 Ibid.  
106 See Moody-Stuart (1997)  
107 Ibid. See Moody-Stuart, 1997, p.112.  
109 See Rose-Ackerman (1999)  
110 Ibid.  
111 Ibid.  
112 Doig and Theobald, 2000, p.3.  
113 See Doig and Theobald, 2000, p.4.
Public officials colluding with cronies and business associates to skew procurement processes in their favor are rife. A network of cowboy contractors who do shoddy work, inflate bills and make huge claims for public projects that are either poorly executed or not done at all exists. Section 27 of the PPDA gives accounting officers the responsibility for establishing the tender committees and carry out procurement within their entities. The discharge of this responsibility can work well as long as there is no conflict of and vested interest in the procurement process. However, one cannot rule out vested interests in the process.

**Probe Reports and Cases Illustrating Instances of Alleged Corruption in the Public Procurement**

The following probe reports and cases were reviewed to illustrate instances of alleged corruption in the public procurement in recent times and the interplay between law and politics in the sector.

(a) **The Procurement of Electronic Voting Devices for the 2013 General Election by the Independent Electoral and Boundaries Commission (IEBC)**

In the matter of *The Procurement of Electronic Voting Devices for the 2013 General Election by the Independent Electoral and Boundaries Commission (IEBC)*, the Public Accounts Committee (PAC) of the National Assembly moved in to audit the procurement of Biometric Voter Registration (BVR) kits that had been procured for the March 2013 general election, by the IEBC. This was informed by the massive failure of the BVR kits on the Election Day and suspected misappropriation of funds and mismanagement of their procurement. The special audit and the Committee hearings exposed massive procurement irregularities aided by lack of a procurement plan. BVR procurement for instance saw tender opening minutes not duly signed, financial and technical proposals were opened at the same time contrary to the law; and the CEO appointed

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119 PAC Report (March, 2016) p. 11.
members in the evaluation committee from the due diligence team that travelled to India to evaluate one of the bidders.\textsuperscript{120} The procurement stalled after the vested interests failed to budge.\textsuperscript{121}

The procurement was then taken over by Government which saw advice by the Attorney General ignored. The procurement was direct, costing the country a principal loan amount of Kshs. 6,480,000,000.00, plus interest of Kshs. 1,592,829,037.41, loan insurance of Kshs. 988,250,009.00 and a brokerage fee of Kshs. 2,494,559,058.55. The total cost of the tender is 11,555,638,104.96.\textsuperscript{122} on EVIDs kits, the mismanagement of procurement continued unabated. Technical advice by experts on the viability of the use of EVIDs kits in the 2013 general election was ignored by the IEBC.\textsuperscript{123} No due diligence was done on the successful bidder and the kits were deployed uninspected contrary to the law. This led to massive failure by the kits on Election Day.\textsuperscript{124} The contract was then varied by more than 10\% in contravention of procurement laws.\textsuperscript{125} No evidence of written approval by the tender committee of the IEBC was available on record. There is also no evidence to prove that a variation on the contract price was based on the prescribed price raising the question of legality of the decisions taken in respect of the material sections of the Act. Kshs. 250 million was paid to a supplier without a valid contract.\textsuperscript{126} Further, on the Electronic Results Transmission, mobile phones were un-procedurally procured using quotation method, at Kshs. 17,847,049.00, WAN was directly procured\textsuperscript{127} from Safaricom Ltd at a cost of Kshs. 6,132,013 and a further Kshs. It is not true that Safaricom Ltd was the only service provider who could offer the said services to IEBC. The decision to procure WAN from Safaricom was therefore against the provisions of Section 74(2) of the Act since Kenya has other competent WAN service providers

\begin{flushleft}
\textsuperscript{120} Ibid.
\textsuperscript{121} Ibid.
\textsuperscript{122} Ibid.
\textsuperscript{123} Ibid.
\textsuperscript{124} Ibid.
\textsuperscript{125} Section 47 of the PPDA, 2005 states: An amendment to a contract resulting from the use of open tendering or an alternative procurement procedure under Part VI is effective only if – (a) the amendment has been approved in writing by the tender committee of the procuring entity; and (b) any contract variations are based on the prescribed price or quantity variations for goods, works and services.
\textsuperscript{126} Ibid.
\textsuperscript{127} Section 74 of the PPDA, 2005 provides that: (2) A procuring entity may use direct procurement if the following are satisfied – (a) there is only one person who can supply the goods, works or services being procured; and (b) there is no reasonable alternative or substitute for the goods, works or services.
\end{flushleft}
who could provide the same services. The Report also indicates that Kshs. 480,516 was paid to Airtel for services not rendered.\textsuperscript{128} Again, this was a blatant case of corruption.

(b) The Tender for the National Surveillance, Communication, Command and Control System for the National Police Service

This follows a decision by the Government of Kenya in April 2014 to single source procurement of the national surveillance, communication, command and control system for the National Police Service (NPS) from Safaricom Limited at a total cost of eighteen billion, seven hundred and eighty one million, two hundred and fifty one thousand, eight hundred and forty four shillings (Ksh. 18,781,251,844.00).\textsuperscript{129} The procurement was necessitated by the need to replace the obsolete communication system a great challenge to service delivery, having been installed three decades ago. \textsuperscript{130} The project comprises four components; Digital Trucking Radio Network, Central Command Operation Center, Installation of a Video Surveillance System, and Internet Connectivity to Police Stations.\textsuperscript{131}

In this procurement process, the government was accused of single sourcing against the provisions of Section 74 (3) which states that “a procuring entity may use direct procurement if the following are satisfied: there is an urgent need for the goods, works or services being procured; because of the urgency the other available methods of procurement are impractical; and the circumstances that gave rise to the urgency were not foreseeable and were not the result of dilatory conduct on the part of the procuring entity”.\textsuperscript{132} Facts of the case which the present study sought to address include: whether or not security is an emergency issue in Kenya; if it was impractical to go through an open tender which is supposed to last for 30 days if it is not challenged at the PPARB or in a court of law; and if the circumstances that gave rise to the urgency were not foreseeable.

The justification for the choice of the procurement method was that “… the country is currently experiencing upsurge of security challenges among them serious crimes such as; terrorism, robbery with violence, abductions and kidnappings, and carjacking and car thefts. The spate of the

\textsuperscript{128} See PAC Report (March, 2016) p. 11.
\textsuperscript{130}\textit{Ibid}.
\textsuperscript{131}\textit{Ibid}.
aforementioned criminal activities in the country is beginning to adversely affect the economy especially tourism and investment throughout the country”.\footnote{133}

This study is of the opinion that the justification given by the Procuring Entity for choice of procurement method does not lie within the circumstances envisaged under Section 3 of the PPDA, 2007 cited earlier and therefore does not satisfy Section 74(3) of the Act. This argument is ground on the reasoning that security issue is a recurrent problem in Kenya and may not qualify to be an emergency. A number of high casualty attacks have been reported in this country over the last two decades. Terrorist have previously attacked the US Embassy in Nairobi (1998), the Paradise Hotel in Kikambala Mombasa (2004), Westgate Shopping Mall in Nairobi (2013), Mpeketoni Mombasa (2014), a Nairobi-bound Passenger Services Vehicle (PSV) from Mandera County (2014), Garissa University College (2015), Kenya Defense Forces (KDF) AMISOM Camp in Al Adeh Somalia (2016) and many other relatively smaller attacks which have occurred in Nairobi, Mombasa, Wajir, Garissa and Mandera Counties. There is also the perennial problem of bandit attacks in the North Rift region and many other ethnic related attacks witnessed in many parts of this country in the last couple of years.

Urgent need is defined under Section 3 of the Procurement Act as “the need for goods, works or services in circumstances where there is eminent or actual threat to public health, welfare, safety, or of damage to property, such that engaging in tendering proceedings or other procurement methods would not be practicable”.\footnote{134} In view of this, this study concludes that the GoK should have undertaken an open tender procurement process instead of single sourcing as there was no emergency to warrant violation of the law. It took over a month, from the date the government invited a proposal from Safaricom Limited and the actual date of tender award. Security will always be a problem in this country as long as the KDF are still in Somalia. This study also asserts that Parliament also failed in its oversight duty when it approved the irregular tender. This points to a possible case of arm-twisting by the Executive, and hence, patronage.

\textbf{(c) The controversial hire of an Aircraft for the Deputy President (2013)}

\footnote{133}{See Republic of Kenya, July 2014, at supra note 58, 59 and 60, Annex 2, p.7.}
\footnote{134}{Ibid.}
This matter refers to an official tour by the Deputy President to Congo Brazzaville, Ghana, Nigeria and Gabon in a hired aircraft between 16th and 19th May 2013. The Deputy President undertook the tour on behalf of the President, in his official capacity as the President’s principal assistant, in accordance with Article 147 of the Constitution. The delegation numbered fourteen in total, including the Deputy President himself and the total cost of the tour is recorded as being twenty one million, one hundred and sixty seven thousand, five hundred and seventy nine and twenty cents (Kshs.21,167,579.20).

The issue which came up for determination before the PAC of the National Assembly of Kenya was if the government procurement regulations, procedures and practices were breached in the process of hiring the aircraft. The findings of the Committee indicate that the procurement regulations, procedures and practices were breached in the process of hiring the aircraft. The report indicates that there was no Inspection and Acceptance Committee established for the procurement, and so the aircraft was not inspected as required. This was reckless and exposed the Deputy President and the rest of the delegation to potential risk. It was established that the supplier, EADC Ltd, quoted to supply a Global Express 6000 aircraft but instead delivered a Challenger 850. This variation was found to be irregular and illegal.

The Committee also established that at the time of initiating the procurement, the Office of the Deputy President was not exchequered for this expenditure. This occasioned desperate efforts to shift funds from other vote heads and to seek extra exchequer from treasury. Initiating government procurement in the absence of an exchequer is in breach of procurement regulations. It was also found out that no contract was signed between the Office of the Deputy President and the supplier, EADC Ltd, for the aircraft hire. An incomplete Local Service Order (LSO) was irregularly used to initiate payment to the supplier, and four (4) LSO and one Local Purchase Order (LPO) leaves mysteriously disappeared in suspicious circumstances, raising real fears of intended fraud.

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136Ibid.

137Ibid.
The Report also indicated that there was a deliberate attempt to exploit the haste with which the trip was arranged and use it as a cover to defraud government and the taxpayer. The highly suspicious disappearance of the LSOs and LPO, coupled with the failure by the Office of the Deputy President to institute any investigations into this grave matter, and the subsequent hurried transfer of the two officers directly involved in the procurement of the aircraft hire, all point to attempted fraud and a deliberate subsequent effort aimed at a cover-up.

(d) Goldenberg Scandal

In 2004, a commission of inquiry was constituted by the then President of the Republic of Kenya to investigate the conditions under which the country lost billions of shillings of tax-payers’ money in a gold export compensation racket involving government officials and Goldenberg International Ltd.\(^{138}\) The Goldenberg affair led to a loss by tax payers’ money approximated at Kshs. 6 billion through illegal transactions involving government officials and exporters.\(^{139}\) It involved a series of business deals of dubious or non-existent gold exports through Goldenberg International Limited (GIL) and Exchange Bank Ltd between 1991 until 1993 when the scandal was exposed by a whistle blower, David Munyakei, then an employee of Central Bank.\(^{140}\) The business deals revolved around various economic schemes, export compensation, pre-shipment financing, retention accounts, foreign accounts and cheque-kiting.\(^{141}\)

Attempts have been made by the previous regimes to investigate the Goldenberg scum including a setting up of a parliamentary committee to no avail.\(^{142}\) As a result of these successive failures to arrive at the truth, a commission of inquiry was appointed by the government in 2003 to look into the Goldenberg affair.\(^{143}\) The mandate of the Commission was relatively wide and included: “to inquire into the origins of, acceptance and implementation by the CBK of the Rediscounting Facility for Pre-Export Bills of Exchange; to inquire into the rediscounting facility which caused

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\(^{138}\)See Goldenberg International Case at supra note 125.


\(^{142}\) Ibid.

\(^{143}\) President Kibaki through Gazette Notice No. 1237 and 1238 of February 24, 2003 and Gazette Notice No. 7593 of October 29, 2003 appointed commissioners to look into the Goldenberg affair.
loss to the CBK; to inquire how monies fraudulently paid to the GIL were allegedly used by companies and individuals to fraudulently earn profits by speculating in convertible foreign exchange certificates; and to inquire into the effect the Goldenberg-related civil and criminal litigation had on the administration of justice in Kenya. Others included: to inquire into the beneficiaries of the Goldenberg scandal; to inquire and trace any local or international assets acquired directly or indirectly with the monies fraudulently obtained through Goldenberg; to inquire into the financial detriment the scandal had on the economy of Kenya; and inquire into the identity of those involved and recommend necessary action.¹⁴⁴

The Commission carried out public hearings and submitted its report to then President Mwai Kibaki in October, 2005. The report listed the names of the alleged perpetrators and the role they played in the scandal and made various recommendations. The Commission found out that apart from the criminal cases in which the role of the Attorney-General had been considered, approximately eight other Goldenberg-related cases had been filed at the High Court in Nairobi. All of the eight cases were tax-related. The Commission also established that the architect of this scandal, Mr. Kamlesh Pattni and his associated companies had used the court process to stop attempts to recover tax from him.

Mr. Pattni was granted an injunctive relief after the judiciary failed and/or neglected to prosecute the substantive suits to completion. He obtained injunctions that rendered suits pending indefinitely. Injunctions were in some cases, the losing party would go to the Court of Appeal and there, too, there would be an array of applications with the effect that none of the Goldenberg cases was ever completed. The Commission found that:

The ‘Goldenberg Affair’ serves to illuminate in real terms the institutional, structural and procedural weaknesses prevailing in our court system and how a party can effectively exploit them to defeat the very purpose of the system of administration of justice.

Curiously, the Commission did not point out what these weaknesses were and how they could be dealt with. Further, the Commission’s report was silent on the question of how Mr. Pattni and his cronies managed to subvert the cause of justice and to literally capture and control the courts. Some

of the questions that the commission needed to have addressed but were never raised were as follows: who were the players within the corridors of justice that aided and abetted Goldenberg International Ltd in its underhand operations? why is it that the courts could not dispense with the needless rounds of applications, adjournments and objections, and deal with the substantial issues before them? what price was paid by those who benefited from these maneuverings within the courts? was there bribery involved in the temporary injunctions that seemed to favor Goldenberg International? and was the transfer of various judicial officers in the course of hearing Goldenberg-related cases merely coincidence or part of a more sinister plot to sink the ‘Goldenberg Affair’ deeper into a web of mystery and incomprehension?

The Report failed to investigate the impact of Goldenberg-related cases on the administration of justice. It appears like the Commission merely raised a few questions and left the bulk of investigations unexplored. Identities of the shareholders, directors and other beneficial owners of all entities involved in the transaction should have been obtained to establish the real owners and beneficiaries of the ‘Goldenberg Affair.’

The Commission’s findings based on the concept of a legal or juristic person, epitome for instance in the case of Salomon vs. Salomon (1897) that decrees the separate and distinct legal existence of a company.145 This principle that a company is distinct from the directors who run it and the shareholders, who own it, is often abused to conceal fraud and corruption related issues. Just as in the case of Salomon vs. Salomon (1897),146 it would have been prudent for the Commission to look beyond the veil of incorporation and unmask the individuals involved.

145 Salomon v Salomon & Co [U.K. 1897] Accessed at www.thelawteacher.net on Feb 02, 2015. This is a case filed after Mr. Solomon’s family owned limited company went into liquidation; the liquidator argued that the debentures used by Mr. Salomon as security for the debt were invalid, on the grounds of fraud. The judge, Vaughan Williams J. accepted this argument, ruling that since Mr. Salomon had created the company solely to transfer his business to it, the company was in reality his agent and he as principal was liable for debts to unsecured creditors.

146 In the Salomon v Salomon & Co [U.K. 1897] case, the High Court and the Court of Appeal in the UK ruled against Mr. Salomon, on the grounds that he abused the privileges of incorporation and limited liability, which the Legislature had intended only to confer on “independent bona fide shareholders, who had a mind and will of their own and were not mere puppets”. The lord justices of appeal variously described the company as a myth and a fiction and said that the incorporation of the business by Mr. Salomon had been a mere scheme to enable him to carry on as before but with limited liability.
The Commission was expected to proceed on the basis that corporate personality is really legal fiction, the company being considered as a person under the law yet having no physical existence. A company exists, deals, and acts through its human controllers who are the mind and soul of the company. As such, a company may be guilty of criminal offences if its controllers commit them. Whereas there are few references to the directors and shareholders in a number of the companies mentioned in the report as having been involved in the ‘Goldenberg Affair’, one does not get the sense that the Commission made any serious, focused and/or deliberate attempt to discharge the burden of this particular mandate.

It is instructive that the other shareholder and Director of Goldenberg International Ltd and Exchange Bank Limited was the then Director of Intelligence, James Kanyotu. However, there was need to establish whether he was acting on his behalf or as a proxy. The Commission did not establish this. The Commission also did not get to establish whether Uhuru Highway Development Ltd, related to the then Grand Regency Hotel (now Laico Regency Hotel) at the centre of Goldenberg and its proceeds, had among its shareholders the then President of the Republic of Kenya as at 12th February, 1985.

Perhaps, due to the involvement of the then President in these deals, the Commission avoided that line of enquiry. Consequently, the issue was not investigated conclusively and the powerful individuals involved exposed. A number of legal and administrative actions have been taken against some of the alleged perpetrators. However, a number have obtained court orders to have their names expunged from the report. For instance, in 2006, the High Court expunged the name of Hon. George Saitoti, the former Vice President and Minister for Security from the list of those accused of involvement in the Goldenberg scandal. This is believed to have happened as a result of behind-the-scene push by some powerful forces in government to have the names of some of these alleged perpetrators expunged. This is the hidden hand of influence in the way cases are decided that was the subject of interrogation in this study.

147 See the judgment of the Constitutional Court in High Court Misc. Civil Application NO. 102 OF 2006 Republic vs The Judicial Commission of Inquiry into the Goldenberg Affairs & Others ex parte Hon Professor George Saitoti, p.67.
(e) MFI Office Solutions Ltd v Kenya Ports Authority (Case No. 32/2007)

This was an appeal against the decision of the Corporation tender committee of the Kenya Ports Authority (KPA) in the matter of tender No. KPA/005/2007PM (Operation of Printing Shop). In this case, the procuring entity admitted that section VI on the technical specifications was retained despite the amendments on the tender document through an addendum. However, the procuring entity evaluated the tenders based on the schedules of requirements under Section v. The technical evaluation was based on the requirements set out under clause 2.32 of the tender documents. One of the factors considered was performance details of the equipment used. Whereas there were technical specifications at schedule VI for the digital machines, there were no corresponding technical specifications for offset machines.

The Review Board ruled that since the procuring entity was not procuring equipment, it ought to have specified in the tender document that the evaluation of the tender would be performance-based. Part of the ruling stated that:

The procuring entity should have provided an evaluation criterion based on performance and not on the equipment. This way, it would have been open to the bidders to offer any type of the machine, whether offset or digital, so long as it would have met the job performance requirements.

Taking into consideration all the inconsistency, the procuring entity was found to have acted irregularly and the appeal was successful hence cancellation of the award of the tender and an order that the procuring entity re-tender using clear specifications. From an informant at the Review Board, the procuring entity never retendered as directed by the Board and MFI Office Solutions Ltd. The winner of the nullified tender, actually went ahead and supplied the equipment in total disregard of the ruling.

It was also established that MFI Office Solutions Ltd. had been awarded that particular tender three times before. In trying to establish why this particular company was fraudulently awarded this tender, the informant reported that the tenderer was indirectly associated to the then Managing Director of Kenya Ports Authority. This perhaps explains why the procuring entity was reluctant to honor the ruling of the Review Board to retender. The insider dealings in procurement of equipment for the Printing Shop at the Kenya Ports Authority and the apparent conflict of interest
thereof are indications of corruption, impunity and to an extent, abuse of executive authority in the Corporation’s hierarchy of command and therefore, within the boundaries of this study.

(f) Kenya Airports Authority v Anhui Construction Engineering Group (March, 2012)
Informants at the PPAB highlighted the case of Kenya Airports Authority (KAA) v Anhui Construction Engineering Group of China of March 2012. In August 2008, a consultant was commissioned to do a periodic review of the Airport’s Master Plan. The review that informed the decision to build a new airport terminal next to the Jomo Kenyatta International Airport (JKIA) was completed in February, 2011. KAA Board of Directors then approved the Greenfield Terminal Project and KAA management later advertised the tender in June, 2011. In October 2011, The Permanent Secretary in charge of Ministry of Transport wrote to KAA asking them to proceed with the tender as a design, build, and finance tender. In early November, five firms submitted their bid documents by the tender bid submission closing date.
In mid-November 2011, the Prime Minister asked for a brief on the status of the project and told KAA management to seek Cabinet approval. However, the directive by the Prime Minister for KAA management to seek cabinet approval may have been well-intentioned but was ill-timed in this particular case since the PPDA, 2005 provides otherwise in matters of public procurement. His directive came too late as the process was almost concluded. This amounted to political interference.

The PPDA, 2005 Part V on Open Tender provides for the procedure to be followed while procuring goods and services for the government through an open tender. The role of the executive in a tender process remains that of policy direction and should be the first step in a tender process. Once, the proposed project is approved, and a policy directive issued by the parent ministry, the same is communicated to the concerned government body under which the project is to be implemented. It is at this stage that availability of finances for the tender is established and if sufficient funds are available for the project, the PPDA requires a tender committee of the institution to advertise the

149 Ibid.
150 Ibid.
tender, receive bids, evaluate bids, and award the tender to the lowest bidder or any other deemed to offer the best value for money.

In July 2012, a tender row erupted between the Minister for Transport and the management of Kenya Airports Authority over this tender whose estimated value was Kshs.55 billion. The Minister for Transport ordered cancellation of this tender which had been awarded to Anhui Construction Engineering Group of China. This matter aroused public interest and was a subject of heated debate among various stakeholders further raising eyebrows. The minister was taken to task by parliament to explain his cancellation order and the source of his authority. As noted elsewhere in this study, the minister purported to have exercised his authority emanating from Section 4 of the KAA Act which gave him powers to supervise, direct, and control use of funds in excess of Kshs.10 million.

This purported authority by the Minister from the KAA Act is in direct conflict with Section 5(1) of the Public Procurement and Disposal Act, 2005 which directs that the provisions of the latter to prevail in case of any apparent conflict in matters of procurement.\textsuperscript{151} The minister’s directive to cancel the tender was, therefore, not only illegal, but also amounted to gross interference to the procurement process. This is a classic example where the political elite have interfered with public procurement process and law because of varied vested interests. Corruption, foul play, state arms working at cross-purposes were cited as among the major reasons behind this tender row which has been touted as Kenya’s single largest project in aviation industry since 1978.\textsuperscript{152} Coming from the Ministry of Transport whose brief includes improvement of public transport and infrastructure made it even more puzzling.

To illustrate the forces that were working against the proposed Airport project, an informant (number 1) at the PPOAB observed as follows:

This is how a government working at cross-purposes, corruption, and foul play is threatening to derail Kenya’s single largest and most important project in the

\textsuperscript{151} Section 5.(1) of the PPDA states; “If there is a conflict between this Act or the regulations made under this Act and any other Act or regulations, in matters relating to procurement and disposal, this Act or the regulations made under this Act shall prevail”.

\textsuperscript{152} Paul Wafula, Why Airport Tender has Stalled. A Smart Company Investigative Journal published in the Daily Nation, (Tuesday, September 4\textsuperscript{th}, 2012). P.8.
aviation industry since 1978. Varied interests surrounding the project have sucked in almost all relevant government ministries, including the Offices of the President, the Prime Minister, the Inspector General of State Corporations, the courts, the PPARB, the KACC, the Attorney General, and the PPOA.

Another informant from the same body indicated to this study that both the Office of the President and that of the then Prime Minister had tried to unduly influence this particular procurement. The informant observed:

In March 2012, the KAA Board attended two meetings in the same day. One was at the Office of the President, where a senior government official told them to proceed with the process and fast-track it as the President was anxious to do the ground-breaking before he goes into retirement. At a later meeting at the Ministry of Transport, the Minister repeated his position that the process ought to be restarted, leaving the Board confused at the conflicting directives. Given these circumstances, it is not clear why the KAA Managing Director, went ahead and entered into a legal contract with the Chinese firm that bagged the tender despite numerous requests from the Board of Directors and his parent Ministry to wait for a Cabinet decision.

As seen above, when the then Prime Minister gave the directive that KAA seeks for cabinet approval for the project, the tender process was already at an advanced stage and the deadline for submission of bids was over. Informant number 2 further observed:

Ideally, this directive ought to have been made at the initial stages of the process when the Government is mandated to provide policy direction concerning a public project. At the time the Minister was making this directive, the process was at an advanced stage and any intervention by the Minister may be interpreted as interference with the process.

The directive by the minister was, therefore, ill-timed and may be taken as a proof of executive interference in public tendering process. Another question that stands out in the tender row was whether the Transport Minister was justified in his order to the KAA management to cancel the tender. The law provides for termination of tenders but does not indicate that a cabinet minister can play a role in the process.

The action of the minister therefore, is an ideal example of undue political patronage on this particular tender process against the general procurement rules as contained in Part V of the PPDA,
2005. This is a form of corruption in public procurement where powerful political leaders, heads of state corporations, and other politically connected individuals interfere with public procurement processes to further their vested economic interests.

(g) Riley Falcon Security Services Ltd & Total Security Surveillance Ltd v Kenya Pipeline Company Ltd (Cases No. 53/2009 and 54/2009)

Reviews against the decision of the Tender Committee of the Kenya Pipeline Company Ltd in the matter of expression of Interest No: SU/QT/306N/09 for provision of security services for the year 2009/2010. In the above matter, the Review Board scrutinized the tender documents that were placed before it and made the following observations, “all the tender documents including that of the applicant bore green colored stamp by the procuring entity’s Internal Audit Department; all the documents including that of the applicant were duly signed by four officers on the 21st July, 2009 which was the tender opening date; and the board noted that all the signatures in all the tender documents were the same and that the different officers were using different pens to sign the documents.”

The verdict of the Review Board read “In the circumstances, whichever way the Review Board looks in this matter, it is clear that the entire tender process was flawed and the integrity of the officers handling the whole tender process is questionable. Accordingly, the Review Board finds that the entire procurement process is tainted with irregularities and is completely flawed and therefore, annuls the entire procurement process and order that the retender be done.”

The line of question that the Review Board took and determined clearly indicates that there was an attempt by Kenya Pipeline Company employees to collude with a prospective bidder to defraud the company through forged documents and undue influence in the process arising from insider trading. Fraud is a form of corruption as outlined elsewhere in this study.

153 Section 38 of the PPDA, 2005 outlines Inappropriate Influence on Evaluations.


155 Public Procurement Administrative Review Board, Case Files 2006-2012. Decided cases obtained from PPOA.
(h) The Illegal and Irregular Allocation of Public Land in Kenya

In 2003, the President of the Republic of Kenya established a Commission of Inquiry to look into the illegal and irregular allocation of public land in the country since independence. The Commission was established through a Gazette Notice No. 4559 of July, 4, 2003. It was chaired by Paul Ndung’u, a senior Nairobi Advocate and was mandated to inquire into the following issues: the legality of allocation of public land to private individuals and/or corporations; to collect information on the nature and extent of unlawful and irregular allocations; prepare a list of all lands unlawfully acquired or irregularly allocated, to whom they were allocated, date of allocation and other particulars to the subsequent dealings in the concerned lands; and ascertain any persons or corporations to whom such land was allocated; and identify any public official involved. Others were to recommend legal and administrative measures needed for the restoration of such land; recommend legal action in case these lands were not able to be restored to their proper title; recommend criminal investigation or prosecutions of and against the concerned persons; and recommend legal and administrative measures which should be taken in the future.156

The Commission completed its task after nine months and thereafter, presented its report to the President in June, 2004. The report was published on December 16, 2006 following massive agitation by the civil society and other actors. Several properties were identified as having been irregularly allocated to various individuals and institutions.157 Individual beneficiaries of these irregular allocations were identified. The list was largely consisted of the names political elite and high ranking government officials in Kenya.

Criminal investigations and prosecutions were recommended against the perpetrators in accordance with the terms of reference of the Commission.158 However, to date, the report has never been implemented in spite of the millions of tax payers’ money spent in the inquiry. This is an indication of lack of political goodwill to prosecute corruption and by extension, an effort to perpetuate impunity in this country.

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156 The terms of reference for the Judicial Commission of Enquiry into the Illegal and Irregular Allocation of Public Land was accessed from the Ndung’u Report of 2006.
158 Ibid.
(i) **The Maize Importation Scandal of 2010/2011**

The audit firm of Price Waterhouse Coopers (PWC) was mandated by the Office of the Prime Minister then and the Ministry of Finance to carry out an independent forensic investigation into the alleged irregularities in the implementation of the subsidized maize scheme at the National Cereals and Produce Board (NCPB). The task was to investigate and give recommendations to the concerned ministries as to the manner in which the subsidized maize scheme, intended to cushion the poor Kenyans against high food prices, was mismanaged by both government and parastatal officials.

The scheme as conceived by government involved sale of maize from the Strategic Grain Reserve to millers by the NCPB at fixed prices to avoid exploitation from middle men and other business people and the millers would then avail the maize meal for sale at subsidized prices.\textsuperscript{159} However, in March 2009, there was a major public outcry arising from the massive mismanagement of the subsidized maize scheme. Officials at NCPB and the Ministries of Agriculture and Finance were accused of involvement in irregular sale of the maize. The PWC audit was commissioned in the face of unrelenting public pressure on government to unearth the goings on in relation to the scheme.

PWC presented its report in December 22, 2009. Several high profile individuals and senior government officers were found culpable.\textsuperscript{160} Some were suspended, others were reportedly being investigated, but largely, little has been done or is likely to be done with regard to the losses which arose from the maize scandal. Those who were suspended were later reinstated to their positions or transferred to other dockets in government essentially ruling out any possibility of ever recovering public funds which were lost in the process.

(j) **Irregular Acquisition of Cemetery Land in Nairobi**

Former City Council of Nairobi v Sammy Kirui, Mary Ngethe, Alender Musee and 11 Others, 141/316/10-ACC No. 19/2010 in the Matter of Conspiracy to Defraud, Abuse of Office and Fraudulent Acquisition of Public Property[ongoing]. The City Council of Nairobi wanted to


\textsuperscript{160}Ibid.
purchase land for a cemetery and the Town Clerk requested the Ministry of Local Government for financial support because the Council did not have funds.\textsuperscript{161} The Ministry asked the Council to procure the land and funds would be availed to them. The criteria agreed was that: land must be within Nairobi Metropolitan region; it must be easily accessible by the public; and the soil depth reaches a minimum of 1.8m (6ft) deep.

During the procurement process, these requirements were overlooked and the land acquired did not meet any of them. Efforts by some officials to have the procurement process stopped were met with a lot of resistance and little or no attention was paid to them. The advice of the Director of City Planning on the tender documents and search for land for use as a cemetery was not considered during the entire process of procurement. The tender was awarded to M/S Naen Rech Company Ltd, the sixth lowest bidder, without due diligence.\textsuperscript{162} The entire process was marred by procurement irregularities and fraudulent deals that led to the loss of approximately Kshs. 290,694,250.00 by the City Council of Nairobi.\textsuperscript{163}

Parliament also conducted its own independent probe into the cemetery saga and published a report.\textsuperscript{164} This report was compiled by the Parliamentary Departmental Committee on Local Authorities after its own investigations on the procurement of land for a cemetery by the City Council of Nairobi.\textsuperscript{165} The Office of the Speaker ordered the Committee to investigate and file a report on the procurement of the Cemetery Land by the Council after a question by private notice was asked by Hon. Mithika Linturi to the Minister for Local Government.\textsuperscript{166}

The report was tabled in Parliament in January, 2010 with detailed information on the role played by each individual and with the Committee’s observations and recommendations. It noted in particular that the land was not suitable for a cemetery and there were also massive illegalities and

\textsuperscript{161} Former City Council of Nairobi v Sammy Kirui, Mary Ngethe, Alender Musee and 11 Others, 141/316/10-ACC No. 19/2010 in the Matter of Conspiracy to Defraud, Abuse of Office and Fraudulent Acquisition of Public Property.
\textsuperscript{163} Ibid.
\textsuperscript{164} The departmental Committee on Local Authorities Report on the Procurement of Cemetery Land by the City Council of Nairobi.
\textsuperscript{165} The Departmental Committee is established pursuant to Standing Order 198(1). Its mandate pursuant to Standing Order 198(3) is to investigate, inquire into, study and make reports and recommendations on the mandate, management, activities, administration, operations and estimates of the assigned Ministries and departments in question.
irregularities in the entire procurement process.\textsuperscript{167} It also recommended investigation of the matter by the Kenya Anti-Corruption Commission. However, very little has happened to date. Curiously, some of those who were implicated in the scandal have been reinstated to their previous positions in government. The public was dissatisfied the way this scandal was handled so far. The public feeling was that justice had been derailed.

(k) The Triton Oil Scandal of 2010/2011

Kenya Pipeline Corporation (KPC), a state corporation under the Ministry of Energy (MoE) has a mandate to store and transport petroleum products from Mombasa to Nairobi, Nakuru and Eldoret on behalf of Oil Marketing Companies (OMCs) in the country. In July 2009, the OMCs and KPC entered into a Transport and Storage Agreement (TSA) where KPC would store and transport petroleum products for the OMCs and OMCs would, in turn, meet their obligation under the agreement.\textsuperscript{168} To operationalise this arrangement the parties entered into a collateral financial agreement (CFA).

Through what appears to be dubious dealings with KPC staff, Triton Oil, a small player in the oil industry and which was not part of the CFA agreement was allowed to draw oil from KPC system without paying for it. In total, 126.4 million litres worth over $ 90 million had allegedly been released to Triton without the consent of financiers.\textsuperscript{169}

In light of this development, the MoE instructed KPC to engage the services of an independent audit firm (PricewaterhouseCoopers) to vet the activities of CFA and submit its findings to the ministry. The scope of the report was to investigate: the extent of the irregularities and non-compliance with the CFA; with respect to the Triton to investigate the parties involved and the extent of their culpability; investigate KPC’s legal position and ascertain its level of compliance under the CFA and highlight any breaches or irregularities observed; and to investigate the appropriateness of the CFA for contractual and business relationship between KPC and the OMCs.

\textsuperscript{167}Ibid.
\textsuperscript{168} PricewaterhouseCoopers Report, An audit report into the affairs of the Triton Oil Corporation in regard to the importation, storage, and sale of petroleum products worth 2 billion shillings that was under the custody of KPC and was financed by KCB on behalf of the product importers, (2011). The audit was commissioned by the Office of the Prime Minister of the Republic of Kenya.
\textsuperscript{169}Africa Center for Open Governance, Analysis of the Triton Oil Scandal, 2011. Nairobi, AFRICOG.
KPC being a public entity shouldered the loss in this scam and to date the scandal has never been resolved to the disadvantage of the Kenyan tax payer. The main architect of this scandal, who was the Managing Director of Triton Oil Ltd, flew out of the country under very suspicious circumstances and efforts to extradite him have also not been successful.

Corruption is, therefore, a major challenge in the procurement process and is one of the major challenges in the workings and delivery of the Public Procurement Law as illustrated in the above decided and unresolved procurement-related corruption cases. However, this study asserts that corruption is a moral issue whose answers may not lie in legislation. It is a culture which has pervaded the Kenyan social, political and economic fabric and may not be solved through legislation. It can best be approached through moral transformation of the mindset of the people.

If the society inculcates the spirit of sanity and moral good in the minds of the subjects, self-control can be achieved. It would help to differentiate wrong from the good and isolate the evil in the mind. If that is achieved, then the people can refrain from corruption not because they have been coerced by use of a law, but simply because it is the right and moral thing to do. This ties the findings of this section to the theoretical framework of this study which is the intersection of moral and legal philosophy in social engineering. The study further sought to establish why many people in this country never react to issues of corruption and the reasons were as presented in Table 4.

Table 4: Reasons for not Reporting Instances of Corruption in Tendering Process

<table>
<thead>
<tr>
<th>Reasons</th>
<th>Frequency</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>No action taken</td>
<td>195</td>
<td>62.5</td>
</tr>
<tr>
<td>I don’t feel secure enough</td>
<td>103</td>
<td>34.2</td>
</tr>
<tr>
<td>I fear intimidation by the accused</td>
<td>106</td>
<td>35.2</td>
</tr>
<tr>
<td>I fear losing business opportunities</td>
<td>69</td>
<td>22.9</td>
</tr>
<tr>
<td>Person involved is known to me</td>
<td>63</td>
<td>20.9</td>
</tr>
<tr>
<td>I was promised some benefits</td>
<td>38</td>
<td>12.7</td>
</tr>
</tbody>
</table>
A majority (62.5%) of the respondents indicated that they don’t report cases of corruption because even if they reported, no action would be taken against the accused. A further 35.2% said they could not report corruption instances because they fear intimidation by the accused while 34.2% don’t feel secure enough to expose cases of corruption. It was revealed that 22.9% of the respondents fear losing business opportunities from the procuring entities involved while 20.9% indicated that those involved in corruption were not known to them and therefore, they can’t report them. Only a small minority at 12.7% admitted that they were compromised by a promise of some form of benefit if they drop the cases.

What Encourages Corruption in the Public Procurement?
In order to establish what encourages corruption in public procurement sector in Kenya, a descriptive analysis was done on 6 items related to corruption in the public sector to investigate the variable relationship between the items and establish patterns of responses and Table 5 presents the findings.

Table 5: Descriptive Analysis of the Things that Encourage Corruption in Public Procurement

<table>
<thead>
<tr>
<th>Dimensions</th>
<th>Analysis N</th>
<th>Mean</th>
<th>Std. Dev</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lack of political goodwill</td>
<td>255</td>
<td>1.65</td>
<td>0.972</td>
</tr>
<tr>
<td>Tribal and political manipulative culture</td>
<td>255</td>
<td>1.98</td>
<td>1.053</td>
</tr>
<tr>
<td>Deliberate efforts to weaken legal institutions</td>
<td>255</td>
<td>1.78</td>
<td>1.003</td>
</tr>
<tr>
<td>Lack of respect for the rule of law</td>
<td>255</td>
<td>1.81</td>
<td>0.966</td>
</tr>
<tr>
<td>Little survival outside public procurement</td>
<td>255</td>
<td>1.96</td>
<td>1.125</td>
</tr>
<tr>
<td>Unmerited appointment to public service</td>
<td>255</td>
<td>2.13</td>
<td>1.095</td>
</tr>
</tbody>
</table>

From Table 5 above, a total of 255 tenderers gave their responses to the items under study. From the findings, the average ranged from 1.65 to 2.13 on a Likert Scale where 1 represented strongly agrees and 5 strongly disagrees. On the other hand the standard deviation was from a low of 0.966 to a high of 1.125.
To further establish the things that encourage corruption in the public procurement sector, the respondents were asked to state the extent to which they agreed with certain statement based on the Likert Scale. The respondents rated the extent to which they agreed with the given aspects which were indicators of the identified factors on a scale of 1 – 5 where 1 was strongly disagree and 5 was strongly agree and Table 6 presents the findings.

**Table 6: Things that Encourage Corruption in Public Procurement**

<table>
<thead>
<tr>
<th>What encourages Corruption in the Public Procurement Sector</th>
<th>SA</th>
<th>A</th>
<th>U</th>
<th>D</th>
<th>SD</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lack of political goodwill</td>
<td>59.6%</td>
<td>25.5%</td>
<td>7.6%</td>
<td>6.0%</td>
<td>1.3%</td>
</tr>
<tr>
<td>Tribal and political manipulative culture</td>
<td>38.6%</td>
<td>36.1%</td>
<td>15.4%</td>
<td>6.7%</td>
<td>3.2%</td>
</tr>
<tr>
<td>Deliberate efforts to weaken legal institutions</td>
<td>52.7%</td>
<td>25.4%</td>
<td>16.6%</td>
<td>4.1%</td>
<td>1.7%</td>
</tr>
<tr>
<td>Lack of respect for the rule of law</td>
<td>46.8%</td>
<td>27.8%</td>
<td>14.6%</td>
<td>8.1%</td>
<td>3.1%</td>
</tr>
<tr>
<td>Existence of little survival outside public procurement</td>
<td>46.4%</td>
<td>27.8%</td>
<td>14.6%</td>
<td>8.1%</td>
<td>3.1%</td>
</tr>
<tr>
<td>Unmerited appointment to public service</td>
<td>33.6%</td>
<td>33.6%</td>
<td>17.1%</td>
<td>13.4%</td>
<td>2.3%</td>
</tr>
</tbody>
</table>

As shown in Table 6 above, 59.6% of the respondents indicated that lack of political goodwill by the leadership to decisively deal with corruption encourages corruption in the public procurement. A further 52.7% thought that it was due to deliberate efforts by those in leadership to weaken institutions and legal and justice system to save their kin, friends and cronies from prosecution. 38.6% cited tribal and political manipulative culture in the public sector as a cause while 46.8% said it was due to lack of respect for the rule of law. 46.4% agreed that existence of little means of survival outside public procurement encouraged corruption while 33.6% view unmerited appointment to public service based on ethnic or political consideration and not qualification or experience as a cause.

**Ways of Addressing Corruption and Ethical-Related Challenges**

To establish ways of addressing corruption-related challenges in the public procurement sector in Kenya, descriptive analyses was done on 9 related items in order to establish the variable relationship between the items and patterns of responses. Table 7 presents the findings.
Table 7: Descriptive Analysis of Ways of Addressing Corruption Challenges

<table>
<thead>
<tr>
<th>Ways</th>
<th>Analysis N</th>
<th>Mean</th>
<th>Std. Dev.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Leadership to create political goodwill</td>
<td>229</td>
<td>1.69</td>
<td>1.061</td>
</tr>
<tr>
<td>Culture change to tame culprits</td>
<td>229</td>
<td>1.99</td>
<td>0.908</td>
</tr>
<tr>
<td>Strengthen institutional and legal framework</td>
<td>229</td>
<td>1.79</td>
<td>0.938</td>
</tr>
<tr>
<td>Respect the rule of law and uniform application</td>
<td>229</td>
<td>1.85</td>
<td>0.999</td>
</tr>
<tr>
<td>Harsh punitive measures</td>
<td>229</td>
<td>2.03</td>
<td>1.038</td>
</tr>
<tr>
<td>Proceeds of corruption to be returned to public</td>
<td>229</td>
<td>1.93</td>
<td>1.060</td>
</tr>
<tr>
<td>Government to expand economic advancement</td>
<td>229</td>
<td>1.86</td>
<td>0.938</td>
</tr>
<tr>
<td>Appointment to public service should be on merit</td>
<td>229</td>
<td>2.00</td>
<td>1.126</td>
</tr>
<tr>
<td>Encourage transparency and accountability</td>
<td>229</td>
<td>2.18</td>
<td>1.162</td>
</tr>
</tbody>
</table>

As shown in Table 7, a total of 229 tenderers responded to this particular item under study. From the findings, the average range is 1.69 to 2.18 on a Likert scale where 1 represented strongly agree and 5 strongly disagree. On the other hand the standard deviation was from a low of 0.908 to a high of 1.162.

In a bid to establish ways of addressing challenges of corruption in the public procurement sector, the respondents were asked to state the extent to which they agreed with pre-identified statements on ways of addressing corruption based on the Likert Scale. The respondents rated the extent to which they agreed with the given suggestions which were indicators of the identified factors on a scale of 1 – 5 where 1 was strongly disagree and 5 was strongly agree and Table 8 presents the findings.
Table 8: Ways of Addressing Corruption Challenges in Public Procurement

<table>
<thead>
<tr>
<th>Ways of addressing Corruption, Nepotism and Ethnic Challenges in Public Procurement Sector</th>
<th>SA</th>
<th>A</th>
<th>U</th>
<th>D</th>
<th>SD</th>
</tr>
</thead>
<tbody>
<tr>
<td>Country’s leadership to create political goodwill</td>
<td>59.7%</td>
<td>23.6%</td>
<td>9.2%</td>
<td>3.6%</td>
<td>3.9%</td>
</tr>
<tr>
<td>Culture change necessary to tame corruption and tribalism and political manipulation</td>
<td>31.3%</td>
<td>43.7%</td>
<td>19.7%</td>
<td>3.5%</td>
<td>1.8%</td>
</tr>
<tr>
<td>Strengthen institutional and legal framework</td>
<td>46.7%</td>
<td>28.9%</td>
<td>18.1%</td>
<td>14.0%</td>
<td>2.7%</td>
</tr>
<tr>
<td>Respect the rule of law and uniform application</td>
<td>45.9%</td>
<td>33.5%</td>
<td>14.2%</td>
<td>2.5%</td>
<td>3.9%</td>
</tr>
<tr>
<td>Harsh punitive measures against those flouting public procurement regulation</td>
<td>36.4%</td>
<td>31.8%</td>
<td>21.7%</td>
<td>7.0%</td>
<td>3.1%</td>
</tr>
<tr>
<td>Proceeds of corruption to be returned to public coffers</td>
<td>42.0%</td>
<td>30.2%</td>
<td>19.4%</td>
<td>4.2%</td>
<td>4.2%</td>
</tr>
<tr>
<td>Government to expand economic advancement</td>
<td>41.5%</td>
<td>32.7%</td>
<td>19.0%</td>
<td>4.6%</td>
<td>2.1%</td>
</tr>
<tr>
<td>Appointment to public service should be on merit</td>
<td>44.0%</td>
<td>29.9%</td>
<td>15.1%</td>
<td>6.0%</td>
<td>4.9%</td>
</tr>
<tr>
<td>Encourage transparency, accountability and good governance in public finance management</td>
<td>36.2%</td>
<td>27.6%</td>
<td>21.5%</td>
<td>8.5%</td>
<td>6.1%</td>
</tr>
</tbody>
</table>

As presented in Table 8, a majority (59.7%) of the respondents suggested that the country’s leadership should create a political goodwill to decisively deal with corruption in the public sector. This is followed by 46.7% who want the government to strengthen institutional and legal frameworks in the public procurement sector to deliver justice in case of economic crimes committed against the people of Kenya. Further results show that 45.9% suggest that the rule of law should be respected and application of the law should be uniform. 44% of the respondents want appointment to the public service done purely on merit and the ability to deliver services to the people. 42% want proceeds of corruption to be followed and returned to public coffers (retributive justice). 41.5% suggest that the government should expand other means of economic advancement outside the public procurement. Another 36.4% want harsh punitive measures to be meted against those flouting public procurement regulations while 36.2% suggest that transparency, accountability and good governance in public finance management should be encouraged. Thirty one point three percent (31.3%) proposed culture change as the necessary ingredient to tame runaway corruption in the public procurement sector.
CONCLUSION

The success of the institution of law greatly depends on the will of the political leadership to promote the culture of obedience to the law. Their actions greatly determine whether or not the citizens observe the tenets of fidelity to the law. If the leadership chooses to strictly enforce the law, then there will be the tendency to abide by the law among the populace. However, if there is laxity in the enforcement of the law, then there is a tendency by the citizenry to break or flout the rules. This in effect renders the law hollow. A good law will fail if not backed by the necessary moral support from the leadership. This outlines the connection between legal and moral philosophy as outlined in the theoretical framework informing the study.

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Muslims for Human Rights (MUHURI) & 2 Others V Attorney General & 2 Others [2011] in the High Court Petition No. 7 of 2011 at Mombasa in the matter of Articles 1, 2(1) (2) (4) 3(1), 4, 10, 12(1)(A),19, 20, 22, 23, 165, 258 and 269 of the Constitution of Kenya; and in the matter of: alleged contravention of fundamental rights and freedoms under the Constitution of Kenya 2010 to wit contrary to Articles 10,19,21,22,23; and in the matter of: contravention or breach of the Constitution of Kenya to wit, Article 258; and in the matter of: the interpretation, implementation and enforcement of the Constitution of Kenya to wit Article 259; between Muslims for Human Rights (MUHURI) [1stPetitioner], Khelef Abdulrahaman Khalifa [2ndPetitioner], and Ndungu


Riley Falcon Security Services Ltd & Total Security Surveillance Ltd v Kenya Pipeline Company Ltd (Cases No. 53/2009 and 54/2009)


This assessment is based on a personal English translation of the Spanish language Web site: www.transparenciamexicana.org.mx/ENCBG/.


