

**THE LEGAL AND INSTITUTIONAL ENVIRONMENT ON IMPLEMENTATION OF
PUBLIC PRIVATE PARTNERSHIPS IN KENYA**

BY M

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DECLARATION

I, **MARTHA MURINGI MUTHOGA**, hereby declare that this is my original work and that it has not been presented for the award of a degree or any other award in any other university or institution. Where works by other people have been used, references have been provided.

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Date:

DEDICATION

To my loving mother, Roseann Wangechi Wanguku for her endless love, support and encouragement; her unwavering confidence in me, and for teaching me to reach for the stars and chase my dreams.

To my husband, Larry Ayiti Mulomi for his insight and support throughout this journey.

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My earnest thanks goes to the Almighty for His love and for giving me the strength to complete this study.

ABBREVIATIONS AND ACRONYMS

a)	GDP	Gross Domestic Product
b)	GoK	Government of Kenya
c)	ICRC	Infrastructure Concession Regulatory Commission
d)	IMF	International Monetary Fund
e)	MDAs	Ministries, Departments and Agencies
f)	MTP	Third Medium Term Plan
g)	NIE	New Institutional Economics
h)	PPP	Public Private Partnership
i)	PPPAC	Public Private Partnerships Appraisal Committee
j)	UNCITRAL	United Nations Commission on International Trade Law
k)	UNDP	United Nations Programme for Development

LIST OF STATUTES

Constitution of Kenya

Environmental Management and Co-Ordination Act, 2012.

Land Act, 2012

National Construction Authority Act, 2011

Public Finance Management Act, 2012

Public Private Partnerships Act, 2013

Public Private Partnerships Regulations, 2014

Public Private Partnerships (Project Facilitation Fund) Regulations, 2017

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PPP Petition No. 1 of 2014, Hebei Construction Ltd v Ministry of Energy and Petroleum and 4 others.

PPP Petition No. 1 of 2019, Mota-Engil Engenharia E Construcao Africa SA & 4 others v Kenya National Highways Authority (KeNHA)

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ABSTRACT

In recent past, there has been a move by many developing countries to bridge their budget deficit by mobilizing funding from the private sector to finance their development agenda. Many governments, including Kenya, seek to leverage on Public Private Partnerships (PPPs) as they afford them the opportunity to procure and implement public infrastructure projects and/or services that would otherwise not be attainable due to financial constraints. However, PPP projects in Kenya face a myriad of challenges which can be attributed to weaknesses in the current PPP legal and institutional framework. There is need to develop a strong legal system as no country can grow without the right guiding principles and laws regulating economic development. This study reviewed the legal and institutional environment on which implementation of the Kenyan PPP programme is founded. It revealed the current PPP framework is inadequate to guarantee successful implementation of PPP projects towards realization of the sustainable development goals under Vision 2030. A comparative analysis of PPP experience in Nigeria and India was also undertaken to get insights on how to improve the Kenyan PPP legal and institutional environment.

CHAPTER ONE

1.0 Background of the Study

Kenya has mapped out its development agenda in its Vision 2030 which is the long-term development blueprint for the country that seeks to transform the country into a middle-income nation providing a high quality of life to all its citizens.¹ The Vision is implemented through a series of 5-year medium term plans (MTPs) at the national level with county governments implementing County Integrated Development Plans (CIDPs). The Country is currently implementing the MTP 3 (2018-2022) which seeks to put the economy on a high and inclusive growth trajectory to achieve a double digit growth rate by the end of the plan period.²

Developing countries are often required to mobilize funding either from foreign aid or public borrowing to fulfill their development goals. The implementation of the Vision 2030, particularly the Second Medium Term Plan (2013-2017), has been characterized by extensive public borrowing resulting in a steep rise in the country's public debt which as at March 2019 had accumulated to above Kenya Shillings 5.4 Trillion.³ There has been concerns that the debt accrual and servicing patterns are unsustainable.

Public Private Partnerships (PPPs) can be a major force in bridging the funding gap in an affordable way. A PPP is a form of public procurement that allows the private sector to complement public sector finance. It is an arrangement between a contracting authority and a private party under which a private party undertakes to perform a public function or provide a service on behalf of the

¹ Republic of Kenya, 'About Vision 2030' <<https://vision2030.go.ke/about-vision-2030/>> accessed 21 February 2019.

² Republic of Kenya, 'Third Medium Term Plan (2018-2022)', pg 6.

³ Central Bank of Kenya, 'Public Debt'. Available at <<https://www.centralbank.go.ke/public-debt/>> accessed on 25 October 2019.

contracting authority who in turn receives a benefit for performing a public function and is generally liable for risks arising from the performance of the function.⁴

PPPs afford governments the opportunity to procure and implement public infrastructure and/or services that would otherwise not be attainable due to financial constraints by using the resources and expertise of the private sector and creates an incentive mechanism aligning private and public interests.⁵ PPPs are designed to enhance the mutual sharing of costs, risks and benefits between the public and the private sector by exploiting the strengths of both sides.

The PPPs take the form of service and management contracts⁶, lease or affermage contracts⁷; and concessions⁸. The key features that distinguish PPPs from the conventional procurement model are how PPPs are financed and the element of risk allocation. In the PPP model, the responsibility to mobilize finance is transferred to the private sector. The finance structure may involve a combination of equity and debt, and contractual relationships between the equity holders and lenders.⁹ There is need to safeguard the bankability of PPP projects so as to achieve a successful financial close. Secondly, PPP model allows the public agency to transfer risks to the private party unlike in the traditional government procurement model most long-term risks are borne by the public agency. However, risk transfer to the private sector comes at a price as costs in PPP projects

⁴ Section 2 of the Public Private Partnerships Act, No15 of 2013.

⁵ The World Bank, 'Public-Private Partnerships Reference Guide Version 3', PPP Knowledge Lab, 2017.

⁶ The public entity retains ownership of a facility while the private party manages and operates services at a fee. Typically the private entity does not assume commercial risk and payment of such fees is performance-based.

⁷ Under a lease or affermage contract, the public entity is responsible for operating and maintaining an already existing facility. However, the government maintains the responsibility for investment and bears the investment risk as the private partner is not required to make any large investment while the operational risks are transferred to the private party.

⁸ Under a Concession Agreement, the private partner is responsible for all capital investments with respect to the project as well as operation, maintenance, collection, management, construction and rehabilitation. The role of the private partner is to regulate the price and quality of service rendered by setting performance standards.

⁹ The World Bank (n 5).

are likely to be greater than for traditional government procurement processes which may erode value for money.¹⁰

As of June 2018, there were 72 PPP Projects in the pipeline in different sectors among them roads, education, health, energy, water & sanitation, 67 of which were approved under the solicited process and 5 approved as Privately Initiated Investment Proposals (PIIPs) by both the National Government and County Governments.¹¹ Some of the challenges that developing countries face in implementation of PPPs include: lack of government commitment; poor risk management policies; poor banking policies and unavailability of loans; poorly drafted regulatory and legal framework; inadequate mechanism to attract foreign investors and the local private sector participants; and lack of transparency and competition in the procurement process.¹²

Successful conceptualization and implementation of PPPs requires comprehensive preparation by both the public and private sectors. The public partner should assess its capabilities including its institutional capacity to act as a partner; create a shared vision that identifies the opportunities, objectives, and ultimate goals for the community; be legislatively prepared; and establish mechanisms to manage public expectations. On the other hand, the private partner should familiarize itself with the jurisdiction's plans, approval processes, and length of permitting processes; establish the feasibility of the project; and get the right team.¹³

¹⁰ Pauline Hovy, 'Risk Allocation in Public-Private Partnerships: Maximizing Value for Money' (2015). Available at <<https://www.iisd.org/sites/default/files/publications/risk-allocation-ppp-maximizing-value-for-money-discussion-paper.pdf>> accessed on 22 February 2019.

¹¹ Public Private Partnerships Unit, 'PPP Pipeline'. Available at <<https://pppunit.go.ke/ppp-pipeline/>> accessed on 21 February 2019.

¹² Christian Azuka Olele, 'The Challenges of Public Private Partnership (PPP) Projects in a Developing Country : The Case Study of the Lekki Toll Road Infrastructure Project in Lagos , Nigeria' (2016) International Journal of Ground Sediment & Water Vol. 04.

¹³ Mary Beth Corrigan and others, 'Ten Principles for Successful Public / Private Partnerships', the Urban Land Institute Washington DC (2005).

1.0.1 The Place of PPPs in Kenya's Development Agenda

Since independence, Kenya has pursued social, economic, and political development through various development plan such as Sessional Paper No. 10 of 1965 which sought to eradicate poverty, ignorance and diseases, it was criticized for taking a discriminatory approach to development; the Poverty Reduction Strategy Paper of 1999 which was directed towards poverty reduction and economic growth; and the Economic Recovery Strategy for Wealth and Employment Creation of 2003 to 2007 that placed the country back on the growth path based on four pillars of Macro-economic stability, strengthening institutional governance, rehabilitation and expansion of physical infrastructure, and investment in human capital of the poor.¹⁴

The current Vision 2030 is based on three pillars: economic, social and political. First, the economic pillar targets to improve the prosperity of all Kenyans through an economic development programme covering all the regions of Kenya aiming to achieve an average GDP growth rate of 10% per annum. Secondly, the social pillar seeks to build a just and cohesive society with social equity in a clean and secure environment. Last, the political pillar aims to realize a democratic political system founded on issue-based politics that respect the rule of law and protects the rights and freedoms of every individual in Kenyan society.¹⁵

The Government of Kenya (GoK) has recognized that the required funds to fully support the country's development agenda requires the involvement of the private sector and seeks to leverage on Public Private Partnerships (PPPs) in implementation of the Third Medium Term Plan (2018-2022).¹⁶

¹⁴ UNDP, 'Sustainable Development in Kenya : Stocktaking in the Run up to Rio + 20', 2012.

¹⁵ Government of Kenya, 'Kenya Vision 2030 - A Globally Competitive and Prosperous Kenya', 2007.

¹⁶ Preface to the 'Third Medium Term Plan (2018-2022)'.

Initiatives in the health sector are to be undertaken through PPP arrangements whenever possible to be facilitated through establishment a PPP framework in healthcare service delivery; Initiatives in the housing sector include use of PPPs to secure and service urban land with physical and social infrastructure to be facilitated through development of detailed guidelines to promote PPPs in the housing sector; With respect to the environmental initiatives, PPPs are to be commissioned in water and sanitation delivery for improved efficiency among others sectors.¹⁷ The national government in implementing the MTP3 has placed greater reliance on PPP arrangements due to the existing funding gap.¹⁸

Kenya is also involved in other global initiatives anchored in the Vision 2030. It has adopted Agenda 2063 which is Africa's strategic framework that aims to achieve inclusive and sustainable development as well Agenda 2030 for Sustainable Development Goals which is a shared blueprint for peace and prosperity for people and the planet. Sustainable development is one Kenya's national values and principles of governance.¹⁹ The Brundtland Commission in *Our Common Future* defines sustainable development as *“development that meets the needs and aspirations of the present without compromising the ability of future generations to meet their own needs”*.²⁰

The SDGs Kenya Forum conducted a study in 2016 to determine the extent to which goals and aspirations in both the SDGs and Agenda 2063 exist in one form or another in the Vision 2030. It revealed that the MTPs were not aligned to the SDGs and Agenda 2063. The existing development frameworks should be adjusted to accommodate requirements under the SDGs and Agenda 2063.²¹

¹⁷ Government of Kenya (n 15).

¹⁸ 'Third Medium Term Plan (2018-2022)' (n 2).

¹⁹ Article 10 (2) (d) of the Constitution of Kenya, 2010.

²⁰ UNDP (n 14).

²¹ SDGs Kenya Forum, 'Vision 2030's Medium Term Plan as a Framework for Implementation of the Sustainable Development Goals' 2016.

It is estimated that there is an infrastructure funding gap of approximately US\$ 2 to 3 billion per year required in order to implement the projects under Vision 2030.²² PPPs are a way to maintain a sustainable level of economic growth due to the limited fiscal space in Kenya. Accordingly, it is crucial to develop an enabling legal and institutional framework in order for the country to harness maximum benefits of PPP to assist the National and County Governments meet the developmental expectations of Kenyans under Vision 2030.

1.0.2 Legal Framework on Public Private Partnership

Chapter twelve of the Kenyan Constitution spells out the framework for public finance. Parliament is mandated to prescribe a framework within which policies relating to procurement and asset disposal.²³ The legal framework governing PPPs comprises of: - the PPP Act; Public Finance Management Act; PPP Regulations; PPP (Project Facilitation Fund) Regulations; and sectoral laws such as the Water Act, 2002; Energy Act, 2006; The Privatization Act, 2005; and The Public Roads Toll Act Cap.407.

The PPP Act is the principal framework that allows for the participation of the private sector in financing, construction, development, operation, or maintenance of infrastructure or development projects of the government; and establishes institutions to regulate, monitor and supervise the implementation of PPP projects.²⁴ The Public Procurement and Asset Disposal Act sets out the procedures for efficient public procurement and assets disposal by public entities. However, it excludes procurement and disposal of assets under the PPP Act from its ambit.²⁵

²² Vision 2030 Delivery Secretariat, 'Kenya Vision 2030 Newsletter Issue 004', 2014.

²³ Article 227 (2) Constitution of Kenya, 2010.

²⁴ The Public Private Partnerships Act, No15 of 2013.

²⁵ Section 4 (2) (e) of the Public Procurement and Asset Disposal Act, No 33 of 2015.

The Public Finance Management Act provide for the effective management of public finances by the national and county governments; the oversight responsibility of Parliament and county assemblies; the different responsibilities of government entities and other bodies.²⁶ It establishes the Public Debt Management Office which carries out the government’s debt management policy of minimizing its financing cost over the long-term taking account of risk among others.²⁷ The Public Debt Management Office verifies the affordability of PPP projects prior approval.²⁸

The PPP Regulations set out the membership of the PPP Committee; functions of the PPP Unit and PPP Nodes; the project preparation and appraisal process; appointment of the transaction advisors; the procurement process among others.²⁹

The PPP (Project Facilitation Fund) Regulations set out the eligibility criteria projects and management of the fund which provides financial support for the implementation of PPP projects in the form of grants, loans, equity, guarantees and other financial instruments.³⁰

1.0.3 The Institutional Framework on Public Private Partnership

The Institutional framework on PPP comprises of PPP Committee; PPP Nodes; PPP Unit, PPP Petitions Committee; and Project Facilitation Fund. The PPP Committee is mandated to assess; approve and oversee implementation of PPP Projects and to formulate policy guidelines on PPPs.³¹

The PPP Unit is responsible for overall coordination, promotion, and oversight of the implementation of the PPP Program in the country. It provides the technical, financial and legal

²⁶ Preamble to the Public Finance Management Act, 2012.

²⁷ Section 63 *ibid*.

²⁸ Section 64 (2) (b) Public Private Partnerships Act, 2013.

²⁹ The Public Private Partnerships Regulations, 2014.

³⁰ The Public Private Partnerships (Project Facilitation Fund) Regulations, 2017.

³¹ Section 7 of the Public Private Partnerships Act, 2013.

expertise to the Committee and any Node established under the Act.³² It is obligated to develop an open, transparent, efficient and equitable process for managing the identification, screening, prioritization, development, procurement, implementation and monitoring of projects, and ensure that the process is applied consistently to all projects.³³

PPP Nodes are established by a contracting authority³⁴ with responsibility for project selection and development, procurement and contracting as well as the day to day management of the project.³⁵

The node reports to the PPP Unit and is obligated to implement the recommendations and guidelines issued by the unit; and submit such information as shall be required by the unit or the Debt Management Office.³⁶

The PPP Petitions Committee has jurisdiction to hear petitions and complaints submitted by a private party during the process of tendering and entering into a project agreement under the Act.³⁷

Its decisions are final and binding on both parties with no option for appeal.³⁸

The Project Facilitation Fund is established to support the contracting authorities in the preparation phase of a project, the tendering process and project appraisal; support the activities of the PPP Unit; and extend viability gap finance to projects that are desirable but cannot be implemented in the absence of financial support from the Government; provide a source of liquidity to meet any contingent liabilities arising from a project: and settle the transaction advisor's retainer fees.³⁹

³² Section 14 (1) *ibid.*

³³ Section 14 (2) *ibid.*

³⁴ Section 16 *ibid.*

³⁵ Section 17 (1) *ibid.*

³⁶ Section 17 (2) *ibid.*

³⁷ Section 67 *ibid.*

³⁸ Section 67 (5) *ibid.*

³⁹ Section 68 *ibid.*

1.1 Statement of the Research Problem

Kenya has a strong demand for infrastructure development to achieve its sustainable development goals under the Vision 2030. Traditionally, it is the role of government to deliver public infrastructure and public services as infrastructure is critical for economic development. However, there has been an ever increasing budget deficit in Kenya which shrinks the amount available for development initiatives.⁴⁰ Although Kenya has recognized PPPs as a major force in bridging the infrastructure funding gap, the legal and institutional implementation environment of the PPPs is wanting as the country has not made much headway in ensuring that PPP projects are feasible, sustainable, and successfully implemented.

Kenya has had a poor run at rolling out and finalizing PPP projects as only one project had reached financial close as at September 2019.⁴¹ No single PPP project that has been successfully undertaken from commencement to completion since the coming into force of the PPP Act in 2013. PPPs face a myriad of challenges which include poor planning and coordination; weak analysis underpinning project selection; pursuit of political gain, and corruption; poorly run tender processes, poorly drafted contracts, and frequent re-negotiation; and lack of bankability making it difficult for projects to reach financial close.⁴²

These challenges can be attributed to the weak and/or inadequate PPP legal and institutional framework in the country. Some of the legal challenges include: gaps in the regulatory PPP

⁴⁰ In its Budget Statement for the 2019/20 financial year, the National Treasury has reported a fiscal deficit of Kenya Shillings 607.8 billion.

⁴¹ PPP Unit, 'Kenya Public Private Partnerships (PPP) Programme Status – September 2019'. Available at <<http://www.pppunit.go.ke/wp-content/uploads/2019/10/Kenya-PPP-Pipeline-Status-Report-September-2019.pdf>> accessed on 27th October 2019.

⁴² World Bank Group, 'Public Private Partnerships Reference Guide - Version 2.0'. Available at <<https://ppp.worldbank.org/public-private-partnership/library/public-private-partnerships-reference-guide-version-20>> accessed 27th October 2019.

procurement process which has been characterized by lengthy negotiations and inadequate disclosure; the current regime does not adequately take into account the constitutional requirements of public participation by stakeholders and beneficiaries which is necessary to instill public confidence in these projects;⁴³ inadequate dispute resolution mechanisms; inadequate incentives and financial government support for private investors;⁴⁴ there are several regulations required to fully operationalize the provisions of the PPP Act which are yet to be published 6 years after enactment of the Act. Further, devolution creates a new level of complexity for PPP implementation in Kenya. However, current framework does not adequately deal with PPP arrangements within the county government context.

In addition, there is lack of institutional capacity to establish the required PPP nodes within the contracting authorities to work with the PPP Unit in actualizing these projects and to ensure that projects are feasible, sustainable, and meet the expectations for value for money.⁴⁵ At the moment, most transactions rely on international advisors which increases the cost.⁴⁶

The unique characteristics of PPP legal and institutional framework in each country influence their attractiveness to investors hence the need to build a PPP enabling environment in Kenya. This study seeks to conduct an in depth analysis of the PPP implementation environment in Kenya with focus on the legal and institutional challenges and make appropriate recommendations to close the gap in the current regulatory regime.

⁴³ The Constitution of Kenya, Articles 10 (2) (a) and 201 (a).

⁴⁴ Under the Policy on the Issuance of Government Support Measures in Support of Investment Programmes' 2018, there is a recent shift in government policy to only offer government support measures in exceptional circumstances due to administrative challenges.

⁴⁵ Paul Kamau, 'Commercial Banks and Economic Infrastructure PPP Projects in Kenya: Experience and Prospects', Kenya Bankers Association, WPS/01/16, 2016.

⁴⁶ The Economist and Intelligence Unit, 'Evaluating the Environment for Public-Private Partnerships in Africa: The 2015 Infrascopé', EIU, London.

1.2 Justification of the Study

In recent past, Kenya's debt trajectory has been on the upward path. In the 2018/19 financial year, the ratio of debt to GDP shot up to 62.3%. While seeking for Parliament's approval to increase country's public debt ceiling from Kshs. 6 trillion to Kshs. 9 trillion, the National Treasury raised concerns that it would be unable to implement the budget for the 2019/20 financial year without the amendment which implies that the public debt is likely to increase to 70% of the GDP.⁴⁷ The World Bank has cautioned that the move to increase the public debt ceiling risks plunging the country into debt distress.⁴⁸ The IMF has attributed the increase in public debt to GoK's public investment drive and revenue shortfalls in recent years.⁴⁹

In view of the economic constraints, the Kenyan government has been under increased pressure to maintain public services and fund public infrastructure projects especially in the wake of the Vision 2030. It has been observed that private sector investment in infrastructure in developing economies has grown steadily over the past decade.⁵⁰ Like many of these countries, Kenya has turned to PPPs as an alternative way of financing its public infrastructure. According to the UNDP, public procurement accounts for 30% of the GDP in developing countries.⁵¹ As a form of public

⁴⁷ Paul Wafula, 'Economy in Crisis: World Bank Warns of Debt Distress' *The Daily Nation*, 31st October 2019. Available at <<https://www.nation.co.ke/news/Economy-in-crisis-World-Bank-warns-of-debt-distress/1056-5330904-8605uiz/index.html>> accessed on 1st November 2019.

⁴⁸ The World Bank "Kenya Economic Update: Securing Future Growth - Policies to Support Kenya's Digital Transformation", October 2019.

⁴⁹ International Monetary Fund, 'Article IV Consultation And Establishment Of Performance Criteria For The Second Review Under The Stand-By Arrangement Kenya', October 2018.

⁵⁰ E. Farquharson, C. T. Märtle and ER Yescombe, 'How to Engage with the Private Sector in Public-Private Partnerships in Emerging Markets' World Bank Publications, 14th January 2011.

⁵¹ Doyeun Kim, 'Why Should You Care about Public Procurement Reform?' (*United Nations Programme for Development*) <<http://www.undp.org/content/undp/en/home/blog/2016/12/15/Why-should-you-care-about-public-procurement-reforms-.html>> accessed 23 February 2019.

procurement, PPPs demand great attention since public resources are not being properly managed as GoK continue to lose billions of shillings through procurement irregularities.

Well-designed PPPs can drive essential infrastructure in a context of limited government budgets. Kenya stands to gain a lot by using PPP arrangements to undertake its development projects. First, from the financial perspective, PPPs allow governments to use funding from the private sector to fill the immense gap between limited public resources and the growing need for infrastructure development⁵² hence reducing the tax burden on the citizenry and regulating the public debt. Secondly, they play strategic role in facilitating the realization of development goals⁵³ such as the Vision 2030 or other internationally set development agendas. Third, PPPs are preferred for efficiency reasons due to government failure to secure accountability in infrastructure development.⁵⁴ Fourth, PPPs are implemented in support of ideological/political reasons in favor of economic liberalization and less state intervention towards attaining economic development.⁵⁵

Although PPPs may be seen as the holy grail in meeting the funding deficit, they can be an expensive and inefficient way of financing infrastructure and services. Critiques argue that a PPP is simply a way of moving borrowing off the public sector balance sheet while providing long-term state guarantees for profits to private companies with no real benefit to the public.⁵⁶

⁵² P. Burger and I. Hawkesworth, 'How To Attain Value for Money : Comparing PPP and Traditional Infrastructure Public Procurement', OECD Journal on Budgeting Volume 2011/1 12.

⁵³ *ibid.*

⁵⁴ The Auditor General's National Government Report for the 2017/18 financial year revealed that the government had incurred huge expenditure on projects which had either stalled or had remained incomplete long beyond the contract period. There were instances where payments were made for work not done, casting doubt on value for money for such expenditure.

⁵⁵ P. Burger and I. Hawkesworth (n 52).

⁵⁶ David Hall, 'Why Public-Private Partnerships Don't Work', Public Services International Research Unit (PSIRU), University of Greenwich, UK, February 2015. Available at <<http://www.world-psi.org/en/publication-why-public-private-partnerships-dont-work>> accessed on 23 February 2019.

PPP projects are difficult to execute, requiring robust regulatory and institutional architectures, high levels of technical capacity, political will and social consensus. The PPP project cycle is complex and demands specialized skill. The burden of building the PPP environment falls heavily on government. It must identify and select appropriate projects, issue transparent tenders, structure robust contracts, and have checks and balances in place to ensure the proper execution of these projects.⁵⁷ Nonetheless, PPPs can bring greater efficiency and sustainability in meeting public need when designed well and implemented in a balanced regulatory framework.

No country can grow without the right guiding principles and laws regulating economic development. The rule of law and strong legal systems are a precondition to sustainable development. Law properly employed is an instrument of development. On the other hand, poor laws can stifle growth or even reverse it. An excellent legal and institutional framework is indispensable in the promotion and fostering of successful PPP projects.

Given the place of PPPs in Kenya's development agenda and the socio economic context, it is important to assess the implementation environment of PPPs in Kenya and devise legal mechanisms to make it conducive if we are obtain maximum benefit from these projects and ultimately realize the sustainable development goals under the Vision 2030.

1.3 Aims of the Study

The aim of this study was to examine the implementation environment of PPP Law in Kenya with specific focus on the legal and institutional challenges plaguing efficient execution of PPPs as a

⁵⁷ The Economist and Intelligence Unit (n 46).

vehicle for hastening sustainable development under Vision 2030 with a view of identifying legal mechanisms to overcome these challenges.

1.4 Objectives of the Study

The objectives of this study are as follows:

- a) To analyze the implementation framework of PPPs in Kenya.
- b) To identify the legal and institutional challenges facing implementation of PPPs and assess the adequacy of the current framework in overcoming these challenges.
- c) To undertake a comparative analysis of the PPP experience in other jurisdictions that Kenya can adopt to overcome the challenges.
- d) To propose reforms and recommendations in order to bridge the gap in the current PPP legal and institutional regime towards achieving sustainable development.

1.5 Research Question

This study will be guided by the following research questions:

- a) What is the implementation framework of PPPs in Kenya?
- b) What are the legal and institutional challenges facing implementation of PPP law in Kenya?
- c) Is the existing framework adequate to overcome the legal and institutional challenges?
- d) What lessons can Kenya learn from the PPP experience in other jurisdictions so as to overcome the legal and institutional challenges?
- e) What reforms and recommendations can be made to bridge the gap in the current PPP legal and institutional regime towards achieving sustainable development?

1.6 Theoretical Framework

This study is based on three theories: First, the Social Exchange Theory which views interactions and exchanges as a results-driven where potential benefits are weighed against the costs in order to ascertain the value of a relationship; Secondly, the Resource Dependency Theory which examines how organizations are affected by externalities; and Third, the New Institutional Economics Theory which examining the role of institutions in economic growth.

1.6.1 Social Exchange Theory

Developed by George Homan, social exchange involves a series of interactions between parties that generate obligations. The theory was developed to explain why some relationships work while others fail and why we choose to start and continue only certain relationships. The theory which has roots in economics, psychology and sociology, asserts that relationships are formed by the use of a subjective cost-benefit analysis and the comparison of alternatives the purpose of which is to maximize positive interactions and minimize negative interactions.⁵⁸

This theory is relevant to this study in that in PPP project, both the public sector participant and the private sector participant conduct a cost-benefit analysis before undertaking the projects. This analysis involves an assessment of the financial viability of the project when deciding on the funding as well as value for money analysis where the societal benefits is compared against societal costs.

⁵⁸ Mark V. Redmond, 'Social Exchange Theory' [2015] English Technical Reports and White Papers. 5. 377 <<http://sk.sagepub.com/books/engaging-theories-in-interpersonal-communication/n28.xml>>.

1.6.2 Resource Dependency Theory

The main proponents of this theory are Jeffery Pfeffer and Gerald Salancik. The theory examines the relationship between organizations and the resources they need to operate. It states that no firm or entity can secure the resources and capabilities required to survive without interacting with firms and individuals beyond their boundaries. It focuses on: the flow or exchange of resources between organizations; those dependencies and power differentials created as a result of unequal resource exchange; the constraining effects such dependence has on organizational action; and the efforts by organizational leaders to manage dependence.⁵⁹

The major limitation of the theory is its assumption that organizational behavior and structures are shaped primarily by materialistic forces; it fails to regard the role of cultural, ideological, and institutional forces.⁶⁰ Nevertheless, this theory is relevant to this study in the wake of the increased collaboration between the public sector and the private sector resulting from strained public resources and lack of dynamism in traditional public service delivery.

1.6.3 New Institutional Economics Theory

The main scholars of the New Institutional Economics (NIE) are Ronald Coase, Douglass North and Oliver Williamson. NIE theory attributes economic growth to three factors: technology, human capital, and efficient economic organization.⁶¹ The theory incorporates a theory of institutions into economics. It postulates that legal, political, social and economic institutions (“institutions”) have important effects on economic performance. Accordingly, formal and informal institutions are formed to reduce uncertainty in human exchange as they help to facilitate

⁵⁹ Bob L Johnson, ‘Resource Dependence Theory: A Political Economy Model of Organizations’ [1995] Education Resources Information Center (ERIC) 1.

⁶⁰ *ibid.*

⁶¹ C. Ménard and M. Shirley, ‘The Contribution of Douglass North to New Institutional Economics’ (2011). Available at <<https://halshs.archives-ouvertes.fr/halshs-00624297>> accessed 27 February 2019.

order in daily social and economic interactions. Public policies aimed at improving economic performance in various dimensions will vary along with the institutions that are available to respond to them.⁶²

In his book “Institutions, Institutional Change, and Economic Performance”, Douglass C. North argues that Third World countries are poor because the institutional constraints define a set of payoffs to political/economic activity that do not encourage productive activity and claims that they could do better by altering the existing institutional framework.⁶³ Underdevelopment has been attributed to the government failure to provide structures of necessary governance to guarantee the institutions that bolster development.⁶⁴

The PPP context in Kenya is crippled by institutional challenges which hamper effective implementation of PPP law. This study proceeds on the premise that if the institutional framework is sound, then there should be optimum results from the PPP projects being implemented under Vision 2030. To attain optimum results, then we need to look at the environment under which the PPP law is operating.

1.7 Research Methodology

This study adopted a qualitative method of legal research. Primary, subsidiary and related legislation governing PPPs in Kenya were analyzed with a view of determining the adequacy of the existing legal and regulatory framework to overcome the challenges in the PPP implementation

⁶² Paul L Joskow, ‘New Institutional Economics: A Report Card’, 2nd June 2004 . Available at <<https://economics.mit.edu/files/1171>> accessed on 27th February 2019.

⁶³ Douglass C North, "*Institutions, Institutional Change, and Economic Performance*", Cambridge University Press, 1990.

⁶⁴ José G Vargas-hernández, ‘Institutional and Neo-Institutionalism Theory in the International Management of Organizations’, University of Guadalajara, 2008. Available at http://revistacientifica.fce.unam.edu.ar/index.php?option=com_docman&task=doc_view&gid=146&Itemid=35 accessed on 27th February 2019.

environment. Further, secondary sources such as reports, speech transcripts, textbooks, reported cases, newspapers, magazines, journals, and a considerable number of online articles were analyzed to help identify the legal and institutional challenges facing implementation of PPPs in Kenya.

The study also adopted a comparative approach to determine what best practices Kenya can borrow, in terms of legal and institutional arrangements, from other jurisdictions that have successfully implemented PPPs.

1.8 Literature Review

This literature review is based on studies that have been done and are related directly or indirectly to this study. There is considerable literature on PPPs generally. However, the major theme of this review revolves around the state of the legal and institutional environment of PPPs in Africa and other developing countries.

Evans K. Lagat undertook a review of the critique of the current legal, policy and institutional framework of PPPs in Kenya. He argues that the current PPP legal framework is not commercially - oriented and does not promote a secure, predictable and stable environment in which PPPs can be properly nurtured. He identifies the procurement process as being complex and tedious; challenges with PPP governance in terms of accountability and fairness; lack of clear policy guidelines and standard documents to guide implementation of PPPs; failure to adequately take into account the need for public participation in the PPP process; and institutional challenges. He proposed legal reforms such as statutory amendments to address procurement malpractices, preferential procurement to PPP arrangements among others; policy reforms such as timescale for PPP delivery, development of standard documentation and manuals among others and institutional

reforms such as empowering the PPP Committee to issue conservatory orders and establishment of central institution within National Treasury to manage equity investments arising from projects that demand co-ownership among others.⁶⁵

The Economist Intelligence Unit (EIU) in 2015 conducted a study to evaluating the environment for PPPs in 15 African countries among them Kenya. The study focused on the legal and regulatory environment, institutional framework; operational maturity, investment climate, financial facilities; and subnational adjustment factor. The research revealed that most African governments are actively building PPP frameworks but implementation of the law is lagging. 10 out of the 15 countries covered in the study have PPP-specific legal frameworks in place but these laws are often stronger on paper than in practice. Slow PPP processes are a common challenge across the continent and there is need for broader stakeholder engagement to get public buy in. With respect to Kenya's institutional framework, the EIU noted that there is need to harmonize the PPP institutional framework between national and county levels and need for personnel trained with PPP-specific knowledge at both national and county levels.⁶⁶

PPPs in South Africa have been counted among the most successful in Sub-Saharan Africa. Nathanael Bruchez examined the extent to which PPPs are suitable for long-term infrastructure development in South Africa. He noted that despite the high potential for PPPs in South Africa, the pace of their implementation has been relatively slow as only 24 PPP projects have been set up between 1998 and 2014. He opined that there is an urgent need for simplification of the

⁶⁵ Evans Kiplimo Lagat, 'Review Of The Policy, Legal And Institutional Framework of Public-Private Partnerships (PPPs) In Kenya', (Unpublished LLM Project, University of Nairobi, 2018).

⁶⁶ The Economist and Intelligence Unit (n 46).

legislation and processes around PPPs as well as of capacity building on the public sector's side, both in terms of legislation and processes understanding and of efficient implementation.⁶⁷

Madeleine C. Fombad in her article “Accountability challenges in public–private partnerships from a South African perspective” identifies the accountability challenges in South African PPPs to include: lack of public consultation as people are often alienated from the PPP decision-making process; lack of transparency as arguing that the South African PPP unit provides superficial and inconsistent disclosure of PPP information online through the PPP Quarterly; the PPP tendering process is perceived to be riddled with corrupt practices; lack of competition arguing that competition is more of perception than the reality; accounting issues resulting from off-balance-sheet PPP financing with the reality being that governments are still incurring debts and are committing themselves to payments that will still have an impact on the budget even though these do not show on the books; ineffective contract management; failure to monitor performance; failure to ensure value for money; and lack of equitable risk allocation.⁶⁸ These challenges mirror the challenges faced in Kenya.

Sónia Araújo and Douglas Sutherland in their article “Public-Private Partnerships and Investment in Infrastructure” argue that PPPs are preferred in stable and sound institutional environments, where there is a consensus towards honouring contractual arrangements with the private sector. A stable institutional environment is an incentive for the private partners' investment thus the public sector should build a pool of in house knowledge and expertise that is able to successfully manage and monitor PPP contracts and assist the different public bodies throughout the contracting process

⁶⁷ Nathanael Bruchez, ‘Public Private Partnerships (PPPs) in South Africa: To What Extent Are PPPs Suitable for the Long-Term Development of Infrastructure in South Africa?’, University of Bern, 2014.

⁶⁸ Madeleine C. Fombad, ‘Accountability Challenges in Public – Private Article Partnerships from a South African Perspective’, African Journal of Business Ethics, Vol. 7 Issue 1, Jan-Jun 2013.

to guarantee that value for money is indeed achieved. They argue that problems of possible opportunism and uncertainty of PPPs can be mitigated through appropriate institutional design.⁶⁹

Jeffrey Delmon in his book “Public-Private Partnership Projects in Infrastructure: An Essential Guide for Policy Makers” states that the PPP sector is littered with the corpses of failed efforts and badly designed projects that end up costing governments and the private sector huge amounts of time and money. He argues that implementing PPP using traditional public procurement institutional, legal, and financial mechanisms is a recipe for disaster. Successful PPP requires the creation of a robust investment climate, driven by right institutional arrangements.⁷⁰

The World Bank in its report “Public-Private Partnership Units: Lessons for their Design and Use in Infrastructure” observed that some of the challenges facing PPP Units across the world include: poor incentives for procurement of PPPs; lack of coordination within the machinery of government; lack of necessary skill; high transaction costs; and lack of information. It concludes that these challenges can be addressed by developing a meticulous institutional design, proceeding from a clear understanding of a country's needs, capacity, culture, and administrative traditions as Governments in different countries suffer from different institutional failures.⁷¹

In 2017, the World Bank undertook a study of 82 economies, among them Kenya, to assesses government capabilities to prepare, procure, and manage PPPs and their ability to make evidence-based decision making on the design of PPP procurement policies and regulations. In its report

⁶⁹ S. Araujo and D. Sutherland, ‘Public-Private Partnerships and Investment in Infrastructure’, OECD Economics Department Working Papers No. 80, 2010.

⁷⁰ Jeffrey Delmon, *Public-Private Partnership Projects in Infrastructure: An Essential Guide for Policy Makers*, Cambridge University Press 2011.

⁷¹ The World Bank, ‘Public-Private Partnership Units Lessons for Their Design and Use in Infrastructure’, 2007 . Available at

<<http://documents.worldbank.org/curated/en/220171468332941865/text/431390REPLACEM0te0partnership0units.txt>> accessed 20th February 2019.

dubbed “Benchmarking Public-Private Partnerships Procurement” it revealed that most these economies fall short of PPP best practice and concludes that governments need proper frameworks and capacity to identify the projects that are best done as PPPs, to procure them transparently and efficiently, and to undertake contract management and regulation so as to achieve the expected value-for-money for government and consumers and sustain investment.⁷²

Fritz Nganje in his article “Moving Beyond Africa’s Crisis of Institutions” argues that in many African countries, the basic institutions that are supposed to structure and regulate political and economic activities are generally weak or, in some instances, in a state of dysfunction. He explains institutional failure in Africa from the conceptual and operational levels. At the conceptual level, he attributes institutional failure to the colonial legacy and argues that most African institutions are largely western imports that do not reflect the socio-economic and cultural realities of modern African states. At the operational level, the failure is attributed to the lack of sufficient capacity to implement and enforce rules, weak incentive structures to encourage compliance with institutions, poor quality of leadership on the continent among others. He concludes that for Africa to develop strong institutions there is need for socio-political and economic transformation.⁷³

Suezan Lee in “Public-Private Partnerships for Development: A Handbook for Business”, writes on the steps that partners should take to build successful PPPs focusing on the partnership exploration, partnership building, maintenance, and closure and sustainability. First she argues that an internal assessment should be done and the process for selecting a partner should be outlined. Secondly, a PPP should strive for benefits while minimizing the costs and risks. Third, she argues

⁷² International Bank for Reconstruction and Development /The World Bank, '*Benchmarking Public-Private Partnerships Procurement*' 2017. Available at <http://pubdocs.worldbank.org/en/461481475076529519/PPP-benchmarking-Report-embargo-revised.pdf> accessed on 20th February 2019.

⁷³ Fritz Nganje, 'Moving Beyond Africa ' s Crisis of Institutions', SAIIA, 2015. Available at <https://saiaa.org.za/wp-content/uploads/2015/10/saia_sop_222_nganje_20151012.pdf> accessed 20th February 2019.

that when partnerships fail, it is often due to poor day-to-day management. A successful partnership requires carrying out the terms of the initial agreement, maintaining communications and transparency among partners, and conducting periodic monitoring and evaluation of partnership activities. Fourth on closure and sustainability, she advocated for development of a continuation strategy upon implementation of the PPP project.⁷⁴

From the foregoing, it is clear that a sound legal and institutional environment is key to successful implementation of PPPs. Although the weaknesses in the legal and institutional framework of PPPs in developing countries is acknowledged by many writers, there are very few writers who have focused on Kenya. There is need to build the knowledge on the implementation environment of PPPs in Kenya noting the major role of PPPs in the implementation of the Kenyan Vision 2030. Accordingly, the motivation of this study is to scrutinize the Kenyan implementation framework with specific focus on the adequacy towards the realization of the Vision 2030 and make appropriate recommends that suit the local conditions and circumstances.

1.9 Delimitations of the Study

The study has been limited to the legal aspects only and does not address the social, economic, political, and cultural aspects which may influence the implementation of PPPs in Kenya.

Further, this area of study has not been widely explored in the Kenyan context as there are few local publications on the subject under research. Accordingly, the secondary data relied upon in the study are studies carried out in other developing countries that have adopted similar approach to PPPs as well as studies conducted by international organizations such as the World Bank.

⁷⁴ Suezan C Lee, "*Public-Private Partnerships for Development A Handbook for Business*", The Committee for Economic Development (CED) 2006.

1.10 Hypothesis

This study proceeds from the following hypothesis: -

The implementation environment for PPPs in Kenya is weak and/or inadequate to guarantee successful implementation of PPP projects towards realization of the sustainable development goals under Vision 2030.

1.11 Chapter Breakdown

This study pursues the following chapter background:

Chapter one introduces the study in the form of the background to the study, statement of the problem, justification of the study, the research objectives, the research questions, the theoretical framework, the literature review, limitations of the study; the hypothesis on which the study embarks; and outlines the way the research shall be conducted.

Chapter two examines the implementation environment of PPPs in Kenya. Particularly, the legal framework interrogating the basic and fundamental principles of PPPs, the recognized PPP models, the Project Agreement, and the PPP cycle encompassing project development, project implementation and post implication. Further, this chapter evaluates the role and responsibilities of the institutional framework which comprises of the PPP Committee, the PPP Unit, the PPP Nodes, PPP Petitions Committee; the Contracting Authority; and the key private actors in PPPs such as the private partners and lenders shall be reviewed.

Chapter three identifies and highlights the legal and institutional challenges facing implementation of PPPs in Kenya and assess the adequacy of the existing PPP legal and regulatory framework in promoting sustainable development in Kenya as contemplated under Vision 2030. In terms of the

legal framework, the review focuses on the following areas: public participation; the procurement process; transparency in all processes and stages of the PPP process; dispute resolution mechanisms; county governments; and regulatory gaps in operationalization of the PPP Act. In addition, review of the institutional framework covers institutional capacity; governance structure; and inter-governmental cooperation.

Chapter four presents a comparative analysis of the PPP experience in other jurisdictions that Kenya can emulate. Specifically, focusing on Nigeria where PPPs have been pursued at both the federal and state level; and India which is the leading developing country in implementation of PPPs, demonstrating how these jurisdictions have successfully organized their legal and institutional framework in a manner that promotes PPPs.

Lastly, chapter five contains conclusions and recommendations arrived at the end of the study. It is hoped that the recommendations made will be of use to policy makers and contribute positively to the development of the law in this area.

CHAPTER TWO

THE IMPLEMENTATION FRAMEWORK OF PUBLIC PRIVATE PARTNERSHIPS IN KENYA

2.0 Introduction

PPPs are not a recent phenomenon in Kenya. Over the years the private sector has been involved in the country's infrastructure development albeit sector specific involving the telecommunications, energy, transport, water and sewerage sectors. These infrastructure investments occurred without a specific policy, legal and regulatory framework for PPPs.¹ Nonetheless, due to the critical role PPPs play in Kenya's development agenda under Vision 2030, the implementation framework has grown extensively comprising of the PPP Act; Public Finance Management Act; PPP Regulations; PPP (Project Facilitation Fund) Regulations; and sectorial laws.

The PPP legal and regulatory framework defines how and when PPPs can be used to deliver public services. Successful PPPs depend on the effectiveness of the existing legal and regulatory framework. Nick Frydas highlights six guidelines of best regulatory practice as: clarity of roles and objectives, predictability, transparency in decision making, participation through compulsory or voluntary consultations, accountability, and open access to information.²

This chapter is the bedrock of this study analyzing the implementation framework of PPPs in Kenya with specific focus on the fundamental principles guiding PPP, the recognized PPP models, the PPP cycle, as well as the PPP institutional framework under the PPP Act and the PPP Regulations which is the primary law regulating PPP arrangements.

¹ Republic of Kenya, 'Policy Statement on Public Private Partnerships', 2011.

² Nick Frydas, 'The Importance of the Regulatory Framework in enabling Private Sector Participation in the Energy Sector', South African Economic Regulators Conference, Johannesburg, 21-22 August 2012.

2.1 Guiding Principles in PPPs

Although each PPP project is unique in terms of implementation, most share common stages within the development process bounded by legal and political parameters.³ The PPP Policy outlines the following principles which should be included in PPP projects:

- i. the PPP projects should maximize the benefits of private sector efficiency, expertise, flexibility and innovations;
- ii. achieve long-term affordability within the constraints of budgetary sustainability, potential for returns for the private party and affordability by the users;
- iii. increase efficiency and access to quality public services for all members of society and enhancing balanced regional development;
- iv. allocate risks to the party best able to control them;
- v. enhance the health, safety, and wellbeing of the public;
- vi. achieve value for money particularly as compared to the conventional procurement;
- vii. ensure social and environmental safeguards; ascertain prior to tender the willingness of the private party to participate in the project on account of its financial viability;
- viii. manage fiscal risks created under PPP contracts within the government's overall fiscal management framework;
- ix. respect the employment rights and opportunities of employees;
- x. promote participation of small- and medium-sized enterprises in PPP projects; and
- xi. ensure good governance, transparency and accountability in the whole process of PPP development.⁴

³ Mary Beth Corrigan and others, 'Ten Principles for Successful Public / Private Partnerships', Washington, D.C.: ULI—the Urban Land Institute, 2005.

⁴ Republic of Kenya, 'Policy Statement on Public Private Partnerships', 2011.

Three of the key principles that should guide PPPs *viz* affordability and value for money and risk allocation, are further elaborated below.

2.1.1 Affordability and value for money of PPPs

Affordability means that PPP projects should only be awarded if the government can meet any payments or liabilities required for the duration of the contract, and/or that users will be able to reasonably pay the tariffs or user fees required. If the budget or users cannot meet such commitments, the project should not be implemented as a PPP.⁵

A PPP project has value for money if it accrues a net benefit in terms of cost, price, quality, quantity, timeliness or risk transfer to the Contracting Authority.⁶ The cost of a PPP project should be affordable and provide value for money to the Contracting Authority while enabling the private party to maintain its financial integrity, attract capital, operate efficiently and compensate a private party for any assumed risk.⁷ A feasibility study is conducted for purposes of determining the viability of undertaking the project by ascertaining its affordability, value for money and public sector comparator among others.⁸

Value for money is an overarching consideration in the procurement and delivery of each public investment project. A value for money analysis should include cost-benefit analysis to determine the social and the private costs and benefits of the projects that is, the net economic impact of the project; and cost-effectiveness analysis in order to optimum combination of whole-life cost, quality (or fitness for purpose) of the project.⁹

⁵ Republic of Kenya, 'Draft Public Private Partnership Manual', 2015.

⁶ Section 2 of the Public Private Partnerships Act, No. 15 of 2013.

⁷ Section 28 (2) *ibid*.

⁸ Section 33 (2) (d) *ibid*.

⁹ Penny Jackson, 'Value for Money and International Development: Deconstructing Myths to Promote a More Constructive Discussion', OECD Development Co-operation Directorate, May 2012.

Nevertheless, Penny Jackson argues that assessing value for money is harder in the developing countries as the availability of reliable information, notably statistics, is often of too poor a quality to make any reliable assessment; and that there is a lack of agreement on value for money for whom, of what and by when should the benefits be realized. Therefore it is important to have clear objectives and clear parameters (such as acceptable timeframes and levels of risk) in each case and at different levels.¹⁰

2.1.2 Risk allocation in PPPs

Under the PPP Act, the private party is generally liable for risks arising from the performance of the function in accordance with the terms of the project agreement.¹¹ Best practice demands that risks should be allocated to the party best-placed to manage that is one who is able to influence the risk factor, or to absorb the risk where it can neither be influenced nor its impact controlled. When the party that can manage a risk also bears its cost, it faces a strong incentive to do all it can to manage or reduce the impact of the risk.¹²

There are five key risks associated with PPP projects.¹³ First, the parties may face reputation risk, potential loss of reputation, in the event of defaults by either party. This risk can be mitigated by conducting thorough pre-screening of partners and ensuring that the limits of the engagements including timeframe and resource commitment are clearly articulated.¹⁴ Secondly, there is a risk of unrealistic expectations from the society. The mitigation strategy for this risk includes

¹⁰ *ibid.*

¹¹ Section 2 of the Public Private Partnerships Act, No. 15 of 2013.

¹² Public Private Infrastructure Advisory Facility, 'PPP Basics and Principles of a PPP Framework', May 2012. Available at <file:///C:/Users/ASUS/Downloads/Note-One-PPP-Basics-and-Principles-of-a-PPP-Framework.pdf> accessed on 20th May 2019.

¹³ Suezan C Lee, '*Public-Private Partnerships for Development A Handbook for Business*', The Committee for Economic Development (CED), 2006.

¹⁴ *ibid.*

involvement of all relevant stakeholders in the PPP process as well as adequate communication with the public about the project.¹⁵ Third, project risks arising from irreconcilable interests and lack of complementarities among partners, financial weakness of the project leading to unsustainability among others. This may be mitigated by selecting an appropriate partner with the required core competences and developing budget accounting for the various contingencies.¹⁶ Fourth, political risks which may arise from potential disruption of projects due to government instability, unexpected changes in legislation, inadequate security of investments, and project may become target of strong political opposition. The controls that may be put in place to mitigate this risks include partnerships with local business and social institutions, obtaining political risk insurance and postponing the project until change in political climate.¹⁷ Last, there may be legal risks associated with PPPs which include intellectual property issues which can be mitigated by ensuring that the issue is agreed upon in the PPP Agreement.¹⁸

A PPP allows effective risk allocation because there are typically some risks the government can best control or absorb and some that can be managed best by the private party. For instance the government may be in a position to manage political risks. The PPP Act allows the Cabinet Secretary, in consultation with the Debt Management Office and the Committee, to issue a guarantee, undertaking or binding letters of comfort in relation to a project for political risks.¹⁹ On the other hand, the private party may be best-placed to manage the project risks which include construction, commercial, and operating risks.

¹⁵ *ibid.*

¹⁶ *ibid.*

¹⁷ *ibid.*

¹⁸ *ibid.*

¹⁹ Section 27 of the Public Private Partnerships Act, No. 15 of 2013.

2.2 PPP Models

PPPs take a wide range of forms and operate on different conditions depending on level of investment, ownership control, risk sharing, technical collaboration, duration of the project, financing mode, tax treatment, management of cash flows etc.²⁰

The level of complexity of a project and the consequent risk of failure grow concurrently. Accordingly, it is important to identify the most suitable option to adopt. Some of the factors to consider in the choice of a PPP model include: the coherence of the project/option with the main objectives of the project; the capacity of the private sector to undertake the project; the capacity of the public sector to implement the PPP model; and the adequacy of a country's environment (political, legal and institutional framework) to the contractual and organizational arrangements required to for the project.²¹

There are several PPP models recognized under the second schedule of the PPP Act, elaborated herein below. However, the Cabinet Secretary is empowered under the Act to approve other PPP arrangements.²²

First, management contracts where the private party is responsible for the management and performance of a specified obligation for a specified period of time not exceeding ten years while the contracting authority retains ownership and control of all facilities and capital assets and properties.²³

²⁰ Tojo Jose, 'What Are the Different Models for Public Private Partnership (PPP) in Infrastructure?', 2016. Available at <<https://www.indianeconomy.net/splclassroom/what-are-the-different-models-for-public-private-partnership-ppp-in-infrastructure/>> accessed 3 April 2019.

²¹ Infrastructure Advisory Facility (PPIAF), 'Toolkit for Public - Private Partnerships in Roads & Highways'. Available at <https://ppiaf.org/sites/ppiaf.org/files/documents/toolkits/highwaystoolkit/6/pdf-version/1-13.pdf> accessed on 3rd April 2019.

²² Section 19 Public Private Partnerships Act, No. 15 of 2013.

²³ Paragraph 1 of the Second Schedule *ibid*.

Secondly, output performance based contracts where the private party is responsible for the operation, maintenance and management of an infrastructure facility for a specified period of time not exceeding ten years and the contracting authority retains ownership of the facility and capital assets.²⁴

Third, leases whereby the private party pays the contracting authority rent or royalties and manages, operates and maintains the facility or utilises the leased property for the purpose of exploration, production and development of minerals and receives fees, charges or benefits from consumers for the provision of the service or sale of products for specified period of time not exceeding thirty years.²⁵

Fourth, concessions where contracting authority issues a contractual licence to the private party to operate, maintain, rehabilitate or upgrade an infrastructure facility and to charge a user fee while paying a concession fee to the contracting authority.²⁶

Fifth, build-own-operate-transfer (BOOT) schemes where the private party designs, constructs, finances, operates and maintains an infrastructure facility owned by the private party for a specified time period not exceeding thirty years, or such longer period as may be agreed, after which the private party transfers the facility to the contracting authority.²⁷ The 140MW Geothermal PPP project at Olkaria and the Development of the Shimoni Port, which are at project proposal stage, are to be undertaken via the BOOT PPP Model.²⁸

²⁴ Paragraph 2 *ibid.*

²⁵ Paragraph 3 *ibid.*

²⁶ Paragraph 4 *ibid.*

²⁷ Paragraph 5 *ibid.*

²⁸ Public Private Partnership Unit, 'Kenya PPP Programme Status - March 2019'. Available at <http://pppu.redhousstage.com/wp-content/uploads/2019/04/Kenya-PPP-Pipeline-Status-Report-March-2019-Final.pdf> accessed on 4th May 2019.

Sixth, build-own operate (BOO) scheme where the private party designs, finances, constructs, operates and maintains the infrastructure facility and provides services for a specified period of time.²⁹ The 35MW Sosian Menengai Geothermal Power Plant Project and 35MW Ormat Orpower Geothermal Power Plant Project, both of which have reached commercial close, are to be undertaken via the BOO PPP model. These are green field geothermal electricity generation projects that seek to increase the installed national capacity.³⁰ Seventh, build-operate-and-transfer (BOT) scheme where the private party finances, constructs, operates and maintains an infrastructure facility and transfers the facility to the contracting authority at the end of a specified term which shall not exceed thirty years.³¹ Illustrations of BOT PPP projects are the Kenyatta University Students Hostel PPP Project anticipated to accommodate over 10,000 student which has reached commercial close; and the University of Embu Student Accommodation Hostels project, Moi University Student Accommodation Hostels, South Eastern Kenya University (SEKU) Student Accommodation Hostels project, Egerton University Student Accommodation Hostels project, and the Kenya Technical Trainers College (KTTC) Student Accommodation Hostels project which are still at procurement stage.³²

Eighth, build-lease and transfer (BLT) scheme where the contracting authority authorizes the private party to finance and construct an infrastructure or development facility and upon its completion lease it to the contracting authority for a specified period and upon the expiry of which the ownership of the facility automatically transfers from the private party to the contracting authority.³³

²⁹ Paragraph 6 of the Second Schedule, PPP Act.

³⁰ PPP Unit (n 28).

³¹ Paragraph 7 of the Second Schedule, PPP Act.

³² PPP Unit (n 28).

³³ Paragraph 8 of the Second Schedule, PPP Act.

Ninth, build transfer and operate (BTO) scheme where the private party constructs an infrastructure facility and assumes the costs and risks associated with the construction of the building and upon completion, transfers the ownership of the facility to the contracting authority and continues to operate the facility on behalf of the contracting authority.³⁴

Tenth, develop operate and transfer (DOT) where favourable conditions external to a proposed infrastructure project by a private party are integrated into the arrangement by giving that private party the right to develop adjoining property, and enjoy the benefits the investment creates as the parties agree on condition that the private party transfers the infrastructure facility to the contracting authority within a period not exceeding thirty years from the commencement of the project and the developed property remain the property of the private party in perpetuity.³⁵

Eleventh, rehabilitate operate and transfer (ROT) where the private party refurbishes, operates and maintains for a specified period, an existing facility at the expiry of which the private party transfers the facility to the contracting authority.³⁶

Thirteenth, Land Swap where a contracting authority transfers existing public land or an asset to the private party in consideration of an asset or facility that has been developed by that private party.

The Design-Build-Finance-Operate-Maintain-Transfer (DBFOMT) PPP model is another popular model. The private partner is compensated via fixed and performance-related periodical payments (annuity) by Government from public funds. There are currently several road project to be undertaken via this model which include: the Lot 33 of Road Annuity Programme which is the

³⁴ Paragraph 9 *ibid.*

³⁵ Paragraph 10 *ibid.*

³⁶ Paragraph 11 *ibid.*

only project that has reached financial close under the current regime; Lot 3 of Annuity Programme and the Likoni Cable Car Project are at commercial close; Lot 15, 18 and 32 Road Annuity Programmes where the contracts have been approved but yet to be signed; Lot 8 and 10 of Road Annuity Programme which are still at the contract negotiation stage among others.³⁷

2.3 The PPP Cycle

2.3.1 Project identification, selection and prioritization

The starting point of the PPP process is project identification, selection and prioritization. This starts with identification of the public need. The contracting authority needs to understand what the problem is that it is trying to solve before it starts identifying possible projects. Projects are not an end in themselves rather they are enablers for the government to meet its service delivery obligations. Thereafter, prioritization may require the government to choose the right alternatives when there are numerous economically and technically feasible projects to address the public needs. It is important to prioritize in order to ensure that public funds are well spent and produce the highest benefit for society.³⁸

It is a central responsibility of the government is to ensure fairness and protection of the public interest. Accordingly, during the project identification, selection and prioritization phase, the contracting authority should evaluate whether the project is acceptable and in public interest; and adequately educate and prepare both consumers and the general public.³⁹

³⁷ PPP Unit (n 28).

³⁸ ADB, EBRD, IDB, IsDB, MIF, PPIAF and WBG, 'The APMG Public-Private Partnership (PPP) Certification Guide Chapter 3 : Project Identification and PPP Screening' 2016. Available at <https://ppp-certification.com/sites/www.ppp-certification.com/files/documents/Chapter-3-Project-Identification-and-PPP-Screening.pdf> accessed on 20th May 2019.

³⁹ Republic of Kenya, 'Draft Public Private Partnership Manual' 2015.

The contracting authority is responsible for conceptualizing or identifying potential projects and take into account the strategic and operational benefits of entering into a PPP arrangement compared to the development of the facility or provision of the service by the contracting authority.⁴⁰

Specifically, the project proposal should include information on the demand assessment; the estimated cost of the project based on the prevailing market rates, an updated cost of similar precedent projects, or international best practices; details of the project; the expected private sector role in the project; the socio-economic benefits of the project; and the operational and strategic benefits of the project.⁴¹

2.3.2 Project preparation and appraisal

The project preparation and appraisal phase serves to filter out projects that do not meet the feasibility criteria from being launched and to avoid an expensive waste of resources or a failure to deliver the service. The analysis should entail: technical feasibility, commercial feasibility, economic feasibility, fiscal feasibility (affordability), debt analysis, environmental feasibility, social feasibility, legal feasibility, and value for money assessment.⁴² Only commercially viable or financeable projects need to be implemented as from both the lenders and investors perspective as private partners need to maintain healthy and profitable companies for the project to succeed and deliver value.⁴³

⁴⁰ Section 31 of the PPP Act.

⁴¹ Paragraph 12 of The Public Private Partnerships Regulations, 2014.

⁴² ADB, EBRD, IDB, IsDB, MIF, PPIAF and WBG, 'The APMG Public-Private Partnership (PPP) Certification Guide Chapter 4: Appraising PPP Projects', 2016. Available at <https://ppp-certification.com/sites/www.ppp-certification.com/files/documents/Chapter%204.pdf> accessed on 20th May 2019.

⁴³ Republic of Kenya, 'Draft Public Private Partnership Manual', 2015.

The contracting authority constitutes a project appraisal team for purposes of overseeing the preparation phase of the project which is comprised of a representative from the PPP Unit; such technical, financial and legal experts of the contracting authority; and a member of its PPP Node; and such other relevant persons.⁴⁴

The contracting authority is obligated to undertake a sector diagnostic study and assessment covering technical issues; legal, regulatory and technical frameworks; institutional and capacity status; commercial, financial and economic issues; and such other issues as the Cabinet Secretary may stipulate prior to entering into the PPP arrangement.⁴⁵ A feasibility study is also conducted for purposes of determining the viability of undertaking the project. The feasibility study should consider the technical requirements of the project; the legal requirements to be met by the parties to the project; the social, economic and environmental impact of the project; and the affordability, value for money and public sector comparator for the project.⁴⁶

The feasibility report is submitted by the contracting authority to the PPP unit for review and evaluation and thereafter to the Debt Management Office for assessment and approval of the fiscal risk and contingent liabilities of the project.⁴⁷

It should be noted that some projects can be feasible economically and technically but are not appropriate for the PPP process for a variety of other reasons such as no value for money is achieved by using the private sector.⁴⁸

⁴⁴ Section 32 of the Public Private Partnerships Act, No.15 of 2013.

⁴⁵ Section 20 *ibid*.

⁴⁶ Section 33 *ibid*.

⁴⁷ Section 35 *ibid*.

⁴⁸ ADB, EBRD, IDB, IsDB, MIF, PPIAF and WBG (n 42).

2.3.3 Project tendering

Following approval of the feasibility study by the PPP Committee, the contracting authority undertakes the project procurement. The objective of project tendering is to make sure that a number of suitably competent private companies respond to the project opportunity. It is important to get the right partner as PPP projects could take years. Therefore, the procurement process should not be rushed as it could result in the selection of a weak private partner and cause many problems in the future.⁴⁹

The procurement process should be conducted through competitive bidding guided by the principles of transparency, free and fair competition and equal opportunity.⁵⁰ As a general principle, projects should be tendered with a maximum of information provided to the potential bidders, including the level of government support to be extended to the undertaking.⁵¹

The main approach is the use of a two stage procurement process. First, a pre-qualification is conducted which involves confirmation that the private party has the financial capacity to undertake the project; the relevant experience in undertaking projects of a similar nature; and the relevant expertise to undertake the project.⁵² An invitation request for qualification is issued by notice in at least two newspapers of national circulation and in the electronic media specifying the eligibility criteria of a bidder and such other documents as may be required as proof of their eligibility.⁵³ A pre-qualification committee is constituted for the purpose of pre-qualifying bidders.⁵⁴

⁴⁹ Republic of Kenya, 'Draft Public Private Partnership Manual', 2015.

⁵⁰ Section 29 Public Private Partnerships Act, No. 15 of 2013.

⁵¹ Republic of Kenya, 'Policy Statement on Public Private Partnerships', 2011.

⁵² Section 26 Public Private Partnerships Act, No. 15 of 2013.

⁵³ Section 37 *ibid.*

⁵⁴ Section 39 *ibid.*

Secondly, the contracting authority in consultation with PPP Unit prepare an invitation to bid and the tender documents.⁵⁵ An evaluation team then constituted for purposes of evaluation of the technical and financial bids.⁵⁶ An evaluation report is prepared by the team specifying the evaluation criteria, the manner in which the first ranked bidder satisfied the requirements specified in the tender documents in comparison with the other bidders, and such other necessary information which is then submitted to the PPP Committee for approval.⁵⁷

The PPP Unit is tasked with the responsibility of assessing the technical expertise of the contracting authority to procure the development of a project. In the event the contracting authority does not have the technical expertise to procure the project it may appoint a transaction advisor to assist in the procurement process.⁵⁸

The PPP Act allows a contracting authority, in consultation with the unit and with the approval of the Committee, to hold a competitive dialogue with each bidder to define the technical or financial aspects of the project. The discussions held during a competitive dialogue are confidential and should not be disclosed to any person by any party to the discussions.⁵⁹

For privately initiated investment proposal, the PPP Act authorizes a contracting authority to procure the construction or development of a project or the performance of a service by negotiation without subjecting the proposal to a competitive procurement process where: there is an urgent need and engaging in the competitive procurement process would be impractical; the costs relating to the intellectual property in relation to the proposed design of the project is substantial; there

⁵⁵ Section 43 (1) *ibid.*

⁵⁶ Sections 47 and 48 *ibid.*

⁵⁷ Section 49 *ibid.*

⁵⁸ Section 36 *ibid.*

⁵⁹ Section 45 *ibid.*

exists only one person or firm capable of undertaking the project; and there exists any of the circumstance as the Cabinet Secretary may prescribe.⁶⁰

2.3.4 Project Negotiation

“In multiparty negotiations such as the case of PPPs, both the public and private sectors will need to be cooperating enough to reach mutually acceptable agreements while simultaneously be competing enough to satisfy individual interests.”⁶¹

A negotiating committee is constituted, comprising of representatives from the PPP Unit, the PPP Node, the contracting authority and a transaction advisor (where applicable), for purposes of entering into negotiations with the successful bidder on the technical and financial terms of the project agreement.⁶² The negotiating committee then prepare and submit to the contracting authority, a project report specifying the negotiated terms together with its recommendations which is then submitted to the PPP Unit.⁶³ If in order, the PPP Unit then submits the same to the Debt Management Office for confirmation of its initial approval at feasibility stage based on final contract and preferred bidder submission.⁶⁴

However, the second ranked bidder is requested to extend the validity of its bid pending the completion of negotiations with the successful bidder. In the event negotiations with the successful bidder are unsuccessful, the negotiating committee enters into negotiations with the second ranked bidder.⁶⁵

⁶⁰ Section 61 *ibid.*

⁶¹ H. J Thia and D. G Ross, ‘Towards a Model for Goal Setting and Negotiation in Public Private Partnerships’ 2000. Available at https://www.anzam.org/wp-content/uploads/pdf-manager/2274_THIA_DB3_5.PDF accessed on 22nd May 2019.

⁶² Section 52 (3) Public Private Partnerships Act, No. 15 of 2013.

⁶³ Section 53 (1) & (2) *ibid.*

⁶⁴ Section 53 (4) *ibid.*

⁶⁵ Section 52 (6) *ibid.*

Nonetheless, no fundamental terms, conditions or prices may be changed such as the price, the non-negotiable terms and conditions specified as non-negotiable conditions in the invitation to tender, the financial structure, or the conditions in respect of which there were no reservations raised by the bidder in the bid.⁶⁶

2.3.5 Project approvals

The approval process varies from country to country. Some countries require legislative approval of projects while more often, approval may come from the cabinet or a cabinet level committee, the finance ministry, or a combination of agencies and authorities.⁶⁷

The PPP Unit submits the project lists submitted to it by the contracting authorities to the PPP Committee for approval. The committee then prepares a national priority list and submits the same to the Cabinet for approval.⁶⁸ Once the national priority list of projects that has been approved, the PPP Unit is obligated to publish it in the electronic and print media.⁶⁹

PPP Committee is obligated inform the contracting authority of the decision of the Cabinet or Parliament within a period of thirty days from the date of the decision. In the event Cabinet approves undertaking of a project or Parliament ratifies the project agreement, the contracting authority shall finalize the project agreement for execution by the parties to the project. The contracting authority should communicate the decision of the Cabinet or Parliament as the case may be, in writing, to all bidders who participated in the bidding of the project.⁷⁰

⁶⁶ Section 52 (4) *ibid.*

⁶⁷ ADB, EBRD, IDB, IsDB, MIF, PPIAF and WBG 'The APMG Public - Private Partnership (PPP) Certification Guide Chapter 6 : Tendering and Awarding the Contract' 2016. Available at <https://ppp-certification.com/sites/www.ppp-certification.com/files/documents/Chapter%206%20%E2%80%93%20Tendering%20and%20Awarding%20the%20Contract%20-%20Final%20-%20v1.2.pdf> accessed on 22nd May 2019.

⁶⁸ Section 24 Public Private Partnerships Act, No. 15 of 2013.

⁶⁹ Section 25 *ibid.*

⁷⁰ Section 56 *ibid.*

Transactions involving the grant of a right or concession by or on behalf of any person, including the national government, to another person for the exploitation of any natural resource of Kenya is subject to ratification by Parliament.⁷¹

It is important to adopt good governance practices that embody accountable and transparent decision-making. Principles of leadership and integrity under the Constitution demand objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices as well as accountability to the public for decisions and action.⁷² Cabinet Secretaries are specifically obligated to act in accordance with this Constitution.⁷³

2.3.6 Project monitoring and evaluation

The last phase of the PPP cycle involves reviewing the project to ensure compliance with the project agreement during implementation and operation period and to ensure that the transfer of asset at the expiration of the project agreement is consistent with the terms and conditions in the project agreement.⁷⁴ PPPs are usually long term commitments. Therefore, they must be manageable for both the government and for the private partner.

Both the Contracting Party and the sector regulator (where applicable) are responsible for ensuring that the project is properly implemented by monitoring the implementation of the project agreement; measuring the output of the project; liaising with the private party, users of the facility or service and other relevant stakeholders; overseeing the management of the project agreement; preparing periodic reports on the project agreement implementation; and submitting reports on the

⁷¹ The Constitution of Kenya, Article 71.

⁷² Article 73 (2) (b) & (d) *ibid*.

⁷³ Article 153 (4) (a) *ibid*.

⁷⁴ Policy Statement on PPPs, 2011.

project agreement implementation to the Committee in June and December in each year of the project.⁷⁵

An independent expert is also appointed by the contracting authority to manage, in consultation with the authority, the implementation of the project agreement by the parties.⁷⁶The PPP Committee is also tasked to oversee the implementation of every project under the Act.⁷⁷

The process of performance monitoring needs to be dynamic and under constant review because project circumstances undergo a change over time due to the long duration of PPP contracts.⁷⁸

2.4 The Institutional Framework of PPPs

2.4.1 PPP Committee

The PPP Committee is the top policy organ on PPPs in Kenya. It is mandated to formulate policy guidelines on PPPs, approval PPP projects including project proposals and the feasibility study, review the legal, institutional and regulatory framework of PPPs, oversee the monitoring and evaluation of PPP projects, it has the responsibility of ensuring compliance with act and that PPP programme is in alignment with National Priorities among others.⁷⁹

Its composition includes the Principal Secretaries in the ministries of Finance, Planning, Lands, Devolution, Transport, Infrastructure, energy; a representative from the Attorney General; Four persons representing the private sector appointed by the cabinet secretary; and the Director of the PPP Unit.⁸⁰

⁷⁵ Section 65 (1) & (6) Public Private Partnerships Act, No. 15 of 2013.

⁷⁶ Section 65 (2) *ibid.*

⁷⁷ Section 65 (5) *ibid.*

⁷⁸ Planning Commission – Government of India, 'Guidelines for Monitoring of PPP Projects', 2012.

⁷⁹ Section 7 of the Public Private Partnerships Act, No. 15 of 2013.

⁸⁰ Section 4 (1) *ibid.*

The PPP Committee has all the powers necessary for the proper discharge of its functions which includes power to oversee the implementation of PPP policies, to request information on PPP projects, and to take custody of a project agreement and monitor compliance thereof.⁸¹

2.4.2 PPP Unit

The PPP Unit is a state department under the National Treasury.⁸² It serves as the secretariat and technical arm of the PPP Committee and provides technical, financial and legal expertise to the PPP Committee and PPP nodes.⁸³

Further, it serve as a resource center on matters relating to PPPs and supports the contracting authorities in the identification, appraisal, procurement, negotiation, contract and monitoring phases of PPP projects; it conducts civic education to promote the awareness and understanding of the PPP process amongst stakeholders, it conduct research and gap analysis to ensure continuous performance improvement in the implementation of public private partnerships among others.⁸⁴

2.4.3 PPP Nodes

The Act requires all contracting authorities who intend to undertake PPP projects to establish a PPP node.⁸⁵ It is responsible for project identification, project appraisal, project procurement, contracting, and monitoring the implementation of the project.⁸⁶ Generally, it is responsible for undertaking projects for that contracting authority.

⁸¹ Section 8 *ibid.*

⁸² Section 11 *ibid.*

⁸³ Section 14 (1) *ibid.*

⁸⁴ Section 14 (2) *ibid.*

⁸⁵ Section 16 (1) *ibid.*

⁸⁶ Section 17 (1) *ibid.*

The Node is headed by the accounting officer of the contracting authority and comprises of such financial, technical, procurement and legal personnel necessary for the performance of its functions.⁸⁷

2.4.4 Petitions Committee

The Petitions Committee is mandated to consider all petitions and complaints submitted by a private party during the process of tendering and entering into a project agreement.⁸⁸ An unsuccessful bidder may appeal against the decision of the evaluation team to the Petitions Committee.⁸⁹ Its composition includes the chairperson who should be a person qualified for appointment as a judge of the High Court of Kenya, four other persons with such knowledge and experience as the Cabinet Secretary may consider appropriate, and the director of the PPP Unit.⁹⁰

Many appointments to top public offices in Kenya have been marred by claims of political patronage. In 2014, Kituo cha Sheria, a non-government organization, challenged the appointment of members of the petition committee on grounds of infringement of constitutional requirements on values and principles of public service. The court, while dismissing the petition for lack of evidence, noted that the fact that the petition had failed does not mean that the matters raised are idle. It noted that had the petitioner pursued the information that it had sought from the National Treasury and used it as a basis of attack, the Petition may have had life breathed into it.⁹¹ The PPP Act sets out the powers of the Petition Committee. The Committee may require a petitioner or a complainant to appear before it; it may require a petitioner or a complainant to provide further information in addition to the information contained in the petition or complaint; may compel a

⁸⁷ Section 16 (2) *ibid.*

⁸⁸ Section 67 (1) *ibid.*

⁸⁹ Paragraph 26 of The Public Private Partnerships Regulations, 2014.

⁹⁰ Section 67 (2) Public Private Partnerships Act, No. 15 of 2013.

⁹¹ Legal Advice Centre aka Kituo Cha Sheria v. Attorney General & 3 others [2015] eKLR.

person in relation to the petition or the complaint to produce documents for examination by the Petition Committee; may issue summons to any person in relation to the petition or the complaint who is likely to help in the resolution of the petition or complaint; or may allocate the costs of hearing the petition or complaint to the parties to the petition or complaint. It also has power to suspend the tendering process while the petition or complaint is being heard and determined.⁹²

The Committee is obligated to hear and determine a petition or complaint within seven working days of the hearing to consider the petition or complaint.⁹³ The decision of the Petitions Committee are final and binding on the parties.⁹⁴

2.4.5 The contracting authority

A contracting authority is a state department, agency, state corporation or county government which intends to have a function undertaken by it performed by a private party.⁹⁵ It has a key role in ensuring that the ultimate objective of a PPP as it is the main body responsible for implementing PPP projects and signing Project Agreements. A Contracting Authority is obligated to undertake a feasibility study of the project it intendeds to undertake to determine its viability in consultation with the PPP Unit, upon approval of the project by PPP Committee.⁹⁶

It is responsible for the preparatory and tendering processes of the project including procuring the services of a transaction advisor, where applicable.⁹⁷ A contracting authority is obligate to make a report on evaluation of bids which gives an explanation on why the preferred bidder was selected.⁹⁸

In addition, a contracting authority has a key obligations with respect to contract and risk

⁹² Paragraph 60 The Public Private Partnerships Regulations, 2014.

⁹³ *ibid.*

⁹⁴ Section 67 (5) Public Private Partnerships Act, No. 15 of 2013.

⁹⁵ Section 2 *ibid.*

⁹⁶ Section 33 *ibid.*

⁹⁷ Paragraph 18 of The Public Private Partnerships Regulations, 2014.

⁹⁸ Section 49 of the Public Private Partnerships Act, No. 15 of 2013.

management. The PPP Act requires it to take measures to ensure that the Project Agreement is properly implemented.⁹⁹

The primary responsibility for providing services to members of the public rests with the government. Therefore, it is critical for contracting authorities to ensure that the services being delivered to the public meet the agreed time, cost, quantity and quality standards.

2.4.6 The private partner

A private party is a party that enters into a project agreement with a contracting authority and is responsible for undertaking a project on behalf of the contracting authority.¹⁰⁰ The qualifications are such that it meets the criteria specified in the pre-qualification; has the technical capability and financial capacity to undertake the project; has the legal capacity to enter into a project agreement; is not insolvent, in receivership, bankrupt or in the process of being wound up; and is not precluded by the contracting authority from entering into an agreement.¹⁰¹

A successful bidder is required to establish a project company for the purpose of undertaking a project.¹⁰² The project company should be incorporated in Kenya in accordance with the Companies Act; incorporated specifically to execute the project; the incorporation documents should incorporate the provisions of the project agreement and the tender documents; and its shareholding should be according to the project agreement.¹⁰³

Other private sector actors in PPPs include: the lenders who provide support in form of debt or equity investment and take the highest risks; the construction contractor who is engaged by the

⁹⁹ Section 65 *ibid.*

¹⁰⁰ Section 2 *ibid.*

¹⁰¹ Section 38 *ibid.*

¹⁰² Section 59 *ibid.*

¹⁰³ Paragraph 49 of The Public Private Partnerships Regulations, 2014.

company to carry out the construction work; and an operator for purposes of operation and maintenance of the project upon completion.

2.4.7 Public Debt Management Office

The Public Debt Management Office is established under the Public Finance Management Act. Its objectives are minimize the cost of public debt management and borrowing over the long-term taking account of risk; promote the development of the market institutions for Government debt securities; and ensure the sharing of the benefits and costs of public debt between the current and future generations.¹⁰⁴

The Public Debt Management Office is responsible for assessing projects and determining any fiscal commitments or liabilities to the country at various stages of the project cycle. For instance it must give a go ahead before a guarantee or letter of comfort is issued by the Government in respect of a PPP project.¹⁰⁵ Further, it also receives the feasibility report and the project and risk assessment report for purposes of assessing the fiscal risk and contingent liabilities of the project.¹⁰⁶

2.4.8 Project Facilitation Fund

The Project Facilitation Fund has been established to support contracting authorities in the preparation phase of a project, the tendering process and project appraisal; to extend viability gap finance to projects that are desirable but cannot be implemented in the absence of financial support from the Government; and to support the activities of the PPP Unit.¹⁰⁷

¹⁰⁴ Section 62 of the Public Finance Management Act, 2012.

¹⁰⁵ Section 27 of the Public Private Partnerships Act, No. 15 of 2013.

¹⁰⁶ Section 35 and section 53 (4) *ibid.*

¹⁰⁷ Section 68 (3) *ibid.*

2.5 Conclusion

Legal certainty and regulatory stability are key components that attract private sector investment in infrastructure development. Although government capacity in PPPs has gotten stronger, the country is still in the early stages of implementing the PPP framework as no single project has been successfully implemented under the current regime. The next chapter shall highlight the challenges facing implementation of PPPs and assess the adequacy of the existing PPP legal and regulatory.

CHAPTER THREE

LEGAL AND INSTITUTIONAL CHALLENGES FACING IMPLEMENTATION OF PUBLIC PRIVATE PARTNERSHIPS IN KENYA

3.0 Introduction

The overall commercial context of a country may encourage or hamper private participation in its development agenda. An enabling PPP investment and business climate is influenced by effectiveness of government in executing its policy agenda, the ease of doing business, the degree of government support for PPPs and levels of market concentration.¹

A country's legal, regulatory and institutional framework is a key indicator of the suitability of its business and investment climate. Africa's legal and regulatory environment ranks amongst the least business-friendly in the world. According to the 2011 Doing Business report by the World Bank, the average ranking of African countries on overall ease of doing business is 137 out of 183 economies.² Kenya has since made efforts to improve its business climate ranking at position 61 among 190 economies in the ease of doing business index for the year 2018.³

While the private sector has been instrumental in facilitating economic growth around the world, this can only be realized where there is a sound legal and regulatory environment. An enabling legal environment for a PPP project is determined by the system of laws, regulations and law enforcement of a country that may be relevant to, or have an impact on, a PPP project and on how

¹ The Economist Intelligence Unit, 'Evaluating the Environment for Public-Private Partnerships in Asia: The 2018 Infrascopes', the EIU, London.

² Abdul Karim Aldohni, 'Africa Development Report - Chapter 2: The Legal and Regulatory Environment', African Development Bank Group, 2011.

³ The World Bank, 'Ease of Doing Business Index', World Bank, Doing Business project. Available at <<https://data.worldbank.org/indicator/IC.BUS.EASE.XQ>> accessed 15 May 2019.

the project is implemented and enforced.⁴ When properly designed, PPP enabling laws reduce uncertainty, establish pre-set guidelines, and lower the transaction costs associated with PPPs.⁵ It provides stability, protection and transparency to investors while encouraging inclusive growth and sustainable development.

This chapter shall highlight the legal and institutional challenges facing implementation of PPPs projects in Kenya.

3.1 Efficacy of the PPP Legal and Institutional Framework

Public procurement is an important interface in the delivery of most government functions. It is used a tool for achievement of the government's socioeconomic and political responsibilities. Therefore, focus should be placed on the 'ends' rather than the 'means' of public procurement regulation.⁶

Humphrey Njuguna argues that the public procurement system in Kenya is characterized by the dirty trio of corruption, tribalism and impunity.⁷ The country continues to lose billions of shilling in public procurement scandal which is a symptom of a flawed regulatory framework.

Regulation should be guided by the prevailing socioeconomic and political context within which it operates. Failure to understand the context will lead to the encouragement and imposition of inappropriate regulation, misunderstanding between the participants in the regulation process, and

⁴ Anthony Smith, 'Policy , Legal and Regulatory Frameworks', PPP Experts 2014. Available at <https://www.unescap.org/sites/default/files/5.%20Policy,%20Legal%20and%20Regulatory%20Frameworks%20-%20Anthony%20Smith.pdf> accessed on 16th May 2019.

⁵ R R. Geddes and B. L Wager, 'Do State Public-Private Partnership Enabling Laws Increase Investment in Transportation Infrastructure?', Cornell University, 2012.

⁶ Peter Trepte, 'Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation', (Oxford University Press, 2004) pg 58.

⁷ Humphrey Kimani Njuguna, 'Political Patronage on the Operationalisation of Public Procurement Law in Kenya' (University of Nairobi, 2017).

the inability of those responsible to correctly implement the resulting regulation.⁸ Key issues in the Kenyan PPP legal and institutional framework are discussed below.

3.1.1 The Legal Framework

In the absence of a sound and comprehensive legal framework, there will be legal uncertainties in implementation of PPPs. Notwithstanding the progressive legal and regulatory reforms over the years, there are still some inadequacies in the Kenyan PPP legal framework.

3.1.1.1 Public participation

Public participation is the process where the public influence decision making in policy, legislation, service delivery, oversight and development matters. The duty bearer engages the public in decision making and is responsive and accountable to their needs.⁹ The Constitution places the sovereign power on the people of Kenya.¹⁰ It is on this basis that public participation must be respected and institutionalized in all processes of governance.¹¹

Public participation is one of the guiding principles that is required to guide all aspects of public finance under the Kenyan Constitution.¹² It is also part of our national values and principles of governance,¹³ and the state has an obligation to encourage public participation in the management, protection and conservation of the environment.¹⁴

In 2018, the National Treasury reported that the national government projects estimated at Kshs. 366 million had stalled across the country. It is feared that the government's development objective

⁸ Peter Trepte (n 6).

⁹ Republic of Kenya, County public participation guidelines, 2016.

¹⁰ The Constitution of Kenya, Article 1 (1).

¹¹ Republic of Kenya, County public participation guidelines 2016.

¹² The Constitution of Kenya, Article 201 (a).

¹³ Article 10 (2) (a) *ibid*.

¹⁴ Article 69 (d) *ibid*.

may not be realised due to its spending on pointless projects.¹⁵ Accountability is a central pillar of any public procurement system without which the vast resources channelled through public procurement systems run the danger of increased corruption and misuse of funds.¹⁶

In the case of *Erick Okeyo v County Government of Kisumu & 2 others*,¹⁷ the court stated that a decision by the county government to enter into a public private partnership in relation to solid waste management was a major policy decision that required public participation. It held that it was illegal for the county government to proceed with the project without public participation as it would lead to imprudent and irresponsible use of a precious resource without assuring the public that there is value for money.

The PPP legal framework does not adequately take into account the right of stakeholders and beneficiaries to public participation contrary to Constitutional requirements. Citizens may become suspicious and feel manipulated without significant public participation.¹⁸ It is therefore a means to legitimize the implementation process. In order to enhance public confidence, the PPP law should include mechanisms to ensure that the government is held accountable for its actions and that it is responsive to the interest of its citizens. The concerns of the public should be addressed before embarking on the project.

¹⁵ David Mwere, 'Kenya: State Doing Badly as Projects Worth Over Sh366 Billion Stall', Daily Nation, 14th February 2019). Available at <<https://www.nation.co.ke/news/Govt-put-on-the-spot-over-stalled-projects/1056-4980834-mncuy3z/index.html>> accessed 18th May 2019.

¹⁶ UNDP Capacity Development Group, 'Accountability in Public Procurement - Transparency and the Role of Civil Society', 2010.

¹⁷ *Erick Okeyo v County Government of Kisumu & 2 others*, 2014 eKLR.

¹⁸ Republic of Kenya, 'County public participation guidelines', 2016.

3.1.1.2 The procurement process

Procurement is the medium through which the government performs its functions. About 60% of the national government budget is spent in on procurement of goods and services. In addition to the obvious economic implications public procurement, it is also a tool to advance various social policies as it takes place in a social context.

The procurement process for PPPs by nature varies from the traditional procurement of goods, works, and services in the sense that the private partner generally receives or shares in the revenue generated from the project rather than being paid for provision of goods or services or for the construction of an asset thereby changing the balance of risks between the parties. Further, PPP contracts are usually long-term thus the operating environment may change over the life of the partnership in unforeseen ways.¹⁹ Nevertheless, the PPP procurement process should be designed and implemented in compliance with procurement principles of fairness, equitability, transparency, competition and cost-effectiveness.²⁰

The PPP procurement process in Kenya is flawed in several ways. Although the PPP Act sets out the steps in the PPP cycle, it does not give clear timelines in each stage of the process. Consequently, the procurement process is often slow characterized by lengthy negotiations. The common perception is that the PPP process is choke block with red tape and manned by bureaucrats with no sense of urgency. An illustration is the Kenyatta University Student Hostel PPP project.²¹ Procurement of the project was launched in 2012, the successful bidder was identified in 2014, the

¹⁹ Asian Development Bank, 'Public-Private Partnerships Guidance Note on Procurement', June 2018.

²⁰ The Constitution of Kenya, Article 227 (1).

²¹ The project, estimated at a cost of KSh5.1 billion, will see construction of an ultra-modern student hostel at Kenyatta University's main campus to accommodate over 10,000 students. It is to be undertaken under the Build-Operate-Transfer (BOT) PPP model for a period of 18 years.

PPP contract was signed in 2015 but the project was still awaiting financial close as at June 2018 which marks six years since the project was taken to market.²² There is need to set a timeframe for each stage of the PPP procurement cycle as the investors may get discouraged and look for opportunities elsewhere.

Further, the law is silent on how to proceed in the event the procuring entity receives only one bid in response to a PPP tender. There are no guidelines on whether the procuring entity should proceed with the sole bidder or if a fresh tender process should be conducted.²³ Further, although the PPP Act provides that the PPP procurement process should be conducted through competitive bidding,²⁴ privately initiated investment proposals are allowed in certain circumstances which are not subjected to a competitive procurement process.²⁵ These gaps create the challenge of how to guarantee that the procuring entity get value for money from such projects.

A fair and competitive selection of the private partner is of utmost importance in the entire PPP implementation process. The legal framework should be designed to correct the lack incentive often demonstrated by the typical public procurement officer to engage in the rational cost-benefit analysis that is naturally inherent in private economic transactions.

3.1.1.3 Transparency in the PPP process

Transparency relates to openness and fairness in all the processes and stages of PPP implementation. It helps in eradicating corruption, coercion and collusive practices.

²² Kiptness & Odhiambo Associates, 'Too Long a Wait: An Assessment of Kenya's Public Private Partnership (PPP) Program' <<http://www.koassociates.co.ke/too-long-a-wait-an-assessment-of-kenyas-public-private-partnership-ppp-program/>> accessed 18 May 2019.

²³ Cynthia Olotch, 'Public-Private Partnerships: How Does Kenya Fare?', 2017. Available at <<http://blogs.worldbank.org/ppps/public-private-partnerships-how-does-kenya-fare>> accessed 26 February 2019.

²⁴ Section 29 of the Public Private Partnerships Act, No15 of 2013.

²⁵ Section 61 *ibid*.

Although the PPP Act places an obligation on the contracting authorities to publish information on PPP projects and the results of the tender process,²⁶ it does not provide clear and direct guidelines on disclosure. Disclosure is a key underlying principle that ought to govern the implementation of PPPs.

In the case of *Republic v Public Private Partnerships Petition Committee & 3 others Ex Parte APM Terminals*,²⁷ the court stated that where it would be in the interests of justice to allow discovery, an administrative tribunal should do so even where its rules do not expressly provide for discovery. The court found the PPP Petition Committee erred in rejecting the Applicants request for disclosure of the Technical Evaluation Report contrary to Article 227 of the Constitution and Section 29 of the PPP Act which require transparency in public procurement.

In *PPP Petition 1 of 2019*, a consortium of four foreign companies which lost the bid to construct the 187 kilometer Nairobi-Nakuru-Mau Summit highway (expected to cost more than Sh150 billion) filled a petition with the PPP Petition Committee claiming that the contracting authority, Kenya National Highways Authority (KeNHA) was “engaging in a non-transparent bidding process ... by cloaking the entire evaluation process in secrecy and intrigue to the extent that its fairness and impartiality are highly questionable and its outcomes irredeemably inconsistent with fair process to the bidders.”²⁸ Although, the petition was dismissed by the PPP Petition Committee, it is important that justice must not only be done but must also appear to be done.

²⁶ Section 60 (1) of the *ibid*.

²⁷ *Republic v Public Private Partnerships Petition Committee (The Petition Committee) & 3 others Ex Parte APM Terminals*, 2015 eKLR.

²⁸ Geoffrey Mosoku, ‘Tribunal Clears Sh160 Billion Nairobi-Nakuru-Mau Summit Road Project’ *The Standard Newspaper*, 11th April 2019. Available at <<https://www.standardmedia.co.ke/article/2001320432/relief-as-tribunal-dismisses-case-against-sh160b-project>> accessed on 24th May 2019.

Sufficient guidelines should be developed on the quality of information that should be published so as to ensure that a proper balance is struck between the need for transparency and accountability vis-à-vis the protection of commercially sensitive information relating to the tendering process.²⁹ A greater degree of transparency will enhance Kenya's reputation as a reliable partner.

3.1.1.4 The Dispute Resolution Mechanisms

The multiplicity of parties in PPP projects makes them prone to disputes. The ability to adequately resolve disputes that may arise at any point in the PPP cycle is critical to guarantee the long-term viability and profitability of the project. Disputes mean delay and cost overruns which translate to loss of earnings for the private investor.³⁰ PPPs usually involve projects of significant value with elements of public interest. Therefore, it is essential to have a speedy and efficient dispute resolution mechanism.

The Constitution of Kenya guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair³¹ as well as the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.³²

The PPP Petitions Committee has jurisdiction to resolve petitions and complaints submitted by a private party during the process of tendering and entering into a project agreement.³³ In an attempt to ensure timely resolution of disputes, the PPP Regulations demand that petitions or complaints

²⁹ Walter Amoko, 'A Matter of "Competing" Principles: Confidentiality and Disclosure in PPP Procurement' (Oraro & Company Advocates). Available at <<https://www.oraro.co.ke/2018/06/26/a-matter-of-competing-principles-confidentiality-and-disclosure-in-ppp-procurement/>> accessed 24 May 2019.

³⁰ LLP Diaz Reus, 'Resolving Disputes in Private/Public Partnership Agreements'. Available at <<http://diazreus.com/resolving-disputes-in-privatepublic-partnership-agreements/>> accessed 21 May 2019.

³¹ The Constitution of Kenya, Article 47 (1).

³² Article 50 (1), *ibid.*

³³ Section 67 Public Private Partnerships Act, No15 of 2013.

brought before the PPP Petition Committee should be heard and determined within seven working days of the hearing.³⁴

However, the PPP Act does not provide an appeal mechanism against the decisions of the Petition Committee. The decision of the PPP Petition Committee is final and binding on the parties.³⁵ The only available remedy is judicial review which is limited to the process and not merits of the case. Justice Korir in the *APM Terminals case* mentioned above, noted that in a situation where there is no window for appeal, judicial review takes a higher pedestal owing to the fact that if the Petition Committee reaches a wrong decision its repercussions on public procurement will be long lasting and devastating.

The Constitution of Kenya provides that use of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms should be promoted in exercise of judicial authority by courts and tribunals.³⁶ In line with this constitutional requirement, the PPP Act provides that disputes arising under a project agreement may be resolved through arbitration or any other non-judicial means of dispute resolution agreed upon in the project agreement.³⁷ However, the procedure and other necessary provisions are not provided in the law

It has been observed that PPP disputes eventually crystalize into investment disputes which end up being decided on the basis of investment protection clauses contained in various Bilateral Investment Treaties (BITs) between countries as well as within the International Center for Settlement of Investment Disputes (ICSID) framework.³⁸ The ICSID regime (to which Kenya is a

³⁴ Regulation 60 (3) of the Public Private Partnerships Regulations, 2014.

³⁵ Section 67 (5) of the Public Private Partnerships Act, No15 of 2013.

³⁶ The Constitution of Kenya, Article 159 (2) (d).

³⁷ Section 63 (3) of the Public Private Partnerships Act, No15 of 2013.

³⁸ Madialo Lawrence Odero, 'Public Private Partnerships and the Development of Infrastructure in Kenya: Understanding and Resolving Disputes', (Unpublished LLM Thesis, University of Nairobi 2010).

signatory) has been criticized as inconsistent with developmental priorities of developing countries. States are currently exploring innovative ways of changing their approaches to ISDS. Some have withdrawn from the ICSID Convention such as Venezuela, Bolivia, Ecuador, & Nicaragua while others are excluding the regime in their investment agreements such as South Africa.³⁹

Taking into account the length of time, amounts of investments involved and the critical nature of services being delivered by PPPs, it is important to ensure that services continue to be provided in the face of disagreement between the various parties in the project by developing adequate dispute resolution mechanisms.⁴⁰

3.1.1.5 County Governments

The Constitution of Kenya provides for a devolved system of government establishing 47 counties.⁴¹ One of the objects of devolution in Kenya is to promote economic development.⁴² In view of the fact that Vision 2030 is implemented at both the national and county levels, devolution is instrumental in realization of inclusive development in Kenya.

The PPP Act recognizes the county government as a contracting authority,⁴³ and empowers the Cabinet Secretary to prescribe the thresholds for approval and the carrying out of PPP projects by

³⁹ Becky L Jacobs, 'A Perplexing Paradox: "De-Statification" of "Investor-State" Dispute Settlement?' (2015) 30 Emory International Law Review.

⁴⁰ United Nations Economic Commission for Europe, 'Governance in Public Private Partnerships for Infrastructure Development', 2014.

⁴¹ The Constitution of Kenya, Article 6 (1).

⁴² Article 174 (f) *ibid.*

⁴³ Section 2 of the Public Private Partnerships Act, No15 of 2013.

the county governments.⁴⁴ The County Government Act also recognizes PPPs as a tool to deliver public services.⁴⁵

However, there is low uptake of PPPs in the counties notwithstanding the fact that PPPs are key in implementation of the County Integrated Development Plans. As at June 2018, there were 6 PPP projects under county governments out of the 72 PPP projects currently in the pipeline.⁴⁶

The current regime does not adequately guide PPPs in the county government context. In light of this gap, the Public Private Partnerships (Amendment) Bill was introduced in the National Assembly in 2017 to recognize county governments as distinct contracting authorities for PPP projects and to make further provisions for guidelines to be made by the Cabinet Secretary to facilitate the manner in which county governments may deal with PPP arrangements.⁴⁷

The Bill seeks to introduce a new Section 54A that empowers county governments to enter into PPP agreements and places the responsibility for the administration of the overall project development cycle on the county government. This may be problematic in light of the institutional challenges at the county government level discussed herein below. The Bill also seeks to strengthen the institutional capacity at the county level by introducing a new section 67 (2) (iii) (ba) which demands the Council of Governors to appoint two persons to the PPP Petitions Committee⁴⁸ among other key provisions.

⁴⁴ Section 24 (3) *ibid.*

⁴⁵ Section 2 of the County Governments Act, No. 17 of 2012.

⁴⁶ Public Private Partnership Unit, 'Kenya Public Private Partnerships (Ppp) Programme Status', 2018. Available at <<https://pppunit.go.ke/wp-content/uploads/2019/02/Kenya-PPP-Pipeline-Status-Report-January-2019-Final.pdf>> accessed 25th May 2019.

⁴⁷ The Public Private Partnerships (Amendment) Bill, 2017.

⁴⁸ Section 19 *ibid.*

The Bill was passed by the National Assembly on 31st July 2018 and forwarded to the Senate for consideration on 29th August 2018.⁴⁹ However, Senate made amendments to the Bill which were rejected by the National Assembly. As at 20th September 2019, the Bill had been referred to a Mediation Committee.⁵⁰ It is clear that there is need to develop county specific policies to guide counties in implementation of PPP projects owing to the fact that adoption of PPPs at the county level may require a different approach to that at the national government level. However, a 360 degree approach should be taken in these reforms to ensure that as much as responsibilities are being devolved, adequate capacity and recourses are also devolved.

3.1.1.6 Regulatory gaps in operationalization of the PPP Act

There are various regulation required to be developed in order to fully operationalize the provisions of the PPP Act which are yet to be published six years after enactment of the PPP Act. Four of these key regulations are discussed below.

First, the PPP Act sets out certain minimum contractual obligations to be included in project agreements under the third schedule. It is common practice for countries to develop standardized sector specific agreements in an attempt to reduce the significant time and expense involved in preparing custom-made project agreements for each individual PPP transaction.⁵¹ The Act empowers the Cabinet Secretary to make regulations specifying the other substantive provisions of a project agreement.⁵² There is need to develop model bidding documents, model contracts or

⁴⁹ Kenya Law Reports, 'National Assembly Bills, 2017. Available at <<http://kenyalaw.org/kl/index.php?id=6819>> accessed on 25 September 2019.

⁵⁰ The National Assembly, 'Bill Tracker 2019'. Available at <<http://www.parliament.go.ke/the-national-assembly/house-business/bills-tracker>> accessed 25 September 2019.

⁵¹ The World Bank, 'Should Standardized Agreements Be Used for PPP Transactions in Developing Countries: A Debate', 23rd October 2014. Available at <<http://www.worldbank.org/en/events/2014/10/16/should-standardized-agreements-be-used-for-ppp-transactions-in-developing-countries-a-debate#1>> accessed 23 May 2019.

⁵² Section 62 Public Private Partnerships Act, No15 of 2013.

key contract clauses, and guidance manuals to boost efficiency. A PPP manual is currently being developed to provide standard bidding documents, templates, toolkit/user guidelines.

Second, the Cabinet Secretary has power to make regulations to guide the procedure for determining a petition presented to the PPP Petitions Committee.⁵³ The chairman of the PPP Petition Committee developed Petition Committee Guidelines, 2014 setting out the procedure in determining PPP Petitions.⁵⁴ However, the legality of these guidelines were challenged in *PPP Petition No. 1 of 2014*, on the grounds that section 67 (6) of the PPP Act vests the power to make regulations providing for the procedure of determining a petition in the Cabinet Secretary. However, the PPP Petition Committee disallowed the objection relying on the advice of the Attorney General that the word "may" was permissive and by extension means that should the Cabinet Secretary not publish the regulations the Committee may come up with its own procedure.⁵⁵ Nonetheless, the PPP Unit has reported that there are ongoing efforts to finalize on PPP Petition Regulations.⁵⁶ In view of the implication of dispute resolution mechanisms, it is of outmost importance that these regulations are completed and published in a timely manner.

Third, the PPP Act provides that contracting authorities should undertake a feasibility study of the project it intends to implement for the purpose of determining its viability. To operationalize this provision, the cabinet secretary is obligated to develop regulations on key parameters of the feasibility study which affordability, value for money and public sector comparator for the

⁵³ Section 67 (6) *ibid*.

⁵⁴ The Kenya Gazette: Gazette Notice No. 7435, 17th October 2014, Vol CXVI No. 124.

⁵⁵ Consumers Federation of Kenya (Cofek), 'Ruling by PPP Petition Committee - Petition No. 1 of 2014: Hebei Construction Ltd v Ministry of Energy and Petroleum and 4 others'. Available at <<http://www.cofek.co.ke/index.php/who-we-are/14-news/916-ruling-by-ppp-petition-committee-petition-n0-1-of-2014>> accessed 22 May 2019.

⁵⁶ Public Private Partnership Unit (n 46).

project.⁵⁷ It is vital that these regulations are published in order to promote the success of PPP projects through comprehensive feasibility studies.

Fourth, the PPP Act empowers county governments to approve undertaking of PPP projects within their counties where a project does not pose contingent liabilities to the national or county government. The Cabinet Secretary is mandated to develop regulations to operationalize this provision.⁵⁸ However, these regulations are yet to be developed. The Public Private Partnerships (Amendment) Bill, 2017 if passed into law may fill some of these legal gaps.

There is need for procedural clarity as these gaps create uncertainty on issues of fairness, efficiency, transparency, accountability, bankability among others which compromises good governance in implementation of PPPs.

Other inadequacies in the Kenyan PPP legal framework include lack of adequate incentive provisions for investors such as tax incentives; and lack of an appropriate insurance regime owing to the high risks associated with PPP projects.⁵⁹

3.1.2 The Institutional framework

A country's institutional framework provides the context in which government monitors and evaluates PPP projects. The task of regulating PPPs is complicated by the need to balance the interest of the public and private actors. Poorly functioning institutional structures have been known to create significant problems for projects.⁶⁰ The potential benefits of PPPs cannot be realized in the absence of a suitable institutional framework which is evidenced by the ability of

⁵⁷ Section 33 Public Private Partnerships Act, No15 of 2013.

⁵⁸ Section 54 (4) *ibid*.

⁵⁹ Beryl Zoraima Nalo, 'Establishing an Effective Regulatory Framework for PPPs in Kenya', Unpublished LLM Thesis, University of Nairobi, 2018.

⁶⁰ R. J. Clews, 'Project Finance for the International Petroleum Industry', Elsevier Inc, 2016.

all governmental agencies involved to prepare, procure, and implement quality PPPs efficiently and consistently.

In the Kenyan context, there has been more failures than successes in the implementation of public projects. There is suspicion that some of these projects are used as fronts to loot from the public as public resources are utilized with no output. A perfect illustration would be the recent “Kimwarer and Arrow Dams Scandal”⁶¹ where the contractor has allegedly been paid billions of shillings with nothing to show for it. This points to a weakness in the financial public management systems and the institutional arrangements.

Successful implementation of PPP projects requires adequate administrative capacity in addition to an appropriate legislative framework. The institutional framework should clearly delineate the roles and responsibilities of all participating stakeholders in the PPP implementation process and ensure they are empowered to deliver these projects successfully.⁶² The best regulatory framework is likely to fail in execution without proper institutions. The key institutional challenges affecting implementation of PPPs in Kenya are discussed below.

3.1.2.1 Lack of institutional capacity

In addition to a sound legal and investment framework, investors also want assurances that governments have the personnel capable of managing the PPP process and that policy makers and

⁶¹ The Kimwarer and Aror dams scandal involved proposed construction of a multi-purpose dam in Elgeyo-Marakwet County. It was reported that about KShs. 20 billion was used to make advance payments to contractors yet the project has not commenced. About 26 government officials were charged in the multibillion-shilling scandal. On 18th September 2019, President Uhuru Kenyatta ordered the cancellation of the Kimwarer Dam project as the same was not technically and finally feasible. On the other hand, the Arrow Dam project was approved albeit after cost rationalization as it was found to be economically viable but overpriced.

⁶² Maude Vallée, ‘PPP Laws in Africa: Confusing or Clarifying?’, 22nd February 2018. Available at <<http://blogs.worldbank.org/ppps/ppp-laws-africa-confusing-or-clarifying>> accessed 21 May 2019.

the parties implementing projects have a realistic understanding of the complexity of PPP projects.⁶³

PPP are more complex, time consuming and requires higher level of expertise than traditional procurement method. They demand a multi-disciplinary approach often drawing in people with expertise in finance, economics, law, engineering, environment, accounting/taxes etc. The PPP Act obligates contracting authorities to undertake a sector diagnostic study before a project is implemented focusing on the institutional and capacity status among others.⁶⁴ Further, the PPP Unit is tasked to build capacity and advice contracting authorities involved in the planning, coordinating, undertaking or monitoring of PPP projects.⁶⁵ In support of this obligation, the PPP (Project Facilitation Fund) Regulations allows the Unit to utilize monies from the Project Facilitation Fund towards capacity building programmes.⁶⁶

This notwithstanding, most PPP transactions in Kenya rely on international advisers at both the national and county level due to lack of adequate capacity.⁶⁷ For instance, a study at the Uasin Gichu County reveals that county governments have inadequate resource to fund PPP procurement transactions, there is lack of capacity to originate or implement PPP procurement, that there is political interference on PPP procurement implementation, that there is poor coordination between County Government departments on the adoption of PPP procurement among other challenges.⁶⁸

⁶³ E. Farquharson, C. T. Märtle and ER Yescombe, 'How to Engage with the Private Sector in Public-Private Partnerships in Emerging Markets', World Bank Publications, 14th January 2011.

⁶⁴ Section 20 (c) of the Public Private Partnerships Act, No15 of 2013.

⁶⁵ Section 14 (2) (c) of the *ibid*.

⁶⁶ Paragraph 6 of The Public Private Partnerships (Project Facilitation Fund) Regulations, 2017.

⁶⁷ The Economist and Intelligence Unit, 'Evaluating the Environment for Public-Private Partnerships in Africa: The 2015 Infrascoppe', EIU, London.

⁶⁸ Kennedy Omondi Okwaro, Joel Chepkwony and Rose Boit, 'Factors affecting adoption of Public- Private- Partnership in County Government of Uasin Gishu , Kenya', International Academic Journal of Procurement and Supply Chain Management, Volume 2, Issue 3, pp. 33-56.

The implementing institutions at both levels of government should be staffed with trained personnel with PPP-specific knowledge to provide in-house technical capacity to implement the PPP program. The government should facilitate continuous trainings, workshops and conferences for both public and private sectors to enhance their PPP capabilities, thus broaden their PPP knowledge.⁶⁹ Further, there is need to harmonize the institutional framework between national and county governments in order to make implementation clearer.

Moreover, although universities have included the study of public procurement in their curricula, there is no sustainable PPP training programmes in the country noting the fundamental differences between PPPs and the traditional forms of public procurement. There is need to develop a long-term programme for PPP promotion and awareness which includes setting up of specialist departments or faculties in universities.⁷⁰

3.1.2.2 The governance structure of the PPP Unit

A sound institutional environment for PPPs implies high standards of public and corporate governance, transparency and the rule of law, including protection of property and contractual rights, which is essential to attract the participation of the private sector.⁷¹ A PPP unit is a point of co-ordination, quality control, accountability, and information for PPP projects.

There are three common approaches to PPP institutional organization. The first model is to locate a dedicated unit within the Ministry of Finance. The second model is to locate a dedicated unit as an independent government agency that collaborates with the finance ministry. A third model is to

⁶⁹ *ibid.*

⁷⁰ The Economist and Intelligence Unit (n 67).

⁷¹ OECD, 'Dedicated Public-Private Partnership Units. A Survey of Institutional and Governance Structures', OECD Publications, 2010.

locate a dedicated unit in an individual line ministry that is predisposed in its functions to use public-private partnerships, such as the Ministry of transport.

Kenya has adopted the first model establishing a dedicated PPP Unit within the Ministry of Finance,⁷² responsible for overall coordination, promotion, and oversight implementation of the PPP program. The Unit reports to the PPP Committee and the National Treasury. The challenge with this kind of set up is that political preferences rather than the concrete costs and benefits of the project could play a role in the PPP implementation process.⁷³

Notwithstanding the constitutional requirements on good governance, integrity, transparency and accountability.⁷⁴ The prevailing circumstances in Kenya is that the operationalization of public procurement law is influenced by political patronage which reveals itself in public appointments; judicial, legal and policy frameworks; politics of ethnicity and tribal balancing; corruption and impunity in public service; and economic influences of corruption.⁷⁵ Effective regulation should impose appropriate schemes of incentives and sanctions for such human conduct.

PPPs can function well if there is transparency and accountability and no political interference at all stages of the implementation process. In view of the prevailing circumstances and the place of PPPs in the country's development agenda, an independent PPP Unit is a more suitable approach in order to ensure efficiency in the PPP implementation process and to effectively manage the fiscal liabilities and fiscal risks associated with PPPs. The current governance structure does not efficiently and effectively promote public interest.

⁷² Section 11 of the Public Private Partnerships Act, No15 of 2013.

⁷³ OECD (n 71).

⁷⁴ The Constitution of Kenya, Article 10 (1) (c).

⁷⁵ Humphrey Kimani Njuguna (n 7).

In Zambia, the government has expressed interest to make the PPP Unit a stand-alone statutory body to enhance the efficiency of the unit.⁷⁶ Kenya needs strong political will, support and commitment in order to follow a similar route.

3.1.2.3 Inter-governmental cooperation

There are a number of government departments and agencies at different levels of government directly and indirectly involved in the PPP implementation process. These projects often require several licences and permits from different agencies. It is imperative to identify all such stakeholders in the government and involve them from the onset of the project as weak intergovernmental cooperation can threaten the success of a project.⁷⁷

The PPP Act provides that the responsibility for obtaining authorizations, permits, and approvals should be set out in the project agreement.⁷⁸ The Kenyan scenario typically involves approval from the PPP Committee and Cabinet;⁷⁹ the Debt Management Office;⁸⁰ Parliament where the projects involves exploitation of natural resources;⁸¹ Land Settlement Fund;⁸² National Environmental Management Authority;⁸³ the National Construction Authority;⁸⁴ among many others.

⁷⁶ Angela Chishimba-Nduba and Kalonde Nyati, 'State Wants PPP Unit Independent', Zambia Daily Mail, 20th January 2017. Available at <<https://www.daily-mail.co.zm/state-wants-ppp-unit-independent/>> accessed 18 May 2019.

⁷⁷ Abdul Quium, 'A Guidebook on Public-Private Partnership Projects in Infrastructure', United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP), 2011.

⁷⁸ Paragraph 6 of the Third Schedule to the Public Private Partnerships Act, No15 of 2013.

⁷⁹ Section 24 of the *ibid.*

⁸⁰ Section 35 (2) *ibid.*

⁸¹ Section 55 *ibid.*

⁸² Section 135 (1C) (a) (iii) of the Land Act 2012. The Board of Trustees of the Land Settlement Fund is responsible for the provision of access to land for development projects.

⁸³ Section 58 of the Environmental Management and Co-Ordination Act 2012. It imposes a requirement for an Environmental Impact Assessment Licence in respect to all projects listed under the second schedule.

⁸⁴ Section 18 of the National Construction Authority Act 2011. Requires registration of all foreign contractors undertaking works in Kenya.

Particularly, PPP projects can be quite demanding in terms of land acquisition which is a serious challenge in implementation of development projects in Kenya. Major projects such as Lake Turkana Wind Power Project⁸⁵ and Standard Gauge Railway⁸⁶ have been delayed due to land disputes. This deserves special attention demanding increased collaborative efforts between the PPP Unit, contracting authorities and the National Land Commission in designing better compulsory acquisition mechanisms in the context of PPP projects.

It has been observed that jurisdictions with “one stop shop” for issuing of necessary approvals, licences, permits or authorizations have been successful in attracting private investment as this eliminates lengthy approval processes and overlapping regulations which presents risks to developers.⁸⁷ There is need to establish a system of coordination/liaison mechanism with all stakeholders involved in project implementation in order to overcome this challenge. To ensure effective partnership there should be simple, transparent and predictable requirements for licenses, permits and planning approvals.

⁸⁵ Anniel Njoka, ‘Marsabit Wind, Solar Power Project Halted as Land Dispute Goes to Court’ *Daily Nation* (20th December 2016) <<https://www.nation.co.ke/counties/marsabit/Land-dispute-Marsabit-wind-power/3444778-3492942-qvcidxz/index.html>>. The project stalled due to a land dispute between the Lake Turkana Wind Power Ltd and Marsabit residents.

⁸⁶ Stanley Ngotho, ‘Kenya: Railway Construction to Delay Due to Dispute over Compensation for Displacement’ *Business Daily*, 18th September 2018. Available at <<https://www.business-humanrights.org/en/kenya-railway-construction-to-delay-due-to-dispute-over-compensation-for-displacement>>. The 2nd Phase of the SGR has been delayed due to a dispute between Kenya Railways Corporation, National Land Commission (NLC) and land owners in Kajiado County over land compensation.

⁸⁷ Mary Beth Corrigan and others, ‘Ten Principles for Successful Public / Private Partnerships’, the Urban Land Institute Washington DC (2005).

3.2 Conclusion

PPPs are difficult to deliver in an unstable policy environment. In the short term, the current PPP model can be effective in raising funds for development projects and transferring financial risks to the private sector but in the long run law suits became the order of the day.⁸⁸

In the public procurement context, the government is not a buyer like any other as it has simultaneous responsibilities for the welfare of its people. Consequently, the PPP programme is not an end in itself but a means to achieve the country's objectives of social, economic and political development under the Vision 2030.

The deficiencies in current PPP legal and institutional framework in Kenya acts as impediments to investments and attainment of the countries development objectives. Therefore, the GoK must take clear and concrete actions to confer credibility on the legal and institutional PPP framework so as to increase economic efficiency and fulfill it social, economic and political responsibilities for the welfare of its people. It is only within the context of proper legal regulation that any meaningful PPPs can be undertaken in Kenya.

⁸⁸ Matti Siemiatycki, 'Delivering Transportation Infrastructure Through Public-Private Partnerships: Planning Concerns', *Journal of the American Planning Association*, 76(1):43-58, January 2010. Available at ,<<https://www.tandfonline.com/doi/abs/10.1080/01944360903329295>> accessed on 25th May 2019.

CHAPTER FOUR

INTERNATIONAL BEST PRACTICE: COMPARATIVE ANALYSIS OF PPP EXPERIENCE IN NIGERIA AND INDIA

4.0 Introduction

In recent past, there has been increase in the use of PPPs in developing countries. The World Bank has reported that between 2002 and 2011, 134 developing countries implemented PPP projects in infrastructure alone which accounts for 15–20 percent of total infrastructure investment.¹

The design of the PPP legal and institutional framework varies across the world depending the legal traditions of the country in question. However, lack of uniform rules on the use of PPPs as a tool for infrastructure development and the provision of public services creates legal uncertainty which increase transaction costs as standard terms may need to be negotiated on a project-by-project basis and discourage use of PPPs around the world.²

On the other hand, countries should contextualize their legal and institutional framework in response to specific needs and challenges within their jurisdiction. It has been noted that wholesale imposition of international procurement rules without full understanding and consideration of the domestic situation, particularly the objectives of domestic regulation, will displace the very nature of procurement regulation. This is in view of the fact that there is no ideal form of procurement regulation as regulation is only appropriate within the context in which it was developed.³

This chapter gives an overview of the legal and institutional framework of PPPs from an international perspective and attempts a comparative analysis of the PPP regulation in Nigeria and

¹ The Independent Evaluation Group, 'World Bank Group Support to Public-Private Partnerships: Lessons from Experience in Client Countries, FY02–12', World Bank Publications, 2012.

² Seungwoo Son, 'Legal Analysis on Public-Private Partnerships Regarding Model PPP Rules', June 2012.

³ Peter Trepte, 'Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation', (Oxford University Press, 2004) pages 40 & 41.

India, owing to similarities in devolved governance structures, highlighting the key learning lessons for Kenya given their experience in PPPs.

4.1 International Perspective on PPP Legal and Institutional Framework

There is no clear and comprehensive rule covering the use of PPPs at the international level notwithstanding the long history of PPPs in many countries. The current framework consists of a series of non-uniform legislative guides and publications made by different international bodies to regulate PPPs at the international level.

The most prominent guides and publications are: UNCITRAL Privately Financed Infrastructure Projects Instruments; The United Nations Industrial Development Organisation (UNIDO) Guidelines for Infrastructure Development through Build, Operate and Transfer (BOT) 1996; The OECD “BASIC Elements of Law on Concession Agreements” 2000; European Bank for Reconstruction and Development (EBRD’s) “Core Principles on Modern Concession Law” 2006; and European Commission’s Directives on the Award of Concessions.⁴The result is the development of multiple PPP approaches, practices and procedures aimed at regulating PPP transactions. It has been observed that public efficiency would be enhanced through standardizing administrative procedures, while leaving enough flexibility to adapt the project agreements to the specific needs of each project.⁵

Nonetheless, PPP laws in many developing countries have been fashioned after the UNCITRAL instruments, which provide legislative recommendations and model provisions on privately

⁴ Adekilekun Mubarak Tijani, ‘Legal and Regulatory Framework for Public-Private Partnerships in Infrastructure Development: A Case Study of Three African Models and Core International Frameworks’, (University of Malaya 2014).

⁵ International Colloquium on Public-Private Partnerships (PPPs), ‘Report of the UNCITRAL Colloquium on PPPs’, 2013. Available at <<http://www.uncitral.org/uncitral/en/commission/colloquia/public-private-partnerships-2013.html>> accessed 3 June 2019.

financed infrastructure projects in a bid to promoting good governance and establish appropriate legislative framework.

4.1.1 The UNCITRAL Framework

United Nations Commission on International Trade Law (UNCITRAL) is a core legal body of the United Nations mandated to promote the codification, harmonization and modernization of international laws and conventions in the field of international trade law.⁶ It has adopted the UNCITRAL Legislative Guide to Privately Financed Infrastructure Projects, 2001 (PFIP Guide) and the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects, 2013 (Model Provisions) which set out legislative recommendations intended to assist domestic legislative bodies in developing a legislative framework favourable to privately financed infrastructure projects.

It is important to note that these provisions are not binding unless ratified. A summary of the legislative recommendations in the PFIP Guide and the Model Provisions are set out hereunder:

The PFIP Guide and the Model Provisions recognize three forms of private sector participation that is public ownership and public operation; public ownership and private operation; and private ownership and operation⁷ to be implemented in line with underlying principles of transparency, fairness, and the long-term sustainability of projects.⁸

The law should identify the public authorities (including national, provincial and/or local authorities) empowered to award concessions.⁹ Selection of the concessionaire should be through

⁶ United Nations Commission on International Trade Law, 'Origin, Mandate and Composition of UNCITRAL' <https://uncitral.un.org/en/about/faq/mandate_composition> accessed 27 May 2019.

⁷ Background information on privately financed infrastructure projects UNCITRAL, *Legislative Guide on Privately Financed Infrastructure Projects* (2001).

⁸ Recommendation 1 of the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects, 2001.

⁹ Recommendation 2 to 5 *ibid*.

transparent and efficient competitive procedures with limited room for noncompetitive procedures.¹⁰

The UNCITRAL framework recognizes that private sector participation in PPP projects is encouraged where the investors have confidence that disputes arising with respect to projects will be resolved fairly and efficiently. This points to the need for provisions that guarantee investors' access to expeditious appeals procedures and judicial recourse. Hence, the law should allow contracting authorities the freedom to choose dispute resolution mechanisms that are best suited to the needs of the project.¹¹

Moreover, the law should state how to access financial support from the relevant authority, and to what extent such support may be issued to third party.¹² The recognized forms of government support include public loans and loan guarantees; equity participation; subsidies; sovereign guarantees; protection from competition; and ancillary revenue sources.

In terms of institutional arrangements, the PFIP Guide and the Model Provisions acknowledge that projects may require involvement of several public authorities at various levels of government. It is recommended that the regulatory competence should be entrusted to functionally independent bodies with sufficient autonomy to ensure that their decisions are made without political interference. Particularly, a central unit with the overall responsibility for formulating policy and providing practical guidance on implementation of projects.¹³

Although the UNCITRAL Framework represents a useful basis for assessment of the readiness of a government's legal, policy, regulatory and financial frameworks to support PPPs, the level of

¹⁰ Recommendation 14 to 35 *ibid.*

¹¹ Recommendation 69 *ibid.*

¹² Recommendation 23 *ibid.*

¹³ Recommendations 6 to 10 *ibid.*

global awareness of its existence is low hence not widely relied upon directly as a source of guidance or detail in the drafting of national PPP laws.¹⁴

There is also need to revise the PFIP Guide and Model Provisions so as to cover wider forms of PPPs as they focus on concessions; criteria for determining whether a project is in the public interest; oversight mechanisms in selection of the private partner and implementation of the project; measures for evaluations on financial aspect of a project among others.¹⁵

4.2 PPPs in Nigeria

Nigeria is a key economic player in Africa, with a population of approximately 197 million. In 2017, the country was ranked position 30 in the world in terms of GDP.¹⁶ Upon independence, Nigeria adopted an indigenization regime where foreign investors were restricted under the Nigerian Enterprises Promotion Act 1977. However, the 1990s the country moved towards liberalization laws allowing foreign investors to invest in any part of the Nigerian economy.¹⁷ The Nigerian government has since embarked on an extensive liberalization and privatization program to promote private sector participation in order to ensure quality infrastructure service delivery to the increasing population.¹⁸

The country's development blueprint, Nigeria Vision 20:2020, seeks to attain rapid socio-economic development focused on four dimensions: social dimension which seeks to attain a peaceful, equitable, harmonious and just society; the economic dimension aims towards a globally

¹⁴ Simmons & Simmons LLP, 'Report to the Third Session of the Team of Specialists on Public-Private Partnerships 18-19 April 2011 Regarding Model PPP Laws', United Nations Economic Commission For Europe, 2011.

¹⁵ Seungwoo Son (n 2).

¹⁶ The World Bank Group, 'Gross Domestic Product 2017' 2017. Available at <<https://databank.worldbank.org/data/download/GDP.pdf>> accessed 8th June 2019.

¹⁷ Kate Nkechi Okoth, 'Public-Private Partnerships (PPPs) in Nigeria : An Emerging Tool for Infrastructural Development', Trlplaw Solicitors and Advocates, 2015.

¹⁸ Olufemi Soyeju, 'Legal Framework for Public Private Partnership in Nigeria', De Jure Law Journal, 814, 2013.

competitive economy; institutional dimension focuses on a stable and functional democracy; and the environmental dimension seeks to attain level of environmental consciousness that enables and supports sustainable management of the nation's God-given natural resources.¹⁹

The NV20: 2020 has identified PPPs as a key strategic initiative towards realization of the aspiration of the Nigerian people. The country seeks to leverage on PPPs to help provide the skills, core competencies and best practices needed to deliver high standards of services, products and other public goods. Accordingly, the government has committed to provide incentives and the necessary legal and regulatory environment to attract PPPs.

The World Bank has reported that 56 PPP project projects in Nigeria with a total investment commitment of US\$39 billion have reached financial closure between 1990 and 2015 and that presently, 60 projects are at various stages of development and procurement while 51 projects are under implementation.²⁰ This implies that Nigeria has experienced some level of success with its PPP programme compared to Kenya where no PPP project has reached financial close since enactment of the PPP Act in 2013.

Nigeria's Vision 2020 has a striking resemblance to Kenya's Vision 2030. Further, Nigeria operates a federal system of government that allows implementation of PPPs at both the federal and state levels similar to Kenya. Therefore, it is relevant to evaluate Nigeria's PPP legal and institutional regime given these similarities with Kenya and its success with PPPs which can be attributed to a fairly sound regulatory framework.

¹⁹ Federal Republic of Nigeria, 'Nigeria Vision 20 : 2020 Economic Transformation Blueprint', 2009.

²⁰ Chidi Izuwah, 'Nigeria Blazes the Trail for PPP Disclosures with New Web Portal', *World Bank Blogs*, 21st September 2017. Available at <<http://blogs.worldbank.org/ppps/nigeria-blazes-trail-ppp-disclosures-new-web-portal>> accessed 8 June 2019.

4.2.1 Legal Framework for PPPs in Nigeria

4.2.1.1 Constitutional Basis

PPPs are not mentioned under the Nigerian Constitution, 1999. Nonetheless, it allows individuals to participate in economic activities in any sector of the Nigerian economy. Further, the state has an obligation to protect the right of every citizen to engage in economic activities outside the major sectors of the economy.²¹ This is the constitutional basis of PPPs in Nigeria pursuant to which the National Assembly have enacted legislation allowing private enterprises to participate in the economic development of Nigeria.

4.2.1.2 The Infrastructure Concession and Regulatory (Establishment) Act, 2005

The Infrastructure Concession and Regulatory (Establishment) Act, 2005 is the primary framework for participation of the private sector in financing the construction, development, operation, or maintenance of infrastructure or development projects.²² The Act applies to concession contracts by the Federal Ministries, Agencies, Corporations and other bodies empowered to enter into a concession contract.²³

The Nigerian PPP approval process involves nine steps. First, the Ministries, Departments and Agencies (MDA) identify and prioritize a PPP project. Second, the MDA obtain approval from the National Planning Commission that the project is in line with the plan priorities. Third, the plan is submitted to the Ministry of Finance (MoF) and the Debt Management Office (DMO) for financial appraisal. Fourth, the review the costs and contingent liabilities of the proposed projects by the MoF and DMO. Fifth, approval of spending plans in the budget as agreed by MOF and DMO which is hinged on the credibility of the private partner, bankability of the project, government

²¹ Section 16 of the Constitution of the Federal Republic of Nigeria 1999.

²² Section 1 (1) of the Infrastructure Concession Regulatory Commission (Establishment, ETC.) Act, 2005.

²³ Section 2 (1) to (3) *ibid*.

prioritization, expected cash flows from the project among others. Sixth, approval by the legislature. Seventh, MDA is permitted to move spending between different budget heads. Eighth, funds are disbursed to the MDA. The Last step involves preparation/auditing of annual accounts.²⁴

There are several provisions in the Act that seek to inspire confidence through open and transparent processes and procedures and by levelling the playing field. For instance, open and competitive bidding is the primary method for bid solicitation in so as to enthrone integrity in PPP procurement.²⁵ In addition, the Act requires that a list of all projects eligible to be undertaken as PPPs is required to be published in at least three national newspapers having wide circulation in Nigeria.²⁶

However, the Act does not provide for detailed rules the PPP procurement process. Further, there are no extensive provisions on dispute resolution under the Act. It only recognizes that an agreement shall not be arbitrarily suspended, stopped, cancelled or changed except in accordance with the Act.²⁷ Recourse is made to the Arbitration and Conciliation Act in settlement of PPP disputes pursuant to arbitration clauses in PPP contracts. This lacuna has given rise to failure of some PPP projects such as Bi - Courtney Highway Services Ltd- Lagos Ibadan Expressway Concession Project.²⁸

4.2.1.3 The National Policy on Public Private Partnership

The National PPP policy sets out policy, economic, social and environmental objectives of the federal government infrastructure development programme; and the government's commitment to

²⁴ U. Essia and A. Yusuf, 'Public-Private-Partnership and Sustainable Development of Infrastructures in Nigeria', *Advances in Management & Applied Economics* vol. 3, no.6, 2013, 113-127.

²⁵ Section 4 Infrastructure Concession Regulatory Commission (Establishment, ETC.), Act, 2005.

²⁶ Section 2 (4) *ibid*.

²⁷ Section 11 *ibid*.

²⁸ Augustine Edozor Arimoro, 'Legal Framework for Public Private Partnership: South Africa and Nigeria in Focus', *Unimaid Journal of Public Law*, Vol 5 Issue II November 2018 pg 106.

PPPs as an avenue for meeting the country's infrastructure deficit and improving the quality of public services ultimately achieving the country's Vision 2020.

The underlying principles that guide implementation of the PPP programme envisaged under the National PPP Policy are: achieving the best value for money outcome in public services; consideration of the public interest; optimizing and not maximizing the transfer of project risks to the private partner; the formal agreement should set out the output requirements; transparency and openness in procurement process; effective competition in procurement; capacity of the private partner to deliver the project; and engaging the market before the involvement of the private sector.²⁹

4.2.1.4 Public Procurement Act, 2007

The Act is the legal framework for public procurement in Nigeria. It establishes the National Council on Public Procurement³⁰ and the Bureau of Public Procurement³¹ mandated to monitor and oversee public procurement and to regulate and set standards for public procurement in Nigeria.

Although the Act does not specifically focus on PPPs it is relevant to the way the Nigerian government goes about its fiduciary relationship and responsibility in public procurement as applies to all forms of procurement of goods, works and services carried out by the Federal Government of Nigeria and all procuring agencies.³² PPPs in Nigeria arguably fall under the ambit of the Public Procurement Act. However, the Act is silent on the distinguishing characteristics of PPPs compared to traditional public procurement.

²⁹ The Federal Republic of Nigeria, 'The National Policy on Public Private Partnership, 2008' Part 8.

³⁰ The Federal Republic of Nigeria, the Public Procurement Act, 2007, section 1.

³¹ Section 3 *ibid*.

³² Adekilekun Mubarak Tijani (n 4).

4.2.1.5 The Fiscal Responsibility Act, 2007

This Act was enacted to provide for prudent management of the country's resources, ensure long-term macro-economic stability of the national economy, secure greater accountability and transparency in fiscal operations within the medium term of fiscal policy framework, and the establishment of the Fiscal Responsibility Commission mandated to promote Nigeria's economic objectives.³³

The Fiscal Responsibility Commission is obligated to monitor and enforce the provisions of the Act; disseminate such standard practices including international good practice that will result in greater efficiency in the allocation and management of public expenditure, revenue collection, debt control and transparency in fiscal matters; and undertake fiscal and financial studies, analysis and diagnosis and disseminate the result to the general public.³⁴ It has power to compel any person or government institution to disclose information relating to public revenues and expenditure; and to cause an investigation into whether any person has violated any provisions of the Act.³⁵

The Act does not set out specific provisions on PPPs. However, in so far as PPPs are linked public funds, there is an obligation to adhere to sound financial management provisions under the Act.

4.2.1.6 PPPs at the State Level

At the state level, each state has the power to make its laws and regulations and has a lot of autonomy in implementing PPP projects. It has been observed that much of the implementation of concessions in Nigeria has taken place in the local level.³⁶ Nonetheless, it has been observed that

³³ Preamble to the Fiscal Responsibility Act, 2007.

³⁴ Section 3 (1) *ibid.*

³⁵ Section 2 *ibid.*

³⁶ The Economist and Intelligence Unit, 'Evaluating the Environment for Public-Private Partnerships in Africa: The 2015 Infrascopé', EIU, London.

whilst most states have initiated PPP projects, only a few states out of the 36 states in the country have passed enabling PPP laws.³⁷ Lagos, Rivers, Cross Rivers, Ekiti and Niger states have passed their own PPP laws and set up PPP Units.³⁸

Lagos state has the most developed infrastructure-related laws at the state level. The main framework is the Lagos State Public Private Partnership Law, 2011.³⁹ It established a PPP office in 2008 and has successfully implemented a concession contract granted to the Lekki Concession Company (LCC) for design, construction, finance, and operation of the 49.36 km toll road project whose capital value is estimated to be US\$450 million.⁴⁰

There are other sector specific legal and regulatory frameworks that impact PPPs in Nigeria such as the Highways Act, 1971; Utilities Charges Commission Act, 1992; Bureau of Public Enterprises (Privatization and Commercialization) Act, 1999 among others.

4.2.2 The Institutional Framework for PPPs in Nigeria

The Nigerian PPP institutional framework allocates specific roles and responsibilities to various entities within the Federal Government of Nigeria. The key institutional arrangements are discussed below.

4.2.2.1 Infrastructure Concession Regulatory Commission

The Infrastructure Concession Regulatory Commission (ICRC) and its Governing Board, established under the Infrastructure Concession and Regulatory (Establishment) Act,⁴¹ is

³⁷ Augustine Edozor Arimoro, 'An Evaluation of the Legal Framework for Public Private Partnerships in Nigeria', University of Derby, 2015. Available at <https://www.researchgate.net/publication/274951436_An_Evaluation_of_the_Legal_Framework_for_Public_Private_Partnerships_in_Nigeria> accessed on 10th June 2019.

³⁸ Ibid.

³⁹ Olufemi Soyaju (n 18).

⁴⁰ Adekilekun Mubarak Tijani pg 128 (n 4).

⁴¹ Section 14 and 15 Infrastructure Concession Regulatory Commission (Establishment, ETC.), Act, 2005.

empowered to provide general policy guidelines, rules and regulations; and take custody of every concession agreement entered by the federal government and ensure efficient execution and compliance with the Act.⁴²

The ICRC has developed PPP Contracts Disclosure Portal in a bid to ensure greater openness and transparency of PPPs in Nigeria as well as timely disclosure of contract information from project initiation through to the implementation. Members of the public are able to access all non-confidential information relating to PPP project including project documents and milestones.⁴³

The PPP Resource Centre and the Contract Monitoring Unit operate within the ICRC. The PPP Resource Center acts as a national resource center of PPPs expertise in Nigeria, made up of public and private sector personnel, with legal, financial, and public sector backgrounds, which provides technical assistance to MDAs in the development and procurement of PPP projects. It works with state governments to ensure consistency, best practice and a coordinated approach to PPPs. On the other hand the Contract Monitoring Unit ensures efficient execution of any concession agreement or contract entered into by the government and monitors compliance with the contractual terms and conditions by both the government and the private partner.⁴⁴

The ICRC Board provides oversight and strategic direction to the PPP Resource Centre and the Contract Monitoring Unit through its internal governance structures.

⁴² Section 20 *ibid.*

⁴³ Obinna Chima, 'ICRC Launches PPP Contracts Disclosure Portal' (*Infrastructure Concessions Regulatory Commission*) <<http://www.icrc.gov.ng/icrc-launches-ppp-contracts-disclosure-portal/>> accessed 9 June 2019.

⁴⁴ Infrastructure Concession Regulatory Commission, 'Draft PPP Manual for Nigeria', 2017.

4.2.2.2 Bureau of Public Procurement

The Bureau of Public Procurement is established under the Public Procurement Act⁴⁵ mandated to monitor and oversee public procurement, harmonize the existing government policies and practices by regulating, setting standards and developing the legal framework and professional capacity for public procurement in Nigeria.⁴⁶ The Bureau plays a vital role in PPPs by ensuring that due process in the procurement of public works and services and uses the pricing standards and benchmarks to ensure that prices of goods and services are fair and reasonable.⁴⁷

4.2.2.3 The National Planning Commission

The National Planning Commission (NPC), established under the National Planning Commission Act,⁴⁸ is responsible for the preparation of the national economic priorities and programmes and maps out the implementation strategies among others functions.⁴⁹ The investment strategy identifies the infrastructure needs against predicted financial resources, and covers all forms of procurement to be financed in whole or in part from the Federal budget. It is the center for economic appraisal of projects in determining whether private or public borrowing will have the lowest economic cost for projects or programmes.⁵⁰

The MDAs work with the NPC in order to identify their long term plans for infrastructure projects. Any agency that intends to carry out a project under PPP must have to act in compliance with the NPC's plan.⁵¹

⁴⁵ Section 3 of the Public Procurement Act, 2007.

⁴⁶ Preamble *ibid*.

⁴⁷ Adekilekun Mubarak Tijani pg 141 (n 4).

⁴⁸ Section 1 of the National Planning Commission Act 1993.

⁴⁹ Section 2 *ibid*.

⁵⁰ Infrastructure Concession Regulatory Commission (n 44).

⁵¹ Adekilekun Mubarak Tijani (n 4).

4.2.2.4 The Debt Management Office

The Debt Management Office is established under Debt Management Office (Establishment) Act, 2003.⁵² One of its key obligations is to prepare and implement a plan for the efficient management of Nigerian's external and domestic debt obligations at sustainable levels compatible with the desired economic activities for growth and development.⁵³ In this regard, the Debt Management Office evaluates and manages the fiscal risks associated with PPPs; and provides guidance on the budgetary treatment of the liabilities created under PPP projects and their treatment in the national accounts. In the PPP approval process the Debt Management Office needs to be satisfied that any contingent liabilities are manageable within the government's economic and fiscal forecasts.

4.2.3 Legal and Institutional Challenges facing PPPs in Nigeria

Notwithstanding the legal and regulatory framework discussed above, there are some challenges facing implementation of PPPs in Nigeria. These include: Cultural issues such as resistance from the civil service, negative perception from the general public, resistance from staff unions, and failure to honour contractual agreements; Funding issues such as the challenge of raising long term credit facilities locally; Regulatory challenges such as incessant changes in relevant political office holders; Political issues such as absence of the political will to ensure that PPPs work, risks associated with political transition, Legal issues such as slow pace of justice delivery system; and other issues such as corruption and dearth of experts.⁵⁴

Research by Transparency International conducted in 2018 on perceived levels of public sector corruption around the world revealed the high prevalence of corruption in Kenya and Nigeria, both

⁵² Section 4 of the Debt Management Office Establishment (Etc .) Act, 2003.

⁵³ Section 6 (1) (c) *ibid*.

⁵⁴ Adekilekun Mubarak Tijani pg 177-192 (n 4).

ranking position 144 out of 180 with a score of 27 out of 100.⁵⁵ As a form of public procurement, PPPs are prone to corruption as these governments lack strong and independent institutions to implement the PPP programme. An analysis of corruption and PPPs in Nigeria indicates that corruption and opacity in decision making continue to feature in public discourse and a culture of secrecy within government functioning remains a matter of concern.⁵⁶

Good governance calls for public accountability, responsiveness, transparency, efficiency and effectiveness. Nigeria has taken several steps to move towards lower levels of corruption and greater transparency and accountability. At the constitutional level, the Nigerian government is obligated to eradicate all corrupt practices and abuse of power.⁵⁷ Several laws have been enacted towards this end which include: Code of Conduct Bureau and Tribunal Act 1990, Independent Corrupt Practices & Other Related Offences Act 2000, Economic and Financial Crimes Commission Act 2004, Fiscal Responsibility Act 2010, Money Laundering Prohibition Act 2011, the Nigeria Extractive Industries Transparency Initiative (NEITI) Act 2007, and the Freedom of Information (FOI) Act 2011.

These laws directly or indirectly impact PPPs. Nonetheless, their impact in improving disclosure in the PPP space has not been substantial. For instance, the current ICRC guidelines on disclosure of PPP contract information do not cover the project preparation and procurement phases which is most susceptible to corruption. When properly implemented, transparency and disclosure requirements can be very instrumental in the fight against corruption. However, most government

⁵⁵ Transparency International, 'Corruption Perceptions Index 2018'. Available at <<https://www.transparency.org/cpi2018>> accessed 5 November 2019.

⁵⁶ Augustine Arimoro, 'Corruption and Public-Private Partnerships in Nigeria : Good Governance , Anti-Corruption and Ethical Reflections', Independent Corrupt Practices and other Related Offences Commission (ICPC) Nigeria, 2018.

⁵⁷ Constitution of the Federal Republic of Nigeria 1999, Section 15 (5).

institutions in Nigeria have not developed internal policies, rules, and mechanisms for disclosure of information as required under the various legislative frameworks.⁵⁸ It has been argued that the Nigerian “*anti-corruption agencies were formed on corrupt foundation with vague legislations and structures devoid of transparency and accountability.*”⁵⁹ Corruption remains a major menace that sabotages the country’s development efforts.

4.3 PPPs in India

India is one of the fast growing economies in the world with a GDP of US\$ 2.652 Trillion and a population of 1.339 billion as at 2017.⁶⁰ Nonetheless, government funding has not been sufficient to finance the country’s growing need for infrastructure hence the need to look for other sources of funding in the form of public private partnerships.

India has emerged as one of the world’s leading PPP markets. Between 2008 and 2012, the country was the top receipt of Private Participation in Infrastructure (PPI) activity receiving almost half of the PPI projects investment in developing countries in 2011.⁶¹ About 945 PPP projects have reached financial close accounting for over US\$347 billion in investment.⁶²

The Indian PPP experience is relevant to Kenya as it is the highest-ranking developing country in PPP implementation. The success of PPPs in India has been attributed to strong political will as

⁵⁸ The World Bank Group, ‘Improving Transparency and Accountability in Public-Private Partnerships: Disclosure Diagnostic Report Nigeria’, World Bank Publications, 2017.

⁵⁹ C. Ekpo, J. Chime, and F. Enor, ‘The Irony Of Nigeria’s Fight Against Corruption: An Appraisal of President Muhammadu Buhari’s First Eight Months in Office’ International Journal of History and Philosophical Research, Vol.4, No.1, pp.61-73,2016 .

⁶⁰ The World Bank, ‘World Bank Open Data - India’ <<https://data.worldbank.org/country/india>> accessed on 10th June 2019.

⁶¹ Deblina Saha, ‘PPPs in India – Will They Regain Their Former Glory?, World Bank Blogs, 4th July 2017. Available at <<http://blogs.worldbank.org/ppps/ppps-india-will-they-regain-their-former-glory>> accessed 10 June 2019.

⁶² The Economist Intelligence Unit, ‘Evaluating the Environment for Public-Private Partnerships in Asia: The 2018 Infrascop’, pg 41.

well as favourable policy, regulatory and institutional government initiatives. The policy and institutional framework in India is discussed below.

4.3.1 The Legal Framework for PPPs in India

4.3.1.1 Constitution of India

There is no PPP specific law at the central level in India. Nonetheless, the Constitutional basis of PPPs can be traced to Article 299 which allows the entering into contracts in exercise of the executive power of the Union or of a State. The Constitution provides for shared legislative responsibility between the National Parliament and the State Legislative Bodies. The central government has power to make laws relating to ports, airports, railways, national highways, inland water transport, telecommunications, oilfields and mineral resources. On the other hand, state governments have power to make laws with respect to police services, prisons and corrective facilities, regulation of local governments, public health and sanitation, state highways, city roads, water supply and irrigation.⁶³

There are various laws and regulations support PPPs in India at the national level. Pursuant the power to make laws covered under the Union List, the central government has developed sectoral legislations as well as administrative controls, programmes and policies to regulate PPPs at the national level. Further, procuring authorities release model concession agreements that contain basic terms and conditions for PPP projects in their respective sectors. Together, these comprise the regulatory framework for PPPs in India.⁶⁴

⁶³ Seventh Schedule of The Constitution of India, 1950.

⁶⁴ Anudeep Kaur, 'Law Relating to Public Private Partnership a Comparative Study between India and UK with Special Reference to Infrastructure Sector', Panjab Univeristy 2017. Available at <<https://shodhganga.inflibnet.ac.in/handle/10603/235195>> accessed 15th June 2019.

Similarly, states have the right to promulgate legislation in the areas covered under the state list. Some states have developed legal frameworks that supports private participation in infrastructure development such as the Andhra Pradesh Infrastructure Development Enabling Act (No. 36 of 2001); Gujarat Infrastructure Development Act (No. 11 of 1999, amended by Act No.18 of 2006); Bihar Infrastructure Development Enabling Act, 2006; Punjab Public Private Partnership Act, 2014; among others.

As the country does not have a comprehensive National PPP Act or policy clearly setting out the objectives, scope and implementing principles of its PPP program, discussions herein below shall focus on the key guidelines at the central level on PPPs.

4.3.1.2 Guidelines for Formulation, Appraisal and Approval of Public Private Partnership Projects

The guidelines were developed by the Central Government to ensure speedy appraisal of projects, adopt international best practices and have uniformity in appraisal mechanism. It provides the institutional structure for appraisal of the PPP projects; inter-ministerial consultations where the project involves more than one ministry/department; the PPP procurement and approval process; and the time frame for the various steps under the appraisal procedure for PPP projects.⁶⁵

It is important to note that the Central Government has developed standard bidding documents. These documents include: Model Request for Qualification (RFQ) aimed at pre-qualification and short-listing of eligible bidders; Model Request for Proposal (RFP) aimed at obtaining financial offers from the short listed bidders; Model RFP for engaging financial consultants and technical advisers for PPP Projects; standard contractual documents such as sector specific Model

⁶⁵ Government of India, 'Guidelines for Formulation, Appraisal and Approval of Central Sector Public Private Partnership Projects' 2013.

Concession Agreements developed by central ministries which lay down the standard terms relating to allocation of risks, contingent liabilities and guarantees as well as service quality and performance standards.⁶⁶ Standardizing documents and processes saves time and costs involved in structuring and awarding complex PPP projects; and minimizes errors.

In an effort to establish transparency in the PPP programme, the Department of Economic Affairs of the Central Government has developed an online repository of Concession Agreements of executed PPP projects. The central government has also developed a portal for PPP activities in India which is a one-stop site on information relating to PPP initiatives as well as a database of PPP projects by central and state governments in India.⁶⁷

4.3.1.3 General Financial Rules, 2005

The General Financial Rules set out the general provisions to be followed by all offices of Government of India while dealing with matters of a financial nature. The main objective of the rules is to ensure prudent financial management through mechanisms for expenditure control, inventory management, contract management, loans, and government guarantees among others. These Rules governs general procurement by the government and therefore set out the underlying principles which extend to PPPs.

4.3.1.4 Guidelines for Financial Support to PPPs in Infrastructure

The central government formulated the financial support scheme for PPPs in order to enhance private sector participation in critical infrastructure sectors by offering grant assistance of up to

⁶⁶ Department of Economic Affairs, 'Standardized Bidding Documents' . Available at <<https://www.pppinindia.gov.in/standardized-bidding-documents>> accessed 13 June 2019.

⁶⁷ Department of Economic Affairs, 'Public Private Partnerships in India' <<https://www.pppinindia.gov.in/project-concession-agreements>> accessed 14 June 2019.

20% of the project costs. The scheme supports infrastructure projects that are economically justified but fall short of financial viability.⁶⁸

However, support is available only for infrastructure projects where private sector sponsors are selected through a process of competitive bidding; and where the project agreements adheres to best practices that would secure value for public money and safeguard user interests. It is an incentive to incorporate sound practices in PPP projects and eliminate the pitfalls associated from inadequate due diligence which will help to maximize efficiency and value for public money.⁶⁹

4.3.1.5 PPP Public Auditing Guidelines, 2009

This regulatory framework allows the Comptroller and Auditor General of India to audit PPP projects. These guidelines were developed to guarantee that PPP arrangements are truly in public interest; there is optimal risk allocation between the public and private partners; projects enjoy high credibility in the public eye and that there is due diligence, transparency, objectivity and probity of the entire PPP decision making process.⁷⁰

The scope of the audit covers aspects of: data, records, analysis and the decision process of the government department to prefer the PPP route; Documents and files leading to the formulation, appraisal and approval of the project; identification the private sector partner, requests for proposals, bidding and tendering process of the contract with due diligence to fairness, transparency and objectivity; In-depth analysis of the project documents such as shareholders' agreement, concession agreement, and financing arrangements; Value for money considerations and safeguarding the public interest; Quality and standards of the service, customer protection,

⁶⁸ Paragraph 5 of the Guidelines for Financial Support to Public Private Partnerships in Infrastructure, 2007.

⁶⁹ *ibid.*

⁷⁰ Foreword to Public Private Partnerships (PPP) in Infrastructure Projects: Public Auditing Guidelines, 2009.

dispute resolution and asset transfer arrangements; and End of the project operations including valuation of residual assets, decommissioning .⁷¹

4.3.1.6 Post Award Contract Management Guidelines for PPP Concessions, 2015

It has been noted that one of the key distinguishing factor between successful and failed /troubled projects is the level of coordination between private partner and the public partner. The Post Award Contract Management Guidelines have been developed by the central government as a tool to solve major hurdles that arise during a project lifecycle so as to serve the objectives set out in the PPP Agreement in the best possible manner.⁷²

The guidelines provide support and advice to those responsible for managing PPP projects during the phases of: Development stage which covers the process leading up to contract execution; Construction stage which covers the time construction starts up to the completion of construction; Operations and Maintenance Stage covers the provision and use of the contracted services during the remaining life of the concession and Handover stage which entails the period leading up to and after contract expiry or termination.⁷³

4.3.1.7 Other key regulatory issues for PPPs in India

Land acquisition and dispute resolution are key regulatory issues that affect implementation of PPPs. Land acquisition has been a major roadblock in development of infrastructure projects under PPP in India. A notable mention is the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 which regulates acquisition of land for public purposes in India. The Act was amended in 2013 to exempt the government from the

⁷¹ Part 3.1 *ibid.*

⁷² PPP Cell, Department of Economic Affairs, 'Guidelines for Post-Award Contract Management for PPP Concessions, 2015'.

⁷³ *ibid.*

requirement of obtaining consent of 70% of land owners when land is acquired for PPP projects in a move to speed up project implementation.⁷⁴

In addition, the need for speedy and efficient resolution of dispute in PPP Projects cannot be overemphasized. The central government and state governments have given impetus to alternative dispute resolution such as conciliation, arbitration, expert adjudication and amicable settlement which are generally provided for in the concession contracts. As regulation is sector based, the regulatory authorities such as Airport Economic Regulatory Authority, Tariff Authority of Major Ports, Central electricity regulatory commission and state level electricity commission play central roles in dispute resolution in PPP projects.⁷⁵

4.3.2 The Institutional Framework for PPPs in India

4.3.2.1 The PPP Cell - Department of Economic Affairs

The PPP Cell is established under the Department of Economic Affairs within the Ministry of Finance. It responsible for development of policy, schemes, programmes; capacity building and all other matters relating to mainstreaming PPPs at the central level.⁷⁶

India has made great strides in PPP capacity building. In 2010, the Ministry of Finance launched a National PPP Capacity Building Programme to train 10,000 government officials in preparing and managing PPPs across various infrastructure sectors.⁷⁷ The government has also published a series of guidance papers and PPP Toolkits to assist in project preparation and decision making. State governments establish their own PPP cells which act as nodal agencies for PPP projects.

⁷⁴ Section 2 (b) (ii) of The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013.

⁷⁵ Anudeep Kaur pg 94 (n 64).

⁷⁶ World Bank Group, 'Benchmarking PPP Procurement 2017 in India', 2017.

⁷⁷ Mathieu Verougstraete, 'PPP Units in Asia-Pacific', United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP), 2014.

The Ministry of Finance is the nodal Ministry responsible for examining concession agreements from the financial angle, deciding on guarantees to be extended, and generally assesses risk allocation from the investment and banking perspectives.⁷⁸

4.3.2.2 The Public-Private Partnership Appraisal Committee (PPPAC)

The PPP Appraisal committee was set up in 2005 pursuant to the decision of the Cabinet Committee on Economic Affairs. Its objective is to fast track the appraisal and approval of PPP projects of all sectors.⁷⁹ It has developed standard documents for ‘in principle’ clearance obtained before inviting expressions of interest from prospective investors.⁸⁰

Its composition entails Secretary, Department of Economic Affairs (in the Chair); Secretary, Planning Commission; Secretary, Department of Expenditure; Secretary, Department of Legal Affairs; and Secretary of the Department sponsoring a project.⁸¹ This inter-ministerial composition of the PPPAC promotes cooperation as all major stakeholders of a PPP projects are involved from the onset, at the project approval stage.

4.3.2.3 National Institution for Transforming India (NITI Aayog)

It was formed in 2015 through a Union Cabinet resolution to replace the Planning Commission instituted in 1950. Its key mandate is to evolve a shared vision of national development priorities sectors and strategies with the active involvement of States in the light of the country’s national objectives.⁸²

⁷⁸ Government of India, ‘Guidelines for Formulation, Appraisal and Approval of Central Sector Public Private Partnership Projects, 2013 pg 33.

⁷⁹ Annex I *ibid*.

⁸⁰ Annex II *ibid*.

⁸¹ *ibid*.

⁸² Government of India - National Institution for Transforming India, ‘About Us’ <<https://niti.gov.in/content/functions>> accessed 19 June 2019.

India's three year action agenda recognizes PPPs as a growth enabler. It reinforces the drive to promote private participation through the PPP mode in view of the demands placed on the limited fiscal space and the substantial scale of investments required to meet the infrastructure gaps in the country.⁸³

4.3.2.4 Schemes for Financial Support

The government of India has undertaken several initiatives to reduce dependency on commercial banks and improve the PPP financing market in the country. In an attempt to improve the financial viability of PPP projects, the government of India established the Scheme for Financial Support to PPPs in Infrastructure (Viability Gap Funding scheme), administered by the Ministry of Finance, to provide financial support to infrastructure projects undertaken through PPPs in form of grants. This was motivated by the fact that that PPP projects may not always be financially viable due to their long duration and the limited financial returns.⁸⁴ The program has attracted more private investors in the country.

Further, the Indian government has established the India Infrastructure Project Development Fund (IIPDF) which is also administered under Ministry of Finance. The IIPDF provides financial assistance for PPP transaction costs in view of the fact that the procurement costs for PPPs, which include costs of Transaction Advisors, are significant and often pose a burden on the budget of the contracting authority.⁸⁵

In addition, the India Infrastructure Finance Company Limited (IIFCL), which is a company wholly owned by the government of India, was set up to provide innovative financing solutions to

⁸³ National Institution for Transforming India, 'India Three Year Action Agenda', 2017.

⁸⁴ PPP Cell, 'Scheme and Guidelines for Financial Support to Public Private Partnerships in Infrastructure', 2013. Available at <http://pppinindia.com/pdf/scheme_Guidelines_Financial_Support_PPP_Infrastructure-english.pdf> 20th June 2019.

⁸⁵ PPP Cell, 'Scheme and Guidelines for India Infrastructure Project Development Fund', 2013. Available at <http://www.pppinindia.com/pdf/guideline_scheme_IIPDF.pdf> accessed on 20th June 2019.

promote and develop world class infrastructure in India. It offer long-term financial assistance to viable infrastructure projects including PPPs.⁸⁶

4.3.3 Legal and Institutional Challenges facing PPPs in India

Some of the challenges to PPPs in India include: sector specific policy and regulatory gaps; inadequate availability of long term finance both equity and debt; inadequate capacity in public institutions and public officials to manage PPP processes; inadequate capacity in the private sector both in the form of developer/investor and technical manpower; inadequate shelf of bankable infrastructure projects that can be bid out to the private sector; and inadequate advocacy to create greater acceptance of PPPs by the public at large.⁸⁷

4.4 Lessons for Kenya

Kenya, Nigeria and India have all acknowledged the significance of PPP in their development agendas. Accordingly, all the three countries have established legal and institutional frameworks to govern the implementation of PPP projects. Kenya and Nigeria have developed PPP specific legislation while PPP laws in India are found in various legislative frameworks as regulation is focused at the sectoral level.

Conspicuously, all these three countries face similar challenges in implementation of their PPP programmes which may be attributed to the fact that they are all developing countries. This notwithstanding, Nigeria and India have experienced great success in implementation of PPP

⁸⁶ India Infrastructure Finance Company Limited, 'About Us' <http://www.iifcl.org/Content/about_us.aspx> accessed 20 June 2019.

⁸⁷ CUTS Institute for Regulation and Competition, 'Mainstreaming Public Private Partnerships in India', Center of Excellence on Law & Economics, 2012.

projects compared to Kenya which implies that there are aspects of their legal and institutional frameworks that can be desired by Kenya.

4.4.1 The Institutional Arrangements for PPPs

The Institutional framework of PPPs in the three countries reveals that there are several stakeholders within and outside government involved in the PPP implementation process. It is crucial that these institutional roles are competently pursued at levels where the obligations of the stakeholder match the degree of autonomy and accountability. Nigeria and India have put in place better mechanisms that inculcate checks and balances in their PPP programme compared to Kenya. In Kenya the PPP programme is largely implemented at the Ministry of Finance. There is need to ensure that the key players in PPPs are kept separate so as to secure the lines of accountability in order to attain the public procurement objectives envisaged under Article 227 of the Kenyan Constitution.

In addition, intergovernmental cooperation is crucial as successful implementation of PPP programmes demands supportive institutional arrangement. The PPP Appraisal Committee in India has successfully involve all key stakeholders in the PPP appraisal and approval process. Kenya ought to adopt a similar approach to ensure that all stakeholder are involved from the onset to avoid the delays that the country has experienced in implementation of the PPP programme.

Further, countries should build internal capacity and ensure that the responsibilities for promoting, implementing and managing PPP projects are clearly assigned. There has been no national capacity building programme in Kenya despite the existing capacity challenges at both the national and county levels. There is need to follow the steps taken by Nigeria through the PPP Initiative

Project⁸⁸ and India through the National PPP capacity building programme 2010. There is need to develop and implement a national PPP capacity building programme in Kenya to ensure that PPP transactions are carried out according to international best practices.

4.4.2 Financial Support Schemes for PPPs

PPP projects often involve high risks and run for long duration of time. Government incentives and assurances attract private investors. The Kenyan PPP Act does not provide adequate incentive neither does the government Policy on the Issuance of Government Support Measures in Support of Investment Programmes 2018. The current practice is that government support measures are issued only in exceptional circumstances. In contrast, the Government of India has come up with several initiatives to provide financial support that has boosted its PPP programme such as the Viability Gap Funding scheme; India Infrastructure Project Development Fund and India Infrastructure Finance Company Limited.

Government support is crucial especially in the early years of PPP development or where the PPP market is untested as private investors tend to shy away from such situations. Kenya should take action to ensure that its PPP programme is financially attractive.

4.4.3 PPP Procurement

In terms of procurement planning, Nigeria and India have aligned their PPP programmes with their prioritized national development initiatives. In Nigeria MDAs work with the National Planning Commission to ensure that the PPP projects they implement are in line with the country's long term plans for infrastructure projects. The National Institute for Transforming India plays a similar

⁸⁸ Federal Republic of Nigeria and the World Bank, 'Public Private Partnership APL Program' 2011. Nigeria in collaboration with the World Bank launched the PPP Initiative Project to facilitate capacity building and technical assistance to the Infrastructure Regulatory Concession Commission and select key ministries, departments and agencies.

role in PPPs. In order to promote good governance in PPP procurement, the country needs to put in place adequate pre-procurement mechanisms to ensure compliance with the development objectives set out in the Vision 2030.

With reference to the procurement process, the Government of India has successfully developed standard bidding documents and standard contractual documents such as sector specific Model Concession Agreements. Standardization of PPP documents saves time and costs, and mitigate against the risks of that may arise out of improper design and contents. Both Kenya and Nigeria are in the process of developing PPP manuals which include PPP standard bidding documents, templates, toolkit/user guidelines.

In addition, the PPP procurement process in Kenya tends to be very lengthy often conducted in several years. The procurement process in India is less lengthy as the country has set timelines for each stage of the PPP procurement cycle under the Guidelines for Formulation, Appraisal and Approval of Public Private Partnership Projects. There is need to put timelines in Kenya to ensure speedy procurement and implementation of PPP projects.

Transparency in the PPP procurement process is a key theme in the PPP legal framework across the three countries. India has successfully developed an online repository of executed PPP Contracts as well as a portal where information relating to PPP activities is published. Nigeria's ICRC has also developed PPP Contracts Disclosure Portal. In collaboration with the World Bank, Kenya launched the PPP Disclosure Portal where all non-confidential information relating to PPP

contracts available to the public.⁸⁹ However, the Kenya PPP Disclosure Portal is currently not operational.

4.4.4 PPP Contract Management

PPPs are long term in nature hence demand effective and efficient contract management to ensure that parties fulfill their obligations in order to meet the objectives of the PPP agreement. PPP contract management policies should incorporate: the collection and analysis of information, the manual management of the contract, monitoring and evaluation of performance, the relationship between public and private entities; governance, probity and compliance, information management, management of contractual changes; and contingency plans.⁹⁰

Nigeria has established a specific unit within the ICRC that is the Contract Monitoring Unit which has the responsibility to monitor compliance with the terms of the PPP contract between the parties. India has also developed Post Award Contract Management mechanisms primarily undertaken by contracting authorities to ensure that all PPP projects meet their objectives on a continuous basis. The Indian Post Award Contract Management Toolkit for PPP Concessions sets out a step-by-step methodology for undertaking various tasks of the post-award phase of a PPP project.

In the Kenyan context, the mandate of contract management for PPP projects is placed on the PPP Unit and the PPP Committee. There is need for PPP contract management procedure manuals that guide on how performance verification is undertaken and how to respond to any contract

⁸⁹ National Treasury, 'Public-Private Partnership (PPP) Disclosure Web Portal Launch' <<http://treasury.go.ke/media-centre/news-updates/506-public-private-partnership-ppp-disclosure-web-portal-launch.html>> accessed 20 June 2019.

⁹⁰ Tavares Silvana, 'The Contract Management in Public-Private Partnership', 2015. Available at <[https://fenix.tecnico.ulisboa.pt/downloadFile/395144992772/Resumo alargado.pdf](https://fenix.tecnico.ulisboa.pt/downloadFile/395144992772/Resumo%20alargado.pdf)> accessed on 24th June 2019.

deviations. A specialized PPP monitoring unit with clear mandate can best perform the PPP contract management function.

4.5 Conclusion

This chapter has demonstrates how the Kenyan PPP legal and institution framework fairs in comparison to Nigeria and India. Key learning areas have been identified which could assist in law reform. The next chapter shall make recommendations on how the Kenyan PPP legal and institutional framework can be improved.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.0 Introduction

The purpose of this study was to assess:

- f) What is the implementation framework of PPPs in Kenya?
- g) What are the legal and institutional challenges facing implementation of PPP law in Kenya?
- h) Whether the existing PPP framework is adequate to overcome the legal and institutional challenges?
- i) What lessons can Kenya learn from the PPP experience in other jurisdictions so as to overcome the legal and institutional challenges?
- j) What reforms and recommendations can be made to bridge the gap in the current PPP legal and institutional regime towards achieving sustainable development?

The findings of the study and the proposals for reform are discussed below.

5.1 What is the implementation environment of PPPs in Kenya?

High level of legal certainty and regulatory stability are fundamental in creating an enabling environment for PPPs to thrive. Kenya has made great strides in improving the PPP climate by developing a fairly robust legal and institutional framework. However, out of the 70 PPP projects currently in the pipeline, only one has reached financial close and no single PPP project has been successfully undertaken from commencement to completion since enactment of the PPP Act in 2013. The study concludes that the current PPP regime is inadequate to guarantee successful implementation of PPP projects towards realization of the sustainable development goals under Vision 2030 owing to the legal and institutional challenges discussed below.

5.2 The legal and institutional challenges facing implementation of PPPs and the adequacy of the current framework in overcoming these challenges

There are several legal and institutional challenges facing implementation of PPPs:

First, PPP procurement process is wanting in terms of transparency, accountability and fairness which are key requirements of public procurement under Article 227 of the Constitution and part of our national values and principles of governance. There is inadequate public participation in implementation of the PPP programme; there are no clear and direct guidelines on disclosure of information relating to PPP projects; and law is silent on how to proceed in the event the procuring entity receives only one bid in response to a PPP tender; the law gives contracting authorities a lot of discretion in the award of unsolicited proposals without proper checks and balances.

Second, there are various regulatory gaps in the current PPP legal framework. There are no clear timelines for each stage of the PPP cycle which has led to a slow implementation process; there is no model bidding documents, model contracts, key contract clauses or guidance manuals to guide implementation of the PPP programme hence contracts are currently negotiated on a project by project basis with increases time and costs; and there are which are yet to be published six years after enactment of the PPP Act.

Third, the PPP dispute resolution mechanisms are inadequate. The PPP Act does not provide an appeal mechanism against the decisions of the PPP Petition Committee. Further, the law provides for use of alternative dispute resolution mechanisms but does not outline the procedures and other necessary provisions.

Fourth, the PPP legal framework does not provide adequate incentives and financial government support for private investors. The current situation is that financial government support is granted

in exceptional circumstances which has undermined the bankability of PPP projects as many are yet to reach financial close.

Fifth, although the PPP Act recognized county governments as contracting authorities it does not adequately guide county government in implementation of PPP programmes which has led to slow uptake of PPPs at the county level. There is no county specific PPP policies to provide procedural clarity in county PPP implementation.

Sixth, there is room to improve the PPP institutional arrangement. There is no adequate system of coordination among the various stakeholders involved in the PPP implementation process; the institutional framework at the national and county levels is not adequately harmonized; currently most PPP projects rely on transaction advisors due to lack of institutional capacity; and the governance structure of the institutional framework is susceptible to political interference.

5.3 What lessons can Kenya learn from the PPP experience in other jurisdictions?

A comparative analysis of the PPP experience in Nigeria and India was undertaken to get insights on how Kenya can improve its PPP legal and institutional environment. Although these countries face challenges similar to Kenya, they have experienced great success in implementation of PPP projects. Both Nigeria and India have put in place better mechanisms that inculcate checks and balances in their PPP programme and have taken considerable steps to build internal capacity in PPPs. In addition, both countries have better contract management procedures which is necessary to ensure that parties fulfill their obligations.

India has established several government initiatives for financial support that has boosted its PPP programme. Further, significant efforts have been made to ensure that its PPP programme is aligned to the prioritized national development initiatives. In terms of the procurement process, it

has successfully developed standard bidding documents and standard contractual documents which saves time and costs, and mitigate against the risks of that may arise out of improper design and contents.

5.4 What reform measures need to be undertaken to bridge the gap in the current PPP legal and institutional regime?

In view of the foregoing, the following recommendations are made in respect to the legal and institutional framework governing PPPs in Kenya.

5.4.1 The PPP Legal Framework

First, a comprehensive legal and regulatory framework is very essential in sustaining PPP programme. The Cabinet Secretary should move with speed to develop and finalize the various regulations required to fully operationalize the provisions of the PPP Act. The PPP Manual should also be finalized as a guide for best practices for the government institutions the private parties and all PPP practitioners.

Secondly, this study recommends that PPP procurement policies and regulations should be amended and redesigned in a way that promotes evidence based decision making and to include strict penalties for non-compliance in order to enthrone a greater degree of transparency and accountability in the procurement process. The PPP Act does not take into account the prevailing socioeconomic and political context within which public procurement in Kenya operates which has led to loose of billions of shillings. Further, pre procurement mechanisms should be put in place to ensure that projects are prioritized in accordance with the country's development agenda.

Third, information is a vital tool to monitor the implementation of PPP projects. Access to information is a fundamental right under Article 35 of the Kenyan Constitution. Transparency and disclosure in PPPs promotes good governance and boosts investor confidence. The PPP Act places an obligation on contracting authorities to publish information relating to PPP projects. It is recommended that disclosure guidelines should be developed under the PPP Act to demand a greater degree of disclosure; accessibility and timeliness of information; and that the information disclosed is clear, logical, well-founded, and user-friendly.

Fourth, public participation in decision making is one of the principles of governance and part of the national values under the Kenyan Constitution. The rationale is to ensure that the actions taken by public agencies adequately reflect the needs of the people and that there is equitable sharing of resources and benefits. This study recommends amendment of the PPP Act to inculcate both formal and informal mechanisms that allow for direct participation of members of the public at the PPP planning stage and continuously throughout project implementation to facilitate social monitoring. Further, PPP specific public participation guidelines should be developed to guide on the level and scope of public participation; the planning process; the methodology and tools; timelines for public participation activities among others.

Fifth, private investors are motivated to participate in a country where they are confident that disputes arising will be resolved fairly and efficiently as disputes mean delays and cost overruns for PPPs. The slow pace of the justice delivery system in Kenya is a major hurdle to the PPP programme. The PPP legal framework should be amended to include strict timelines for dispute resolution both at the tendering stage and during project implementation; and allow the contracting authorities freedom choose dispute resolution mechanisms that are best suited to the needs of the

project. Further, the legal framework should also include create space for sector regulators to intervene in PPP dispute resolution during project implementation.

Sixth, it is one thing to have a framework under which PPPs can be implemented, and it is another thing to make the programme work. The government has not displayed adequate political will in support of the PPP programme. The PPP Act should be amended to lay down the foundation for incentives and government assistance to the private investor which may be inform of form of tax breaks, guarantees, or financial support schemes in order to make the programme financially attractive.

Seventh, it is recommended that strict timelines should be put in place for each stage of the PPP cycle to speed up implementation of PPP projects. Further, standard bidding and contractual documents should be developed to save time and cost associated with preparing custom-made project agreements for each individual PPP transaction.

5.4.2 The PPP Institutional Framework

First, PPP programmes demand supportive institutional arrangements and such intergovernmental cooperation mechanisms should be put in place to ensure that all relevant stakeholders are involved from the onset. This can be achieved enhancing the composition of the PPP Committee to include representatives of all key stakeholders in the PPP implementation process.

Second, the government should develop long term programmes to build internal capacity to ensure that the responsibilities for promoting, implementing and managing PPP projects are competently assigned. A national PPP capacity building programme should be developed in accordance with international best practice and implemented at both the national and county levels.

Third, the governance structure of the current institutional arrangement should be reviewed to give the PPP Unit or the PPP Committee greater levels of autonomy in order to secure the lines of accountability and better enforce compliance with the legal framework.

5.5 Conclusion

PPPs have become an essential key to unlocking the development funding needed by many developing countries. Particularly, Kenya has adopted PPPs as a strategy for attainment of its development agenda under the Vision 2030. A comprehensive legal and institutional framework is one of the hallmarks of a successful PPP programme. It is imperative that the country devises to make the PPP programme conducive if we are obtain maximum benefit from these projects and ultimately realize the sustainable development goals under the Vision 2030. The PPP legal and institutional framework should be continuous improved as what is sufficient today may not be so in the near future.

5.6 Further area of Research

There is need to conduct further in-depth research in the area as PPPs can be an important tool to unlock the economic potential in Kenya. Specifically, the interplay between the political environment and the PPP legal environment should be examined as politics plays a vital role in the success of PPPs around the world. The ability of PPP to thrive in a given location is dependent on the project acceptability by beneficiaries, political stability and the political support that the project enjoys.

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