

# DEVELOPMENT PARTNERS AND GOVERNANCE OF PUBLIC PROCUREMENT IN KENYA: ENHANCING DEMOCRACY IN THE ADMINISTRATION OF AID

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## I. INTRODUCTION

It is now widely accepted in international development policy circles that aid, also known as development assistance, has not achieved its primary goal of alleviating poverty.<sup>1</sup> Indeed, the number of people living in extreme poverty has increased.<sup>2</sup> The ineffectiveness of aid has been attributed to factors such as the donor countries' policy of tying aid to specific conditions,<sup>3</sup> the provision of aid against the background of persistent protection of markets in the donor countries,<sup>4</sup> and bad governance in the recipient countries.

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1. See JOHN DEGNBOL-MARTINUSSEN & POUL ENGBERG-PEDERSEN, *AID: UNDERSTANDING INTERNATIONAL DEVELOPMENT COOPERATION* 285 (2003). While it is difficult to assess the effectiveness of aid in alleviating poverty due to the multiplicity of causal factors, ineffectiveness of aid is certainly one such factor. See FOREIGN AID IN AFRICA 8-9 (Jerker Carsson et al. eds., 1997).

2. See, e.g., Robert Hunter Wade, *The Rising Inequality of World Income Distribution*, *FIN. & DEV.*, Dec. 2001, at 37, 39.

3. See, e.g., DEPARTMENT FOR INTERNATIONAL DEVELOPMENT, *ELIMINATING WORLD POVERTY: MAKING GLOBALISATION WORK FOR THE POOR*, 2000, ¶¶ 320-22, (U.K.), available at <http://www.dfid.gov.uk/pubs/files/whitepaper2000.pdf> [hereinafter *UK White Paper*] (arguing that tied aid is "grossly inefficient" and encourages a donor driven approach to development and "signals that development agencies' major concern is not development, but their national contracts"). The practice of tying aid entails the conditioning of the provision of development assistance on the purchase of goods and services from the donor countries. For examples, see GRAHAM HANCOCK, *LORDS OF POVERTY* 156 (1989).

4. See, e.g., Ian Goldin, Halsey Rogers & Nicholas Stern, *The World Bank, The Role and Effectiveness of Development Assistance: Lessons from World Bank Experience* vii (2002), available at [http://econ.worldbank.org/files/13080\\_Development\\_Effectiveness.pdf](http://econ.worldbank.org/files/13080_Development_Effectiveness.pdf).

The donor countries have therefore sought to improve the effectiveness of aid.<sup>5</sup> In particular, they have sought to abandon stand-alone projects employed in the past in favor of “Sector Wide Approaches” (SWAPs), out of the realization that conditioned aid rarely persuades developing country governments to reform their policies, and that these governments are often “overwhelmed by the sheer number of donors and donor projects, with the result that public expenditure [becomes] an unplanned aggregation of donor projects lacking a coherent framework of policies, priorities and service standards.”<sup>6</sup>

The new thinking is that it is better if development partners provide direct budgetary support to sector-wide reform programs initiated by developing country governments. Since these governments would “own” such programs, the hope is that they would be more committed to their realization. The idea is thus to transform the provision of development assistance into a partnership between the donors and the recipients. Further, by harmonizing their procedures through the use of SWAPs, the donor countries—now going by the name “development partners”—would considerably ease the administrative burden imposed on developing countries by “appropriations in aid,” that is, financial support for stand-alone projects.

While SWAPs promise to enhance the effectiveness of aid, a major drawback is that they invariably seek to bypass national public accounting and procurement systems on the ground that the latter are ineffective and corrupt. On the one hand, there is much evidence, as we will see, that these systems in many cases merely facilitate the use of public procurement as a

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5. See, e.g., Wil Hout, *Political Regimes and Development Assistance*, 36 *CRITICAL ASIAN STUD.* 591 (2004).

6. Mick Foster, *New Approaches to Development Co-operation: What can we learn from experience with implementing Sector Wide Approaches?* 18 (Overseas Dev. Inst., Working Paper No. 140, 2000), available at [http://www.odi.org.uk/publications/working\\_papers/wp140.pdf](http://www.odi.org.uk/publications/working_papers/wp140.pdf); William Easterly, *The Cartel of Good Intentions: Bureaucracy versus markets in foreign aid* 20, 22 (Ctr. for Global Dev., Working Paper No. 4, 2002), available at <http://www.cgdev.org/content/publications/detail/2786> (observing that “[i]n Tanzania in the early 1990s, donors were implementing 15 separate stand-alone projects in the health sector alone” and that “Tanzania had to produce more than 2400 reports a year for the donors, who sent the poor country 1000 missions a year.”).

resource for political patronage and for the unjust enrichment of corrupt public officials. On the other hand, if the development of local public accounting and procurement capacity is instrumental for the effectiveness of aid, then the case for the maintenance of parallel accounting and procurement regimes ceases to be persuasive. This is especially the case where, as in Kenya, considerable efforts have been made to reform the national procurement system. The maintenance of parallel procurement systems is not only inefficient, but also provides avenues for corruption since the lines of accountability are attenuated. At the very least, there is a case for the harmonization of these parallel systems.

In response to concerns that SWAPs are bypassing national frameworks for accountability, development partners often argue that they are primarily accountable to their taxpayers and that it is up to the recipient governments to worry about being accountable to the local electorate. Again, this argument is not entirely persuasive since this accountability relationship implicates the effectiveness of aid. Because there are no frameworks through which the local electorate can hold such governments to account, aid funds have invariably not been used for their intended purposes. Accordingly, there is a strong case for reformed national frameworks to ensure the accountability of SWAPs to the citizens of developing countries, since the local electorate cannot demand accountability *directly* from the development partners.

The emergence of SWAPs should receive particular consideration in the context of public procurement, whose governance they implicate in significant respects. Public procurement often constitutes the largest domestic market in developing countries.<sup>7</sup> Depending on how it is managed, the public procurement system can thus contribute to the economic de-

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7. WAYNE A. WITTIG, BUILDING VALUE THROUGH PUBLIC PROCUREMENT: A FOCUS ON AFRICA 4 (2002), available at <http://www.intracen.org/ipsms/tools/bdv.pdf>; Bernard M. Hoekman, *Introduction and Overview*, in LAW AND POLICY IN PUBLIC PURCHASING: THE WTO AGREEMENT ON GOVERNMENT PROCUREMENT 1 (Bernard M. Hoekman & Petros C. Mavroidis eds., 1997) (noting that “[d]epending on the economic system of a nation, central government purchases of goods and services typically account for some 10 per cent of gross domestic product (GDP).”).

velopment of these countries in a significant way.<sup>8</sup> Indeed, public procurement is the principal means through which governments meet developmental needs such as the provision of physical infrastructure and the supply of essential medicines.<sup>9</sup> Many governments use public procurement to support the development of domestic industries, overcome regional economic imbalances, and support minority or disadvantaged communities.

Because the deployment of the public procurement system to pursue these developmental goals entails an enormous exercise of governmental discretion, public procurement is often an extremely controversial subject. This is especially the case in developing countries where “the ability to exercise discretion in the award of government contracts has been a source of valued political patronage” and where procurement has been “a means for the illicit transfer of funds from governmental to private hands.”<sup>10</sup>

SWAPs implicate the governance of public procurement in developing countries since a considerable part of many public contracts are financed by the development partners, as part of either bilateral or multilateral development assistance.<sup>11</sup> While it is estimated that the global pool of development assistance now averages \$60 billion annually,<sup>12</sup> a significant proportion of that amount remains tied to the procurement of goods and services from the donor countries,<sup>13</sup> leading many com-

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8. See Sue Arrowsmith, *National and International Perspectives on the Regulation of Public Procurement: Harmony or Conflict?*, in PUBLIC PROCUREMENT: GLOBAL REVOLUTION 3, 5 (Sue Arrowsmith & Arwel Davies, eds., 1998).

9. See, e.g., Vinod Rege, *Transparency in government Procurement: Issues of Concern and Interest to Developing Countries*, 35 J. WORLD TRADE 489, 496 (2001).

10. Patrick A. Low *et al.*, *government Procurement in Services*, in LAW AND POLICY IN PUBLIC PURCHASING, *supra* note 7, at 225-26.

11. Thus, for instance, it is estimated that 64% of public procurement in Mali is financed by foreign resources. See JEAN RUCHE & ERIC GARANDEAU, *THE MALI DONORS' PUBLIC PROCUREMENT PROCEDURES: TOWARDS HARMONISATION WITH THE NATIONAL LAW 6* (2000), available at [http://web.domino1.oecd.org/COMNET/DCD/ProcurementCWS.nsf/viewHtml/index/\\$FILE/1\\_MaliProcurement-website.pdf](http://web.domino1.oecd.org/COMNET/DCD/ProcurementCWS.nsf/viewHtml/index/$FILE/1_MaliProcurement-website.pdf).

12. *UK White Paper*, *supra* note 3, ¶ 283.

13. *Id.* ¶ 284.

mentators to question whether developing countries are the real beneficiaries of development assistance.<sup>14</sup>

This Article reviews Kenya's first SWAP—the Ministry of Justice and Constitutional Affairs' Governance, Justice, Law and Order Sector (GJLOS) Reform Program—and its procurement regime in the context of ongoing public procurement reform efforts. It advances two principal arguments. First, SWAPs such as the GJLOS Program constitute a form of trans-governmental regulation and should be subject to national administrative law frameworks. Second, the GJLOS Program's procurement regime is inefficient and unlikely to be effective since it creates administrative structures that are not only unwieldy but also run parallel to the national system. It should therefore be harmonized with the national system. Further, this procurement regime is not sufficiently democratic as it is not accountable to the Kenyan people and does not facilitate the meaningful participation of key stakeholders. In the interests of accountability, the private firm entrusted with the task of administering this procurement regime should be subject to the jurisdiction of the national public procurement regulatory authority since it is exercising a public function.

The Article therefore takes a bottom-up approach to the development of institutional mechanisms for creating accountability in the domestic implementation of international regulatory decisionmaking.<sup>15</sup> As a first step towards ensuring adequate responses to the need for global governance, developing countries in particular should enhance the effectiveness of their administrative law frameworks. The idea is for administrative law to facilitate the accountability of developing country governments to the citizens of these countries by creating "do-

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14. See, e.g., HANCOCK, *supra* note 3, at 156-57 (highlighting a practice among bilateral donors of using funds allocated for development assistance to help their exporters to secure contracts in the recipient countries).

15. See Richard Stewart, *The Global Regulatory Challenge to U.S. Administrative Law* 37 N.Y.U. J. INT'L L. & POL. 709-710 (2005) (arguing that administrative law could respond to the need to discipline and hold to account international regulatory decision making and its domestic implementation in one of two ways. That is, "a 'bottom up' approach, extending domestic administrative law to assert more effective control and review with respect to the supranational elements of domestic regulation . . . global regulatory regimes . . . themselves adopt[ing] administrative law disciplines for their decisions . . .").

mestic forums, flows of information, and political processes necessary for an effective and creative citizenship.”<sup>16</sup> By doing so, administrative law would enhance the participation of the citizens of developing countries in the politics of development assistance.<sup>17</sup>

The bottom-up approach is particularly compelling in the governance of development assistance as it is both practical and more likely than the top-down approach to facilitate the immediate democratization of aid administration. The top-down approach is not workable at the present time since there is no treaty regime governing the administration of aid.<sup>18</sup> Nor is such a regime likely to emerge in the foreseeable future since donor countries prefer the status quo as it enables them to control the course of development assistance.<sup>19</sup> The democratization of aid administration should therefore become the responsibility of national administrative law. In particular, by establishing procedures for public notice and comment and facilitating the review of the exercise of administrative action (such as procurement) in development assistance, national administrative law would greatly enhance the democratization of aid administration.

Part II provides the article’s conceptual framework and looks at SWAPs in the context of administrative law. Part III examines the political economy of Kenya’s public procurement system. Part IV reviews the experience with the public

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16. ALFRED C. AMAN, JR., *THE DEMOCRACY DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM* xi (2004).

17. See Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics* 13 (NYU Inst. for Int’l Law and Justice, Working Paper No. 2004/7, 2004) (observing that “increased *domestic* democracy can be an important form of participation in global politics in cases where states are the primary actors in international organizations or where global policies must be implemented by state action”) (emphasis in original).

18. See Stewart, *supra* note 15, at 710.

19. Thus far, there have only been efforts spearheaded by the Organization for Economic Cooperation and Development (OECD) to enhance the effectiveness of aid, culminating in the adoption of the *Paris Declaration on Aid Effectiveness: Ownership, Harmonisation, Results and Mutual Accountability* of March 2, 2005. These efforts fall short of advocating a treaty-based regime for the governance of development assistance. Further, and as we shall see in Part II, *infra*, while the sector wide approach promises to enhance the governance of development assistance, its potential is inhibited by the security and economic interests of donor countries, which also constitute a formidable obstacle to the establishment of a treaty-based regime.

procurement reforms undertaken in the country thus far. Part V examines the GJLOS Reform Program and its procurement regime and makes a case for its integration with the national system, which is now fairly democratic thanks to the reform efforts. This Part also argues for the establishment of a legal framework for the administration of aid. Part VI concludes.

## II. DEMOCRACY AND THE ADMINISTRATION OF DEVELOPMENT ASSISTANCE

There has been a proliferation of international regulatory mechanisms over the last decade or so, responding to the urgent need for global governance in an increasingly interdependent world.<sup>20</sup> Some of these global regulatory mechanisms, such as the World Trade Organization (WTO), are formally established by treaty; but others, such as the Basel Committee of national bank regulators, are largely informal intergovernmental networks of domestic regulatory officials and often incorporate private sector and civil society entities.<sup>21</sup> These regulatory mechanisms have developed out of the realization that the “consequences of globalized interdependency” in many areas of interaction such as trade and financial regulation “cannot be effectively addressed by separate national regulatory and administrative measures.”<sup>22</sup> This has resulted in a shift of many regulatory decisions from the national to the global level.<sup>23</sup>

Administrative law scholars are now concerned that this shift has created a “democracy deficit,” since the international regulatory mechanisms “are not directly subject to control by national governments or domestic legal systems or, in the case of treaty-based regimes, the states party to the treaty.”<sup>24</sup> Yet the international institutions and regimes that engage in global governance exercise immense powers and regulate vast sectors of economic and social life.<sup>25</sup> Thus their decisions in-

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20. Benedict Kingsbury, Nico Krisch & Richard Stewart, *The Emergence of Global Administrative Law*, 68(3/4) LAW & CONTEMP. PROBS. 1, 2 (Summer/Autumn 2005).

21. *Id.*

22. *Id.* at 4.

23. *Id.* at 5.

24. *Id.*

25. *Id.* at 6.

creasingly and directly affect individuals and firms, in many cases without any intervening role for national government action.<sup>26</sup>

Alarmed that these global governance institutions and regimes enjoy too much *de facto* independence and discretion, administrative law scholars have called for the recognition of a “global administrative space” and the establishment of a “global administrative law,” consisting of principles, procedures, and review mechanisms to govern decisionmaking and regulatory rulemaking by these institutions and regimes.<sup>27</sup>

The emergence of the sector-wide approach to the administration of development assistance should be examined against this background. A SWAP is a sector development program in which “all significant funding for the sector supports a single sector policy and expenditure program, under government leadership, adopting common approaches across the sector, and progressing towards relying on government procedures to disburse and account for all funds.”<sup>28</sup> Thus the central idea of SWAPs is that donor interventions should be consistent with the recipient government’s sectoral strategies and budgets that have been developed under the latter’s leadership.<sup>29</sup> At least in theory, emphasis is placed on shared accountability and multiple-partner collaboration under the umbrella of developing country leadership.<sup>30</sup> From a democracy viewpoint, SWAPs promise to shift the locus of accountability from donors to the core institutions of developing countries.<sup>31</sup>

SWAPs seek to enhance the accountability of donors and recipient governments to the beneficiaries of aid.<sup>32</sup> Under the traditional project-by-project approach to aid, donors were mainly concerned with their own project management needs

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26. *Id.* at 11.

27. *Id.* at 13 (noting that such a global administrative space is “distinct from the space of inter-state relations governed by international law and the domestic regulatory space governed by domestic administrative law, although encompassing elements of each”).

28. Foster, *supra* note 6, at 9.

29. MARK SCHACTER, INST. ON GOVERNANCE, SECTOR WIDE APPROACHES, ACCOUNTABILITY AND CIDA: ISSUES AND RECOMMENDATIONS 2 (2001), *available at* <http://www.ioq.ca/publications/swap.PDF>.

30. *Id.* at ii.

31. *Id.* at 4.

32. *Cf. id.*

and reporting requirements.<sup>33</sup> Each donor could account to its government about the performance of its portfolio of projects in developing countries and was able to point to particular achievements that had occurred in the developing countries as a direct result of its project support.<sup>34</sup> But since the main flow of accountability was outward—from the developing country to the donor—the citizens of developing countries were effectively excluded from the accountability framework.<sup>35</sup> This gave developing country governments considerable leeway in the management of aid. Thus such governments had strong incentives to use development assistance funds in ways that favored “narrow elites and particular social, ethnic or economic classes.”<sup>36</sup> By shifting the locus of accountability from the donors to the recipient governments, the SWAPs seek to make it more difficult for aid administration to ignore the impact of governance in developing countries on development assistance.<sup>37</sup>

Nevertheless, the shift to SWAPs has not been easy, given the strong incentives that donors have to stick to the traditional approach. First, bilateral donors “like to plant their flags,”<sup>38</sup> that is, attribute particular development results exclusively to their own inputs.<sup>39</sup> Indeed, while many donors cite a “moral and humanistic obligation” to help poor countries develop economically as their principal motivation for contributing aid, unstated national security and economic considerations—such as maximizing their influence in the international arena and securing markets for their firms—are often controlling.<sup>40</sup> Second, because they control huge sums of money under the traditional approach, the principal agents of the donor agencies exercise immense power and influence in the developing countries.<sup>41</sup> It should be understandable if many of

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33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 20.

37. *Id.* at i.

38. Easterly, *supra* note 6, at 18 (internal citations omitted).

39. Schacter, *supra* note 29, at ii.

40. See DEGNBOL-MARTINUSSEN & ENGBERG-PEDERSEN, *supra* note 1, at 12-13, 17.

41. See, e.g., Foster, *supra* note 6, at 18 (observing that “donors have involved themselves in everything from Governance to economic and social policy . . .”).

them are reluctant to cede such power and influence under the SWAP approach, which seeks to rely on the recipient governments' procedures for the disbursement and accounting of aid monies.

From the viewpoint of global administrative law, SWAPs constitute "regulatory networks" of governmental officials, which determine how development assistance funds are utilized. They also make rules and decisions that affect individuals and firms. For instance, they determine who can participate in procurement involving the funds under their control. Because these funds constitute a core part of the development expenditures of developing countries where public procurement is the largest domestic market, SWAPs may effectively determine the fortunes of domestic firms—hence the need to enhance their accountability, especially to local constituencies.

The need to enhance the accountability of SWAPs also arises given the variations in their structures and administration. Indeed, SWAPs have been described appropriately as "an approach rather than a blueprint."<sup>42</sup> In some cases, developing country governments take leadership in setting out the vision and strategy for a sector and then seek donor support, while in other cases government agencies use their alliance with donors to drive through a sector policy and program, even where there is no strong public support. In yet other cases, donors simply develop their own strategies, which they then "sell" to the developing country governments.<sup>43</sup> In effect, SWAPs have tended to be fairly informal networks of donors and influential developing country officials. Even more important, perhaps, is the fact that each of these models of reform strategy formulation has different implications for participation by local constituencies and the eventual success of the proposed reforms.

SWAPs raise questions of participation and accountability, since decisions are made by the recipient governments, their agencies, and donor representatives. Typically, the management structures do not effectively incorporate private sector and civil society representatives. This should be a cause for

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42. Adrienne Brown et al., *The Status of Sector Wide Approaches* 7 (Overseas Dev. Inst., Working Paper No. 142, 2001), available at [http://www.odi.org.uk/publications/working\\_papers/wp142.pdf](http://www.odi.org.uk/publications/working_papers/wp142.pdf).

43. Foster, *supra* note 6, at 19.

concern, given the deficiency of institutional frameworks of accountability in many developing countries. For example, the administration of development assistance tends to be characterized by secrecy, and members of parliament are invariably excluded from the decisionmaking process.

Within SWAPs, there is also worrisome donor ambivalence over the use of recipient government procedures and systems. While the donors are quick to acknowledge that there are significant efficiency savings to be gained by relying on local systems, they are exceedingly reluctant to do so due to lack of confidence in local capacities and integrity.<sup>44</sup> As a result, the local systems continue to be bypassed and continue to remain undeveloped, thereby limiting the success of SWAPs. The fact that local capacities are undeveloped and lack integrity also continues to be cited by some donors to retain control over the administration of development assistance. The donors claim that this is only an interim measure, but since it weakens government systems, the transition periods tend to be rather protracted.

The procurement of goods and services under Kenya's GJLOS program provides a useful illustration of this phenomenon.<sup>45</sup> Whereas donors support the reform of the national public procurement system in principle, they continue to insist on the use of their own procurement regimes in cases involving the use of their money. In order to enhance the usefulness of SWAPs, therefore, measures that mandate reliance on developing country government procedures to disburse and account for aid funds should be implemented.

In order to appreciate the achievements of public procurement reforms in Kenya, a historical overview of the practice prior to the commencement of reforms is necessary.

### III. THE POLITICAL ECONOMY OF PUBLIC PROCUREMENT IN KENYA

The bulk of corrupt practices in Kenya have occurred in public procurement.<sup>46</sup> About *sixty per cent* of government reve-

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44. *Id.* at 30-31; Schacter, *supra* note 29, at 16.

45. *See infra* Part V.

46. The explanation for this state of affairs is to be found in the political dynamics of the state and its role in the economy. Public procurement constitutes the principal instrument for exercising political patronage, a prac-

nue is spent on procurement,<sup>47</sup> and it is thus easy to understand why public procurement has been at the center of corruption.

This corruption has been facilitated by opaque and unaccountable regulations. Until the early 1970s, public procurement in Kenya was largely undertaken by the British firm Crown Agents, since local supplies were inadequate, and most of the needs of the new government could only be met from external sources.<sup>48</sup> Thereafter, the government established supply offices within its ministries and departments and appointed supply officers to take charge of procurement<sup>49</sup> for their respective ministries and departments. The Ministry of Finance was given overall responsibility for regulating public procurement. As the resulting centralized public procurement system was not subject to any particular law, the Ministry issued regulations and guidelines in the form of circulars to the ministries and other public agencies from time to time.

The principal regulations in this regard were the *Government Financial Regulations and Procedures (Financial Regulations)*, which dealt with administration of government finances, including procurement. The *Financial Regulations* established a

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tice that is especially prevalent in Kenya and other African countries since "there are very few means of economic advancement outside of the state." Jeffrey Herbst, *The Politics of Privatization in Africa*, in *THE POLITICAL ECONOMY OF PUBLIC SECTOR REFORM AND PRIVATIZATION* 234, 240 (Ezra N. Suleiman & John Waterbury, eds., 1990). The way political patronage works is that governments, which tend to be unpopular, ensure that only their narrowly-drawn and often ethnic constituencies have access to public resources, such as lucrative public procurement contracts. Public resources are therefore a means through which these governments can "purchase" legitimacy and remain in power. *Id.*; see J. M. Migai Akech, *Public Law and the Neoliberal Experiment in Kenya: What Should the Public Interest Become?* 86-89, 132-34 (Jan. 15, 2004) (unpublished JSD Dissertation, NYU School of Law) (on file with author).

47. Republic of Kenya Ministry of Finance, *Proceedings of the 1st National Public Procurement Consultative Meeting*, Nairobi, Kenya, May 13-15, 2004 at 10 [hereinafter *Proceedings of Procurement Consultative Meeting*] (on file with author). It is estimated that public procurement in Kenya amounts to about 10% of the country's Gross Domestic Product (GDP). See Walter Odhiambo & Paul Kamau, *Public Procurement: Lessons from Kenya, Tanzania and Uganda* 13 (Org. for Econ. Co-operation and Dev., Working Paper No. 208, 2003), available at <http://www.oecd.org/dataoecd/59/11/2503452.pdf>.

48. *Id.* at 16.

49. *Id.*

Central Tender Board (CTB) comprising members appointed by the permanent secretaries in the ministries they represented.<sup>50</sup> The CTB was responsible for procurement of goods and services valued at Kshs. 2,000,000 and above. Under the regulations, Ministerial Tender Boards (MTBs) were responsible for procurement of goods and services whose value was below Kshs. 2,000,000.<sup>51</sup>

Some government departments, such as the Department of Defence, were also allowed to have their own tender boards, which operated on the ceilings and powers of the MTBs. District Tender Boards (DTBs) were also established to cater for procurement at the lower levels of government administration. DTBs were also inter-ministerial and were made up by the representatives of government ministries in the districts. They had the same powers as MTBs. In addition, the *Financial Regulations* applied to the tender boards of local authorities, public enterprises, public universities, and other institutions of learning and cooperative societies.

The Ministry of Finance also issued circulars from time to time setting out the details of public procurement procedures and policies. For example, these circulars raised the procurement thresholds and reviewed adjudication procedures. They also dealt with matters of policy.<sup>52</sup>

The above centralized procurement system had several deficiencies. First, the Government Contracts Act provides that “public officers cannot be sued personally upon any contracts which they make in that capacity,”<sup>53</sup> and thus, since there were no sanctions against government officers who breached them, the system was vulnerable to abuse<sup>54</sup> and the

50. Permanent secretaries are the principal executive and accounting officers in government ministries.

51. Financial Regulations, Procurement and Tendering Procedures §§ 4.1-4.2 (1996) (Kenya) [hereinafter *Procurement and Tendering Procedures*].

52. Republic of Kenya Ministry of Finance and Planning, *Report on the Diagnostic Survey, Findings and Recommendations on the Kenya Public Procurement Systems*, at 43 (1999) [hereinafter *Report on Kenya Public Procurement Systems*]. Thus Treasury Circular No. 1 of 1998 sought to give incentives to local firms to participate in government procurement by conferring a preferential bias of 10% where the tendering firms were controlled by indigenous Kenyans. *Id.*

53. Government Contracts Act Chap. 25 § 6(1) (2005) (Kenya). I am grateful to Otiende Amollo for pointing out this anomaly.

54. *Report on Kenya Public Procurement Systems*, *supra* note 52, at 41.

incentive to engage in corrupt procurement deals strong. Second, procurement policies and procedures were scattered in various government documents. Thus, for example, it was difficult to comprehend the *Financial Regulations* without the benefit of the Treasury circulars.<sup>55</sup> Again, vague procurement procedures and policies meant that the system could easily be abused or manipulated by unscrupulous public officers.<sup>56</sup>

Common corrupt practices in public procurement included public officers—often under the influence of powerful politicians and businessmen—only inviting preferred firms, favoring certain firms at the short-listing stage, designing tender documents to favor particular firms, and releasing confidential information.<sup>57</sup> This state of affairs was exacerbated by the fact that the procurement system was manned by junior officers, who were therefore powerless to correct any anomalies and could easily be manipulated by their seniors and powerful politicians.<sup>58</sup> Corruption in public procurement was also facilitated by the lack of transparency in the system; the applicable procedures were invariably inaccessible to the public.

To make matters worse, Kenyan law does not prohibit public officials from participating in private enterprise.<sup>59</sup> Indeed, the civil service is by far the most important launching pad for businessmen in Kenya as it gives senior government officials and politicians access to public resources, including lucrative public procurement contracts. The participation of public officials in private enterprise has thus been a key source of corruption in public procurement, since the rules established to guard against conflicts of interest have invariably been breached.

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55. *Id.* at 41.

56. Odhiambo & Kamau, *supra* note 47, at 16.

57. *Id.* at 36; *Report on Kenya Public Procurement Systems*, *supra* note 52, at 138 (observing that “[t]here is rampant lack of observance of procurement ethics by the procurement officials”).

58. See Murithi Mutiga, *Going Public*, THE EAST AFRICAN STANDARD (Kenya), Apr. 3, 2005, at 17.

59. A commission established by the Kenyatta government in the early 1970s endorsed public officials’ participation in private enterprise provided there was no conflict between their duty to the state and their private interests. See COLIN LEYS, UNDERDEVELOPMENT IN KENYA: THE POLITICAL ECONOMY OF NEO-COLONIALISM 1964-1971, at 249-50 (1975).

Further, there was no provision for dissatisfied bidders or the general public to appeal against the procurement decisions of the various tender boards where, for instance, there were irregularities in the process. The system only allowed for appeals by accounting officers (usually permanent secretaries) in the relevant government ministries, departments, and agencies.<sup>60</sup> Appeals against the decisions of the DTBs lay to the CTB, those against the MTBs lay to the relevant permanent secretaries, while appeals against the CTB and Department of Defence tender board lay to the permanent secretary to the Ministry of Finance.<sup>61</sup> Thus while the permanent secretaries typically appointed the members of the tender boards, they did not participate in their deliberations. Nevertheless, by providing that only permanent secretaries could appeal against the decisions of these tender boards, the Financial Regulations gave these government officials sufficient incentives to manipulate the system by, for example, only appealing against decisions they found unacceptable for parochial reasons. Moreover, no role existed for independent judicial review since the decisions of the administrative appeal bodies were deemed final.<sup>62</sup>

Quite apart from deficiencies related to transparency and accountability, inefficiency also marred the system. Characterized by overspending, this inefficiency has been attributed to poor planning and packaging of procurement contracts by accounting officers and their failure to check on existing inventory, as well as lack of supervision and monitoring of project implementation.<sup>63</sup> Cases where goods and works inferior to the specifications were accepted by the government were also quite common. Indeed, in some cases no goods or works were delivered at all. And in yet other instances, contracts were varied upwards from the originally quoted price, often with the connivance of senior government officers. Thus, for example, a building constructed by the National Health Insurance Fund

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60. *Report on Kenya Public Procurement Systems*, *supra* note 52, at 79-80.

61. *Procurement and Tendering Procedures*, *supra* note 51, § 17.10 (providing that “[a]ppeals against a decision by a District Tender Board shall be made to the Central Tender Board, a Ministerial Tender Board to the accounting officer and the Central Tender Board to the Permanent Secretary to the Treasury”).

62. *Report on Kenya Public Procurement Systems*, *supra* note 52, at 80.

63. *Id.* at 140-143.

costs more than twice the originally quoted price.<sup>64</sup> Lead times have also been exceedingly long. The Minister for Trade has recently reported that it took his ministry nine months to buy a paper shredder.<sup>65</sup>

These deficiencies have contributed to huge losses in public procurement, hastening the call for reform.<sup>66</sup> The local business community complained that inefficiencies in public procurement were contributing to an unsuitable business environment, as they resulted in, for example, poor physical infrastructure and inefficient services.<sup>67</sup> At the same time, the donor community also began to make reform of the public procurement system a condition for lending as part of the structural adjustment process. Led by the World Bank, these donors sought to “harmonize the national procurement system with international procurement guidelines, in order to make the processes more transparent and *to devolve procurement to local entities.*”<sup>68</sup>

The following section reviews the record of the reform process. As we shall see, the reform efforts have achieved much in a relatively short time, especially with respect to enhancing the accountability of public procurement and establishing a functioning bidder protest mechanism. Accordingly, sufficient progress towards the attainment of a sound public procurement system has been made for SWAPs to accelerate the devolution of procurement to national entities.

#### IV. PROCUREMENT REFORMS: GAINS, PROMISES, AND IMPEDIMENTS

##### A. *The Gains of the Exchequer and Audit (Public Procurement) Regulations*

Following the recommendations of a team of consultants,<sup>69</sup> the KANU government enacted the Exchequer and Audit (Public Procurement) Regulations (Procurement Regu-

64. See Mutiga, *supra* note 58.

65. James Anyanzwa, *Kituyi Seeks Review of Public Procurement Law*, EAST AFRICAN STANDARD (Kenya), Oct. 28, 2004, at 10.

66. See, e.g., TRANSPARENCY INT’L, GLOBAL CORRUPTION REPORT 2005 (2005), available at <http://www.globalcorruptionreport.org/download.html>.

67. Odhiambo & Kamau, *supra* note 47, at 17.

68. *Id.* (emphasis added).

69. *Report on Kenya Public Procurement Systems*, *supra* note 52, at 150-163.

lations) in 2001.<sup>70</sup> The team of consultants recommended the enactment of a law on public procurement. Because the team realized that it would take a long time for such a law to be enacted due to lack of support in government circles for a stringent procurement system,<sup>71</sup> it recommended the promulgation of procurement regulations under the Exchequer and Audit Act, which empowers the Minister for Finance to make regulations governing public procurement.<sup>72</sup>

The Regulations apply to all “public entities”<sup>73</sup> and supersede all previous government circulars and other instruments dealing with public procurement.<sup>74</sup> As an exception to this general rule, however, the Regulations do not apply where the Minister for Finance decides, in consultation with the head of the procuring entity, that “it is in the interest of national security or national defense to use a different procedure.”<sup>75</sup>

The Regulations seek to streamline the procurement process by abolishing the CTB and establishing the Public Procurement Directorate (PPD) as “the central organ for policy formulation, implementation, human resource development and oversight of the public procurement process.”<sup>76</sup> The PPD thus takes over general responsibility for public procurement from the Minister for Finance.<sup>77</sup> Its functions include monitoring the overall functioning of the public procurement process and advising the minister, preparing procurement manu-

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70. The Exchequer and Audit (Public Procurement) Regulations, 2001, No. 51, KENYA GAZETTE SUPPLEMENT No. 24 [hereinafter *Procurement Regulations*] (amended by Legal Notice No. 161 of 2002 which reviews the times allowed for the submission of tenders, the compositions of tender committees and procurement thresholds).

71. Interview with Achik Okola, Consultant, Rachier & Amollo Advocates, in Nairobi, Kenya (Jan. 24, 2005). Mr. Okola was a member of the team of consultants.

72. Exchequer and Audit Act Chap. 412 § 5A (2005) (Kenya).

73. These include government ministries, government departments such as the Central Bank of Kenya, administrative districts, state corporations, public universities and other public institutions of learning, local authorities, and cooperative societies.

74. *Procurement Regulations*, *supra* note 70, § 47.

75. *Id.* § 3(2).

76. *Id.* § 7(3).

77. Nevertheless, the PPD is established as a department of the Ministry of Finance, and is therefore answerable to the Minister for Finance. It should also be noted that the Director of the PPD is appointed by the Minister for Finance.

als, advising and assisting procurement entities in undertaking procurement, inspecting the records of procurement entities, and training procurement officers.<sup>78</sup>

Under the new, decentralized system, each public entity constitutes a procurement entity, and is required to establish a tender committee to undertake its procurements.<sup>79</sup> Provided that the PPD is given sufficient autonomy and enforcement powers, the decentralized system should ensure the establishment of an efficient and accountable public procurement system.

The Regulations are based on the UNCITRAL Model Law<sup>80</sup> and embrace the principles of sound public procurement<sup>81</sup> in significant respects. Among other things, they establish open tendering as the preferred procurement procedure,<sup>82</sup> require that specifications be drawn objectively,<sup>83</sup> prohibit the discrimination of candidates,<sup>84</sup> mandate the advertisement of tenders,<sup>85</sup> and require the evaluation of tenders transparently and on the basis of objective criteria.<sup>86</sup>

Efforts have also been made to open up the public procurement system to public scrutiny. The Regulations require that all procurement regulations and instructions of the Minister of Finance must be “promptly made accessible to the public.”<sup>87</sup> Further, procurement entities are required to maintain records of their proceedings, which records they must upon

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78. *Procurement Regulations*, *supra* note 70, § 7(4).

79. The First Schedule of the Procurement Regulations (as amended) set out guidelines for the establishment of tender committees. *Id.*

80. U. N. Comm’n on Int’l Trade Law [UNCITRAL], *UNCITRAL Model Law on Procurement of Goods, Construction and Services*, A/49/17 (Feb. 17, 1995).

81. *See* Arrowsmith, *supra* note 8, at 15 (arguing that a sound public procurement system should emphasize four principles, namely competition, publicity, use of commercial criteria, and transparency).

82. *Procurement Regulations*, *supra* note 70, § 17.

83. *Id.* § 14(3).

84. *Id.* § 11.

85. *Id.* § 22(1).

86. *Id.* § 30(8).

87. *Id.* § 9. There is, however, no sanction where the Minister fails to do so.

request avail to candidates who participated in those proceedings.<sup>88</sup>

### B. *Administrative Review of Procurement Decisions*

The Regulations also provide for the administrative review of procurement decisions, which forms a critical part of the efforts to ensure transparency in the procurement process. Pursuant to the Regulations, the Minister has established a “Public Procurement Complaints, Review and Appeals Board” (PPCRAB or Board) to adjudicate complaints submitted by “any candidate who claims to have suffered, or to risk suffering, loss or damage due to a breach of a duty imposed on the procuring entity.”<sup>89</sup> The Board’s rules of procedure require aggrieved bidders to submit requests for administrative review to the PPD, stating the reasons for the complaint.<sup>90</sup> The PPD has power to dismiss complaints, but where it does not do so, it is required to promptly give notice of the complaint to the procuring entity and interested candidates, and call a meeting of the Board within twenty-one days.<sup>91</sup> The Board is then required to give a decision within thirty days from the date of the said notice and must state the reasons for its decision.<sup>92</sup> The remedies that the Board may grant include declaring the legal rules or principles governing the subject-matter of the complaint, prohibiting a procuring entity from acting unlawfully, requiring a procuring entity to act lawfully, annulling an unlawful act or decision of a procuring entity, revising such decisions or substituting its own decisions for such decisions, or

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88. *Id.* § 10(2). It should be noted, however, that the procurement entities are prohibited from disclosing information if doing so “would be contrary to law, would impede law enforcement . . . would prejudice legitimate commercial interests of the parties, would inhibit fair competition, or would not be in the public interest.” *Id.* § 10(2)(a).

89. *Id.* §§ 40(1), 41(1). The members of PPCRAB are appointed by the Minister, and include a chairperson from the private sector, permanent secretaries in the ministries of Finance and the Office of the President, the Solicitor General representing the Attorney-General’s office, and members nominated by particular private sector organizations. In addition, PPCRAB is allowed to co-opt two members, one of whom must be an expert in procurement. The Director of PPD serves as the Board’s secretary.

90. *Id.* §§ 40(1)-42(2).

91. *Id.* § 42(3).

92. *Id.* § 42(6).

terminating the procurement proceedings.<sup>93</sup> Despite this review process, the Board is precluded from entertaining any complaints once a procuring entity has concluded and signed a contract with the successful bidder.<sup>94</sup> Parties dissatisfied with the Board's decision may seek judicial review in the High Court.<sup>95</sup>

Although the bidder protest mechanism established by the Regulations has a number of shortcomings, it has contributed immensely to the restoration of credibility to the public procurement system. The Board has handled well over one hundred cases since its inception.<sup>96</sup> Both local and foreign firms actively participate in its proceedings, and have given it good reviews.<sup>97</sup> Indeed, the Board is unique in many respects, compared to Kenya's other regulatory and administrative bodies.<sup>98</sup> Above all, the Board has stopped a considerable number of corrupt and irregular procurements.<sup>99</sup>

A perennial problem that has bedeviled the procurement system is ministerial interference with the tender process. While the Regulations do not give government ministers, other than the Minister for Finance, any role in the procurement process, they have nevertheless intervened and influenced the award of tenders. Many government ministers simply have no regard for stipulated laws and regulations and often use their residual powers, such as the power to suspend or fire public officers, to pursue their own interests. The threat of being suspended or fired has in many cases intimidated public officers into obeying illegal ministerial directives. Indeed, where ministers want to manipulate the procurement process, they use such powers to demand information from

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93. *Id.* § 42(5).

94. *Id.* §§ 40(3), 42(5)(e).

95. *Id.* § 42(7).

96. *Proceedings of Procurement Consultative Meeting, supra* note 47, at 9.

97. Interview with Akich Okola, *supra* note 71.

98. For example, the Board has demonstrated an unusual ability to assert its independence from the government, which may be attributed to effective private sector representation, among other factors. *Id.*

99. See *Millions Saved in Bid to Curb Corrupt Tender Deals*, THE EAST AFRICAN STANDARD (Kenya), July 11, 2004 (observing that "Tenders worth a staggering Sh800 have been halted by [the PPCRAB] in the past eight months alone. The tenders . . . were dismissed for various reasons ranging from canvassing by bidders, leakage of technical information to favored competitors and procedural blunders by bidders").

the procuring entity, which they publish and use to cancel tenders, then turn around to claim that the process has been compromised and needs to be restarted.<sup>100</sup>

In one such instance, the Minister for Communications sought to interfere with the Communications Commission of Kenya's tender for a license to install and operate the country's second fixed telecommunications service.<sup>101</sup> The Minister unlawfully obtained confidential information on the tender and then purported to terminate it. The Board determined that the Minister had breached the confidentiality of the procurement process and interfered with the independence of the procuring entity.<sup>102</sup>

Such decisions of the Board may not end the problem of ministerial interference with the procurement process. Nevertheless they highlight instances where ministers exceed their powers and expose their misdeeds to public scrutiny.

Apart from exposing corrupt practices in the procurement process, the Board has also done a good job of ensuring that procuring entities adhere to the Regulations and is devel-

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100. Interview with Otiende Amollo, Partner, Rachier & Amollo Advocates, in Nairobi, Kenya (Feb. 16, 2005).

101. CNC/ZTC/Kensim (Taifacom Ltd.) v. Commc'ns Comm'n of Kenya, Application No. 30/2004 (Public Procurement Complaints Review and Appeals Board Aug. 5, 2004) (Kenya). Another interesting case is Getrio Ins. Brokers Ltd. v. City Council of Nairobi, Application No. 23/2003 (Public Procurement Complaints Review and Appeals Board Aug. 6, 2003) (Kenya), where the Board set aside the Minister for Local government's decision granting a tender for insurance services contrary to the Regulations. Here, an evaluation committee had recommended that the tender should be awarded to Consolidated Insurance Brokers Ltd. But its recommendations were ignored by the procuring entity, which instead consulted the Minister for Local government, who decided to grant the tender to another firm, Invesco Assurance Company Ltd. The Board ruled that tender awards can only be made by duly constituted tender committees and ordered that the insurance services be re-tendered under the direction and supervision of the PPD.

102. CNC/ZTC/Kensim (Taifacom Ltd.) v. Commc'ns Comm'n of Kenya, *supra* note 101, at 26 (observing that "[I]n our view, for transparency or justice to be done, it must also be seen to be done. We have had occasion to look at the Kenya Communications Act, and do not find in it that the Minister has power to interfere in the tender process. His power is granted under the Act for purposes of safeguarding public policy and the core business of the procuring entity. It is not to be used to interfere with tenders of independent committees of the Procuring Entity which are protected by law from such interference").

oping very good case law on public procurement.<sup>103</sup> Where a procurement entity has not followed the Regulations, the Board typically requires it to re-tender under the supervision of the PPD. In the short run, this may delay procurement processes. On the whole, however, the delays should become fewer as procurement entities become familiar with the Regulations. Indeed, the prospect of being required to re-tender should serve as an incentive for procurement entities to comply with the Regulations.

It should be noted, however, that by precluding the Board from entertaining complaints once a procurement entity has concluded a contract with the successful bidder, the Regulations may be encouraging corruption.<sup>104</sup> Presumably, the idea was to prevent endless litigation and facilitate speedy conclusions of tender processes. But in practice, this is frustrating the efforts of the the Board to stop irregular and corrupt tenders. The case of *Kabage & Mwirigi Insurance Brokers v. The National Social Security Fund* provides a good example.<sup>105</sup> The National Social Security Fund (NSSF) sought to tender for the provision of various insurance services. At some point during the tendering process, the Minister for Finance wrote to the

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103. See, e.g., *Siemens Ltd. v. Kenya Power & Lighting Co.*, Application No. 19/2004 (Public Procurement Complaints Review and Appeals Board May 24, 2004) (Kenya) (where the Board determined that tender evaluation process lacked objectivity, transparency and fairness and ordered the procuring entity to re-advertise the tender and “to ensure that the tender document contains clear and unambiguous specifications, specific score for responsiveness and clear evaluation criteria.”).

104. See *Procurement Regulations*, *supra* note 70, § 40(3).

105. *Kabage & Mwirigi Ins. Brokers v. Nat'l Soc. Sec. Fund*, Application No. 21/2003 (Public Procurement Complaints Review and Appeals Board Aug. 12, 2003) (Kenya). See also *Flambert Holdings Ltd. v. Ministry of Health*, Application No. 25/2003 (Public Procurement Complaints Review and Appeals Board Oct. 28, 2003) (Kenya). In this case, by the time the applicant lodged its complaint, the procuring entity had signed a contract with the successful bidder, who had substantially performed the contract. The procurement process in this case was irregular in several respects. There was no effective competition since one bidder was an agent of one of the other two, the tender specifications were ambiguous, the applicant was not given sufficient time to prepare its bid, and the bidders were not simultaneously notified of the award contrary to the Regulations. Despite these irregularities, the Board dismissed the application on the ground that it is precluded from entertaining complaints where the procuring entity has concluded and signed a contract with the successful bidder.

NSSF proposing that the tenders be awarded to certain firms. Indeed, one of the parties awarded a tender had not even submitted a bid. The NSSF made its awards on June 30, 2003, and immediately thereafter notified the “successful” bidders, on the ground that its insurance covers were expiring that very day. But the unsuccessful bidders were not notified until seven days later, by which time the NSSF had signed contracts with the successful bidders.

The Board found that the tender process was fatally flawed and annulled the tender awards. The NSSF appealed to the Board on the ground that the applicants’ complaint should not have been entertained in the first place since contracts had come into force by the time the application was lodged. The Board noted that it is established as “an administrative review board” specifically mandated to deal with complaints submitted by bidders, not procuring entities. In its view, the review contemplated in the Regulations is a review of a procuring entity’s decision. Accordingly, the Board determined that it did not have the jurisdiction to entertain the NSSF’s application, reasoning that “upon the issuance of its decision in respect of an appeal or complaint, the Board becomes *functus officio*.”<sup>106</sup>

### C. *Impediments to the Realization of a Sound Public Procurement System*

An obvious flaw of the new public procurement regime is that it does not have a firm legal basis. The Minister for Finance could simply bring the regime to an end by repealing the Regulations. At present, the Minister for Finance retains a great deal of power that can be used to frustrate the reform efforts. In 2003, for instance, the Minister suspended all procurement officers and public tenders to allegedly purge the procurement system of corruption.<sup>107</sup> Many believe that the real reason for this action, however, was for the Minister to assume control of public procurements.<sup>108</sup> Since suspended

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106. *Kabage & Mwirigi Ins. Brokers v. Nat’l Soc. Sec. Fund*, Application No. 21/2003, at 5 (Public Procurement Complaints Review and Appeals Board Nov. 12, 2003) (Kenya).

107. Muriithi Muriuki, *State Suspends All Tenders*, DAILY NATION (Kenya), May 29, 2003, at 48.

108. Interview with Akich Okola, *supra* note 71.

officers included those of the PPD, the operations of the procurement system were virtually brought to a halt and decisions were made by permanent secretaries in total disregard of the Regulations. Fortunately, the Minister had not suspended the operations of the PPCRAB, and it was able to stop many of the ensuing corrupt and irregular procurements.<sup>109</sup>

There is therefore an urgent need to enact a law on public procurement if the gains of the emerging regime are not to be lost. Several attempts have been made to enact such a law, but these have not succeeded largely because the Ministry of Finance is opposed to the creation of an independent authority as it wants to retain control of public procurement.<sup>110</sup>

The latest such attempt is the Public Procurement and Disposal Bill of 2005, which is currently being debated in Parliament. This bill is similar to the Regulations in many significant respects, although it seeks to make a number of useful changes. First, it provides that a procuring entity may engage the services of other persons to assist it in its work.<sup>111</sup> The government lacks capacity to design appropriate specifications and evaluate bids<sup>112</sup> and thus should be able to take advantage of expertise available in the private sector. Second, the bill gives the Director much needed powers, including that to inspect the records and accounts of procuring entities and contractors, order investigations of procurement proceedings and cancel contracts or terminate procurement proceedings pursuant to such investigations except where a matter is before the Review Board, and to debar firms from participating in procurement proceedings.<sup>113</sup> The Bill also introduces stringent penalties for persons who inappropriately influence the evaluation of tenders, induce the employees or agents of procuring entities, misrepresent material facts, collude to inap-

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109. *Id.*

110. *See, e.g.,* Geoffrey Irungu, *Treasury Not Happy with Procurement Bill*, DAILY NATION (Kenya), Nov. 11, 2003, at 7.

111. The Public Procurement and Disposal Bill § 28 (2005), <http://www.treasury.go.ke/ppd/Procbill.pdf>. Such persons are to be deemed employees of the procuring entity.

112. Interview with Caroli Omondi, Senior Counsel, African Trade Insurance Agency, in Nairobi, Kenya (Feb. 15, 2005). Mr. Omondi was a State Counsel in the Attorney-General's Chambers.

113. The Public Procurement and Disposal Bill, *supra* note 111, pts. VIII, IX.

propriately influence the tender process, or fail to disclose conflicts of interest.<sup>114</sup>

Another avenue for corruption is the exemption of national security and defense procurements from the Regulations.<sup>115</sup> Typically, the Minister for Finance resorts to this exemption even where the procurements strictly speaking have little or nothing to do with national security or defense. The result is that the tendering process is then shielded from public scrutiny. Nevertheless, a number of corrupt security procurements have been exposed by the media.<sup>116</sup> By far the most controversial of these procurements is the Anglo Leasing Scandal, which involved the acquisition of tamper-proof passports by the Ministry of Home Affairs and the construction of forensic laboratories for the police force.<sup>117</sup> The Bill seeks to seal this loophole by embracing security procurements. In the

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114. *Id.* §§ 38-43.

115. *See Procurement Regulations, supra* note 70, § 3(2).

116. *See, e.g., How Tender Turned Into a Sh7b Embarrassment*, THE EAST AFRICAN STANDARD (Kenya), July 11, 2004.

117. The Ministry of Home Affairs had initially sought to acquire tamper-proof passports and invited five firms to tender for their production. A technical committee of the Ministry of Finance, Immigrations Department, and the Government Technology Services then disqualified all the bids and recommended that the project be expanded to include other security facets in the issuance of new visas, passports, and computerization of the immigration records, thereby blowing up the cost of the project beyond Treasury's means and necessitating external financing. At this point Anglo Leasing & Finance Limited, a firm purportedly with registered offices in the United Kingdom, entered into the picture and submitted an unsolicited technical proposal for the supply and installation of an Immigration Security and Document Control System (ISDCS). Under the proposal, Anglo Leasing was to finance the project and supply the ISDCS through its subcontractor, Francois-Charles Obethur Fiduciare based in Paris. The Permanent Secretary in the Ministry of Home Affairs then wrote to the Ministry of Finance, informing it of the proposal and seeking to proceed with the procurement under security classification. A contract worth Kshs.2.7 Billion was subsequently signed between Anglo Leasing and the government, although no due diligence test was conducted on the firm. The Ministry of Finance then paid the firm a commitment fee of Kshs.95 million. The government then cancelled the contract once the scandal was exposed. The government later sacked the permanent secretaries in the Ministries of Finance and Home Affairs. But the Ministers, who gave final approval for the projects, declined to resign. And the same firm was also awarded a contract worth Kshs. 4 billion for constructing forensic laboratories for the police force, without competitive tendering. *See A Harvest of Corruption Scandals*, EAST AFRICAN STANDARD (Kenya), Feb. 5, 2005, at 1.

meantime, the government has established an inter-ministerial committee to oversee security procurements in response to public outcry.<sup>118</sup>

Corruption is also facilitated by the lack of a comprehensive policy on public procurement.<sup>119</sup> Such a policy would in particular enable effective participation of indigenous firms. In the absence of an objective policy, however, successive governments have simply used public procurement as a political patronage resource. Thus only a few indigenous firms have benefited from governmental efforts to give incentives to local firms to participate in public procurement.

The composition of the PPCRAB and its relationship with the PPD also needs review. Three permanent secretaries—those in the Ministry of Finance, the Office of the President, and the Solicitor-General—are members of the PPCRAB. Because these senior government officers sit on the boards of a number of government agencies and corporations, there is potential for conflicts of interest.<sup>120</sup> In *Kabage & Mwirigi Insurance Brokers v. The National Social Security Fund*, for example, the Permanent Secretary in the Ministry of Finance was accused of influencing the procurement process to favor certain bidders—and yet he was able to sit in judgment of his own decision.<sup>121</sup> Again, there is a need for the PPCRAB to be granted autonomy from the PPD to facilitate a clear separation of regulatory and adjudicatory roles. Once that is done, the PPCRAB should also be granted jurisdiction to review the decisions of the PPD/Authority, in light of the immense powers that the latter will have once the proposed bill is enacted.

A further source of inefficiency and corruption lies in the decision to exempt development agreements from the provisions of the Procurement Regulations, which leads to the maintenance of parallel procurement regimes and attenuates the lines of accountability. The Regulations provide that “[t]o

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118. *Kenyan President Orders Probe into Security Projects*, BBC MONITORING NEWSFILE (London), Feb. 10, 2005, at 1.

119. Odhiambo & Kamau, *supra* note 47, at 15 (observing that small, medium, and micro enterprises (SMMEs) have not participated in public procurement due to “lack of a coherent, transparent, accountable and participatory procurement policy . . .”).

120. See Jaindi Kisero, *Curb Ministers’ Appetite for Mischief*, DAILY NATION (Kenya), Nov. 12, 2003, at 10.

121. *Kabage & Mwirigi Ins. Brokers v. Nat’l Soc. Sec. Fund*, *supra* note 105.

the extent that these Regulations conflict with an obligation of the government under or arising out of an agreement with one or more other States or with an International organization, the provisions of that agreement shall prevail.”<sup>122</sup> The result is that in sector-wide development assistance programs such as GJLOS in which procurement is undertaken by a private entity answerable only to donors, there is virtually no accountability to local constituencies.

The following Part reviews the institutional structures of the GJLOS Reform Program and its procurement regime. As we shall see, this program raises serious concerns about efficiency and democracy in the administration of aid. In particular, there is a need to harmonize the procurement regime of the program with the public procurement system established by the Procurement Regulations.

## V. THE GJLOS REFORM PROGRAM AND ITS PROCUREMENT REGIME

### A. *Efficiency, Democracy, and the Institutional Structures of the GJLOS Reform Program*

#### 1. *The Nature of the GJLOS Reform Program*

The GJLOS Program seeks to strengthen the capacities of the institutions in the governance and legal sector for “efficient, accountable and transparent administration of justice.”<sup>123</sup> The Program is quite broad, and brings together some *thirty* departments of the government drawn from the Ministry of Justice and Constitutional Affairs (MoJCA), Office of the President (Provincial Administration and National Security), the Ministry of Home Affairs, the Attorney General,

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122. *Procurement Regulations*, *supra* note 70, § 3(5). The Public Procurement and Disposal Bill, *supra* note 111, § 6 is even more explicit and provides: “If there is a conflict between this Act, the regulations or any directions of the Authority and an agreement between the government and one or more states or multilateral or bilateral intergovernmental organizations, the agreement shall prevail.”

123. Republic of Kenya Governance, Justice, Law and Order Sector Reform Programme, *Short Term Priorities Programme (STTP) Fiscal Year 2003/04* 11 (2003) [hereinafter *STTP*]. A major drawback of the GJLOS Program is that it concentrates on supply factors at the expense of demand factors. For example, it does not address how citizens can access justice. I am grateful to Patricia Kameri-Mbote for this insight.

and the Judiciary.<sup>124</sup> These departments work with an array of donor organizations and non-state actors drawn from the private sector and civil society.

The Program emerged in the environment of optimism that followed the inauguration of the NARC administration in January 2003. The new government developed a comprehensive policy framework, *The Economic Recovery Strategy for Wealth and Employment Creation (ERS)*,<sup>125</sup> in which it identified governance as one of the foundations for economic growth. Through the ERS, the NARC government sought to institute reforms in public administration, national security, and law and order. Among the new institutions it created to foster the required governance reforms were the MoJCA and the Department of Governance and Ethics in the Office of the President.<sup>126</sup> The enthusiasm of the Kenyan people was shared by the development partners, who quickly moved in to support the reform agenda of the new government. It is in this environment that the MoJCA and development partners conceived the GJLOS Program in November 2003. At inception, the participation of non-state actors in the Program was limited and unstructured.<sup>127</sup>

The Program was developed out of a realization that the institutions in the governance and legal sector need to address their inadequacies on a sector-wide basis if they are to be effective. In the administration of criminal justice, for instance, it was noted that the judiciary cannot function efficiently and effectively without the cooperation of the prosecution service, the police, and the prisons department.<sup>128</sup> The development partners introduced the idea of sector-wide funding in order to support the government's integrated approach to reforms.<sup>129</sup>

The principal document governing the Program is a Memorandum of Understanding (MoU) between the govern-

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124. DAVID EVERATT ET AL., KENYA: GOVERNANCE, JUSTICE, LAW AND ORDER SECTOR (GJLOS) PROGRAMME REVIEW 6 (2004) [hereinafter REPORT OF ADVISORY TEAM].

125. ECONOMIC RECOVERY STRATEGY FOR WEALTH AND EMPLOYMENT CREATION 2003-2007, at 9-10 (2003) (Kenya).

126. REPORT OF ADVISORY TEAM, *supra* note 124, at 5.

127. *Id.* at 13-14.

128. STTP, *supra* note 123, at 11.

129. REPORT OF ADVISORY TEAM, *supra* note 124, at 17.

ment of Kenya and the development partners, which sets out the funding arrangements for the Program. It provides that most of the development partners will provide funding through a basket fund, the GJLOS Basket Fund, while others will do so on a bilateral basis.<sup>130</sup> While bilateral funding agreements take precedence over the MoU, the development partners undertake to “strive to establish funding agreements that are compatible with the provisions of [the] MoU” for the sake of harmonization.<sup>131</sup> Further, the MoU sets out the terms and procedures for the joint management, funding, monitoring, and evaluation of the Program. Thus it provides for the appointment of a Financial Management Agent (FMA) to manage the Basket Fund, through a holding account in a commercial bank.<sup>132</sup> It also gives the government overall responsibility and accountability for the implementation of the Program.<sup>133</sup>

A number of institutions have been established to assist the MoJCA to run the Program, namely the Inter-Agency Steering Committee (IASC), the Technical Coordination Committee (TCC) and its Management Committee, the Program Coordination Office (PCO), the Thematic Groups (TGs), and the Donors’ Coordination Forum. These institutions work together with the thirty or so government departments charged with the task of implementing the Program.

The IASC was created to ensure that there is sufficient political goodwill behind the program and to provide policy oversight and strategic leadership to the program.<sup>134</sup>

The TCC provides guidance on Program implementation, coordinating implementation and ensures that implementa-

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130. Draft Memorandum of Understanding § A5, in *STTP*, *supra* note 123, app [hereinafter *Memorandum of Understanding*]. Eight development partners provide their funding through the Basket Fund. These are the governments and/or development agencies of Canada, Denmark, Finland, Germany, the Netherlands, Norway, the United Kingdom, and Sweden. They have appointed the Swedish International Development Agency (SIDA) as the lead donor.

131. *Id.*

132. *Id.* §§ D3, K1.

133. *Id.* § E1.

134. The IASC is thus made up by senior government officers, namely the Vice President, Ministers in the MoJCA and Office of the President, the Attorney-General, the Chief Justice, and the Permanent Secretary of Governance and Ethics.

tion is in line with government policies.<sup>135</sup> Because of its large size, it has a Management Committee to provide coordination and decision-making oversight. The Management Committee is comprised of Permanent Secretaries and heads of institutions and is given the task of leading the thematic groups.

Furthermore, given the deficiencies of the IASC, the TCC and the Management Committee, a Program Coordination Office (PCO) was created to assume responsibility for the day-to-day management of the Program.<sup>136</sup> Further, the PCO implements the strategic decisions of the TCC.

There are also Thematic Groups (TGs) created around seven “Key Result Areas” to address “output-specific issues.”<sup>137</sup> The TGs are convened by members of the TCC and are required to provide a forum for the discussion of issues and to assist the implementing government departments in developing work plans and carrying out activities. Members of the TGs are drawn from the implementing institutions, the PCO, the FMA, donors, the private sector, and civil society.

In addition, the donors have established a Donors’ Coordination Committee to provide opportunities for feedback on the implementation of the Program and consultations with the government.<sup>138</sup>

The Program’s institutional framework is rather unwieldy. A group of consultants hired to review the Program (the Review Team) unsurprisingly found that “[t]he absence of a clear

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135. The TCC is made up by a Justice of the Court of Appeal as chair, permanent secretaries, heads of departments participating in the Program, and representatives of donors, the private sector, and civil society organizations.

136. In some respects, the PCO was established as a response to complaints about the FMA. But while the PCO now performs some of the functions previously performed by the FMA, there is no clear demarcation of their roles.

137. These Key Result Areas are: Ethics, integrity, and anti-corruption; Democracy, human rights, and rule of law; Justice, Law, and Order; Public Safety and Security; Constitutional Development; Legal Services; and Leadership and Management Development.

138. It is interesting to note that tensions have been observed within the Donors’ Committee, with non-basket fund donors being accused of cherry picking, that is, selecting high-profile program areas they regard as their own turf while leaving the basket fund to pay for the low-profile work. See REPORT OF ADVISORY TEAM, *supra* note 124, at 25.

program management structure detailing linkages between organizations and their functions is causing confusion.”<sup>139</sup>

## 2. *Assessing the Effectiveness and Accountability of the GJLOS Program*

Corruption tends to thrive well in environments characterized by institutional confusion, which facilitates neither program effectiveness nor accountability. There is therefore every reason for Kenyans to be concerned about the democratic shortcomings of the GJLOS Program. First, vast financial resources have been allocated to the Program. The Program is expected to last some five years and will cost about \$15 million, seventy five percent of which will be sourced from the development partners.<sup>140</sup>

Second, GJLOS constitutes Kenya’s first SWAP and is considered by many in government and donor circles as a test case. The expectation is that it should be replicated in other sectoral reform programs.<sup>141</sup> Given that the development partners fund virtually the government’s entire development expenditure budget, the governance of the GJLOS Program considerably implicates the future administration of development assistance in Kenya, especially if donors achieve consensus on basket funding.<sup>142</sup>

Thus far, a number of concerns have been raised about the effectiveness and democratic character of the GJLOS Program. As a SWAP, the effectiveness of the Program should be assessed by the extent to which it ensures government ownership and leadership, and strengthens the government’s capacities and efficiency. The Program is not doing well on either count. While the MoJCA has “increasingly exerted its authority,” there are concerns that “donors have too much influence and only pay lip-service to the notion of government leadership” and are “too involved in the detail of GJLOS.”<sup>143</sup> The evidence for such influence includes the frequent meetings

139. *Id.* at 59.

140. *STP*, *supra* note 123, at 36; GOVERNANCE, JUSTICE, LAW AND ORDER SECTOR (GJOS) REFORM PROGRAMME, MINISTRY OF JUSTICE AND CONSTITUTIONAL AFFAIRS, FIRST PROGRESS REPORT 6 (2004) (Kenya).

141. *See* REPORT OF ADVISORY TEAM, *supra* note 124, at 12.

142. Development expenditures account for about thirty percent of the government’s annual budget. Interview with Caroli Omondi, *supra* note 112.

143. REPORT OF ADVISORY TEAM, *supra* note 124, at 17.

between donors, the PCO, and the FMA.<sup>144</sup> Thus donors, rather than domestic constituencies, remain the main point of accountability.<sup>145</sup> Concerns have also been expressed that the development partners have undue influence over the PCO, which is arguably the Program's executive organ.<sup>146</sup>

Furthermore, the Program has not been sufficiently mainstreamed into the government financial management processes. In particular, budgetary management and control problems have been noted because of the poor linkage between the Program and the Ministry of Finance, where GJLOS is "not well known or understood."<sup>147</sup> Indeed, officers of the Ministry of Finance acknowledge that they are yet to develop financial management approaches appropriate for SWAPs.<sup>148</sup>

Perhaps the most important unfulfilled expectation relates to the Program's efforts to strengthen the government's financial management and procurement capacities.<sup>149</sup> Because the Development Partners were convinced that the government's financial management and procurement systems are cumbersome and corrupt, they insisted on the appointment of the FMA.<sup>150</sup> In effect, therefore, they created financial management and procurement structures that bypassed the national systems. With respect to financial management, while the FMA is contracted to improve the government's capacities, it appears that neither indicators nor a timetable for doing so were provided.<sup>151</sup> The Review Team thus "found no evidence of the FMA proactively identifying financial management capacity gaps and filling them."<sup>152</sup>

Furthermore, bypassing the government's financial management system is likely to weaken the government's financial management capacity since disbursements take place outside of the governmental financial system.<sup>153</sup> As a consequence, a

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144. *Id.* at 26.

145. *Id.* at 28.

146. *Id.* at 18.

147. *Id.* at 20-21.

148. *Id.* at 21.

149. The procurement activities of the FMA are discussed *infra* Part V(B).

150. REPORT OF ADVISORY TEAM, *supra* note 124, at 28. KPMG, an international accounting firm, was appointed as the FMA.

151. *Id.* at 29.

152. *Id.* at 50.

153. *Id.*

vicious cycle—in which the government’s financial management system is bypassed and weakened, in turn justifying the continued demand for an FMA—tends to develop.<sup>154</sup>

The participation of non-state actors, namely private sector and civil society organizations (CSOs), has also been problematic. Their participation is not only unstructured, but there are also concerns that the Program may be crowding out CSOs.

At the time that it conceptualized the Program, the government invited a select group of non-state actors to participate.<sup>155</sup> While the participation of private sector organizations has not been controversial, the absence of effective representation from small and medium term enterprises (SMEs) is notable. Thus, the Kenya Private Sector Alliance (KEPSA), whose members are drawn from the high end of the sector, is the focal point for private sector organizations.

Conversely, the government only invited participation from a number of CSOs it thought were implementing projects similar to those proposed under GJLOS and others who “had shown an interest in working with government.”<sup>156</sup> Because this select group of CSOs was thereby guaranteed access to the Program’s resources, the government was perceived by many as using the Program to dispense political patronage.<sup>157</sup> Indeed, according to the report of the advisory team, many of these CSOs “had personal relationships with the new leadership in MoJCA and sector departments, many of whom came from civil society.”<sup>158</sup> In addition, in some cases, CSO actors have been hired as consultants for the Program, but were apparently not sourced transparently.<sup>159</sup> Further, a

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154. It is, however, encouraging that a consensus seems to be emerging among the development partners towards moving to an arrangement under which the Program’s finances are managed by the Ministry of Finance through a special account. *Id.* at 29.

155. *Id.* at 30.

156. *Id.*

157. *Id.* at 31 (observing that “some CSOs are rumoured to have received substantial funds to participate in GJLOS . . . while others have been told by the FMA that no funds are available for civil society participation”).

158. *Id.* at 30.

159. Interview with Harun Ndubi, Executive Director, Kituo Cha Sheria, Ardhi House, in Nairobi, Kenya (Feb. 28, 2005).

number of CSO actors felt that only the select group of CSOs had access to information on the Program.<sup>160</sup>

This problem largely stems from the fact that the role that CSOs are supposed to play in the Program is not clear: are they partners, service providers, or program monitors? The CSOs participating in the Program span this spectrum of participation. Especially for those that seek to provide services, the modalities for accessing GJLOS funds require clarification. Indeed, a scenario in which the GJLOS funds CSOs directly is undesirable since it gives the MoJCA the resources with which to compromise the independence of CSOs and effectively crowd them out of the governance and legal sector.<sup>161</sup>

### B. *The Procurement Regime of the GJLOS Program*

The procurement regime of the GJLOS Program raises serious questions of accountability and participation. According to the MoU, procurement arrangements under the Program must comply with the government's Procurement Regulations, but prior to the enactment of procurement legislation, the Program "will adopt procurement procedures of the FMA."<sup>162</sup> Further, the MoU authorizes the FMA to appoint a Procurement Agent to help it with this work.<sup>163</sup> Thus despite the elaborate and fairly democratic procurement system established by the Procurement Regulations, it was thought best to create a parallel procurement regime. Unfortunately, however, the parallel regime only seems to have served to lengthen the procurement process.<sup>164</sup>

In order to enable it carry out the task of procurement, the FMA developed a set of guidelines (Guidelines) in consultation with the donors and the government. Although these

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160. Interview with Millie Odhiambo, Executive Director, The Children Rights and Advisory Center (CRADLE), in Nairobi, Kenya (Feb. 28, 2005).

161. Interview with Harun Ndubi, *supra* note 159.

162. *Memorandum of Understanding*, *supra* note 130, § G.

163. *Id.* § G2.

164. REPORT OF ADVISORY TEAM, *supra* note 124, at 49 (reporting respondents as stating that 86% of the procurements by the FMA were not done on time). However, the FMA argues that it has improved the lead times and that its absorption rates of donor funds of about 50% are much better than the government's 20-25%. Interview with Chris Ngovi, Fund Manager, KPMG, in Nairobi, Kenya (Feb. 21, 2005).

Guidelines seek to embrace the principles of sound public procurement, they raise several issues.<sup>165</sup>

First, the Guidelines for all intents and purposes establish KPMG, a private firm, as a procuring entity. Thus it is the responsibility of KPMG to develop procurement plans after it has been furnished with approved work plans and to tender for goods and services.<sup>166</sup> According to the Guidelines, KPMG prepares and compiles the tender documents, although the implementing agencies are responsible for providing technical specifications.<sup>167</sup> Furthermore, the FMA determines whether bids are responsive and coordinates the evaluation of responsive bids by establishing an evaluation panel.<sup>168</sup>

Quite apart from the fact that this arrangement concentrates responsibility for the procurement needs of some thirty government departments in one institution, it is also quite troublesome from a public law viewpoint. Since it is managing public resources, the FMA is for all intents and purposes exercising a “public function.” Thus far, however, the FMA is only accountable to the Basket Fund Donors through their leader (SIDA), with which it has entered into a contract. In addition, since it has not been established as a “Procuring Entity” under the Procurement Regulations, the exercise of its procurement powers under the Program are removed from the purview of national accountability mechanisms. But since the exercise of these powers affect “vital interests” of the citizenry, it ought to accord with principles of good administration—such as participation, accountability, and fairness.<sup>169</sup>

In particular, the need for KPMG to be accountable to domestic constituencies arises because a number of concerns have been raised that it is exercising its powers arbitrarily. There are allegations that, as an accounting firm, KPMG does

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165. The GJLOS Procurement Guidelines 2004 [hereinafter *FMA Procurement Guidelines*].

166. *Id.* §2.1 [hereinafter *FMA Procurement Guidelines*].

167. *Id.* § 4.5.1.

168. The members of the evaluation panel are the FMA Project Director, 2 FMA Procurement Advisors, FMA Fund Manager, FMA Capacity Building Advisor, FMA Financial Accountant, three government representatives, and a donor representative. *Id.* § 4.7.2.

169. See Alfred C. Aman, Jr., *The Limits of Globalization and the Future of Administrative Law: From government to Governance*, 8 IND. J. GLOBAL LEGAL STUD. 379 (2001).

not have the requisite public procurement management capacity.<sup>170</sup> Furthermore, concerns have been expressed over the fact that in some instances KPMG has acted beyond its mandate by interfering with activities in work plans and suggesting ways of implementing them.<sup>171</sup> For instance, where a children's rights CSO selected a venue for a workshop, KPMG insisted it be held at a different venue.<sup>172</sup>

Secondly, the Guidelines do not provide for a bidder protest mechanism. The Guidelines merely provide that "[a]pplicants who feel they have been evaluated unfavorably, or were disadvantaged in evaluation either by error or due to an irregularity, may register a written complaint with the FMA within five working days from the date of notification of award."<sup>173</sup> The FMA is required to immediately inform SIDA of the complaint and respond to the complainant "within a reasonable time."

Furthermore, the Guidelines provide for the automatic disqualification of bidders where they attempt to influence the outcome of the selection process. There are no provisions for bidders to contest such disqualification. In addition, the Guidelines provide for the suspension of "suppliers" from the FMA's supplier lists.<sup>174</sup> In this case, however, the FMA is required to give suppliers a hearing. Those aggrieved with the FMA's decision may appeal to SIDA.

In either case, there is no convincing reason why the decisions of the FMA should not be subjected to scrutiny by the PPCRAB, which has developed good jurisprudence on public procurement. Indeed, the procurement guidelines of development agencies such as SIDA typically provide that dissatisfied bidders "may have recourse to procedures established under the cooperation partner's national legislation."<sup>175</sup> In the case of GJLOS, however, it is not clear whether the envis-

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170. See, e.g., REPORT OF ADVISORY TEAM, *supra* note 124, at 50 (observing that "[r]espondents also noted that the FMA had not 'hit the ground running,' but had built their capacity as GJLOS unfolded").

171. *Id.*

172. Interview with Millie Odhiambo, *supra* note 160.

173. *FMA Procurement Guidelines*, *supra* note 166, § 4.12.

174. *Id.* Annex C.

175. SWEDISH AGENCY FOR INTERNATIONAL DEVELOPMENT COOPERATION, SIDA PROCUREMENT GUIDELINES 18, § 3.19 (2004), available at [http://www.sida.se/content/1/c6/01/80/88/SIDA2450en\\_SPG%202004%20web.pdf](http://www.sida.se/content/1/c6/01/80/88/SIDA2450en_SPG%202004%20web.pdf).

aged procedures are those established by the Procurement Regulations or the GJLOS Procurement Guidelines.

C. *Administrative Law and Aid Administration*<sup>176</sup>

The experiences of the GJLOS Program illustrate the need for a national law on aid administration, establishing clear institutional and accountability frameworks, and also structuring the participation of local stakeholders.<sup>177</sup> Such a law should also require the government to keep an inventory of all development assistance agreements and facilitate public access thereto.

As we have seen, development assistance is typically driven by the national security and economic interests of donor countries, who thus set most of the agenda and the conditions of cooperation.<sup>178</sup> This is the case even with initiatives such as SWAPs, which seek to enhance the effectiveness of aid. Furthermore, aid policies typically do not recognize the “enormous diversity that exists in recipient countries;” instead, they assume that these countries are homogenous.<sup>179</sup> In this scenario, and despite much talk about local ownership, participation, and partnership, the formulation of aid policy remains donor-led.<sup>180</sup> Indeed, because meaningful local participation may lead to the citizens of developing countries expressing preferences that conflict with the priorities of donors, participation remains little more than a buzzword.<sup>181</sup>

While donors have made notable efforts to end the policy of tying aid, they still ensure that their firms get business by pursuing unofficial or tacit agreements with recipient govern-

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176. A discussion of the nuts and bolts of a national law on aid administration is beyond the scope of this article. The idea here is to underscore the need for such a law.

177. Among other things, this will entail designing objective criteria for screening participants (who in Kenya are likely to be CSOs given their reach and effectiveness) to ensure that they actually represent the views of the affected public. It will also require efforts to educate the public on development assistance so that they attain the capacities necessary for effective participation.

178. DEGNBOL-MARTINUSSEN & ENGBERG-PEDERSEN, *supra* note 1, at 1, 12-13.

179. *Id.* at 5.

180. *Id.* at 175.

181. *Id.* at 271.

ments.<sup>182</sup> In fact, the procurement policies of donors undermine the development of local firms, which are invariably passed over in favor of international ones.<sup>183</sup>

Accordingly, development assistance is not free and will only work for developing countries if their governments integrate aid within national development strategies.<sup>184</sup> For this to happen, each government must establish “organizations with the will and capacity to set policy priorities, negotiate with donors, and determine when to accept or reject donor proposals.”<sup>185</sup> Preferably, they should centralize aid planning and management so that there is only one institution charged with negotiating and securing aid.<sup>186</sup> Indeed, Botswana’s success in using aid effectively has been attributed to its adoption of this approach.<sup>187</sup>

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182. *Id.* at 13-14 (observing that this may occur, for instance, when consultant firms from a donor country design infrastructure projects according to specifications that favor equipment manufacturers from their own country).

183. Thus, for instance, there is no convincing reason why KPMG was hired as the FMA for the GJLOS Program since there are enough local firms that could have ably performed the required tasks. It appears that the specifications in this particular tender were drawn so as to favor international firms.

184. FOREIGN AID IN AFRICA, *supra* note 1, at 213 (observing that “[p]erhaps the most important determinant of aid effectiveness is the recipient’s capacity to manage aid and integrate it in to its own coherent development management process. Aid programmes are more likely to be successful when the recipient government has the capacity to identify and articulate its own priorities and programmes, and the ability to implement, monitor, and evaluate the resulting programmes in the context of its own planning and budgeting.”).

185. *Id.*

186. The typical situation in most African countries is that there is no aid coordination, and government institutions negotiate aid separately. As a result, there has been a proliferation of aid activities, some of which these countries do not need. Such proliferation also perpetuates the lack of accountability and unsustainability of aid activities. *Id.* at 215, 217.

187. Gervase Maipose et al., *Effective Aid Management: The Case of Botswana*, in FOREIGN AID IN AFRICA, *supra* note 1, at 26. In Botswana, the Ministry of Finance and Development Planning is the only institution charged with negotiating and securing aid. This ministry is mandated to plan, program, and evaluate aid activities. Indeed, there are instances where Botswana has refused aid for not being in the country’s interests. While Botswana is relatively wealthy compared to other African countries, it is worth noting that “the [aid] procedures and attitudes of the Botswana government were

To achieve the envisaged integration of aid within national development strategies, developing countries should enact laws on aid administration, to ensure that the formulation and administration of aid is efficient, accountable, and participatory.<sup>188</sup> While it can be expected that governments keen to maintain aid as a patronage resource will resist attempts to make aid administration transparent, such laws would offer effective means through which the citizens of developing countries can debate and counter the narrow interests of donors and government elites.

## VI. CONCLUSION

The sector wide approach to development assistance should be encouraged and developed further, especially since it promises to enhance the accountability of aid administration to the citizens of developing countries. Nevertheless, the experience with SWAPs thus far raises a number of concerns that should be addressed if the case of the GJLOS Program is anything to go by. There is a concern that donors continue to exert too much influence as they are too involved in the detail of the programs, which can only work to the detriment of the SWAP objective of ensuring governmental leadership and ownership of development assistance programs. Furthermore, such donor influence means that the main flow of accountability will continue to be outward, that is from the developing countries and SWAP institutions to the development partners. In addition, development partners have not achieved sufficient consensus on the need to harmonize their accounting procedures and policies on whether or not to untie their aid. As we have seen, the policy of tied aid is not only inefficient but also works against the efforts of developing countries to gain a foothold in international trade.

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forged when that country was one of the poorest in Africa." FOREIGN AID IN AFRICA, *supra* note 1, at 216.

188. In the case of Botswana, for example, all aid projects must be integrated within the national development plan, which is given legal backing by the Finance and Audit Act. Furthermore, the national development plan is formulated through a participatory process and "[c]ommitments are not made to new projects until the affected parties are consulted, and often until a general consensus is reached regarding project goals and implementation." Maipose, *supra* note 187, at 24-25.

By far the most significant concern is the ambivalence of the development partners over the use of recipient government administrative procedures and systems.<sup>189</sup> While they acknowledge the need to rely on national procedures and systems, they are exceedingly reluctant to do so, arguing that these procedures and systems are inefficient and corrupt. As a result, they create parallel structures which only end up undermining national systems. Even more worrisome, these parallel structures bypass national accountability mechanisms. In the case of the GJLOS Program, for instance, the private firm responsible for procuring goods and services is entirely unaccountable to national constituencies. There is thus a need for development partners to demonstrate some faith in national reform efforts, especially where, as in the case of Kenya's public procurement reforms, tremendous gains have been made in an effort to establish a credible system and need only to be consolidated. Last but not least, developing countries must establish clear and democratic legislative frameworks for the administration of aid, as these will not only ensure better and participatory engagement with the development partners, but also enhance accountability to their citizens.

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189. This concern is not unique to Kenya. See, e.g., RUCHE & GARANDEAU, *supra* note 11, at 6 (observing that "some donors are apprehensive about the capacity of the developing countries to take on the full responsibility of managing public procurement. They believe that effectiveness and transparency concerns justify adopting specific procedures and management structures that can easily be controlled by the donors, at least during the transitional period.").