

**THE CHALLENGES FACING THE IMPLEMENTATION
OF THE PUBLIC PROCUREMENT LAW IN LIGHT OF
THE CONSTITUTION OF KENYA 2010.**

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requirements for the award of the Master of Laws Degree (LL.M)
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DECLARATION

I, **GATHU CHARLES KANJUKI**, declare that this is my original work and that the same has not been presented to any institution of higher learning for the award of a diploma, degree or post-graduate qualifications.

Signature.....Date.....

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This project has been presented for examination with my authority as the university supervisor.

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Signature.....Date.....

DEDICATION

I dedicate this study to the entire corpus of knowledge.

To my elder brother, Elijah Gathu, may this inspire you to chart your path, follow, and materialize your dream.

‘... [W]e cannot solve our problems with the same thinking we used when we created them.’ Albert Einstein.

ACKNOWLEDGEMENT

I acknowledge the Almighty God for His grace, providence and sustenance throughout this journey.

My Mom, Agnes Wairimu Kanjuki, nothing will ever come close to your love, sacrifice, and constant encouragement to see me through this phase. There is no way I can pay you back, but my plan is to show you that I understand. You are appreciated.

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Finally, my supervisor Dr. Nkatha Kabira whose guidance, support, dedication, perfection just to mention a few has been so instrumental in perfecting this thesis, I'm forever grateful.

LIST OF ABBREVIATIONS

AG	Attorney General
AGPO	Access to Government Procurement Opportunities
CDF	Constituency Development Fund
COK	Constitution of Kenya
CTB	Central Tender Committee Board
DPP	Director of Public Prosecutions
EACC	Ethics and Anti-Corruption Commission
EACC	Ethics and Anti-Corruption Commission
EU	European Union
GDP	Gross Domestic Product
HSS	Head of Supplies Services
IAG	Internal Auditor General
ICAC	Independent Commission against Corruption
ICT	Information and Communications Technology
IEBC	Independent Electoral Boundaries Commission
IMF	International Monetary Fund
IPR	Independent Procurement Review
ITC	International Trade Centre
KACC	Kenya Anti-Corruption Commission
LPO	Local Purchase Order
LSO	Local Service Order
MPI	Market Price Index
NSSF	National Social Security Fund
PFO	Public Finance Ordinance
PPAB	Public Procurement Appeals Board
PPAD	Public Procurement and Disposal Act
PPARB	Public Procurement Administrative Review Board
PPD	Public Procurement Directorate
PPDR	Public Procurement and Disposal (Preference and Reservations) Regulations

PPOA	Public Procurement Oversight Authority
PPRA	Public Procurement Regulatory Authority
PR	Procurement Review
PU	Procurement Unit
RFP	Request for Proposal
RFQ	Request for Quotations
RT	Restricted Tender
SPR	Stores and Procurement Regulations
TC	Tender Committee
UN	United Nations
WTO	World Trade Organization

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ABSTRACT

This study demonstrates that up and until the year 2001, Kenya did not have a solid public procurement legal order, and the procurement regime was characterized by a liberal atmosphere which tolerated the culture of impunity and corruption. When the clamor for procurement laws heightened, procurement laws came into being namely the Exchequer & Audit Regulations of 2001, PPAD Act of 2005, the 2006 & 2011 Regulations and the 2015 PPAD Act with the latter finally being anchored in the Constitution of Kenya 2010.

However despite these milestones, challenges facing the former procurement regime continue to persist. These challenges include uncertainty and unconstitutionality of certain provisions in the Act, incongruent provisions between the 2006 Regulations and the Act, weakness and lack of independently resourced institutions, lack of good political will, corruption and impunity.

The continuing presence of these challenges is what has resulted in loopholes that the relevant actors in the procurement process have sought to exploit leading to non-adherence to procurement laws, policies and procedures and ultimately, the proliferation of procurement scandals in the country.

This study as such critically examined the Public Procurement law in light of the Constitution of Kenya 2010. It demonstrated that although Kenya has enacted elaborate legislative, institutional and administrative frameworks on public procurement, procurement scandals continue to persist. This is because despite the fact that the Constitution of Kenya 2010 sought to reform the public finance and governance structures in the country, nevertheless the sector continues to face numerous challenges.

In justifying these claims, the study relied on both doctrinal and non-doctrinal research methodologies that examined the historical evolution of the procurement system in Kenya, conducted a critical analysis of the procurement law in light of the CoK 2010, conducted a case review of select judgments, conducted a comparative analysis between Kenya and Hong Kong and conducted informal interviews on select state procurement officials.

The overall objective of this study therefore was to examine the challenges facing the implementation of the public procurement law in Kenya in light of the Constitution of Kenya 2010 and to provide appropriate proposals for reform.

The study concluded that there is need to align the Act with the Constitution; fill the loopholes previously misused and in the end create true institutions of accountability and transparency. It also argues that Kenya can learn several lessons from Hong Kong's efficient, transparent and accountable public procurement system.

1.0 CHAPTER ONE

1.1 Introduction to the study

Public Procurement refers to the purchase of goods and services from an outside body. It is the acquisition by public bodies, such as government departments and municipalities, of the various goods and services that they need for their activities.

The three main players in this process include the government who is the purchaser, the bidder and the procuring entity/firm. The process of procurement commences with a decision to make the purchase propelled by the need for a certain class or particular kind of good or service. The process of procurement in Kenya involves ten stages.¹

Public procurement is an important aspect in that it accounts for 11% of Kenya's Gross Domestic Product.² This may however differ due to changing circumstances in the responsibilities and activities of the government.³

In terms of economic growth, public procurement plays a vital role in facilitating infrastructure development, and communications which have a direct impact on growth of an economy in a given nation depending on the success of the procurement process.⁴ It's also used in enhancing national industrial development by awarding of tenders to local firms than outsourcing where possible and this contributes towards developing local innovation and development.⁵

It impacts on the social arena by the provision of procurement chances to marginalized groups, ethnic societies manifested by according them preferential access to government opportunities for example the 30% initiative for Kenyan youth, women and persons with

¹ Identification of requirements, Procurement planning, Definition of requirements, Determination of source, Evaluation and selection of the vendor, Contract award, Contract implementation/delivery, Storage, Payment, and Disposal.

² Transparency International, 'Contract Monitoring Network of Kenya' (2013). <<http://www.tikenya.org/index.php/contract-monitoring-network-of-kenya>> Accessed 25 October 2016.

³ Ibid.

⁴ Jeong-Wook Choi, 'A STUDY OF THE ROLE OF PUBLIC PROCUREMENT – CAN PUBLIC PROCUREMENT MAKE SOCIETY BETTER?' (2015)

www.ippc.org/IPPC4/Proceedings/13ProcurementPreferences/Paper13-4.pdf> Accessed 7 February 2017

⁵ Ibid.

disabilities in a bid to address social oppression. This is provided for in the Access to Government Procurement Opportunities.⁶

Up and until the year 2001, Kenya did not have a solid legal order, and the procurement system was characterized by a culture of impunity and corruption. When the clamor for procurement laws heightened, procurement laws came into being namely the Exchequer & Audit Regulations of 2001, PPAD of 2005, the 2006 & 2011 Regulations and the 2015 PPAD Act which finally got its anchorage in the CoK 2010 Article 227.

When the 2010 CoK was promulgated, it brought with it changes that sought to reform the public finance and governance system in the country. Public procurement system was among the targeted areas for reform having been plagued by uncertainty and unconstitutionality of certain provisions in the Act, incongruent provisions between the 2006 Regulations and the Act, weakness and lack of independently resourced institutions, lack of good political will, corruption and impunity.

The promulgation of the 2015 Public Procurement and Asset Disposal Act was meant to address these challenges by conforming to the letter and spirit of the 2010 Constitution but it fell short of doing so.

This study as such attempts to discover why procurement scandals involving huge losses of money continue to persist despite the enactment of elaborate legislative and institutional framework governing public procurement in Kenya?

⁶Abigail Arunga, 'Tenders: This is what it really takes to clinch one in Kenya' (30 June 2016) <<http://www.nation.co.ke/lifestyle/myNetwork/Tenders-This-is-what-it-really-takes-to-clinch-one-in-Kenya/3141096-3274398-763lrrz/index.html>> Accessed 7 February 2017.

1.2 Historical development of Public Procurement law in Kenya

1.2.1 The Colonial Epoch

Kenya was colonized by Great Britain and the relationship between the Europeans and the Africans was one characterized by exploitation. The Europeans arrested Africa's natural economic development and imposed their own economic structures that were oppressive and exploitative.⁷ Actually, Adrian Leftwich termed the colonial relationship to Africans as extractive rather than developmental.⁸ Economic development was unimportant to them and they delegated these economic activities to commercial companies.⁹ They were more concerned with the needs of their own states in satisfying the growing need for raw materials due to the industrial revolution as opposed to the individual needs of the colonies. This they did by forcing Africans to produce commodities for exports to Europe.¹⁰

The following structures were put in place to ease the course of procurement:

Crown Agents dealt with purchases from abroad at the Government's behest which lasted up to the 1970s.

The Central Tender Committee (CTB) came into being in 1955 vide a Treasury Circular was and it was tasked with managing all tenders emanating from the government. In the year 1959, the Procurement and Supplies Unit was positioned under the Ministry of Public Works to manage common-user goods and services. In 1960 it was converted to Supplies Branch.

Procurement and Supplies were centralized as a result of the government organization being small. In 1960, Supplies Branch was further restructured.¹¹

⁷ Collins Leys, *Underdevelopment in Kenya: The Political Economy of Neocolonialism*, (University of California Press, Berkeley 1975) 65.

⁸ Adrian Leftwich, 'Theorizing the state' in *Politics in the Developing World*, Peter Burnell & Vicky Randall (eds) Oxford University Press, Oxford. cf. Prof Vincent Simiyu – *democracy in African history 2005*

⁹ Martin Meredith, *The State of Africa* (2011): *A History of the Continent Since Independence*, Simon & Schuster, London.

¹⁰ Joshua Dwayne Settles, 'The Impact of Colonialism on African Economic Development' (1996) <http://trace.tennessee.edu/utk_chanhonoproj> accessed 26 October 2016.

¹¹ Joseph M. K. Mokaya 'The Historical Evolution of Public Procurement in Kenya' (18 December 2014). <<http://procurement.uonbi.ac.ke/node/844>> Accessed 26 October 2016. The Chief Storekeeper (possibly a White man) made Chairman with the Chief Purchasing Officer becoming its Secretary. All Government

1.2.2 The Postcolonial Epoch between (1963-1978)

When Kenya attained independence from the British in 1963, the patron-client relationships and structures were handed down to the Kenyan elites and supplies services never underwent change up to 1970s. However, in 1974 there was a major alteration that saw the CTB shifted from the Ministry of Works and positioned under the Treasury.¹²

The Supplies Manual in 1978 was introduced which became the main text in issues regarding supplies. A critical imperfection of the document was that it failed to unify procurement in the government and failed to encompass corporations and parastatals.¹³

The office of the Head of Supplies Services (HSS) was established. Its chief responsibility of was to guarantee the performance of the manual.¹⁴

Problems arose in the number of circulars that individuals were required to refer to so as to make a procurement decision mainly the overlap of duties and uncertainty of status.¹⁵ This setting became puzzled with corruption and pilfering of public money. In particular, the Supplies manual never catered for public works and this created a liberal platform upon which the ministry and the president exploited.¹⁶

Departments were to obtain their common-user supplies from Supplies Branch. The Government Press under the office of the Governor and later the President was to provide the printing services

¹² The Chairman was the Deputy Secretary, Ministry of Finance and the Secretariat was managed by the Supplies Staff. The Secretary was the Chief Executive Officer.

¹³ Ibid n 11.

¹⁴ The first occupant of this office was Mr. Wan 'goo.

¹⁵ Many Treasury Circulars some superseding each other at high speed, circulars were also emanating from the Ministry of Public Works that was also to clear a department when getting common user supplies outside Supplies Branch, finally, other circulars were emanating from the office of the President.

¹⁶ Ibid n 13.

1.2.3 Epoch of World Bank Reform (1978-2001)

In 1997, the World Bank conducted a countrywide review and came up with a commentary on weaknesses facing the Public procurement sector.¹⁷

The Blue Book otherwise known as the Nyachae Book was the main document that regulated Procurement in the era of District focus for Rural Development Strategies.¹⁸

1.2.4 Epoch of Public Procurement Reform (2001-2010)

There were major reforms in this era. They included:

1.2.4.1 Enactment of the Exchequer and Audit (Public Procurement) Regulations, 2001

In the year 2001, Key reforms were introduced leading to the abolition of CTB and the subsequent establishment of the Public Procurement Directorate (PPD) and the Public Procurement Appeals Board (PPAB). The private sector was to produce Chairmen of the Tender Committees.¹⁹

1.2.4.2 Enactment of the Public Procurement and Disposal Act, 2005

This Act was approved and gazetted in 2005 by Uhuru Kenyatta the then Minister for Finance who operationalised the Act. The Act came into operation in 2007. As such Public Procurement and Asset Disposal came under one legal regime.²⁰

¹⁷ ‘...Which identified reduced effectiveness of Public Financial Management, the inability to deliver services effectively by the government, the absence of fair competition and transparency rendering the system to abuse based on ambiguous and incomprehensible rules, no clear and proper legal framework to enforce procurement rules.’

¹⁸ Ibid.

¹⁹ Corporations and parastatals were for the first time subjected to the Public Procurement Regulations just as was the Central Government. Each public procuring entity was to establish a procuring unit within it and all purchasing and disposal processes were to be managed by the same unit. Previously, procurement (Tender) and Purchasing were under the Personnel Division and Finance Department.

²⁰University of Nairobi Procurement Department n 52.

1.2.4.3 Public Private Partnership and enactment of Public Procurement and Disposal Regulations of 2006

The Government realized that there was a deficit in financial resources used to fund and undertake projects essential to the growth of the economy and public welfare. This resulted in the enactment of the 2006 Regulations.²¹

These regulations as amended from time to time however, still make reference to the PPAD 2005 Act despite it being repealed by the 2015 PPAD Act. They contain a lot of inconsistencies with the Act.

1.2.5 2010 – present day

The promulgation of the 2010 COK effectively brought with it changes and included a specific clause outlining principles for Public Procurement and Asset Disposal.²² Article 227 introduced principles upon which a procurement system should be premised on. These include, transparency, competitiveness, fairness, and cost effectiveness amongst others. It also makes reference to principles espoused under Chapter 6 on leadership and integrity to guide procurement officials.

1.2.5.1 The Public Procurement and Disposal (Preference and Reservations) Regulations 2011 (revised 2014)

They were enacted to give preference to disadvantaged groups who have to compete with established firms in the race for the award of government tenders and contracts and promote the growth of local firms.²³

1.2.5.2 Public Procurement and Disposal (County Governments) Regulations, 2013

²¹To facilitate the muster and rally financial resources in the private sector to be used in public projects under specific settings.

²² Article 227 which provides, "When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective' and provides for preference in the allocation of contracts."

²³These groups include Small enterprises, Micro-enterprises, Disadvantaged groups (youths, women, and persons with disability), Citizen and Local contractors, and Citizen Contractors in a joint venture with foreign firms.

It focused on procurement and disposal within the newly established County Governments. Its objectives and purpose was to regulate procurement at county government level and facilitate promotion of local industries.²⁴

1.2.5.3 The Public Procurement and Asset Disposal Act 2015

This Act came into force on 7th January 2016 repealing the previous Public Procurement and Disposal Act of 2005. The new Act is characterized by various controversial provisions as will be seen in the following chapters.²⁵

This study also identifies the failure of this Act to align itself to the letter and spirit of the CoK 2010 as will be discussed in the following chapters.

1.3 Statement of the problem

Although Kenya has enacted elaborate legislative, institutional and administrative frameworks on public procurement, nevertheless procurement scandals continue to persist.

The historical background has demonstrated that it is not until the year 2001 when Kenya started operating under a comprehensive and solid code of legal order. Prior to the year 2001, the procurement system was liberal and the same was characterized by a culture of impunity and corruption. When the clamor for enactment of procurement laws heightened, procurement laws came into being namely the Exchequer & Audit Regulations of 2001, PPAD Act of 2005, the 2006 & 2011 Regulations and the 2015 PPAD Act which finally got its anchorage in the Constitution of Kenya 2010 in Article 227.

Despite these commendable milestones, challenges plaguing the former procurement regime continue to persist in the new regime. These challenges include uncertainty and unconstitutionality of certain provisions in the Act, incongruent provisions between the 2006 Regulations and the Act, weakness and lack of independently resourced institutions, lack of good political will, corruption and impunity.

²⁴ Ibid.

²⁵ Daly & Inamdar, 'The Public Procurement and Asset Disposal Act, 2015' (February 2016) <<http://www.dalyinamdar.com/the-public-procurement-and-asset-disposal-act-2015/>> Accessed 7 February 2017.

The continuing presence of these challenges is what has resulted in loopholes that the relevant actors in the procurement process have sought to exploit leading to non-adherence to procurement laws, policies and procedures and ultimately, the proliferation of procurement scandals in the country e.g. National Irrigation Board scandal, KPLC scandal, NYS 1 & 2 scandals just to mention a few involving losses to the tune of billions of shillings.

This study therefore examines the procurement law vis a vis the 2010 Constitutional of Kenya in attempt to unearth the reasons for continuing procurement scandals in Kenya despite the enactment and presence of elaborate legislative and institutional framework.

1.4 Hypothesis

Despite the presence of an elaborate legal order in the field of public procurement coupled with the enactment of the 2010 Constitution of Kenya, nevertheless the sector continues to face numerous challenges which can be attributed to both ethical and legal shortcomings.

1.5 Objectives of the study

The overall objective of the study is to establish the challenges facing the implementation of the public procurement law in Kenya in light of the Constitution of Kenya 2010.

The specific objectives are as below:

1. To establish how corruption has affected implementation of the procurement law in the Kenya.
2. To find out how the lack of respect for the rule of law has affected implementation of the procurement law in the Kenya.
3. To find out how weakness and failure of institutions like the EACC, Judiciary, PPARB and PPRA has contributed to the failure of implementation of the procurement law in the Kenya.
4. To examine and investigate the weaknesses of the principal laws governing procurement in Kenya in light of the Constitution of Kenya 2010.

1.6 Research questions

This study seeks to answer the following questions:

1. How has corruption affected the implementation of the procurement law in Kenya?
2. Why is the respect for the rule of law important and what effects does it have on the implementation of procurement law in Kenya?
3. How has the weakness and failure of institutions governing procurement affected the implementation of the procurement law in Kenya in light of the CoK 2010?
4. What are the challenges existing between provisions of the C.O.K 2010 and the PPAD 2015 Act and its Regulations?

1.7 Justification of the study

Public procurement impacts directly on the growth and development of a country. It therefore renders every intricacy of its system vital. This study is thus important seeing as no one has done a review of the PPAD Act 2015 in light of the CoK 2010 using the legal realism approach. As such this study will seek to expose the challenges facing implementation of the public procurement law in Kenya and recommend proposals for reform.

1.8 Limitations

Given the sensitive nature of public procurement and investigative research, this study encountered some hostility and/or secretiveness in terms of cooperating to give information on pertinent issues underlying the reason for the existence of procurement scandals. This coupled with lack of enough materials by local scholars and enough time limited this study.

1.9 Chapter conclusion

This chapter has clearly demonstrated the presence of an elaborate legal order coupled with the support of the Constitution of Kenya 2010. However, procurement scandals involving huge losses of money like the NYS 1 & 2, IEBC BVR Kits scandal, National Irrigation Board Scandal just to mention a few, and other challenges alluded to continue to persist.

As such, this study sought to establish the reason for the continuance of these challenges and the reason for the failure of the implementation of the procurement law in Kenya.

1.10 Chapter breakdown

Chapter 1- Introduction to the study

This chapter introduces the study and provides an overview of it.

Chapter 2- Theoretical Framework & Literature Review

This chapter examines the philosophical and literature foundation of the problem under study.

Chapter 3- Research Methodology

This chapter establishes the method, tools and design used by the researcher to arrive at the findings of the study and justifies the same.

Chapter 4- Key Procurement Pillars and Principles

This chapter analyzes the public procurement process in Kenya challenges facing the implementation of the procurement law in light of the Constitution of Kenya 2010.

Chapter 5- Case Review

This chapter entails a detailed review of procurement judgments to unearth existing challenges in the procurement system in Kenya.

Chapter 6- Comparative Analysis

This chapter compares Kenya's procurement system to Hong Kong's.

Chapter 7- Findings, Conclusion and Recommendations

This chapter demonstrates the key findings, provides a synopsis of the study and provides recommendations on how to improve on the gaps identified by the study.

2.0 CHAPTER TWO

2.1 Theoretical Framework and Literature Review

This study relies on theories from two schools of thought being positivism and realism. They help this study understand in depth the nature of procurement laws, their validity and efficacy in the administration of the procurement process in Kenya.

2.1.1 Positivism

The term positivism derives from the word *positum*, which infers to law laid down or posited.²⁶ Positivist jurisprudence posits that the validity of any law should be traced to an objectively verifiable source. It rejects the idea of marrying external factors with the law. It argues for the sharp distinction between law on one hand and other external factors like morality on the other.²⁷

The forerunners of this theory are Jeremy Bentham, John Austin, HLA Hart, and Hans Kelsen amongst others. This study will focus on the works of Bentham and Kelsen.

Bentham in his prodigious writings seeks to demystify the law in every aspect and construct a comprehensive theory of law and, logic, politics and psychology.²⁸ He critiques the common law system for being indeterminate and unreasonable.²⁹ He opines that the solution to common law problems lies in codification of laws. As a result, judicial discretion and power would be diminished, and the judges' roles restricted to interpretation rather than making of law. It would also lessen the need for lawyers since the code would be comprehensible and absolute.

As such his conception of a valid law lies in the formulation of a single, complete law that expresses the will of the legislature and no one else. Taking the Kenyan legal system into perspective, Bentham's ideology is almost impracticable if not impossible to apply. The failure of the procurement system in Kenya is attributed to the uncertain nature of positive

²⁶ Raymond Wacks, *Philosophy of Law; A Very Short Introduction* (2nd edition, Oxford University Press, 2014)25.

²⁷ Freeman, M.D.A, *Lloyd's Introduction to Jurisprudence* (Stevens& Sons, London, 7ed, 2001).

²⁸ Raymond Wacks n 26.

²⁹ Jeremy Bentham, *Of Laws in General* (London: Athlone Press, 1970).

law governing it. It is characterized by inconsistencies between procurement laws and policies and the incongruence between the PPAD 2015 Act and its Regulations which by the way are not up to date. It is safe to say, that the legislature clearly needs the Judiciary to make law where none exists and adjudicate on situations where the law is unclear as will be seen in the case review chapter.

The critics of positivism being critical legal scholars and realists share almost similar ideologies being anti-formalist and having skeptical approaches to law. Both seek to demystify the law and expose its operation more as the law in action rather than the law in books. Critical legal studies (CLS) state that the law is intertwined with social biases and seek to show the possible preferential outcomes of supposedly impartial, formal and rigid legal doctrines. For instance, a plaintiff may object on the defendant's conduct which seeks to undermine a right to something and thereby resort to judicial involvement to prevent against harm. The defendant on the other hand would then combine a defence based on his or her right to freedom of action with an argument against judicial initiative in an area unaddressed by the legislature or beyond judicial capabilities. This rigidity of positive law is what CLS seeks to address.

The main crux of CLS's critique of formal law is divided into three. The first critique which is otherwise known as the principle of indeterminacy, denies that formal law has the ability to resolve every conceivable problem. The second critique lies in the anti-formalism doctrine, which denies the presence of a neutral and autonomous mode of legal reasoning. The final critique draws from the doctrine of contradiction, which denies the presence of a dominant point of view.³⁰

Basically, this study argues that the failure of the PPAD 2015 Act to envisage some situations adequately in its positive text, its failure to align itself to article 227 of the 2010 Constitution and the disharmony between its provisions and that of its 2006 Regulations as amended from time to time conceives implementation challenges. If judicial officers are to be subjected to interpretation of the law as is, then the procurement system would continue

³⁰ Unger R, 'The Critical Legal Studies Movement' (Harvard Law Review 96, 1983)561.

to fail. This study recommends that judges be allowed to employ reason and embrace the law in action and implement the law accordingly.

Hans Kelsen in his Pure Theory of Law conceives that law derives from norms which include judicial decisions and positive law.³¹ He argues for the disinfection of law from all other external considerations which he terms them as impurities. The upshot of this conception is that law is that which one can objectively know and identify. This is heavily criticized by critical legal scholars and realists as will be discussed later. The latter argues that neutrality of law is impossible, seeing as law cannot be separated from social factors.

Kelsen further argues that for these norms to be valid, they have to be authorized by higher norms. His ideal valid law is therefore a succession of interconnected norms in the form of a hierarchical system. Each norm derives from a higher one, with the validity of all norms resting and deriving from the basic norm which he calls 'grund norm'. The validity of the basic norm cannot derive from another norm; as such it has to be presupposed. Once a norm ceases to conform to the basic norm, it loses its validity.

In the context of this study, the CoK 2010 is the basic norm from which all other legislations derive their validity from. This study posits that the failure of the PPAD 2015 Act to align itself to the letter and spirit of the CoK 2010 automatically eschews its validity. The various sections offending Article 227 of the Constitution as will be identified in the subsequent chapters render their force invalid. Until that time when they to align themselves to letter and spirit of the Constitution will they achieve valid force.

2.1.2 Realism

The main proponents of this theory are Oliver Wendell Holmes, Karl Llewellyn and Jerome Frank. Of course there are others from both American and Scandinavian Realism schools; however, focus will be on these three proponents.

Realism developed mainly as a liberal school of thought rejecting principles of formalism espoused by positivism. Realism advocates for reliance on empirical evidence otherwise

³¹ Hans Kelsen, *General Theory of Law and State*, (Cambridge, Massachusetts, 1945); Hans Kelsen, *ReineRechtslehre* (2nd edition, Wien 1992 [1960]).

known as sensory experience and takes refuge in the belief that there is more to adjudication than the mechanical application of objective dictates as positivist jurisprudence argues. It views law as indeterminate and depicts it as uncertain, ambiguous and unstable.

Realists argue that formal law is neither neutral nor objective. By using the analogy of a doctor prescribing medicine to different patients and his mode of approach, it follows that the same way a physician has different solutions to different illnesses on individuals, so should the law take cognizance of changing times, societal needs and prevailing conditions and have different solutions to different problems.³²

Realism is more concerned with the law in action as opposed to legal conceptualism. It embraces liberalism. By doing this, it offers a less formalistic and loose account of the law. Realists reckon that too much concentration is had on paper rules with little or no regard to the 'facts of life'.³³ They challenge this view by contending that the law is more than what it is on paper. The law is what it does.³⁴ To determine what the law does, they look to the judiciary.

Justice Oliver Holmes defined law as predictions of what courts will decide.³⁵ According to him, the law was derived from judicial decisions enforced by the state.³⁶ Holmes opines that law should be applied as a practical social science that responds to the actual social needs of a highly industrialized society.³⁷ Laws thus needed to be practical and not merely formal or traditional.³⁸

³²George Christie and Patrick Martin, *Jurisprudence: Texts and Readings on the Philosophy of Law* (3rd edn, West Publishing Company 1995) 798.

³³Christopher Roederer and Darrel Moellendorf, *Jurisprudence* (1st edn, Juta and Company Ltd).

³⁴JW Harris, *Legal Philosophies* (2nd edn, Butterworths 1997).

³⁵Justice Oliver Wendell Holmes Junior, 'The Path of the Law' (Harvard Law Review Journal, 1897).

³⁶Mark De Wolfe Howe, *Oliver Wendell Holmes: The Common Law* (Boston: Little, Brown, 1963)- His view of law considered other factors that influenced a legal system rather than concentrating on 'pure law'. He critiques John Austin's command theory because of its lack of applicability in the complex federal structure of the United States government. In particular, he singled out the Supreme Court's rulings on political issues as being controlled by the Legislature. Holmes opines that good law comprises of not only logic, but also experience thus making it applicable.

³⁷Ibid.

³⁸Ibid.

Karl stressed on the functionalist approach of the law with the most important job of the law is acting as a technology as opposed to philosophy and helping in the disposition of trouble cases.³⁹ He also appreciates the importance of judge made law as opposed to formal positive law.

Jerome Frank's work is perhaps the most relevant from which this critique approach of positivism will draw from. He opined that the biases of judges and their interpretative ability had a direct effect on the outcome of a case. His main thrust of attack however was directed against the positivist reasoning that legal rules espoused certainty. He asked then, if certainty was achieved through legal rules, would any lawyer bother to litigate then? The upshot of Frank's idea is that despite the presence of an applicable rule, one of two possible conclusions is possible.

He emphasizes that the law needs to be certain for it to be legitimate. He uses the father-son analogy to illustrate the need for the law to be certain. He says that the same way a child relies on his father's wisdom and trusts in his intuition, is the same security we as the society seek in the law and institutions tasked with implementing the law.

In a nutshell, Realism orates the following:

That judges primarily respond to stimuli from facts before them as opposed to positive law. Llewellyn states that the '*...[a]ccepted rules do actually have some influence on the judges behaviour.*'⁴⁰ Frank and Hutcheson claim that judges' decisions are influenced by factors such as the judge's psychology or personality.⁴¹ Herman Oliphant (1884-1939) stated that facts as opposed to positive law stimulate judges.⁴²

³⁹ Karl Llewellyn, 'Some Realism about Realism' (Harvard Law Review, 44, 1931)1222.

⁴⁰Karl Llewellyn, 'A Realistic Jurisprudence- The Next Step' (30, Columbia Law Review 431).

⁴¹ *ibid*

⁴²Herman Oliphant, 'A Return to the Stare Decisis' (American Bar Association Journal 71, 1928, 17)- Oliphant argues that a return to meaningful doctrine of stare decisis could be achieved by attending to what the courts do and translating them into legal rules. This would entail coming up with legal rules based on decisions judges make.

Judicial intuition plays a major role. Joseph Hutcheson proposes that judges first makes a decision based on a hunch or rather an intuition about the facts of the case.⁴³ Realism emphasizes on the autonomous power of the judge to determine what law is. This therefore means that it is the judge's discretion to decide what law is, in his conscience. Article 160(5) of the Constitution and Section 6 of the Judicature Act breathe life to this contention.⁴⁴

Law is Judge made law. Judicial officers make law in the course of their interpretation of the law. As such, positive law is not law until a judicial pronouncement is made on it.⁴⁵ Holmes reinforces his argument by using the bad man analogy well known as the bad man theory. According to Holmes, the bad man is not interested in what the legal rules state but is more concerned with what the court will do in fact.⁴⁶ Holmes goes on to state that "the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."⁴⁷ The law is therefore a consequence of the mode of operation of the courts. The notion that judge made law is law depicted under the Constitution⁴⁸ which vests authority exclusively in judicial presiding officers, thus underscoring the realists' assertion that law is not formal rules but judicial behaviour which is determined by legal propositions.

Another boulevard where the realism ideologies are underscored is found in the provision which states that, in exercising judicial authority, the courts are to ensure justice is duly administered without undue regard to procedural technicalities⁴⁹. This poses the fact that a judge can make a subtle departure and override the existing legal provisions stipulating

⁴³Joseph Hutcheson, 'Judgment Intuitive-The Function of the Hunch in Judicial Decision,' (Cornell Law Review. Vol. 14, No. 3 (n.d.)- '...[A] judge really decides by feeling, and not by judgment; by "hunching" and not by ratiocination, and that the ratiocination appears only in the opinion....the motivating impulse for the decision is an intuitive sense of what is right or wrong for that cause.' A judge therefore first makes a decision on a case just by looking at the facts and then later comes up with legal reasons to back up the decision that he made.

⁴⁴They provide categorically that a judge's liability does not extend to things done out of good faith in the course of their duty. This elevates the role of a judge as an independent law maker.

⁴⁵Oliver Wendell Holmes Jr., 'The Path of the Law,'(Harvard Law Review, Vol. 10 (1897)457-478.

⁴⁶ *ibid.*

⁴⁷ *ibid.*

⁴⁸Article 159(1) Judicial Authority is derived from the people and vests in and shall be exercised by the courts and tribunals established under the Constitution.

⁴⁹ Article 159 (2) (d) of the Constitution of Kenya.

procedure with a legitimate aim of ensuring justice is achieved. The judge can overlook procedural stipulations in the PPAD 2015 Act and its Regulations to ensure that a just end is achieved.

The law is indeterminate. They reason that what law is cannot be determined from reading the law as it appears in statutes or precedents. Any precedent or statute can be interpreted either strictly or loosely and either interpretation will be legitimate. Judicial precedents are highly relevant in common wealth countries in determining the cases before the court since the judges are persuaded by cases of similar facts to rule in favour or in line with the similar fact case. In Kenya, for example, Section 3 of the Judicature Act⁵⁰ gives life to Benjamin Cardozo's emphasis on the importance of precedents as a source of law in the judicial process but warns of the strict adherence due to the dynamic nature of the society and what is considered right or wrong may change over time. When a superior court⁵¹ renders a decision upholding a just end at the expense of procedural technicality, then drawing from the precedent principle in common law, lower courts are bound by that decision hence it attains the force of law.⁵²

⁵⁰ ‘...The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with (a) the Constitution; (b) subject thereto, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date.’;

⁵¹ ‘..the Supreme Court, Court of Appeal and the High Court, The Environment and Land Court and the Industrial Court.’

⁵² The doctrine of precedent is buttressed in Section 3 of the Judicature Act Cap 8 which stipulates the hierarchy of laws on Kenya. Common law as a source strictly advocates precedent as one of its main pillars.

2.2 Literature review

After having examined the literature on public procurement, the study observes that on one hand some simply give the process and dynamics of public procurement and the postulates on which it should operate to ensure a coherent flow in its activities within the established legal limits.

For instance, Sue Arrow Smith L, John L, Don Wallace Jr, (2001)⁵³ lists the three main players in this process include the government who is the purchaser, the bidder and the procuring entity/firm and gives the process of procurement which they say commences with a decision to make the purchase propelled by the need for a certain class or particular kind of good or service. An important element underlying this transaction is the legal capacity to undertake such, and the need to follow the legal procedure in acquisition of these goods and services such as obtaining relevant approvals with the government department involved and then what follows is choosing from the interested players available, which company or firm will provide those goods and services and draw up a contract with that firm. And the last detail in the procurement process is supervision of the performance of the contract so drawn to ensure goods delivered are as promised, payment to be effected to the contractor and dealing with disputes.

Hunja (2003)⁵⁴ argues that a clear, transparent, efficient legal framework with enforcement mechanisms characterized by a consistent institutional arrangement in both policy formulation and implementation is what underpins a strong and well-functioning procurement system an argument shared by Thai (2001)⁵⁵ and Walter Odhiambo and Paul Kamau (2003)⁵⁶ who basically base public procurement on the postulates of ethics, disclosure, and transparency.

⁵³ Smith L, John L, Wallace Jr, *Regulating Public Procurement*, (Kluwer Law International, 2000).

⁵⁴ Hunja, R. (2003). Obstacles to public procurement reform in developing countries. In S. Arrowsmith, & M. Trybus, *Public Procurement: The Continuing Revolution* (pp. 13-22). Dordrecht: Kluwer Law International.

⁵⁵ Thai, K..V (2001). "Public procurement re-examined", *Journal of Public Procurement*, Vol. 1 No.1, pp.9-50. See De Boer, L., & Telgen, J. 'Purchasing Practice in Dutch Municipalities. *Journal of Supply Management*' (2006).

⁵⁶ Walter Odhiambo and Paul Kamau, 'PUBLIC PROCUREMENT: LESSONS FROM KENYA, TANZANIA, AND UGANDA' March (2003) DEV/DOC (2003)06.

Thai is of the opinion that good procurement practices should adhere to the natural rules of accountability, integrity, competition which is healthy, and equality in all aspects irrespective of race, nationality or political affiliation.

Odhiambo & Kamau argue that the whole public procurement process should adhere to ethical rules such as disclosure and transparency ensuring that there is awareness by the players in the procurement system of the whole process. However, in Kenya this is abstract. The regulatory framework is in place but still, agencies and public officers tasked with ensuring compliance of the law based on these ethical notions act to the contrary and end up disregarding the law in the course of furthering their own individual interests. The study attributes this to the culture of impunity and comfort that the law will not punish them as there always is a short cut route to get away with it.

Kenya's legal framework⁵⁷ is equipped with legal and regulatory mechanisms to ensure this takes place in practice. Sang & Mugambi, (2014)⁵⁸, look at the initiative by the PPOA now renamed PPRA in Kenya whose main aim is to streamline procurement activities by implementing procurement sensitization programs to create awareness among the trainees of challenges facing the system and proposals for reform.

International arrangements have a major bearing on public procurement in Kenya and they significantly impact on Kenya being a signatory to international agreements.⁵⁹ Kenya is a signatory to the WTO.

Kenya is more active regionally than it is internationally.⁶⁰

⁵⁷ The constitution of Kenya 2010, The County Government Act 2012, The Public Procurement and Disposal Act (PPAD), 2015, institutions such as Public Procurement Oversight Authority (PPOA) and Public Procurement Administrative Review Board (PPARB) tasked with overseeing the administration of this sector. Other enabling legislation like the Anti-Corruption and Economic Crimes Act, 2003; the Public Procurement Regulations of 2014; **The Public Finance Management Act, 2012**; and the Public Officer Ethics Act, 2003 (revised edition 2012) among others.

⁵⁸ Sang, W. K., & Mugambi, F, 'Factors Affecting Compliance with Public Procurement Laws and Regulations in Public Institutions in Kenya: A Case Study on Public Entities in Mombasa County. International Journal of Social Sciences and Entrepreneurship' (2014)1(11), 650-671.

⁵⁹ For instance, Public Procurement policy is expected to recognize multilateral trading arrangements under the World Trade Organization (WTO).

⁶⁰ It is a signatory to the regional trading arrangements under the Economic Partnership Agreement (EPA) between the East and Southern African (ESA) countries and the European Union (EU). In addition

Mostly, the regional framework on procurement is based on reform proposals and initiatives by member states.

One of the regional law that is applicable is the UNCITRAL Model Law⁶¹ Quite a number of African states have indirectly or directly relied on this model law in aligning their procurement systems. Kenya is one of them.⁶²

Alongside the UNICTRAL, the Public Procurement Reform Project of COMESA⁶³, is perhaps the most comprehensive of them all together with its successor, the Enhancing Procurement Reforms, and Capacity Project.⁶⁴

The COMESA came up with proposals for reform in procurement for its state members which included a regulatory model.⁶⁵ In 2009 the COMESA Council went further and adopted a standard public procurement regulation for all public procurement.⁶⁶ COMESA member states are expected to align their domestic procurement laws to these regulations for procurement within the thresholds.⁶⁷

Despite the presence of regional laws unethical practices persist in procurement.⁶⁸

On the absence of a regional procurement framework in the East African Community, Prof. Benon Basheka, states that there is no procurement law applicable to all East African

agreements under the Common Market for Eastern and Southern Africa (COMESA) and the East African Community (EAC) must come to bear.

⁶¹ United Nations Commission on International Trade Law on Procurement of Goods, Construction, and Services

⁶² Geo Quinot, 'Current Developments in African Procurement Law' (2014)

⁶³ Common Market for Eastern and Southern Africa.

⁶⁴ Sponsored by the African Development Bank and whose main objectives are to '...modernize public procurement rules and practices throughout COMESA as well as to attain their uniformity and harmonization in a manner that is aligned to practices which conform to internationally accepted standards.'

⁶⁵ Karangizi (2005) 14 *PPLR* NA53.

⁶⁶ COMESA Legal Notice No. 3 of 2009, COMESA Official Gazette Vol. 15 No. 3 of 9 June 2009.

⁶⁷ COMESA Legal Notice No. 3 of 2009, article 5.

⁶⁸Stevenson Mugisha,' COMESA expert calls for enforcement of procurement rules' (2011) <<http://www.newtimes.co.rw/section/article/2011-12-09/37579/>> Accessed 3 March 2017- For instance, Ziki, a Project Manager of Enhancing Procurement Reforms and Capacity Project (EPRCP) at COMESA during an extraordinary meeting of the Technical Committee of Procurement Experts (TCPE) held in Kigali in 2011 stated that, '...Many COMESA countries have procurement laws, regulations, and procedure, but sometimes these are not followed; and when they are not adhered to, then you have got the wrong suppliers winning tenders. He was of the view that lack of enforcement of public procurement laws and procedures was key to corruption within the public procurement sector in the region.

countries. The countries are yet to agree on a common framework.’⁶⁹This shows lack of a comprehensive legal framework regionally.

Migai Aketch (2004)⁷⁰, attributes public procurement as constituting a big part of the economy in most countries and has a potential of developing. He looks at developing countries who receive a lot of aid from developed countries and proposes that this aid should be channeled to public procurement and is to be used to finance public contracts instead of misuse by public officials either as bilateral or multilateral development assistance. A report by the ITC (International Trade Centre) which is a joint agency to the WTO (World Trade Organization) and the United Nations shows that if international purchasing and supplies management was improved, it can lead to greater competitiveness and export readiness. If a nation is more focused on the management of public procurement then it can be more effective in taking advantage of its purchasing power in order to help development efforts.

Ngugi & Mugo (2007)⁷¹, indicate that given the impact of procurement contracts and other activities on the operation and effectiveness of public sectors in Kenya, it is essential that these activities be performed by qualified staff with high professional and ethical standards and using sound procedures anchored in appropriate policies and regulations.

Gatere (2014)⁷² and McWilliams & Siegel (2001)⁷³ on the illustration of affirmative action, programs identify the need for successfully integrating youths ensuring into the economy through public procurement as the result will be the reduction of poverty, raising of

⁶⁹Lameck ‘The role of procurement in the EAC integration’ (2015) <<https://www.PPAD.go.ug/the-role-of-procurement-in-the-eac-integration/>> Accessed 3 March 2017.

⁷⁰Migai Aketch, ‘Development Partners and Governance of Public Procurement in Kenya: Enhancing Democracy in the Administration of Aid’ (New York University Journal of International Law & Politics, 2004).

⁷¹John Karanja Ngugi and Hildah W. Mugo, ‘Internal Factors Affecting Procurement Process Of Supplies In The Public Sector; A Survey Of Kenya Government Ministries’ (2007).

⁷²Gatere, B. C. & Shale, N. I. ‘Challenges affecting the implementation of access to government procurement opportunities for special interest groups in Kenya: A case of Nairobi County. *International Journal of Social Sciences and Entrepreneurship*, 1 (12)’ (2014).

⁷³ Donald S. Siegel, Abigail McWilliams, ‘Corporate Social Responsibility: A Theory of the Firm Perspective,’ (January 2001)- who says that the youth constitute the generation that has lived through the greatest social, political, intellectual, scientific and technological transformation in modern history. As such incentives should be granted to them to enable them to develop. If given an opportunity the youths would contribute majorly to economic development.

household incomes, create a circle of investment and growth and ultimately improve Kenya's competitiveness. McWilliams & Siegel, advocate for incentives to be granted to them to enable them to develop. If given an opportunity the youths would contribute majorly to economic development.

On the other hand, other writers critique the procurement regime and attribute its failures to a diverse array of shortcomings. Peter Trept (2006)⁷⁴ attributes the failure of the procurement system to the gap between the law in action and that in books. De Boer and Telgen (2006)⁷⁵ who in their analysis of the Dutch municipalities attach the disregard and strict non-adherence of laws to the lack of integrity professionalism among procurement officials.

World Bank report, *Benchmarking Public Procurement 2016* in Allens (2016)⁷⁶, showed that, '[m]odern and sound public procurement regulations were not always matched by satisfactory implementation and that regulatory requirements for procurement in different economies did not translate to better performance by those economies. PPOA (2007)⁷⁷ now renamed PPRA also echoed this in its discovery of ignorance among procurement staff in many procuring entities on the legal framework, principles, procedures, and processes of procurement existed and this created a mechanism through which procurement professionals took advantage of loopholes that existed in the then procurement laws in Kenya. It has commensurate mandate alongside that of the Public Procurement Complaints Review and Appeals Board (PPRB) now renamed the PPRAB.⁷⁸

⁷⁴ Peter Trept, *Regulating Procurement: Understanding the Ends And Means of Public Procurement Regulation*, (Oxford University Press Inc., New York 2006)-He says that the concepts contained in the procurement regulations don't really reflect the true nature and objectives of those regulations, concepts such as efficiency, equal treatment, non-discrimination, transparency, value for money. State of affairs personifies the exact opposite.

⁷⁵ De Boer, L., & Telgen, J. 'Purchasing Practice in Dutch Municipalities. *Journal of Supply Management*' (2006) 34(2), 31-36.

⁷⁶ Allens, 'Focus: World Bank compares public procurement globally' (2016), <https://www.allens.com.au/pubs/const/foconst12jan16.htm> Accessed 7 February 2017.

⁷⁷ Public Procurement Oversight Authority, (2007).

⁷⁸ '...To provide oversight on public procurement in Kenya, to report on and facilitate the implementation of the PPAD and to build capacity and advice procuring entities on public procurement.'

Raymond (2008)⁷⁹ identifies that lack of adequate training and education of procurement officers leads to lack of proper qualifications and this has led to negative consequences like breaches of codes of conduct. He goes further to link the level of professionalism with corruption, which has been shown to hamper the observance of public procurement regulations.

Dennis Mbae and Micheal Onsondo (2016)⁸⁰, shares the views of Ambasa (2014)⁸¹, who says that despite the enactment of PPAD 2015 and the 2014 Regulations, efficiency is still not realized due to challenges like corruption facing the authorities hindering them from carrying out implementation policies. They argue that proper implementation of procurement laws and policies could save at least 25 percent of public expenditure.

Njuguna Humphrey Kimani, Justice Prof. James Otieno Odek, Dr. Attiya Waris⁸², trace inherent weaknesses in the various institutions, inadequate justice system, lacunas in the law facilitating tender rigging, numerous procedural requirements which were and still are unnecessary, unreasonably strict timelines, the expensive nature of procurement deterring the financially unstable, too many technicalities and expensive nature of the appeal process and the 30% affirmative action for women, youth and persons with disability was found to be discriminatory by many respondents. The study also identified institutional weaknesses in the public procurement sector in Kenya and the failure by High Court, and the Public Procurement Administrative Review Board (PPARB) to deliver as anticipated.

Notably, inefficiency of the procurement regime is not attributable to legal principles alone, ethical considerations play a role.⁸³ The study orates that there are other legal concerns that

⁷⁹ Raymond, J. 'Benchmarking in Public Procurement. Benchmarking: An International Journal' (2008). 15(6), 782-793.

⁸⁰ Dennis Mbae, Michael Onsondo, 'The Officially Sanctioned Procurement Fraud in Kenya' (27 April 2016) <<http://africauncensored.net/the-officially-sanctioned-procurement-fraud-in-kenya/#.WBCTDEZnrIU>> Accessed 7 February 2017.

⁸¹ Ambasa, E, 'Weaknesses in the public procurement regime in Kenya and what needs to be improved' (2014).

⁸² Njuguna Humphrey Kimani, Justice Prof. James Otieno Odek, Dr. Attiya Waris, 'The Influence of Political Patronage on the Legal and Institutional Framework in Public Procurement Sector' Vol-2, Issue-9, (2016). <<http://www.onlinejournal.in>> Accessed 7 February 2017.

⁸³ Kimani Njuguna Humphrey, Justice Prof. James Otieno and Dr. Attiya Waris, 'The Influence of Political Patronage on The Legal and Institutional Framework in Public Procurement Sector' (2016) <<http://www.onlinejournal.in>> Accessed 29 December 2016- '...ethical considerations to wit lack of respect

make the implementation of the new regulatory framework to better the procurement process a difficult task to actualize.

Most of the positive texts on procurement law this study has engaged illustrate challenges existing within the etho-legal lines. What most writers have not engaged in is the challenges existing within the legal framework itself.

In that light, this study sought to delve into the legal framework and unearth the discordance between various provisions of the PPAD Act and constitutional provisions. Its analysis of the 2015 PPAD Act in comparison with the 2005 PPAD Act and the 2006 Regulations as amended from time to time reveal inconsistencies between them and within the former. It also reveals inconsistencies between it and the Constitution of Kenya 2010. These inconsistencies contribute to lacunas which parties seek to exploit due to the uncertainty.

For instance, unconstitutionality of various sections in the PPAD 2015 is witnessed, to wit sections 167(2), 175(2) that require deposit of a certain percentage of money so as to access justice flouts the letter and spirit of constitutional rights in Articles 27, 47, 48, 50(1) and 227(1) on non-discrimination, fair administrative action, access to justice, fair trial and requirement of a fair and transparent procurement system respectively and is an impediment to justice access.

One finds that filing fees on procurement matters are way higher than in other contentious matters in tribunals and courts including superior courts.

Section 169 of the PPAD2015 is unconstitutional primarily because it seeks to confer a quasi-judicial function on the secretariat whereas that jurisdiction is traditionally reserved for courts of law to reject a case before it or the tribunal for that matter.

Also since the provisions of the above section are couched in mandatory terms, it heightens the impediment of justice.

for the rule of law, a widespread culture of corruption and impunity in the management of public affairs and lack of political goodwill needed to drive the reform agenda'

The loopholes in the Act are exploited by corrupt public procurement officials to the detriment of the procurement process itself and the litigants.

Further, the 2006 regulations that were applicable then during the 2005 PPAD tenure are still applicable to date. The study opines that they need to be revamped, and updated to suit whatever new provisions may have been legislated into the new PPAD 2015 and also to suit the current public procurement atmosphere in the country (Kenya).

It is not in doubt that the agency problem one scholar Peter Trepte refers to in his book alluded to earlier is a major hindrance to an effective procurement process. Agents of the government being procurement officials are known to misappropriate funds entrusted to them in the acquisition of goods and services. The current scandals like the NYS speak to the study's contention.

The presence of strict timelines that are set forth in the Act in respect to the tender process locks out many eligible tenderers. Sections 175(3, 4 &5) which limit the Court to 45 days in determining Judicial Review proceedings, and making the tribunal's decision final if any litigant does not appeal within the set time frame have been time and again been declared unconstitutional even in the previous tenure of the 2005 PPAD most notably in the *Selex Sistemi Integreti 2007* case. Ouster clauses as they are called are unconstitutional for the primary reason that they interfere with judicial independence.

These sections encourage scrupulous litigants to adopt delaying tactics to ensure the 45 days lapse so they can argue to their favor using those specific provisions. Also, it means that an absurd decision by the Tribunal would effectively become law after 45 days lapse (sic).

Section 175(7) is also unconstitutional as it seeks to limit the Court's power in awarding costs. Does it mean since the High Court has no power to award costs, similarly it lacks jurisdiction to hear a Judicial Review matter or rather an appeal on issue of payment of costs?, does it mean that an inferior tribunal has superior powers the superior Court lacks?, does it mean that the Court of Appeal can award costs since the Act speaks to limiting the High Court in that respect?. All this uncertainty is what advances the study's contention

that indeed the implementation of the 2015 PPAD is and will not be a smooth sailing process.

The 2006 regulations refer to the 2005 Act entirely. Perhaps they should be amended to refer to 2015 one.

On preferences and reservations, provisions in the regulations and those in the 2015 Act also differ as will be seen in the concluding chapter.

Though Sections 9 and 64 of the PPAD 2015 Act provide for embracing of ICT Act it remains a challenge.

The PPAD 2015 Act as will be seen in the ensuing chapters contains too many procedural technicalities.

At the beginning of this study, the writer had set out to explain the Kibaki initiative that was actualized by President Uhuru Kenyatta on the 30% affirmative action plan for the disadvantaged in the Kenyan society that includes the women, youths and physically disabled. Despite it being proclaimed, this has not been realized. Many youths are jobless with the tenders going to international companies and select entities based on bias.

In light of the foregoing, this study seeks to engage the tension existing between the CoK 2010 and the PPAD 2015 Act and recommend proposals for reform to ensure the PPAD 2015 Act conforms to the letter and spirit of the CoK 2010.

Conclusion

An analysis of the literature review and philosophy clearly demonstrates that despite Kenya having enacted elaborate procurement laws, policies and institutions, nevertheless, the procurement system in the country continues to face implementation challenges because of the uncertainty and unconstitutionality of certain provisions in the PPAD 2015 Act, incongruent provisions between the 2006 Regulations and the Act, weakness and lack of independently resourced institutions, lack of good political will, corruption and impunity.

The two theories and the literature review help this study come to the conclusion that there is a strong interplay between legal and ethical issues and these two have resulted to failure of the procurement laws to deliver as anticipated.

3.0 CHAPTER THREE

3.1 Research Methodology

Introduction

This study largely relied on doctrinal research which is also referred to as armchair research.⁸⁴ Doctrinal research being a theoretical study where mostly secondary sources of data are used to seek to answer one or two legal propositions or questions or doctrines, has a very narrow scope and there is no such need of field work.⁸⁵ It involves first locating the sources of the law and then interpreting and analyzing the text. As such the researcher sought to analyze the existing statutory provisions on procurement along with the present case laws by applying his reasoning power and rational deduction to find out the shortcomings/gaps, problem and ultimately draw out the final conclusion.⁸⁶

This study in resorting to this methodology as such engaged materials in libraries, archives and other data bases.

The reason why this study preferred this method is because of the time factor and considering the magnitude of the problem under study, it would definitely need a lot of time to adequately research on it.

Also, being a purposive investigative research, and taking into account the nature of the research being highly sensitive, the researcher found it prudent to resort to desk top research. Information about procurement scandals is very intimate and privileged with many people withholding this information for fear of victimization and reprimand.

This notwithstanding the study also relied on non-doctrinal research methodology in which it conducted investigative research by way of informal interviews by targeting high ranking officers (whose identity will remain anonymous) in institutions tasked with implementing procurement laws, policies and procedures to wit PPRA, PPARB, Judiciary and the EACC.

⁸⁴Dr. Paranjape Vinay N. *Legal research – current trends*. (Legal Education Research Methodology) 77, Para 4.

⁸⁵Mrs. Debashree Chakraborty, 'Empirical (non-Doctrinal) Research Method and its role in Legal Research' (International Journal of Advances in Social Sciences, vol 3, 2015).

⁸⁶Dr. Mona Purohit. *Legal Education and Research Methodology*. 179. Para 4

The researcher also interviewed renowned scholars who are authorities in the field of public procurement.

This the researcher did by way of guided interview schedules and oral interviews which were very informative and helped the study draw out some key findings.

3.2 Research Design

This study began by reviewing the secondary sources of data and by doing so examined the historical evolution of the procurement system in Kenya to expose the systemic evolution of public procurement law in Kenya and unearth challenges facing the procurement regime to date.

It also conducted a critical analysis of the procurement law in light of the Constitution of Kenya 2010 to establish the extent to which the procurement law has been implemented in light of its anchorage in the Article 227 of the Constitution.

Further, it conducted a case review of select judgments in order to examine judicial perspectives on implementation of the procurement law in Kenya in light of the Constitution of Kenya 2010.

This study conducted a comparative analysis between Kenya and Hong Kong to establish the parameters in which Hong Kong operates to ensure the success of its procurement system and to benchmark Kenya's procurement system to Hong Kong's.

The researcher also went ahead and conducted oral interviews using guided interview schedules on public procurement officials in various institutions being the PPRA, PPARB, Judiciary and the EACC whose identity this study prefers to remain anonymous as information was given in confidence.

Finally it came up with proposals for reform to cure the shortcomings identified and bolster the procurement regime in Kenya.

3.3 Tools of research

Using the research designs above, this study reviewed materials to wit judgments, statutes, legal articles and journals, text books, magazines and law reform policy papers to arrive at the key findings.

It also resorted to oral interviews by way of guided interview schedules to fish out the realities of life and identify the key findings.

3.4 Location

While tendering occurs in both national and county governments in Kenya, this study purposely and specifically chose Nairobi county as the preferred location of the study to be a fair representation of the entire country reason being most of the materials the study reviewed were available in Nairobi, institutions tasked with implementing procurement laws and policies have their head offices in Nairobi and virtually all of the officials and scholars the researcher interviewed reside and work in Nairobi. Carrying out research on all counties in Kenya would have been an unsurmountable task hence the narrowed choice on Nairobi.

3.5 Population

This study purposely identified the four institutions PPRA, PPARB, Judiciary and the EACC and renowned scholars in public procurement as the targeted population sample from which the researcher would gather his data from and draw out the key findings thereof.

3.6 Conclusion

The research methodology this study largely relied on satisfied the three key elements of a pure doctrinal research being reading, analyzing and linking. As such this study sought to analyze the public procurement law in light of the constitution and link the challenges identified to the implementation of the procurement law in light of the Constitution of Kenya 2010.

This study in resorting to non-doctrinal research methods also conducted informal interviews and gathered crucial information that helped this study draw out the key findings, conclusions and recommendations that are reflected in this study.

4.0 CHAPTER FOUR

4.1 Key Procurement Pillars and Principles Governing Public Procurement in Kenya Introduction

This chapter examines the procurement process and the gist of its operations in Kenya in light of statutory and constitutional principles guiding it and the challenges facing their implementation.

The CoK 2010 brought with it highlights to the procurement system in Kenya with the requirement of procurement laws and policies to conform to the Constitution. As such in its quest to identify the challenges facing implementation of the PPAD 2015 Act, this chapter will do an analysis of the constitutional and statutory principles governing procurement and examine the challenges facing the realization of these principles.

The guiding principles are set forth in section 3 of the PPAD 2015. The and constitutional principles under articles 10, 27, 55, 56, 227 and 232 on national values and principles of governance, equality, freedom and non-discrimination, affirmative action programmes, values and principles of public service amongst others.

4.1.0 Accountability and Transparency

These two principles in public procurement are explained in the context of 'corruption'.⁸⁷

The 2015 PPAD Act in section 66 prohibits the involvement of anyone in corrupt practices and conflicts of interests.

Taking into account the enshrinement of these principles in the constitution and other acts that cut across the public procurement sector in Kenya, they are not put into practice by public entities in the course of carrying out duties. Corruption continues to exhibit itself in

⁸⁷ Asian Development Bank, 'Anticorruption Policy: Harmonized Definitions of Corrupt and Fraudulent Practices', Manila, Philippines, ADB, (2006).

the way tenders are awarded which is characterized by under table dealings leaving out other qualified bidders.⁸⁸

4.1.1 Efficiency

This entails a cost-effective and time conscious manner of handling the public procurement process.

Section 48 of the PPAD mandates the inspection committee to ensure timely delivery and completion of works, services and goods.

Similarly, in section 70 under part 7 on basic procurement rules, it makes it mandatory for tender documents to set out timelines for delivery and completion.

Section 74 of the same Act mandates the accounting officer to ensure that goods and services are described and that the invitation to tender during its preparation sets out timelines for delivery and completion.

Section 80 on the evaluation of tenders' timelines should be considered.

Other timeframes are set forth in the act to establish clear timelines within which the procedure commences with the advertisement of tenders up and until the time they are accepted and awarded.

The PPAD in section 41 in an attempt to ensure efficiency provides grounds for debarment of deviants.

All these go towards ensuring the effectiveness of the process.

⁸⁸Kimani Njuguna Humphrey, Justice Prof. James Otieno and Dr. Attiya Waris, n 82-Dr. Attiya attributes corruption to '...political patronage on the legal and institutional framework on procurement and argues that it is the compromise of both institutions and individuals tasked with the responsibility of ensuring the implementation of law that mauls the mode of delivery and effective working of the procurement sector.'

4.1.2 Value for Money

The Merriam Webster Dictionary defines it as a fair return or equivalent in goods, services or money for something exchanged.⁸⁹ As such Value for money requires consideration of various criteria not just the lowest evaluated price.

Public entities should avoid unnecessary costs and delays and ensure the constant improvement in the efficiency of intrasystem and process.

Other ways of effecting the same is by competitive tendering. This process underpins contemporary procurement markets.

4.1.3 Consistency

This principle simply connotes the standardization of the procurement process across all procurement entities with regards to the rules of procedures and policies so that suppliers expect standardized policies on procurement. For example, section 91 of the PPAD prefers the open tendering method. If all the procuring entities were to use the open tendering method then it would be easier to benchmark the procurement law.

4.1.4 Open and Effective Competition

This study earlier on alluded to the fundamentality of healthy competition in the procurement process due to the nature of favorable results it produces. This it does by promoting equality of opportunities at minimal costs.

Vices such as favoritism and profiteering should be done away with by enhancement of public participation and equal opportunities to every potential and qualified, eligible contractor/supplier.

For purposes of accountability and transparency, this information should be published in the authority's websites to reach out to the public and give effect to the contemporary way of doing things given the dynamics of globalization that has brought about the electronic

⁸⁹ Merriam- Webster Dictionary <<https://www.merriam-webster.com/dictionary>> Assessed 29 December 2016.

means which are more effective. They should embrace technology. This website is to be maintained by the PPRA.

The whole purpose of this principle is to ensure that healthy competition is promoted.

4.1.5 Professional Ethics

The hallmark of professionalism is respect and adherence to ethical standards befitting a profession. This is characterized by transparency and high levels of integrity of individuals heading the procurement entities.

It therefore demands that the whole process should not be handled by one person, rather there should be a separation of roles to avoid concentration of power on one individual as this more often than not results to autocratic regimes that have little regard to ethical and straight practices.

The Public Officers and Ethics Act (2003) read together with Article 76 of the constitution makes it an offense to indulge in corrupt practices like corruption and accepting gifts and donations in the public officials in their official capacities as incentives or rewards for favoring or disfavoring individuals or entities with regards to the award of tenders. Such incentives and gifts are deemed to have been given to the state.

The position in Kenya is the contrary with high profile cases such as the NYS 1 & 2 scandals and the rest going against ethical standards with public officials accepting bribes and awarding tenders to faceless individuals and companies based on favoritism and incentives.

Is it the law in place or is it its application? This study's opinion is that there's a comprehensive legal framework in place spelling out the expected standards of ethics for public officials and sanction in case of deviance from those standards.

The study concludes that what causes this is a combination of both ethical and legal factors such as corruption, impunity, political patronage and shortcomings within the law. What should be done is the establishment of an independent institution that is grounded on

principles of impartiality and impenetrable integrity and one which is completely free of patriarchal influence to oversee the procurement process.

4.1.6 Policy Integration and harmonization of PPAD with other Acts.

Authorities on public procurement should recognize the interplay between the different policies and strive to stay in line and put them to consideration to the extent they impact on the procurement process.

The inconsistencies between constitutional and statutory provisions on procurement are also a major setback as will be identified in the next chapter. Section 5 of the PPAD 2015 Act states that its provisions supersede all other laws in conflict with it in procurement matters.

The Kenyan Vision 2030⁹⁰ coupled with the parallel First Medium Term Plan (2008-2012)⁹¹ are the two policies that heavily rely on an equitable, reliable, efficient, effective, and transparent procurement process.

This then mandates the procuring entities to be fair and accord domestic suppliers who are qualified and offer value for money.⁹²

If goods locally supplied according to the policies and relevant qualification are actualized in the public procurement policies based on the required standards of healthy competition and the foundation of policy integration then a strong procurement process would thrive.

Policy integration should be carried out together with the harmonization of the PPAD with other relevant and cross-cutting laws on public procurement. Harmonization should be done for easier interpretation by the relevant stakeholders.

⁹⁰ Government of Kenya, Kenya Vision 2030: A Globally Competitive and Prosperous Kenya, 2008.

⁹¹ Government of Kenya, First Medium Term Plan, 2008-2012, Kenya Vision 2030: A Globally Competitive and Prosperous Kenya, 2008.

⁹² Ministry of Economic Development, Government of New Zealand, 2002, Government Procurement in New Zealand, Policy Guide for Purchasers.

4.1.7 Effective Dispute Resolution channels

There must be a clear channel through which disputes are presented and adjudicated upon. The process must be transparent enough and professional in its conduct. There should be a timely and expeditious mode of disposing of the cases in line with the oxygen principles elucidated in section 1A of the Civil Procedure Act cap 21.

Cases are won in court but the execution never happens partly due to corruption and disregard of the laws in place.

4.1.8 Electronic Procurement (e-procurement)

This is a technologized way of handling the procurement process and it is most preferred because it's authentic, confidential, accessible, user-friendly, more precise and secure as manipulation of data is minimized. Online technology also involves a high level of transparency and serves as an effective tool to reach out to virtually every Kenyan who can access the internet.⁹³

In the Kenyan context in light of the above theory on disclosure and transparency in the public procurement process, the PPOA established an online portal aimed at publication of a diverse array of procurement information.

Despite this initiative, the portal is virtually obsolete. With regards to complaints review which by the way happens within established legal time frames, access to decisions is limited in that they are present within the PPRA/ARB premises, but not currently published in any official gazette nor on the PPRA or government.

⁹³E-Tendering systems in Kenya <<http://www.focweb.co.ke/focweb-portfolios/e-tendering-system-in-kenya/>> Accessed 29 December 2016.

4.1.9 Green Procurement and Outsourcing

Outsourcing simply means the procuring of external agents in the procurement process where necessary and where technical expertise lacks from the existing system in line with clear processes of recruitment.

Green procurement involves buying goods and services which are environmentally friendly and take into account the sustainable development of the land and its inhabitants. Prevention of pollution and dumping of waste should be the hallmark of procuring entities contracting suppliers and their products or services.

Products made up of recycled materials and biodegradable materials that are non-depleting substances should be preferred.⁹⁴

In Kenya, the outsourcing process is mauled by corruption and often shrouded in secrecy while the green procurement methods are hardly followed. Locals have been known to lodge complaints to the local governments on the harmful nature of the waste products dumped in their fields by Chinese contractors when building infrastructure.

4.1.10 Professionalism

This is important in the procurement process as it determines the result of the decisions made.

There should be regular training and education for procurement professionals through workshops and forums to further professionalism.

⁹⁴Green Procurement

<http://www.epd.gov.hk/epd/english/how_help/green_procure/green_procure.html> Accessed 30 December 2016.

4.2 The linkage between constitutional principles and procurement laws

This study after identifying the key procurement pillars above demonstrates the linkage between these constitutional principles and the laws in the PPAD 2015 Act and its Regulations in an attempt to illustrate the challenges existing and expose them so as to recommend ways to address them.

4.2.0 Maximizing economy and efficiency in procurement

This principle demands that the end result of a rational man's calculation should result to transactions that maximize economy and efficiency in procurement rather than the opposite and transactions that result to the well-being of the public as opposed to select few individuals.

This is one of the policy objectives set out in the Act and a postulate upon which a successful procurement system is believed to be active in pursuit of. The quest to do so, however, has presented some challenges.

It is illustrated by the lack of a regional presence for the PPARB to cater for the rising proliferation of procurement scandals all over the country.

Also, with the requirement to embrace ICT services in procurement, the failure to avail procurement tender documents in the PPOA website for free and easy download and inducing a fee to access them goes against the spirit of efficiency.

Finally, replication of the intent of the former act in the current one in regards to considerations for a tender to be considered successful (lowest evaluated tender) is contrary to maximizing economy and efficiency.

As regards operations of the PPARB, PPAD 2005 Act⁹⁵ provides for the Administrative Review Board and refers to the regulations for composition and duties. The 2006 Regulations 67-72 state the appointment, composition, tenure, duties, quorum, and termination. Section 30 of the 2015 PPAD Act adds qualification of Board members. The

⁹⁵ Section 25.

addition of grounds for qualification to be a Board member reflects the quest for integrity in the composition of members.

Section 32(2) of the new Act allows Board members to serve on a part-time basis. This study is of the opinion that with the sensitive nature of procurement contracts seeing as 70% of corruption cases in Kenya happens in procurement, and given the proliferation of procurement scandals, shouldn't the Board be functional like the Courts on a daily basis rather than part-time basis to ease efficiency in rendering of decisions and the administration of justice?

The study opines that there should be established a regional presence in form of satellite courts to cater for each county just like courts to ease access to justice for parties procuring in whatever region in Kenya?

Another challenge presented is that with the advent and dynamic nature of ICT services, it is imperative to note that efficiency results from the use of ICT. In that regard, Section 9 of the PPAD 2005 Act on the functions of the PPOA neither provided for the maintaining of a state portal, creation of a central repository system or database nor embracing of ICT. The 2009 Draft Zero Policy recommended introduction by legislation of value based computer activity.

Following that argument, Section 45(4) of the 2005 PPAD Act provided for charging a fee to avail procurement records. Sections 68(4) & 70(4) of the PPAD 2015 Act which are similar to section 45(4) of the former Act provide for charging of fees to make available records as well as for obtaining tender documents.

The 2015 Act somewhat heeded to the Policy's recommendation and included ICT provisions in the Act. With the requirement to create and maintain the state procurement portal in Section 9 of the 2015 Act and the embracing of information and communication technology (ICT) under Section 64(2) of the Act, this study orates that it would be prudent to make the records available online for the tenderers to access them easily to ease efficiency in the system.

This study posits that the old provision in Section 66(4) of the 2005 PPAD Act which provided that the tenderer with the lowest evaluated tender is considered the successful tenderer did not enhance economic efficiency. Regulations 47, 48, 49 & 50 read together with section 64 & 66(4) of the 2005 PPAD Act provide for the same.

On the other hand, Section 86(1) of the 2015 Act provides for additional grounds to be considered for a tender to be successful. These considerations in addition to the lowest evaluated prices include: highest scored technical and financial proposal, tender with the lowest evaluated total cost of ownership and tender with the highest technical score.

In as much as the additional grounds are aimed at ensuring cost-effectiveness and efficiency in the procurement system, the wording of section 86(1) infers that no change really has taken place. It uses the word ‘ANY’.⁹⁶This potentially could impede the maximization of economic efficiency.

4.2.1 Transparency, Accountability, and Public participation

Institutions owe a duty of transparency and disclosure on its practices to its stakeholders and the public mostly so as justify their existence within the precincts of society. They form a contract with the society to abide by its norms and values and any deviation from this social contract makes the presence of such institutions not legitimate. These principles are key to satisfying constitutional rights.⁹⁷

Section 135 of the of the 2005 PPAD Act provides for offenses, listed 5 in particular, while section 137 of the same Act provided for sanctions. Section 176 of the 2015 PPAD Act provides for both offenses and sanctions. In addition, it lists eight more offenses in addition to the five in Section 135 of the former Act. It also replicates the same sanctions present in Section 137 of the former Act.

The 2009 Draft Zero Policy argued for the observance of accountability and openness.

The addition of offenses not in the previous Act is a boost to cover gaps in the procurement system which parties may seek to exploit on account of them not being listed as offenses

⁹⁶It states, ‘...*the successful tender shall be the one who meets ANY one of the following...*’

⁹⁷ ‘Access to information in article 35 of the CoK 2010 alongside other legal and ethical postulates.’

under the Act. This is commendable. However, retaining the same sanctions present in the former regime is a bit inconsiderate taking into account the changing economic times and the inflation rates. The sanction for the natural persons was four million while that of body corporates being ten million. The prices remain the same.

On debarment of individuals or companies, the PPAD 2005 in section 115 Act provided for five grounds of debarment and sanctions the offenses listed under it at a period of five years. Regulations 90& 91 make reference to this section. Conversely, Section 41 of the 2015 PPAD 2015 lists the offenses similar to the ones listed under the former Act and adds more offenses to include inter alia defaulting of tax obligations, engaging in corruption and fraudulent practices, and violation of labour laws.

The PPAD 2015 Act, however, has lessened the five year sanction period to three years period that an individual or entity is subject to debarment upon the commission of the offenses listed. This potentially could encourage firms to have some comfort of the lessened sanctioned time and risk engaging in any or some of the practices.

Section 125 of the PPAD 2005 Act mandated the PPOA to maintain and make available to public entities a list of persons debarred from participating in procurement proceedings. Section 9(k) as read together with 9(m) of the PPAD 2015 Act mandates the PPRA to maintain the procurement portal and ensure its accessibility and availability and in doing so create a central repository or database system with records of those debarred or prohibited from participating in tenders amongst other things.

This notwithstanding, the online Procurement portal is absolutely not up to date. For instance, it only identifies 3 firms debarred with the last one being debarred on the 19th of May 2014. Is it that the procurement system is that transparent and accountable and no corruption exists in the process? The answer would be in the negative.

Section 2 of the PPAD 2005 Act identified principles to guide the procurement system being transparency and accountability amongst others. In that regard, Section 96(d) of the PPAD 2005 Act permitted such other persons other than tenderers and procuring entities presumably members of the public to be parties to procurement proceedings.

Section 3 of the PPAD 2015 Act identifies the same principles in section 2 of the former Act while making reference to Article 201 and 232 of the Constitution of Kenya which identifies public participation as a satisfier of transparency and accountability. The two constitutional provisions talk of involvement of people in the process of policy making, transparency and provision to the public of timely accurate information. Section 170(d) of the PPAD 2015 Act is similar to Section 96(d) of the former Act.

Contrasting these provisions allowing the public to be parties to procurement proceedings, with judicial review requirements of the Civil Procedure Rules⁹⁸ where the Court only hears 3rd parties in opposition to and not in support of the proceedings and the enjoined parties are liable to costs if the order is made. Instructively, this means that to be heard as a right is not absolute and for a 3rd party to be heard that party must convince the Court that he or she is rightfully before it. This goes against the principle of public participation.

Another possible area of tension on transparency is exhibited in Section 133 of the PPAD 2005 Act provided for restricted tendering for the defense and national security organs. Though, it never made an express statement as in the 2015 PPAD Act on confidentiality and non-disclosure. On the other hand, Section 90 of the PPAD 2015 Act has the same provisions as Section 133 of the former Act. In addition, it includes a provision on confidentiality and non-disclosure of information that allegedly may compromise national security.

This contradicts constitutional and statutory principles on transparency and accountability. (Article 232). It also contradicts section 9(d) of the 2015 PPAD which mandates the Authority to report to the cabinet secretary on monitored classified procurement information. Some of the advanced jurisdictions like the US have online disclosures on their security organs.

The government of Kenya is on the verge of awarding a secret restricted tender for procurement of a Kshs. 3 Billion digital registration system classified as top secret that will create a national population register. ⁹⁹Secrecy in the past for instance in the Anglo leasing

⁹⁸ More specifically Order 53 Rule 6.

⁹⁹ Mutuma Mathu and John Kamau, 'Procurement: Restricted tendering is allowed in, among other situations, where expertise is limited to select suppliers: Revealed: Kshs 3bn 'top secret' tender for identity data; Three

scandal has been used as a metaphor for corruption. This goes against the ideals of competitive tendering which maximizes value for money when suppliers compete. The discretion given to procurement officials in restricted tendering is also prone to misuse and corrupt practices characterized by individualization.

If at all the government can prove that the benefits of this intended restricted tender will benefit the public and compensate any eventuality not envisaged that results from not opting for competitive tendering then its actions in the economic world would be ethically justified.

Further on transparency, in a bid to promote access to information and ensure transparency, the Draft Zero policy of 2009, argued for digitizing the procurement process to ease efficiency.

The 2015 PPAD was receptive of that and Section 64 of the 2015 PPAD Act provides that ICT may be used in PPAD proceeding as prescribed.

However, the word 'MAY' infers an option on whether to use ICT or not. This should not be the case since ICT makes it easier and facilitates efficiency, competitiveness, fairness, equitability, and effectiveness. Regulations also do not prescribe the use of ICT in procurement proceedings.

4.2.2 Integrity and public confidence in the procurement process

The whole gist behind a procurement system having integrity in its operations is so as to instill confidence in the public that indeed it can be trusted and it is transparent. Integrity borders along both ethical and legal considerations. There is a strong interplay between ethics and law. Disregard of the laws by procurement officials evidenced by recent scandals involving cartels backed by rogue state procurement officials' exhibits unethical conduct. For instance, the unethical and illegal methods used to fleece billions of public funds are inflation of contract sums, tampering with tender documents, using unauthorized junior

firms approached to submit bids as officials bypass law that stipulates competitive bidding' (Daily Nation, 3rd August 2018).

officers to conceal their identities and tailor-made tenders suiting their specifications.¹⁰⁰ See the National Irrigation Board scandal¹⁰¹, the KPLC scandal¹⁰², the Kenyatta National Hospital Scandal¹⁰³ and the Ministry of Agriculture scandal¹⁰⁴ amongst many others.

Some provisions are aimed at enhancing public confidence, for instance, Section 97 (1) of the 2005 PPAD Act set 30 days within which the Board must complete a review. Section 171(1) of the 2015 PPAD Act minimized this period to 21 days. This is aimed at enhancing effectiveness and efficiency in the determination of disputes and rendering of decisions to enable aggravated parties to chart the next cause of action.

However, various provisions in the PPAD 2015 impede on the realization of the above. Here are some of them.

Section 36 of the 2005 PPAD Act contained a vague wording on termination with no stated reasons for termination and gave unfettered powers to the procurement entity to terminate procurement proceedings and the same was not subject to judicial scrutiny by the Courts nor review by the Board.

Section 63 of the 2015 PPAD Act outlines reasons for termination and states termination can only be prior to notification of tender award and strikes off or rather leaves out the provision on terminated proceeding not being subject to review by Courts or the Board. Being a positive change, tenderers now have the confidence that termination if unlawful may be challenged and justice possibly rendered.

¹⁰⁰ Paul Ogemba, 'Tricks state officers & cartels use to loot billions in the name of tenders' (The Standard, 3rd August 2018).

¹⁰¹ Where it over-inflated tender amount to Kshs.29.8 billion from the correct estimated Kshs.17 billion regarding construction of the Lowaat Dam Project. The PPARB shockingly discovered that the National Irrigation Board was involved in irregularities to wit inflation and faking figures of the lowest bidder so as to conceal the fraud.

¹⁰² Where KPLC awarded a Kshs. 2 billion tender to a Chinese company and extended period for submissions of tender bids illegally in a bid to accommodate the Chinese company despite the fact that the firm had no capacity to deliver. Also in another recent scandal where KPLC awarded Kshs. 6 billion tender to a Chinese company after tailor-making its specifications for supply of single-phase pre-payment meters to suit the Chinese

¹⁰³ In the award of tender to Phillips East Africa Ltd for installation of MRI machines worth 419 million shillings yet due process wasn't followed.

¹⁰⁴ Where the ministry was found guilty of awarding Kshs. 186 million tender of supplying milk cooling tanks by changing the contract terms at the last minute to favor the then successful bidder. This it did by introducing a late requirement being proof of workshop which was absent in the contractual documents.

However, the requirement of the procuring entity to report to the authority on reasons for termination of the tender does not absolve the entity of the risk that it may misrepresent the reasons for termination.

In respect to the requirement to deposit a certain amount to access administrative review proceedings, Section 97 of the 2005 PPAD Act did not make reference to a deposit of not less than 10% of contract cost to accompany a request for review, neither did it refer to the requirement to pay for one to apply for judicial review proceedings.

The 2006 Regulations do not provide for such refundable deposit or security fee. It is purely a creature of the 2015 PPAD Act. Section 167(2) of the 2015 PPAD Act requires payment of at least ten percent of the contract cost of the contract to accompany a request for review.

The 2015 PPAD Act requires the applicant to a security fee as a condition for acceptance of judicial review proceedings.¹⁰⁵

The introduction of these two provisions flout the letter and spirit of constitutional rights in Articles 27, 47, 48, 50(1) and 227(1) on non-discrimination, fair administrative action, access to justice, fair trial and requirement of a fair and transparent procurement system respectively and is an impediment to access to justice.

They also impose financial burdens not envisaged by procuring entities who may or may not have budgeted for funds to pay for the fees if their decisions say are challenged successfully.

On the same issue of administrative review proceedings, Section 100(4) of the 2005 PPAD Act made the Board's decision final if judicial review proceedings were not preferred to the High Court within thirty days from the date of filing.

Section 175(3&5) of the 2015 PPAD Act replicated section 100(4) of the 2005 PPAD Act of the former Act with the only difference being an additional 15 days to the original 30 to make the Board's decision final if within 45 days the High Court or the Court of Appeal had not determined proceedings emanating from the Board.

¹⁰⁵ Section 175 (2)

Time and again, various decisions have declared section 100(4) unconstitutional for imposing unrealistic timelines and being a clause meant to oust the Court's jurisdiction, something the courts don't take too lightly. (Notably in Selex Sistemi Integreti case). These sections may encourage scrupulous litigants to adopt delaying tactics to ensure the case delays and the 45 days lapse.

Further, section 175(3) of the PPAD 2015 Act clashes with the Fair Administrative Action Act section 8 which provides for 90 days as opposed to the 45 espoused by the PPAD.

Additionally, the same section contradicts Section 8 & 9 of the Law Reform Act that gives litigants a period of six months to challenge administrative decisions.

Section 100 of the 2005 PPAD did not envisage any provision on costs during the review. Conversely, the 2015 PPAD Act¹⁰⁶ provides that the High Court doesn't have power to award costs on either party where the Board's decision is quashed. This causes uncertainty in this sense: Does this mean that an inferior tribunal that is subordinate to the High Court has powers to award costs but the High Court doesn't?

Also, does it effectively mean that the Court of Appeal can award costs since the section only mentions the High Court lacks the power to do so?

Finally, since the High Court cannot award costs, can it listen to an appeal from the Board on the issue of payment of costs?

Another possible tension existing is the creation of quasi-judicial powers for the secretariat to the Board where the 2005 PPAD Act did not envisage the powers of the Board's Secretariat. Section 169 of the 2015 Act gives the quasi-judicial powers to the Secretariat enabling him to refuse a request for review where appeal fees are not paid within the set time frame. This tends to create a quasi-judicial function on behalf of the secretariat who has draconian powers, and a platform for review of his or her decision is not provided for. It is an impediment to justice.

¹⁰⁶ Section 175(7).

This illustrates the need to abandon formalism depicted in positivism jurisprudence and instead embracing the law in action that can only be achieved by having recourse to judge made law and interpretation.

4.2.3 Promotion of equality & nondiscrimination, affirmative action, local industry & competition, Policy integration & harmonization of PPAD with other laws, and money-cost effectiveness & sustainable development

The ideals of realism demand that we employ reason and intuition in the interpretation and implementation of law. The rigidity of positive law results to indeterminacy. In order to avoid this, realists favor the embracing of law in action as opposed to law as is in the books. Jerome Frank eschews positivism for the uncertainty it creates. He uses the father-son analogy in showing the need for certainty in law so as to elicit confidence and trust.

As will be shown, the 2006 regulations are still in force and worse still make reference to the 2005 PPAD. These are outdated laws. The dynamic nature of procurement and intricacies involved within its workings demand that the law constantly change to envisage the changing dynamics. Despite the promulgation of the 2010 Constitution bringing forth change, some provisions in the PPAD 2015 offend constitutional provisions.

Coming back to the principles, this study opines that they are key to enhancing an effective procurement system. Various setbacks, however, prevent the implementation of the same.

For instance, the Draft Zero Policy of 2009 argued for the creation of a policy that takes cognizance of other policies on procurement. The current overarching government policy is Kenya Vision 2030.

Section 33 of PPAD 2015 Act tasks the County Treasury with the implementation of procurement policy. Kenya does not have a procurement policy apart from the 2009 Draft Zero Policy that was drafted before the coming into force of the CoK 2010. Ideally, this is considered overtaken by events.

On the overlap of duties, Section 34 of the PPAD 2015 Act mandates the public entities to provide information to the National Treasury or the Authority.

This potentially creates a tension between the PPRA and the National Treasury in terms of overlap of duties. The wording of this provision does not expressly draw the line between the two.

Another possible area of tension is the incompatibility of policy objectives and the laws governing procurement locally and internationally. Policy objectives are listed under Section 2 of the PPAD 2005. In the 2015 Act, they are listed under section 3.

The policy objectives listed therein are incongruent with provisions of sections 167(2) and 175(2) of the 2015 Act. Additionally, they are incongruent with the Preamble and Article 8 of the Model Procurement Law (UNCITRAL) in this sense. Section 89 of the 2015 Act is similar to Section 71 of the 2005 Act where both make reference to international tendering only when there is no effective competition locally. The Preamble and Article 8 of the UNCITRAL Model Law provide for promotion of international trade by contracting suppliers irrespective of their nationality. Also despite Kenya having not acceded to the General Procurement Agreement (GPA), the latter's prohibition on discrimination of foreign products, services or suppliers in respect to laws, regulations, procedures, and practices is very informative and should be taken to consideration.

Another tension existing is in regards to preferences and reservations. Section 39 of the 2005 PPAD Act provided for preference and reservations inconsideration of economic and social development factors. Regulations 28 of the 2006 Regulations as read together with Regulation 13 of the Preference and Reservation Regulations of 2014 provide for the threshold of exclusive preference being one billion for road works, 500 million for other works, 100 million for goods & 50 million for services on one hand.

Section 155-157 of the 2015 PPAA Act provide for preferences and reservations schemes in a bid to foster competition. The 2009 Draft Zero Policy recommended for open, fair and competitive practices to get the best goods, works and services.

The main tension existing between the provisions in the Act and the Regulation is the prescribed threshold for exclusive preference, with the Act listing it at below 500 million for procurement of goods and services, and 200 million for procurement of works. The disharmony between the regulations and the Act may cause confusion.

Another tension existing is on the margin of preference. Sections 155(3) (b) and 155(4) of the 2015 Act provides that preference shall be given to firms where Kenyans are shareholders with shareholding being set at above 51%. on the other hand regulation 28, which is similar to regulation 15 of the Preference & Reservation Regulations prescribe a 6% margin of preference to companies with 20% or less shareholding percentage, 8% margin of preference to companies with 51% or less but above 20% shareholding percentage. Question is which reigns supreme. The Act or the Regulations?

See in as much as preferential schemes are aimed at the promotion of local industries and growth of development, they sometimes cause economic stagnation and who is to say preferential procurement will save uncompetitive and/or inefficient industry markets in Kenya? Wouldn't it be more effective to hire foreign contractors and suppliers who offer quality work at a cheaper price rather than award it to Kenyans who charge a higher rate, pocket half of the money, procure substandard materials and deliver low quality work? (Contrast the efficiency and effectiveness of China contractors in Kenya Vis a Vis those of say local construction workers in the construction of roads. the former build better roads than the latter and cost-effectively)

The Zero Draft Policy argued for harmonization of laws to ease implementation.

The State Corporations Act in section 13 still makes reference to the PPAD 2005 where it applies for disposal of current assets contrary to section 163-165 of the 2015 PPAD.¹⁰⁷

At the beginning of this study, the study had set out to explain the Kibaki initiative that was actualized by President Uhuru Kenyatta on the 30% affirmative action plan for the disadvantaged in the Kenyan society that includes the women, youths and physically disabled. Despite it being proclaimed and the affirmative provisions in the Act under sections 155-157, this has not been realized. Many youths are jobless with the tenders going to international companies and 'well-known' entities.¹⁰⁸

¹⁰⁷Where unserviceable, obsolete, obsolescent, or surplus stores, equipment or assets are subject to disposal.

¹⁰⁸Abigail Arunga (n 93).

4.3 Conclusion

This chapter has demonstrated that although Kenya has elaborate institutions and laws to govern procurement, nevertheless, implementation of the PPAD 2015 Act remains a challenge.

It demonstrates the need for respect for the principles alluded to and alignment of the provisions of procurement laws to the letter and spirit of the Constitution. As alluded to in the theoretical framework, the PPAD 2015 Act and its Regulations being norms in the hierarchical structure as depicted in Hans Kelsen's theory of pure law need to conform to the grund norm being the constitution of Kenya 2010 for them to achieve validity and elicit confidence, obedience and trust from their subjects.

Also, this chapter demonstrates the need to move away from all the formalism present in the positive text and resort to the law in action which envisions the changing times and takes into account public policy considerations, reason and other external factors necessary in the interpretation of law.

Finally it demonstrates the notion that respect to and adherence to good procurement practices is essential to sustain an effective and robust procurement system and avoid procurement scandals.

5.0 CHAPTER 5

5.1 Case Reviews

Introduction

This chapter critically analyses select judgments in a bid to demonstrate the impacts of formalism and rigidity of positive law and the need to embrace judge made law which is law in action based on judges' reasoning and intuition.

It seeks to illustrate this by exposing the challenges which parties seeks to exploit in procurement laws, regulations and policies and their impacts on the implementation by drawing from interpretation of these laws done by the judges in the course of delivering judgments.

This chapter finally seeks to demonstrate the importance of procurement laws, regulations and policies conforming to the letter and spirit of the Constitution so as to ease implementation and avoid scandals in the long run.

Case Review 1- Civil Appeal No. 224 of 2017¹⁰⁹

This case captured conflicts between the PPAD 2015 Act and the Constitution of Kenya 2010 in respect to procedural law as well as substantive law. It illustrates the need to align most of the provisions of the PPAD 2015 Act to the CoK 2010 in order to achieve efficiency and instill public confidence in the procurement system.

5.1.0 Brief Background

A brief background to the case shows that the IEBC in fulfilling its obligations under the constitution of Kenya 2010 awarded a tender to Al-Ghurair being for purposes of printing ballot papers. This move was fiercely contested with the synopsis of the same being as below;

On 13th February 2017, the High Court annulled the original award to AI-Ghurair.

¹⁰⁹ Civil Appeal No. 224 Of 2017 Between Independent Electoral And Boundaries Commission (IEBC) And The National Super Alliance, (Nasa) Kenya & 6 Others.

The study shall proceed to give an analysis of the decision stemming from application 224 of 2017.

5.1.1 Issues

This case raised the issue whether resulting to direct tendering was contrary to constitutional dictates of fairness, transparency, public participation and efficiency.

5.1.2 Rule

It relied on the rule in sections 103 & 104 of the PPAD, 2006 Regulations, and Article 10 of the Constitution.¹¹⁰

5.1.3 Decision

The court decided that direct procurement was the most appropriate and convenient way to handle the upcoming elections and address constraints of time.

5.1.4 Analysis

The court based its decision on the foundations of approaches taken in procurement and most importantly, the underlying assumptions that decision makers are rational, act in self-interest, respond to Legal Rules through a rational cost-benefit analysis and the law exists in procurement for purposes of economic welfare.¹¹¹

However, it is the reliance of these assumptions by the lawmakers and disregard of other underlying social and political objectives in this case that resulted to a decision that in the study's view violated the tenets of a sound procurement system.

It is trite to note that the Independent Electoral Boundaries Commission (hereinafter referred to as IEBC) is not a buyer like any other and cannot, therefore, be treated as a variable exogenous to market efficiency. It bears multiple functions.

¹¹⁰ In force pursuant to Section 182 (2) of the PPAD Act of 2015.

¹¹¹ Peter Trepte 'Regulating Procurement –understanding the ends and means of Public Procurement Regulation'(2004)

Ultimately it is on the basis of the foregoing, that the Court opted for direct procurement seeing as it would save time and resources and advance the social welfare of the citizens of Kenya.

In reviewing and analyzing the decision it can be noted that the decision promotes inefficiency. Tendering processes should be done through open tendering because such yields the best results, since parties compete and in doing so the buyer obtains the best services or goods at the best prices. This requirement is enshrined in the 2015 PPAD in Section 91 which prefers open tendering as the most optimal method with deviation being allowed where that alternative procedure is allowed and satisfies the conditions of the PPAD 2015 Act.

The step therefore taken by the IEBC in opting for Direct Procurement goes against the open- tendering and the procurement laws based on the fact that the decision was made scrupulously by the party engineering urgency and of course due to their own selfish interest.

The fact that the court revised the decision to have the tender awarded De Novo in the study's opinion promotes inefficiency by upholding the use of Direct Procurement where the same was engineered by the party. The law on direct procurement is governed by section 103 and 104 of the PPAD Act, 2015 which states that recourse to direct procurement is not available where the circumstances giving rise to urgency are attributable to dilatory or other wrongful conduct on the part of the procuring entity.

The issue of individuals and parties acting in self-interest and being an element of the economics has in no doubt come to light in the case being discussed herein and as evidenced the arguments raised above. The IEBC worked in self-interest.

The concept of public participation being frowned eschews the objective of enhancing efficiency in public procurement. The Courts have declared it a justiciable right including in the present case. So the contention that it is a mere aspiration should be put to rest. It is through public participation that arbitrary abuse of power by state officials and procuring entities is put to scrutiny and in check, thereby promoting healthy competition. The position on public participation being a justiciable right was aptly laid out in the Matter of Peter

Makau Musyoka and Award of Mining Concessionary Rights to the Mui Coal Basin Deposits - Constitutional Petition NOs. 305 of 2012; [2015] eKLR.¹¹²

There also is the aspect of outdated regulations still. One wonders why no initiative has been made to promulgate new regulations. The Court, in this case, applied the old regulations to set aside the High court's earlier decision on availability of time to re-tender.¹¹³ The Appellate Court was of the view that had the trial court addressed its mind to the time lines as stipulated in Regulations 36¹¹⁴, 40¹¹⁵, 46¹¹⁶, 54 (5)¹¹⁷ of the PPAD 2005 and Section 80 (6) of the PPAD 2015¹¹⁸, the learned judges would have appreciated that indeed there was no sufficient time to restart the process for procurement of election materials. To this extent, the learned judges erred in their finding that there was sufficient time to start the procurement process.

In terms of benefits it can be argued correctly in lieu of PARA 10 of the Judgment where the Appellant explained that the cancellation of the contract would have far-reaching financial consequences on the Government which would still have to pay the colossal amount under the letter of credit and by Further arguing that the quashing the award would render the scheduled General Elections impossible resulting in a constitutional crisis, given that the date of the elections was sacrosanct, and could not be altered.¹¹⁹

Also on the scarcity of resources, as per Posner's analysis, the Judgment was based on the impossibility if not impracticability of getting resources in terms of time to order another fresh award of tender De-novo. It would be thus correct to argue that the Court also factored

¹¹² The High Court noted that public participation is an established justiciable right in Kenya and one of the corner stones of our new democracy."

¹¹³ The court appreciated that the 2006 Regulations were still in force pursuant to Section 24 of the Interpretation and General Provisions Act and Section 182 (2) of the Public Procurement and Asset Disposal Act of 2015 to be construed mutatis mutandis accordingly.

¹¹⁴Regulation 36: espousing thirty days being the minimum period of time between advertisement and deadline for submission of international tenders.

¹¹⁵Regulation 40: twenty one days being the minimum time for the preparation of tenders.

¹¹⁶Regulation 46: A procuring entity should evaluate the tenders within a period of 30 days after the opening of the tender.

¹¹⁷Regulation 54 (5): fourteen days being the minimum time for the preparation of tenders.

¹¹⁸Section 80 (6) of the PPAD Act, 2015: evaluation to be carried out within thirty days.

¹¹⁹ This foregoing is well in line with Posner's theory of economic efficiency where he correctly observes that the benefits of an exchange outweigh the costs, which in turn means that in theory, the winners from the exchange could fully compensate the losers and still be better off and that in the long run, all individuals can expect to benefit from greater efficiency.

in the elements of economic efficiency in reaching its Judgment and this is the spirit of the provisions of the PPAD 2015 Act.

The decision reached the Court on this matter has some far reaching consequences some of which are as outlined herein below;

The decision will encourage individuals and parties involved in procurement to engineer scenarios that will help them fulfill their self-interests as observed in our case study afore-discussed.

The decision further injures the economy of the country as public bodies may be encouraged to pursue scrupulously direct procurement even where they do not qualify. Such successful pursuit would mean that the body procuring will not get the best services at the best prices as direct procurement doesn't provide a ground for proper tendering leaving the parties to give the tender to the person or organization of their choice.

The decision further weakens the regulatory framework governing procurement as the decision is not in tandem with the PPAD Act, 2015.

The decision does not promote efficiency as the act fails to place strict reliance on the PPAD act's principles which are useful in ensuring efficiency in procurement of services and Goods.

It can be correctly concluded that the issue revolving around procurement and mainly public procurement is serious in nature and requires strict adherence to the laws by the parties seeing as they impact on the social, economic, cultural and political life of a country. The well-being of a country and growth in development is pegged on a sound public procurement system to realize value for money, efficiency amongst other good principles of a procurement system.

The fact that individuals always work in their own self-interests validates the argument that sanctions and incentives should be put in place cogent enough to ensure that the regulations are adhered to.

It is also important for courts to consider the economic perspectives in reaching their decisions and support the regulations in place towards the realization of a robust and well-functioning procurement framework.

The government should promulgate new regulations to replace the outdated 2006 ones. This is for purposes of complementing the latest 2015 PPAD and its improved provisions on the law on procurement.

All this is premised on respect and fidelity to the new PPAD 2015 and regulations in place to support the same. Also, all other incidental laws including constitutional provisions should be the foundation upon which all actors in play should base their actions upon. In doing this, implementation of the Act will be effective and efficient and the ship will set sail.

Case Review 2- Public Procurement Administrative Review Board Review No.108/2017¹²⁰

This case demonstrates the inconsistencies of the PPAD 2015 with the letter and spirit of the 2010 Kenyan Constitution and incompatibility of certain provisions with international specialization and liberalization of trade that eclipses implementation of the provisions of the PPAD 2015 fully for the benefit of efficiency in the procurement sector.

5.2.0 Brief background

The Central Bank of Kenya advertised for a tender for Production of banknote origination material and currency printing services which was locally and internationally done under Tender number CBK/043/2013/2014, subsequently published in two local dailies¹²¹, regional weekly paper¹²² and in the CBK's website.¹²³

After evaluation, and having passed the 75% threshold, the evaluation committee observed that all tenderers met the set mandatory requirements and hence were eligible for technical evaluation.

The Tender Evaluation Committee noted that De La Rue International had indicated that they would print the new design currency locally if successful. A justification letter for award of preference was enclosed in the Tender submission together with certificates of incorporations and change of names for the Kenyan companies which De La Rue International Ltd.

On account of provisions in Sections 155-157 of the PPAD Act, 2015, on preferences and reservations, the Tender Evaluation Committee was allegedly satisfied that De La Rue

¹²⁰ Public Procurement Administrative Review Board Review No.108/2017 Of 19th December, 2017 BETWEEN Crane Ab (Applicant) AND Central Bank of Kenya (1st Respondent/ Procuring Entity), De La Rue International Limited (2nd Respondent), De La Rue Currency & Security Print Limited (3rd Respondent), De La Rue Kenya Epz limited (4th Respondent).

¹²¹The Daily nation & The East African Standard on June 16, 2014.

¹²² The East African for the week of June 14th to 20th of 2014.

¹²³CBK Website, Tenders Portal from June 16th to July 8th of 2014.

International Ltd had submitted enough evidence to prove that they could print the banknotes locally and went ahead to assign a 15 per cent preference to its bid.

In addition, the Tender Evaluation Committee relied on an application letter for subcontracting by De La Rue International Limited to its affiliates namely De La Rue Currency and Security Print Ltd or its alleged successor De La Rue Kenya EPZ Ltd.

After evaluation, Crane AB emerged as the tenderer with the lowest quoted prices, however, due to the 15% preference scheme awarded to De La Rue, it emerged as the tenderer with the lowest evaluated price.

After consideration of all requirements of the tender, the committee recommended and awarded the contract to De LA Rue International Limited.

The Applicant Crane AB filed a Request for Review seeking a declaration that the 15% preference margin was applied irregularly to De La Rue International Limited and that the procuring entity be ordered to reevaluate the tenders.

5.2.1 Issues

This case raised two issues namely:

1. Whether section 167(2) is unconstitutional for impeding access to justice.
2. Whether preferential schemes are discriminatory and are detrimental to the efficiency of the procurement system.

5.2.2 Rule

It relied on the rules in Articles 48, 50, 227 of the Constitution Vis a Vis Sections 155, 157, 167 (2) of the PPAD 2015 on fairness and justice.

5.2.3 Decision

The court finally decided that the tender awarded by CBK to DeLaRue was both unlawful and unconstitutional and therefore null.

It's reason was that Section 167(2) impedes access to justice for Applicants as well as the Procuring Entities who may have failed to budget for funds to provide security fee if in any event their decisions are challenged before the Board.

Purporting to give the 3rd Respondent preference went against constitutional dictates in Article 227 which mandates that the contracts for goods or services be in accordance with a system that is fair, equitable, transparent, competitive and cost-effective. A system cannot be said to be fair when a tenderer is given an undeserved preference.

5.2.4 Analysis

Among the several issues raised in this case, the study identifies the relevant costs impeding efficiency and effectiveness of the implementation of the PPAD 2015 to be as follows:

Section 167(2) which requires payment of not less than ten percent to accompany a review request is arguably inconsistent and unconstitutional for being an unreasonable impediment on the access to justice as a right guaranteed by Article 48 of the 2010 Kenyan Constitution.

Ideally, procurement contracts are worth millions, at times billions and occasionally tunes into trillions of shillings. This mandatory requirement of paying at least 10% deposit is an impediment to access to justice in this sense, it locks out many genuine applicants from lodging a request for review.

Section 167(2) also contravenes other constitutional provisions on discrimination¹²⁴, fair administrative action¹²⁵, right to a fair trial¹²⁶ and procurement system being fair and transparent¹²⁷.

¹²⁴ The constitution of Kenya, 2010, Article 27- implementation of section 167(2) imposes a discriminative aspect seeing as the same provision is nonexistent in other types of cases.

¹²⁵ Ibid, Article 47- it impedes on the possibility of challenging administrative decisions of the procuring entities due to the high inhibitive costs.

¹²⁶ Ibid, Article 50- which guarantees the right to every citizen or person in Kenya the right to be heard by an impartial and fair independent tribunal or court.

¹²⁷ Ibid, Article 227- which states that when a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

This contention is similar to the perceived unconstitutionality of Section 175(2) of the PPAD 2015 which requires payment of a security fee in order to accept a judicial review application.

This provision impedes access to justice for Applicants as well as the Procuring Entities who may have failed to budget for funds to provide security fee if in any event their decisions are challenged before the Board.

In this case, the Respondents argued that the review request by the Applicant offended the public Procurement and Asset Disposal Act 2015, Section 167(2).

The Board rejected this contention on grounds of lack of regulations to enforce the same as provided for in the Act. This effectively ensured the right to access to justice for the Applicant who had not paid the deposit fee and the Respondent sought to have the case thrown out on this technicality which the Board so readily rejected.

The Applicant's contention was that there were no regulations providing for the payment of this refundable deposit.¹²⁸ The Board affirmed this position and stated that they bound to apply provisions of the existing Regulations being the 2006 Regulations as amended from time to time and under these regulations, there was no requirement as to the payment of that refundable deposit. The board relied on the dictas in *Hexing Technology limited (Nai HC JR Appl. No. 645 of 2016)* and *Republic vs Public Procurement Administrative Review Board, Magnate Ventures Limited Ex Parte: Kenya Power And Lighting Company limited* to fortify its decision.¹²⁹ It also relied on *CMC Motors Group Limited –vs- The National Treasury (PPARB No. 24 of 2016)*.¹³⁰

Absence of Regulations at this particular time having promulgated the Act is a major setback towards full implementation evident in the case above. Section 167(2) lacks force

¹²⁸ Relied on Republic v Public Procurement Administrative Review Board, Magnet Ventures Limited Ex-parte Kenya Power and Lighting Company Limited & another [2017] eKLR and the case of Republic vs. Public Procurement Administrative Review Board & 2 others Ex Parte Kenya National Highway Authority [2016] eKLR

¹²⁹ In affirmation of the decision in *Republic vs. Public Procurement Administrative Review Board & 2 others Ex Parte Kenya National Highway Authority [2016] eKLR* the court was of the view that section 175(2) of the Act with respect to payment of the percentage can only be implemented after the Regulations are in place.

¹³⁰ Where the Board held that in the absence of the promulgation of the new Regulations, an Applicant is not under a duty to pay the refundable deposit while filling a Request for Review.

on the altar of the absence of Regulations to supplement and complement the provisions of the Act.

Entitlement to preferential scheme

Counsel for the Applicant submitted that The Procuring Entity via Addendum No.3 relied on the provisions Sections 155 and 157 of the PPAD Act, 2015 which provide for preferences and reservations and resulted to discrimination on its account.

Preferences and reservations though statutory, are arguably a hindrance to free trade and international specialization.¹³¹ Federico Trionfetti opines that indeed home biased procurement constitutes a barrier to trade. He also looks at the other side and posits that discriminatory procurement has benefits as well such as increase in domestic output thereby reducing imports costs. He approaches discriminatory procurement as a concept from the size of the market. According to him, discriminatory procurement results to inefficient allocation of resources only when it is large.¹³²

Trionfetti thus attributes the benefits of home biased procurement to developing economies as opposed to developed economies seeing as there is redress on structural cost disadvantage incurred by developing countries.

Francis Ssenoga¹³³ criticizes the concept of discriminatory procurement and favors the approach on opening up of procurement markets to enhance competitiveness that ultimately results to efficient public resources utilization. He appreciates Trionfetti's argument that formal respect of the tendering procedures doesn't necessarily guarantee fair treatment to foreign firms, as the discrimination behavior is usually tacit.¹³⁴

The point the study is putting across is that preferential schemes amount to discriminatory procurement and is a hindrance to efficiency in the procurement arena and affects

¹³¹ Federico Trionfetti, 'Discriminatory Public Procurement and International Trade' (Blackwell Publishers Ltd, 2000)57.

¹³²As such home biased procurement may be effective without necessarily interfering with efficiency decisions in private production and consumption.

¹³³ Francis Ssenoga, 'Examining Discriminatory Procurement Practices in Developing Countries' (PR Academics Press, 2006).

¹³⁴ Ibid. see Federico Trionfetti, 'Discriminatory Public Procurement and International Trade' (Blackwell Publishers Ltd, 2000)57.

competition which is one of the pillars of a sound procurement system adversely amongst others. Perhaps the Court of appeal's excerpt in *Rentco East Africa Limited, Lantech Africa Limited, Toshiba Corporation Consortium v Public Procurement Administrative Review Board & another (NAI Civil Appeal 24 of 2017)* captures the essence of efficiency in procurement laws comprehensively.¹³⁵

Conversely, in terms of benefits, the study contends that indeed Kenya being a developing economy, some of the concepts emerging from this case that international actors would deem incompatible with a sound and effective procurement system, actually are in favour of not only remedying structural costs but also, inequalities, historical injustices, and emancipation from social oppression.

Scholars such as Professor Sue Arrowsmith¹³⁶, Professor Phoebe Bolton¹³⁷, Professor Christopher McCrudden¹³⁸ and Francis Ssenoga¹³⁹ amongst others, advocate for the use of public procurement as an instrument of policy.¹⁴⁰

Provisions in the Kenyan Constitution on affirmative actions for the minorities and disadvantaged in the society are backed up and fortified by statutory provisions regarding procurement all in quest to promote and enhance the welfare of these target groups.¹⁴¹

¹³⁵The object of procurement laws is to improve public financial management, promote efficient use of State resources in order to foster national development; enhance harmony with international procurement laws, foster principles depicted under Article 227 of the Constitution. These values and principles however lose meaning if the persons and institutions responsible for ensuring compliance are themselves in violation of the law. Economic advancement is hampered if grand projects, aspirations like the Kenya Vision 2030 and Sustainable Development Goals viewed as catalysts of growth are delayed due to avoidable controversies.

¹³⁶Sue Arrowsmith, 'Public Procurement as an instrument of Policy and the Impact of Market Liberalisation,' (Law Quarterly Review, 1995).

¹³⁷Phoebe Bolton, 'Government Procurement as a Policy Tool in South Africa' (Journal of Public Procurement, Volume 6, Issue 3, 2006)193-217.

¹³⁸Christopher McCrudden, 'Using Public Procurement to Achieve Social Outcomes' (Natural Resources Forum 28, 2004)257-267.

¹³⁹Francis n 131.

¹⁴⁰ They are of the contention that 'governments should use their extensive powers of procurement to promote other objectives other than the immediate objective being pursuit of economic efficiency.'

¹⁴¹ See Section 157(4&5) of the PPAD 2015.

So in as much as there are cons, the pros far much outweigh them, however, it is not wise to overlook the downsides of such procurement practices as they negatively impact on full implementation of the Act.

The study therefore recommends harmonization of statutory and constitutional laws to enhance efficiency in procurement and reduce the number of litigation cases that result due to the lack of clarity and gaps in the law on procurement.

The study also recommends adherence to the laws in place and construing of law not only subjectively but also objectively and in doing so take into consideration other factors underlying procurement functions to wit social, political and cultural implications. Procurement doesn't exist for economic purposes in the modern world, it happens to be a powerful tool to eradicate social-cultural and political evils and promote policies on equality and non-discrimination amongst others.

Finally, the study recommends promulgation of new and up to date Regulations to complement the PPAD 2015 law and in the long term enhance efficiency and clarity in interpretation of the procurement laws to avoid ambiguity or loopholes that scrupulous individuals take advantage of and exploit them to their advantage and to the detriment of others.

Case Review 3- Misc. Application No. 240 of 2016¹⁴²

This case examines the constitutional and statutory considerations and the negative implications of bad procurement decisions on the economic, social welfare of the country.

5.3.0 Issues

This case raised the following issues.

1. Whether the Respondent's actions of purporting to enforce its earlier decision via a request for review by ordering financial evaluation and directly awarding the subject tender to a party who had failed the technical evaluation on account of lack of requisite experience among other failures was valid.
2. Whether its failure to take account of relevant factors in that Magic lacked the technical capacity to undertake the project in the subject tender was in accordance with provisions of the 2015 PPAD Act and its regulations.

5.3.1 Rule

It applied the rules in the Constitution Article 227, section 3 of the PPAD 2015, section 66(2) of the PPAD Act and 2006 PPAD Regulations 46, 47, 48, 49 & 50 .

5.3.2 Decision

The court decided that the Respondent's decision awarding the subject tender to the interested party be quashed.

5.3.3 Analysis

It based its decision on the breach of the Constitution¹⁴³ and section 3 of the PPAD Act, 2015. The Board ought not to have stepped into the shoes of the procuring entity and made a decision awarding the tender to the interested party without considering the bids of the other bidders. The primary duty of considering the bids in order to determine whether they are in accordance with the tender documents rests on the procuring entity and therefore

¹⁴² Republic v PPARB Ex parte Athi Water Services Board & 2 others [2017]

¹⁴³ Article 227.

where the entity has not made a decision thereon, the board cannot step in and make that decision.¹⁴⁴

Also, cost-effectiveness, for example, does not infer that the Procuring Entity must go for the lowest tender no matter the results of the evaluation of the bid.¹⁴⁵ Therefore apart from the lowest tender, the procuring entity is under an obligation to consider all other aspects of the tender as provided for in the tender document and where a bid does not comply with the conditions stipulated therein it would be unlawful for the procuring entity to award a tender simply on the basis that the tender is the lowest as held in the KRA case.¹⁴⁶

This case had some costs attributed to the decision as alluded to below.

The Constitution¹⁴⁷ which stipulates that procurement matters in Kenya must, as a matter of public policy, set to achieve the goals of competitive bidding which is also transparent and cost-effective. In other words, the taxpayer should get value for money and not be exposed to the more expensive tender. In this case, it was averred that the 1st Respondent chose to award the tender directly to Magic without subjecting its bid to competitive bidding. However, the Respondent Board could only proceed to award the Tender directly to Magic if its bid was successfully subjected to both technical and financial evaluation. Its implication is that if such a position was allowed, value for money, efficiency and quality would not be achieved and thus would defeat constitutional and statutory principles on procurement.

Regulation 47 requires the evaluation committee to conduct a preliminary evaluation of all bids and thereafter pursuant to regulation 48 the procuring entity is to reject those that are unresponsive. Regulation 49 further requires the evaluation committee to subject the preliminary successful bids to technical evaluation and the procuring entity would then reject those found unresponsive. Finally, the committee must conduct a financial evaluation

¹⁴⁴ Republic vs. PPARB & 2 Others ex-parte MIG International Ltd & Another [2016] eKLR.

¹⁴⁵ A position fortified by the case of Republic –vs. The Public Procurement and Administrative Review Board & 2 Others *ex parte* Akamai Creative Limited in which the Court held the view that other considerations other than the lowest evaluated tender ought to be taken into account.

¹⁴⁶ PPRB vs. KRA Misc. Civil Application No. 540 of 2008, [2008] eKLR which held that the decision of the procuring entity was not complete or done by just coming up with the mathematically lowest tenderer.

¹⁴⁷ Article 227.

of the bids to determine the lowest ranked bid in tandem with section 66(4) of the PP&DA 2005 which mandates the procuring entity to give the contract to the successful bidder with the lowest evaluated price. Contrasting the same with Section 86 of the PPAD 2015 on the criteria for award of tender in which several considerations are taken into account, it elicits a major loophole that procuring entities, tenderers, and the Review Board seek to exploit seeing as it uses the word any, inferring choice as opposed to taking into consideration all criteria.

The implication of this provision is that awarding a tender premised on this one consideration could be detrimental and is contrary to constitutional dictates. Many considerations need be taken into consideration and not just the lowest price so as to ensure value for money and quality of services.

The main benefit of this decision is that quasi-judicial tribunals and boards are now required to operate within the confines of the law and if they don't, the higher Courts have the power to check their powers if they are arbitrarily applied. This is the study's view will bring sanity in the procurement sector and ensure that statutory and constitutional principles on equality, justice, fairness, accountability, and transparency among others will be adhered to.

This ultimately will lead to effective implementation of the provisions of the recent PPAD 2015.

Case Review 4- Judicial Review No. 59 of 2017¹⁴⁸

This case extrapolates more on the unconstitutionality of sections 175(3) & (5) of the PPAD Act of 2015 being ouster clauses.

5.4.0 Issues

This case espoused the following issues revolving around the legality of sections 175(3) & (5) of the PPAD 2015.¹⁴⁹

1. Whether the Respondent's failure to release a copy of the Award within 21 days as mandated by section 171(1) of the PPAD Act 2015.
2. Whether the Respondent having identified ambiguities, vagueness or lack of specificity in the various areas of the technical evaluation of the tender, and knowing it lacked jurisdiction to amend the tender document or to impose its opinion of what may have been intended by the Applicant had the right to do so.
3. Whether the Respondent's decision was unreasonable and/or illegal requiring the Applicant to readmit a financial bid from the 1st Interested Party outside the period allowed submission of tenders contrary to section 77(3) of the PPAD Act 2015.
4. Whether the Respondent's actions of, after re-evaluating the 1st Interested Party's bid, despite its lack of jurisdiction, ordering the Applicant to re-open and re-evaluate the financial bids submitted by the bidders who had qualified to go to the financial evaluation contrary to Clause 24:2 of the Instructions to Tenderers.¹⁵⁰ Further, where a Tenderer fails at the Technical Evaluation stage, the financial bid remains unopened and will be returned unopened, section 67(1) similarly which prohibits disclosure of information relating to contents of tenders, evaluation, comparisons or information and Article 227 of the Constitution.

¹⁴⁸ Republic v PPARB Ex parte Kenya Ports Authority Limited & 2 others [2017] Eklr.

¹⁴⁹(3)Judicial Review in the High Court is to be determined within 45 days.

(5) If the superior courts fail to make a decision within 45 days then the Board's decision becomes binding.

¹⁵⁰Requiring that the financial bids in a two stage tendering process like the current one will be "kept securely unopened until the technical evaluation has been completed".

5. Whether Section 175(3) & (5) is unconstitutional being contrary to Articles 48 & 50 of the Constitution and additionally intruding on the judicial independence guaranteed by Article 160 of the Constitution.¹⁵¹

5.4.1 Rule

It relied on the rules under Section 171(1) of the PPAD Act 2015¹⁵², section 67(1)¹⁵³, 77(3) of the PPAD Act 2015 which prohibits the admission of any documents after the deadline for submissions of tenders, and Article 227 of the CoK 2010 on the principles of a sound procurement system.

5.4.2 Decision

The court quashed Board's decision dated 19th October 2016 in Review Application No. 81/2016 and the Applicant was ordered to start the tender process afresh.

5.4.3 Analysis

Its reasoning was informed by the contention that it is not in doubt that the Court's jurisdiction can be restricted or ousted by legislation. However, over time, certain principles have developed which guide the Courts in determining when the ouster clauses ought to be applied, supported by various decisions of the Court stating that the same has to be done with certainty and unequivocally.¹⁵⁴

¹⁵¹ The rationale being section 175(3) & (5) is an exact replica of the provisions of section 100(4) of the *Public Procurement and Disposals Act of 2005* (now repealed) save for substituting forty-five days in the 2015 Act with thirty days in the repealed Act. The High Court presided over by three different learned judges all found section 100(4) to be unconstitutional and in this regard, reference was made to *Republic vs. Public Procurement Administrative Review Board & Another ex parte Selex Sistemi Integrati [2008] eKLR*, *Republic vs. The PPARB ex parte Zhongman Petroleum & Natural Gas Group Company Limited [2010] Eklr* and *Republic vs. Public Procurement & Another Ex- Parte Hyosung Ebara Company Limited [2011] eKLR*.

¹⁵² The Review Board shall complete its review within twenty-one days after receiving the request for the review.

¹⁵³ Which advocates for non-disclosure of information that would prejudice others or the process during or after procurement proceedings.

¹⁵⁴ In which the court argued against interpreting law in a manner that would divest courts of law of jurisdiction too readily.

The Board exceeds its jurisdiction any time it finds ambiguities in a tender document but then decides to give an interpretation to that Tender Document and reference was made to *JGH Marine case*¹⁵⁵ amongst others.

The Respondent's decision violated Constitution which affirms the right of every person to administrative action that is efficient, lawful, reasonable and procedurally fair.¹⁵⁶

The Respondent's actions and delay in supplying all parties to the Review with a typed copy of its decision was illegal and contrary to the Fair Administrative Action Act, 2015¹⁵⁷, and section 58 of the Interpretation and General Provisions Act, CAP 2. The Respondent was in violation of the Constitution by failing to furnish the decisions for its decision expeditiously.¹⁵⁸

In ordering the Ex Parte Applicant to consider only the 1st Interested Party for financial evaluations, having re-evaluated its technical bid, the Respondent gave undue preferential treatment to the 1st Interested Party and effectively and unfairly locked out the 2nd Interested Party and all other bidders

In terms of costs, the right to access justice is a constitutional right and is well pronounced in **Joseph Nyamamba & 4 Others vs. Kenya Railways Corporation [2015] eKLR**. Constitutional rights shouldn't be fettered as ultimately it impacts negatively on parties.

The Board's action of favoring one party in lieu of the other by seeking to operate outside its statutory and constitutional limits by substituting the procuring entity's role with that of its own is somewhat likely to cause injustice by making the Board an all-powerful organ with unfettered jurisdiction. The same goes for the exploitation of ouster clauses targeting the Courts of Law.

¹⁵⁵ It was held the Board ought not to act outside its jurisdiction by stepping into the procuring entity's shoes.

¹⁵⁶ Article 47.

¹⁵⁷ Sections 4(2) and 6(1).

¹⁵⁸ The case of Nairobi Miscellaneous Application No. 116 of 2016 (Consolidated With Miscellaneous Application No. 119 of 2016) Coast Water Services Board & China Henan International Cooperation (Chico) Group Limited vs. The Public Procurement Administrative Review Board And Toddy Civil Engineering Company Limited & Sinohydro Tianjin Engineering Company Limited J/V Machiri Limited (Interested Parties) held that the unreasonably delay in furnishing proceedings and decisions to the parties amounts to unfair administrative action.

The umbrella benefit of this decision is the confinement of the Board in future to limits and confines of the law on procurement and prohibition from seeking to exceed its jurisdiction in respect to administration of its duties and obligations.

In light of the above, decisions rendered by the Board are to be delivered on time and furnished to the parties to give effect to the rights of the litigants to access the decisions on time in order to enable them chart their next cause of action.

Case Review 5- Miscellaneous Application No. 116 of 2016 (Consolidated With No. 119 of 2016)¹⁵⁹

This is a case premised on the applicability of both the 2005 and 2015 PPAD Acts, due to failure to transition from the old to the new act. In this case, the study unravels the predicament existing in interpretation of both the old and new Act.

5.5.0 Brief background

A brief background of this case shows that Coast Water Services Board as the procuring entity advertised and invited international competitive bids the supply and construction of Kakuyuni to Gongoni and Kilifi Pipeline works. The said tender was a wholly funded project by a subsidiary of the World Bank, the International Bank for Reconstruction and Development (IBDR) and the International Development Association (IDA) hereinafter referred to as the Donor.

According to the Procuring Entity, in evaluating the bids its Tender Evaluation Committee was guided by the Donor's (World Bank) Procurement Guidelines, the Bank's bid evaluation guidelines and tender evaluation criteria expressly contained in the Financing Agreement between the Applicant and the World Bank, the External Consultant's recommendations and evaluation criteria set out in bidding documents provided to all candidates. Further to the said bidding documents, the Entity required that all tenderers tender their bids in accordance with the Tender Bill of Quantities for the works.

After consideration of the bids from all parties, based on the Tender Evaluation Committee's recommendation, it awarded the tender to China Henan International Cooperation (CHICO) Group Limited

Later, the PPARB in nullifying the award of the Tender to CHICO and awarded it to Toddy using criteria not contained in the Entity's Bid Documents. The Board effectively conducted an evaluation based on criteria not set out in the tender documents and therefore

¹⁵⁹ Republic v Public Procurement Administrative Review Board & 2 others Ex-parte Coast Water Services Board & another [2016] eKLR.

breached the clear and mandatory provisions of section 80(2) of the PPAD Act of 2015 and section 66(2) of the repealed Act.

In finding that the Entity breached section 66(4) of the repealed Act, the Board acted in an arbitrary manner and contradicted its own earlier finding that once an Act is repealed it cease to exist completely.

Also, the Board acted contrary to section 3 of the PPAD Act No. 33 of 2015 and section 2 of the repealed Act, which require that the public procurement process treat all competitors equally, fairly and without discrimination.

It also was the Entity's contention that the Board was bound by provisions of the 2005 PPAD Act in making its considerations and determinations and arriving at its Award in the Request for Review. In support of its case, the Entity relied on Rule No. 1 of the Transitional Provisions in the 3rd Schedule of the PPAD Act of 2015 as read together with section 183 thereof.¹⁶⁰

The Board in response was of the opinion that it had considered several decided cases on the effect of the repeal of a statute and all the decisions were unanimous that once an Act of Parliament was repealed it ceases to exist completely unless the repealing Act provides otherwise.

5.5.1 Issues

This case raised the following issues.

1. Whether the Board had jurisdiction to deal with the matter.
2. Whether delay in furnishing proceedings and decision of the Board caused prejudice to the parties.
3. Whether the Board considered irrelevant facts or failed to consider relevant ones

¹⁶⁰ Procurement proceedings to continue being governed by the applicable law before commencement of the new act.

5.5.2 Rule

It decision was guided by the rules in Section 66(4) of the repealed 2005 PPAD Act and the Constitution Article 47 as read with section 6 of the Fair Administrative Action Act, 2015 on fair administration.

5.5.3 Decision

The Board's decision to award the tender to the Toddy was nullified and the Entity ordered should it still be willing to carry on with the subject Tender to commence the process re-evaluation of the tenders submitted afresh in accordance with the terms of the tender document and the relevant legal provisions.

5.5.4 Analysis

It's reasoning was guided by the contention that the Request was made out of time reliance was premised on the provisions of Regulation 73(2) of the *Public Procurement and Disposal Regulations* under the repealed Act which provides that a request for review shall be made within seven days of either the occurrence of breach complained of or notification of successful tenderer under sections 67 or 83 of the Act. However, the applicable provisions in respect of the instant proceedings was section 167(1) of the new 2015 Act which provides for 14 days instead of seven. As such the request was made within time and the objection on time failed in that respect.

On the question of jurisdiction and whether the Board was ousted by section 6(1) of the repealed Act, the court noted that in case there was a conflict between the repealed Act and the conditions imposed by the donor of funds, the conditions shall prevail with respect to a procurement process that uses those funds. However, it reached the conclusion that the Board's jurisdiction would only be ousted if the agreement expressly excluded the application of the repealed Act.

The court on delay by the Board to furnish its decision and proceedings on time was emphatic in its statement that efficiency in procurement processes not only demands

speedy determination of the disputes but also encompasses speedy and timely availability of the decisions to the parties so as to enable them decide on their next course of action and as such unreasonable delay in furnishing proceedings and decisions to the parties amounts to unfair administrative action.

On the issue of considering irrelevant matters, it was contended that the Board acted contrary to section 66(4) ¹⁶¹of the repealed PPAD in awarding the tender directly to the interested party who was not the lowest evaluated bidder by deliberately declining to cast its eye upon 2 other bidders whose financial bids were lower than that of Toddy. The court was of the reason that the Board ought not to have stepped into the shoes of the Procuring Entity and made a decision awarding the tender to the Toddy without considering the said bids by the bidders.

This case espoused few costs and for the avoidance of doubt, the new Act is in place and as such this effectively ousts provisions of the repealed Act. Transitioning to the new Act is the hall mark of a progressive society on the premises of better governance envisioned by the changes brought forth by the new Act.

Hence, the Board in rendering decision should have tried and transitioned effectively and smoothly from the old Act's provisions to the new all in a bid of ensuring effective implementation of the new PPAD 2015.

An effective public procurement policy ought to be formulated and effected to shed more light on loopholes presenting challenges in the implementation of the PPAD 2015 Act.

Judicial interpretation as well as construing of the law on public procurement by legal scholars be premised on a progressive cognitive trajectory of transition to avoid barriers that hinder full implementation of the new PPAD 2015 Act provisions.

The benefits that mainly feature in this decision is the light it shines on fair administration. Parties are now able to access justice with the increased time period from 7 days to 14 days within which to file a request for review.

¹⁶¹The tenderer with the lowest evaluated price is the successful tenderer. .

Additionally, it is safe to say in the interests of justice and fairness to litigants, the decision rendered herein speaks to favor speedy and efficient furnishing of the Board's decision to the litigants to enable them deliberate on their next cause of action.

Finally, the decision gives effect to the Wednesbury principle on reasonableness towards whom discretion is bestowed to decide matters in contention, in this case, the Board which is required to stick to relevant matters in contention and deviates from irrelevant considerations.

Case Review 6- Judicial Review No. 59 Of 2017¹⁶²

This Judgment extrapolates more on the principles of a sound procurement system envisioned by both constitutional and statutory provisions on transparency, accountability amongst others.

5.6.0 Brief background

A brief background of this case shows that on 15th March 2017, Kenya Ports Authority advertised in the print media, various tenders. The tender document did not contain the tender validity period subsequent to which all bidders of the 4 tenders were notified via letter that the tender validity period had been extended for a further 30 days.

Via a letter dated 1st September 2017 the 2nd Interested Party informed the Ex-Parte Applicant that its bid was not successful. The Ex-Parte Applicant being aggrieved by this decision filed a Request for Review which was disallowed. The Respondent stated that the 1st Interested Party was at liberty to proceed with the procurement process of the Tender to its logical conclusion.

The applicant hence filed this Application for Judicial Review, grounds being that the tender validity period in the Tender was not provided¹⁶³, the purported extension of the validity period of the Tender by the interested parties was null and void; that even if the purported extension was lawful, the same lapsed hence the award made by the interested parties after the purported extension had lapsed was null and void.

The Applicant premised his contention on Article 227 of the Constitution and stated that precision in the tender documents is what ought to have been informed by the principle of transparency envisaged by the particular provision of the law. He also sought reliance on Sections 87, 88¹⁶⁴ and 135 of the PPAD Act of 2015, which clearly provide for a tender validity period. Further, Articles 10, 47, 201 and 227 of the Constitution of Kenya, 2010 require officers, such as the Respondent, to act in an accountable and transparent manner

¹⁶² R v PPARB & 2 others ex-Parte Higawa Enterprises Limited [2017] eKLR.

¹⁶³ Section 17. 1 of the tender document provided that, "Tenders shall remain valid for the period specified in the Tender Data Sheet after the deadline for Tender Submission Specified in ITT Clause 21.A"

¹⁶⁴(i) The accounting officer has power to extend validity period.

so as to uphold the rule of law, transparency, accountability and good governance. As such the Respondent's decision directing the Interested Parties to proceed with the award made in respect of the Tender which lacked a validity period and/or whose validity period had lapsed contravened the above-named provisions.

The Interested Parties, on the other hand, contended that when the financial evaluation was carried out after the bids were opened the *Ex-parte* Applicant was found not have submitted the lowest evaluated financial bid. The Tender being a special tender targeting preference groups under the government policy was not subject to the mandatory requirement of providing a tender security.

Further, the extension notice by way of a letter was placed in the website which is allowed by Section 64 of the PPAD as a notice to all bidders hence onus of viewing said notice was on the Applicant.

5.6.1 Issues

This case raised the following issues.

1. Whether the Interested Parties awarded the Tender outside the tender validity period
2. Whether the *Ex-parte* Applicant is entitled to the judicial review order sought herein

5.6.2 Rule

The court relied on the rules in Sections 87(1), 88 (2) of the PPAD on the specification of the validity period of tenders, the Constitution of Kenya, 2010 which obliges state organs to act in an accountable, transparent and credible manner, and Section 120 of the Evidence Act and the doctrine of Estoppel.

5.6.3 Decision

The Court declared the awarded tender illegal hence null and void. A quashing Order was issued quashing the award made by the Interested Parties.

5.6.4 Analysis

The court reasoned out that on the question whether the tender was awarded outside the tender validity period, the Court is of the view that provisions of Section 88 of the PPAD permit the extension of the tender validity period but that extension must be made before the expiry of the already stipulated tender validity period. Extension presupposes a period specified.

The Court was emphatic that even assuming that the purported tender validity period was legal the same expired on 16th August 2017 which is 30 days from 16th July 2017 to which the Court relied on Section 87(1) of the PPAD.¹⁶⁵

As such, upon expiry of the tender validity period, there was no tender in existence capable of being awarded. It thus is very apparent and evident that the tender award having been done after the expiry of the extended tender validity period was illegal and therefore null and void. The tender validity period goes to the root of the award of the tender. This period is a critical factor in determining whether a tender is validly awarded or not. Failure by a procuring entity to state the tender validity period in any tender in the Court's view would render any award therein a nullity.

On the second issue of whether judicial review proceedings were in order, it is a settled principle according to the Court that judicial review order will be granted if the Applicant demonstrates the presence of the 3 “I’s of illegality, irrationality and procedural impropriety. Several authorities were quoted in support of this principle by the Court.¹⁶⁶

The Respondent in its decision was of the view that the tender validity period was indeterminate having not been specified then curiously went ahead to find that the tender was awarded outside the validity period. To this end, the Court was of the view that having found that the tender validity period was indeterminate, it was unreasonable and irrational for the Respondent to find that it cannot be said that the tender was awarded outside the tender validity period. Having awarded the Tender, 14 days after the expiry of the tender

¹⁶⁵The accounting officer should notify the successful tenderer of his acceptance in writing.

¹⁶⁶*Pastoli vs. Kabale District Local Government Council and Others* [2008] 2 EA 300 with the Court citing *Council of Civil Unions vs. Minister for the Civil Service* [1985] AC 2 and *An Application by Bukoba Gymkhana Club* [1963] EA 478 at 479.

validity period, is manifest illegality in the decision of the Interested Parties in awarding the tender and is contrary to express provisions of Section 87(1) of the PPAD. The Board in upholding the Interested Parties' illegal award also implicated itself on the illegality aspect to which the Court sought reliance on *Mistry Amar Singh vs Serwano Wofunira Kulubya* UCA No. 74 of 1960.

Finally, the Court was emphatic on the importance of accountability, transparency among other principles that underlie an effective procurement system and stated that Section 3 of the PPAD requires that entities be guided by the principles in Article 201 of the Constitution which demands openness and accountability in financial matters. Openness is an overarching concept that is characterized by an emphasis on transparency and free, unrestricted access to knowledge and information. Failure to provide the tender validity period in the contract negated the openness transparency and predictability contemplated in the Constitution and the Act.

The court upheld the spirit of a sound procurement system, one that's based on the pillars of accountability and transparency.¹⁶⁷

The outstanding negative element/costs, in this case, is the lack of respect for transparency and accountability in the procurement system. This more often than not results to loss of colossal amounts of money and/or litigation which tends to be a tedious process that involves time and resources that could otherwise be used for better ends.

Lack of transparency also is characterized by corruption and secrecy that ultimately denies relevant stakeholders requisite information and opportunity to make the right decisions. On the part of the institution holding back information, if encouraged, it would give the institution the power to do things casually as alluded to in the preceding paragraphs resulting to arbitrariness and corruption in the procurement process.

¹⁶⁷ Its statement which the study quotes verbatim, '*...the whole structure of the law relating to procurement is one that has put in place a mechanism of ensuring that there is accountability, transparency, and fairness so as to prevent corruption in the procurement process. However, the Respondent made a finding that the tender was indeterminate and could not be faulted on its validity. If such a decision was allowed to take root, it will give room for corruption in the procurement processes as the decision of the Respondent indicates that the procuring entities can undertake tendering processes in a casual manner. As such, this court needs to come up with a decision that will ensure the spirit of Articles 10 and 227 of the Constitution of Kenya, 2010 are given the full effect.*'

In terms of benefits, this particular Judgment shines a light on the pillars of a good procurement system, principles that institutions and other players in the procurement system ignore constantly albeit imperative, principles that accentuate a sound, vibrant and effective procurement system. The study need not state more other than what has been clearly exuded from the Judgment and that is adherence and upholding of *inter alia*, transparency, and accountability. This, in the long run, goes to the root of solving corruption in the Kenyan procurement system, a vice that is very prevalent in the country and which results to a waste of resources, energy and time which can be channeled towards more positive ventures.

Case Review 7- Judicial Review 201 of 2017¹⁶⁸

This case raises vital issues on the clashes between statutory and constitutional provisions and the lacuna in the law in respect to the void and silence of the law regarding the same. Section 175(3) of the PPAD has now and then been declared unconstitutional for going against constitutional provisions on a fair hearing. This case extrapolates more on the same.

5.7.0 Brief background

A background of this case shows that the ex parte applicant and 5 other bidders tendered for Kenya Ports Authority's Tender No. for Environment Management Services at its Manda Airstrip.

The subject tender was advertised on various dates in November 2016. Upon receiving the bids, the Procuring Entity Kenya Airports Authority carried out an evaluation of the tender upon which it found the applicant to be the successful bidder and subsequently notified the award of the tender to the ex parte applicant subsequent to which the ex parte applicant submitted the performance bond to the procuring entity within the requisite 30 days.

Unknown to the Applicant, the interested party had already loaded a review request before the Board. The ex-parte applicant alleges that it was never made a party to the request for Review and that neither was it notified of the hearing in good time to enable it to appear and defend itself. Instead, the ex-parte applicant received the notification of hearing after the scheduled hearing date and that is when it discovered that the Review Board had the hearing and a decision was made setting aside the award of the tender made to the applicant by the Procuring Entity.

The ex parte Applicant filed judicial review proceedings seeking Orders for Certiorari and Mandamus compelling the 2nd Respondent to finalize its contract.

¹⁶⁸ Peesam Limited vs PPARB & 2 Others [2018] Eklr.

The Application was opposed by the interested parties on the grounds that although the Judicial Review proceedings herein were filed in time as per provisions of Section 175(1) of the PPAD Act 2015, these proceedings had not been heard and disposed of within 45 days from the date of filing and hence by operation of law, the decision made by the Board regarding the subject matter was final and binding on all parties including the applicant.

5.7.1 Issues

This case raised the following issues.

1. Whether these proceedings are tenable for being determined past the 45 days stipulated in Section 175(3) of the PPAD Act.
2. Whether the applicant was indolent in approaching this court and whether he was condemned unheard by the Board.

5.7.2 Rule

It relied on the rules in Section 175(3) of the PPAD on timelines within which to approach the Court, Articles 47, 48, 50 & 227 of the Constitution on the fair administrative action, access to justice, fair trial and principles of a sound procurement system respectively and the Fair Administrative Action Act, 2015 Sections 8 and 11(h).

5.7.3 Decision

The administrative action made by the Review Board was set aside /quashed, and the Court remitted the request for review matter for reconsideration by the Review Board in accordance with the act and its regulations.

5.7.4 Analysis

The court reasoned out as follows.

On the 1st issue for determination, the Court was emphatic that section 175(3) of the Act is not superior to the Constitutional provisions of Articles 47 on the fair administrative action; Article 48 on access to justice and Article 50(1) on the right to a fair hearing. The

timelines the section imposes runs incongruently with timelines imposed under the Fair Administrative Action Act, 2015 in section 8.

The Court did not hesitate on referring to judgments¹⁶⁹ citing and relying heavily on the *Selesti Sistemi Integreti* case which emphasizes heavily against ouster provisions ousting the jurisdiction of Courts. Also, it did not hesitate to point out that in *Kleen Homes Security Services Ltd* case, Section 175(3) of the PPAD 2015 was declared unconstitutional. Further, the Court referred to a dictum by Lord Reid in *Anisminic vs Foreign Compensation* [1969] 1ALL ER 208 where he stated that jurisdiction of the Court should be emphasized.¹⁷⁰

The Court goes further to predicate its contention on Article 227(1) which guarantees a system that is fair, equitable, transparent, competitive and cost-effective. It therefore follows that in order to accord justice to all as guaranteed in Article 48 of the CoK 2010 and a fair hearing as stipulated in Article 50(1) of the CoK 2010, such cases, owing to their very nature should be given priority and heard and determined within reasonable period of time in view of the funds that may be tied up in the procurement process.

The Court pointed out that there was a conflict between Section 175(3) of the Act, and the Law Reform Act¹⁷¹ and Civil Procedure Rules¹⁷² seeing as the latter doesn't make stipulations on time limits for determination of Judicial Review public administrative decisions. On the other hand, the Fair Administrative Action Act 2015¹⁷³ stipulates the time limit to 90 days. It is the Court's view that the Public Procurement Administrative Review Board's decision is an administrative decision challengeable by Judicial Review under the Fair Administrative Action Act.

¹⁶⁹ Like JR 502 and 503 of 2016 R vs PPARB & another ex-parte *Kleen Homes Security Services Ltd*. It also sought reliance on *Smith vs East ELLOE Rural District Council* [1965] AC 736 where it was held that where a statute is framed in a manner that expressly ousts the jurisdiction of the court, such provisions should be construed strictly and narrowly.

¹⁷⁰ '...Where the provision tending to oust the court's jurisdiction is capable of two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court.'

¹⁷¹ Sections 8 and 9.

¹⁷² Order 53.

¹⁷³ Section 8.

According to the Law Reform Act and Civil Procedure Rules, leave must first be obtained to Commence Judicial Review proceedings, the ambiguity in Section 175(3) (5) is, when does time begin to run?

This in the Court's view renders it necessary to pose this question seeing as statutes and rules are silent, whereas under the Fair Administrative Action Act, 2015, this requirement is absent. As such the Court in upholding the unconstitutionality of section 175 of the PPAD held that it had no reason to depart from the decisions in Kleen Homes Security Services Ltd and Sistemi Integreti.

On the 2nd issue on whether the Applicant was indolent in approaching the Court, the Court emphatically stated that a tribunal or quasi-judicial body or authority has no inherent power. Its power must be derived from statute or Rules and that power is specific as stipulated in Section 173 of the PPAD Act, 2015 and the 2006 Regulations. The Board's negation and in conjunction with the interested parties omission to notify the Applicant of the proceedings was a true manifestation of their intention to oust the Applicant from the Hearing.

In accordance with Section 170 of the PPAD which sets out parties to review proceedings, the Applicant being a successful tenderer and having a major stake and vital interest in the outcome of the proceedings has every right to participate.

The Court was of the view that the said proceedings were illegal and irregular as they were conducted in total breach of the mandatory statutory provisions on a fair hearing, trial and access to justice as alluded to earlier.

On the issue on whether Mandamus, as sought by the Applicant, was a relevant remedy, the Court said that for such to be given, legitimate expectation¹⁷⁴ must be proved and in this case, it would be very unfair to compel the procuring entity to finalize the contract, while the aggrieved party may seek to set aside this judgment as well. As such the Court refrained from giving the mandamus order but went ahead to quash the Board's decision, and in invoking section 11(h) of the Fair Administrative Action Act, 2015 remitted the

¹⁷⁴Royal Media Services Limited & 2 Others vs. Attorney General & 8 others [2014] eKLR where it was held that legitimate expectation, however strong it may be, cannot prevail against express provisions of the Constitution.

request for review matter as filed by the interested party for reconsideration by the Review Board administrator, with directions that the exparte applicant herein be enjoined to the request for review by the interested party to fully participate in the said proceedings which shall be expedited and considered on priority basis and in line with the 2015 PPAD Act and its Regulations.

This case brings out one negative cost being that the right to fair hearing, access to justice and fair administrative action are important rights guaranteed by the Constitution and other statutory provisions. Any provision that seems contrary is unconstitutional. If the Courts were to give effect to section 175 of the 2015 PPAD Act, many litigants would be locked out and end up condemned unheard violating their constitutional rights. The whole essence of the Courts of law is to act as avenues through which litigants can ventilate their issues on a level panel and decisions rendered on a just, equal and fair basis premised on the rules of natural justice. It would be a sad day in this nation if litigants were denied this simple right.

This case also espouses several benefits and this judgment is very important seeing as it guards the jurisdiction of the court in upholding individual rights by declaring ouster clauses in statutes unconstitutional.

It informs the scholarly approach that indeed this lacuna in the law contributes to the clash between statutory and constitutional provisions. This is but one provision, as is seen in this study, many other provisions in the PPAD 2015 are wanting of constitutional fulfillment. This hinders effective implementation of the new Act. Indeed there is a need to amend the statute and align it to constitutional tenets of fairness and justice.

Case Review 8- Miscellaneous Civil Application 491 of 2016¹⁷⁵

This case is similar to case review number 7, where the Court engages itself on the constitutionality of section 175(3) of the PPAD 2015.

5.8.0 Brief background

A background of this case shows that in 2015 the applicant participated in the bid for the said tenders. However, an unsuccessful bidder filed an application for review in which the Board made a decision annulling and setting aside an award of tender made to Hoffman International and directed that the procuring entity award the tender to Tropical Technology Limited.

Aggrieved by the said decision the ex-parte applicant filed judicial review proceedings.

Later, Tropical Technology Limited, filed a notice of preliminary objection in which it raised the following points of objection:

- a. The present proceedings were time-barred by virtue of the provision of Section 175(1) of the Public Procurement and Asset Disposal Act and they ought to be struck out *ex debito justitiae* (as a matter of right).
- b. The issues raised therein were *Res Judicata* having been finally and fully determined by this court in its final judgment delivered.
- c. The letter of award had already been issued and accepted and the present proceedings were overtaken by events and futile and there is, therefore, nothing to stay.
- d. The issues raised in the motion, are, in any event, issues that can only be dealt with by the Board and not this honorable court.
- e. The proceedings offend the overriding objective principle of Litigation which dictates finality of litigation.

¹⁷⁵ R v PPARB & 4 others Ex-Parte J. Knieriem BV [2016] eKLR.

5.8.1 Issues

This case raised the following issues.

1. Whether these proceedings were filed in time?
2. Whether section 175(3) is subject to provisions of IGPA?

5.8.2 Rule

The court relied on the rules on the IGPA¹⁷⁶, and Section 175 of the PPAD 2015.

5.8.3 Decision

The Court held that the proceedings were well before the court and preliminary objections raised on *res judicata* raised are set aside and dismissed.

5.8.4 Analysis

The Court in its reasoning reckoned that in the interpretation of any written law, the applicable statute for the purposes of such interpretation is the IGPA, Cap 2. This must be so because statutes of general application such as the IGPA, Cap 2, apply across the board unless excluded.¹⁷⁷

The implication of the above provision is that unless this section is repealed expressly or by legal implication, the only legal instrument to which the Interpretation and General Provisions Act, Cap 2 does not apply is the Constitution. In this case, it is applicable to the PPAD Act of 2015 and more particularly section 57, applies to the timelines under PPAD 2015 and in particular section 175(1) thereof and hence the date of the decision is excluded from the reckoning of time and as such these proceedings were filed in time.

On the issue of *res judicata*, the court pronounced itself that parties are not to ignore its application by simply conjuring up parties or issues with a view to giving the case a

¹⁷⁶ Section 57(d).

¹⁷⁷ Section 2 of the Interpretation and General Provisions Act, Cap 2 provides that: ‘... *This Act shall not apply for the construction or interpretation of the Constitution, which is not a written law for the purposes of this Act.*’

different complexion from the one that was given to the former suit. In this case, it was clear the Applicant was not a party to previous proceedings.

The study associates itself completely with the costs and benefits in case review number 7 seeing as they revolve around the same issue on the clash between constitutional dictates on fairness alongside other statutory dictates on the same and section 175(3) of the PPAD 2015.

Case Review 9- JR Misc. Application No. 496 of 2017¹⁷⁸

In our society, tendering plays a vital role in the delivery of goods and services. Large sums of public money are poured into the process and public bodies wield massive public power when choosing to award a tender. It is for this reason that the Constitution obliges organs of the state to ensure that a procurement process is fair, equitable, transparent, competitive and cost-effective. Where the procurement process is shown not to be so, courts have the power to intervene.

This judgment demonstrates the failure of the PPAD 2015 Act to align to constitutional dictates on procurement matters.

5.9.0 Brief background

A background of this case shows that on 18th April 2017, the Energy Regulatory advertised and invited bids from tenders for the provision of marking and Monitoring of Petroleum Products in a local newspaper. It was confirmed that three tenderers passed the minimum technical requirement being SICPA Security Solutions S.A., Intertek Testing Services (East Africa) Limited and SGS Kenya Limited.

The applicant avers that the technical scores for each tender were not read out at the opening of the financial proposal as required and that the applicants' financial proposal was the lowest among the three tenderers. On 7th July 2017, the applicant was notified by e-mail that tender was terminated on grounds that the terms of reference did not include emergent technical requirements. The applicant argued that the said ground requires evidence or a technical report, that the said decision ought to have been exercised judicially through legal and valid grounds, and that the termination was undertaken in breach of section 63 (2) and (3) of the PPAD Act.

Aggrieved by the termination, the ex-parte Applicant moved to the PPARB where the Board dismissed his case. The applicant sought judicial review orders which were granted.

¹⁷⁸ Republic v Public Procurement Administrative Review Board & another Ex-Parte SGS Kenya Limited [2017] eKLR.

5.9.1 Issues

It raised the following issues.

1. Whether the impugned decision is tainted with illegality or was unreasonable?
2. Whether or not the applicant has demonstrated sufficient grounds to warrant this court to grant the judicial Review orders sought?

5.9.2 Rule

It relied on the Constitution of Kenya on constitutional principles of fairness, accountability, and transparency among others¹⁷⁹, Sections 3, 4 and 5 of the Fair Administrative Action Act on the fairness of the administrative procedure and Section 63 of the PPAD on termination of tenders.

5.9.3 Decision

The Court decided that Orders sought for prohibition, certiorari and mandamus be issued in favor of the Applicant.

5.9.4 Analysis

The Court in its reasoning and in rendering itself on Section 63¹⁸⁰ of the PPAD on termination of the award of tender, considered the aspect of substantial change of technology and relied on the case of Avante International Technology Inc. vs the Independent Electoral and Boundaries Commission.¹⁸¹

According to the Court, in the present circumstance, the document tendered in Court hardly shows that evidence was tendered by a technical committee or by persons who are technologically competent to demonstrate that there has indeed been such a technological change. As such the Court was skeptical of how then the Board reached its decision and was it reasonable? To this end the Court in making a decision that there must be clear and

¹⁷⁹ Article 10, 47 And 227.

¹⁸⁰A procuring entity's accounting officer can terminate a tender in the case of a substantial technological change.

¹⁸¹Where the Respondent stated that '...this reason requires evidence more particular a technical report by technical committee or by persons who are technically competent to demonstrate that there has indeed been such a technological change and what the nature of the technological change is.'

cogent evidence in support of the technological change, makes reference and associates itself with the words of Viscount Haldane observed in *Local Government Board v. Arlidge*, {1915} AC 120 (138) HL.¹⁸²

Fairness comprehends moral and value judgment that takes into account the equality of all interested parties to a case. As such in canceling the award of tender, it must have due and proper regard to the objectives sought to be achieved by the Act, and in particular, the proper construction of the ground invoked while canceling the tender and the need to support such a ground with cogent evidence. In this case, the same did not happen and the Court held the decision to be tainted with illegality, irrationality and/or unfairness.

Tender process and in particular, the termination, must be done in a transparent and accountable and legal manner as the law demands.

The study identifies the dictum by this Court on the importance of aligning statutory provisions and more specifically those of the PPAD 2015 to constitutional dictates.¹⁸³

As such the Court arrived at the conclusion that had the Board reflected the ideology quoted above, a better decision would have been arrived at. As such the decision satisfied all the three requirements (the three I's- Illegality, Irrationality, and Impropriety) and hence would be subject to judicial review in favor of the Applicant.

The costs of the Board's decision are more or less what the study has identified in the preceding case reviews and in the introduction of this particular case review and that is lots of monies are poured in procurement processes and if the principles envisioned by the Constitution and relevant statutes are not followed in the process of procuring then corruption is the resultant effect and the ultimate effect is that colossal amounts of money will get lost and end up unaccounted for. In short, the government won't get value for money.

¹⁸² Those whose duty it is to decide must act judicially. The decision must come to the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice.

¹⁸³ The scheme of the act is such that procurement process must strictly conform to the constitutional dictates in Article 227 of transparency, openness, accountability, fairness and generally the rule of law and such rights cannot be narrowly construed. And what is more, the public body terminating the tender bears the onus of establishing that the termination meets all these constitutional dictates.'

In terms of benefits, this decision gives effect and credence to respect and adherence to constitutional dictates of fairness, accountability, and transparency amongst others and tenets against which the procurement process should align itself to in order to achieve the objectives set forth in the PPAD 2015.

Case Review 10- Petition No. 170 of 2016¹⁸⁴

This petition challenges the constitutionality section 2 (o) of the PPAD 2015 on the grounds that it infringes on Pension scheme Funds of public entities rights to Property, Freedom of Equality and freedom of contract and that it contravenes Articles 19 (2), 40 & 27 of the constitution. The crux of the petitioners case is that pension scheme funds are basically contributions from savings/income of the individual members of the public and not from public funds, hence pension scheme funds are not public bodies within the meaning of the law and should not be classified as such, hence it is improper to subject such private entities to the provisions of the act, and also that it is inconsistent with the definition of a public office and a State Organ in Article 260 of the constitution hence the unconstitutionality of the above section which purports to classify them as public bodies.

5.10.0 Brief background

A background of this case shows that the petitioners aver that Pension Funds of Public Entities do not receive public funding from the government, hence it ought not to be ranked as a public entity or a state organ and that Pension Funds of Public entities are private property.

The first, second and third Respondent filed grounds of objection stating that the challenged legislation was in pursuit of the national values and principles of governance under article 10 of the constitution which is envisaged under section 32 (3) of the Retirement Benefits Authority Act and that management of funds contributed on behalf of the public ought to meet the requirements of the PPAD Act and further that by dint of section 3 (1) of the IGPA, the functions of public entities are public in nature, hence this brings them under the Act and that the petitioners have not demonstrated the alleged unconstitutionality of the said section.

¹⁸⁴ Association of Retirement Benefits Schemes v Attorney General & 3 others [2017] eKLR.

5.10.1 Issues

It raised the following issues.

1. Whether or not the petitioner is a public entity?
2. Whether or not section 2 (o) of the PPAD 2015 Act is unconstitutional?

5.10.2 Rule

The Court relied on the rules in Articles 2, 10, 159, 227 and 259 of the Constitution.

The Court decided that the petition failed and Respondents were ordered to bear costs.

5.10.3 Analysis

In its reasoning, the court associated itself with a number of dictas touching on the vitality of constitutional interpretation most notably, the case of *Hamdarddawa Khana vs Union of India* Air{1960} 554.

To this end, it sought reliance on the case of *International Airport Authority (R.D Shetty) vs. The International Airport Authority of Indian & Others* {1979} 1 S.C.R. 1042 where the Court set the test for determining whether an entity is a Government body or not.¹⁸⁵

Having found that the phrase "public entity" under article 227 should include statutory bodies, parastatals, bodies established by statute but managed and maintained privately such as universities and professional societies and any private bodies fulfilling key functions under state supervision, and having examined the need to give prominence to the principles, values and purposes of the constitution, the court held that it found nothing unconstitutional in the challenged section.

¹⁸⁵Consider whether any share capital of the corporation is held by the Government and if so that would indicate that the corporation is an instrumentality or agency of Government; Where the financial assistance of the State is so much as to meet almost the entire expenditure of the Corporation, that fact would afford some indication of the corporation being impregnated with Governmental character; It may also be relevant to consider whether the corporation enjoys monopoly status conferred by the State; Whether the body has deep and pervasive State control; Whether the functions of the corporation are of public importance and closely related to Governmental functions then that would be a relevant factor in classifying the corporation as an instrumentality or agency of Government and If a Department of a Government is transferred to a corporation then it becomes an instrumentality or agency of the Government.

Well, this case exudes more on the benefit than the cost side seeing as the Court has given an all-around master interpretation of the Constitution and its relevant provisions providing for public procurement. The study feels that the judgment is a conclusive approach to giving credence and life to the fundamentality of procurement processes in Kenya and a deterrence to those institutions who would seek to operate outside the ambit of set procurement guidelines according to procurement laws i.e. PPAD 2015 Act.

5.2 Conclusion

This chapter has unraveled challenges facing decision makers, hence this study adopts the analysis involving all the costs, benefits, conclusions and recommendations it has alluded to in each case towards improving the procurement system.

This chapter adopts the critical legal studies and realism school of thought ideologies inferring the need to prefer liberalism over formalism. Positive law is rigid and the only ideal that fits the context of this study is the need for procurement laws to conform to the basic norm being the Constitution in line with the pure theory of law by Hans Kelsen. Otherwise, this chapter demonstrates the need to move away from relying too much on positive law and instead embrace the law in action and allow judges to fill the gaps in the positive law.

6.0 CHAPTER 6

6.1 Comparative Analysis (Hong Kong)

Introduction

This chapter makes a comparison of Kenya's procurement system with Hong Kong's system the latter being more advanced and effective in a bid to benchmark the former to the latter and identify possible areas of improvement.

In the era of 1960-1970, Hong Kong was very corrupt and it was a way of life. However, this ended when the Independent Commission against Corruption (ICAC) was established which revolutionized the country and eradicated all forms of corruption.¹⁸⁶

The procurement process in Hong Kong¹⁸⁷ is similar to Kenya's and the mode of procurement preferred is the open and competitive tendering.

Unlike Kenya, transparency and non-discriminatory qualification criterion are very vital in the public procurement process and tenders here are awarded based on merit, qualification and eligibility and those that meet the relevant requirements of the tendered contract. In furtherance of this point, the tender sum and the date on which it was awarded is required to be published in the government gazette and the internet for purposes of informing all the unsuccessful applicants/suppliers of the identity of the successful bidder and reasons are given.¹⁸⁸ This is unheard of in Kenya.

Hong Kong was ranked number 15 out of 175 and had a score of 76 in the 2014 Transparency International Corruption Perceptions Index.¹⁸⁹ Its cases on malpractices in the public procurement are very few. Kenya is known to lead in high profile cases that involve

¹⁸⁶ Man-Wai, T.K, *Successful Anti-Corruption Strategy and International Good Practices*. (Resource Material Series No. 86).

¹⁸⁷ Procurement in Hong Kong is handled by the Stores and Procurement Regulations (SPR) that is issued as administrative regulations under the Public Finance Ordinance (PFO) that is further complemented by financial circulars.

¹⁸⁸ ADB/OECD, *Curbing Corruption in Public Procurement in Asia and the Pacific: Progress and Challenges in 25 Countries*. Manila (2006).

¹⁸⁹ Transparency International, *Corruption Perceptions Index*, (2013). <<http://www.transparency.org/cpi2013/results>> Accessed 30 December 2016.

shady procurement deals that end up enriching individuals at the society's majority expense. A good example is the NYS scandal, IEBC BVR kits, just to mention a few.

These are instances where corruption was at the forefront in the awarding of the tenders based on how well you knew the procuring entities.

In the fight on corruption, Hong Kong employs various factors:

6.1.0 Enforcement-led approach

It is characterized by agencies tasked with ensuring eradication of corruption by the state lead the enforcement of the laws curbing corruption by enhancing the education and awareness of these laws and policies.

In as much as education and training forums are organized for the procurement officers in Kenya, they continue with their under-table dealings.

6.1.1 Presence of an effective deterrence strategy

It includes an efficient, impartial and judicious public complaint system for the reporting of the corrupt officials, a quick response to such complaints lodged, effective confidentiality system and protection of informants and witnesses.¹⁹⁰

The Hong Kong also through its administrative body ICAC lean towards zero tolerance on corruption and any entity that is involved in corruption, or any individual, this will be investigated immediately irrespective of its gravity.¹⁹¹

Also for purposes of accountability, the above will be publicized in the media to deter others who would want to engage in similar situations.

The situation in Kenya is contrary to this. Stories involving high profile individuals will never get to the media as they are suppressed. The whole procurement process is shrouded in secrecy.

¹⁹⁰ Ethics and Anti-Corruption Commission, 'An Evaluation of Corruption in Public Procurement: A Kenyan Experience' (February 2015)31-38.

¹⁹¹ Ibid.

6.1.2 Mechanism of review

ICAC which is an independent body is clothed with wide powers that range from reviewing to investigation of corruption to avoid abuse of power by public officials.¹⁹²

In Kenya, the bodies tasked with investigating corruption are prone to interference and compromise evidenced by the non-prosecution of key figures in procurement scandals.

6.1.3 Equality on public and private sector corruption

In Hong Kong, no distinction exists between corruption in the private and public sphere. All are held to be the same and are dealt with accordingly.

This study reiterates, in Kenya people focus so much on the public sphere involving huge scandals that lose millions of money, but they don't give thought to small corrupt procurement scandals. This study argues that any loss of money whether huge or small is detrimental and constraints the citizens in their capacity as taxpayers.

If equal emphasis were to be placed on both spheres then we would save a lot of money lost.

6.1.4 An enabling environment that takes into account good political will

Hong Kong's political system is strong-willed against the fight on corruption and its political leaders are at the forefront in this fight.

They respect the independence of ICAC as a body tasked with the fight against corruption.

Kenya is the complete opposite with interference from the executive arms of the government in investigations against corruption especially those involving itself. The politicians form fake companies in order to get tenders from the government then covering it up. See for instance the NYS scandal 1& 2 where charges are yet to be leveled on the chief engineers who orchestrated the scandals.

6.1.5 An effective legal framework

¹⁹² Ibid.

Cases on procurement in Hong Kong are prosecuted by a specific team of prosecutors whose characters are based on impartiality and integrity. The Judiciary there is a strong institution and completely independent of the influence of other arms of the government and it is the backbone of corruption fighting given the high level of professionalism and integrity observed by the judges.¹⁹³

Kenya is the complete opposite with the judges being corrupt. Recently a Supreme Court judge was on the row for allegedly accepting a two hundred million bribe to rule in favor of a certain party in an election matter. That is just but one case. A lot of judges have been laid down due to corruption in their capacity as adjudicators by accepting bribes, gifts, and incentives to influence the outcome of their decisions. This ultimately impacts on the quality of judgments and the negative impacts of bias.

6.2 Conclusion

What stands out from this comparative analysis is that the two nations, Hong Kong and Kenya are very distinct in terms of discipline as regards procurement activities and fight against vices.

Hong Kong is actively involved in the fight against corruption and any entity caught in the act is immediately sanctioned irrespective of its status in the society. The situation is quite different here in Kenya. Corruption is at the forefront and taking into consideration the magnitude of corruption scandals involving procurement agencies in Kenya, it is fair to say that we have negated the core pillars that hold a successful procurement process intact. That is transparency and accountability.

This study favored Hong Kong because their system and legal framework is so organized and comprehensive coupled with an effective and enabling political environment that makes it easy and possible for procurement to run smoothly.

¹⁹³ Ibid.

Kenya needs to learn from this and adopt Hong Kong's approach and in doing the same strengthen its own and ensure adherence to and respect to the procurement principles identified in the preceding chapters.

7.0 CHAPTER 7

7.1 Findings, Conclusion and Recommendations

7.1.1 Key Findings

This study has five primary findings.

1. The first finding is that the PPAD Act of 2015 fails to conform to the letter and the spirit of the Constitution of Kenya 2010.
2. The second finding is, the absence of up-to date Regulations to supplement the Act, with the 2006 Public Procurement Disposal Regulations still being in force.
3. The third finding is the weakness and lack of independently resourced institutions tasked with implementing procurement laws and the overlap of functions and duties between them thereby creating uncertainty.
4. The fourth finding is that there is a strong interplay between ethical and legal issues. Ethical challenges have played a big role in the proliferation of scandals in the country. They include disrespect for the rule of law, corruption, culture of impunity and political patronage.
5. The final finding is that the presence of these challenges is what has resulted in loopholes that the relevant actors in the procurement process have sought to exploit leading to non-adherence to procurement laws, policies and procedures and ultimately, the proliferation of procurement scandals in the country.

This study has demonstrated these key findings by conducting a historical analysis of the procurement system in Kenya, an examination of the PPAD 2015 Act and the 2006 Regulations in light of the CoK 2010, conducting a case review of select judgments on procurement, and examining Hong Kong's procurement system and comparing it to Kenya's procurement system.

This part therefore gives an explanation of the key findings itemized above under the following constitutional and statutory principles heads.

7.1.1.0 Maximizing economy and efficiency in procurement

These two constitutional principles demand that the end result of a rational man's calculation should result to transactions that maximize economy and efficiency in

procurement rather than the opposite and transactions that result to the well-being of the public as opposed to select few individuals.

Maximizing economy and efficiency in procurement are policy objectives set out in the Act and postulates upon which a successful procurement system should be active in pursuit of. The quest to do so, however, has presented some challenges as alluded to earlier.

It is illustrated by the lack of a regional presence for the PPARB to cater for the rising proliferation of procurement scandals all over the country.

Also, with the requirement to embrace ICT services in procurement, the failure to avail procurement tender documents in the PPOA website for free and easy download and inducing a fee to access them goes against the spirit of efficiency.

Finally, replication of the intent of the former act in the current one in regards to considerations for a tender to be considered successful (lowest evaluated tender) is contrary to maximizing economy and efficiency.

7.1.1.1 Transparency, Accountability, and Public participation

Institutions owe a duty of transparency and disclosure on its practices to its stakeholders and the public mostly so as justify its existence within the precincts of society. They form a contract with the society to abide by its norms and values and any deviation from this social contract makes the presence of such institutions not legitimate.

These principles are key to satisfying Constitution principles¹⁹⁴ alongside other legal and ethical postulates. However, the PPAD 2015 Act falls short of upholding these principles in the following manner.

One, it retains the same sanctions in the previous Act's section 137 in its current's section 176 regarding natural persons and artificial ones with the fines being set at 4 million for the former and 10 million for the latter. Given the inflation of the economy and the nature of losses occurring in the procurement arena running to billions of shillings, this provision

¹⁹⁴ The right to information in article 35.

does not subject corrupt officials to full accountability. What logic is there stealing billions and being fined 10 million?

Two, on Debarment, the period of debarment has been lessened from five years to three years in the current Act instead of the vice versa thereby encouraging corrupt persons to risk engaging in unbecoming conduct. Further, the state portal is not up to date and only lists several firms which have been debarred. This is contrary to transparency and disclosure provisions envisaged under Article 227 of the CoK.

Three, though the Act identifies in Section 3 public participation as a satisfier of transparency and accountability and gives people in section 170(d) other than tenderers the right to participate in procurement proceedings, contrasting the same with judicial review provisions in the Civil Procedure Rules the same is not achievable.

Four, it fails to achieve transparency by seeking to subject defense and national security organs procurement to restricted tendering outside the purview of transparency, disclosure and accountability provisions. See Article 232 of the CoK and Section 9(d) of the PPAD Act.

The Government of Kenya which as we speak is on the verge of awarding a restricted tender worth 3 billion shillings for the creation of a national population register and labeled as top-secret. It flouts the letter and spirit of public participation that ultimately results to non-accountability of the state officials.

Finally, the embracing of ICT services is key to enhancing fairness, equitability, transparency, and accountability. However, the provisions of section 64 speak otherwise by using the word 'May' inferring that no one is obligated to use ICT services in dissemination of procurement information. It is worth noting that the 2006 Regulations also do not provide for use of ICT services.

7.1.1.2 Integrity & public confidence in the procurement process

The ideals of realism demand that we allow judges to employ reason and intuition in the interpretation and implementation of law. The rigidity of positive law results to indeterminacy. In order to avoid this, realists favor the embracing of law in action as opposed to law as is in the books. Jerome Frank eschews positivism for the uncertainty it creates. He uses the father-son analogy in showing the need for certainty in law so as to elicit confidence and trust.

The whole gist behind a procurement system having integrity in its operations is so as to instill confidence to the public that indeed it can be trusted and it is transparent. Integrity borders along both ethical and legal considerations. There is a strong interplay between ethics and law. Disregard of the laws by procurement officials evidenced by recent scandals involving cartels backed by rogue state procurement officials' exhibits unethical conduct. For instance, the unethical and illegal methods used to fleece billions of public funds are inflation of contract sums, tampering with tender documents, using unauthorized junior officers to conceal their identities and tailor-made tenders suiting their specifications.¹⁹⁵ See the National Irrigation Board scandal¹⁹⁶, the KPLC scandal¹⁹⁷, the Kenyatta National Hospital Scandal¹⁹⁸ and the Ministry of Agriculture scandal¹⁹⁹ amongst many others. This has eroded public confidence in Kenya's procurement system.

¹⁹⁵ Paul Ogemba, 'Tricks state officers & cartels use to loot billions in the name of tenders' (The Standard, 3rd August 2018).

¹⁹⁶ Where it over inflated tender amount to Kshs.29.8 billion from the correct estimated Kshs.17 billion regarding construction of the Lowaat Dam Project. The PPARB shockingly discovered that the National Irrigation Board was involved in irregularities to wit inflation and faking figures of the lowest bidder so as to conceal the fraud.

¹⁹⁷ Where KPLC awarded a Kshs. 2 billion tender to a Chinese company and extended period for submissions of tender bids illegally in a bid to accommodate the Chinese company despite the fact that the firm had no capacity to deliver. Also in another recent scandal where KPLC awarded Kshs. 6 billion tender to a Chinese company after tailor-making its specifications for supply of single-phase pre-payment meters to suit the Chinese

¹⁹⁸ In the award of tender to Phillips East Africa Ltd for installation of MRI machines worth 419 million shillings yet due process wasn't followed.

¹⁹⁹ Where the ministry was found guilty of awarding Kshs. 186 million tender of supplying milk cooling tanks by changing the contract terms at the last minute to favor the then successful bidder. This it did by introducing a late requirement being proof of workshop which was absent in the contractual documents.

In regards to the law, certain provisions especially those regarding the requirement of provision of a deposit or security fee so as to access review proceedings, flout provisions of fairness, non-discrimination, fair trial and impedes access to justice.

Also, the provisions on the limitation of time to access judicial review proceedings in the High Court flout the spirit of other laws to wit the Law Reform Act, the Fair Administrative Action Act and the CoK 2010. This illustrates the need to abandon formalism depicted in positivism jurisprudence and instead embracing the law in action that can only be achieved by having recourse to judge made law and interpretation.

7.1.1.3 Promotion of equality & nondiscrimination, affirmative action, local industry & competition, Policy integration & harmonization of PPAD with other laws, and money-cost effectiveness & sustainable development

The realism school of thought advocates for embracing of the law in action and moving away from the rigidity and indeterminate nature of positive law. The law in action will take into account the changing times and incorporate changes in the regulated system by judges as they interpret law.

It is evident that the 2006 regulations are still in force and worse still make reference to the 2005 PPAD. These are outdated laws. The dynamic nature of procurement and intricacies involved within its workings demand that the law constantly change to envisage the changing dynamics. Despite the promulgation of the 2010 Constitution bringing forth change, some provisions in the PPAD 2015 offend constitutional provisions.

This is illustrated by the absence of a recent procurement policy other than the 2009 outdated one, discordance between provisions within the Act in respect to preferences and reservations as alluded to earlier; overlap of duties of the PPRA and the Treasury in respect to the same, incongruent provisions between the Act and those of relevant cross-cutting laws (State Corporations Act & Quantity Surveyors Act) and between the Act and International laws in respect to policy objectives.

Institutional weaknesses

This study also established and linked the weaknesses of the institutional framework to the failure of implementation of the PPAD 2015. These institutions are tasked with the implementation of the law in the procurement sector. An analysis of the Act points towards an inordinately powerful national treasury and accounting officer characterized by centralization of power in few individuals who often misuse this post.

These institutions include:

7.1.1.4 The Judiciary

It's the institution that adjudicates cases before it in Kenya. The 2015 PPAD Act in section 39 provides for an avenue through which parties may seek judicial reviews orders in the High Court within 14 days.

This appeal process as the study states above is a bit technical and there is no higher court specifically created to hear procurement cases like the way environment and land matters have their courts. This would really ensure efficient adjudication of the procurement scandals that are happening in Kenya currently.

Corruption in the judiciary is another major setback with judges corrupting their morals and impinging on their integrity by accepting bribes and incentives to influence the outcomes of cases. This they do by delaying judgments or even ruling based on bias. See for instance the case of *NHIF VS MERIDIAN (2013)* where the DPP's website showed at the time delay was occasioned by judicial review application and the absence of the honorable justice.²⁰⁰

High profile cases before the judiciary always end up scaling back allegedly due to lack of sufficient evidence which according to this study's view are as a result of corrupt practices involving arm twisting, bribery and intimidation of the judicial officers.²⁰¹

²⁰⁰ NHIF vs MERIDIAN ACC 12/2013 Petition Application No. 363/2014; a conspiracy to defraud NHIF Kshs.126 million by entering into a contract to provide a medical scheme to civil servants involving Richard Langat & 5 Others.

²⁰¹ See High Court Misc. Application No. 264 of 2001. See also Anti-Corruption Case no. 8 of 2005 terminating the Anglo-Leasing and Finance Limited related cases.

An impartial judiciary is what Kenya lacks and despite its independence, it still is characterized by influence from the others arms of the government.

7.1.1.5 The Public Procurement Regulatory Authority

This authority was established to be the main mouthpiece of the procurement sector however it is hardly operational in handling procurement related cases. It is not independent of it being under the ministry of the finance department.

It is tasked with policy formulation and oversight duties but these are overridden by the ministry under which it is located and its decisions are influenced by the cabinet secretary to that ministry and his team.

The issue of underfunding of the PPRA is another challenge making it impossible to effectively carry out its duties which demand a lot of manpower and resources to do so. With devolution in place, it is expected to handle 47 counties. How then will it implement the new law effectively if it is under-stocked and underfunded? It is difficult to do so.

7.1.1.6 The PPARB

Its main challenge is the overwhelming number of cases brought before it relating to procurement. With the inadequate staff required to sit on a part-time basis, it becomes almost impossible to enhance expediency in rendering decisions.

7.1.1.7 The EACC

The commission is established in the constitution of Kenya 2010²⁰² and operationalised by the Anti-Corruption and Economic Crimes Act 2003.²⁰³ However, cases reported and taken up by this commission end up not being prosecuted fully²⁰⁴ in line with 2015 PPAD Act and the constitution of Kenya. The propagators of high profile procurement scandals like

²⁰² Article 79 states, 'Parliament shall enact legislation to establish an independent ethics and anti-corruption commission, which shall be and have the status and powers of a commission under Chapter 15, for purposes of ensuring compliance with, and enforcement of, the provisions of Chapter 6 on Leadership and Integrity.'

²⁰³ Enacted for purposes of prevention, investigation, and punishment of corruption, economic crime, and related offenses.

²⁰⁴ KACC Corruption Perception Report of 2009 which indicated that the Attorney General had declined to prosecute the majority of the cases forwarded to him citing lack of evidence contrary to the position taken by the Commission.

NYS, Golden Berg and Anglo Leasing just to mention a few have never been charged by the EACC leave alone seen the inside of a court room. Blame shifts from the judiciary, to the prosecution department under the DPP to the Anti-Corruption Courts which have failed in the delivery of justice and implementation of the provisions of public procurement Acts and Regulations partly due to corruption in the sector as well.²⁰⁵

Interference with its mandate in the investigation of corruption cases also hampers its delivery as in the case of Mumo Matemo and Ms. Keino. EACC officials are never allowed to work freely evidenced by the leaving of office due to allegations leveled against them based on the nature of the high profile cases they listen to. They are removed unceremoniously. See John Harun Mwau, Ringera, Lumumba and Matemo. This is a pattern of interference with the operations of the commission in their fight against corruption. It results in an ineffective system to eradicate procurement related corrupt practices and implementing the laws in place.

²⁰⁵ The Republic of Kenya, in the Matter of Article 251 of the Constitution of Kenya and in the Matter of National Assembly Standing Order No. 230, Petition for Removal of Mumo Matemu and Irene Keino as Chairperson and Member Respectively of the Ethics and Anti-Corruption Commission (EACC), Petition No. 07 of 2015.

7.1.2 Conclusion

This study in the beginning set out to attempt to discover why procurement scandals involving huge losses of money continue to persist despite the enactment of elaborate legislative and institutional framework governing public procurement in Kenya?

As such, it examined the hypothesis that despite the presence of an elaborate legal order in the field of public procurement coupled with the support of the 2010 Constitution of Kenya, nevertheless the sector continues to face numerous challenges which can be attributed to ethical and legal shortcomings.

This is because despite the fact that the Constitution of Kenya 2010 sought to reform the public finance and governance structures in the country, nevertheless the procurement law contradicts the letter and spirit of the 2010 Constitution.

This study demonstrated this by conducting a historical analysis of the procurement system in Kenya, an examination of the PPAD 2015 Act and the 2006 Regulations in light of the CoK 2010, conducting a case review of select judgments on procurement, examining Hong Kong's procurement system and comparing it to Kenya's procurement system and conducting of oral interviews on select scholars and state procurement officials.

This study relied on two theories being legal realism and positivist jurisprudence.

Realism helped this study appreciate that there is more to law than as is in the books and laws need to be certain in order to be valid and effective, and they can only be effective if they derive from a combination of abstract rules, societal interests and public policy considerations, which are better expressed through judicial pronouncements rather than the will of the legislature alone. As such the law in action clearly helps us navigate through challenges presented by gaps in the law occasioned by uncertain, inadequate and ambiguous positive laws.

Positivism in particular Hans Kelsen pure theory of law helped this study understand that for a law to acquire validity, it has to conform to the grund norm. For the PPAD 2015 to acquire validity and elicit public confidence it ought to conform to the Constitution which is the grund norm.

This study came to the conclusion that we cannot solve problems with the same thinking we used while creating them. As such, following positive static procurement laws and regulations will only lead us to remaining static. However, interpreting these laws in light of constitutional provisions on one hand while taking into account dynamic societal changes and its needs and public policy considerations in pursuit of socio-economic and political goals on the other will help in the effective implementation of laws and create stronger institutions of true accountability and transparency to effectively minimize these scandals.

7.1.3 Recommendations

The basis of the proposals for reform is to address the relentless occurrence of procurement scandals in Kenya with the rising concerns by the majority of Kenyans and international players on the implications of these scandals to the country's growth and development. There is a Law in place and what it lacks is the conformation to constitutional dictates.

The summary findings of this study as such suggest several courses of action for the challenges facing the implementation of the PPAD 2015 to ensure the implementation process is smothered out and is actualized. These are:

7.1.3.0 Strengthen institutions

Institutions²⁰⁶ should be strengthened and well-funded to boost their capacity to professionally manage the sector. Principles of good governance like transparency and accountability albeit imperative are not enough to guarantee full implementation, the autonomy and independence of such institutions should be enhanced as well and allowed to operate without any political interference.²⁰⁷

7.1.3.1 Harmonize the law in books with the law in action

The relevant actors should ensure that the letter and the spirit of the Law are maintained at all times. The law in action should reflect that in the books. Loopholes and discrepancies in the laws governing procurement in Kenya that have been identified in the case review chapter and which parties exploit to suit their own interests should be cured and aligned to constitutional provisions. Much emphasis should be placed on embracing of judge made law as opposed to positive law which is rigid and does not envisage all situations in the procurement process.

²⁰⁶EACC, PPOA, DPP, the Courts of law, and the Public Procurement Administrative Review Board (PPARB).

²⁰⁷ Kimani Njuguna Humphrey, Justice Prof. James Otieno and Dr. Attiya Waris, (n 132).

7.1.3.2 Sanction offenders

The government should place emphasis on sanctioning public officials who do not respect the law and constantly engage in irregular and corrupt activities during the procurement process to ensure a free, just and fair tender process. Heavy penalties should be introduced since the magnitude of procurement scandals is equally colossal and parallel to funds misappropriated.

7.1.3.3 Vet suppliers and public officials, blacklist and punish those who don't adhere to the law

The government and procuring entities, in general, should carry out thorough vetting of the suppliers, blacklist them and institute criminal proceedings for those who flout the provisions of the law on public procurement. Suppliers who are paid and do not deliver the goods or deliver low-quality goods and other malpractices should be punished.

In light of those public officers known to own companies directly or through a proxy that win tenders from the government should be punished accordingly as this is not the promotion of healthy competition as many eligible Kenyans end up being locked out of the tendering process yet they are qualified for the awards.

Consequently, those suppliers who are known to bribe public procurement officials so as to win tenders should be blacklisted. This ultimately avoids loss of taxpayers' money and ensures quality goods, works and services are delivered and the impartiality, fairness, and equality of the process are upheld.

Vetting should also be done on procurement officers. Corruption always leads to the government losing millions of shillings to scrupulous officials who tender amounts to their companies at the highest cost, disregarding the principle of value for money. Public entities and their officials should maintain a high level of integrity and professionalism in their carrying out of duties. Those found to be engaging in unprofessional conducts should be prosecuted.²⁰⁸

²⁰⁸ Ibid.

7.1.3.4 Revamp Market research

Public procurement entities should undertake market research to establish the prevailing market price of goods/services that they intend to procure. This should be undertaken by the PPRA to come up with guidelines and undertake market research. This should be done on a regular basis and the prices estimated should be realistic and based on up-to-date information on prevailing economic and market conditions.²⁰⁹

7.1.3.5 Borrow best practices from other countries²¹⁰

Some of the successful countries in the procurement sector like Hong Kong which the study earlier alluded to are based on the operation of a comprehensive legal, policy and institutional framework that is fully implemented.

These practices are what Kenya should aim to integrate into our public procurement system to fight against corruption and ensure effective implementation of the new PPAD 2015 law.

7.1.3.6 Promote competition in the open tendering process

Open tendering is the preferred method of tendering in Kenya and as such healthy competition in the process should be implemented in line with provisions of the PPAD 2015. This should be done by publicizing tenders and inviting all qualified suppliers to bid in an open, impartial and fair process.

7.1.3.7 Embrace technology (e-procurement)

'... locking itself into one set of technologies is bad procurement policy' -Tom Schatz. ²¹¹

The e-procurement system is more authentic, precise, accurate and confidential and it's difficult to rig tenders online. The manual system is prone to vandalism and tampering by

²⁰⁹ Ethics and Anti-Corruption Commission, 'An Evaluation of Corruption in Public Procurement: A Kenyan Experience' (February 2015)98.

²¹⁰ Ibid 94.

²¹¹Vroozzi, 'Great Quotes for Procurement Professionals' <<https://www.vroozzi.com/2013/08/30/11-great-quotes-for-procurement-professionals/>> Accessed 30 December 2016.

scrupulous individuals who serve their selfish interests at the expense of the majority of the citizens.

We are living in a world where technology is embedded in virtually everything. For purposes of accessibility for most who are not able to travel to Nairobi to access tenders, and also getting results, technology in the procurement sector is the way to go.

This should be in line with the recent executive order No. 2 issued by the president which requires entities²¹² to publish all awarded contracts starting from 1st of July 2018.²¹³ As per the Order, all public entities are expected to publish details in full of all contracts awarded by them through various means.²¹⁴ This ultimately enhances transparency and accountability in the public sector bringing an end to the opacity that characterizes procurement processes in Kenya.

7.1.3.8 Adhere to ethics and morals

Ethics concern morals, as such in this study's context refers to what is morally right.²¹⁵ The acts of public officials towards suppliers and vice versa determine the viability of the procurement process and its success.

Ethical behavior includes avoiding conflicts of interest and avoiding improper use of an individual's position in his capacity as a procurement stakeholder. Ethics and morals are what underpin an individual's or an entity's willingness to obey and implement the law.

Kenneth Lyson (2006) alludes to the main principles of procurement ethics characterized by accountability, responsiveness, professionalism, transparency, open competition, confidentiality, non-discrimination and fair play²¹⁶.

²¹² Comprising of ministries, departments, counties, and state corporations.

²¹³ The presidency official website 'Government issues directive on awarded contracts,' (2018) <http://www.president.go.ke/2018/07/02/government-issues-guidelines-on-the-publication-of-awarded-contracts/>> Accessed 9 July 2018.

²¹⁴ To wit, e-citizen portals, websites, PPOA website, public notice boards and/or any other official government publications.

²¹⁵ John Karanja Ngugi and Hildah W. Mugo, 'Internal Factors Affecting Procurement Process Of Supplies In The Public Sector; A Survey Of Kenya Government Ministries'

²¹⁶ Kenneth Lyson, *Purchasing and Supply Chain Management*(2006).see: ZogoNdomo Emmanuel, 'Ethics and Procurement In Management System' (2015). <<https://www.linkedin.com/pulse/ethics-procurement-management-system-zogo-ndomo-yannick-emmanuel>> Accessed 30 December 2016.

7.1.3.9 Embrace legal realism approach taking into account societal changes and political factors influencing the law

'... [W]e cannot solve our problems with the same thinking we used when we created them.' Albert Einstein²¹⁷.

This quote resonates with the Kenyan situation and clearly provides the solution to the problems envisaged since the colonial times up to now where patron-client relationships have been passed from the colonials to the African elite and institutionalized in our current system.²¹⁸ This study argues that the procurement system needs a paradigm shift from formalism towards embracing dynamic societal changes and its needs thereof, and the law in action guided by the role of the judge in social engineering and pioneering solutions where none exists.

The effective implementation of the public procurement law, the constitution and other relevant cross-cutting laws is what will transform the procurement sector into a more robust, impartial and effective system. All the recommendations this study has alluded to above are just but a fraction of what needs to be done. A further study delving deeper into this quagmire is almost inevitable to unearth the underlying intricacies and provide insight for future research on the ever dynamic nature of public procurement in Kenya.

²¹⁷Kerry C. Murray, '7 Inspirational Quotes to get you through your Procurement Woes' (2015) <<https://www.sciquest.com/blog/7-inspirational-quotes-get-you-through-your-procurement-woes>> Accessed 30 02December 2016.

²¹⁸ Adrian Leftwich, "Theorizing the state" in *Politics in the Developing World*, Peter Burnell & Vicky Randall (eds) Oxford University Press, Oxford. (Cf. Prof Vincent Simiyu – democracy in African history (2005).

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