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AND INVESTMENTS LAW**

**REVIEW OF THE POLICY, LEGAL AND INSTITUTIONAL FRAMEWORK OF
PUBLIC-PRIVATE PARTNERSHIPS (PPPs) IN KENYA**

BY

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2018

DECLARATION

I, **EVANS KIPLIMO LAGAT**, do hereby declare this thesis to be my original work and that it has not been submitted elsewhere or is not due for submission for a degree in any other University.

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DATE

DEDICATION

This thesis is dedicated to my parents; Mr. Andrew Lagat and Mrs. Ednah Lagat; who taught me to go for the best or nothing.

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3. Energy Bill, 2012, Kenya.
4. Interpretations and General Provisions Act, Chapter 2 of the Laws of Kenya.
5. Mining Act, Cap 306, Laws of Kenya
6. Privatization Act, Chapter 485C, Laws of Kenya.
7. Procurement and Disposal (Public Private Partnership) Regulations, Legal Notice No. 38 of 2009.
8. Public Finance Management Act, No. 18 of 2012, Laws of Kenya.
9. Public Private Partnership Act No. 15 of 2013, Laws of Kenya.
10. Public Procurement and Assets Disposal Act, No. 33 of 2015, Laws of Kenya.
11. Public Procurement and Disposal (Preference and Reservation) (Amendment) Regulations 2013, Legal Notice No. 114 of 2013.
12. Public Procurement and Disposal Act, No. 3 of 2005, Laws of Kenya (Repealed).
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2. National Treasury PPP Manual: Module 1.

3. National Treasury Practice Note No. 3 of 2004.
4. Regulation 16 to the Public Finance Management Act of 1999, Laws of South Africa.
5. Public Finance Management Act, Act No. 1 of 1999, Laws of South Africa.
6. Local Government (Municipal Finance Management Act), Act No. 32 of 2000, Laws of South Africa.

European Union Law

1. European Union Law, Council Regulation (EC) No. 1467/97 of 7 July 1997 on Speeding up and clarifying the implementation of the excessive deficit procedure.

List of Abbreviations

AFP	Alternative Financing and Procurement.
DMO	Debt Management Office.
EU	European Union.
IPP	Independent Power Producers.
IUK	Infrastructure UK.
NGO	Non-Governmental Organizations
OECD	Organisation for Economic Co-operation and Development.
PAT	Principal-Agent Theory
PF2	Private Finance 2.
PFI	Private Finance Initiatives.
PFMA	Public Finance Management Act.
PFP	Privately Financed Projects.
PPI	Private Participation in Infrastructure.
PPP or P3s	Public Private Partnerships
PUK	Partnerships UK.
SPV	Special Purpose Vehicle.
UK	United Kingdom.
UNCTAD	United Nations Conference on Trade and Development.

List of Cases

1. Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania, ICSID Case No. ARB/05.
2. Caledonia Supermarket Limited Vs. Kenya National Examination Council (2000) E.A. 357.
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7. Republic Vs. Business Premises Tribunal & Another, Ex Parte Davies Motor Corporation Ltd (2013) eKLR.
8. Republic Vs. Partnerships Petition Committee & 3 Others Ex. Parte APM Terminal (2015) eKLR, JR Case 298 of 2015.
9. Tiwi Beach Hotel Limited Vs. Julian Ulrike Stamm (1990) 2 KAR 189.

CHAPTER ONE

REVIEW OF THE POLICY, LEGAL AND INSTITUTIONAL FRAMEWORK OF PUBLIC-PRIVATE PARTNERSHIPS (PPPs) IN KENYA

Public-private partnerships (PPPs) in the delivery of public services have become a phenomenon which is quickly spreading across the globe and generating great interest. Seemingly, this is because the PPPs avoid the often negative effects of either exclusive public ownership and delivery of services on the one hand, or outright privatization, on the other. In contrast, PPPs combine the best of both worlds. It combines the private sector with its resources, management skills and technology; and the public sector with its regulatory actions and protections of the public interest. This balanced approach is especially welcome in the delivery of public services which touches on every individual's basic needs.¹

United Nations Economic Commission for Europe

1.0 Introduction

Public Private Partnerships (commonly referred to as PPPs) developed as a result of general disillusionment with privatization which led to engagement with private sector now in a different way.² PPPs are particularly appealing as it suggests a new middle way between the extreme options in the continuum of private sector engagement of privatization on the one hand and nationalization on the other.³ As a result of this tension, PPPs have therefore become an increasingly popular phenomenon.⁴ Indeed, PPPs now represent an increasingly ubiquitous

¹ United Nations Economic Commission for Europe, *Guidebook on Promoting Good Governance in Public-Private Partnerships* (2008) at iii. Available at < <http://www.uncece.org/fileadmin/DAM/ceci/publications/ppp.pdf> > (Last accessed on 14th September 2015).

² Jamali Dima, *Success and Failure of Public Private Partnerships (PPPs) in Developing Countries: Insights from the Lebanese Context*, *The International Journal of Public Sector Management* 17(5) (2004) 416 available at [https://www.researchgate.net/profile/Dima_Jamali/publication/235321108_Success_and_Failure_Mechanisms_of_Public_Private_Partnerships_\(PPPs\)_in_Developing_Countries_Insights_from_Lebanese_Context/links/0f317533a7ca1efc57000000.pdf](https://www.researchgate.net/profile/Dima_Jamali/publication/235321108_Success_and_Failure_Mechanisms_of_Public_Private_Partnerships_(PPPs)_in_Developing_Countries_Insights_from_Lebanese_Context/links/0f317533a7ca1efc57000000.pdf) (last accessed 14th September 2014).

³ Wettenhall Roger, *Thinking Seriously about Public Private Partnerships as an MDG Tool*, a Paper presented for EROPA 20th General Assembly and Conference on “The Role of Public Administration and Governance Stakeholders in Attaining the Millennium Development Goals (MDGs)”, Hanoi Vietnam, 9-14 October 2005; Published in *Asian Review of Public Administration* Vol. XVII, Nos. 1-2 (January – December 2005) pp. 66-80 available at <http://unpan1.un.org/intradoc/groups/public/documents/EROPA/UNPAN026304.pdf> (last accessed on 30th October 2015)

⁴ Graeme Hodge, ‘*Public Private Partnership and Legitimacy*’, *UNSW Law Journal*, Vol 29(3), pg 318 available at http://www.unswlawjournal.unsw.edu.au/sites/default/files/55_hodge_2006.pdf (Last accessed on 1st July 2015)

institutional arrangement with international acceptance⁵ and currently enjoy a global resurgence as icons of modern public administration.⁶

PPP arrangements have had different labels over time and the nomenclature differs by language, political preference and geography.⁷ In addition, the different manifestations of PPPs also stem from situationally-specific contextual factors that affect their outworking in different jurisdictions.⁸ Some of the commonly used labels include Private Finance Initiatives (PFIs) used in the UK, Japan and Malaysia,⁹ Private Participation in Infrastructure (PPI) used in South Korea, World Bank and in the development-financing sector,¹⁰ Public Private Partnerships (PPPs or P3s) used in most parts of the world including in Kenya, Alternative Financing and Procurement (AFP) used in America, Privately Financed Projects (PFP) used in Australia¹¹ and Performance Based Infrastructure used in Canada.¹²

For the purposes of this paper, the term Private Public Partnership has been used to encompass all variants of PPP arrangements or labels including the above.

⁵ Ole Helby Petersen, *Public-Private Partnerships as Converging or Diverging Trends in Public Management? A comparative Analysis of PPP Policy and Regulation in Denmark and Ireland*, *International Public Management Review*, (12)2, (2011) at 2 available at www.kora.dk/media/339431/ohp_public_Private.pdf (last accessed on June 30 2015)

⁶ Hodge A. Graeme & Greve Carsten, *PPPs: The Passage of Time Permits a Sober Reflection*, Article in *Economic Affairs Journal*, 2009, Blackwell Publishing, Oxford, at page 1 available at http://www.researchgate.net/publication/46537756_PPPs_The_Passage_of_Time_Permits_a_Sober_Reflection (last accessed on November 3, 2015)

⁷ Farugia Christine, Tim Reynolds & Ryan J Orr, *Public-Private Agencies: A Global Perspective*, Collaboratory for Research on Global Projects, August 2008, at page 5, available at http://www.nawc.org/uploads/documents-and-publications/documents/document_02445830-0b21-4f61-8b65-bad5f5989467.pdf (last accessed on September 10, 2016).

⁸ English M Linda, *Public Private Partnerships in Australia: An Overview of their Nature, Purpose, Incidence and Oversight*, *UNSW Law Journal*, 29(3) at 250 available at <http://www.austlii.edu.au/au/journals/UNSWLawJl/2006/46.html#Heading27> (last accessed on October 14, 2016)

⁹ *Public Private Infrastructure Advisory Facility, Toolkit for Public-Private Partnerships in Roads & Highways*, March 2009, at page 12, available at <https://ppiaf.org/sites/ppiaf.org/files/documents/toolkits/highwaystoolkit/6/pdf-version/1-13.pdf> (last accessed October 5, 2016)

¹⁰ *Ibid.*

¹¹ *Ibid.*

Farugia Christine, Tim Reynolds & Ryan J Orr, *Public-Private Agencies: A Global Perspective*, Collaboratory for Research on Global Projects, August 2008, at page 7, available at http://www.nawc.org/uploads/documents-and-publications/documents/document_02445830-0b21-4f61-8b65-bad5f5989467.pdf (last accessed on September 10, 2016).

The rationale for creating PPP arrangements may include either ideological or pragmatic perspectives.¹³ Ideologically, proponents argue that the private sector is superior to the public sector in delivery of goods and services.¹⁴ While on the other hand, pragmatically government leaders see PPPs as a way of bringing in the special technical expertise, funding, innovation or management know-how from the private sector to address complex public policy problems.¹⁵

Hodge observes that while PPPs are a global trend, they are also a paradox given that they are vaguely defined, hotly contested and poorly evaluated.¹⁶ Even with their ubiquity, there remains some level of ambiguity as to what exactly constitutes PPPs.¹⁷

There is no singular definition of the term 'Public Private Partnership' and as such it has been argued that the term should be viewed as a spectrum of possible relationships between public and private actors for the co-operative provision of traditionally public-domain services.¹⁸

In order for one to have an adequate understanding of Public Private Partnerships, it is important to begin by defining the term 'partnership'. A partnership has been defined as a legal relation existing between two or more persons contractually associated as joint principals in a business.¹⁹

¹³ Forrer John, Kee Edwin James, Newcommer E Kathryn & Boyer Eric, *Public Private partnership and the Public Accountability Question*, Public Administration Review, 70 Vol 3, 2010 at page 475 available at <http://sites.duke.edu/niou/files/2011/05/Forrer-Lee-Newcomer-and-Boyer-Public-Private-Partnership-and-the-Public-Accountability-Question.pdf> (last accessed on November 1, 2015)

¹⁴ Ibid.

¹⁵ Ibid.

Hodge A. Graeme & Greve Carsten, *PPPs: The Passage of Time Permits a Sober Reflection*, Article in Economic Affairs Journal, 2009, Blackwell Publishing, Oxford, at page 1 available at http://www.researchgate.net/publication/46537756_PPPs_The_Passage_of_Time_Permits_a_Sober_Reflection (last accessed on November 3, 2015).

¹⁷ Forrer John, Kee Edwin James, Newcommer E Kathryn & Boyer Eric, *Public Private partnership and the Public Accountability Question*, Public Administration Review, 70 Vol 3, 2010 at page 475 available at <http://sites.duke.edu/niou/files/2011/05/Forrer-Lee-Newcomer-and-Boyer-Public-Private-Partnership-and-the-Public-Accountability-Question.pdf> (last accessed on November 1, 2015).

¹⁸ Li Bing, Akintoye Akitonla and Hardcastle Cliff, *Conceptual Framework for Construction Public Private Partnerships*, In Akintoye, A (Ed.), *16th Annual ARCOM Conference*, 6-8 September 200, Glasgow Caledonia University. Association of Researchers in Construction Management, Vol. 1 at page 229 available at http://www.arcom.ac.uk/-docs/proceedings/ar2000-229-240_Li_Akintoye_and_Hardcastle.pdf (last accessed on 30th October 2015)

The concept of PPP has therefore been defined in different terms by different scholars and varies from country to country.

PPPs have generally been defined as long-term contractual arrangements between the public and private sectors for the delivery of public services where there is a significant degree of risk sharing between the public and private sector.²⁰ This paper will borrow the basic definition from the Kenyan Public Private Partnership Act²¹ (hereinafter the ‘Act’ or the ‘PPP Act’) and interrogate it by comparing it with various definitions from other jurisdictions. The main characteristics of PPPs which distinguishes them from other forms of other private sector participation in public sector contracts such as outsourcing include the following:²²

- i) Risk transfer to the private sector – the principle of this risk transfer is that risk should be allocated to the party that can best manage it. For instance, certain risks relating to the design, construction and operation of infrastructure are transferred to the private party which has a greater capacity and ability to mitigate any losses arising therefrom;
- ii) Long term contract – PPPs usually follow a ‘whole-of-life approach’ to infrastructure development which is typically about 10 to 20 years;
- iii) Partnership agreement – PPP arrangements create a partnership where both parties have a mutual interests and a unified commitment. The reasons for establishing such

¹⁹ Winch Graham, Onishi Masamitsu & Schmidt Sandra (Eds), *Taking Stock of PPP and PFI Around the World*, Certified Accountants Educational Trust (London 2002) at page 8. Available at <http://www.accaglobal.com/content/dam/acca/global/PDF-technical/public-sector/rr-126-001.pdf> (Last accessed on 2nd November 2015)

²⁰ Yong H.K., *Public-Private Partnerships Policy and Practice: A Reference Guide*, London Commonwealth Secretarial, 2010, at page 8 available at <http://www.worldcat.org/title/public-private-partnerships-policy-and-practice-a-reference-guide/oclc/609538579/viewport> (last accessed on October 22, 2015).

²¹ Public Private Partnership Act No. 15 of 2013 of the Laws of Kenya.

²² Ibid.

partnerships vary but generally involve financing, design, construction, operation, technology transfer, better and faster production methods.²³

1.1 Background

PPP models are increasingly envisaged as attractive propositions for involving the private sector in both national and international development cooperation. It is generically defined as a form of cooperation between government and business agents sometimes also involving voluntary organizations or institutes that agree to work together to reach a common goal or carry out a specific task, while jointly assuming the risks and responsibilities and sharing same resources and competence. In practice they include a wide variety of arrangements and are not always uniformly defined.²⁴

The underlying logic for establishing partnership is that both public and private sectors have unique characteristics that provide them with advantages in specific aspects of service or project delivery.²⁵ The most successful partnership arrangements draw on the strengths of both the public and private sector to establish complimentary relationships.²⁶ Though the roles may vary from project to project the overall responsibility of the government entities does not change. In all cases the public entity remains responsible and accountable for delivering services and

²³ National Housing Corporation, Public Private Partnership on Finance, Land, Skill and Technology, Government Printers 2014, available at http://www.nhckenya.co.ke/download/PPP_ON_FINANCE_LAND.pdf (last accessed on October 20, 2015)

²⁴ Lynne B. Sagalyn, "Public-Private Engagement: Promise and Practice." In *Planning Ideas that Matter: Livability, Territoriality, Governance, and Reflective Practice*, eds. Bishwapriya Sanyal, Lawrence J. Vale, and Christine D. Rosan, MIT press (2012) available at http://www.asb.unsw.edu.au/schools/economics/Documents/LSagalyn_Public%20Private%20Engagement%20Promise%20and%20Practice.pdf (Last accessed on 26th August 2014).

²⁵ Grimsey, D. and Lewis, M. K., *Public Private Partnerships: The Worldwide Revolution in Infrastructure Provision and Project Finance*, Cheltenham: UK (2004) at 12 available at http://www.untagsmd.ac.id/files/Perpustakaan_Digital_2/PROJECT%20FINANCE%20MANAGEMENT%20Public%20Private%20Partnerships.%20The%20Worldwide%20Revolution%20in%20Infrastructur.pdf (Last accessed on 20th August 2014).

²⁶ Mula R. P., K. N. Rai, V. N. Kulkarni and A.K. Singh, *Public-Private Partnership and Impact of ICRISAT's Pearl Millet Hybrid Parents Research*, Journal of SAT Agricultural Research 5(1) 2007. Available at <http://www.iese.edu/research/pdfs/DI-0884-E.pdf> (Last accessed on 22nd August 2014).

projects in a manner that protects and furthers the public interest.²⁷ Globally, the movement to PPP procurement was driven by the need to fund infrastructure projects and/or the need for private sector innovation in the design and management of public sector facilities and infrastructure projects.²⁸ In developing countries however, the move was due to high demand for infrastructure development and pressure on national budgets.²⁹

As neoliberal limits on government borrowing spread, so too did PPPs.³⁰ In Europe for instance, the EU Rules³¹ limited government budget deficit to 3% of GDP.³² Similarly in developing countries, Kenya being one of them, the international financial institutions such as World Bank and IMF encouraged the adoption of PPPs in the 1990s.³³ The arrangement posed a dilemma to the international financial institutions between an option of encouraging strict fiscal discipline on the one hand which would imply stricter rules for PPPs and a desire to promote privatization in general which makes it easy for PPPs.³⁴

The European Commission in 2003 took a view in regards to the relationship between fiscal discipline and PPPs where in particular it observed that there was a growing practice of financing

²⁷Mula R. P., K. N. Rai, V. N. Kulkarni and A.K. Singh, Public-Private Partnership and Impact of ICRISAT's Pearl Millet Hybrid Parents Research, *Journal of SAT Agricultural Research* 5(1) 2007. Available at <<http://www.iese.edu/research/pdfs/DI-0884-E.pdf>> (Last accessed on 22nd August 2014).

²⁸ Mustafa Alshawi, Concept and Background to Public Private Partnership (PPP)/Private Finance Initiative (PFI): UK Experience at page 1 (2009) available at <https://www.oecd.org/mena/47562550.pdf> (Last accessed on 15th September 2015).

²⁹ Mustafa Alshawi, Concept and Background to Public Private Partnership (PPP)/Private Finance Initiative (PFI): UK Experience at page 1 (2009) available at <https://www.oecd.org/mena/47562550.pdf> (Last accessed on 15th September 2015).

³⁰ David Hall, *Why Public-Private Partnerships Don't Work: The Many Advantages of the Public Alternative*, Public Service International Research Unit, 2015 at 8, available at http://www.world-psi.org/sites/default/files/rapport_eng_56pages_a4_lr.pdf (last accessed November 25, 2016).

³¹ Paragraph 7, Council Regulation (EC) No. 1467/97 of 7 July 1997 on Speeding up and clarifying the implementation of the excessive deficit procedure, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31997R1467> (last accessed September 15, 2015).

³² David Hall, *Why Public-Private Partnerships Don't Work: The Many Advantages of the Public Alternative*, Public Service International Research Unit, 2015 at 8, available at http://www.world-psi.org/sites/default/files/rapport_eng_56pages_a4_lr.pdf (last accessed November 25, 2016).

³³ Ibid.

³⁴ Ibid at page 9

public purpose investment projects through PPPs.³⁵ It further observed that there was a risk that recourse to PPPs was increasingly motivated by the purpose of putting capital spending outside government budgets in order to bypass budgetary constraints.³⁶

One of the most critical constraints in implementing a successful PPP in developing countries is lack of a suitable PPP framework. Lack of a PPP policy and related legislative and regulatory framework cannot be overemphasized.³⁷ It must however be noted that some countries have progressed in spite of the absence of some or all these frameworks on the basis of 'regulation by contract' route.³⁸ The growing consensus however is that a suitable regulatory framework should be put in place instead of re-inventing the wheel for each contract.³⁹

The concept of 'best practice' with regards to PPP framework in particular needs to be looked at with caution since there is no 'one size fits all' solution.⁴⁰ As such, what works in one country may not work in another let alone be transferred to or replicated in another sector or region in the same country. Consequently, the exact scope, remit and institutional arrangement need to be assessed in light of a particular country's needs and local context which often lead to hybrid regulatory models being implemented.

The PPP framework has been an alluring framework for the Kenyan government. This has been catapulted by the need to invest in infrastructural framework and the attendant desire to achieve

³⁵ European Commission Directorate-General for Economic and Financial Affairs, European Economy, No 3 / 2003, Public Finances in EMU 2003 at 102
http://ec.europa.eu/economy_finance/publications/publication473_en.pdf (accessed on 20th June 2015)

³⁶ Ibid

³⁷ Yong H.K, *Public-Private Partnerships Policy and practice: A Reference Guide*, Commonwealth Secretariat, 2010 at page 37, accessed at https://books.google.co.uk/books?id=tnuFUUjP9f8C&printsec=frontcover&source=gbs_atb#v=onepage&q&f=false (last accessed on October 13, 2016)

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Yong H.K, *Public-Private Partnerships Policy and practice: A Reference Guide*, Commonwealth Secretariat, 2010 at page 37, accessed at https://books.google.co.uk/books?id=tnuFUUjP9f8C&printsec=frontcover&source=gbs_atb#v=onepage&q&f=false (last accessed on October 13, 2016)

the Vision 2030 goals.⁴¹ Under-investment in infrastructure and related maintenance, increases the cost of doing business, undermines competitiveness and adversely affects trade.⁴² In order for Kenya to promote its economic growth, it is imperative that it needs to adopt the model of incorporating PPPs in its development blueprint. This would enhance economic growth in leaps and bounds. Nonetheless, adopting the PPP framework is not an end in itself. Chiefly this is because for the PPPs to materialize, an environment conducive for investor confidence and better policies devoid of administrative shortfalls must be put in place to ensure the success of this noble idea.⁴³

It is worth noting that prior to the enactment of the Public Private Partnership Act⁴⁴ in 2013 (hereinafter the ‘Act’ or the ‘PPP Act’), there was no clear government policy in place for PPPs⁴⁵. In addition, the existing legal frameworks at that time were not suited to the specialized nature of procuring PPPs as they applied majorly to traditional systems of procurement.⁴⁶ PPP arrangements at that point were managed through various legislations and regulations including the Privatization Act⁴⁷ and the Public Procurement and Disposal Act, 2005 (now repealed)⁴⁸ as well as the Public Private Partnerships Regulations of 2009⁴⁹ all of which did not take into account the unique nature PPPs. PPPs ordinarily require a specific law relating to a PPP project

⁴¹Gideon Kiarie, *Kenya: Planning for Public Private Partnerships*, Ratio Magazine Friday, 04 May 2012. Available at <<http://www.ratio-magazine.com/201205044095/Kenya/Kenya-Planning-for-Public-Private-Partnerships.html>> (Last accessed on 27th August 2014). The author explains that vision 2030 aims at making Kenya a middle income economy by 2030 and a key element in Kenya’s growth strategy is infrastructure development the bulk of which will be financed through a range of Public Private Partnership models.

⁴²*Ibid.*

⁴³Siemiatyacki M., *Delivering Transportation Infrastructure through Public Private Partnerships*, Journal Note No 224, The World Bank Group, December 2000 of the American Planning Association 76 (1) p.53-54.

⁴⁴ Kenyan Public Private Partnership Act No. 15 of 2013 of the Laws of Kenya.

⁴⁵ <http://pppunit.go.ke/index.php/legal-regulatory-framework> (last accessed on 30th November 2015)

⁴⁶ <http://pppunit.go.ke/index.php/legal-regulatory-framework> (last accessed on 30th November 2015)

⁴⁷ Privatization Act, Chapter 485C, Laws of Kenya. Available at <www.kenyalaw.org> (Last accessed on 31st August 2014).

⁴⁸ Public Procurement and Disposal Act, Act No. 3 of 2005(Repealed), Laws of Kenya. Available at <www.kenyalaw.org> (Last accessed on 31st August 2014)

⁴⁹ Public Private Partnership Regulations of 2009, Laws of Kenya, Kenya Gazette Supplement No. 17, Legislative Supplement No. 13 Government Press, Nairobi.

or a framework law relating to PPPs in general.⁵⁰ The enactment of the PPP Act in Kenya is a welcome move.⁵¹ It is however not an end as of itself. Thus, it is prudent to examine the legal framework, institutional and policy mechanisms, so as to determine whether the existing environment is appropriate for the implementation of the PPPs in Kenya. Where PPPs are anticipated, carefully thought of and executed in a timely manner, the PPPs tend to have a higher rate of success.⁵²

1.2 Statement of the Problem

The current PPP legal framework is not commercially-oriented hence do not promote a secure, predictable and stable environment in which PPPs can be properly nurtured.⁵³ This is largely attributed to the fact that the legislation in Kenya regulating PPP is inadequate, overly complex, and has failed to provide sufficient security and investor incentives in PPP arrangements.⁵⁴ As a consequence, the growth of PPPs in Kenya has been negatively affected. This can be demonstrated by the fact that out of the 70 projects which have been approved following the enactment of the PPP Act as per the latest Kenyan PPP Pipeline Status Report as at September 2017, only two of the projects had attained commercial close while none had attained financial close.⁵⁵

⁵⁰ Yescombe E.R., *Public Private Partnerships: Principles of Policy and Finance*, Butterworth-Heinneman Elsevier, (2007) at page 31, available at http://www.untagsmd.ac.id/files/Perpustakaan_Digital_1/FINANCE%20Public%20Private%20partnerships%20Principles%20of%20Policy%20and%20finance.pdf (last accessed September 10, 2015)

⁵¹ This Act, Act No. 15 of 2013 was enacted in December 2012, received Presidential Assent on 14th January 2013 and came into force on 8th February 2013. See < <http://pppunit.go.ke/index.php/legal-regulatory-framework>> (Last accessed on 22nd August 2014).

⁵² Siemiatyacki M., *Delivering Transportation Infrastructure through Public Private Partnerships*, Journal Note No 224, The World Bank Group, December 2000 of the American Planning Association 76 (1) at page 10.

⁵³ *Ibid.*

⁵⁴ Mwangi, E., Gichini G. & Guchu, S. M., “Recent Strategies towards Science Technology and Innovation Transfer Commercialization and Partnerships in Kenya for Social Economic Development”, *The Second Science with African Development* 2009.

⁵⁵ Kenya PPP Pipeline Status Report, September 2017, available at <http://www.pppunit.go.ke/news/view/ppp-pipeline-status-report-september-2017> (accessed on 1st March 2018)

Although PPPs in Kenya are still at infancy stage given that the PPP Act was recently enacted and only came into effect in 2013 to regulate it, it has already experienced a number of pitfalls.

One of the main issues of concern to this study is the procurement process under the PPP Act which is complex and tedious with uncertain and long timelines. This does not inspire confidence on the private investors. The bureaucracy within the institutions involved in the PPP process coupled with the long and tedious procurement process discourage private sector participants. Further, the long procurement process leads to higher costs in the PPP investments given that investors often factor risks in the cost of the projects. By way of example, the first PPP project agreement to be signed after the enactment of the PPP Act relating to the construction of student hostels at Kenyatta University to accommodate 10,000 students⁵⁶ was signed on 19th June 2015 which was about four years from the date the Expression of Interest was issued which was in September 2011.⁵⁷ It is worth noting that this project had not attained financial close as at September 2017.⁵⁸

Further, institutions involved in the PPP process ought to meet the constitutional thresholds on governance so as to ensure accountability and fairness as well as avoid avenues for corruption. The PPP Act does not have positive and strong statutory provisions that demands greater governance including accountability, transparency and fairness. This study will therefore address the governance challenges in respect to the institutional framework of PPPs in Kenya.

Another shortcoming of the PPP arrangement in Kenya is the lack of clear policy guidelines, standard documents and manuals to guide the implementation of PPPs. The PPP Act requires the

⁵⁶ Kenyatta University, Request for Proposals, Volume 1: Instruction to Bidders, Kenyatta University Student Hostels PPP Project, March 10, 2014

⁵⁷ <https://www.devex.com/funding/tenders/72438/72438> (last accessed in October 20, 2016)

⁵⁸ Kenya PPP Pipeline Status Report, September 2017 at page 13, available at <http://www.pppunit.go.ke/news/view/ppp-pipeline-status-report-september-2017> (accessed on 1st March 2018)

institutions responsible for PPPs to develop manuals, policies and guidelines all of which have not been developed.⁵⁹

The PPP legal framework does not adequately take into account the need for public participation by stakeholders and beneficiaries in the PPP process contrary to the constitutional edict which requires participation.⁶⁰ The inclusion of stakeholders in PPP projects has not been well encapsulated. This therefore divests them of an opportunity to participate in the decision-making process through public participation. The stakeholders are thus not empowered and their rights are not adequately protected under the PPP legal framework.⁶¹

Owing to the nature of the PPPs, they present a severe organizational and institutional challenge for the public sector.⁶² Without this paradigm shift in both organizational and institutional processes implementation of the PPP program will prove to be an uphill task. This is largely attributed to their complex nature which demands not only different types of skills but also new enabling institutions and viable economic platforms.⁶³ Further, they require transparent, efficient procedures and accountable and competent public and private sectors. This poses a major challenge as one of the main obstacles the government faces in promoting PPPs is instigating the procedure and process involved in delivering successful PPPs and establishing new institutions.⁶⁴

⁵⁹ Section 7(b), Public Private Partnership Act, Act No. 15 of 2013.

⁶⁰ Article 10, Constitution of Kenya, 2010.

⁶¹ Harry Anthony Patrinos, Felipe Barrera-Osorio & Juliana Guaqueta, *The Role and Impact of Public-Private Partnerships in Education*, The World Bank 2009 available at <https://openknowledge.worldbank.org/bitstream/handle/10986/2612/479490PUB0Role101OFFICIAL0USE0ONLY1.pdf?sequence=1&isAllowed=y> (last accessed on 23rd October 2015)

⁶² *Ibid.*

⁶³ Spielman D. J. & Von Grebmer K., Public-Private Partnerships in International Agricultural Research: An Analysis of Constraints, *Journal of Technology Transfer* 31 (2005) available at <https://link.springer.com/article/10.1007/s10961-005-6112-1> (last accessed on 23rd October 2015).

⁶⁴ *Ibid.*

Ordinarily, lenders and investors before embarking on investment programs usually establish if the legal system is reliable and predictable.⁶⁵ This determination is usually hinged on ascertaining the tax policies in a country, investment laws, security standards, corporate laws, and contract and dispute resolution laws in the project country.⁶⁶ It is noted that a formidable regulatory framework aims to protect investors from political opportunism, arbitrary actions and help ensure stability.⁶⁷ One of the approaches to strengthening the regulatory system includes establishing rules that limit the regulator's discretion by constraining the regulator's decision-making powers through setting out rules that must be followed.⁶⁸

The PPP framework in Kenya does not adequately and exhaustively spell out with certainty how an investor can benefit from government support and incentives. Both the PPP Act and the PPP Policy do not have certain and documented list of all government support and incentives for PPP projects so as to give confidence and clear information to investors.

Collectively, these are fundamental issues which raise genuine and compelling concerns which ought to be addressed by the legal system. The PPP Act however stands awkwardly on these issues by not sufficiently addressing them within the realms of the law.

⁶⁵ Christian Koch & Jesper Ole Jensen, *Small Public Private Partnerships: The Answer to Local Public and Private Needs yet an ugly Duckling?*, Aarhus University Press (2011). Available at <http://vbn.aau.dk/files/18418466/Small_public_partnerships.pdf> (Last accessed on 28th August 2014).

⁶⁶ *Ibid.*

⁶⁷ Yong H.K, *Public-Private Partnerships Policy and practice: A Reference Guide*, Commonwealth Secretariat, 2010 at page 34, accessed at https://books.google.co.uk/books?id=tnuFUUjP9f8C&printsec=frontcover&source=gbs_atb#v=onepage&q&f=false (last accessed on October 13, 2016).

⁶⁸ *Ibid.*

This study therefore intends to delve into the critical issues raised so as to ventilate on what measures can be taken to address them. It is noted that the challenges identified above may not have been fathomed during the enactment of the PPP Act.

1.3 Justification of the Study

PPP arrangements are still a novel concept in the Kenyan system. The PPP Act⁶⁹ is the key and sectoral specific legislation regulating PPP arrangements in the country. Vision 2030 emphasizes the importance of private sector participation through the improvement of regulatory and institutional frameworks of PPPs⁷⁰. PPPs are a key driver for achieving infrastructural programmes under Vision 2030. It is therefore imperative that the legal and regulatory framework is conducive.

The total number of projects that have been approved under the PPP Act stand at 70 as per the latest published status report of PPP Pipeline.⁷¹ It is observed that the process of project approvals under PPP Unit take long given that none of the 70 projects mentioned have reached financial close to date. There is therefore need to interrogate the legal, policy and institutional framework so as to make appropriate recommendation for reforms for improvement of the PPP environment.

Moreover, given that the PPP Act is a fairly new piece of legislation having been enacted in the year 2013, there is need for a research to investigate its adequacy so as to ignite debate for its

⁷⁰ Cambridge Economic Policy Associates Ltd, Mobilizing Finance for Infrastructure; A study for the UK Department for International Development (DFID): Kenya Country Case Study, August 2015, at page 2, available at <http://www.cepa.co.uk/portfolio-dfid-mobilising-finance-infrastructure?flBack=CS&selYear=2015> (last accessed on October 14, 2016)

⁷¹ Kenya PPP Pipeline Status Report, September 2017, available at <http://www.pppunit.go.ke/news/view/ppp-pipeline-status-report-september-2017> (accessed on 1st March 2018)

improvement by comparing it to the more established policies, legislative and institutional frameworks in other jurisdictions such as the United Kingdom and South Africa.

There is a dearth of literature in Kenya especially following the enactment of the PPP Act in 2013. This can be contrasted with literature in other developed jurisdictions where PPPs have evolved over time and where there has been significant scholarly works on PPPs. This study is intended to fill the gap in literature by providing a critique of the PPP Act and to make appropriate recommendations for its improvement and legal reform.

It is noted that the essential building blocks to a PPP reform programme entails sound and enabling legal regulatory framework on the one hand and strong supporting institutions on the other hand.⁷² These building blocks form the basis of this study.

1.4 Objectives of the Study

This research undertakes to look at the following objectives:

- i) To undertake a comprehensive critique of the current legal, policy and institutional framework of PPPs in Kenya bringing out the gaps and the practical challenges faced in implementation of PPP projects in Kenya.
- ii) To discuss comparative approaches to PPPs and identify best practices for PPP frameworks from other jurisdictions such as the United Kingdom and South Africa.
- iii) To outline viable recommendations for reform which should be taken into account to ensure that the PPP legal, policy and institutional framework is sound.

1.5 Research Questions

⁷² Chaponda Taz, *Key Institutional Decisions in Public Private Partnerships*, Policy Brief 43012, March 2013 at page 1, available at <https://www.theigc.org/wp-content/uploads/2015/03/Chaponda-2013-Policy-Brief.pdf> (last accessed October 20, 2015).

This study will be guided by the following questions:

- i) Does Kenya have a comprehensive legal, policy and institutional framework to govern PPP arrangements?
- ii) What challenges are likely to arise in the implementation of PPPs in Kenya?
- iii) What best practices can Kenya learn from other jurisdictions such as the United Kingdom and South Africa so as to make PPPs to be attractive to both local and international investors?
- iv) What proposals for reforms should be implemented in order to improve the legal, policy and institutional framework of PPPs in Kenya?

1.6 Research Hypothesis

This study is premised on the following assumptions:

- i) That the PPP arrangements can only be implemented successfully if the country has stable, predictable and clear laws and policies relating to regulation of PPPs.
- ii) There are clear gaps in the legal, policy and institutional framework of PPPs in Kenya;
- iii) The legal, policy and Institutional framework of PPPs in Kenya do not meet best practice

1.7 Theoretical Framework

There is no unified theoretical basis for PPPs.⁷³ Some of the theoretical approaches used in discussions relating to PPPs include the Resource Dependency Theory⁷⁴, Neo-institutional Theory⁷⁵ and the Principal-Agent Theory (PAT)⁷⁶.

a) The Resource Dependency Theory

Several scholars have been associated with the development of the Resource Dependency Theory such as Mayer N. Zald, Hasenfield Yeheskel, David Jacobs, Kenneth J. Benson, Jeffery Pfeffer and Gerald Salancik but it is the work of James Thompson which represent the earliest attempts to interrogate the concept.⁷⁷

The Resource Dependency Theory suggests that the more dependent partners are, the more the need for their interaction.⁷⁸ As such, since partnerships are organized because partners hope to achieve added value, they make their achievement of their goals dependent on the other partner.⁷⁹ Partnerships therefore are characterized by high dependency⁸⁰. Further, Resource Dependency Theory has been held as a theory of organizations that seeks to explain organizational and inter-organizational behaviour in terms of the critical resources that an

⁷³ Jean-Michel Oudot, *Risk-Allocation: Theoretical and Empirical Evidences. Application to Public-Private Partnerships in the Defense Sector*, Carecon (2005). Available at <<http://Carecon.Org.Uk/Conferences/Conf2005/Papers/Oudot.Pdf>> (Last accessed on 31st Aug 2014).

⁷⁴ Klijjn, E.H. (2010), *Public Private Partnerships: deciphering meaning, message and phenomenon in*: G. Hodge & C. Greve (2010), *International Handbook of PPP*, Cheltenham: Edgar Elgar: 68-80 (repub.eur.nl/pub/78080/Metis_144366.pdf accessed on 20th October 2015).

⁷⁵ Ibid

⁷⁶ André de Palma, Luc Leruth & Guillaume Prunier, 'Towards a Principal-Agent Based Typology of Risks in Public-Private Partnerships', International Monetary Fund (IMF), 2009, at 12 (<https://www.imf.org/external/pubs/ft/wp/2009/wp09177.pdf>. accessed on 20 October 2015).

⁷⁷ Johnson Bob L. Jr, *Resource Dependency Theory: A Political Economy Model of Organizations*, University of Utah, 1995 at page 3, Available at <https://files.eric.ed.gov/fulltext/ED387871.pdf> (last accessed on March 05, 2018).

⁷⁸ Klijjn, E.H. (2010), *Public Private Partnerships: deciphering meaning, message and phenomenon in*: G. Hodge & C. Greve (2010), *International Handbook of PPP*, Cheltenham: Edgar Elgar: 68-80 (repub.eur.nl/pub/78080/Metis_144366.pdf accessed on 20th October 2015).

⁷⁹ Ibid.

⁸⁰ Ibid.

organization must have in order to survive.⁸¹ The theory thus focuses on resources, flow or exchange of resources between organizations, power differentials as a result of unequal resource exchange and resource dependence.⁸² The theory's major limitation is its assumption that organizational behaviour is shaped primarily by materialistic forces to the exclusion of such factors as institutional, ideological and cultural forces.⁸³

b) Neo-Institutional Theory

On the other hand, the Neo-Institutional Theory propounds that given that partners in a relationship make certain investments in the relationship and incur specific transaction costs, this leads to high dependency in the relationship and minimize the risk of opportunistic behaviour.⁸⁴ This will lead to tight organizational structures in which partners will try to minimize the possibilities of the other partner walking away with large share of profits. Under this theory, extensive contracts or organizational structures are costly in terms of transaction costs which then diminish a partner's space to manoeuvre out of a partnership.⁸⁵

c) Principal-Agent Theory (PAT)

Another theoretical approach used in this study is the PAT approach which in simple terms is typified in the behavior of a boss (the principal) and an employee (the agent), where the boss cannot accurately monitor the productivity of his/her employee.⁸⁶

⁸¹ Johnson Bob L Jr, *Resource Dependence Theory: A Political Economy Model of Organizations*, Position Paper, September 1, 1995, at 2. <http://files.eric.ed.gov/fulltext/ED387871.pdf>. (accessed on October 20, 2015)

⁸² Klijn, E.H. (2010), *Public Private Partnerships: deciphering meaning, message and phenomenon in:* G. Hodge & C. Greve (2010), *International Handbook of PPP*, Cheltenham: Edgar Elgar: 68-80 (repub.eur.nl/pub/78080/Metis_144366.pdf accessed on 20th October 2015).

⁸³ Johnson Bob L Jr, *Resource Dependence Theory: A Political Economy Model of Organizations*, Position Paper, September 1, 1995, at pages 13-16. <http://files.eric.ed.gov/fulltext/ED387871.pdf>. (accessed on October 20, 2015).

⁸⁴ Palma, Luc Leruth & Guillaume Prunier, 'Towards a Principal-Agent Based Typology of Risks in Public-Private Partnerships', *International Monetary Fund (IMF)*, 2009, at 12 (<https://www.imf.org/external/pubs/ft/wp/2009/wp09177.pdf>. accessed on 20 October 2015).

⁸⁵ Ibid.

⁸⁶ Ibid.

The Principal-Agent Theory or Agency Theory derives its disciplinary origins from economics.⁸⁷

The key assumptions underlying a PAT framework and which are similar to the basics of a PPP contract (where government is the principal and the private sector as the agent) include:

- i) Information asymmetry between the parties whereby the agent has more information about its own actions as compared to the principal;
- ii) The agent pursues its own interests which may run contrary to those of the principal.⁸⁸

An agency problem arises under conditions of asymmetry of information and conflict of interest between the principal and the agent.⁸⁹ The leading proponents of the Principal-Agent Theory are Jensen and Meckling.⁹⁰

Under this theory, the best results between the principal and agent can be achieved if there is a fully specified enforceable contract with stable terms over time, measurable output indicators that can be monitored and credible punishment against a party in case cheating is proved.⁹¹

The PAT theory is relevant in the discussion of PPPs given the specific nature of risks existing in most PPP projects which in most cases are uninsurable.⁹² Indeed, the probability of risk

⁸⁷ Kivisto Jussi, *Agency Theory as a Framework for the Government-University Relationship*, Tampere University Press, 2007, at page 8, available at <http://tampub.uta.fi/bitstream/handle/10024/67724/978-951-44-6969-5.pdf;sequence=1> (last accessed March 5, 2018)

⁸⁸ Palma, Luc Leruth & Guillaume Prunier, 'Towards a Principal-Agent Based Typology of Risks in Public-Private Partnerships', International Monetary Fund (IMF), 2009, at 12 (<https://www.imf.org/external/pubs/ft/wp/2009/wp09177.pdf>, accessed on 20 October 2015).

⁸⁹ Sanches Solino Antonio, *Application of the Agency Theory for the Analysis of Performance Based Mechanisms in Road Management*, A Paper Presented on the 13th World Conference on Transport Research, July 13-18, 2010, Rio de Janeiro, Brazil, at page 2, available at <http://www.wctrs-society.com/wp/wp-content/uploads/abstracts/rio/selected/863.pdf> (last accessed on March 02, 2018).

⁹⁰ Eisenhardt M. Kathleen, *Agency Theory: An Assessment and Review*, Academy of Management Review, 1989, Vol. 14, No. 1, Stanford University, at page 59, available at <http://amr.aom.org/content/14/1/57.full.pdf+html> (last accessed March 05, 2018)

⁹¹ Palma, Luc Leruth & Guillaume Prunier, 'Towards a Principal-Agent Based Typology of Risks in Public-Private Partnerships', International Monetary Fund (IMF), 2009, at 14 (<https://www.imf.org/external/pubs/ft/wp/2009/wp09177.pdf>, accessed on 20 October 2015).

⁹² Jean-Michel Oudot, *Risk-Allocation: Theoretical and Empirical Evidences. Application to Public-Private Partnerships in the Defense Sector*, Carecon (2005). Available at <http://Carecon.Org.Uk/Conferences/Conf2005/Papers/Oudot.Pdf> (Last accessed on 31st Aug 2014).

materialization depends on the PPP partners' behaviour and as a consequence, the risk allocation should be treated within this realm.⁹³ The PAT approach addresses this by modelling the relation between the informed party (the Agent) and the less informed one (the Principal).⁹⁴ As a result of the information asymmetry, the question is how to efficiently allocate the risks between partners in the reference contract.⁹⁵ The target followed in the determination of risk allocation criteria is the total cost minimization which must maximize the Principal's utility.⁹⁶

The analytical process followed by the PAT approach consists in maximizing the principal's utility subject to the agent's participation and incentive constraints.⁹⁷ The respect of these two constraints must permit both partners to improve their situation, compared to a situation in which only one constraint would have been taken into account. This is underlined by the idea that "incentive and participation constraints define the set of incentive feasible allocation." Both risk allocation criteria registered by the PAT come from these two constraints.⁹⁸

In the PAT framework, the Agent's effort is not observable.⁹⁹ At the same time, the Agent's behaviour is at the root of the performance. In order to assure a certain level of performance, the principal should give the agent incentives to perform.¹⁰⁰ The incentive constraints should be tackled. The authors belonging to the PAT concentrate on imposing of potential cost overruns on partners as an incentive device. There are several general conclusions on PAT: Firstly, the risk

⁹³Ibid.

⁹⁴Ibid.

⁹⁵ Ibid.

⁹⁶Ibid.

⁹⁷Laffont Jean-Jacques & Martimont David, *The Theory of Incentives: The Principal-Agent Model*, Princeton University Press, Princeton, 2012 at 84, available at <https://books.google.co.ke/books?isbn=1400829453> (last accessed on 23rd October 2015)

⁹⁸Ibid.

⁹⁹Ibid.

¹⁰⁰Ibid.

should be allocated to the agent to the extent he can manage the risk. Secondly, risk should be allocated to the risk averse partner in order to minimize the overall risk-bearing cost.¹⁰¹

It is worth noting that PPP contracts often have high transactional costs that may be caused or increased by Principal Agent problems.¹⁰² The transaction costs in a PPP include costs required to initiate, negotiate and manage the PPP relationship over the life of the contract.¹⁰³

This research shall seek to identify those areas that increase the transaction costs caused by the principal-agent problems that are in the current regulatory and policy framework with a view of recommending reforms. These include long procurement process, uncertain contractual terms and institutional bureaucracies among others.

In light of the above this study adopts both Neo-Institutional Theory and the PAT approach owing to the unique nature of the PPP models and the compelling need to as far as possible adequately address the concern of the equal partners of the partnership arrangement.

1.8 Literature Review

As already noted the PPP concept is quite a novel and nascent idea in the Kenyan development program. Its regulation invites a lot of questions owing to the insufficient and overly complex legislation in Kenya. Though not many authors have researched in this area, the few who have, have advanced different arguments regarding institutional, legal and policy changes which can be used to enhance regulation of this sector. This research intends to precisely narrow down on

¹⁰¹ *Ibid.*

¹⁰² Boardman E. Anthony *et al*, *The Theory and Evidence Concerning Public-Private Partnerships in Canada and Elsewhere*, The School of Public Policy SSP Research Papers, University of Calgary, Vol. 9, Issue 12, March 2016 at page 14, available at <https://www.policyschool.ca/wp-content/uploads/2016/05/p3-boardman-siemiatycki-vining.pdf> (last accessed on March 2, 2018).

¹⁰³ Boardman E. Anthony *et al*, *The Theory and Evidence Concerning Public-Private Partnerships in Canada and Elsewhere*, The School of Public Policy SSP Research Papers, University of Calgary, Vol. 9, Issue 12, March 2016 at page 14, available at <https://www.policyschool.ca/wp-content/uploads/2016/05/p3-boardman-siemiatycki-vining.pdf> (last accessed on March 2, 2018).

policy, legal and institutional issues which can be explored to ensure better administration of PPPs.

In addition, most scholarly writings on PPPs are in respect to the developed economies while researches on PPPs in Africa and in particular Kenya are few understandably given that the PPP concept is a recent development bearing in mind that the PPP Act became effective in 2013. In addition, most of the writings available relate to PPPs under the existing legal regime prior to the enactment of the PPP Act in 2013.

Professor Migai Akech in his seminal book; *Privatization & Democracy in East Africa: The Promise of Administrative Law*, has explored the role of democracy and public law in privatization processes in East Africa.¹⁰⁴ He has accordingly defined privatization in a broad sense to mean the transfer of ownership or control of public assets and/or functions from public to private entities and typically embraces such measures as divestiture, commercialization or corporatization, commodification, contracting-out and public-private partnerships.¹⁰⁵ The author focuses on PPP from a very broad perspective as being a means of privatization. This he has done rightly so given that there was no separate regulatory framework governing PPPs at the time but rather it was part of the overall privatization process. Further the author has dealt with governance of the privatization process in East Africa in the context of democracy.¹⁰⁶ In contrast, this research will attempt to deal with governance of the existing PPP institutions based on the current PPP law and make recommendations thereof.

The Kenya Public Procurement Oversight Authority (Authority) advocates for a more pragmatic approach of promoting efficient partnerships between the public and the private sectors for the

¹⁰⁴ Migai Akech, *Privatization & Democracy in East Africa: The Promise of Administrative Law*, at page 1, East African Educational Publishers 2009.

¹⁰⁵ Ibid at page 5.

¹⁰⁶ Ibid at page 2.

provision of major services and goods to the general public¹⁰⁷. The Authority explains that PPPs in the delivery of public services have become a phenomenon which are spreading across the globe and hence should be recognized as an effective way of promoting development.¹⁰⁸ The Authority argues that by expanding the private sector role, public agencies are able to tap private sector technical management and financial resources so as to achieve certain public objectives including greater cost and schedule certainty, supplementing in-house staff, innovative technology applications specialized expertise or access to private capital.¹⁰⁹ On the other hand, the private partner will expand its business opportunities.¹¹⁰

The Authority further asserts that PPPs generate interests because they often avoid the negative effects of either exclusive public ownership or outright privatization, on the other hand.¹¹¹ In order to effectively ensure success of PPPs in Kenya, the Authority explains that the procurement framework has been enforced to give the government minimal stance to determine the parameters of the management of the project.¹¹² This is done through ensuring that the private consortium which the government partners with is in charge of designing the infrastructure, building the assets and efficiently managing them.¹¹³ This research however studies the gaps in the procurement of PPPs so as to ensure that there is no breach of agreement.

¹⁰⁷ Public Procurement Oversight Authority, *The Long Term Policy Framework for Public Procurement in Kenya*, Draft Zero 2009 available at <http://ppoa.go.ke/downloads/Manuals/public_procurement_policy_-_draft_zero.pdf> (Last accessed on 24th August 2014).

¹⁰⁸ The Authority explains that the government is increasingly seeking to develop financing mechanisms which brings together the public and private sector, not only to control budgetary expenditure but also to pool these two sectors specific know-how. This form of cooperation, commonly referred to as PPP, may formally be defined as "... institutional relationships between the state and the private sector for profit or non-profit ventures, where the different public and private actors jointly participate in defining the objectives, the methods and the implementation of an agreement cooperation." The Authority further clarifies public procurement and full privatization lies at the opposite end of a continuum defined by the extent of service obligations imposed, and ultimate ownership of assets.

¹⁰⁹ Public Procurement Oversight Authority, *The Long Term Policy Framework for Public Procurement in Kenya*, Draft Zero 2009 at page 35, available at <http://ppoa.go.ke/downloads/Manuals/public_procurement_policy_-_draft_zero.pdf> (Last accessed on 24th August 2014)

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Ibid.

This research further interrogates the institutions put in place to monitor and supervise delivery of the PPP projects in line with the provisions of the PPP Act.

The United Nations Economic Commission for Europe in its guidebook widely discusses how PPPs can be used to promote good governance.¹¹⁴ The guidebook notably underscores how PPPs can be used in capacity-building.¹¹⁵ It analyses distinctive features of the PPP and stresses how PPP can be used to introduce a policy change in governance to enhance service delivery. The guidebook demonstrates how the government can capitalize on PPPs through seeking financial investment from the private sector to provide essential services to the citizens through private arrangement. It also recognizes the fact that this is only possible in a country which has stable, predictable and simple laws which can invite investor confidence.¹¹⁶ This is an affirmation that without better legal framework these complex legal arrangements cannot succeed. This thesis on the other hand strives to examine measures which can be taken by the government to ensure that a better legal system is in place which protects not only the interests of the lenders and investors but also protects the rights and interests of the beneficiaries.

An article by Hannington Odame and Elsie Kangai, “Agribusiness Public-Private Partnership,¹¹⁷ posits that an effective and sustainable legal and institutional structure is essential for identification, development, and implementation of successful PPPs. According to the author, the supporting legal and institutional framework for PPP development is still evolving in Kenya.¹¹⁸

The author further maintains that the existing PPPs have been implemented based on legislation

¹¹⁴United Nations Economic Commission for Europe, *Guidebook on Promoting Good Governance in Public-Private Partnerships* (2008), available at < <http://www.unecce.org/fileadmin/DAM/ceci/publications/ppp.pdf>> (Last accessed on 14th September 2015).

¹¹⁵*Ibid*, United Nation’s Economic Commission for Europe.

¹¹⁶ *Ibid*.

¹¹⁷Hannington Odame & Elsie Kangai, “Agribusiness Public-Private Partnerships - Country Report of Kenya,” Food and Agriculture Organization of the United Nations, Rome 2013 at page 8, available at <http://www.fao.org/docrep/017/aq232e/aq232e.pdf> (last accessed on October 25, 2015).

¹¹⁸*Ibid*.

such as the Public Procurement and Disposal Act¹¹⁹ and the Privatization Act¹²⁰ which are not sectoral legal frameworks. Notwithstanding this, the author asserts that proper monitoring and evaluation of the PPPs does not take place because they have not been adequately captured in the legislation. This has also led to non-promotion of transparency in these complex agreements to the detriment of the beneficiaries.¹²¹ In order to ensure better management from PPPs, efforts must be made to ensure that sectoral legislation addresses these pressing concerns. This will enhance formulation of project specific regulations and precise contractual documents. The author's concerns on PPPs was brought out at the time when the PPP Act had not been enacted. This study intends to examine specific legal issues which should be addressed to rout these concerns. This study will undertake an in-depth analysis of the current PPP Act and propose recommendations for law reform so as to improve the PPP legal environment.

Andrew Munya illustrates in the article, “*The advantages and Risks of Pursuing P3s for Elements of Express Lane Networks in Carlifornia USA: Lessons for Developing Countries,*”¹²² that PPPs are contractual arrangements between public and private sector entities where the private sector’s role involves participation in multiple elements of public infrastructure projects.¹²³ The author proceeds to assert that PPPs unlike conventional methods of contracting for a project, are arrangements where discreet functions are divided and procured through

¹¹⁹Public Procurement and Disposal Act, No. 3 of 2005, Laws of Kenya. Available at <www.kenyalaw.org> (Last accessed on 31st August 2014)

¹²⁰ Privatization Act, Chapter 485C, Laws of Kenya. Available at <www.kenyalaw.org> (Last accessed on 31st August 2014).

¹²¹Hanningtone Odame & Elsie Kangai, “Agribusiness Public-Private Partnerships - Country Report of Kenya,” Food and Argiculture Organization of the United Nations, Rome 2013 at page 42, available at <http://www.fao.org/docrep/017/aq232e/aq232e.pdf> (last accessed on October 25, 2015).Ibid note 72 at page 42.

¹²² Munya Andrew, *Advantages and Risks of Pursuing P3s for Elements of Express Lane Networks in California, USA: Lessons for Developing Countries*, 46th ISOCARP Congress 2010 Nairobi Kenya. Available at <http://www.isocarp.net/Data/case_studies/1726.pdf> (Last accessed on 27th August 2014).

¹²³ According to the author, PPPs present a middle case between public procurement and privatization. These arrangements involve a more open relationship in which business is encouraged to propose alternatives rather than mere provision of a service and the private sector operator is further tasked to design the best solution given the government’s specifications.

separate solicitations.¹²⁴ The author also explains that in PPPs a single private entity is responsible and financially liable for performing all or a significant number of functions in connection with a project. In addition, the author underscores that the “private partners” in these instances are typically a consortium of multiple private companies that vary in expertise and specialty so that the different elements or functions are sufficiently performed and executed (design, construction, financing, operation and/or maintenance).¹²⁵

While this Article generally explores the concept of PPPs in terms of the private arrangements between the partners i.e. from the public sector and the private sector this study undertakes to examine the risks associated with the PPPs so as to anticipate some of the challenges PPPs are likely to face in Kenya. This is informed by the fact that for developing countries, the lingering question remains whether or not PPPs are ideal or practical, especially in delivery of infrastructural projects.¹²⁶ In light of this, this thesis undertakes to make a strong case for a new approach to the PPPs which can lead to the success of the arrangements.

An article by Adrian Lopez, “AFC and Public-Private Partnership,”¹²⁷ opines that PPPs are based on bringing public authorities and private agents together to design, finance, build, manage or preserve a project of public interest.¹²⁸ This is done through sharing of responsibilities and

¹²⁴Munya Andrew, *Advantages and Risks of Pursuing P3s for Elements of Express Lane Networks in California, USA: Lessons for Developing Countries*, 46th ISOCARP Congress 2010 Nairobi Kenya at page 1, available at <http://www.isocarp.net/Data/case_studies/1726.pdf> (Last accessed on 27th August 2014).

¹²⁵ The author underscores that public procurement and full privatization lies at the opposite ends of a continuum defined by the extent of service obligations imposed and ultimate ownership of assets. He asserts that though they are closely related, there are fundamental differences between public procurement, PPP and full privatization. He states that often the criteria used to choose the private partner are more complex than just who offers the best price and who conforms to the technical specification's. He clarifies that while PPPs emphasize the actual delivery phase of the project while under a simple tender, government bears the responsibility for specifying exactly what it needs.

¹²⁶Dewulf, G., Blanken, A. & W.D. Bult-Spiering, *Strategic Issues in Public-Partnerships*, Oxford: Wiley (2012).

¹²⁷ Adrian Lopez, “AFC and Public-Private Partnerships”, AFC 2010. Available at <http://www.afd.fr/webdav/shared/PORTAILS/PUBLICATIONS/PLAQUETTES/AFD_et_les_PPP_GB_v01.pdf> (Last accessed on 27th August 2016).

¹²⁸*Ibid.*

ownership between governments and the private sector, guaranteed by a long term project.¹²⁹ The author explains that PPPs became increasingly widespread in developing countries in the 1990s. The aim was to offset the shortcomings of the public sector in infrastructure and essential services management. However, many first generation PPPs failed in the wake of the financial and economic crises and were replaced by the second generation of contracts under which the private sector further limited its financial exposure.¹³⁰ In a nutshell, this article posits that the authorities must play a key role by adapting the terms of the partnerships to the local socioeconomic situation.¹³¹ The purpose of this study is to establish that the success of these initiatives is largely dependent on the quality of the institutional and regulatory framework and sectoral policies.

1.9 Methodology of the Study

This is a qualitative research work. The use of qualitative research assisted in the analysis of PPP frameworks in various jurisdictions. It will be enriched through the use and review of legal instruments, subsidiary legislations and government policy papers. The secondary sources used include textbooks, scholarly journals and articles, research papers, newspapers and magazines, internet sources as well as other materials relevant to this study.

1.10 Limitations of the Study

This study is limited to public private partnerships arrangements only. It will not attempt to look at the issues of privatization under the Privatization Act and the conventional/traditional forms of procurement procedures under the Public Procurement and Disposal Act. The study will however

¹²⁹*Ibid.* According to the author, there are a whole host of formats for partnerships between public authorities and private operators. These include: joint ventures, concessions, afterimage contracts, management or service contracts. These agreements can cover a wide range of sectors: drinking water, sanitation, health, power generation, transport, telecoms, health and education, etc.

¹³⁰*Ibid.* The author illustrates that these largely involved investment and exchange rates risks.

¹³¹ *Ibid.*

attempt to mirror some provisions in the Public Procurement and Disposal Act with those of the PPP Act without going into the substantive underpinnings. The study will therefore elaborate procurement of PPPs strictly under the PPP Act only.

The study will also not delve into technical aspects of the financial and economic considerations of PPPs.

1.11 Chapter Breakdown

This study is broken down into five thematic chapters all having a direct bearing on the PPP arrangements in Kenya.

Chapter one marks the introduction of the research topic and an overview of the research problem and background of the study is highlighted. This chapter also outlines the way the research is conducted and clearly defines the boundary of the research topic. It also contains a theoretical review. An overview of the issues discussed under this research has been set out by first setting out the definition of PPPs followed by a general outlook of the shortcomings of the PPP legal framework.

Chapter two on the other hand discusses the legal framework of PPPs in Kenya. It first outlines the historical development of PPPs as well as setting out the PPP arrangements in Kenya prior to and after the enactment of the PPP Act. In addition, it discusses the basic, critical and fundamental provisions of the PPP Act. In order to effectively do this, this chapter will interrogate the provisions of the PPP Act regulating the PPP arrangements and the enabling institutions provided for in the PPP Act. This chapter will also outline the roles of the various institutions that are involved in the implementation of PPPs which have been established under the PPP Act. The statutory provisions under the PPP Act as well as the institutional framework

created for the management of PPPs will be mirrored to the provisions enshrined in the Constitution relating to the management of public affairs. This chapter will argue that a clear framework of law and regulation is vital for PPPs.

Chapter three will give a critique of the overall PPP arrangements in Kenya by examining the elements of PPPs as well as the governance, policy and regulatory framework of PPPs. It explores the different types of PPPs available. It also undertakes to study in depth the legal, policy and institutional framework laid down to regulate the PPP arrangements. It further undertakes to topically highlight and explore the vitiating factors that have or likely to be compounded by the PPP arrangements in Kenya. This chapter therefore undertakes a comprehensive critique of the PPP arrangements in Kenya topically by focusing on the following areas: Review of the PPP Regulations, PPP Governance, PPP procurement processes, PPP Procurement methods and PPP Institutions.

Chapter four undertakes to look at comparative best practices in other jurisdictions which have effectively implemented PPPs and who have advanced laws regulating how PPP arrangements are governed and can be regulated. This will be done with a keen comparison with the challenges faced in Kenya. This study will undertake a comparative analysis of the policy, legal and institutional framework of the United Kingdom and South Africa.

The United Kingdom has a rich history in respect to PPP implementations having pioneered the modern form of PPP initiatives in Europe. In addition, the United Kingdom is one of the foremost mature markets of PPPs worldwide having proactively promoted PPP programmes and refined their effectiveness to the current status where PPPs have been mainstreamed within the

wider infrastructure programmes.¹³² Indeed, the United Kingdom had in year 2012 signed up upto 550 successful operations projects worth over 56 Billion Euros in a wide range of sectors.¹³³

On the other hand South Africa has a preminent position in Africa in respect to PPPs given that it has the greatest cumulative experience of PPPs in Africa.¹³⁴ South Africa which is the leading sub-Saharan country in respect to PPPs together with Latin America and Asia Pacific Region constitute the major rich and fast growing PPP markets in infrastructure PPPs among developing countries.¹³⁵ Indeed, South Africa has been ranked among the top developing countries in respect to PPP.¹³⁶

It is therefore worth learning from both jurisdictions.

This chapter will dwell on the successes and salient features of PPPs in both the United Kingdom and South Africa so as to determine if Kenya can borrow from them certain aspects of PPPs for purposes of advancing Kenya's local system.

Lastly chapter five provides an overall summary and conclusions of the research topic. It highlights the general overview of the research topic. It also enumerates the proposed the recommendations that can be applied to improve the existing legal, policy and institutional regime.

¹³² European PPP Expertise Centre, United Kingdom-England: PPP Units and Related Institutional Frameworks, June 2012 at page 7, available at http://www.eib.org/attachments/epec/epec_uk_england_ppp_unit_and_related_institutional_framework_en.pdf (last accessed on November 22, 2017)

¹³³ Ibid at page 9.

¹³⁴ Farlam Peter "Working together, *Assessing public-private partnerships in Africa, Nepad Policy Focus Series, the South African Institute of International Affairs (SAIIA)*, Pretoria, SA (2005) at page 1 available at <https://www.oecd.org/investment/investmentfordevelopment/34867724.pdf> (last accessed November 21, 2016)

¹³⁵ Fombad M.C, *Enhancing Accountability in Public-Private Partnerships in South Africa*, at page 67, available at <https://www.ajol.info/index.php/sabr/article/viewFile/111365/101143> (last accessed on 24th November 2017).

¹³⁶ Ibid.

CHAPTER TWO

HISTORICAL DEVELOPMENT AND OVERVIEW OF THE CURRENT LEGAL AND INSTITUTIONAL FRAMEWORK OF PPPs IN KENYA

2.0 Introduction

This chapter lays the foundation of this study. It presents a brief historical development of PPP framework by tracing the history of the development of PPPs in Europe, Africa and eventually in Kenya. It thereafter proceeds to specifically study the development of PPPs in Kenya. Since the development of PPPs in Kenya is melded with the ushering of various laws to regulate PPP platform in Kenya, this chapter sets out an overview of the current legal provisions as well as the institutional frameworks established by law to oversee the management of PPP arrangements in Kenya. In particular, an outline of the regulatory provisions entrenched in the PPP Act, PPP Policy, PPP Regulations, Public Finance Management Act, Public Roads Toll Act all of which shepherd growth and development of PPPs in Kenya has been undertaken.

2.1 Historical Perspectives of PPPs

2.1.1 History of PPPs in Europe

The term Public Private Partnership is now a dominant slogan in public sector reforms taking over the status once accorded to privatization in the 1980s and 1990s¹³⁷. Privatization on the

¹³⁷ Ole Helby Petersen, *Public-Private Partnerships as Converging or Diverging Trends in Public Management? A comparative Analysis of PPP Policy and Regulation in Denmark and Ireland*, International Public Management Review, (12)2, (2011) at page 2 available at www.kora.dk/media/339431/ohp_public_Private.pdf (last accessed on June 30 2015).

other hand was taken as an antidote to ‘nationalization’ which was a dominant idea in the mid 20th Century¹³⁸.

There has been a continued blurring of the boundaries between public and private realms in the commerce of society and the economy¹³⁹.

Notions of public private cooperation or partnerships have a long pedigree going back many centuries¹⁴⁰. The partnerships were in various forms such as privateering, mercenary armies, reliance on private business accountants to run the state treasury or simply outsourcing. Graeme has attempted to analyze the evolution of the interaction of public and private interests in Europe through some social and economic activities as discussed in some few illustrations below¹⁴¹:

i) **Privateer Shipping**

Public and private initiatives were vital to England’s rise as a major sea power during the Spanish War of 1585 to 1603.¹⁴² The English Navy was at its infancy at the time and the vessels were financed by powerful merchants and aristocratic landowners.¹⁴³ That practice where private and public interest were inextricably mixed and the privateer’s vessels far outnumbered those of the English Queen came to be known as ‘Privateering’¹⁴⁴. In fact one of the famous example was

¹³⁸ Graeme Hodge & Carsten Greve (eds), *The Challenge of Public Private Partnerships: Learning from International Experience*, at page 22, Edgar Elgar Publishing, 1st January 2005. Available at https://books.google.co.ke/books/about/The_Challenge_of_Public_private_Partners.html?id=pKAvNQmpXkUC&redir_esc=y (last accessed on 29th June 2015)

¹³⁹ Graeme Hodge & Carsten Greve (eds), *The Challenge of Public Private Partnerships: Learning from International Experience*, at page 23, Edgar Elgar Publishing, 1st January 2005. Available at https://books.google.co.ke/books/about/The_Challenge_of_Public_private_Partners.html?id=pKAvNQmpXkUC&redir_esc=y (last accessed on 29th June 2015)

¹⁴⁰ Graeme Hodge, Public Private Partnerships and Legitimacy, *UNSW Law Journal*, Vol 29(3) at pg 319, available at <http://www.austlii.edu.au/au/journals/UNSWLJ/2006/55.html> (last accessed on 29th June 2015).

¹⁴¹ Graeme Hodge & Carsten Greve (eds), *The Challenge of Public Private Partnerships: Learning from International Experience*, at page 23-35, Edgar Elgar Publishing, 1st January 2005. Available at https://books.google.co.ke/books/about/The_Challenge_of_Public_private_Partners.html?id=pKAvNQmpXkUC&redir_esc=y (last accessed on 29th June 2015)

¹⁴² Ibid at page 22.

¹⁴³ Ibid at page 22.

¹⁴⁴ Ibid at page 25.

the English fleet under Sir Francis Drake which defeated the Spanish Armada in 1588 wherein 163 vessels out of 197 were privately owned¹⁴⁵. The French on the other hand had a system known as “Royal Partnership” which was intended to take up ship and dockyard labour and facilities¹⁴⁶.

ii) Mercenary Armies

It is estimated that over 90 private military groups operated in Africa in the mid-1990s especially in war torn states such as Sierra Leon and Angola. The late 20th Century was marked by growth in private security services, user pays policing, increasing reliance on ‘neighbourhood watches’ as part of community policing which in a sense demonstrate a decline in state monopolization in the provision of security¹⁴⁷.

iii) Trade, Commerce and Colonial Expansion

The first settlements of English subjects overseas in the 1600s were the work of private enterprise with the state’s initial function simply being conferring on the private enterprise by Charter the right to govern lands acquired on its behalf.¹⁴⁸ One best example was the East India Company which though a private commercial company, acquired territorial and governmental responsibilities throughout India and the East Africa¹⁴⁹. Similarly, the Spanish Empire upto 1700 relied principally on private contractors to supply soldiers and ships¹⁵⁰.

iv) Treasury Organization

¹⁴⁵ Ibid at page 25.

¹⁴⁶ Ibid at page 26.

¹⁴⁷ Ibid at page 27.

¹⁴⁸ Ibid at page 27.

¹⁴⁹ Ibid at page 27.

¹⁵⁰ Ibid at page 28.

Before the major administrative reforms of the 19th Century, a model system of pre-budgetary financial administration applied wherein a body of businessmen on own account functioning as private accountants contracted to rulers of states.¹⁵¹ They acted as receivers and payers of taxes and had the right to collect taxes and make profits if they were able to collect more than what they had contracted with a state¹⁵². The public and private interaction became even more apparent with the involvement of the Church in the form of the medieval religious orders of the Catholic Church such as the Knights Templars and Knights Hospitallers which came to provide numerous services on behalf of European monarchs such as debt and tax collection, providing loans, paying royal pensions, transferring funds and providing repositories for governments¹⁵³.

The worldwide momentum for PPP solutions has emerged from a broad and diverse coalition that sees the strategy as a governance reform as much as a pragmatic imperative.¹⁵⁴ Complex problems are no longer singularly solvable by traditional forms of state intervention.¹⁵⁵ Multi-faceted approaches are required, including new institutional arrangements that devolve responsibility from the national centres to local entities of government and reinvent local models of governments by engaging the private market to deliver services in cooperation with the public agencies.¹⁵⁶

¹⁵¹ Ibid at page 28.

¹⁵² Ibid at page 28.

¹⁵³ Ibid at page 29.

¹⁵⁴ Ole Helby Petersen, Public-Private Partnerships as Converging or Diverging Trends in Public Management? A comparative Analysis of PPP Policy and Regulation in Denmark and Ireland, *International Public Management Review*, Vol 12, Iss. 2, 2011 available at www.kora.dk/media/339431/ohp_public_Private.pdf (last accessed on June 30 2015) at page 2.

¹⁵⁵ International Funding Organizations like the World Bank, Asian Development Bank, Japan Bank for International Cooperation, and Inter-American Development Bank have entered the PPP advocacy tent seeking to promote and expand the development of needed infrastructure around the world. Relatively recently, the European Union (EU) accepted the PPP as a “complimentary implementation tool,” linking PPP use to its initiativeness for economic development and comprehensiveness.

¹⁵⁶ Sagalyn Lynne B, “Public-Private Engagement: Promise and Practice.” in *Planning Ideas that Matter: Livability, Territoriality, Governance, and Reflective Practice*, eds. Bishwapriya Sanyal, Lawrence J. Vale, and Christina D. Rosan. MIT Press, 2012, available at <https://www.business.unsw.edu.au/About-Site/Schools-Site/Economics->

The concept of partnership between the private and public sectors continued in Europe up to the 19th Century which marked the golden age of concessions in Europe as it brought rapid urbanization and expansion of public networks in transport, water supply and sewerage¹⁵⁷. The trend in respect to PPPs in Europe was reversed in the 20th Century due to the effects of both the 1st and 2nd World Wars as well as the great depression in 1929.¹⁵⁸ Consequently, the notion of the state owned companies was born in Europe with public infrastructure being undertaken mostly by the state.¹⁵⁹ There was however a renewed move towards liberalization and privatization in the 1980s.¹⁶⁰ One of the factors which gave impetus to the adoption of the PPP model include public finance pressure faced by most governments.¹⁶¹ From the 1980s, governments considered two alternatives of engaging the private sector either through total privatization of public facilities or PPPs¹⁶². Given the political controversies that surrounded privatization process where government was thought to have heavily subsidize the price on the one hand and the reluctance to privatize certain facilities for national security reasons, PPPs became a more popular option¹⁶³.

2.1.2 Development of PPPs in Africa

Site/Documents/LSagalyn_Public%20Private%20Engagement%20Promise%20and%20Practice.pdf (last accessed on 30th October 2015).

¹⁵⁷ Public Private Infrastructure Advisory Faculty, Overview of PPP Experience, Toolkit for Public Private Partnerships in Roads and Highways, March 2006 at page 34-35. Available at <https://www.ppiaf.org/sites/ppiaf.org/files/documents/toolkits/highwaystoolkit/6/pdf-version/1-21.pdf> (accessed on October 30th 2015)

¹⁵⁸ Ibid at page 35.

¹⁵⁹ Ibid at page 35.

¹⁶⁰ Ibid at page 35.

¹⁶¹ Reeves Eoin, *Public-Private Partnerships in Ireland: A Review of the Experience*, A Paper Presented to the Nevin Economic Research Institute, Dublin, Ireland, 2013. Available at http://www.nerinstitute.net/download/pdf/reeves_neri_2013_ppp.pdf (accessed on 2nd November 2015).

¹⁶² Winch Graham, Onishi Masamitsu & Schmidt Sandra (Eds), *Taking Stock of PPP and PFI Around the World*, Certified Accountants Educational Trust (London 2002) at page 7. Available at <http://www.accaglobal.com/content/dam/acca/global/PDF-technical/public-sector/rr-126-001.pdf> (Last accessed on 2nd November 2015)

¹⁶³ Ibid.

The overall growth in private sector participation in infrastructure in developing countries has been remarkable as evidenced by the increase from 58 projects achieving financial close in only eight countries in 1990 to 288 in 64 countries in 2007¹⁶⁴.

The challenge of massive infrastructure deficit is obviously a common denominator to all African Countries. This has resulted in the region's weak investment climate and tremendous competitive disadvantage in the global market.¹⁶⁵ The emergence of PPP as a vehicle for driving private investment in infrastructure projects, coupled with other changes in the dynamics of global investment provides a window of opportunity for African countries to attract significant private investments to scale up their appalling physical infrastructure.¹⁶⁶

In Africa governments are increasingly looking to PPPs to radically improve infrastructure networks in their countries and enhance service delivery to their people. This development finance model – where the state shares risk and responsibility with private firms but ultimately retains control of assets – will improve services, while avoiding some of the pitfalls of privatization such as unemployment, higher prices and corruption. In theory, PPPs have the potential to solve Africa's profound infrastructure and services backlogs.¹⁶⁷

The experience in Africa like in most other countries has been that PPP programs start in transport, with later migration to other sectors.¹⁶⁸ The main reason is often the high cost of such projects coupled with the attendant easier ability for the private sector partners to get revenues through toll charges. The rate of migration to other sectors e.g. health, education, energy, water, waste treatment often reflect National priorities and Legal frameworks. Lately there is a tendency

¹⁶⁴ Yong H.K, *Public-Private Partnerships Policy and practice: A Reference Guide*, Commonwealth Secretariat, 2010 at page 22, accessed at https://books.google.co.uk/books?id=tnuFUUjP9f8C&printsec=frontcover&source=gbs_atb#v=onepage&q&f=false (last accessed on October 13, 2016)

¹⁶⁵ Report of the Africa Public Private Partnership Network held on the 15th of February 2012 at Abuja Nigeria.

¹⁶⁶ *Ibid.*

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

for projects to cascade from central to local government/municipalities/devolved county government.¹⁶⁹

In Africa, PPP arrangements began to flourish in the mid-to-late-1990s.¹⁷⁰ This was largely attributed to and influenced by the successful application of PPPs in Europe where it was widely used in the transport sector to develop better infrastructural facilities. The realization that the concept could be used to beat capacity constraints within the African countries led to the spawning of this relatively nascent idea in Africa as a means of facilitating faster economic growth.¹⁷¹ Thus it became widely embraced as a viable development program especially in the transport sector where it had a lot of prominence.¹⁷²

Based on the logic of pragmatism, PPP advocates make compelling arguments for bridging public and private sectors through alliance, collaboration, and partnership. They cast these arrangements as innovative and resourceful ways of dealing with the intensifying demands of urbanization or critical needs for economic development. Citing a particular combination of economic and institutional forces, infrastructure policy specialists, in particular emphasize the core role of PPPs can play in meeting the pressing need for new large-scale investments and equally urgent need to refurbish existing systems. For national governments and international organizations anxious to enhance productivity and stimulate economic growth, PPPs represent an efficient means to expand the scope of their development investments and simultaneously tap advanced technological expertise.¹⁷³

PPPs associated with the transport sector then as is now are mainly concessions and Greenfield projects.¹⁷⁴ Concessions occur when a private entity takes over the management of a state-owned

¹⁶⁹ *Ibid.*

¹⁷⁰ Mabizela M., "Public-Private Partnerships: Organizational Conformity of Private Providers to Meet Market Demands," Albany (2005). Available at <http://www.albany.edu/dept/eaps/proph/publication/ASHE05_presentation/ASHE2005_Mabizela.ppt> (Last accessed on 30th August 2014).

¹⁷¹ *Ibid.*

¹⁷² *Ibid.* The author explains that transport sector in the African countries has been the major beneficiary of PPP arrangements in Africa. He attributes this largely due to the fact that though the transport sector has been and still remains a vital organ for economic development, it has been riddled with neglect and under prioritization by various African governments due to the heavy financial muscle it demanded. The advent of PPPs has thus emerged as a welcome idea in most if not all African countries.

¹⁷³ *Supra* note 4.

¹⁷⁴ Baker & McKenzie, Public Private Partnerships: Evolution or Revolution? Global Business Challenges, University of California Press, Berkeley (2012) p.36. Available at <<http://www.bakermckenzie.com/files/Publications/f926f49ad12a4cd49a3abe74e63b45ea/Presentation/PublicationAttachment/248d75c6-bc1d-48a7-ad10-63cced1b7043/bk/australia/pppsreport/mar12/pdf>> (Last accessed on 24th September 2014)

road for a given period during which it also assumes significant investment risk.¹⁷⁵ Greenfield Projects on the other hand requires a private entity or a public-private joint venture to build and operate a new project for the period specified in the contract. The road project usually returns to the public sector at the end of the concession period.¹⁷⁶

Currently PPPs are significantly used to make improvements to economic (physical) infrastructure such as construction of roads, telecommunications, provision of electricity and water.¹⁷⁷ Great inroads are being made by several African countries to utilize PPPs to improve social infrastructure, such as health and education, and other services such as garbage collection and agriculture extension services.¹⁷⁸ Traditionally, in Africa, these services were solely being provided by the public sector. They were strictly reserved for the government. This was due to the fact that most of them required large capital outlays and had long gestation period. Notably, the use of PPPs in Africa has not been widely embraced yet due to lack of legal and institutional structures.¹⁷⁹

2.1.3 Development of PPPs in Kenya

Early developments of private sector participation in Kenya was sector specific¹⁸⁰. For instance as a result of severe power shortage in 1990s, the Government of Kenya initiated a raft of policies and reforms that restructured the energy sector that promoted private sector participation

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ International Monetary Fund, *Public-Private Partnerships*, IMF 2004. Available at <<http://www.imf.org/external/np/fad/2004/pifp/eng/031204.htm>> (Last accessed on 30th August 2014).

¹⁷⁸ Evatt Foundation, "The Myths of PPPs Paying for Private Profit," Blueburn Series 2005. Available at <<http://evatt.labor.net.au/publications/papers/117.html>> (Last accessed on 30th August 2014).

¹⁷⁹ African Development Bank, "Enhancing Development in Africa: Public-Private Partnerships," ADB 2002. Available at <<http://www.afdb.org/pls/portal/url/ITEM/F5F752E54/2321E030A8C0668C29FB>> (Last accessed on 30th August 2014).

¹⁸⁰ *Ibid.*

through introduction of Independent Power Producers (IPPs)¹⁸¹. Additionally, telecom sector reforms led to significant private sector investments¹⁸². Reforms in the water and roads sectors through the amendment of the Water Act in 2002 as well as the Public Road Tolls Act in 2007 increased the private sector participation in those sectors respectively¹⁸³.

The Kenya Vision 2030 program which aims to transform Kenya into an industrialized middle income country by year 2030 requires heavy investment in infrastructure services.¹⁸⁴ It is particularly propelled by amongst others, the increased demand of quality and affordable public services by the citizens. However, the huge funding gap in the country to complete infrastructural projects coupled with the attendant desire to reduce sovereign borrowing has led to inadequate infrastructural facilities in the country.¹⁸⁵ The realization that inadequate infrastructure has resulted in huge cost loss as a result of lower productivity to reduced competitiveness and ultimate loss of business has compelled the government to resort to the PPPs as a feasible and alternate viable development module.¹⁸⁶ The first Medium Term Plan (2008-2012) under the Kenya Vision 2030 emphasized the importance of private sector participation through the improvement of regulatory and institutional frameworks of PPPs¹⁸⁷. Consequently, the Government put in place the Public Procurement and Disposal (Public-Private

¹⁸¹ Ibid.

¹⁸² Ibid.

¹⁸³ Ibid.

¹⁸⁴ Kenya Vision 2030: A Globally Competitive and Prosperous Kenya, at pg viii, available at https://www.researchictafrica.net/countries/kenya/Kenya_Vision_2030_-_2007.pdf (last accessed on 22, November 2017).

¹⁸⁵ Kenya Vision 2030: A Globally Competitive and Prosperous Kenya, at pg viii, available at https://www.researchictafrica.net/countries/kenya/Kenya_Vision_2030_-_2007.pdf (last accessed on 22, November 2017).

¹⁸⁶ Mwaniki Gachoka, "Enter Public Private Partnerships," Kenya Procurement Journal 2012 available at http://www.ppoa.go.ke/images/downloads/procurement-journal/issue_no._3.pdf (last accessed September 14, 2015).

¹⁸⁷ Cambridge Economic Policy Associates Ltd, Mobilizing Finance for Infrastructure; A study for the UK Department for International Development (DFID): Kenya Country Case Study, August 2015, at page 2, available at <http://www.cepa.co.uk/portfolio-dfid-mobilising-finance-infrastructure?flBack=CS&selYear=2015> (last accessed on October 14, 2016)

Partnerships) Regulations which outlined what constituted a PPP and also created both the PPP Steering Committee and PPP Secretariat both of which were both established in 2010¹⁸⁸.

The PPP framework was therefore previously governed by Regulations which had been issued under the Public Procurement and Disposal Act¹⁸⁹ namely the Public Procurement and Disposal (Public Private Partnership) Regulations 2009¹⁹⁰.

PPPs provide benefits by allocating the responsibilities to the party that is best positioned to control the activity that will produce the desired result. With PPPs, this is accomplished by specifying the roles, risks and rewards contractually, so as to provide incentives for maximum performance and the flexibility necessary to achieve the desired result.¹⁹¹

Kenya motivated by the broad consensus to promote infrastructural development to stimulate faster economic growth cordially welcomed the PPP framework as a feasible avenue of bringing the private sector on board to catapult implementation of the development blue print.¹⁹² This led to the establishment of requisite legal and institutional structure to promote and regulate the PPP programs in the country.¹⁹³ The novelty of the PPP mechanism coupled with the reality of limited funds in the public sector to develop viable infrastructure projects drove Kenya towards adopting this economic renaissance.¹⁹⁴

¹⁸⁸ Ibid at page 2-3.

¹⁸⁹ Public Procurement and Disposal Act, Act No. 3 of 2005, Laws of Kenya.

¹⁹⁰ Public Procurement and Disposal (Public Private Partnership) Regulations, Legal Notice No. 38 of 2009, Laws of Kenya.

¹⁹¹ Grimsey, D. and Lewis, M., *Public Private Partnerships: The Worldwide Revolution in Infrastructure Provision and Project Finance*, Edward Elgar, Cheltenham, UK (2004) available at <https://epdf.tips/public-private-partnerships-the-worldwide-revolution-in-infrastructure-provision.html> (last accessed on 26th August 2016).

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ Ibid.

PPP in Kenya is defined as a performance-based contract under which the private sector supplies public services over time and is paid by the public sector, end user or a hybrid of both.¹⁹⁵ While the output is specified by the contracting authority, the input is squarely the responsibility of the private sector.¹⁹⁶ Under these arrangements the Government retains the total strategic control on the service and is able to secure new infrastructure which becomes the Government assets at the end of contract life.¹⁹⁷

As a result of the PPP arrangements various projects have been undertaken by the private sector in Kenya and some other projects are underway.¹⁹⁸ This is a pointer to the fact that if better policies can be laid down various public projects can be undertaken under the flagship of the PPP arrangements. Lack of capacity and infrastructural constraints would then be a thing of the past.¹⁹⁹

2.2 The Legal Framework of PPPs in Kenya

The legal framework of PPPs in Kenya is based on the parliamentary legislations and on the Constitution, 2010 which enshrines good governance, integrity, transparency and accountability in governance institutions.²⁰⁰ Key parliamentary legislations also go a long way to provide a suitable legal framework for PPPs in Kenya. The PPP arrangements are also hinged on contract

¹⁹⁵ Sarah Jamil, *The Miscellaneous Desirability of Public-Private Partnerships and an Approach to Design an Appropriate Constitution*, Freiburg Press (2008). Available at <https://www.wipo.uni-freiburg.de/dateien/tagungen/reformen/the_miscellaneous_desirability_of_public.pdf> (Last accessed on 15th September 2014).

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*

¹⁹⁸ These include Mtwapa and Nyali Bridges Concessions 1959, Westmount 46 MW (not active)/Iberafrica 1997 (56MW and 53 thermal and power plant)/Tsavo/Kipevu IPP (2000)/ Orpower-Olkaria III 48 MW Geothermal Plant (2000/2008)/Rabai Independent Power Project 98 MW (2009) and Mumias Cogeneration Power Plants (26MW), Port of Mombasa Grain Terminal (BOO 1998), JKIA Cargo Terminal (1998), Kenya-Uganda Railway (BOT 2006), Malindi Water Utility (1999) and Nairobi Urban Toll Road (Failed, 2009) were all through PPP arrangements.

¹⁹⁹ Mwaniki Gachoka, "Enter Public Private Partnerships," Kenya Procurement Journal 2012 available at page 70, available at http://www.ppoa.go.ke/images/downloads/procurement-journal/issue_no._3.pdf (last accessed September 14, 2015).

²⁰⁰ Article 10, Constitution of Kenya, 2010.

law which further assures the private sector that the contract arrangements will be honoured.²⁰¹ Lastly, Kenya being a common law country is also guided by the common law system on matters PPP. It thus heavily borrows from the common law legal system on how PPP can be properly regulated.

The key statute that specifically spells out the legal framework for PPPs in Kenya is the Public Private Partnerships Act together with the Regulations thereunder. It is the framework legislation which fundamentally and primarily regulates the PPP arrangements in Kenya. There are however various other Acts which regulate specific areas of the PPP framework in Kenya. These are the Public Finance Management Act, Public Roads Toll Act. These pieces of legislation are critical when analyzing the PPP framework in Kenya. This study undertakes to examine critical provisions envisaged in the aforementioned pieces of legislation starting with the Constitution.

2.2.1 The Constitution

The 2010 Kenyan Constitution is arguably the most pro-citizen framework that Kenya has or will probably ever have. It encapsulates principles and values of proper management of public resources by thrusting citizens and their plights at the center of governmental decision-making.²⁰² It frowns upon misuse of public power for private gain and seeks to open up governance to public scrutiny if not participation.²⁰³

Although the Constitution does not have express provisions which regulate the PPP framework, its overbearing and towering provisions over legislative Acts is important in many ways more

²⁰¹ Mwaniki Gachoka, "Enter Public Private Partnerships," Kenya Procurement Journal 2012 available at page 70, available at http://www.ppoa.go.ke/images/downloads/procurement-journal/issue_no._3.pdf (last accessed September 14, 2015).

²⁰² Ruth Aura & Maurice Oduor, "Gender Equality in the New Constitutional Dispensation of Kenya," in Constitutional Law in Kenya, available at https://www.researchgate.net/publication/228145763_Gender_Equality_in_the_New_Constitutional_Dispenation_of_Kenya (last accessed August 25, 2016).

²⁰³ *Ibid*, see generally the import of Chapter Six.

than one.²⁰⁴ From the onset, the Constitution states that it is the supreme law of the republic.²⁰⁵ Thus any law consistent to it is void to the extent of the inconsistency.²⁰⁶ The Constitution equally being citizen oriented clearly maps out the national values and principles of governance. These values and principles bind all State Organs, State Officers, public officers and all persons whenever any of them amongst others enacts, applies or interpret any law or makes or implements public policy decisions.²⁰⁷ It is important to note that Article 10 read with the Preamble of the Constitution recognizes that Kenyans aspire “for a government based on the essential values of democracy, social justice and the rule of the law.” Though the Preamble of the Constitution and Article 10 do not create justiciable rights they generally point out the fundamental values that underlie the Kenyan Constitutional dispensation. The inclusion of these values and principles allows for a wholesome construction of the law not to mention their standard-setting function. These national values and principles are *inter alia* good governance, integrity, transparency and accountability.²⁰⁸ It is manifestly clear that though these do not form justiciable rights, they clearly informs the parameters and the manner in which the laws can be interpreted in Kenya in order to enhance the general public interest.

Importantly the Constitution outlines the principles which guide public finance. It enshrines that at all times there shall be openness and accountability including public participation in financial matters.²⁰⁹ The import of this constitutional dictate is to demand for competitive procurement process during the vetting of project bidders in the PPP framework. The Constitution further sets out a high standard on accountability as it requires that all public money shall be used in a

²⁰⁴ Ibid.

²⁰⁵ Article 2(1), Constitution of Kenya, 2010.

²⁰⁶ Article 2(4) Constitution of Kenya, 2010.

²⁰⁷ Article 10(1) (b) and (c), Constitution of Kenya, 2010.

²⁰⁸ Article 10(2) (c) Constitution of Kenya, 2010.

²⁰⁹ Article 201(a) Constitution of Kenya, 2010.

prudent and responsible way.²¹⁰ In addition to the provisions on public finance, the Constitution has spelt out the procurement system to be adopted in respect to procurement of goods and services under Article 227. The system should be fair, equitable, transparent, competitive and cost-effective.²¹¹ This is a cardinal requirement under PPP arrangements. The Constitution under Article 227, has addressed the question of corruption and other malpractices during the procurement process. It requires that a framework should be developed to deal with among others, sanction against contractors who have not performed according to professionally regulated procedures, contractual agreements or legislation.²¹² Additionally, the Constitution prescribes that legislation to be enacted in respect to procurement should provide for sanctions against persons who have defaulted on tax obligations or guilty of corrupt practices or serious violation of labour practices.²¹³

In light of the foregoing account it is justifiable to infer that the Constitution by implication and extension regulates and informs the interpretation of the PPP Act which is the primary legislation regulating PPP frameworks in Kenya.

2.2.2 Public Private Partnership Act (PPP Act)²¹⁴

This is the primary legislation which regulates PPP arrangements in Kenya.²¹⁵ The PPP Act explicitly provides that in instances where there is conflict between the provisions of the PPP Act and any other written laws, then the provision of the PPP Act prevails.²¹⁶ Not only does it

²¹⁰ Article 201(d) Constitution of Kenya, 2010.

²¹¹ Article 227(1), Constitution of Kenya, 2010.

²¹² Article 227(2)(c) Constitution of Kenya, 2010.

²¹³ Article 227(2)(d) Constitution of Kenya, 2010.

²¹⁴ Public Private Partnership Act, No. 15 of 2013, Laws of Kenya.

²¹⁵ Section 3, PPP Act. Section 4(e) of the Public Procurement and Asset Disposal Act, 2015 precludes any procurement under the PPP Act from the application of that Act. of This section provides that a project agreement concluded under the PPP Act shall not be subjected to the provisions of the Public Procurement and Disposal Act No. 3 of 2005.

²¹⁶ Section 63 (2), PPP Act.

establish institutions which monitor the way PPP programs are implemented but it also regulates the manner in which such institutions involved in PPP shall operate. Therefore, it encompasses the legal, administrative and institutional framework of regulating PPPs in Kenya. The PPP Act states that it applies to every contract for the financing, construction, operation, equipping or maintenance, of a project or for the provision of public services undertaken as, a public private partnership.²¹⁷ It is worth noting at this point that the Public Procurement and Asset Disposal Act in Section 4(2)(e)²¹⁸ specifically precludes procurement and disposal of assets under the PPP Act.

As already noted, a contracting authority may enter into a project agreement with any qualified private party for provision of specific infrastructural service or development facility to the government.²¹⁹ Depending on the terms of the agreement, the contracting authority may designate its assets for the use of a private party undertaking the project.²²⁰ In determining the duration of the project, a contracting authority must take into account several factors pertinent to the project including the provisions of any relevant law, life span of the technology employed, depreciation of the project assets, period required by the parties for service delivery and for recouping of a party's investment.²²¹ The PPP Act further provides that each contracting authority must prepare a list of projects it intends to undertake on a priority basis and submit the list to the PPP Unit for assessment.²²² The said projects must however be in tandem with the development program of the authority.²²³

²¹⁷ Section 3, PPP Act.

²¹⁸ Section 4(2)(e), Public Procurement and Asset Disposal Act No. 33 of 2015.

²¹⁹ Section 18(1), PPP Act.

²²⁰ Section 18(2), PPP Act.

²²¹ Section 21, PPP Act.

²²² Section 23(1), PPP Act.

²²³ Section 23(2), PPP Act.

The PPP Unit upon receipt of the list from the contracting authority shall assess and thereafter submit the list with its recommendation to the PPP Committee.²²⁴ The PPP Committee on its part is required to consider the list and recommendations of the PPP Unit and submit to the Cabinet Secretary (hereinafter any reference to Cabinet Secretary means cabinet secretary of the National Treasury) a national priority list for approval.²²⁵ The Cabinet Secretary is given discretion to prescribe thresholds for approval and the carrying out of projects by the County Government.²²⁶

As a prequalification procedure, a contracting authority which intends to enter into a project agreement with a private party must confirm that the private party has the necessary financial capacity, relevant expertise and experience to undertake a project.²²⁷ In compelling circumstance where it is necessary for the government to reduce premiums factored for political risk the government may issue guarantee, undertaking or binding letters of comfort in relation to a project.²²⁸

In determining the cost of undertaking a project, the parties to the PPP shall be guided by the prevailing market rates.²²⁹ The PPP Act specifically stipulates that the cost of the project must be affordable to the Government and end users and must provide value for money while on the other hand it must be sufficient to enable the private party to maintain its financial integrity, attract capital, operate efficiently and compensate a private party for any assumed risks.²³⁰ The PPP Act further states that all PPP projects can only be procured through a competitive bidding

²²⁴ Section 24(1), PPP Act.

²²⁵ Section 24(2), PPP Act.

²²⁶ Section 24(3), PPP Act.

²²⁷ Section 26, PPP Act.

²²⁸ Section 27, PPP Act.

²²⁹ Section 28(1), PPP Act. Where it is not possible to determine the prevailing market rates, the setting of the price shall be based on the full allocation of cost of such facilities or on international best practices.

²³⁰ Section 28(2), PPP Act.

process save as provided under the PPP Act.²³¹ The default procurement procedure therefore under the PPP Act is principally through competitive process although the PPP Act does provide for non-competitive procedure which is subject to certain conditions.²³² On both competitive and non-competitive procurement procedures, a contracting authority is expected to be guided by the principle of transparency, free and fair competition and equal opportunity in the procurement and award contract.²³³

The PPP Act states that where a contracting authority intends to implement a project through PPP, then the contracting authority is tasked to conceptualize or undertake potential projects and undertake the preparatory and tendering process of the project²³⁴ and in so doing the contracting authority is required to consider the strategic and operation benefits of entering into a PPP arrangement as compared to the development of the facility or the provision of the service by the contracting authority itself.²³⁵

The contracting authority must constitute a project appraisal team for the purpose of overseeing the preparation phase of the project.²³⁶ The project appraisal team constituted must consist of a representative of the PPP Unit and such technical, financial and legal experts of the contracting authority as the contracting authority shall determine.²³⁷ The project appraisal team shall also include a member of the PPP Node.²³⁸ Upon approval of the project by the PPP Committee, the contracting authority must undertake a feasibility study for the purpose of determining the

²³¹ Section 29 (1), PPP Act.

²³² Section 61, PPP Act.

²³³ Section 29(2), PPP Act.

²³⁴ Section 31(1), PPP Act.

²³⁵ Section 31(2), PPP Act.

²³⁶ Section 32(1), PPP Act.

²³⁷ Section 32(2), PPP Act.

²³⁸ Section 32(3), PPP Act.

viability of undertaking the project.²³⁹ The contracting authority shall then submit the feasibility report to the PPP Unit for review and evaluation.²⁴⁰ The PPP Unit shall thereupon submit the feasibility report to the Debt Management Office (DMO) for review and approval in respect to fiscal risk and contingent liabilities.²⁴¹ Consequently, the PPP Unit shall then submit the feasibility report together with its recommendations and the approval of the DMO to the PPP Committee for approval.²⁴²

Upon approval of the project by the PPP Committee, the contracting authority shall through notices in the newspapers invite requests for qualification.²⁴³ The advertisement and tendering process is done in consultation with the PPP Unit.²⁴⁴ Any person or consortium is qualified to apply.²⁴⁵ The contracting authority shall then constitute a pre-qualification committee for purpose of qualifying bids.²⁴⁶ The project appraisal team may be constituted as a pre-qualification committee.²⁴⁷

Having shortlisted qualified bidders, the Contracting authority then prepares invitation to bid and tender documents in relation to the project for purposes of inviting bids²⁴⁸ and shall then publish a notice to tender in the Gazette and newspapers.²⁴⁹ A project evaluation team to open and evaluate the bids shall be constituted consisting of atleast one representative of the contracting authority, one representative each from the PPP Node, relevant regulatory body, PPP Unit and

²³⁹ Section 33(1), PPP Act.

²⁴⁰ Section 35(1), PPP Act.

²⁴¹ Section 35(2), PPP Act.

²⁴² Section 35(3), PPP Act.

²⁴³ Section 37(1), PPP Act.

²⁴⁴ Section 37(3), PPP Act.

²⁴⁵ Section 38(1), PPP Act.

²⁴⁶ Section 39(1), PPP Act.

²⁴⁷ Section 39(3), PPP Act.

²⁴⁸ Section 43(1), PPP Act.

²⁴⁹ Regulation 36(2), PPP Regulations.

the Attorney General.²⁵⁰ The contracting authority thereafter with the approval of the PPP Committee and through the negotiating committee enters into negotiations with the successful bidder.²⁵¹

The negotiating committee shall upon conducting negotiations prepare and submit to the contracting authority, a project report specifying the negotiated terms together with its recommendations²⁵² and the contracting authority on its part shall review and if it is satisfied submit the report to the PPP Unit.²⁵³ If the PPP Unit is not satisfied with the recommendations of the report, the report is then taken back to the contracting authority which shall then forward it to the negotiating committee with its recommendations for review.²⁵⁴ If the report is ultimately approved by the PPP Unit it is forwarded to the Debt Management Office (DMO) for assessment.²⁵⁵ The PPP Unit shall then submit project report together with its recommendations and the financial risk assessment report from the DMO to the PPP Committee for consideration.²⁵⁶ The PPP Committee shall upon its consideration and submit a report to the Cabinet Secretary who shall together with the Cabinet Secretary in the State Department responsible for the implementation of the project prepare a joint cabinet memorandum based on the recommendations from the PPP Committee for approval by the Cabinet.²⁵⁷ If the Cabinet

²⁵⁰ Section 47(1), PPP Act.

²⁵¹ Section 52(1), PPP Act. The negotiating committee shall consist of: One person nominated by the PPP Unit among its members; One person nominated by the PPP Node from among its members; Such persons representing such State departments as the contracting authority may, in consultation with the PPP Unit consider necessary; and Where applicable, the transaction advisors appointed by the contracting authority.

²⁵² Section 53(1), PPP Act.

²⁵³ Section 53(2), PPP Act.

²⁵⁴ Section 53(3), PPP Act.

²⁵⁵ Section 53(4), PPP Act.

²⁵⁶ Section 54(1), PPP Act.

²⁵⁷ Section 54(3), PPP Act.

assents to the implementation of the project, the PPP Committee informs the contracting authority the communication of the cabinet which is then relayed to the successful bidder.²⁵⁸

The PPP Act in an attempt to create transparency and accountability of the entire exercise concisely states that the contracting authority shall notify the general members of the public relevant information relating to the project.²⁵⁹ The information to be disclosed include the nature, scope and duration of the project, the successful bidder, project costs at net present value, project value and tariff.²⁶⁰

In addition to the foregoing, the PPP Act equally gives an avenue for implementation of projects initiated by private investment unsolicited proposals through a non-compete procurement process.²⁶¹ This provision gives a wide discretion to interested private parties who intend to offer certain services to directly engage the government on a partnership program in the delivery of certain services. This method of procurement is frowned upon. In South Africa, there is no provision for unsolicited proposals in the PPP framework and the South African National Treasury does not favour it given that they are difficult to manage, threaten to violate

²⁵⁸ Section 56, PPP Act.

²⁵⁹ Section 60(1), PPP Act.

²⁶⁰ Ibid.

²⁶¹ Section 61(1). These projects are not subjected to competitive procurement proposals where:

- a) There is need for continuity in the construction, development, maintenance, or operation of a facility or provision of a service and engaging in the competitive procurement process would be impractical;
- b) The cost relating to the intellectual property in relation to the proposed design of the project is substantial;
- c) There exists only one person or firm capable of undertaking the project, maintaining the facility or providing the service or such person or firm has exclusive rights over the use of the intellectual property, trade secrets or other exclusive rights necessary for the construction, operation or maintenance of the facility or provision of the service;
- d) An invitation to tender or prequalify has been issued and only one response has been received or satisfies the evaluation criteria; and issuing a further invitation to tender would result in a delay in the award of a tender;
- e) There exists, any of the, circumstances as the Cabinet Secretary may prescribe.

constitutional protections of fair administrative process and competitive procurement.²⁶² Further, internationally unsolicited bids have not proven to deliver faster or secure better value for money in PPPs.²⁶³ Additionally, it is worth noting that the Kenyan Constitution Article 227 contemplates a procurement system that is competitive. It follows therefore that Section 61 of the PPP Act may be considered to be in contravention of the Kenyan Constitution and it is therefore proposed that it be amended accordingly by providing for a competitive process for evaluating the privately initiated proposals.

Similarly, the PPP Act in section 76(a) has sought to exclude concession as a form of privatization by deleting any reference of concession in the Privatization Act.²⁶⁴

2.2.3 The PPP Regulations²⁶⁵

The PPP Act requires the issuance of various regulations to spell out the operational details on how PPP projects will be prepared, tendered, approved and implemented on the one hand as well as the operational details on the roles and responsibilities of the parties involved in a PPP transaction²⁶⁶.

The PPP Unit is currently in the process of coming up with various regulations to ensure the PPP Act is fully operational. In 2014, the Cabinet Secretary for the National Treasury published general Regulations under section 71 of the PPP Act for the better carrying out of the functions under the PPP Act.

²⁶² South African, National Treasury PPP Manual Module 1: South African Regulations for PPPs, at page 11 available at <http://www.ppp.gov.za/Legal%20Aspects/PPP%20Manual/Module%2001.pdf> (last accessed October 10, 2016).

²⁶³ Ibid.

²⁶⁴ Privatization Act, Chapter 485C, Laws of Kenya

²⁶⁵ Private Partnership Regulations of 2009, Kenya Gazette Supplement No. 17, Legislative Supplement No. 13 Government Press, Nairobi.

²⁶⁶ <http://pppunit.go.ke/index.php/legal-regulatory-framework>.

The PPP Regulations apply to every contract for the design, financing, construction, operation, equipping or maintenance of a project as provided in Regulation 2 of the PPP Regulations. The PPP Regulations however sets out a threshold for the application of the Regulations wherein the Regulations shall not apply in the following instances:

- i) If a project is a national project that has a capital expenditure component with a contract value of less than 85 million shillings;²⁶⁷
- ii) If a project is a county government project that has a capital component with a contract value of less than 5 million shillings;²⁶⁸
- iii) either a national or county government project that does not have a capital expenditure component but a contract value of more than 5 million shillings being life cycle costs²⁶⁹.

2.2.4 Public Finance Management Act²⁷⁰

The objective of the Public Finance Management Act (PFM Act) is to provide for the effective management of public finances by both National and County Governments, the overall oversight of Parliament and County Assemblies and the different responsibilities of government and other entities²⁷¹.

The PFM Act is relevant especially in relation to the approval by the Debt Management Office of any PPP project as well as the issuance of government support such as guarantees, undertaking or binding letters of comfort²⁷².

Additionally, under the PFM Act, the Cabinet Secretary for the National Treasury is required to submit to Parliament on or before 15th February every year the national government's debt

²⁶⁷ Regulation 2(2)(a), PPP Regulations 2014.

²⁶⁸ Regulation 2(2)(b), PPP Regulations 2014.

²⁶⁹ Regulation 2(2).

²⁷⁰ Public Finance Management Act, No. 18 of 2015, Laws of Kenya.

²⁷¹ Ibid, Preamble, Public Finance Management Act, No. 18 of 2015, Laws of Kenya

²⁷² Republic of Kenya, Public Private Partnership Act, Section 27.

strategy over the medium term in respect to actual and potential liabilities arising from loans and guarantees²⁷³. It is for that reason, that the PPP Unit does seek the confirmation of the Debt Management Office in respect of a PPP project report so as to ensure the project's affordability²⁷⁴ as well as assessment and approval of financial risk and contingent liabilities²⁷⁵. Pursuant to the PFM Act, the Cabinet Secretary for the National Treasury in April 2015 published the Public Finance Management (Roads Annuity Fund) Regulations²⁷⁶ for purposes of implementing the roads annuity programme through procurement of long term contracts for the design, finance, construction and maintenance of upto 10,000 kilometer priority roads under a PPP arrangement.²⁷⁷

2.2.5 Public Roads Toll Act²⁷⁸

The Public Roads Toll Act as amended by the Kenya Roads Act is a sector specific legislation under which PPPs may be undertaken in the roads sector. The roads sub-sector developed a framework for private participation in the development and management of roads infrastructure under the Sessional Paper No. 5 of 2006 on "The Development and Management on the Road Sub-Sector for Sustainable Economic Growth"²⁷⁹. The main objective of the Public Roads Toll Act is to provide for collection of tolls on public roads²⁸⁰. Under the Public Roads Toll Act, the Cabinet Secretary may declare any road as a toll road. The Cabinet Secretary or a roads agency may enter into an agreement with a suitably qualified person to plan, design, construct and manage a toll road or a portion thereof²⁸¹ in consideration of levying a toll on the road. The

²⁷³ Republic of Kenya, Public Finance Management Act, Section 33.

²⁷⁴ Republic of Kenya, Public Private Partnership Act, Section 64(2)(b).

²⁷⁵ Republic of Kenya, Public Private Partnership Act, Section 35(2).

²⁷⁶ Republic of Kenya, Legal Notice No. 36 of 2015, Kenya Gazette Supplement No. 35 of 2015.

²⁷⁷ Republic of Kenya, Legal Notice No. 36 of 2015, Kenya Gazette Supplement No. 35 of 2015, Regulation 2(2)

²⁷⁸ Public Roads Toll Act, Chapter 407, Laws of Kenya.

²⁷⁹ <http://pppunit.go.ke/index.php/project/category/road>. Last Accessed on 5th November 2015.

²⁸⁰ Republic of Kenya, Public Roads Toll Act, Chapter 407 of the Laws of Kenya, Preamble.

²⁸¹ Republic of Kenya, Public Roads Toll Act, Chapter 407 of the Laws of Kenya, Section 4A(1).

proposed agreement is required to be approved by Parliament before it is signed by the Cabinet Secretary²⁸². Section 77 of the PPP Act has amended the Public Roads Tolls Act by the addition of a new sub-section 5(4) which requires the Cabinet Secretary responsible for Roads to table before the Cabinet, any proposed toll charges for approval.

2.3 Institutional Framework of PPP

The formal institutions that manage the PPP arrangements and processes include the following and have been discussed in great detail hereinafter below:

- i) Parliament;
- ii) PPP Committee;
- iii) PPP Unit;
- iv) PPP Node;
- v) Petition Committee; and
- vi) Fund Policy Board.

2.3.1 Parliament

The role of Parliament comes into play in respect to a concession relating to natural resources. Article 71 of the Constitution provides that a transaction is subject to parliamentary ratification if it involves a grant of a right or concession to another person for the exploitation of natural resources. The PPP Act²⁸³ also buttresses the requirement that a project agreement for the exploitation of natural resources has to be ratified by Parliament.

In accordance with Article 71(2) of the Constitution, Parliament has subsequently enacted legislation in that regard namely, the Natural Resources (Classes of Transactions subject to

²⁸² Republic of Kenya, Public Roads Toll Act, Chapter 407 of the Laws of Kenya, Section 4A(3)

²⁸³ Section 55, PPP Act

Ratification) Act.²⁸⁴ Section 3 if this Act sets out the transactions requiring Parliamentary approval to include transactions involving the grant of a right or concession by or on behalf of any person to another person for the exploitation of a natural resource of Kenya and falls within the classes prescribed in the Schedule to the Act²⁸⁵ namely:

- i) Crude oil and Natural Gas - Authorization to extract crude oil or natural gas.
- ii) Minerals - Mineral agreements with threshold of US\$ 500 Million;
- iii) Water resources - Extraction of sea water within the territorial sea for private commercial use;
- iv) Underground Water resources - the extraction of underground steam within a water conservation or other water resource protected area;
- v) Wildlife - Extraction of oil, gas and minerals within a wildlife conservation area or within wildlife protected area;
- vi) Wildlife - Excision or change of boundaries of gazetted national park or wildlife protection area;
- vii) Wildlife - Export and re-export of endangered wildlife species;
- viii) Forests - Long term concession of a gazetted forest resource;
- ix) Forests - Excision or change of boundaries of gazetted public forests or natural reserves;
- x) Any other transaction subject to ratification under an Act of Parliament.

In respect to PPPs generally, the PPP Act does not explicitly provide for a role for Parliament in the approval of guarantee or any contingent liability or any budgetary issues that may arise in the process of entering into a PPP arrangement. This study considers this as a serious omission given

²⁸⁴ Natural Resources (Classes of Transactions subject to Ratification) Act, No. 41 of 2016.

²⁸⁵ Schedule, Natural Resources (Classes of Transactions subject to Ratification) Act, No. 41 of 2016

that the Public Finance Management Act²⁸⁶ requires that the cabinet secretary ought to submit to Parliament a list of all contingent liabilities and guarantees for approval. The PPP Act²⁸⁷ only provides for the approval of contingent liabilities report by the Debt Management Office and the Cabinet. The PPP Policy²⁸⁸ on the other hand indicates that the Government will facilitate issuance of guarantees for PPP contracts and binding letters of comfort/support to investors. In addition, the PPP Policy also provides that the government may in special circumstances and with the approval of Parliament issue guarantee to a private party in a PPP project. In order to avoid uncertainty and mismanagement, there is need to develop an integrated policy framework on guarantees comprising allocation, valuation and management.²⁸⁹ Guarantees need to be appropriately managed through suitable budgeting rules, suitable disclosures and creation of special funds²⁹⁰. Some countries do not include contingent liabilities from PPPs on their balance sheet hence run the risk of over commitment.²⁹¹ Based on international experience from countries such as Brazil, Columbia and Canada, it is evident that separate and special funds are created for contingent liabilities and their management.²⁹²

It is noted that the PPP Act in Section 68(1) establishes a Fund known as Private Partnership Facilitation Fund whose role among others is to receive monies to settle contingency liabilities in PPP projects. It is also noted that the Cabinet Secretary has issued Regulations for the

²⁸⁶ Section 58(4), Public Finance Management Act, No. 18 of 2015, Laws of Kenya.

²⁸⁷ Section 35, PPP Act.

²⁸⁸ Paragraph 3.3, PPP Policy.

²⁸⁹ H.K. Yong, *Public-Private Partnerships Policy and Practice: A Reference Guide*, Commonwealth Secretariat 2010, at page 38, available at <http://southernvoice.org/wp-content/uploads/2015/04/public-private-partnerships.pdf> (last accessed September 2, 2016)

²⁹⁰ H.K. Yong, *Public-Private Partnerships Policy and Practice: A Reference Guide*, Commonwealth Secretariat 2010, at page 38, available at <http://southernvoice.org/wp-content/uploads/2015/04/public-private-partnerships.pdf> (last accessed September 2, 2016)

²⁹¹ Ibid.

²⁹² Ibid at page 39.

management of the Project Facilitation Fund.²⁹³ In particular the Project Facilitation Fund require the creation of a separate account known as Contingent Liability Reserve Account²⁹⁴ which is a sub-account within the Fund to cover contingency liabilities and is separate from other funds used for other funding purposes. This is in line with international practice.

2.3.2 PPP Committee

The PPP Act establishes a Public Private Partnership Committee (PPP Committee) under Section 4(1).²⁹⁵ This Committee is tasked to *inter alia* formulate policy guidelines on public private partnerships and to closely monitor development and progress of projects taken under the flagship of the PPP framework.²⁹⁶ In particular, the PPP Committee²⁹⁷ is tasked with issuing guidelines for the identification, selection, pre-tender approval, tendering, negotiation, post-tender approval and monitoring processes of PPPs²⁹⁸. The PPP Act regulates how the membership of the PPP Committee shall be constituted²⁹⁹ and further provides that the duration of service for each member is limited to a renewable term of five years.³⁰⁰ The PPP Committee is empowered for proper discharge of its functions to require any information from any party to a project on any matter relating to a PPP and to take custody of a project agreement made under this Act and to monitor its compliance with the terms and conditions of the agreement.³⁰¹

²⁹³ Public Private Partnership (Project Facilitation Fund) Regulations 2017.

²⁹⁴ Regulation 8(3), Public Private Partnership (Project Facilitation Fund) Regulations 2017.

²⁹⁵ Section 4(1), PPP Act.

²⁹⁶ Section 7, PPP Act.

²⁹⁷ This is established under Section 4 of the PPP Act.

²⁹⁸ Section 29, PPP Act.

²⁹⁹ Section 4(1), PPP Act.

³⁰⁰ Section 4(2), PPP Act.

³⁰¹ Section 8, PPP Act.

Some governments form inter-departmental committees to oversee each PPP transaction and to ensure the perspectives of oversight agencies are taken into consideration.³⁰² In Kenya, such inter-departmental committee is in the form of the PPP Committee.

It is worth noting that the PPP Committee replaced the PPP Steering Committee under the Public Procurement and Disposal Act.

2.3.3 PPP Unit

One of the most significant innovations in the PPP system is the creation of permanent governmental units tasked with overseeing and managing the PPP process³⁰³. In most jurisdictions, Public Private Partnership Units (PPP Unit) are created as a point of co-ordination, quality control, accountability and information on matters related to PPP³⁰⁴. Typically, the PPP Units are either created as independent agencies or situated within a ministry which in most countries is within the ministry of finance³⁰⁵. It has been observed that PPP Units work best when it is attached to a key ministry such as ministry of finance or planning³⁰⁶. In Kenya, the PPP Act establishes the Public Private Partnerships Unit (PPP Unit) under the Ministry of Finance.³⁰⁷ The chief function of the unit is to serve as the secretariat and technical arm of the PPP Committee and to provide technical, financial and legal expertise to the committee and any

³⁰² The World Bank, *Public Private Partnerships: Reference Guide*, Version 2.0, at pg. 91 available at <https://openknowledge.worldbank.org/bitstream/handle/10986/20118/903840PPP0Refe0Box385311B000PUBLIC0.pdf?sequence=1> (last accessed on 24th November 2017)

³⁰³ Son Seungwoo, *Legal Analysis on Public-Private Partnerships Regarding Model PPP Rules*, June 2012, https://www.uncitral.org/pdf/english/colloquia/public-private-partnerships-2013/20120704_Report_on_PPP_legal_IssuesSon_Seungwoover.11.pdf

³⁰⁴ Asian Development Bank, *Public-Private Partnership Handbook*, September 2008. Available at <http://www.adb.org/sites/default/files/institutional-document/31484/public-private-partnership.pdf> (Last accessed on 3rd November 2015)

³⁰⁵ Ibid.

³⁰⁶ Delmon Jeffrey, *Creating a Framework for Public-Private Partnership (PPP) Programs: A Practical Guide for Decision Makers*, Kluwer International (2014) at page 12. Available at http://www.ppiaf.org/sites/ppiaf.org/files/publication/PPP_guide-decision-makers.pdf (last accessed on 6th November 2015).

³⁰⁷ Section 11, PPP Act. This section provides that there is established, within the State department responsible for matters relating to finance, a unit known as the Public Private Partnership unit.

node established under the Act.³⁰⁸ In the performance of its function the PPP Unit is required to *inter alia* serve as a resource center on matters relating to PPPs in Kenya and maintain a record of all project documentation.³⁰⁹ The PPP Unit therefore serves as a centre of knowledge and expertise providing other government departments with technical assistance during the PPP procurement process.³¹⁰

PPP Units in various other jurisdictions ordinarily play a supporting role in preparing projects and ensuring projects fits into the overall PPP policy of a country.³¹¹ PPP Units also play a role in project approval and quality assurance throughout the project development.

The rules for the administrative and financial framework of the PPP Unit is made by the Cabinet Secretary in charge of Finance. Those rules also stipulate the relationship between the PPP Unit and other State departments and organization and also involve the conduct of affairs of the unit.³¹²

2.3.4 PPP Node

A contracting authority³¹³ that intends to enter into a public private partnership arrangement with a private party shall establish a public private partnership Node (PPP Node).³¹⁴

³⁰⁸ Section 14(1), PPP Act.

³⁰⁹ Section 14(2), PPP Act.

³¹⁰ Akintola Akintoye & Matthias Beck (Eds), *Policy, Management and Finance of Public Private Partnerships*, Wiley-Blackwell (2009) at page 85.

³¹¹ The World Bank, *Attracting Investors to African Public-Private Partnerships: A Project Preparation Guide*, at page 17 available at <https://openknowledge.worldbank.org/bitstream/handle/10986/2588/461310revised017808213773070Revised.pdf;sequence=1> (last accessed on 23rd November 2017).

³¹² Section 15, PPP Act..

³¹³ Section 2(1), PPP Act. According to this section, “contracting authority,” means a State department, agency, state corporation or county government which intends to have a function undertaken by it performed by a private party.

³¹⁴ Section 16(1), PPP Act..

The PPP Node is headed by the accounting officer of the Contracting Authority and consists of financial, technical, procurement and legal personnel as the Contracting Authority in consultation with the PPP Unit shall consider necessary in relation to the project³¹⁵.

The PPP Node carries out its functions on behalf of the Contracting Authority. The functions of the PPP Node as set out in the PPP Act³¹⁶ can be summarized as follows:

- i) Identify, screen and prioritize projects based on guidelines issued by the Committee;
- ii) Prepare and appraise each project agreement to ensure its legal, regulatory, social and economic and commercial viability;
- iii) Ensure that the parties to a project agreement comply with the provisions of the Act;
- iv) Undertake the tendering process in accordance with the Act;
- v) Monitor the implementation of a project agreement entered into with the contracting authority;
- vi) Liaise with all key stakeholders during the project cycle;
- vii) Oversee the management of a project in accordance with the project management entered into by the contracting authority;
- viii) Maintains a record of all documentation and agreements entered into by the contracting authority relating to a project under this Act;
- ix) Prepare projects in accordance with guidelines and standard documents issued by the Committee under this Act;

³¹⁵ Section 16(2), PPP Act.

³¹⁶ Ibid

- x) Ensure that the transfer of assets at the expiry or early termination of a project agreement is consistent with the terms and conditions of the project agreement when the project agreement involves a transfer of assets;

In performing its functions, the PPP Node report to the PPP Unit and implements the recommendations and guidelines issued by the PPP Unit and further submits information as required by the PPP Unit.³¹⁷

Typically, the responsibility for implementing PPP projects rests with the contracting authority through the PPP Node.³¹⁸ It is worth noting that the PPP Node is a permanent institution under the contracting authority.

2.3.5 Petition Committee

The Petition Committee is established under Section 67 of the PPP Act to receive and resolve all complaints touching on the procurement of a PPP in Kenya³¹⁹. The Petition Committee shall consist of a Chairperson, the PPP Unit Director and 4 other persons with knowledge and experience as the Cabinet Secretary in consultation with the PPP Unit consider appropriate³²⁰.

The Petition Committee is a quasi judicial body charged with role of considering all complaints and petitions submitted by any private party during the tendering process³²¹. Consequently, the Petition Committee is required to observe the rules of natural justice and fair hearing as stipulated under Article 50 of the Constitution³²².

³¹⁷ Section 17(2), PPP Act.

³¹⁸ The World Bank, *Public Private Partnerships: Reference Guide*, Version 2.0, at pg. 89 available at <https://openknowledge.worldbank.org/bitstream/handle/10986/20118/903840PPP0Refe0Box385311B000PUBLIC0.pdf?sequence=1> (last accessed on 24th November 2017)

³¹⁹ <http://pppunit.go.ke/news/view/ppp-petition-committee-guidelines> (last accessed on November 2, 2015).

³²⁰ PPP Act, Section 67(2).

³²¹ <http://pppunit.go.ke/news/view/ppp-petition-committee-guidelines> (last accessed on November 2, 2015).

³²² Republic of Kenya, Constitution, 2010

The Chairperson of the Petition Committee has published the Guidelines, 2014³²³ which form the rules of procedure for the Petition Committee and any private party in the determination of complaints.

2.3.6 Project Facilitation Fund

Section 68(1)³²⁴ of the PPP Act establishes a Fund to be known as Public Private Partnership Project Facilitation Fund. The PPP Act further grants the Cabinet Secretary authority to prescribe the manner in which the fund will be administered³²⁵. The monies received in the Fund shall be used for the following purposes:³²⁶

- i) Support contracting authorities in the preparation phase of a project, tendering phase and project appraisal;
- ii) Support the activities of the PPP Unit;
- iii) Extend viability gap finance to projects that are desirable but cannot be implemented in the absence of financial support from the government;
- iv) Provide a source of liquidity to meet any contingent liabilities arising from a project; and
- v) Settle the transaction advisor's retainer fees.

In pursuance to the powers granted under the PPP Act, the Cabinet Secretary established a Fund Policy Board³²⁷ which was constituted by a Chairperson who also doubled up as the Chairperson of the PPP Committee³²⁸ and two other members who shall be appointed by the Cabinet Secretary.³²⁹ It is worth noting that the Fund Policy Board was never constituted as required

³²³ Petition Committee Guidelines 2014, Kenya Gazette No. 7435,

³²⁴ Republic of Kenya, PPP Act.

³²⁵ Section 69(4), PPP Act.

³²⁶ Regulation 68(4) of the PPP Regulations.

³²⁷ Republic of Kenya, Public Private Partnership Regulations, 2014, Regulation 62(1)(revoked).

³²⁸ PPP Regulation 62(2)(revoked).

³²⁹ PPP Regulation 62(3)(revoked).

under the PPP Act and subsequently, the Cabinet Secretary of the National Treasury issued fresh Regulations abolishing the Fund Policy Board vide Public Private Partnerships (Project Facilitation Fund) Regulations 2017³³⁰ whose effect was to revoke the provisions of the PPP Regulations in respect to the establishment of the Fund Policy Board. As a result, the Fund is now administered by the PPP Committee with the assistance of the Director of the PPP Unit.³³¹ The PPP Committee is required to oversee the management of the Project Facilitation Fund³³² and the Director of the PPP Unit shall act as the secretariat and technical arm.³³³

2.4 Conclusion

This chapter has analyzed to great detail the historical development of PPPs through the European, Africa and Kenyan experience. The Chapter has also analyzed the legislative documents which regulates the PPP framework in Kenya. It has largely concentrated on the PPP Act and the regulations thereunder as it is the primary law regulating PPP arrangements in Kenya. This analysis has been pegged on procedural requirements undertaken during the execution of the project with specific regard paid to the institutional and regulatory/administrative mechanisms established by the PPP Act. This has also informed the legal framework of the PPP arrangements in Kenya. The Public Finance Management Act, Public Roads Toll Act, and the Public Procurement and Disposal Act have also been examined as they also contain provisions which directly affect the PPP arrangements one way or the other.

The next Chapter will attempt to provide a deeper understanding of PPPs and the available types as well as the different approaches from different jurisdictions. The chapter will also focus on

³³⁰ Legal Notice No. 75 of 2017 available at <http://www.kenyalaw.org/lex//sublegview.xql?subleg=No.%2015%20of%202013> (last accessed on 23rd November 2017).

³³¹ Regulation 17(1), Public Private Partnerships (Project Facilitation Fund) Regulations 2017.

³³² Regulation 17, Public Private Partnerships (Project Facilitation Fund) Regulations 2017.

³³³ Regulation 20, Public Private Partnerships (Project Facilitation Fund) Regulations 2017.

highlighting the vitiating factors that compounds or are likely to compound the PPP arrangements in Kenya. It therefore critiques in great detail the legal and policy pitfalls facing PPP arrangements by discussing the following topical areas: Governance, Procurement, Contractual Considerations, Policy, Institutional and Regulatory Framework. This is done by generally examining the existing legal and institutional structures in Kenya in respect to PPPs.

CHAPTER THREE

A CRITIQUE OF PPP ARRANGEMENTS IN KENYA: REVIEW OF THE ELEMENTS, GOVERNANCE, POLICY AND REGULATORY FRAMEWORK

3.0 Introduction

This Chapter forms the core of this entire study. It first attempts to further analyse the PPP definition. This will bring out the different approaches and elements as well as types of PPPs that have developed over time. It then thereafter gives a critique of the PPP arrangements clearly highlighting vitiating factors which compound or likely to compound PPPs in Kenya by topically discussing them as follows: Governance, Procurement Process, Procurement Methods, Institutional framework, government support and Contractual Considerations. This chapter therefore identifies and critically discusses policy, legal and institutional gaps in respect to PPP arrangements in Kenya.

3.1 Approaches in PPP Definition

Khanom notes that there have been debates on the different meanings, approaches, features and conceptualizations attached to PPPs.³³⁴ She proceeds to identify three approaches on the definition of PPPs which are discussed hereunder.

The first approach is definition of PPPs as a tool of governance or management wherein authors focus on organisational aspects of the relationship. As a consequence, most definitions under this approach emphasize that PPPs are either inter-organizational or financial arrangements between the public and private actors. One example of a definition under this approach was adopted by

³³⁴ Nilufa Akhter Khanom, Conceptual Issues in Defining Public Private Partnerships (PPPs), International Review of Business Research Papers, Vol. 6 Number 2, July 2010 at page 150 – 163 www.bizresearchpapers.com/12.%20Nilufa.pdf (accessed on July 15, 2015).

the Commission on UK Public Private partnerships where PPPs were described as sustainable cooperation between public and private actors in which joints and/or services are developed and in which risks, costs and profits are shared³³⁵.

The second approach focuses on PPPs as a tool of financial arrangements. Under this approach, it is expected that PPPs reduce pressure on government budgets through the use of private finance as well as the fact that PPPs provide better value for money on infrastructure development. One definition put forward by Khanom under this approach is based on a survey of PPPs in Sweden as an arrangement between a municipality and one or more private firms where all parties were involved in sharing risks, profits, utilities and investments through joint ownership³³⁶.

The third approach outlines PPP as a tool of development process. Under this approach, PPPs are seen as maximizing benefits for development through collaboration and enhanced efficiency. It is worth noting that the World Bank's definition of PPP follows this approach. The World Bank has defined PPP as 'a long-term contract between a private party and a government entity, for providing a public asset or service, in which the private party bears significant risk and management responsibility, and remuneration is linked to performance'³³⁷,

The final alternative approach views PPP as a language game. According to Khanom, given that such concepts as 'privatization' and contracting out generate opposition in some levels of government PPPs present an alternative delivery system which enables private organizations to get market share in public service provision. Some scholars believe that PPP is just another

³³⁵ Ibid at page 152.

³³⁶ Ibid at page 153.

³³⁷ World Bank, Asian Development Bank, Inter-American Development Bank, Public-Private Partnerships, Reference Guide Version 2.0 (2014) at page 14 (<https://openknowledge.worldbank.org/bitstream/handle/10986/20118/903840PPP0Ref0Box385311B000PUBLIC0.pdf?sequence=1>) (accessed on 23rd July 2015)

catchy terminology that governments promote so as to keep off the attention of the fact of contracting out.³³⁸

It is observed that the best approach to definition of PPPs in Kenya is the third approach.

3.2 Elements and Dimensions of PPPs

As pointed out in Chapter One above, PPPs are now a dominant term in public sector reform taking over from privatization which held similar dominance in the 1980s and 1990s. Indeed, PPPs now represent an increasingly ubiquitous institutional arrangement with international acceptance³³⁹.

The concept of PPP has been defined in different terms by different scholars and varies from country to country.

This study borrows the basic definition from the Act and compares it with various other definitions in different jurisdictions.

The definition of PPP in the PPP Act³⁴⁰ is as follows:

*An arrangement between a **contracting authority** and a private party under which a **private party**:*

- a) *Undertakes to perform a **public function** or provide a service on behalf of the contracting authority;*
- b) ***Receives a benefit** for performing a public function by way of:*
 - i) *Compensation from a public fund;*
 - ii) *Charges or fees collected by the private party from users or consumers of a service provided to them; or*
 - iii) *A combination of such compensation and such charges or fees; and*
- c) *Is **generally liable for risks** arising from the performance of the function in accordance with the term of the project agreement.*

³³⁸ Nilufa Akhter Khanom, Conceptual Issues in Defining Public Private Partnerships (PPPs), *International Review of Business Research Papers*, Vol. 6 Number 2, July 2010 at page 154, available at www.bizresearchpapers.com/12.%20Nilufa.pdf (accessed on July 15, 2015). at page 154.

³³⁹ Ole Helby Petersen, *Public-Private Partnerships as Converging or Diverging Trends in Public Management? A comparative Analysis of PPP Policy and Regulation in Denmark and Ireland*, *International Public Management Review*, (12)2, (2011) at page 2 available at www.kora.dk/media/339431/ohp_public_Private.pdf (last accessed on June 30 2015).

³⁴⁰ Section 2(1), PPP Act.

(Emphasis added.)

Arising from the above definition of a PPP, the meaning can be deconstructed so as to unpack the following four components. First, that there exists a partnership between a contracting authority and a private party. Second, that there must be a purpose of the partnership being performance of a public function. Third, that compensation for performing a public function shall be given and finally that risk is apportioned by generally shifting to the private party. There is not much debate in respect to all the components save for the first component relating to existence of a partnership for which is discussed below.

Partnership has been defined by OECD as follows:

Systems of formalized co-operation, grounded in legally binding arrangements or informal understandings, co-operative working relationships, and mutually adopted plans among a number of institutions. They involve agreements on policy and programme objectives and the sharing of responsibility, resources, risks and benefits over a specified period of time³⁴¹.

It has been argued that the term 'partnership' in the PPP definition does not accord well with the generally accepted business sense meaning. It is argued that PPPs lack the essential elements of a partnership which include the following³⁴²:

- i) partnerships generally exist where there is a voluntary association of 2 or more persons engaged together for the purposes of doing business as a partnership for profit;
- ii) Partners share risks equally;
- iii) Partners are jointly and severally responsible for liabilities and obligations without limit;

³⁴¹ Osborne P. Stephen (ed), *The New Public Governance: Emerging Perspectives on the Theory and Practice of Public Governance*, page 128, available at https://edisciplinas.usp.br/pluginfile.php/3343001/mod_resource/content/0/Anexo%20sem%20t%C3%ADtulo%200582.pdf (last accessed on October 10, 2016)

³⁴² Cartlidge Duncan, *PPP Phenomenon* at page 2-3, available at <http://www.duncancartlidge.co.uk/images/1%20%20%20%20%20The%20PPP%20phenomenon.pdf> (last accessed October 10, 2016)

iv) Partners have equal rights to make decisions on the partnership;

Further in an attempt at defining PPPs and in light of the above definition, one is tempted to ask the question; who then are the partners? There is no controversy as to who the public partner is given that the PPP Act impliedly defines a contracting authority and by extension the public party as being a state department, agency, state corporation or county government which intends to have a function undertaken by it performed by a private entity.³⁴³ Further inference may be drawn from the definition of a public body under the Interpretations and General Provisions Act³⁴⁴ which provides that a public body means the Government or any department, institution or undertaking thereof or a local authority or any authority, body, commission, committee or other body which perform functions of a public nature.³⁴⁵

On the part of the private party, the PPP Act defines it as a party that enters into a project agreement with a contracting authority and is responsible for undertaking a project on behalf of the contracting authority.³⁴⁶ The PPP Policy on the other hand offers an expansive definition of a private entity and states that it includes a public entity where it is contracted to perform a public function by another public entity.³⁴⁷ It can therefore be argued that this definition is expansive and goes against the very objects of PPP arrangements the world over. This definition is contrary to the objects set out at the Preamble of the PPP Act which clearly indicates that the PPP arrangement is intended to give the private sector an opportunity to participate in government projects. The Preamble of the PPP Act³⁴⁸ states as follows:

³⁴³ Section 2(1), PPP Act.

³⁴⁴ Interpretation and General Provisions Act, Chapter 2, Laws of Kenya.

³⁴⁵ Section 3(1), Interpretation and General Provisions Act, Chapter 2, Laws of Kenya.

³⁴⁶ Section 2(1), PPP Act

³⁴⁷ Policy Statement on Public Private Partnership, Section 2.2 at page 4.

³⁴⁸ Preamble, PPP Act.

*An Act of Parliament to provide for the **participation of the private sector** in the financing, construction, development, operation, or maintenance of infrastructure or development projects of the Government through concession or other contractual arrangements. (Emphasis added.)*

3.3 Types of PPPs in Kenya

There are various types of PPPs, which are primarily distinguished by two key factors namely; the degree of risk allocation between the public and the private sector and the length of the contract period.³⁴⁹ PPPs lie on a continuum between government service delivery on the one hand and private service delivery through privatization on the other hand.³⁵⁰ There are no fixed classification or types of PPPs but they are generally classified based on the different combination of involvement by public or private partners.³⁵¹

In Kenya, the PPP Act³⁵² sets out 13 different types of PPP arrangements available for government or any contracting authority as follows:

- i) Management Contract
- ii) Output Performance Based Contract
- iii) Lease
- iv) Concession
- v) Build-Own-Operate-Transfer Scheme (BOOT)
- vi) Build-Own-Operate Scheme (BOO)

³⁴⁹ H.K. Yong, Public-Private Partnerships Policy and Practice: A Reference Guide, London Commonwealth Secretarial, 2010, at page 19 <http://www.worldcat.org/title/public-private-partnerships-policy-and-practice-a-reference-guide/oclc/609538579/viewport>, (last accessed on October 22, 2015)

³⁵⁰ NSW Parliamentary Library Research Service, Public Private Partnerships in NSW: A Timeline and Key Sources, August 2011 at page 1 available at [http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/key/IssuesBackgrounder:PublicPrivatePartnershipsinNSW:atimelineandkeysources/\\$File/Public+Private+Partnerships+in+NSW.pdf](http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/key/IssuesBackgrounder:PublicPrivatePartnershipsinNSW:atimelineandkeysources/$File/Public+Private+Partnerships+in+NSW.pdf) (last accessed on 25th October 2015)

³⁵¹ Ibid.

³⁵² Schedule 2 of the PPP Act.

- vii) Build-Operate-and-Transfer Scheme (BOT)
- viii) Build-Lease-and-Transfer Scheme (BLT)
- ix) Build-Transfer-and-Operate Scheme (BTO)
- x) Develop-Operate-and-Transfer Scheme (DOT)
- xi) Rehabilitate-Operate-and-Transfer Scheme (ROT)
- xii) Rehabilitate-Own-and-Operate Scheme (ROO)
- xiii) Land Swap.

The above list of PPP arrangements is by no means exhaustive since section 19 of the PPP Act provides that a contracting authority may in addition to the above enter into such other PPP arrangement as may be approved by the Cabinet Secretary. Further, the PPP Regulations³⁵³ do grant discretion to the Cabinet Secretary to approve such other type of PPP arrangement which may not be set out in the second schedule of the PPP Act.

Examples of other types PPP not listed in the above list include affermage or a hybrid arrangement. A hybrid is a combination of two or more of the above types. An affermage on the other hand is similar but not identical to a lease contract given that unlike a lease contract where the private party retains revenue collected during the contract period, an affermage allows a private party to collect revenue from the customers then pay the contracting authority an affermage fee and retain the balance.³⁵⁴

³⁵³ Regulation 9, PPP Regulations.

³⁵⁴ Asian Development Bank, *Public-Private Partnership Handbook*, at page 33, available at <http://www.apec.org.au/docs/adb%20public%20private%20partnership%20handbook.pdf> (last accessed on October 29, 2016)

PPPs therefore take a wide range of forms as demonstrated in the above list varying in the extent of involvement of and risk taken by the private party.³⁵⁵

This paper has discussed the above types of PPPs based on the following classifications:

a) **Management Contract & Output Based Performance Contract**

Under a management contract, the private party is responsible for management and performance of a specified obligation for a period not exceeding 10 years and the contracting authority retains control and ownership of all capital assets, facilities and properties.³⁵⁶ Although ultimate obligation to provide service rests with the contracting authority, daily management and control is left with the private party.³⁵⁷ The private party is paid a pre-determined rate for operating costs while the contracting authority is under obligation to provide major capital investments.³⁵⁸

One of the key advantages of this type of PPP is that many operational gains from the private sector can be achieved without transferring the assets to the private party.³⁵⁹ On the other hand, given that the private party does not enjoy sufficient autonomy, they may not invest to lead to lasting change.³⁶⁰

Under performance-based contract, the private party is paid a portion of the profits or given an incentive payment.³⁶¹ Performance based contract is a derivative of the management contract but with a shift of focus from administration to certain performance

³⁵⁵ <https://ppp.worldbank.org/public-private-partnership/agreements>

³⁵⁶ Paragraph 2, Schedule 2, PPP Act.

³⁵⁷ Asian Development Bank, *Public-Private Partnership Handbook*, Manila Philippines at page 31, available at <http://www.apec.org.au/docs/adb%20public%20private%20partnership%20handbook.pdf> (last accessed on 24th November 2017).

³⁵⁸ Ibid.

³⁵⁹ Ibid.

³⁶⁰ Ibid.

³⁶¹ Ibid.

conditions and gives the private party more autonomy in the design and organisation of work.³⁶²

b) Lease

Under a lease type of PPP, the private party pays the contracting authority rent or royalties in consideration for management, operation or maintenance of a facility or use of the leased property for purposes of exploration, production and development of minerals and receives fees, charges or benefits from consumers for a period not exceeding 30 years.³⁶³ Some institutions such as the World Bank recon that the typical length of leases is between eight and 15 years.³⁶⁴

The lease rental fee paid to the private party is fixed irrespective of the level of collection that is achieved hence the private party takes a risk on collections.³⁶⁵

c) Concession

A concession occurs where a contracting authority issues a contractual license to a private party to operate, maintain, rehabilitate or upgrade an infrastructure facility and to charge a user fee while paying concession fee to the contracting authority.³⁶⁶ In effect, a concession makes the private party (concessionaire) responsible for the full delivery of services as well as responsible for all capital investments.³⁶⁷ Although the private party is responsible for delivery of the assets, such assets are public owned even during the

³⁶² Public Private Infrastructure Advisory Facility, *Toolkit for Public-Private Partnerships in Roads and Highways; Module 1: Overview and Diagnosis*, March 2009, available at <https://ppiaf.org/sites/ppiaf.org/files/documents/toolkits/highwaystoolkit/6/pdf-version/1-13.pdf> (accessed on 24th November 2017).

³⁶³ Paragraph 3, Schedule 2, PPP Act.

³⁶⁴ <https://ppp.worldbank.org/public-private-partnership/agreements/leases-and-affermage-contracts> (last accessed on 24th November 2017).

³⁶⁵ <https://ppp.worldbank.org/public-private-partnership/agreements/leases-and-affermage-contracts> (last accessed on 24th November 2017).

³⁶⁶ Paragraph 4, Schedule 2, PPP Act.

³⁶⁷ Asian Development Bank, *Public-Private Partnership Handbook*, Manila Philippines at page 34, available at <http://www.apec.org.au/docs/adb%20public%20private%20partnership%20handbook.pdf> (last accessed on 24th November 2017).

concession period.³⁶⁸ A concession contract is typically valid for 25-30 years to enable the concessionaire to recover the capital investment and earn an appropriate return.³⁶⁹ It is worth noting that the PPP Act has not recommended the limit for the contract period for concessions.

d) **Build-Operate-Transfer and Similar Arrangements**

The variations of Build-Operate-Transfer and similar arrangements (BOTs) are set out under paragraphs five to 12 (inclusive) of Schedule 2 of the PPP Act and include BOOT, BOO, BOT, BLT, BTO, DOT, ROT, ROO.

Generally under BOTs, the private party provides the capital for building the new facility and owns the asset for a specified period.³⁷⁰ BOTs are distinguished from concessions given that concessions generally involve extension to and operation of existing systems whereas BOTs generally involve greenfield investments.³⁷¹

e) **Land Swap**

Land swap occurs where a contracting authority transfers existing public land or an asset to a private party in consideration for an asset or facility that has been developed by the private party.³⁷²

3.4 Critique of PPP Legal arrangements in Kenya

3.4.1 PPP Regulations

³⁶⁸ Ibid.

³⁶⁹ Asian Development Bank, *Public-Private Partnership Handbook*, Manila Philippines at page 36, available at <http://www.apec.org.au/docs/adb%20public%20private%20partnership%20handbook.pdf> (last accessed on 24th November 2017).

³⁷⁰ Asian Development Bank, *Public-Private Partnership Handbook*, Manila Philippines at page 38, available at <http://www.apec.org.au/docs/adb%20public%20private%20partnership%20handbook.pdf> (last accessed on 24th November 2017).

³⁷¹ Ibid.

³⁷² Paragraph 13, Schedule 2, PPP Act.

Upon review of the PPP Act it is noted that it variously requires a raft of regulations, policies, guidelines, standards, procedures and rules to be developed for purposes of fully implementing the Act. It is further noted that the Cabinet Secretary has so far published Regulations as required by the PPP Act. Needless to say, the Regulations are not adequate to fully and comprehensively implement the PPP Act for the benefit of all stakeholders. Some of the Regulations required to be developed for purposes of implementing the PPP arrangements include the following:

- i) Regulation 52(8) the Cabinet Secretary is required to develop regulations on how the negotiation committee shall conduct negotiation;
- ii) Regulation 54(4) demands that the Cabinet Secretary shall come up with regulations on how County Government may approve projects provided the project does not pose contingent liabilities to either the national or county governments;
- iii) Regulation 15 requires the Cabinet Secretary to make rules for administration and financial framework of the PPP Unit, relationship of the PPP Unit and other State Departments and conduct of the affairs of the PPP Unit;
- iv) Regulation 15(2) requires the PPP Unit to develop standardized forms for submission of sector diagnostics, studies and assessment and feasibility study reports;

It is observed that since the commencement of the PPP Act in early 2013, numerous Regulations which ought to have been developed are still pending over four years later. The lack of regulations and guidelines as prescribed in the PPP Regulations hampers the smooth implementation of the PPP Act and the eventual procurement of PPP projects in Kenya. It is proposed that the Cabinet Secretary should set a time limit for the development of all the regulations including the manuals, practice notes and standardized forms required so as to allow for the full implementation of the PPP Act. It is instructive to note that the Public Procurement

and Disposal Act 2015³⁷³ prescribes a time limit within which all regulations contemplated therein should be made. Similarly, this paper proposes that a period of 1 year should be sufficient for development of relevant regulations, guidelines, manuals, forms and rules as contemplated under the PPP Regulations.

Further, the PPP Act requires the Cabinet Secretary under Section 71(1)(c) to develop regulations to provide for the minimum value of investment cost and tenor for PPP projects less than which will not be subject to the PPP Act. Accordingly, the Cabinet Secretary proceeded to make PPP Regulations³⁷⁴ in compliance with Section 71(1)(c). Regulation 2(2) of the PPP Regulations sets out the threshold for the low value PPP projects for which the PPP Regulations shall not be applicable. This paper argues that the drafting of the Regulation 2(2) leads one to believe that the threshold set out exempts the low value projects from application of the Regulations and not from the application of the PPP Act as contemplated under Section 71(1)(c). This paper therefore recommends that the Cabinet Secretary should amend Regulation 2(2) of the PPP Regulations so as to provide that the low value projects set out thereunder shall not be subject to both the PPP Act as well as the PPP Regulations.

In light of the above, it is worth noting that Regulation 2(2) presents another challenge to the effect that once a project is excluded from being subject to the PPP Act and the PPP Regulations, it is left in legal limbo and hence there is need to provide greater clarity as to the proper applicable law for such excluded low value projects. This paper posits that the proper law applicable to the procurement of the projects below the threshold contemplated under Regulation 2(2) is the Public Procurement and Asset Disposal Act, 2015 (PPAD) by virtue of the omnibus

³⁷³ Paragraph 11, Third Schedule of the Public Procurement and Disposal Act, No. 33 of 2015

³⁷⁴ Public Private Partnership Regulations, 2014.

provision in Section 4(3) of the PPAD which provides that all public procurements shall be procurement as defined under the Act. For purposes of greater certainty and in order to aid in the smooth implementation of the PPP projects, there is need for the Cabinet Secretary to introduce an amendment into the PPP Regulations whose effect is to provide that all projects excluded by virtue of the threshold set out in Regulation (2)(2) shall be governed by the Public Procurement and Asset Disposal Act, 2015 or in the alternative the Cabinet Secretary should provide guidelines with truncated procedures for low value procurements under the PPP Act.

3.4.2 Governance

“Governance” is a term used widely in the social sciences to connote a mode of governing that is distinct from hierarchical control model characterizing the interventionist state³⁷⁵. It is a type of regulation typical of cooperative state where the state and non-state actors participate in mixed public/private policy networks.³⁷⁶ Further, Prof. Migai Akech sets out the World Bank definition of governance as being the manner in which power is exercised in the management of a country’s resources.³⁷⁷ In addition, the author brings forth a broader conceptualization to the effect that governance relates to the manner in which people are ruled and the affairs of a state administered and regulated. Based on the aforesaid definitions, the author concludes that privatization³⁷⁸ process and hence PPP has everything to do with governance as it touches on the administration and regulation of a state’s affairs for instance provision of services such as water

³⁷⁵ Borzel A. Tanja & Risse Thomas, *Public-Private Partnerships: Effective and Legitimate Tools of International Governance?* At page 2, A paper presented in a workshop on "Global Governance", European University Institute, Florence, April 6-7, 2001, and at the Conference on "The Reconstitution of Political Authority in the 21st Century" University of Toronto, March 15-16, 2002 available at http://userpage.fu-berlin.de/~atasp/texte/021015_ppp_risse_boerzel.pdf (last accessed September 18, 2016)

³⁷⁶ Borzel A. Tanja & Risse Thomas at page 2.

³⁷⁷ Migai Akech, *Privatization & Democracy in East Africa: The Promise of Administrative Law*, at page 2, East African Educational Publishers 2009.

³⁷⁸ Migai Akech defines privatization broadly to include PPPs

or electricity³⁷⁹. As a necessary consequence therefore and for there to be good governance in the privatization process, the participation of the citizenry is fundamental in the formulation and implementation of policies.³⁸⁰

According to Skelcher³⁸¹, PPPs are a sub-set of the tools of government as institutions through which public policy is mediated. Consequently, the status of PPPs as instruments of public interest yet actively engaged with private actors means that governance is particularly important.

The Constitution of Kenya declares³⁸² that Kenya shall be founded on the national values and principles of governance. It proceeds to spell out under Article 10(2) that the principles of governance include ‘good governance, integrity, transparency and accountability’. In addition, the Constitution enjoins Parliament to protect the constitution and promote the democratic governance of the Republic³⁸³. Further, the Constitution provides in Article 259 (1)(d) that the Constitution shall be interpreted in a manner that contributes to good governance. The County Governments are also required to adhere to good governance through ensuring participation of communities in governance at the local level³⁸⁴.

The Constitution does not however define what good governance is despite the fact that it has given it great prominence. The PPP Act has also not proffered any definition of good governance perhaps in recognition of the fact that that governance is a concept that is not easy to define.

³⁷⁹ Migai Akech, *Privatization & Democracy in East Africa: The Promise of Administrative Law*, at page 2, East African Educational Publishers 2009.

³⁸⁰ Migai Akech, *Privatization & Democracy in East Africa: The Promise of Administrative Law*, at page 2, East African Educational Publishers 2009.

³⁸¹ C. Skelcher (2010), ‘Governing partnerships’ in G. Hodge, C. Greve and A. Boardman (eds) (2010) **International Handbook on Public-Private Partnerships**, Cheltenham: Edward Elgar, pp 292-304 ()

³⁸² Constitution of Kenya Article 4(2)

³⁸³ Constitution of Kenya 2010 Article 94.

³⁸⁴ The 4th Schedule, Part II, paragraph 14, Constitution of Kenya 2010

The United Nations Economic Commission for Europe has sought to define governance as the processes in government actions and how things are done.³⁸⁵ It covers the quality of institutions and their effectiveness in translation of policy into successful implementation. From the above basic definition, United Nations Economic Commission for Europe sets out 6 core principles it believes have become widely accepted as forming part of good governance namely; Participation, Decency, Transparency, Accountability, Fairness and Efficiency. Some of these principles are discussed below.

In respect to accountability, Section 69 of the PPP Act provides that a project company or private party is required to keep proper books of accounts which shall be open to scrutiny by the contracting authority. It is our proposal that the books should be open to the public not just the contracting authority since the contracting authority is performing a public function.

One of the core functions of the PPP Unit as listed in the PPP Act³⁸⁶ is to develop an open, transparent, efficient and equitable process for managing the identification, screening, prioritization, development, procurement, implementation, and monitoring of projects and ensure that the process is applied consistently to all projects. The PPP Act further lays down the principles to be observed in the procurement process of PPPs to include principles of transparency, free and fair competition and equal opportunity³⁸⁷. The engagement of a transaction advisor is also required to comply with similar principles³⁸⁸.

In order to achieve greater transparency in the PPP arrangement, the PPP Unit or the Government through the Ministry of Finance should publish the number and total amount of PPP

³⁸⁵ United Nations Economic Commission for Europe, Guidebook on Promoting Good Governance in Public Private Partnerships, United Nations Publications: New York 2010, at page 13 (www.unece.org/fileadmin/DAM/ceci/publications/ppp.pdf accessed July 25th 2015)

³⁸⁶ Section 14(2)(e), PPP Act

³⁸⁷ Section (29)(2) and Section 45(3), PPP Act

³⁸⁸ Section 36(3) PPP Act

commitments which may be off-balance sheet contracts. In addition the PPP Unit should periodically publish the status of the approval stages of all the PPP projects³⁸⁹. This will give greater comfort to private investors. The PPP Policy³⁹⁰ provides that PPP projects shall be procured in an open and transparent manner in line with national and relevant international standards and procurement rules while ensuring competitiveness. It further directs that all public entities involved in the procurement process of PPPs shall ensure fairness, equity, transparency, competitive tension, accountability and cost effectiveness.

According to Greve and Hodge³⁹¹ transparency which is part of good governance has become a topical issue. They argue that the concept of transparency is embodied in freedom of information, openness in dealings by office-holders, predictability in decision making process and fighting corruption.³⁹² It is therefore important to note that in the absence of transparency, it can be expected that the executive actors will benefit from PPP processes through corrupt practices that ultimately frustrate the attainment of public-regarding outcomes.³⁹³

Transparency in procurement process was extensively discussed in the case of **Republic Vs. Public Private Partnerships Petition Committee & 3 Others Ex. Parte APM Terminal**³⁹⁴ where Hon. Justice Korir was of the view that the main reason why disclosure is necessary is because the losing bidder cannot advance its case without the benefit of the information

³⁸⁹ HM Treasury, A New Approach to Public Private Partnerships, 2012 at page 8 (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/205112/pf2_infrastructure_new_approach_to_public_private_partnerships_051212.pdf accessed 25th June 2015)

³⁹⁰ Government of Kenya PPP Policy Statement, Section 3.9 at page 9

³⁹¹ Carsten Greve & Graeme Hodge, Transparency in Public-Private Partnerships: Some Lessons from Scandinavia and Australia, Paper for the 1st Global Conference on Transparency Research, Rutgers University, Newark, 19-20 May 2011 at page 3 (http://openarchive.cbs.dk/bitstream/handle/10398/8572/Greve_2011_b.pdf?sequence=1 accessed 25th July 2015)

³⁹² Ibid at page 4.

³⁹³ Migai Akech, *Privatization & Democracy in East Africa: The Promise of Administrative Law*, at page 62, East African Educational Publishers 2009.

³⁹⁴ Republic Vs. Partnerships Petition Committee & 3 Others Ex. Parte APM Terminal (2015) JR Case 298 of 2015 available at <http://kenyalaw.org/caselaw/cases/export/115869/pdf> (last accessed November 10, 2016).

contained in an evaluation report.³⁹⁵ The Judge also indicated that it is only through disclosure of the contents of the evaluation report that participants in a public tender will be assured that the tender process was above board.³⁹⁶

On the other hand, accountability which is closely related to transparency means giving reasons for ones actions.

Greve and Hodge while discussing transparency in PPP, agrees with the OECD statements on transparency which states as follows:³⁹⁷

... ready access to information at all stages of PPP procurement assists both the public and private partners, and improves transparency, accountability and management of projects ... for the public, transparency helps to ensure that a project is fair and that the planned costs are open for public scrutiny. For private firms, too, access to PPP data, robust project development and competitive modeling.

There is a stronger movement around the world to reconsider PPP policies in light of the financial crisis and in particular the need to demand for greater degree of disclosure, accessibility and timeliness of information³⁹⁸.

One may wonder whether private entities performing public functions under PPPs can be regulated by Government or be subject to accountability to the citizenry. It has been argued that the PPP arrangements create what may be referred to as the ‘democratic deficit’ problem which refers to the shortfall in accountability of a non-elected public body³⁹⁹ since the PPP

³⁹⁵ Republic Vs. Partnerships Petition Committee & 3 Others Ex. Parte APM Terminal (2015) JR Case 298 of 2015 at 23 (Korir J) available at <http://kenyalaw.org/caselaw/cases/export/115869/pdf> (last accessed November 10, 2016).

³⁹⁶ Ibid.

³⁹⁷ Carsten Greve & Graeme Hodge, Transparency in Public-Private Partnerships: Some Lessons from Scandinavia and Australia, Paper for the 1st Global Conference on Transparency Research, Rutgers University, Newark, 19-20 May 2011 at page 15 (http://openarchive.cbs.dk/bitstream/handle/10398/8572/Greve_2011_b.pdf?sequence=1 accessed 25th July 2015).

³⁹⁸ Ibid.

³⁹⁹ C. Skelcher (2010), Governing partnerships” in G. Hodge, C. Greve and A. Boardman (eds) (2010) **International Handbook on Public-Private Partnerships**, Cheltenham: Edward Elgar, pp 292-304.

arrangements invariably bypass traditional accountability mechanisms such as parliamentary oversight especially in respect to Common Law countries which have Westminster-derived form of governments⁴⁰⁰. This dilemma has been tackled by Prof. Migai Akech who agrees with the emerging view that the exercise of power whether public or private which affects vital interests should accord with the principles of accountability, participation, fairness and rationality.⁴⁰¹ This is because PPPs should be viewed as an extension of the state given that delegation of public functions by the state to private actors represent new ways for the state to carry out its responsibilities⁴⁰². In fact, some scholars view privatization and by extension PPPs as a means through which private actors commit themselves to traditionally public goals at the price of access to lucrative investment opportunities to deliver goods and services which ought to be delivered by the state. As such and based on such views, there would be need to include third party rights to the citizenry in the PPP contracts⁴⁰³.

It will therefore be necessary to have stronger statutory obligations inbuilt into the PPP Act or at least clear policy prescriptions be developed to provide for requirement of transparency and accountability on the PPP projects to cover the processes, procurement and implementation. These statutory obligations will be positive obligations and not merely prescriptive statements such as periodic publications of PPP projects and procurement stages of PPPs and the amount in liabilities of the project among others. It is noted that the PPP Act⁴⁰⁴ only provides for publication of information relating to a project agreement only upon execution of the project agreement. This could very well be too little too late.

⁴⁰⁰ Migai Akech, *Privatization & Democracy in East Africa: The Promise of Administrative Law*, at page 37, East African Educational Publishers 2009.

⁴⁰¹ Ibid.

⁴⁰² Ibid at page 38-39.

⁴⁰³ Migai Akech at page 39 while referring to the views of Jody Freeman.

⁴⁰⁴ Section 60, PPP Act.

On a related note, lack of transparency and accountability may lead to corrupt practices in the PPP process. It is in this context that it would be necessary to develop clear anti-corruption policies during the PPP process. The Constitution⁴⁰⁵ has addressed the question of corruption and other malpractices during the procurement process. It requires that a framework should be developed to deal with among others, sanction against contractors who have not performed according to professionally regulated procedures, contractual agreements or legislation⁴⁰⁶ on the one hand as well as sanctions against persons who have defaulted on tax obligations or guilty of corrupt practices or serious violation of labour practices⁴⁰⁷. It is worth noting that Parliament has enacted the Public Procurement and Asset Disposal Act 2015⁴⁰⁸ in compliance with Article 227 and the 5th Schedule of the Constitution but this Act does not specifically regulate to procurement under PPP arrangement. As such, there is need for an appropriate amendment to the PPP Act similar to what was enacted under the Public Procurement and Asset Disposal Act 2015 to give effect to the prescriptions of Article 227.

In regards to public participation, the Constitution expressly prescribes public participation as one of the core principles that guide public finance in both National and in the Devolved levels of Government.⁴⁰⁹ Prof. Migai Akech agrees that there is need for political instruments to ensure

⁴⁰⁵ Kenyan Constitution 2010.

⁴⁰⁶ Constitution 2010 Article 227(2)(c).

⁴⁰⁷ Constitution 2010 Article 227(2)(d)

⁴⁰⁸ Act No. 33 of 2015.

⁴⁰⁹ Articles (201)(a) identifies the principles of public finance to include openness, accountability and public participation in the Republic which includes both National and Devolved Governments. Further, there are various Articles in the Constitution which relate to public participation as follows: Article 174(c). This section sets out the objects of the devolution as being among others 'to ... enhance the participation of the people in the exercise of powers of the State and in making decisions affecting them'. Article 184(1)(c) provides for participation by residents in the governance of urban areas and cities.

the participation of citizens in the design, award, implementation and regulation of privatization initiatives.⁴¹⁰

In the case of *Erick Okeyo Vs. County Government of Kisumu & 2 Others*⁴¹¹ a case relating to public private partnership which was filed in Court before the enactment of the PPP Act, the Court held that the decision to enter into a public private partnership in relation to solid waste management for a contract period of 15 years and with a contract sum of Kshs.1.2 Billion was a major policy decision that required public participation. The court therefore underscores the importance of public participation in the PPP process.

Another case that illustrates the importance of public participation is *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*⁴¹² (hereinafter the *Biwater case*) which was extensively discussed by Prof. Migai Akech.⁴¹³ The project involved the provision of water and sewerage services by a private entity in the city of Dar Es Salaam by way of a 10 year Lease contract.⁴¹⁴ Throughout the process, the public was kept in the dark with no public deliberations on alternative policy options.⁴¹⁵ In fact, the privatization documents were considered confidential and not even Members of Parliament had access to them.⁴¹⁶ Akech concludes that had the project which is the subject of the Biwater Case been taken through proper public scrutiny, many of its weaknesses would have come to light at the right time.⁴¹⁷

⁴¹⁰ Migai Akech, *Privatization & Democracy in East Africa: The Promise of Administrative Law*, at page 38, East African Educational Publishers 2009.

⁴¹¹ Erick Okeyo Vs. County Government of Kisumu & 2 Others (2014) eKLR, High Court Petition No. 1 'A' of 2014 available at <http://kenyalaw.org/caselaw/cases/export/97414/pdf> (last accessed in October 21, 2016)

⁴¹² ICSID Case No. ARB/05

⁴¹³ Migai Akech, *Privatization & Democracy in East Africa: The Promise of Administrative Law*, at page 76, East African Educational Publishers 2009.

⁴¹⁴ Ibid at page 66.

⁴¹⁵ Ibid at page 66.

⁴¹⁶ Ibid at page 66.

⁴¹⁷ Ibid at page 76.

There is therefore need for consultation of all relevant stakeholders of PPP projects. Stakeholder consultation through public participation is seen as increasingly necessary given that inadequate consultation may lead to opposition of the project which could potentially cause delay or cancellation of a PPP project.⁴¹⁸ In addition, engagement of stakeholders invariably is beneficial given that stakeholders provide valuable input in the design and practicality of the project hence allows for buy-in resulting in innovative approaches.⁴¹⁹ Further, engagement of stakeholders through dissemination of information leads to increased credibility of the project partners and project buy-in.⁴²⁰ It can therefore be argued that involving the stakeholders through public participation is beneficial as it reduces the attendant risks associated in lack of consultation.

3.4.3 Procurement Process

Procurement of PPP projects have a number of features which make them more complex than other conventional/traditional procurement types. In the first instance, PPP projects are ordinarily of long-term nature and its financing varies significantly from that of conventional procurement given that the projects could be financed through user fees or direct tariffs⁴²¹ which understandably may necessitate that the procurement process is more complex.

Notwithstanding the complex procurement process of PPP projects, it is necessary that the process is efficient and timely so as not to discourage the private sector participants. It is acknowledged that there is no particular favoured procurement timelines for PPP projects. Indeed, international comparisons on procurement timelines are imperfect as they are affected by

⁴¹⁸ Asian Development Bank, Public Private Partnership Handbook, at page 21 <http://www.apec.org.au/docs/adb%20public%20private%20partnership%20handbook.pdf> accessed August 12 2015

⁴¹⁹ Ibid.

⁴²⁰ Ibid.

⁴²¹ Procurement Arrangement Applicable to Public-Private Partnerships (PPP) Contracts Financed under World Bank Projects, Guidance Note, September 2010 at page 14 (http://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/GuidanceNote_PPP_September2010.pdf accessed on August 4th 2015)

differing legal systems and cultural behaviours. Generally, it has been observed that the UK procurement timelines are slower than the European comparators.⁴²²

In the UK,⁴²³ the Government requires ministers at the time the business cases are submitted to Treasury to provide their commitment to procurement timetable that runs from issuing the project tender to financial close for approval. To this end, the UK government has given a blanket commitment that the procurement phase of a project shall not take longer than 18 months from the time a tender notice is issued to the appointment of a preferred bidder. Firm timelines do give confidence to private investors. Government agencies must therefore establish clear guidelines and reasonable timelines from project announcement to project award.⁴²⁴

In respect to project identification and selection, neither the PPP Act nor the PPP Policy gives clear timelines in each step in the process. The PPP Act sets out a stepwise process in the procurement cycle of PPP projects in part VI⁴²⁵ which we shall discuss hereinbelow and for purposes of this study we have classified into the following four stages:

- i) Conceptualization and selection stage;⁴²⁶
- ii) Pre-tender approval stage;⁴²⁷
- iii) Tender and Approval stage;⁴²⁸
- iv) Post tender and monitoring stage.⁴²⁹

⁴²² Her Majesty Treasury, A New Approach to Public Private Partnerships, December 2012 at page 38.

⁴²³ Her Majesty Treasury at page 41.

⁴²⁴ Thierry Deau & Julien Touati, *Using PPPs to Fund Critical Greenfield Infrastructure Projects*, at 28, available at <http://www.mckinsey.com/industries/public-sector/our-insights/using-ppps-to-fund-critical-greenfield-infrastructure-projects> (last accessed on 16th November 2016).

⁴²⁵ Section 31, to 35, PPP Act.

⁴²⁶ Section 31, PPP Act

⁴²⁷ Section 32 to 36, PPP Act.

⁴²⁸ Section 37 to 61, PPP Act.

⁴²⁹ Section 62 to 65, PPP Act.

The above procurement processes are explained below:

a) **Conceptualization and Selection Stage**

In the conceptualization and selection stage, the PPP Act in Section 31(3) does not give a timeline within which the PPP Committee shall approve a project proposal submitted to it by a contracting authority. The approval is left to the discretion of the PPP Committee.

In addition, Section 31(3) of the PPP Act requires that the project proposal be submitted to the PPP Committee in a prescribed form. In order to streamline the procurement process at this stage, it is necessary that the project proposal should follow prescribed requirements so as to enhance greater consistency of approach across sectors and reduce time for each contracting authority in developing the documentation.⁴³⁰ To this end, Regulation 12 of the PPP Regulations sets out a list of information that should be included in a project proposal.⁴³¹ In addition to the information listed under Regulation 12, there is need to develop a manual for PPP projects for purposes of standardizing this procedure. South Africa PPP Unit has even proceeded to develop PPP manuals for specific sectors such as the Tourism sector.

b) **Pre-tender Approval Stage**

During the pre-tender stage, the contracting authority is required to undertake a feasibility study of the project to determine its viability⁴³² and submit the feasibility report to the PPP Unit for review and evaluation. The PPP Unit in turn is required to submit the feasibility report to the Debt Management Office for assessment and approval.⁴³³ Thereafter, the PPP Unit shall submit

⁴³⁰ Her Majesty Treasury, A New Approach to Public Private Partnerships, December 2012 at page 42

⁴³¹ The information required under Regulation 12 of the PPP Regulations in a project proposal include the following information: a) Demand assessment (b) estimated cost of the project (c) details of the project (d) the expected private sector role in the project (e) socio-economic benefits of the project (f) the operational and strategic benefits of the project.

⁴³² Section 33, PPP Act.

⁴³³ Section 35(2), PPP Act.

the feasibility report together with the Debt Management Office approval to the PPP Committee for approval.⁴³⁴

It is worth noting that there are no fixed timelines in each stage described above from the time the feasibility report is completed to approval of the same by the PPP Committee. The PPP Unit, the Debt Management Office and the PPP Committee are not put under any obligation to expeditiously process the approvals. This has the effect of delaying projects which may be of great national importance.

Furthermore, there is need to emphasize on extensive pre-procurement engagement between the contracting authority, the public and possible bidders as a precondition to approval of the project proposal under Section 31(3).⁴³⁵ In the UK a contracting authority is required to undertake the pre-procurement engagement and to develop a full bidder's pack complete with specification, selection and award criteria, terms and conditions and timescales. It is intended that this process will ensure that projects do not go to tender before they are fully prepared hence lead to faster and more straightforward procurement process.

c) **Tender and Approval Stage**

The pre-qualification committee is required to submit a short list of pre-qualified bidders upon review of requests for qualification in accordance with Section 40(1).⁴³⁶ There is no set time period within which the pre-qualification committee is required to issue the short list of pre-qualified bidders or to render its decision upon consideration of the requests for qualification and neither is any time limit for notifying the applicants of the outcome.

⁴³⁴ Section 35(3), PPP Act

⁴³⁵ Section 31(3), PPP Act.

⁴³⁶ Section 40(1), PPP Act.

Similarly, no time limits are provided in the PPP Act to guide the process of invitation to bid, evaluation of bids, negotiations with successful bidders and eventual cabinet approval of the project. There is a feeble attempt by the Cabinet Secretary for Finance through the PPP Regulations to prescribe the time for preparation of evaluation report and approval of the same by the PPP Committee under Regulation 48.⁴³⁷ This does not seem to help since there is no time limit provided between submission of proposals and opening of the bids.

In view of the above, there is need for clear and bankable timelines for the entire procurement cycle as well as simplification of the procurement processes so as to increase efficiency and reduce the cost of PPP procurement. The PPP Committee should issue guidelines and procedures on the identification, selection, pre-tender approval, tendering, negotiation, post-tender approval and monitoring process as stated in Section 30 of the PPP Act.

3.4.4 PPP Procurement Methods

The PPP Act provides for two major procurement methods under the PPP arrangement namely: Competitive Bidding process⁴³⁸ and the Non-compete process.⁴³⁹ The competitive bidding process has two other optional processes that can be adopted by a contracting authority during the bidding processes namely Competitive Dialogue⁴⁴⁰ and Concession of natural resources.⁴⁴¹ The processes under both the competitive bidding method and non-compete method are provided in great detail above as well as in the previous chapter and as such this paper shall not delve further. The study shall however attempt to critique both the competitive dialogue procedure and the concession of natural resources below.

⁴³⁷ The Public Private Partnerships Regulations, 2014, Kenya Gazette Supplement No. 166, Legal Notice No. 171, 19th December 2014.

⁴³⁸ PPP Act Part VII

⁴³⁹ Section 61, PPP Act.

⁴⁴⁰ Section 45, PPP Act.

⁴⁴¹ Section 55, PPP Act.

a) **Competitive Dialogue**

The PPP Act does not define competitive dialogue perhaps owing to its novel nature in Kenya's procurement process. It will be noted that competitive dialogue was itself introduced into the European Community Law relatively recently in 2004 yet the EU is a more mature jurisdiction in procurement.⁴⁴² Under the European Community Law, competitive dialogue has been defined as a process whereby a contracting authority conducts a dialogue with candidates admitted to procedure with the aim of developing one or more suitable alternatives capable of meeting its requirements and on the basis of which candidates chosen are invited to tender.⁴⁴³ In light of this definition, the condition for a contracting authority to choose competitive bidding is that the PPP contract must be one which is particularly complex.

The PPP Act⁴⁴⁴ provides that a contracting authority may in consultation with the PPP Unit and approval of the PPP Committee hold competitive dialogue with each bidder to define technical or financial aspects for the Project. It is noted that competitive dialogue seems to have been an afterthought since the Policy did not mention this method of procuring PPPs.

It is acknowledged that competitive dialogue as a mode of procurement of PPPs is not favoured in most jurisdictions and remains an 'unexplored' procedure in Europe.⁴⁴⁵ Competitive dialogue is not favoured firstly because it takes longer as compared to the normal alternative procurement procedures.⁴⁴⁶ This is mainly because it involves more detailed discussions with a greater number of participants and given that it is a highly prescriptive procedure, it would require

⁴⁴² European PPP Expertise Centre, *Procurement of PPP and the use of Competitive Dialogue in Europe, A Review of Public Sector Practices across the EU*, at page 9 (www.eib.org/epec-resources/epec-procurement-and-cd-public.pdf accessed on 30th July 2015)

⁴⁴³ Ibid.

⁴⁴⁴ Section 45, PPP Act.

⁴⁴⁵ European PPP Expertise Centre, *Procurement of PPP and the use of Competitive Dialogue in Europe, A Review of Public Sector Practices across the EU*, at page 12-14 (www.eib.org/epec-resources/epec-procurement-and-cd-public.pdf accessed on 30th July 2015).

⁴⁴⁶ Ibid at page 12.

additional care and diligence so as to ensure compliance throughout.⁴⁴⁷ Secondly, competitive dialogue is considered to be a more expensive procedure to use and hence not well adapted to the procurement of PPPs.⁴⁴⁸ The increase in costs may be due to extensive dialogue meetings and use of external specialist advisors.⁴⁴⁹ Thirdly, competitive dialogue is perceived to be complex especially given that it is relatively new with not much available well established practice from different countries.⁴⁵⁰ Fourthly, competitive dialogue is not favoured generally due to the fact that it has limited flexibility and ability to adjust to changing circumstances hence not suitable for PPP contracts.⁴⁵¹ Lastly, there are concerns that competitive dialogue is less transparent and thus prone to corruption risks than other procurement procedures.⁴⁵²

The Kenyan PPP Act does not have criteria upon which a project could be procured through a competitive dialogue process. This is in contrast with the European community law which expressly sets out conditions and circumstances which may necessitate the use of competitive dialogue procedure as set out in Article 1(11)(c) and Article 29(1) of the EU Procurement Directive.⁴⁵³ The condition in the EU Community law is that the contract must be particularly complex in order for the competitive dialogue procedure to be used.⁴⁵⁴ The Directive proceeds to define that a ‘particularly complex’ contract entails a contract where a contracting authority is not objectively able to define the technical means capable of satisfying its needs or objectives

⁴⁴⁷ Ibid.

⁴⁴⁸ Ibid at page 13.

⁴⁴⁹ Ibid.

⁴⁵⁰ Ibid at page 14.

⁴⁵¹ Ibid at page 14.

⁴⁵² Ibid.

⁴⁵³ Article 29 (1), Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the Coordination Of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts, Official Journal L 134, 30/04/2004 at 114-240 (<http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32004L0018> accessed on 29th June 2015)

⁴⁵⁴ Ibid, Article 1(1)(c) Directive 2004.

and secondly where the contracting authority is not objectively able to specify the legal and/or financial make-up of a project.⁴⁵⁵

The disadvantages of competitive dialogue set out above in regards to the European's perspective which is an advanced economy militate against adoption of such procedure in the Kenyan context. However, given that Competitive Dialogue is part of the Kenyan PPP law, what is therefore required is to provide sufficient clarity in its application. The status of competitive dialogue as it sits in the PPP Act is uncertain as to the criteria and conditions to be satisfied and which will guide any contracting authority in the selection of the competitive dialogue procedure as opposed to the other alternative procurement procedures under the PPP Act. Such uncertainty may lead to avenues for corruption, unnecessary delay of projects, possibility of multiple litigations against PPP projects and may even discourage both local and international private investors.

Her Majesty's Treasury undertook a review of competitive dialogue in the UK and issued its recommendation.⁴⁵⁶ According to Her Majesty's Treasury, the Competitive Dialogue procedure should not be used as a 'default' procedure for all complex transactions and that any decision to use this procedure should include a justification document in the published procurement documents.⁴⁵⁷ The justification document should indicate the rationale for using competitive dialogue including reasons as to why the project is considered to be particularly complex and why the other procedures are not appropriate.⁴⁵⁸

⁴⁵⁵ Ibid, Article 1(1)(c) Directive 2004.

⁴⁵⁶ Her Majesty Treasury, HM Treasury Review of Competitive Dialogue, November 2010, available at http://webarchive.nationalarchives.gov.uk/20130129110402/http://www.hm-treasury.gov.uk/d/ppp_competitive_dialogue.pdf (last accessed on October 2016).

⁴⁵⁷ Ibid at page 11.

⁴⁵⁸ Ibid at page 11.

Similarly in Kenya, the Cabinet Secretary should develop Rules for purposes of proper implementation of the competitive dialogue procedure akin to those in the UK discussed above.

b) Concession of Natural Resources

Most of the literature relating to PPPs only address areas of infrastructure and service delivery.

Generally, exploitation of natural resources in Kenya is dealt with substantively by sectoral legislations such as the Energy Act,⁴⁵⁹ Petroleum (Exploration and Production) Act⁴⁶⁰ and Mining Act.⁴⁶¹ There are efforts to develop the extractive industry legal ecosystem in Kenya so as to attract foreign investments through the enactment of more relevant laws. To this end, the following laws are in the legislative pipeline namely the Energy Bill 2015, Natural Resources (County Royalties) Bill⁴⁶² and the Petroleum Exploration and Production Bill 2015⁴⁶³ while Mining Act, 2016⁴⁶⁴ was recently enacted by Parliament.

PPP arrangements in respect to management of natural resources can be said to be novel concepts in Kenya. Indeed, the PPP Act⁴⁶⁵ briefly notes that a concession for the exploitation of natural resources shall be ratified by Parliament in accordance with the provisions of the Constitution⁴⁶⁶. The Constitution on the other hand provides that Parliament shall enact legislation to provide for the classes of transactions which shall be subject to Parliamentary ratification. The legislation envisaged under Article 71 of the Constitution was required to be enacted within 5 years from the date the Kenyan Constitution was promulgated as set out in the

⁴⁵⁹ Chapter 314 of the Laws of Kenya.

⁴⁶⁰ Chapter 308 of the Laws of Kenya.

⁴⁶¹ Chapter 306 of the Laws of Kenya.

⁴⁶² Kenneth Kamaiitha, Natural Resources in Kenya (www.kwm.com/en/uk/knowledge/insights/natural-resources-in-kenya-20140723 accessed 29th July 2015)

⁴⁶³ Business Daily, 4th August 2015 (www.businessdailyafrica.com/CIOC-team-says-House-will-enact-key-laws-in-time/-/539546/2820060/-/10x6dmk/-/index.html accessed on 8th August 2015)

⁴⁶⁴ Act No. 12 of 2016.

⁴⁶⁵ Section 55, PPP Act.

⁴⁶⁶ Article 71 of the Constitution of Kenya 2010.

5th Schedule of the Constitution. In compliance with the Constitutional deadline, Parliament enacted the Natural Resources (Classes of Transactions Subject to Ratification) Act, 2016.⁴⁶⁷ The delay in the enactment of this legislation made any PPP arrangement in respect to natural resources in Kenya unfeasible.

In addition, while taking cognizance of the fact that land and the natural resources in Kenya are emotive subjects, there is therefore need to ensure that there is adequate public participation in every decision which touches on both land and natural resources to avoid any conflicts or disputes arising which may jeopardize a PPP project. This paper therefore proposes that mandatory public participation with clear statutory prescriptions should be inbuilt in an Act of Parliament in addition to parliamentary ratification. The Natural Resources (Classes of Transactions Subject to Ratification) Act, 2016 only briefly mentions "stakeholder" consultations in section 9(1)(d) as one of the relevant but not mandatory considerations for ratification by Parliament of an agreement on exploitation of natural resources by Parliament.

Further there is need to develop regulations on local content that will ensure that the local communities benefit from exploitation of natural resources especially if the PPP arrangement involves a foreign private party.

3.4.5 Contractual Considerations of PPPs

The PPP Act provides in Section 62(2) that the Cabinet Secretary shall make regulations specifying the manner in which a project agreement shall be drawn. The Third Schedule of the PPP Act sets out the minimum contractual obligations to be specified in a project agreement. There has been a long tradition for use of standardized agreements for procurement of goods and

⁴⁶⁷ Natural Resources (Classes of Transactions Subject to Ratification) Act No. 41 of 2016, Laws of Kenya.

services for conventional public works projects and many international institutions including the World Bank require the use of standard documents for projects they fund.⁴⁶⁸ On the other hand, the use of standard contracts for complex PPP transactions has not been common by international institutions.⁴⁶⁹ However, at national levels, countries such as the United Kingdom, Australia and South Africa have developed bidding documents, model contracts or key clauses as well as manuals for the implementation of PPPs.⁴⁷⁰

Standardized agreements are increasingly being developed for specific sectors so as to reduce the cost of negotiating single contracts in different sectors.⁴⁷¹ It is recommended that the relevant PPP institution such as the Kenyan PPP Unit should issue detailed provisions and standard forms in notices, regulations, instructions or guidance notes.⁴⁷² Having standardized contract clauses without over-generalization helps build knowledge and awareness and accelerates the procurement process.⁴⁷³

There is need to develop guidelines and detailed provisions of proposed provisions of a project agreement in addition to the list of minimum requirements listed in the Third Schedule of the PPP Act. This is in line with the UK experience where Her Majesty Treasury has issued draft guide notes on standardization of PPP contracts. The objectives of standardized contracts are stated in the guide notes as being firstly to provide detailed drafting provisions to be incorporated into PPP contracts either on a ‘required basis’ or ‘recommended basis’, secondly to fill gaps in

⁴⁶⁸ The World Bank Group, available at <https://ppp.worldbank.org/ppp/standardized-agreements-bidding-documents-and-guidance-manuals#Guidelines> (last accessed on 24th November 2017)

⁴⁶⁹ Ibid.

⁴⁷⁰ Ibid.

⁴⁷¹ Ibid.

⁴⁷² Kelly Philip, *Preparing a Public-Private Partnership Law: Observations from the International Experience*, Asia Development Bank (2016) at page 25 available at <https://www.adb.org/sites/default/files/publication/190132/eawap-04.pdf> (last accessed on 24th November 2017).

⁴⁷³ Ibid at page 33.

contract standardization and thirdly to reduce the time and costs of procurement by enabling all parties to agree without extended negotiations.⁴⁷⁴

3.4.6 Government Support of PPPs

The PPP Policy sets out a raft of instruments that the Government intends to deploy so as facilitate and incentivize PPP projects as follows:⁴⁷⁵

- i) Establishment of a Project Facilitation Fund (the Fund). The PPP Act has exhaustively made provisions relating to this incentive and has set out several other uses of the Fund over and above the creation of a guarantee fund for settlement of contingent liabilities that may crystallize during the PPP project as provided in the Policy. Indeed, section 68 of the PPP Act⁴⁷⁶ establishes the Fund from where funds shall be used to (i) support contracting authorities in the preparation phase, tendering and appraisal phase of a project (ii) support the activities of the PPP Unit (iii) finance projects that are desirable but cannot be implemented in the absence of financial support from Government (iv) meet any contingent liabilities arising from a project and (v) settle transaction advisor's retainer fees.
- ii) Creation of a seamless interaction between security Markets and the PPP implementation programme so as to mobilize financial resources for PPP projects. In particular, the Government committed to create institutional capacity of market intermediaries and licensees of capital markets on the one hand and develop regulations to ease challenges for sponsors and their lenders to mobilize financial resources including regulations on collective

⁴⁷⁴ Her Majesty Treasury, Standardization of PF2 Contracts, Draft, December 2012, at page 2, Section 1.2, available at <http://ppp.worldbank.org/public-private-partnership/library/united-kingdom-treasury-standardisation-pf2-contracts-sopc-december-2012> (last accessed on 24th November 2017)

⁴⁷⁵ Paragraph 3.3, PPP Policy

⁴⁷⁶ Section 68, PPP Act

investment schemes and asset based securitization.⁴⁷⁷ There are no specific regulations which have been put in place to operationalise this part of the Policy so that investors can be able to raise funds from the capital markets without any delay.

- iii) Facilitate issuance of guarantees with financial institutions as well as provide binding letters of comfort/support to investors and their lenders so as to reduce the premium factored on political risks. In line with the PPP Policy the PPP Act provides for the issuance of such guarantee, undertaking or binding letters of comfort under Section 27.⁴⁷⁸
- iv) Provision of incentives to the project company such as tax benefits, assistance in acquiring land, relation of certain legal requirements such as licensing, use of project resources for non-profit purposes or being allowed to bid for other projects.⁴⁷⁹ Upon a review of the PPP Act, it is observed that there is no specific or special provision on tax incentives for PPPs in Kenya other than a cursory mention of tax incentive in the PPP Policy. It is noted that for certainty and information to investors in PPP arrangements, it is necessary to document the kind of government support envisaged in a PPP. This could be done by way of developing an independent policy on investment incentives in PPP or the same could be included in a general National Investment Policy⁴⁸⁰ on investment in Kenya which the Government is currently developing. UNCTAD in its Report on the Implementation of the Investment Policy Review⁴⁸¹ in Kenya observed that the lack of a whole encompassing Investment Policy to guide and attract both Foreign and Domestic Direct Investment was a hurdle and hence there was need to design one. The adoption of an Investment Policy therefore will

⁴⁷⁷ Kenya PPP Policy, Paragraph 3.3.

⁴⁷⁸ Section 27, PPP Act.

⁴⁷⁹ Paragraph 3.3, Kenya PPP Policy.

⁴⁸⁰ Ministry of Industrialization Website, <http://www.industrialization.go.ke/index.php/media-center/blog/247-kenya-to-have-national-investment-policy-by-2016> (last accessed on 27th July 2015)

⁴⁸¹ United Nations Conference on Trade and Development, Report on the Implementation of the Investment Policy Review, Kenya at page 26. http://unctad.org/en/PublicationsLibrary/diaepcb2012d6_en.pdf last accessed on 8th August 2015.

reduce uncertainty in terms of government support and define the limits of any discretionary powers intended in order to offer incentives to private investors. An incentive has been provided under the Value Added Tax Act⁴⁸² in respect only to PPPs involved in construction of power generating plants which are entitled to tax exemption.⁴⁸³

The above incentives such as tax need to be expanded further to cover the width and breadth of the areas touching on PPPs such as infrastructure. It may therefore be necessary to document all the incentives for clarity purposes and easy understanding by potential investors. There is also need to review the various sectors where PPPs may be the appropriate form of procurement and extend such incentives to all those areas/sectors.

3.5 Critique of the Institutional Framework

3.5.1 PPP Unit

Istrate and Puentes⁴⁸⁴ while recognizing that there is no one strict definition of a PPP Unit, have adopted the World Bank definition which considers a PPP Unit as any organization designed to promote or improve PPPs and has a lasting mandate to manage multiple PPP transactions in multiple sectors. They have identified 3 characteristics of a PPP Unit based on their study and evidence from across the globe as follows:⁴⁸⁵

⁴⁸² Value Added Tax Act Chapter 487 of the Laws of Kenya, Paragraph 29 of the First Schedule which provides thus: “Taxable supplies, excluding motor vehicles, imported or purchased for direct and exclusive use in the construction of a power generating plant, by a company, to supply electricity to the national grid approved by Cabinet Secretary for National Treasury upon recommendation by the Cabinet Secretary responsible for energy”

⁴⁸³ Robert Waruiru, Public Private Partnership- Taxation, *KPMG Public Sector Tax Seminar on 4th June 2015*, at page 22, available at <https://www.icpak.com/wp-content/uploads/2015/09/Public-Private-Partnership.pdf> (last accessed November 14, 2016).

⁴⁸⁴ Istrate Emilia & Puentes Robert, *Moving Forward in Public-Private Partnerships: US and International Experience with PPP Units*, Brookings-Rockefeller Project on State and Metropolitan Innovation, December 2011, at page 6, https://www.brookings.edu/wp-content/uploads/2016/06/1208_transportation_istrate_puentes.pdf (accessed on July 30th 2015).

⁴⁸⁵ Ibid.

- i) It is a government entity that supports other government agencies in procuring projects through PPP process and that it is not a procuring entity;
- ii) It is a dedicated entity with a permanent structure as opposed to an *ad hoc* arrangement;
- iii) It procures PPP projects which may be in multiple sectors or in a specific sector.

A review of the institutional structures of PPPs the world over reveals that they could take any of the following forms:⁴⁸⁶ first, it could be situated in a Ministry of Government which most often could be the Ministry of Finance given its centrality in Government's functionality as is the case in the UK and most developing countries while others have placed PPPs in line ministries such as in Denmark and Poland where the PPPs are situated in Ministry of Business & Economic Affairs and Ministry of Infrastructure respectively.⁴⁸⁷ Secondly, several countries have PPP Units as corporations such as in the UK, British Columbia, Czech Republic, Portugal and Germany.⁴⁸⁸ Thirdly, PPP Units may either be located at the national government in respect to unitary states or at the sub national levels of government in regards to federal or devolved system.⁴⁸⁹

In Kenya the PPP Unit is a creature of the PPP Act under Section 11⁴⁹⁰ and is domiciled within the Ministry of Finance. Despite the systemic and structural differences of the PPP units in different countries, it is evident that most of them are located within the Central Government

⁴⁸⁶ Ibid at pages 9 and 10.

⁴⁸⁷ Ibid.

⁴⁸⁸ Ibid.

⁴⁸⁹ Ibid.

⁴⁹⁰ Section 11, PPP Act.

typically in the Treasury or Ministry of Finance.⁴⁹¹ On this score, the Kenyan PPP Unit is similarly domiciled like most other PPP Units.

Upon review of the PPP Act however, one may be tempted to imagine that the PPP Unit and the PPP Committee are different organs given the way they are structured and how they relate with each other. One of the areas where there seems to be apparent cross-purpose between the powers of the Cabinet Secretary and the PPP Committee is in respect to the PPP Unit's organisational structure. In the first instance the recruitment of both the Director and staff of the PPP Unit is done ostensibly under the direction of the Cabinet Secretary for Finance as provided for under Section 12(2).⁴⁹² On the other hand, one of the functions of the PPP Committee is to approve the organisational structure of the PPP Unit as provided in Section 7(j).⁴⁹³ In view of this organisational challenge, it appears as if the PPP Committee has no role in the management of the PPP Unit yet it is the apex organ under the PPP Act in respect to the control and management PPPs. This apparent gap can be cured by development of regulations that spell out the roles of the PPP Unit clearly including the administrative and financial framework of the PPP Unit as required under Section 15 of the PPP Act.

This kind of organizational structure is fragmented and appears uncoordinated between the PPP Committee and the PPP Unit and it is the proposal of this paper that the organisational structure is reviewed so as to provide that the PPP Committee forms and operates as a Board of the PPP Unit notwithstanding the fact that it is domiciled in the National Treasury. Further, it is our

⁴⁹¹ Farrugia Christine, Orr J & Reynolds Tim, *Public-Private Partnership Agencies: A Global Perspective*, Collaboratory for Research on Global Projects, August 2008, at page 26 available at http://www.nawc.org/uploads/documents-and-publications/documents/document_02445830-0b21-4f61-8b65-bad5f5989467.pdf (last accessed September 10, 2016).

⁴⁹² PPP Act.

⁴⁹³ PPP Act.

proposal that the PPP Unit ought to bear a separate legal entity with some level of semi-autonomy.

3.5.2 Petition Committee

The PPP Act establishes a Petition Committee which is mandated to deal with all petitions and complaints submitted by a private party during the tendering process and entering into a project agreement.⁴⁹⁴ For the better performance of its functions the Cabinet Secretary for Finance has published Regulations⁴⁹⁵ which spell out the constitution of the Petition Committee and the procedure in respect to disposal of petitions or complains.⁴⁹⁶

Given that PPP arrangements relate to contracts of significant value whose interests may even be transnational it is necessary to have strong institutions to buttress the entire life cycle of contracts. In particular, it is noted that the decision of the Petition Committee is final and binding on all parties as provided in Section 67(5) of the PPP Act without an option for an appeal. This fact was brought out in *Republic Vs. Partnerships Petition Committee & 3 Others Ex. Parte APM Terminal (2015)*⁴⁹⁷ where it was contended by the High Court that decisions of the Petition Committee need close scrutiny for reason that the PPP Act does not provide an appeal mechanism against its decisions. Justice Korir opined that if the Petition Committee reaches a wrong decision its repercussions on public procurement will be long lasting and devastating and hence a Judicial Review application should be treated with a lot of caution since an aggrieved

⁴⁹⁴ Section 67, PPP Act.

⁴⁹⁵ Regulations, 2014, The Public Private partnerships.

⁴⁹⁶ Regulations 45, 58, 59 and 60, Public Private Partnerships Regulations, 2014.

⁴⁹⁷ Republic Vs. Partnerships Petition Committee & 3 Others Ex. Parte APM Terminal (2015) JR Case 298 of 2015 at 17 (Korir J) available at <http://kenyalaw.org/caselaw/cases/export/115869/pdf> (last accessed November 10, 2016).

party has no other option.⁴⁹⁸ As such, in a situation where there is no window for appeal, Judicial Review takes a higher pedestal so as to correct bluntly wrong and unjust decisions.⁴⁹⁹

For this reason, it is observed that the provisions in the PPP Act and the PPP Regulation are not sufficient. A comparative equivalent of the Petition Committee is the Public Procurement Administrative Review Board (Review Board) which is an administrative body under the Public Procurement and Disposal Act.⁵⁰⁰ An analysis of the powers of the two bodies in respect to grant of conservatory orders indicates that the Review Board is vested with statutory power under Section 168⁵⁰¹ to stay or suspend procurement proceedings. Indeed, the filing of a complaint under the Public Procurement and Disposal Act operates as an automatic stay of procurement proceedings. In contrast, the Petition Committee does not have such statutory powers given that the PPP Act does not donate jurisdiction to grant conservatory orders. Regulation 60(2) of the PPP Regulations does however provide that the Petition Committee may suspend the tendering process while the petition is being heard. It is worth noting that this is not an automatic stay similar to that of the Review Board aforementioned. In addition but curiously, the Petition Committee Chairperson issued Petition Committee Guidelines⁵⁰² which purport to grant the Petition Committee power to make conservatory orders as stipulated in Guideline No. 25(a).⁵⁰³ It is the opinion of this study that such an ingenious attempt to create jurisdiction which has not been established or donated by the parent statute is *ultra vires*.

⁴⁹⁸ Ibid.

⁴⁹⁹ Republic Vs. Partnerships Petition Committee & 3 Others Ex. Parte APM Terminal (2015) eKLR, JR Case 298 of 2015 at 17 (Korir J) available at <http://kenyalaw.org/caselaw/cases/export/115869/pdf> (last accessed November 10, 2016).

⁵⁰⁰ Section 27, Public Procurement and Disposal Act Act No. 33 of 2015, Laws of Kenya.

⁵⁰¹ Public Procurement and Disposal Act, Act No. 33 of 2015, Laws of Kenya.

⁵⁰² Gazette Notice No. 7435, 17th October 2014, Vol CXVI - No. 124.

⁵⁰³ Gazette Notice No. 7435, 17th October 2014, Vol CXVI - No. 124.

The High Court in *HCIG-Energy Investment Company Limited and Liketh Investment Kenya Limited Vs. The Ministry of Energy & Petroleum Contracting Authority & 2 Others*⁵⁰⁴ concluded that the Petition Committee under the PPP Act does not have powers to grant temporary stay of tendering process during hearing of a petition.⁵⁰⁵ It therefore follows that the attempt to create jurisdiction through the PPP Regulations and the Petition Committee Guidelines amounts to naught. Hon. Justice Mumbi upon review of several cases⁵⁰⁶ concluded that where legislation establishes a body but does not grant it the jurisdiction to grant injunctive relief pending determination of matters before it, such power vests in the High Court.⁵⁰⁷

In view of the above, this study recommends that an amendment of the PPP Act should be undertaken so as to provide explicit powers analogous to those vested in the Review Board so as to enable the Petition Committee to issue conservatory orders or to suspend tendering processes pending the determination of any complaint or petition before it. Any belated attempt to clothe the Petition Committee with jurisdiction to issue conservatory orders through subsidiary legislation or administrative guidelines similar to that in the PPP Regulations and the Guidelines will be prone to legal challenge.

3.6 Conclusion

⁵⁰⁴ *HCIG-Energy Investment Company Limited and Liketh Investment Kenya Limited Vs. The Ministry of Energy & Petroleum Contracting Authority & 5 Others*, (2014) eKLR, High Court Constitutional Petition No. 465 of 2014, EKLR available at <http://kenyalaw.org/caselaw/cases/export/104132/pdf> (last accessed November 10, 2016.)

⁵⁰⁵ *Ibid* at page 11 (Mumbi J)

⁵⁰⁶ The following cases were referred to by Hon. Justice Mumbi in her Judgment: *Caledonia Supermarket Limited Vs. Kenya National Examination Council* (2000) E.A. 357, *Geoffrey Gikonyo Vs. Mohammed Idris Khilji and 3 Others* Nairobi HCCC No. 352 of 2004, *Tiwi Beach Hotel Limited Vs. Julian Ulrike Stamm* (1990) 2 KAR 189, *Moses N. Gitonga Vs. George Gatheca Kinyanjui & Another* Civil Suit No. 125 of 2013 and *Republic Vs. Business Premises Tribunal & Another, Ex Parte Davies Motor Corporation Ltd* (2013) eKLR.

⁵⁰⁷ *HCIG-Energy Investment Company Limited and Liketh Investment Kenya Limited Vs. The Ministry of Energy & Petroleum Contracting Authority & 5 Others*, (2014) eKLR, High Court Constitutional Petition No. 465 of 2014, EKLR available at <http://kenyalaw.org/caselaw/cases/export/104132/pdf> (last accessed November 10, 2016.) at page 12.

This Chapter has comprehensively critiqued the policy, legal and institutional framework of PPPs in Kenya. In doing so, the Chapter has gone into further detail in defining PPPs and the various approaches to PPP conceptualization.

In addition, the Chapter has delved into 12the various areas in the PPP process which require reform and which have an impact in the success of PPPs in Kenya. The various areas have been discussed topically and they include: Governance, procurement process, procurement methods, institutional framework, Government support and contractual considerations. The above critique was done through an in-depth analysis of the current provisions of the PPP Act.

The next Chapter shall undertake a comparative study of PPP arrangements in the UK and South Africa both of which have had fairly longer experience in respect to PPPs. The UK in particular is considered to be a pioneer in PPPs the world over. It shall seek to draw certain parallels with the Kenyan PPP arrangement through the analysis of the legal and institutional underpinnings of PPPs in both countries. The key lessons from the UK and South African jurisdictions shall be discussed.

CHAPTER FOUR

COMPARATIVE ANALYSIS OF PPP EXPERIENCE IN THE UNITED KINGDOM AND SOUTH AFRICA

4.0 Introduction

This Chapter shall attempt to undertake a comparative analysis of the PPP arrangement in Kenya as compared to that in the United Kingdom- UK- and South Africa. The Chapter shall give an overview of the PPP structure both in the UK and South Africa. The Chapter will also look at the key learning areas from both the UK and South African experience given their long history and advanced experience in respect to PPPs.

The United Kingdom has a rich history in respect to PPP implementations having pioneered the modern form of PPP initiatives in Europe. In addition, the United Kingdom is one of the foremost mature markets of PPPs worldwide having proactively promoted PPP programmes and refined their effectiveness to the current status where PPPs have been mainstreamed within the wider infrastructure programmes.⁵⁰⁸ Indeed, the United Kingdom had in year 2012 signed up upto 550 successful operations projects worth over 56 Billion Euros in a wide range of sectors.⁵⁰⁹

On the other hand South Africa has a preeminent position in Africa in respect to PPPs given that it has the greatest cumulative experience of PPPs in Africa.⁵¹⁰ South Africa which is the leading sub-Saharan country in respect to PPPs together with Latin America and Asia Pacific Region

⁵⁰⁸ European PPP Expertise Centre, United Kingdom-England: PPP Units and Related Institutional Frameworks, June 2012 at page 7, available at http://www.eib.org/attachments/epec/epec_uk_england_ppp_unit_and_related_institutional_framework_en.pdf (last accessed on November 22, 2017)

⁵⁰⁹ Ibid at page 9.

⁵¹⁰ Farlam Peter "Working together, *Assessing public-private partnerships in Africa, Nepad Policy Focus Series, the South African Institute of International Affairs (SAIIA)*, Pretoria, SA (2005) at page 1 available at <https://www.oecd.org/investment/investmentfordevelopment/34867724.pdf> (last accessed November 21, 2016)

constitute the major rich and fast growing PPP markets in infrastructure PPPs among developing countries.⁵¹¹ Indeed, South Africa has been ranked among the top developing countries in respect to PPP.⁵¹²

4.1 United Kingdom PPP Experience

At the outset, it is worth observing that the UK does not have a specific PPP law or concession law governing PPPs as a result of the nature of its common law legal system.⁵¹³ Her Majesty's Treasury however publishes guidelines which govern PPPs.⁵¹⁴

It is worth noting that the earliest adopter of a specific law for PPPs in the EU was the United Kingdom where PFI was officially introduced in 1992.⁵¹⁵

The modern version of the PPP is said to have been invented in the UK by the then government of Prime Minister Margaret Thatcher in the 1980s.⁵¹⁶ This was as a result of introduction of neo-liberal fiscal rules limiting government borrowing.⁵¹⁷ As a consequence, the Thatcher government which needed to invest in infrastructure in the face of such fiscal restrictions sought a solution under the concept of Private Finance Initiative (PFI).⁵¹⁸ The UK has been a leader in the

⁵¹¹ Fombad M.C, *Enhancing Accountability in Public-Private Partnerships in South Africa*, at page 67, available at <https://www.ajol.info/index.php/sabr/article/viewFile/111365/101143> (last accessed on 24th November 2017).

⁵¹² Ibid.

⁵¹³ CMS Law, PPPs in Europe, at 144, available at https://cms.law/de/content/download/81911/3036175/version/3/file/CMS_PPPinEurope_Guide082010.pdf (last accessed on October 10, 2016).

⁵¹⁴ Ibid.

⁵¹⁵ European Economy No 3 / 2003, European Commission Directorate-General For Economic And Financial Affairs. Public finances in EMU 2003 at 02 (http://ec.europa.eu/economy_finance/publications/publication473_en.pdf accessed on 20th June 2015)

⁵¹⁶ Hall David, *Why Public-Private Partnerships Don't Work: The Many Advantages of the Public Alternative*, at page 7, available at http://www.world-psi.org/sites/default/files/rapport_eng_56pages_a4_lr.pdf (last accessed on October 10, 2016)

⁵¹⁷ Ibid.

⁵¹⁸ Ibid.

large-scale introduction of PPPs in its economy since the first PPP/PFI in 1987.⁵¹⁹ Prior to 1989, the UK Government was constrained in the use of private capital in financing public projects due to the strict nature of the rules existing known as the "Ryrie Rules."⁵²⁰ The Rules were formulated by a National Economic Development Council working party of the UK under the Chairmanship of Sir William Ryrie. The Rules sought to establish a criteria under which private finance could be introduced into nationalised industries as follows:⁵²¹

- i) Decision to provide funds for investments should be taken under conditions of fair competition with private sector borrowers hence government guarantees or commitments or monopoly power should not grant an investor a degree of security significantly greater than that available on private sector projects;
- ii) Such projects should yield benefits in terms of improved efficiency and profit commensurate with the cost of raising risk capital from financial markets.

The Ryrie Rules were formally retired in 1989 on the ground that they had outlived their usefulness and in their place the Private Finance Initiative (PFI) was set up in 1992.⁵²²

In an effort to streamline and improve delivery of PFI projects, recommendations were made for the creation of a PFI Taskforce within the Her Majesty's Treasury.⁵²³ The PFI Taskforce was to

⁵¹⁹ Ronald W. McQuaid & Scherrer Walter, Public Private Partnership in the European Union: Experiences in the UK, Germany and Austria, available at <http://www.dlib.si/stream/URN:NBN:SI:DOC-ONOG1KDN/d7e50b45-c122-4605-8f7d-bbfbff17d531/PDF> (last accessed on October 10, 2016) (last accessed on October 10, 2016)

⁵²⁰ Grahame Allen, *The Private Finance Initiative*, House of Commons Library, Economic Policy and Statistics Section, Research Paper 03/79, 21 October 2003 at page 12 available on <http://researchbriefings.files.parliament.uk/documents/RP03-79/RP03-79.pdf> (last accessed on October 15, 2016)

⁵²¹ Ibid.

⁵²² Ibid.

⁵²³ Ibid at page 14.

act as a focal point for PFI activities across the UK Government.⁵²⁴ The Taskforce published a series of guidance documents, policy statements, technical notes and case studies.⁵²⁵

A second review of the PFIs in the UK was done in 1999 which recommended that a permanent organisation be formed to replace the PFI Taskforce whose lifespan of 2 years was due to expire.⁵²⁶ As a consequence, Partnerships UK (PUK) was launched in 2000 and in 2001, it became a public private partnership in its own right following the sale of 51% to the private sector while 49% was retained by the government.⁵²⁷

As part of the institutional evolution of PPPs in the UK, another entity was set up in 2009 known as Infrastructure UK (IUK) as a unit within Her Majesty's Treasury. As a result, PUK was formally absorbed within IUK⁵²⁸.

The UK now has a central PPP Unit known as the Infrastructure UK (IUK) which is set up as a separate unit within Her Majesty's Treasury.⁵²⁹ The current remit of IUK is to focus on the UK's long-term infrastructure priorities and facilitate private sector investment over the long term.⁵³⁰

The governance structure of IUK, consists of a Chief Executive Officer appointed by Her Majesty's Treasury supported by a non-executive Chairman who presides over IUK's Advisory Council made up of Permanent Secretaries from key infrastructure departments and senior private sector representatives.⁵³¹ Under this organisational structure, the Chief Executive reports

⁵²⁴ Ibid at page 15.

⁵²⁵ Ibid at page 15.

⁵²⁶ Ibid at page 15.

⁵²⁷ Ibid at page 15.

⁵²⁸ European PPP Expertise Centre, UK England - PPP Units and Related Institutional Framework, June 2012 at page 13 available at http://www.eib.org/epec/resources/publications/epec_uk_england_public_en.pdf (last accessed October 16, 2016).

⁵²⁹ Ibid, at page 14.

⁵³⁰ Ibid, at page 13.

⁵³¹ Ibid, at page 14.

to the Permanent Secretary who is officially the accounting officer for IUK and who in turn is accountable to Parliament.⁵³²

Whereas the UK has a centralised and unitary system of government, there has been devolved governments in Scotland, Wales and Northern Ireland since the late 1990s.⁵³³ Public expenditure and infrastructure investment are however still highly controlled in these devolved governments by the central UK government who fund the vast majority of their income⁵³⁴ although both are devolved matters hence the PF2 policy only applies to England only.⁵³⁵

The independence of PPP Units is an important governance instrument that ensures line agencies do not misuse PPPs to circumvent normal budgetary constraints.⁵³⁶ In addition, an independent PPP Unit serves as a central coordinating agency for infrastructure planning and programme management which is important in avoiding hold-up risk or delay risk, a major cause of high transaction costs.⁵³⁷

Following concerns over the value for money delivered by the PFI programme, the UK government issued a number of reforms to its PPP delivery approach and rebranded it into

⁵³² Ibid at page 14.

⁵³³ McQuaid W. Ronald & Scherrer Walter, *Public Private Partnership in the European Union: Experiences in the UK, Germany and Austria*, available at <http://www.dlib.si/stream/URN:NBN:SI:DOC-ONOG1KDN/d7e50b45-c122-4605-8f7d-bbf17d531/PDF> (last accessed on October 10, 2016)

⁵³⁴ Ibid.

⁵³⁵ Her Majesty's Treasury, *A new Approach to Public Private Partnerships*, December 2012 at page 15, available at <http://ppp.worldbank.org/public-private-partnership/library/new-approach-public-private-partnerships> (last accessed on October 15, 2016).

⁵³⁶ Reagan Michael, *Public Private Partnership Units*, June 2012, Mirvac School of Sustainable Development, Paper 96, at page 3, available at http://epublications.bond.edu.au/sustainable_development/96 (last accessed on October 15, 2016)

⁵³⁷ Ibid.

Private Finance 2 (PF2) in December 2012.⁵³⁸ The UK Government issued a Policy document titled *A New Approach to Public Private Partnership*⁵³⁹ on reform of private finance initiatives.

Among the reforms undertaken under PF2 include the fact that the government of the UK was going to take up significant minority interest in the Project's Special Purpose Vehicle (SPV) of upto 49% in all projects.⁵⁴⁰

One of the desired outcomes of the UK government's increased stake would be a more collaborative approach and a genuine environment of partnership between the public and the private sectors.⁵⁴¹ Under PF2 reforms it was believed that public sector co-investment provides greater transparency through board membership at director level.⁵⁴² Additionally, the reason for mandatory UK government stake in SPVs was to increase transparency of the private sector's approach to managing the project given that private sector party in many projects previously had huge windfall gains as a result of profitable refinancing of projects as well as savings from high contingencies through pooling of contingencies across different projects and proper management of risks.⁵⁴³ This has led to transparency given that in addition to the information that the

⁵³⁸ KPMG, *Public Private Partnerships: Emerging Global Trends and the implications for future Infrastructure Development in Australia*, Available at <https://assets.kpmg.com/content/dam/kpmg/pdf/2015/06/public-private-partnerships-june-2015.pdf> (last accessed on October 15, 2016)

⁵³⁹ Her Majesty's Treasury, *A new Approach to Public Private Partnerships*, December 2012, available at <http://ppp.worldbank.org/public-private-partnership/library/new-approach-public-private-partnerships> (last accessed on October 15, 2016).

⁵⁴⁰ Buisson Andrew, *From PF1 to PF2: The Reform of the Public Private Partnership Model in the UK*, Norton Rose Fulbright LLP, November 2013 at page 4 available at <http://www.nortonrosefulbright.com/files/pf1-to-pf2-reform-of-ppp-model-in-uk-november-2013-110954.pdf> (last accessed October 10, 2016).

⁵⁴¹ *Ibid.*

⁵⁴² Her Majesty's Treasury, *A New Approach to Public Private Partnerships* at page 30, available at <http://ppp.worldbank.org/public-private-partnership/library/new-approach-public-private-partnerships> (last accessed September 29, 2016)

⁵⁴³ Buisson Andrew, *From PF1 to PF2: The Reform of the Public Private Partnership Model in the UK*, Norton Rose Fulbright LLP, November 2013 at page 5 available at <http://www.nortonrosefulbright.com/files/pf1-to-pf2-reform-of-ppp-model-in-uk-november-2013-110954.pdf> (last accessed October 10, 2016).

government will receive through its equity stake, the government does require the private partner to disclose any equity sales returns.⁵⁴⁴

In order to ensure an effective role is played by the public sector as an equity investor in an SPV and to minimize the potential conflict of interest of the public sector acting as both an investor and a procurer, the equity investment in the UK is managed by a commercially focused central Unit at Her Majesty's Treasury.⁵⁴⁵ A Unit known as PF2 Equity Team was created under IUK under the PF2 reforms for purposes of managing the minority equity stake in the SPV on behalf of the procuring entity.⁵⁴⁶

Similarly, under the Kenyan PPP Act⁵⁴⁷ a successful bidder is required to set up a Project Company for purposes of undertaking a project. The Kenyan Government through a public body may at its discretion take up minority stake in the SPV.⁵⁴⁸ However, in contrast to the UK PPP arrangement, equity stake by the government or a contracting authority is not mandatory in Kenya. In light of the apparent advantages of having equity stake in the SPV by a contracting authority, it is recommended that an amendment to the Kenyan PPP Act should be undertaken to make it for mandatory for a contracting authority to take equity stake. In the alternative, the Kenyan government could issue a policy statement confirming mandatory equity stake in project SPVs without necessarily amending the PPP Act. In addition, a separate and independent

⁵⁴⁴ Ibid.

⁵⁴⁵ Her Majesty's Treasury, A New Approach to Public Private Partnerships at page 6, available at <http://ppp.worldbank.org/public-private-partnership/library/new-approach-public-private-partnerships> (last accessed October 22, 2016)

⁵⁴⁶ Organisation for Economic Co-operation and Development, *OECD Review of Public Governance of Public-Private Partnerships in the United Kingdom*, December 02, 2015 at page 28 available at <https://www.oecd.org/governance/procurement/toolbox/search/oecd-review-public-governance-ppp-uk.pdf> (Last accessed on October 19, 2016).

⁵⁴⁷ Section 59(1), Kenya PPP Act

⁵⁴⁸ Section 59(2), Kenya PPP Act.

department within the Treasury should be created with a sole mandate of taking equity stake in SPVs and managing the investment on behalf of the public.

Another reform area that was brought about by the PF2 Policy document was in respect to efficiency in the delivery of PPP projects through firm commitment on procurement timescale on the one hand and use of standard documentation to streamline procurement process on the other hand⁵⁴⁹. It is noted in the PF2 Policy that the average timeline for PPP procurement from project tender to financial close in the UK stood at 35 months.⁵⁵⁰ While noting that the procurement phase of a project is usually expensive, the PF2 Policy gave a commitment that all projects shall not be allowed to take more than 18 months in the procurement phase from tender notice to appointment of preferred bidder.⁵⁵¹ It is also recommended that the Kenyan National Treasury should issue a policy statement prescribing the time limit for the procurement phase covering the time between tender notice to appointment of a bidder within which a PPP project ought to be finalized.

Further, for purposes of eliminating inefficiencies and to streamline the procurement process in the United Kingdom, a comprehensive suite of standard documentations were published.⁵⁵² The standard documentation does reduce the length and cost of the procurement process including the time for negotiation as well as ensures greater consistency of approach in all sectors especially in respect to risk allocation.⁵⁵³ The current version (Version 4) of standard form contract in the UK

⁵⁴⁹ Her Majesty's Treasury, A New Approach to Public Private Partnerships at page 41-42, available at <http://ppp.worldbank.org/public-private-partnership/library/new-approach-public-private-partnerships> (last accessed October 22, 2016)

⁵⁵⁰ Ibid at page 38.

⁵⁵¹ Ibid at page 41.

⁵⁵² Ibid at page 42.

⁵⁵³ Ibid at page 42-43.

was issued in March 2007 and provides standard wording to be used by public sector bodies when drafting PPP contracts.⁵⁵⁴

The Kenyan PPP Unit has not developed standard documentation and it is therefore recommended that it moves with great speed to develop the set of standard documents including standard contracts, practice notes and guidance notes. This will ultimately reduce the time spent during negotiation and procurement.

4.2 South African PPP Experience

South Africa is the leading sub-Saharan African country in respect to PPPs and like many developing countries has resorted to using PPPs as a strategy to deal with its deeply rooted socio-economic, political, fiscal and societal problems⁵⁵⁵. Indeed, development of PPPs in Africa has become increasingly popular with South Africa being the leader in the continent⁵⁵⁶. South Africa started the use of PPPs especially in infrastructure development earlier than other countries in the region⁵⁵⁷.

South Africa created the first statutory basis for cooperation between the public and private sectors in 1999 through the enactment of the Public Finance Management Act⁵⁵⁸ supplemented

⁵⁵⁴ European PPP Expertise Centre, *United Kingdom - England: PPP Units and Related Institutional Framework*, June 2002, available at http://www.eib.org/attachments/epec/epec_uk_england_ppp_unit_and_related_institutional_framework_en.pdf (last accessed on 24th November 2017).

⁵⁵⁵ Fombad M.C, *Enhancing Accountability in Public-Private Partnerships in South Africa*, Southern African Business Review, Vol 18, No. 3, 2014 at page 66-67, available at http://www.unisa.ac.za/contents/faculties/service_dept/docs/Sabview_18_3_Chap%204.pdf (last accessed on October 10, 2016).

⁵⁵⁶ Maseko M, *Analysis of Critical Success Factors for Public-Private Partnerships in Infrastructure Development in South Africa*, 6th International Conference, Platinum-Metal for the Future, the South African Institute of Mining and Metallurgy, 2014 at page 132 available at <http://www.platinum.org.za/Pt2014/Papers/129-Maseko.pdf> (last accessed on October 17, 2016)

⁵⁵⁷ Sanni Olalekan Afeez & Hashim Maizon, *Building Infrastructure through Public Private Partnership in sub-Saharan Africa: Lessons from South Africa*, *Procedia-Social and Behavioural Sciences*, Vol 143 at page 137 available at <http://www.sciencedirect.com/science/article/pii/S187704281404302X> (last accessed on October 17, 2016)

⁵⁵⁸ South Africa, Act No. 1 of 1999 (as amended by Act No. 29 of 1999).

by the Local Government (Municipal Finance Management Act) in 2003⁵⁵⁹ together with subsequent regulations thereunder.⁵⁶⁰ In particular, PPPs were formally introduced in South Africa in 1997 through the enactment of the Water Services Act⁵⁶¹ which enabled private sector to provide water services.⁵⁶²

The principal legislation that governs PPPs both at the national and provincial levels in South Africa is the Treasury Regulation 16 which was issued under the Public Finance Management Act of 1999 and it broadly sets out the PPP process, requirements and approvals as well as institutional responsibilities of the entities involved.⁵⁶³ On the other hand, Municipal PPPs are governed by the Municipal Finance Management Act and the Municipal Systems Act together with Municipal Regulations that mirror the Treasury PPP regulations.⁵⁶⁴ In addition, the South African Government has issued a series of National Treasury PPP Practice Notes which constitute PPP manuals and standardized Practice Notes used to guide government departments and provinces in the project cycle.⁵⁶⁵

⁵⁵⁹ South Africa, Act No. 32 of 2000 (as amended by Act No. 44 of 2003).

⁵⁶⁰ GIZ, Cooperation with the Private Sector in South Africa: Country Report 2013, available at <https://www.giz.de/fachexpertise/downloads/giz2013-en-south-africa-country-report.pdf> (last accessed on October 17, 2016)

⁵⁶¹ South Africa, Act No. 108 of 1997.

⁵⁶² United States Agency for International Development, Building Public private Partnerships: South Africa P3 Final Report, December 2015, at page 11, available at <http://www.chemonics.com/OurWork/OurProjects/Documents/South%20Africa%20PPP.pdf> (last accessed on October 17, 2016)

⁵⁶³ Public-Private Partnerships, Reference Guide Version 2.0 at page 70 (<https://openknowledge.worldbank.org/bitstream/handle/10986/20118/903840PPP0Refe0Box385311B000PUBLIC0.pdf?sequence=1> accessed on 23rd July 2015)

⁵⁶⁴ Ibid.

⁵⁶⁵ Burger Philippe, *The Dedicated PPP Unit of the South African National Treasury*, at page 7, A paper presented at the Symposium on Agencies and Public-Private Partnerships, Collaboration of the Secretary-General of Budget and Expenditure, held in Madrid, Spain, 5-7 July 2006, available at <http://www.oecd.org/mena/governance/37147218.pdf> (last accessed on October 24, 2016).

South Africa does not have a specific PPP law and instead PPPs are regulated by the National Treasury Regulations 16 along with detailed 'Practice Notes' covering approval and procurement process as well as Standardized Provisions which relate to contract content.⁵⁶⁶

It has been observed that one of the shortcomings of the South African legal and policy framework in respect to PPPs is the distinction between municipalities and municipal entities on the one hand and national and provincial entities on the other.⁵⁶⁷ While it may be argued that the decision making and institutional processes differ in both levels of government, this may lead to the different pieces of legislation overlapping.⁵⁶⁸ Modern PPP legislation enhances consistency by adopting single Acts.⁵⁶⁹ Kenya has adopted a single Act to govern all PPP aspects both in the national government and in the Counties.

The South African PPP Unit was established in the year 2000 and is situated in the National Treasury.⁵⁷⁰

The South African National Treasury issues modules of the PPP Manual together with Standardized PPP provisions as Practice Notes in terms of Section 76(4)(g).⁵⁷¹ The instructions

⁵⁶⁶ The World Bank, *Benchmarking Public-Private Partnerships Procurement 2015: A Pilot in 10 Economies*, 2015 at page 11, available at https://colaboracion.dnp.gov.co/CDT/Participacin%20privada%20en%20proyectos%20de%20infraestructu/BenchmarkingPPPProcurement_June2015Final.pdf (last accessed on October 20, 2016).

⁵⁶⁷ Fombad Madeleine, *An Overview of Accountability Mechanisms in Public-Private Partnerships in South Africa*, *Ufahamu: A Journal of African Studies*, Vol 37(1) at page 11, available at <http://escholarship.org/uc/item/18j0h3ng.pdf> (last accessed on October 21, 2016).

⁵⁶⁸ *Ibid.*

⁵⁶⁹ *Ibid.*

⁵⁷⁰ Burger Philippe, *The Dedicated PPP Unit of the South African National Treasury*, at page 6, A paper presented at the Symposium on Agencies and Public-Private Partnerships, Collaboration of the Secretary-General of Budget and Expenditure, held in Madrid, Spain, 5-7 July 2006, available at <http://www.oecd.org/mena/governance/37147218.pdf> (last accessed on October 24, 2016)

⁵⁷¹ South African, Public Finance Management Act of 1999.

contained in the PPP Manual form the basis of detailed best practice guidance and are revised from time to time.⁵⁷²

It is worth noting that the Kenyan PPP Unit has not issued any standardized documentations for use in the PPP procurement and contracting and it is therefore recommended that this should be done with a sense of priority.

One of the distinguishable aspects of PPPs in South Africa is the incorporation of Black Economic Empowerment as a weighting factor in the evaluation of bids.⁵⁷³ Indeed, black empowerment is a key component of PPP procurement and constitutes 10% (with price and technical elements constituting the remaining 90%) of the bid evaluation weighting as recommended by the *Code of Good Practice for Black Economic Empowerment in PPPs*.⁵⁷⁴

Some of the policy objectives of black empowerment in South African PPPs include the following:⁵⁷⁵

- i) Direct ownership of equity interest in the private party to a PPP agreement by black people;
- ii) To create jobs;
- iii) Participation in the management control in the private party to a PPP agreement by black people; and

⁵⁷² South Africa National Treasury PPP Manual: Module 1: South African Regulations for PPPs at page 1, available at <http://www.ppp.gov.za/Legal%20Aspects/PPP%20Manual/Module%2001.pdf> (last accessed on October 15, 2016).

⁵⁷³ Mfunwa Mzwanele, Tylor Anthony & Kreiter Zebulun, *Public-Private Partnerships for Social and Economic Transformation in Southern Africa: Progress and Emerging Issues*, at page 21, A Paper delivered in the Regional Conference on Building Democratic Developmental States for Economic Transformation in Southern Africa, 20-22 July 2015, Pretoria South Africa, available at <http://www.developmentalstatesconference.com/wp-content/uploads/2015/07/28-Zebulun-Kreiter.pdf> (last accessed on October 21, 2016)

⁵⁷⁴ South Africa National Treasury, Code of Good Practice for Black Economic Empowerment in PPPs, issued as National Treasury Practice Note No. 3 of 2004 at page 6, available at <http://www.ppp.gov.za/Legal%20Aspects/BEE%20Code%20of%20Good%20Practice/BEE%20CODE%20OF%20GOOD%20PRACTICE.pdf> (last accessed on October 15, 2016).

⁵⁷⁵ Ibid, at page 7,

iv) Substantive portion of the private party's sub-contracting and procurement is to black people.

A similar attempt to black empowerment in Kenya has been done in respect to conventional procurement under Public Procurement and Disposal Act through the Preference and Reservation Policy which was implemented through the Public Procurement and Disposal (Preference and Reservation) Regulations.⁵⁷⁶ These Regulations allow certain target groups to benefit from public procurement including small and medium size enterprises, local contractors as well as disadvantaged groups such as women, youth and people with disabilities. Indeed, Regulation 31(1)⁵⁷⁷ provides that a procuring entity shall reserve at least 30% of its procurement spend to small and medium size enterprises owned by the youth, women and persons with disability. These Kenyan Regulations are only applicable in respect to procurement under the conventional procurement and not under PPP. There is therefore need to extend similar regulations for preferential procurement to PPP arrangements in Kenya. It is worth noting that the Kenyan Constitution does require a legal framework that provides for categories of preference in allocation of contracts⁵⁷⁸ and protection of persons or groups previously disadvantaged by unfair competition or discrimination.⁵⁷⁹ While these constitutional provisions have been effected by the enactment of the Public Procurement and Disposal Act,⁵⁸⁰ there is need to extend develop similar provisions to for PPP procurement.

⁵⁷⁶ Kenyan, Public Procurement and Disposal (Preference and Reservation) (Amendment) Regulations 2013, Legal Notice No. 114 of 2013, available at <http://kenyalaw.org/kl/index.php?id=3396> (last accessed on October 20, 2016).

⁵⁷⁷ Regulation 31 (1), Kenyan Public Procurement and Disposal (Preference and Reservation) (Amendment) Regulations 2013, Legal Notice No. 114 of 2013, available at <http://kenyalaw.org/kl/index.php?id=3396> (last accessed on October 20, 2016).

⁵⁷⁸ Article 227(2)(a), Kenyan Constitution.

⁵⁷⁹ Article 227(2)(b), Kenyan Constitution Kenyan Constitution.

⁵⁸⁰ Kenyan Act No. 33 of 2015.

In regards to contingent liabilities arising from PPPs, South Africa in 2006 reviewed its management of PPPs contingent liabilities by relocating its management from the PPP Unit to the Treasury.⁵⁸¹ Part of the thinking was behind the change was that the PPP Unit was not in a position by itself to judge whether large liabilities associated with PPPs were acceptable to the government and that that judgment required the involvement of the Treasury which will take a broader view of government's financial position.⁵⁸² A committee known as Fiscal Liability Committee was therefore set up at the Treasury.⁵⁸³ Although the PPP Unit remains the key advisor on PPPs, the control function was given to the Fiscal Liability Committee within the Treasury.⁵⁸⁴ It is noted that there are a number of benefits for centralizing contingent liability management within the public debt management office (DMO) which include the fact that there is often expertise available within the DMO for management of contingent liabilities.⁵⁸⁵

The Kenyan context is different given the fact that the Fund in respect to contingent liabilities are managed by the PPP Committee in collaboration with the Director of the PPP Unit as per the Regulations established by the Cabinet Secretary.⁵⁸⁶

This paper is of the view that given that the Debt Management Office has been given extensive mandate under the PPP Act to approve the PPP projects, it would be best suited to manage the PPP Fund in respect to contingent liabilities component. Indeed, the Debt Management Office is

⁵⁸¹ Irwin Timothy & Mokdad Tanya, *Managing Contingent Liabilities in Public-Private Partnerships: Practice in Australia, Chile & South Africa*, the World Bank (2010) at page 29, available at <https://ppiaf.org/documents/1919/download> (last accessed on 24th November 2017).

⁵⁸² Ibid at page 29.

⁵⁸³ Ibid at page 30.

⁵⁸⁴ Ibid.

⁵⁸⁵ Cebotari Aliona, *Contingent Liabilities: Issues and Practice*, International Monetary Fund (Working Paper) (2008), at (Cebotari, 2008) (Irwin & Mokdad, 2010) page 45, available at https://books.google.co.ke/books?id=yz6aH98tAdMC&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false (last accessed on 24th November 2017).

⁵⁸⁶ See Regulation 4, 8, 17, 19 and 21(5) of Public Private Partnership (Project Facilitation Fund) Regulations, 2017.

required under the PPP Act to approve the feasibility Report,⁵⁸⁷ review the project report submitted by the negotiation committee of a tender,⁵⁸⁸ as well as advise the Cabinet Secretary on issuance of guarantees, undertakings or binding letters of comfort in respect to PPP Projects.⁵⁸⁹ It is therefore recommended in line with the practice in South Africa, that the Cabinet Secretary should cause amendments to the Project Facilitation Fund Regulations so as to carve out the management of the Contingent Liability Reserve Fund Account into a department at the Ministry of Finance or the Debt Management Office.

4.3 Conclusion

This chapter has comprehensively reviewed the regulatory and institutional framework of PPPs in the UK and South Africa and mirrored it with the Kenyan PPP arrangement.

In respect to the UK experience, this chapter has reviewed the reforms in PPP implementation that were brought about by the PF2 Policy document which was issued by Her Majesty Treasury. Similarly, a comprehensive review of the PPP environment in South Africa was reviewed through an analysis of the provisions of Regulation 16 under the South African Public Finance Management Act and various Regulations issued by the National Treasury in South Africa. In so doing the chapter has clearly discussed the key learning areas which could be borrowed for purposes of law reform and improvement of PPP implementation in Kenya.

⁵⁸⁷ Section 35(2), PPP Act.

⁵⁸⁸ Section 53(4), PPP Act.

⁵⁸⁹ Section 27, PPP Act.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.0 Introduction

This is the last chapter of this study and is divided into two parts. The first part of this chapter contains the conclusion of the entire study while the second chapter sets out the recommendations derived from the findings of this study which would be useful to various stakeholders including the institutions charged with implementation of PPP arrangements such as the PPP Unit, the PPP Committee, Contracting Authorities or the Petition Committee.

The focus of the study in the foregoing chapters is the review of the existing legal, policy and institutional framework on PPP with a view of identifying the gaps based on best practice from other jurisdictions such as the UK and South Africa.

The recommendations herein shall identify clearly areas of reform that need to be addressed so as to bolster the confidence of all stakeholders in the PPP sector which in turn leads to more investments in PPPs by the private sector. The recommendations are aimed at striking an optimal balance amongst the various stakeholders arising from proper regulations.

5.1 Conclusion to the Study

This study has done a comprehensive review of the PPP environment in Kenya by analysing the relevant PPP policy, PPP regulatory provisions as well as the institutional framework. The paper has also undertaken a comparative analysis of PPPs in the UK and South Africa and brought out great insights into how the PPP environment can be greatly improved in Kenya.

The purpose of this final chapter is to discuss suitable recommendations for the improvement of the PPP environment in Kenya through better legislative reforms, institutional restructuring and review of the policy prescriptions.

5.2 Recommendations

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

5.2.1 Law Reforms

- a) In order to address the question of corruption and other malpractices during the procurement process, it is recommended that the Cabinet Secretary for the National Treasury or the Attorney General should initiate appropriate amendments on the PPP Act so as to give effect to Article 227 of the Constitution. The amendments shall deal with among others; sanctioning of contractors who do not perform according to professionally regulated procedures, contractual agreements or legislation on the one hand and sanctioning persons who default on tax obligations or persons guilty of corrupt practices or serious violation of labour practices.
- b) In regards to public participation, it is recommended that the Cabinet Secretary for the National Treasury do initiate legislation to ensure participation of citizens in the design, award and implementation of PPP initiatives. One of the areas where public participation is core is in respect to concession for natural resource exploitation. As such, this study proposes that clear and mandatory public participation in the procurement process should be inbuilt into the PPP Act or the Natural Resources (Classes of Transactions Subject to Ratification) Act, 2016 given that land is an emotive subject in Kenya. Further, this study does recommend that the Cabinet Secretary for the National Treasury puts in place Regulations

under the PPP Act to provide for local content in procurement of PPP projects as well as in the exploitation of natural resources especially where a foreign investor is involved.

- c) While noting that the competitive dialogue procedure of procurement is generally novel and complex, there is need to put in place clear criteria and conditions which must be satisfied for use of this procedure. It is therefore the recommendation of this study that the Cabinet Secretary should initiate the development of rules through either a policy statement or subsidiary regulations to provide for clear criteria and conditions similar to those under the EU Community law and the UK law for the proper implementation of the competitive dialogue procure. Clear rules spelling out the criteria and conditions for use of competitive dialogue will remove any form of uncertainty in the use of this procedure. Uncertainty in the rules may lead to avenues for corruption, unnecessary delay of projects and possibility of multiple litigations against PPP projects as well as discourage both local and international private investors. It is proposed that the Cabinet Secretary should adopt rules similar to those in the UK which provide that competitive dialogue should not be used as a default procedure, any decision to use this procedure should include a justification document which states the rationale for choosing the procedure to the exclusion of others.
- d) It is proposed that statutory amendment be put in place to allow for preferential procurement to PPP arrangements in Kenya. The Kenyan Constitution does require obligates parliament to develop a legal framework that provides for categories of preference in allocation of contracts and protection of persons or groups previously disadvantaged by unfair competition or discrimination. This study recommends that the Cabinet Secretary for the National Treasury do initiate amendments to the PPP Act to allow for preferential procurement similar to the Black Economic Empowerment in South Africa should be extended to PPP

procurement. Alternatively, the Cabinet Secretary may issue Regulations under the PPP Act providing for such preferential procurement under PPP arrangements for certain vulnerable groups.

- e) It is recommended that the Cabinet Secretary should amend Regulation 2(2) of the PPP Regulations so as to provide that the low value projects which are below the threshold set out thereunder shall not be subject to both the PPP Act as well as the PPP Regulations. The current PPP Regulations only exempts the low value projects from the PPP Regulations only.
- f) It is also recommended that the Cabinet Secretary should in a bid for greater certainty of the PPP law and smooth implementation of PPP projects introduce an amendment to the PPP Regulations so as to provide that the low value projects which have been exempted from the PPP Act and the PPP Regulations shall be subject to the Public Procurement and Asset Disposal Act, 2015 as the default applicable law for public procurements.

5.2.2 Policy Reforms

- a) Policy reforms commitments in respect to timescale for PPP delivery should be put in place. The government should spell out its commitment to ensure that the time period for PPP projects between tender notice to financial close is reduced so as to minimize the transaction costs by private investors. The UK has committed to at least 18 months period and it is recommended that Cabinet Secretary should issue policy direction for a similar timeline of 18 months from the time of tender notice to financial close.
- b) This study recommends that the PPP Unit or the PPP Committee as the case may be should move with sufficient speed to develop and publish comprehensive standard documentations and manuals for PPP projects. The standard documentations are expected to streamline the

procurement process. The standard documentations include standard contract provisions, practice notes, guidance notes or PPP toolkits or manuals.

- c) It is recommended that the Government should develop an independent policy on investment incentives in PPP or in the alternative incentives in PPPs could be included in a general National Investment Policy⁵⁹⁰ which is currently being developed by the Government. Documentations of incentives will guide and attract both Foreign and Domestic Direct Investment. An Investment Policy will reduce uncertainty on government support as well as incentives. It is expected that the Investment Policy will define the limits of any discretionary powers.

5.2.3 Institutional Reforms

- a) It is noted that the PPP Act does not grant the Petition Committee powers to issue conservatory orders pending the determination of any complaint or petition before it. Any attempt through subsidiary legislation to clothe the Petition Committee with jurisdiction to grant conservatory orders without such power being donated by the substantive legislation is ultra vires. In light of this shortcoming of the Petition Committee, this study recommends that the Cabinet Secretary for the National Treasury or the Attorney General do initiate appropriate amendment to the PPP Act so as to expressly grant powers to the Petition Committee analogous to those vested in the Review Board so as to enable the Petition Committee to issue conservatory orders or to suspend tendering processes pending the determination of any complaint or petition before it to avoid a situation where the determinations of the Petition Committee are considered illusory.

⁵⁹⁰ Republic of Kenya. Ministry of Industrialization Website, <http://www.industrialization.go.ke/index.php/media-center/blog/247-kenya-to-have-national-investment-policy-by-2016> (last accessed on 27th July 2015)

- b) This study is of the view that given that the Debt Management Office has been given extensive mandate under the PPP Act to approve the PPP projects, it would be best suited to manage the PPP Fund in respect to contingent liabilities component. Indeed, the Debt Management Office is required under the PPP Act to approve the feasibility Report,⁵⁹¹ review the project report submitted by the negotiation committee of a tender,⁵⁹² as well as advise the Cabinet Secretary on issuance of guarantees, undertakings or binding letters of comfort in respect to PPP Projects.⁵⁹³ It is therefore recommended in line with the practice in South Africa, that the Cabinet Secretary should cause amendments to the Project Facilitation Fund Regulations so as to carve out the management of the Contingent Liability Reserve Fund Account into a department at the Ministry of Finance or the Debt Management Office.
- c) This paper recommends that the Cabinet Secretary for the National Treasury develop and publish regulations establishing a dedicated commercially focused central institution within the National Treasury to manage the equity investment arising through co-ownership in the project SPVs on behalf of the various procuring entities in the national government similar to the UK's PF2 Equity Team which administers the UK Government's minority stake in PPP SPV.

⁵⁹¹ Section 35(2), PPP Act.

⁵⁹² Section 53(4), PPP Act.

⁵⁹³ Section 27, PPP Act.

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