



**REFORMING PUBLIC FINANCE MANAGEMENT IN KENYA:
IMPLEMENTATIONAL CHALLENGES ON THE PRINCIPLE OF OPENNESS AND
ACCOUNTABILITY IN PUBLIC FINANCE MANAGEMENT**

By

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DECLARATION

This Research Project is my original work and has not been presented for a degree in any other University. No part of this thesis may be produced without the prior permission of the author and/or the University of Nairobi. All sources of information cited herein have been duly acknowledged.

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DEDICATION

This is dedicated to my mother, Rachael Carol Atamba, for her constant encouragement and unwavering support.

ACKNOWLEDGMENT

I am thankful to God for the strength, the courage and the focus to collect the material for the compilation of this work.

To my supervisor Dr. Seth Wekesa, many thanks for the positive criticism, insights and effortlessly making time to guide me, with patience and grace. I will remain grateful.

TABLE OF STATUTES, REGULATIONS CODES AND POLICIES

In The Republic of Kenya

The Constitution of Kenya, 2010

The Anti-Corruption and Economic Crimes Act, 2003

The ICPAK Code of Ethics and Professional Accountants

The Leadership and Integrity Act, 2012

The Public Audit Act, 2015

The Public Finance Management Act, 2012

The Public Officers Ethics Act, 200

The Public Procurement and Asset Disposal Act, 2015

The Salaries and Remuneration Commission Act, 2011

In the Republic of South Africa

The Constitution of the Republic of South Africa, 1996

The Public Audit Act, 2004

The Public Finance Management Act, 1999

The Preferential Procurement Policy Framework Act, 2000

Promotion of Access to Information Act, 2000

The Prevention and Combating of Corrupt Activities Act, 2004

TABLE OF INTERNATIONAL INSTRUMENTS

African Union Convention on Preventing and Combating Corruption, (adopted 11th July 2003, entered into force on 6th August 2006)

OECD Best Practices for Budget Transparency, (produced in 2001)

International Monetary Fund Code of Good Practices on Fiscal Transparency (adopted on 16th April 1998)

Mexico Declaration on SAI Independence (adopted in 2007)

TABLE OF CASE LAW

Benson Riitho Mureithi vs. J.W Wakhungu and 2 others [2014] eKLR

Council of Governors & 3 others v Senate and 53 others [2015] eKLR

David Kinusu Sifuna v Ethics and Anti-Corruption Commission & 3 others [2017] eKLR

Ferdinand Ndung'u Waititu v Benson Riitho Mureithi (suing on his behalf and on behalf of the general public) & 2 others [2018] eKLR

Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others [2017] eKLR

In the matter between the President of the Republic of South Africa and the Office of the Public Protector and 7 others [91139/2016] [2017] ZAGPPHC 747

In Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly and others Case number [2011]

In Economic Freedom Fighters and Others v Speaker of the National Assembly and Another [2017] ZACC 47

In the Matter of the National Land Commission [2015] eKLR

Michael Kojo Otieno & another v County Government of Homa Bay & 9 others [2018] eKLR

Moses Kasaine Lenolkulal v Director of Public Prosecutions [2019] eKLR

R. Ravichandran v The Additional Commissioner of Police [W.P.No.12590 of 2009]

S v Makwanyane (CCT3/94) [1995] ZACC 3

Trusted Society of Human Rights Alliance v The Attorney General and Others Nairobi [2012] eKLR

ACRONYMS

ACEC	Anti-Corruption and Economic Crimes Act, No. 3 of 2003
AGSA	Auditor General of South Africa
AUCPCC	African Union Convention on Preventing and combating Corruption
B-BBEEA	Broad-Based Black Economic Empowerment Act, 2003
CAJ	Commission on Administrative Justice
CBK	Central Bank of Kenya
COFOG	Classification of the Functions of Government
CRA	Commission on Revenue Allocation
FFC	Financial and Fiscal Commission
GFS	Government Finance Statistics
ICPAK	Institute of Certified Public Accountants of Kenya
IFMIS	Integrated Financial Management System
IIAG	Ibrahim Index of African Governance
IPSAS-Cash Basis	International Public Sector Accounting Standards
KI	Katiba Institute
MDAs	Ministries, Departments and Agencies
MDGs	Millennium Development Goals
NPA	National Prosecuting Authority
ODPP	Office of the Director of Public Prosecution
OECD	Organisation for Economic Co-operation and Development
PBB	Program-Based Budgeting
PEFA	Public Expenditure and Financial Accountability
PEMPAL	Public Expenditure Management-Peer Assisted Learning
PFM	Public Finance Management
PFMA	Public Finance Management Act, No. 8 of 2012
PPARB	Public Procurement Administrative Review Board
PPPFA	Preferential Procurement Policy Framework Act No. 5 of 2000

SAIs	Supreme Audit Institution
SARB	South African Reserve Bank
SARS	South Africa Reserve Service
SOEs	State Owned Enterprises
SOTU	State of the Union Coalition
SRC	Salaries and Remuneration Commission
TI	Transparency International
TSA	Treasury Single Unit

ABSTRACT

Research done by the World Bank reveals that a majority of African countries have weak PFM systems. As a result, the abuse of the principle of openness and accountability in relation to public resources is rife. The PFM system in Kenya, being no exception to the findings by the World Bank, has witnessed a number of challenges which result in the limited adherence to the principle of openness and accountability. This is despite the codification of the principle in the supreme law of the land, the Constitution of Kenya.

This study identifies the challenges that hinder the effective implementation of the principle of openness and accountability in the PFM system. Despite the existence of a Constitution which is considered progressive, openness and accountability continues to be sacrificed at the altar of selfish interests and disregard of the laws as codified.

This Research Project critically analyses the effectiveness of the legislation governing PFM in Kenya in relation to holding sacrosanct and promoting the principle of openness and accountability. An in-depth discussion of the challenges facing the implementation of openness and accountability ensues in the study, with useful lessons to the challenges being sought from an analysis of the South African perspective.

Overall, this study argues that whereas there may be some weaknesses in the law governing PFM in Kenya, the same are not weak to the extent that they cannot yield the desired outcome. In fact, this study argues that the problem of implementation of openness and accountability is not the law but rather, the people of Kenya, both in the government and the citizenry in general. This is established by conducting a multidisciplinary study, rather than limiting the same to the law.

It concludes that there is need to approach the challenges by changing the narrative altogether and embedding within the country, a culture where people hold dearly, leadership and integrity.

Table of Contents

DECLARATION	ii
DEDICATION	iii
ACKNOWLEDGMENT.....	iv
TABLE OF STATUTES, REGULATIONS CODES AND POLICIES.....	v
TABLE OF INTERNATIONAL INSTRUMENTS	vi
ACRONYMS	viii
ABSTRACT.....	x
CHAPTER ONE.....	1
1. INTRODUCTION AND BACKGROUND OF THE STUDY	1
1.1. BACKGROUND TO THE STUDY.....	2
1.2. STATEMENT OF THE PROBLEM.....	3
1.3. STATEMENT OF OBJECTIVES	4
1.4. RESEARCH QUESTIONS	4
1.5. HYPOTHESES.....	5
1.6. JUSTIFICATION OF THE STUDY	5
1.7. THEORETICAL FRAMEWORK.....	5
1.7.1. Critical Legal Theory.....	6
1.7.2. Legal Realism	6
1.7.3. Systems Theory	7
1.8. LITERATURE REVIEW	8
1.9. RESEARCH METHODOLOGY	15
1.10. SCOPE AND LIMITATIONS OF THE STUDY	16
1.11. CHAPTER BREAKDOWN.....	16
1.11.1. Chapter One: Introduction to the Study.....	16
1.11.2. Chapter Two: Legislative and Institutional Framework.....	16
1.11.3. Chapter Three: Challenges facing the proper implementation of the principle of openness and accountability in Public Finance Management in Kenya	17
1.11.4. Chapter Four: Lessons from South Africa.....	17
1.11.5. Chapter Five: Conclusion and Recommendations.....	17
CHAPTER TWO: LEGISLATIVE AND INSTITUTIONAL FRAMEWORK GOVERNING PUBLIC FINANCE MANAGEMENT IN KENYA	18

2.1.	Introduction	18
2.2.	History of Public Finance Management in Kenya	18
2.3.	The Legislative and Legal Framework	20
2.3.1.	African Union Convention on Preventing and Combating Corruption	21
2.3.2.	The Constitution of Kenya	21
2.3.2.1.	The Commission on Revenue Allocation	23
2.3.2.2.	The National Treasury	24
2.3.2.3.	The Controller of Budget.....	25
2.3.2.4.	The Auditor General	26
2.3.2.5.	The Salaries and Remuneration Commission.....	27
2.3.2.6.	The Central Bank of Kenya	27
2.3.3.	Public Finance Management Act, 2012	28
2.3.3.1.	The Public Finance Management (National Government) Regulations, 2015.....	32
2.3.3.2.	The Public Finance Management (Senate Monitoring and Evaluation) Regulations, 2018.....	33
2.3.4.	The Public Procurement and Asset Disposal Act No.33 of 2015.....	33
2.3.5.	The Public Audit Act No. 34 of 2015;.....	35
2.3.6.	The Commission on Revenue Allocation Act No. 16 of 2011;.....	36
2.3.7.	The Salaries and Remuneration Commission Act No. 10 of 2011.....	37
2.3.8.	The Central Bank Act CAP 491	37
2.4.	CURRENT DEVELOPMENTS IN THE LEGAL AND LEGISLATIVE FRAMEWORK IN THE PFM IN KENYA	39
2.5.	CONCLUSION	39
CHAPTER THREE: CHALLENGES FACING THE PROPER IMPLEMENTATION OF PUBLIC FINANCE MANAGEMENT IN KENYA		41
3.1.	INTRODUCTION	41
	This study has addressed the following challenges:.....	42
3.1.1.	Disregard of the Rule of Law	42
3.1.2.	Weaknesses in key institutions	49
3.1.2.2.	The Ethics and Anti-Corruption Commission	52
3.1.3.3.	The Judiciary	54
3.1.3.	Cultural mindset	58

3.1.4.	Political patronage and elite capture.....	60
3.1.5.	Limited oversight participation by Civil Society Organizations	62
3.1.6.	Technological challenges	64
3.2.	Conclusion	65
CHAPTER FOUR: LESSONS FROM THE REPUBLIC OF SOUTH AFRICA.....		67
4.1.	Introduction	67
4.2.	The Legislative and Institutional Framework governing Public Finance Management in the Republic of South Africa	68
4.3.	Institutional Framework	76
4.5.	The role of the Courts in PFM in South Africa in relation to the principle of openness and accountability	78
4.6.	The role of the CSOs in fostering openness and accountability in PFM in South Africa	81
4.7.	Creation of Independent Commissions of Inquiry	82
4.8.	Summary of Findings and Lessons from the South African context.....	84
4.9.	Conclusion	85
CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS		86
5.1.	Introduction	86
5.2.	Summary of findings	87
5.3.	Recommendations	88
5.3.1.	To the National Treasury	88
5.3.2.	To the Parliament.....	88
5.3.3.	To the Government.....	89
5.3.4.	To the SRC and the CRA	89
5.3.5.	To the EACC and the ODPP	89
5.3.6.	The Political class.....	90
5.3.7.	To the Judiciary	90
5.3.8.	To the CSOs.....	90
5.3.9.	To the Public.....	91
5.3.10.	All Government Institutions	91

CHAPTER ONE

1. INTRODUCTION AND BACKGROUND OF THE STUDY

Public Finance Management (PFM) is at the core of a country's development, or lack thereof. As identified by the Commonwealth Secretariat, the realization of the Millennium Development Goals is possible only if openness and accountability measures are implemented in the management of public finances.¹ The management of public finances requires special attention as securing long term economic success, maximization of the efficient use of limited public resources and generating better services for the citizens of a country are all dependent on the amount of seriousness given to the issue.² Interestingly, PFM brings to the fore the discussion of the democracy of a country. In 2002, a report by Commonwealth Group of experts, in highlighting how democracy and development can be promoted in Commonwealth Countries, emphasized that promotion of pro-poor development and democracy relies heavily on the process of government revenue and expenditure.³

The relationship between democracy and the resources of a nation cannot be overemphasized, thus mandating parliament to ensure that the public accounts systems are transparent and straightforward, reflecting from where money is coming and to where it is going.⁴ The Parliament of a state which considers itself democratic is tasked with the monitoring of a country's financial affairs. In this regard, the citizenry of a democratic country is ordinarily expected to trust that the legislative arm is at the forefront in guaranteeing fiscal responsibility by the government.

PFM in Kenya is reinforced under the Constitution of Kenya enacted in 2010. Five officers and Institutions have been tasked with ensuring that PFM is achieved: the Controller of Budget⁵, the Office of the Auditor General⁶ (OAG) as the Supreme Audit Institution (SAI), the Salaries and Remuneration Commission (SRC) and the Central Bank of Kenya (CBK).

¹ Commonwealth Secretariat, 'Guidelines for Public Financial Management Reform' Page v, <http://siteresources.worldbank.org/EXTFINANCIALMGMT/Resources/313217-1196229169083/4441154-1196275288288/4444688-1196275323246/GuidelinesforPFMReform.pdf> accessed on 4th March 2019

² Commonwealth Secretariat, (n 1)

³ The Commonwealth Secretariat, 'Making Democracy Work for Pro-Poor Development' (2003) <http://www.romankrznic.com/wp-content/uploads/2011/12/Making%20Democracy%20Work%20For%20Pro-Poor%20Development%20October%202003.pdf> accessed on 4th March 2019

⁴ The Commonwealth Secretariat, (n 3)

⁵ The Constitution of Kenya, Art 229

⁶ The Constitution of Kenya, Art 228

The Republic of South Africa⁷ continues to maintain a good record on its efforts towards alleviation of corruption in its government, as shall be evidenced by the reports prepared by Transparency International and the Ibrahim Index of African Governance (IIAG). The Research analyses the implementation of openness and accountability in the PFM in South Africa and makes recommendations that will improve and enrich PFM in Kenya in relation to transparency and accountability.

1.1. BACKGROUND TO THE STUDY

Public Finance Management refers to the set of laws, rules, systems and processes used by sovereign nations (and sub-national governments), to mobilize revenue, allocate public funds, undertake public spending, account for funds and audit results.⁸ PFM is concerned with the effective management of the collection and expenditure of funds by the government.⁹ In PFM, money and debt, through taxation and debt issuance, are the key financial instruments utilized by a government in order that it acquires control over resources and use the resources to produce services within its country.¹⁰ In summary, while Public Finance is concerned with the income and expenditure of public authorities,¹¹ PFM can be defined to mean the management of the income and expenditure of public authorities.

Proper PFM is key in the development process of a country as it is directly linked to firstly, the appropriate use and effectiveness of donor assistance, secondly, the achievement of the MDGs and thirdly, the alleviation of poverty in a country.¹² Among the various functions of the World Bank Group is to work with governments so as to enhance the management of public resources in pursuit of growth, development and poverty reduction.¹³ To this end therefore, the benefits of having a well-functioning PFM system cannot be belabored.

The Republic of Kenya has experienced a radical shift in matters relating to management of public finances through the systems that were introduced with the promulgation of the

⁷ South Africa is considered a middle aged country and further, continues to perform well in the ranking of how effective it is in fighting corruption. The fact that Kenya has borrowed heavily, the text of some of the laws on PFM from South Africa, makes it suitable for analysis and borrowing lessons from.

⁸ Transparency International Rwanda, 'Analysis of the Causes of financial weaknesses identified in the Auditor General's Report of Decentralized entities for the Financial Year ending 30th June 2014' <https://tirwanda.org/IMG/pdf/agr20132014-2.pdf> accessed on 4th November 2018

⁹ Commonwealth Secretariat, (n 1)

¹⁰ Kenneth T. Palmer and David F. Wihry, 'The Environment of Public Financial Management: An Economic Perspective', (Fall 1982), Vol 6, pp 282-294, <<https://www.jstor.org/stable/40860139>>, accessed on 9th January 2019

¹¹ Hugh Dalton, *Principles of Public Finance*, (11th edition, Routledge 1941)

¹² The World Bank, *Strengthened Approach to Public Finance Management Reform*, <https://www.worldbank.org/publicsector/pe/StrengthenedApproach/> accessed 9th January 2019

¹³ The World Bank, *Public Finance*, (5 January, 2015) <<https://www.worldbank.org/en/topic/governance/brief/public-finance>> accessed 9th January 2019

Constitution. This culminated with the Constitution stipulating the five principles that should guide public finance namely:

- i. openness and accountability including public participation in financial matters;¹⁴
- ii. the promotion of an equitable society,¹⁵ including the equitable sharing of revenue raised among national and county governments;¹⁶
- iii. the equitable sharing of the burden and benefits of the use of resources and public borrowing between present and future generations;¹⁷
- iv. the use of public money in a prudent and responsible way;¹⁸ and
- v. responsible financial management and the clarity in fiscal reporting.¹⁹

A proper PFM system will take into account the principles of public finance during the management of financial resources by the government, which will result in the improvement of a country's economy. Placing emphasis on the importance of proper PFM, Dalton²⁰ observed that the economic welfare of a community requires improvement in production and the distribution of what is produced.

Accountability is defined as putting in places measures to ensure that a person or organization with the authority to provide a service, delivers on the mandate and demonstrates such delivery.²¹ Accountability can be broken down into six categories: fiscal accountability, administrative or managerial accountability, political accountability, social accountability, horizontal and vertical accountability.²² This study will focus mainly on fiscal accountability, but will make reference to the other categories as listed above.

1.2. STATEMENT OF THE PROBLEM

Despite the fact that the Republic of Kenya boasts a progressive Constitution in matters concerning Public Finance Management, loss and mismanagement of public finances continues to bedevil the country. This begs the question whether and to what extent, the principle of

¹⁴ The Constitution of Kenya, Article 201 (a)

¹⁵ The Constitution of Kenya, Article 201 (b)

¹⁶ The Constitution of Kenya, Article 201 (b) (ii)

¹⁷ The Constitution of Kenya, Article 201 (c)

¹⁸ The Constitution of Kenya, Article 201 (d)

¹⁹ The Constitution of Kenya, Article 201 (e)

²⁰ Dalton (No. 10)

²¹ Independent observer of the Global Fund, 'Mapping Accountability Mechanisms: A Review of In-Country Accountability in Health Systems' (2015)

²² Independent observer of the Global Fund, (n 21)

openness and accountability is being implemented in any way or at all. This is despite its express codification in the Constitution.

Based on the disparity between what is contained in the statutes and the law in practice, there is need to critically look into the disconnect and a way forward. As earlier posited, PFM is key in ensuring that Kenya attains its developmental goals.

This study critically, in Chapter Three, investigates the main factors affecting the implementation of the principle of openness and accountability in PFM in Kenya.

1.3. STATEMENT OF OBJECTIVES

This study is guided by the following four objectives:

- i. To investigate the challenges facing the implementation of the principle of openness and accountability in PFM in Kenya;
- ii. To examine the extent at which the existing legislative and institutional framework on public finance management in Kenya entrenches the principle of openness and accountability in public finance management in Kenya;
- iii. To evaluate the existing legislative and institutional framework on public finance management in Kenya and their adequacies in achieving their mandate in relation to the implementation of openness and accountability in the PFM processes; and
- iv. To draw lessons from the implementation of openness and accountability in the PFM systems in South Africa.

1.4. RESEARCH QUESTIONS

- i. What challenges does the principle of openness and accountability face in Public Finance Management in Kenya?
- ii. How has the principle of openness and accountability been captured in the legislative and institutional framework for public finance in Kenya?
- iii. How effective is the legislative and institutional framework for public finance management in Kenya in implementing openness and accountability?
- iv. What mechanisms and systems can be borrowed from the implementation of the principle of openness and accountability in PFM in South Africa?

1.5. HYPOTHESES

1. Despite the fact that the Constitution has elaborate principles to govern Public Finance Management in Kenya, there is perceived mismanagement of public resources due to limited implementation of the principle of openness and accountability.
2. Despite the fact that the Constitution has elaborate principles to govern Public Finance Management in Kenya, nevertheless there is nevertheless perceived mismanagement of public resources due to disregard of the tenets of leadership and integrity.

1.6. JUSTIFICATION OF THE STUDY

Kenya is currently experiencing challenges on the management of public finances. This challenge is reflecting on how the country is being categorized by bodies including, without limitation, Transparency International. This study is instrumental in formulating a way forward on ensuring effective implementation of openness and accountability in PFM in Kenya.

The research carried out in this study is beneficial to the following four stakeholders:

- i. The Government and policy makers to provide them with an insight on how to spur economic growth, enhance good governance through transparency and accountability, and empower the present systems in public finance management so that results are yielded for the public good;
- ii. Academic scholars and researchers will interrogate the findings of the research and not only develop further themes to the research, but also borrow the findings for their research;
- iii. Both prospective and current investors seeking to invest in the Republic of Kenya; and
- iv. The public will, through the research, be properly educated on the principle of openness and accountability in public finance management, thus being empowered to call the government to account for its actions.

1.7. THEORETICAL FRAMEWORK

This study is supported by three theories namely the Critical Legal Theory, Legal Positivism and Systems Theory.

The Critical Legal Theory is instructive to this study in demonstrating why and how it is difficult for the principle of openness and accountability to be effectively implemented. Legal Realism

and the Systems Theory on the other hand are used to validate the importance of the recommendations advanced by this study in actualizing the effective implementation of openness and accountability within PFM in Kenya.

1.7.1. Critical Legal Theory

Critical Legal Theory, otherwise referred to as CLS, posits that the law as codified seeks to look out for the interests and comforts of its drafters as compared to the disadvantaged in the society.²³ It further advances that the law is used as an instrument of oppression by the wealthy.²⁴ In deciphering this theory, Duncan Kennedy and Roberto Unger make reference to individualism and altruism as the driving forces in the making of laws.²⁵ Unger posits that in making decisions in the society, the law cannot be used during the process due to the fact that it is a codification of conflicting visions.

This theory enlightens this study by being demonstrative to the challenges facing the implementation of openness and accountability in PFM. The inadequacies in the law as identified in this study make a case for the fact that some laws have been with the specific intention of being advantageous to a class of people, at the expense of others. For instance, the incentivizing by the law of abuse of office, corruption and other forms of malfeasance confirm that those involved in the law making process do so with the intention of creating an environment conducive for the identified forms of malfeasance. With this, the effective implementation of the principle of openness and accountability is hindered.

1.7.2. Legal Realism

The theory of Legal realism posits that in considering cases before them, judges must take into consideration, public policy and social interests.²⁶ According to Justice Holmes, the very nature of the law is experience, as compared to logic.²⁷ Due to the dynamism of the law, and noting that society changes constantly,²⁸ it is important therefore important that judge-made laws, as is the

²³ Legal Information Institute, *Critical Legal Theory* <https://www.law.cornell.edu/wex/critical_legal_theory> accessed on 3rd December 2019

²⁴ Legal Information Institute (n23)

²⁵ 'Critical Legal Theory Reading from Andrew Altman, Roberto Unger, and Martha Minow' <http://www.jus.unitn.it/users/patterson/course/topics/materiale/ch05.pdf> accessed on 3rd December 2019

²⁶ Legal Information Institute, *Legal Realism* <https://www.law.cornell.edu/wex/legal_realism> accessed on 3rd December 2019

²⁷ Grant Gilmore, 'Legal Realism: Its Cause and Cure' (1961) 70 *The Yale Law Journal* 1038 <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=3643&context=fss_papers> accessed on 3rd December 2019.

²⁸ *ibid.*

position of the proponents of legal realism, transcend beyond what is written in the statute books ensure that social conflicts are resolved.²⁹

In relying on this theory, this study advances the position that interpretation of the law by judges must be multifaceted to include the sociological aspects of the matters before them. In deciding such cases, the judges should be guided by public policy and the sociology.

Legal realism is instructive to this research given the relationship between PFM and the public, together with the overall wellbeing of the country. Judges must, in interpreting the law in relation to PFM, take into consideration the deteriorating state of the implementation of openness and accountability in PFM.

1.7.3. Systems Theory

Systems theory is an interdisciplinary theory about every system in nature, in society and in many scientific domains as well as a framework with which the investigation of phenomena can be done in a holistic approach.³⁰ Matthen, in addressing Aristotle's holistic presupposition of cosmology, posits that viewing a substance holistically is to acknowledge that a composite substance is an individual thing that has a nature and form of its own, but comprehends other substances which have their own nature and form.³¹ Due to it being multidisciplinary in nature, systems theory is classified into six major streams namely general systems theory, living systems theory, mathematical systems theory, cybernetics, social systems theory and philosophical systems theory.³² The systems theory argues that a phenomenon is not fully comprehensible if it is broken down into elementary parts but rather, a global vision must be applied to the phenomenon.³³ Lewis posits that adopting a systems approach is key in seeing the bigger picture and arriving at feasible solutions to contemporary problems.³⁴ He goes on to conceptualize systems approach as specifically suited for interdisciplinary communication and in that regard, helpful in "...eliminating specialized deafness".³⁵

²⁹ *ibid.*

³⁰ Cristina Mele, Jacqueline Pels and Francesco Polese, 'A Brief Review of Systems Theories and Their Managerial Applications' (2010) <https://pubsonline.informs.org/doi/pdf/10.1287/serv.2.1.2.126> accessed on 7th May 2019

³¹ Mohan Matthen, 'The Holistic Presuppositions of Aristotle's Cosmology' (2001) https://www.researchgate.net/publication/311427502_The_Holistic_Presuppositions_of_Aristotle%27s_Cosmology accessed on 7th May 2019

³² Kevin MacGregor Adams, 'Systems Theory: A formal construct for understanding systems' (2012) https://www.researchgate.net/publication/264818391_Systems_theory_A_formal_construct_for_understanding_systems accessed on 7th May 2019

³³ Mele, Pels and Polese (n30)

³⁴ Ovid C. Lewis, 'Systems Theory and Judicial Behavioralism' (1970) Vol21, Case Western Reserve Law Review, <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=2797&context=caselrev> accessed on 8th May 2019

³⁵ Lewis (n34)

This research is narrowed down to the social systems theory whose underpinning is the work of Talcot Parsons, Walter Buckley and Niklas Luhmann. According to Parsons, each system function is supported by subsystems with specific roles. To Parson, system functions are defined in terms of four functions namely adaptation, goal attainment, integration and latency. All the four functions are explained as follows:³⁶

1. Adaptation- all systems must process resources and adapt to their environment in order to survive. A system is bound to fail in the long run unless effective adjustments are made to the system in order that it may adapt to the changing constrained variety of the environment³⁷;
2. Goal attainment-all systems must define and pursue goals to focus their activities;
3. Integration-all systems must integrate their components to prevent internal conflicts; and
4. Latency-all systems must ensure that basic structures and processes are maintained.

Parsons compared system functions and subsystem roles to the structure of the human body's organs and functions.³⁸Luhmann, a student of Parson, enriched the theory by stating that the relationships between the parts themselves and the event they produce through their interaction become more important, with the ultimate result that system elements are rationally connected towards a shared purpose.³⁹

Due to the fact that this study is interdisciplinary, this theory is instructive in proposing an adaptive system that will display a wide range in degrees of openness, differentiation and interdependence.⁴⁰ In looking into other disciplines such as economics, it will come to the fore that the solutions in the legal realm may not yield the desired outcome unless they are interrogated together from an economic perspective. This will result in practical and workable solutions which will interrogate the issues from a bird's eye view, in line with the position advanced by the systems theory.

1.8. LITERATURE REVIEW

The World Bank has reported that African countries have weak PFM systems due to weak domestic accountability systems.⁴¹The weakness is characterized by, inter alia, firstly, soft

³⁶http://www.gerhard-k-heilig.com/main/ppt/GKH_AGILE-Scheme_2.pdf accessed on 7th May 2019

³⁷ Lewis (n34)

³⁸ Adams (n32)

³⁹ Mele, Pels and Polese (n30)

⁴⁰Lewis (n34)

⁴¹ Yongmei Zhou, Strengthening Public Financial Management: Challenges in Africa, <<https://www.worldbank.org/archive/website01531/WEB/IMAGES/3SESSION.PDF>>

control and widespread corruption within political and bureaucratic systems, secondly, non-enforcement of a country's PFM laws and regulations and lastly, financing of competitive politics which puts pressure on PFM.⁴²

According to Aminatu, the introduction of IFMS to developing countries in the 1990s whose purpose was to manage finance effectively has experienced implementation challenges in most countries due to factors such as a lack of capacity building and over ambitiousness of these nations.⁴³ He then posits that among the issues affecting the development of African economies is presence within them, of a poor financial management system.⁴⁴ According to him, increasing transparency through additional mechanisms is perhaps the most powerful action that a government can take in committing to the principle of transparency. This he states in reference to management of oil revenues. As a solution, Aminatu makes a proposal for African countries to design an economic policy better suited to the needs of the country and thereafter, manage the economy according to that policy.⁴⁵ While this reading is instructive to this research, an important conversation ensues. While formulation of additional mechanisms together with introduction of reforms in critical areas such as the treasury and budget preparation is key, the study does not give the details on how these reforms and additional mechanisms can be implemented. There could be mechanisms, existing and others which may be formulated, which are well articulated on paper, but are nonetheless not being implemented at all. It is therefore important to interrogate which necessary tools need to be incorporated into the system in order that the additional mechanisms and the proposed reforms on transparency and accountability are in fact implemented in practice. Additionally, the study does not interrogate the route a country which already has mechanisms in place, should take. Additional mechanisms being introduced into the system may result in an influx of mechanisms which are not being used for their intended purpose.

The three key objectives of a sustainable PFM system are maintaining a suitable fiscal position, effective allocation of resources and efficient delivery of public goods and services, which objectives should not be addressed in isolation.⁴⁶ The IMF, in recognizing that PFM is made up of increasingly complex processes, rules, systems and norms, posits that they are intrinsically linked to one another. In this regard, all the processes must work in harmony should solutions

⁴² Yongmei Zhou (n41)

⁴³ Mohammed Aminatu, "The Impact of Integrated Financial Management Systems on Economic Development: A case of Ghana" <<https://gsis.korea.ac.kr/wp-content/uploads/2015/06/15-2-04-Mohammed-Aminatu.pdf>> accessed on 11th January 2018

⁴⁴ Aminatu (n43)

⁴⁵ Aminatu (n43)

⁴⁶ Transparency International, <https://www.transparency.org/cpi2018> accessed on 3rd March 2019

sought, be achieved.⁴⁷ From this study by the IMF, this research proposes practical ways in which a seamless system can be achieved, based on lessons drawn from the South African perspective.

It is imperative that accountability mechanisms are extended to non-state actors such as the civil society, the media, and professional organizations.⁴⁸ The civil society has a significant role to play in the attainment of openness and accountability, by assuming the role of a watchdog and not only protecting civil rights, but also promoting public participation.⁴⁹ The civil society, due to their independence from donors and state controlled accountability, has the advantage of accessing freedom to raise queries on sensitive matters and expose poor governance. In the Republic of Uganda, the Anti-Corruption Coalition in Uganda brought about an overall improvement in governance by using the media to highlight policy inadequacies and poor use of public resources.⁵⁰ The United Nations has observed that the civil societies, due to their growth and evolution across developing countries, should be engaged by governments so as to achieve, among other objectives, transparency and inclusion.⁵¹ This Report proposed the strengthening of the participation of the civil societies in voicing issues of democracy in their countries, by helping the civil societies expand their roles in deliberative processes. Without the United Nations being involved in empowering the civil society, the report does not touch on how the civil society can self-empower themselves. Wholly relying on the UN to empower the civil society, as compared to creating an environment where the empowerment of the civil society is assured and the UN only complements what already exists, may not be the most ideal approach to the issue of participation by the civil society. In this regard, this study will delve into ways in which at the local level, the civil society can have a more pronounced and effective role in calling to order, all the government institutions tasked with the appropriation of public finances.

Serra observes that the incorporation of a combined system of accountability could be effective in the prevention of corruption, thus increasing openness and accountability by public officials.⁵² A combined system of accountability consists of both bottom-up monitoring and top-down

⁴⁷ Transparency International, (n46)

⁴⁸ Independent observer of the Global Fund, 'Mapping Accountability Mechanisms: A Review of In-Country Accountability in Health Systems' (2015)

⁴⁹ Independent observer of the Global Fund, (n 48)

⁵⁰ Independent observer of the Global Fund, (n48)

⁵¹ United Nations General Assembly, 'Strengthening of the United Nations system' (2004) Fifty-Eight Session, Agenda item 59 <http://unpan1.un.org/intradoc/groups/public/documents/un-dpadm/unpan041831.pdf> accessed on 7th March 2019

⁵² Danila Serra, 'Combining Top down and Bottom Up Accountability: Evidence from a Bribery Experiment' (2012) *Journal of Law, Economics and Organisation*, Vol 28 No. 3, <https://vpn.uonbi.ac.ke/proxy/567dbb7c/https://www.jstor.org/stable/pdf/41653650.pdf> accessed on 7th March 2018

auditing. Here, bottom up monitoring entails the setting up of institutions where citizens can formally yet anonymously, voice instances of corruption and report corrupt officials, all the while knowing that there is a possibility that such formal reports could lead to top down auditing, which is the presence of external controls that increase the possibility of the public officials being formally detected and fined.⁵³This study however does not consider that while proper bottom up and top down systems can be implemented, their success is dependent on the goodwill, experience and professionalism the officials that are present in those offices possess. A system, however clear and well thought out it may be, is bound to fail based on the people implementing the same. Additionally, if there is minimum capacity building available for the administrators of a system, the same may not serve its purpose. This study will therefore enrich Serra's work by coming up with a real time solution which will make the system perform at its optimal level, and thus, bring about positive change in the management of public finances.

Allen and Krause posit that in PFM, attention should be focused to strengthening both capacity and capability.⁵⁴ According to them, most countries focus on strengthening capacity at the expense of building on capability. They define capacity as the volume or scope of inputs, such as human resource or Information Technology systems whereas capability relates to the efficiency of these inputs in achieving better performance towards the delivery of the mandate.⁵⁵ Capability includes improving the management of internal business processes such as decision making hierarchies, corporate planning and information systems and strengthening the management of human resources and internal incentives.⁵⁶ Whiteman however noted that some of the more popular reforms by agencies such as the IMF and the World Bank which include improving the transparency of intergovernmental fiscal relations and moving to GFS/COFOG budget classification standards will have differential impacts on PFM capacity and PFM capability, with an increase in capacity of PFM systems and a decrease in the capability of PFM systems.⁵⁷This has been experienced in Kenya in its adoption of performance based budgeting. Whereas Kenya has introduced performance based budgeting for the central government, its capability remains in question.⁵⁸Whiteman recommends that prior to formulating reforms in the

⁵³ Serra, (n52)

⁵⁴ John L. Whiteman, 'Measuring the Capacity and Capability of Public Financial Management Systems' (2013) <http://journals.sfu.ca/ipmr/index.php/ipmr/article/view/132> accessed on 8th March 2019

⁵⁵ Whiteman, (n54)

⁵⁶ Whiteman, (n 54)

⁵⁷ Whiteman, (n 54)

⁵⁸ World Health Organisation, ' Building strong Public Financial Management Systems towards universal health coverage: Key bottlenecks and lessons learnt from country reforms in Africa' 2018 https://www.who.int/health_financing/events/pfm-for-health-in-africa.pdf?ua=1 accessed on 8th October 2019

PFM system, it is imperative that there is proper knowledge of the country's PFM capacity and capability.⁵⁹ This will go a long way in avoiding the introduction of reforms which are either not implemented, or give rise to a new challenge during implementation. Additionally, Whiteman suggests that increasing the capability of a PFM System and improving the efficiency, effectiveness and transparency of public spending may be achieved through benchmarking partnerships.⁶⁰ A good example of such partnerships includes the Public Expenditure Management-Peer Assisted Learning (PEMPAL) network which was sponsored by the World Bank, IMF and other agencies. The objective of PEMPAL is to improve the efficiency, effectiveness and transparency of public expenditure management in the Central and Eastern European and Central Asian regions.⁶¹ While the study is insightful, there is no mention on the how various government agencies can collaborate and form a symbiotic relationship and ensure that transparency and accountability in PFM systems and public expenditure is achieved in a country. There is need for all government agencies to support each other by carrying out their functions as prescribed by law, should there be hope of existing a transparent and accountable PFM system and public expenditure.

Mkandawire⁶² argues that countries receiving aid often face challenges of accountability because the donor more often than not usually controls what information can be accessible to the public. This control is easily attained by the donor country because they know that the aid given is used to develop a recipient country, thus resulting in fiscal relations between the states. The author argues that fiscal relations between states, donors and citizens affect accountability relations both directly and indirectly.⁶³ He goes on to introduce a breach of the fiscal-socio contract, where countries that are dependent on aid depend less on tax revenue from its citizens, which in turn leads to the consent of the citizens not being sought during fiscal matters. He argues that as a result of the Washington consensus, the developed countries have imposed their ideologies on African countries, going so far as to structure some ministries/departments in a manner to suit the needs of the donor. This has resulted in the donors taking part in policy formulation of the country under the disguise of the recipient's policy makers. Due to donor reliance, parliaments have also learned that it is much easier to let the technocrats in the finance ministries' meet the donors' demands as compared to engaging them in protracted dialogues. This has in turn

⁵⁹ Whiteman, (n54)

⁶⁰ Whiteman, (n54)

⁶¹ Whiteman (n54)

⁶² Thandika Mkandawire 'Aid, Accountability and Democracy in Africa' Social Research, Vol. 77, No. 4, From Impunity to Accountability: Africa's Development in the 21st Century (WINTER 2010), pp. 1149-1182

⁶³ Mkandawire (n62)

trivialized notions of deliberation and accountability by making dialogue and exchange of ideas and experiences superfluous. Additionally, it is a mockery of transparency that is so central to accountability. This article introduces donor reliance as a factor inhibiting transparency and accountability in public finance management, but does not propose mechanisms which countries can employ in ensuring that the donors do not have heavy influence on a country's process of fiscal policy formulation. This research will put up an argument that a country devoted to achieving transparency and accountability in public finance can achieve a degree of acceptable independence from its donors, and further make proposals on the tools that can be employed in ensuring this is achieved.

McKee and Nicolas van de Walle observe that while a number of mechanisms of accountability have been built into public expenditure management and auditing procedures in many sub-Saharan African states, a host of legal, capacity, and political constraints often hinder these mechanisms from being able to effectively monitor and sanction executive misuse and diversion of public funds.⁶⁴ The authors go ahead to highlight the challenges facing the four specific mechanisms of accountability within the budget process namely: parliamentary budget committees, supreme audit institutions, citizen budget monitoring and advocacy groups, and lobbying/elections.⁶⁵ In internalizing the challenges as presented by McKee and Van De Walle, this study customizes the proposals made by the authors to fit the Kenyan context.

Swank and Visser argue that while transparent decision making is a prerequisite for the working of a representative democracy world over, it does not always mean that the decision making process was open. In their view, emphasis on transparency leads to officials presenting before the public meetings, decisions that have already been deliberated and decided upon behind the scenes. It therefore beats the purpose of transparency in a system. They go on to advance that transparency is based on a model where committees ensure that important information exchange and voting takes place outside the public eye, in a closed decision process. This is due to the fact that while Committee members would like to make a decision that is in the interest of the public, they equally take into consideration the opinion or external forces which the committee members hold in high regard. They however proceed to argue that if committee members do not have private information about their abilities, that is, not worrying about the consequences a decision

⁶⁴ Kristin McKee and Nicolas van de Walle, 'Towards an Accountable Budget Process in Sub-Saharan Africa: Problems and Prospects' *Social Research*, Vol. 77, No. 4, From Impunity to Accountability: Africa's Development in the 21st Century (WINTER 2010), pp. 1281-131

⁶⁵ McKee and van de Walle, (n64)

will have on their reputation or careers, decisions will be made with the participation of the public in an honest manner. Additionally, the authors advocate for a secret pre-meeting to be held prior to the main transparent meeting with the public, only for the purposes concealing any disagreements that may arise. The decisions passed during the secret meeting however, must be endorsed in the main meeting.⁶⁶

The Botswana Institute for Development Policy Analysis argues that transparency in the country has declined due to failure in providing adequate information to the citizenry, on the price per carat for diamonds. To ensure improvement in transparency, the Institute made the following ten recommendations:

- a. Publicizing on government website, key budget documents already produced internally such as the Mid-Year Reports and In-Year Reports;
- b. Production and publication of a citizen's budget;
- c. Increase of the comprehensiveness of the Executive Budget proposal;
- d. Improvement of follow-ups by both parliament and accounting officers on quarries raised by the office of the Auditor General (OAG);
- e. Improve the office of the OAG;
- f. Improve the ability of the OAG to receive feedback from the public;
- g. The OAG must be audited;
- h. Provide opportunities for the public to testify at parliamentary hearings on the budget;
- i. Enable Parliament to provide more comprehensive oversight not only when the budget is being approved but also during implementation; and
- j. Provide mechanisms to allow Parliament's Public Accounts 'committee to directly and publicly audit enterprises.

While this report is instructive and the recommendations practical, the report fails to address how the auditing of the OAG should be undertaken. In Kenya, the OAG is audited by an independent auditor appointed by the National Assembly, a method which may raise issues regarding the independence of the OAG. This research will attempt to give an alternative to the most effective way auditing of the OAG can be achieved.

The International Budget Partnership appreciates that overriding objective of including transparency clauses in budget legislation is important in establishing budget principles and

⁶⁶ Otto H. Swank and Bauke Visser, 'Is Transparency to No Avail?' *The Scandinavian Journal of Economics*, Vol. 115, No. 4 (October 2013), pp. 967-994

practice in law. This ensures that the abuse of power by political authorities is constrained and further, empowers the citizens to demand information from government institutions.⁶⁷ Under this Report, Kenya was one of the countries with minimal mentions of transparency in budget legislation while Botswana was categorized as one of the countries with no mention of transparency in budget legislation. The Report went on to identify that even if transparency is legislated, the law more often than not does not provide in clear terms what transparency is, what it entails and how it can be achieved. The Report recognizes, among other countries, Rwanda, South Africa, Sierra Leone, Nigeria and Liberia as the few African countries that include detailed provisions for budget transparency in their laws. The report argues that budget transparency combined with opportunities for participation in the process for the civil society and the general public, improves the prospects for accountability, especially where there are checks and balances. In Brazil, it is provided that ongoing monitoring and evaluation of policies and workability of the fiscal management must be performed by a fiscal management council, composed of representatives from all branches and levels of government, Office of the Public Prosecutor and technical entities representing the public as a whole.

In conclusion and based on the literature review carried out there is an overall gap on the literature, being that none of the authors interrogates how the character of those expected to implement the recommendations given in the studies, affects the attainment of openness and accountability in PFM. None of the authors mentions the effects of leadership and integrity in seeking to effectively implement the principle of openness and accountability in PFM, and the overall effect leadership and integrity has on PFM. This study speaks to the overall gap identified in the literature by bringing out the importance of taking into consideration the people tasked with various mandates in PFM, in addition to the recommendations given.

1.9. RESEARCH METHODOLOGY

The research conducted for this study was qualitative. It was based on doctrinal research, with information collected from the laws and court decision in Kenya and South Africa. Information from textbooks and from online libraries was instructive in the preparation of this research project used. The study is based on descriptive and analytical modes of research. Descriptive research features prominently in the study, with information obtained from conference manuals and various reports from the National Treasury, the Office of the Auditor General, the ODPP, the

⁶⁷ International Budget Partnership ‘Transparency and Participation in Public Finance Management; What do Budget Laws say?’ 2011 <https://www.internationalbudget.org/wp-content/uploads/Research-Note-1-Transparency-in-Public-Finance-Laws1.pdf> accessed on 30th January 2019

EACC, the Legislature and the Executive. In coming up with the conclusions and recommendations, analytical modes of research were adopted.

1.10. SCOPE AND LIMITATIONS OF THE STUDY

Chapter 12 of the Constitution on public finance identifies five principles which should guide all aspects of public finance in Kenya.⁶⁸The scope of this study however, is limited only to the in-depth interrogation of the principle of openness and accountability.

Further, while the study appreciates that there are two levels of government namely the national and county government, it is limited to the interrogation of issues at the national government level.

Lastly, as mentioned, the research methodology adopted was doctrinal. In that regard, this study the study faced a limitation, being that there was no travelling undertaken to collect information from, for instance, the Republic of South Africa, due to limited resources.

1.11. CHAPTER BREAKDOWN

This Research Project is broken down into the following chapters:

1.11.1. Chapter One: Introduction to the Study

In this chapter, the Research gives a background to the study. It identifies the research problem and the statement of the problem. The tenets and principles of Public Finance as encapsulated in the Constitution are provided, after which the study pays specific attention to the principle of openness and accountability.

1.11.2. Chapter Two: Legislative and Institutional Framework

This chapter analyses the legislative framework governing PFM in Kenya, including statutes that govern the relevant institutions. The study looks at the African Union Convention on Preventing and Combating Corruption, the Constitution of Kenya, the Public Finance Management Act, the Leadership and Integrity Act, the Public Audit Act, the Public Procurement and Asset Disposal Act, the Salaries and Remuneration Commission Act, the Commission on Revenue Allocation Act and the Central Bank of Kenya Act.

⁶⁸ The Constitution of Kenya, Article 201

1.11.3. Chapter Three: Challenges facing the proper implementation of the principle of openness and accountability in Public Finance Management in Kenya

This chapter examines in depth, the challenges hindering the effective implementation of the principle of openness and accountability in PFM in Kenya.

1.11.4. Chapter Four: Lessons from South Africa

This Chapter studies the position of openness and accountability in PFM in the Republic of South Africa and thereafter, the lessons Kenya can draw from South Africa are provided.

The study focuses on how the Republic of South Africa is working towards achieving openness and accountability in PFM. The Constitution of Kenya borrows widely, from the Constitution of the Republic of South Africa and in this regard, it is instructive to study how South Africa implements the chapter on PFM as codified in the Constitution. This is important as Kenya can borrow some good practice for the effective implementation of Chapter 12 of the Constitution of Kenya. Secondly, having a mixed system of both civil and common law, studying South Africa in relation to its PFM system is instructive to Kenya in implementing the principle of openness and accountability, given that Kenya is a common law jurisdiction. Thirdly, South Africa's performance on governance and the fight against corruption has been commended as evidenced in its ranking by both the Ibrahim Index of African Governance (IIAG)⁶⁹ and the Corruption Perception Index (CPI) by Transparency International⁷⁰.

1.11.5. Chapter Five: Conclusion and Recommendations

This chapter summarizes the findings of the research based on the amalgamated information, and thereafter, makes specific recommendations that Kenya should adopt.

⁶⁹Mo Ibrahim Foundation, http://s.mo.ibrahim.foundation/i/2018/11/27173840/2018-Index-Report.pdf?_ga=2.69753424.1373815721.1551562739-20926226.1551562739 accessed on 3rd March 2019

⁷⁰ Transparency International, <https://www.transparency.org/cpi2018> accessed on 3rd March 2019

CHAPTER TWO: LEGISLATIVE AND INSTITUTIONAL FRAMEWORK GOVERNING PUBLIC FINANCE MANAGEMENT IN KENYA

2.1. Introduction

In this chapter, an in-depth analysis is done on how openness and accountability is entrenched in the laws regulating public finance management in Kenya, with specific reference to the national government. The chapter outlines the history of PFM in Kenya, culminating in the current Constitution and the various pieces of legislation that have been passed by Parliament so as to make PFM more orderly and effective. In this chapter, while there are many regulations that have been made pursuant to the Legislative instruments available in the management of public finance, this chapter will limit itself to the interrogation of only those that are relevant to the study. The chapter is concluded with an overview of the present position in relation to the legal and legislative framework in PFM in Kenya, with an outline of the bills being debated in Parliament.

Throughout the study, PFM is viewed from a multidimensional and multidisciplinary approach, to include governance, management, leadership, public policy, human resources and public finance.

2.2. History of Public Finance Management in Kenya

The history of PFM in Kenya is tied to the reasons that led to the agitation for the need to promulgate the current Constitution. Through successive post-independence regimes, Kenya has witnessed numerous financial scandals in the public sector which have resulted in heavy losses to the public.⁷¹ It was not uncommon for individuals responsible for these public scandals to go without being prosecuted.⁷² Due to the increase in the levels of corruption, the effectiveness of state institutions and their ability to provide essential public services was jeopardized, leading to the general public agitating for reforms.⁷³

In the early 2000, in realizing that a well-functioning PFM system is the cornerstone to achieving national development, the government came up with the first PFM reform strategy under the

⁷¹ National Assembly, 'Interim Report of the Working Group on Socio-Economic Audit of the Constitution of Kenya 2010' (2015) http://info.mzalendo.com/media_root/file_archive/Socio_Economic_audit_on_the_Constitution_of_Kenya_2010.pdf accessed on 5th March 2019

⁷² National Assembly, (n 71)

⁷³ National Assembly, (n 71)

theme ‘Revitalization of Public Finance Management Systems in Kenya’.⁷⁴ This reform strategy covered the period between 2006 and 2011. The key areas that were targeted included the transformation of political priorities into annual budget allocations, credibility of the budget, the roll out of the Integrated Financial Management System (IFMIS) and quality, timeliness and accuracy of financial reports. However, by the end of the period, many of the reforms had not been actualized. What is more, the expiry of the 2006-2011 PFM reform strategy coincided with the promulgation of the Constitution of Kenya in 2010, which Constitution brought with it changes to the public finance system that the reform strategy had not envisaged. Such changes include the introduction of the county governments, the reorganization of the institutional reforms following the establishment of PFM institutions such as the Controller of Budget⁷⁵ and introduction of principles to guide the public finance system.⁷⁶The enactment of the Public Finance Management Act 2012 and its subsequent regulations thereto equally pushed for PFM reforms, thus resulting in the formulation of the 2013-2018 PFM Reforms Strategy (“the second strategy”) by the National treasury. This 2013-2018 strategy reform was founded on Vision 2030, the Constitution and the PFMA. The second strategy would be spearheaded by the Public Financial Management Reform Secretariat (PFMR).⁷⁷ Between November 2015 and March 2016, the second reform strategy was due for a midterm review and it was noted that while significant progress had been made in the implementation of the same, there were areas of the strategy where implementation was slow. Reference to four areas which experienced delays were the institutional reforms at the National Treasury, introduction of the Treasury Single Account (TSA) at national and country government levels, payroll and pensions reforms and integration of PFM systems .⁷⁸ It was further noted that the 2013-2018 strategy contained gaps that required addressing including the county PFM reforms, additional reforms in strategic planning and budget formulation, investment programme management and lack of reforms to make the PFM system gender responsive. With this, the revised second strategy came along, geared towards the achievement of nine outcomes which included:

1. the production of greater fiscal discipline and integrity through the PFM cycle;

⁷⁴ The National Treasury, ‘The Strategy for Public Financial Management Reforms in Kenya 2013-2018’ <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwiExY6AkuvGAhWNHhOKHfZuBoMQFjAAegQIChAC&url=http%3A%2F%2Fwww.treasury.go.ke%2Ftax%2Ffacts.html%3Fdownload%3D696%3Athe-strategy-for-public-financial-management-reforms-in-kenya-2013-2018&usg=AOvVaw0vYtiuq1pZTFEOXcg6 SsK> accessed on 5th March 2019

⁷⁵National Treasury | Public Financial Management Reforms Secretariat <<http://pfmt.go.ke/background/>> accessed on 6th March 2019

⁷⁶ The National Treasury, (n71)

⁷⁷The National Treasury, (n71)

⁷⁸The National Treasury, (n71)

2. enhancing the capacity of the OAG for audits including financials performance and Value for Money (VfM); and
3. full integration of IFMIS with other PFM systems so as to minimize manual operations and enable more accuracy and timelines of reporting.

The Government of Denmark offered its support to the Government of Kenya towards the attainment of the expected outcomes under the revised reform strategy and any successor thereto. Through an agreement between the Danish Embassy in Nairobi and the National Treasury, there is now in place a Development Engagement Document named ‘Kenya Country Programme 2016-2020 Governance Thematic Programme-Support to the Public Financial Management Reform Strategy’. The objective of this Governance Programme is the implementation of the Constitution and consolidation of an accountable, inclusive and participatory democracy based on increased stability.⁷⁹ The expected outcome of the development engagement is a public finance system that promotes transparency, accountability, equity, fiscal discipline and efficiency in the management of public resources.

Additionally, the reforms envisaged under public finance are heralded through the PFMA⁸⁰ which guides the national and county governments in the effective management of public finances.⁸¹ The PFMA aims at, inter alia, promoting openness, accountability and public participation in the management of public finances.

2.3. The Legislative and Legal Framework

In discussing the legislative and legal framework governing Public Finance Management in Kenya, this study will look into the following six pieces of legislation together and the regulations thereto:

1. Africa Union Convention on Preventing and Combating Corruption
2. The Constitution of Kenya;
3. The Public Finance Management Act (2012) together with its relevant Regulation;
4. The Public Procurement and Asset Disposal Act (No. 33 of 2015);

⁷⁹ The National Treasury, ‘Kenya Country Programme 2016-2020 Governance Thematic Programme – Support To The Public Financial Management Reform Strategy in Kenya’ https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKewi57qqZyu3gAhWZDmMBHQ7XDA4QFjAAegOICAC&url=http%3A%2F%2Fkenya.um.dk%2F~%2Fmedia%2FKenya%2FDEDS%2FGovernance%2FGov%25201%2520PFMR%2520DED.pdf%3Fla%3Den&usg=AOvVaw3OTK9qDc3w_5I_pxmQUccj accessed on 6th March 2018

⁸⁰Public Finance Management Act No. 18 of 2012

⁸¹ Society for International Development, ‘Public Finance Reforms in Kenya: Some emerging issues and their relevance under the context of Devolution’ https://www.sidint.net/sites/www.sidint.net/files/docs/PFM%20_PolicyBrief.pdf accessed on 7th March 2019

5. The Public Audit Act;
6. The Commission on Revenue Allocation Act;
7. The Salaries and Remuneration Commission Act; and
8. The Central Bank of Kenya Act.

2.3.1. African Union Convention on Preventing and Combating Corruption

The AUCPCC was implemented due to concerns about the negative effects of Corruption and impunity on the political, economic, social and cultural stability of African States.⁸² The principles provided under Article three include transparency and accountability in the management of public affairs.⁸³ AUCPCC requires, under article 5, that a country establishes, maintains and strengthens independent national anti-corruption authorities and agencies, which can be evidenced through the establishment of the EACC and the Kenya Anti-Corruption Advisory Board which advises the EACC.⁸⁴

The AUCPCC can be lauded for recognizing the role of the civil society and the media in the fight against corruption, with the direction that State Parties should ensure access to information by the media and guaranteeing the proper environment for monitoring and implementation of the AUCPCC.⁸⁵

Extradition proceedings are allowable among Member States, which makes the implementation of the AUCPCC more effective.

As a follow up mechanism, an Advisory Board on corruption is established under AUCPCC, which is mandated with, among other functions, to advise governments on how to deal with corruption and related offences in their domestic jurisdictions.

A critique of the AUCPCC is it comes across as a guide on how states should conduct themselves, and has no provision on sanctions or repercussions in the event a country is known for rampant corruption. In this regard, the AUCPCC does very little towards the fight against corruption within its member states.

2.3.2. The Constitution of Kenya

Given the above history highlighted above, the need for the management of public finance gained traction and was encompassed in the Constitution. The preamble of the Constitution

⁸² The African Union Convention on Prevention and Combating Corruption, Preamble

⁸³ AUCPCC, Article 3(3)

⁸⁴ Anti-Corruption and Economic Crimes Act, No 3. Of 2003

⁸⁵ AUCPCC, Article 12

provides that in enacting the Constitution, the people of Kenya recognize the need for a government based on, inter alia, equality, democracy and the rule of law.⁸⁶ The Constitution is recognized as the supreme law of Kenya which binds all persons and state organs⁸⁷ and further, where all other laws derive their validity.⁸⁸ All the laws, including any treaty or convention ratified by Kenya governing the country therefore, must be consistent with the Constitution.⁸⁹

Chapter 12 of the Constitution is an indication of the advancement in revenue and expenditure management in Kenya.⁹⁰ Effective PFM systems in the national and county governments are a key priority if aggregate fiscal discipline, strategic resource allocation and efficient use of resources for service delivery are to be attained.⁹¹ The provisions of the Constitution in relation to Public Finance Management contain the principles of public finance.⁹² Of the various principles of public finance as set out in the Constitution, the principle of openness and accountability which is the main principle interrogated in this study is included. In addition, Chapter 12 sets out the aspects that must feature in a public finance system⁹³ in order that it is compliant with the Constitution. In this regard, failure to include in the public finance system, the facets that promote an equitable society, is considered as running afoul the provisions of the Constitution. Equitable sharing of national revenue⁹⁴ is a tenet that the Constitution places emphasis on, with a criteria being set out on what national legislation concerning county government should consider in order that there can be equitable revenue sharing at the county government level⁹⁵. The Constitution provides for the management of public funds by establishing a Consolidated Fund⁹⁶ where all the monies received by the national government shall be paid into, together with the provision on how such monies may be withdrawn.⁹⁷ However, money can be reasonably excluded from the Fund if directed through an Act of Parliament and which money is payable to another fund established for a specific purpose⁹⁸ or has been retained by a State organ for purposes of for

⁸⁶ The Constitution of Kenya, Preamble

⁸⁷ The Constitution of Kenya, Article 2(1)

⁸⁸ The Constitution of Kenya, Article 2(4)

⁸⁹ The Constitution Kenya, Article 2(6)

⁹⁰ Kaguongo Waruguru, ‘Introductory Note on Kenya’ http://www.icla.up.ac.za/images/country_reports/kenya_country_report.pdf accessed on 1st September 2019

⁹¹ Kenya Institute for Public Policy Research and Analysis, SP No, ‘Towards Strengthening Public Financial Management in County Governments in Kenya’. <http://kippra.or.ke/wp-content/uploads/2018/04/SP18.pdf> accessed on 30th August 2019

⁹² The Constitution of Kenya, Article 201

⁹³ The Constitution of Kenya, Article 201(b)

⁹⁴ The Constitution of Kenya, Article 202(1)

⁹⁵ The Constitution of Kenya, Article 203

⁹⁶ The Constitution of Kenya, Article 206(1)

⁹⁷ The Constitution of Kenya, Article 206(2)

⁹⁸ The Constitution of Kenya, Article 206(1) (a)

settling its expenses.⁹⁹ A Contingencies Fund, whose operation is in accordance with an Act of Parliament, is set up¹⁰⁰ and whose monies are used specifically for urgent and unforeseen expenditure needs.¹⁰¹

The Constitution creates a guide on how the country should raise revenue and sets out the terms to be adhered to when the government is exercising its power of borrowing.¹⁰²

These provisions in relation to PFM in Kenya are a turnaround from the previous arrangement where there was no given formula for the allocation of funds. The previous arrangement in PFM pre- 2010 resulted in disregard of openness and accountability in PFM.

Through the Constitution, there are bodies which are established to ensure the effectiveness of implementation of Chapter 12, which bodies are highlighted below:

2.3.2.1. The Commission on Revenue Allocation

The Commission on Revenue Allocation (CRA) whose core mandate is to give recommendations concerning the basis of equitable sharing of the revenue raised¹⁰³ by the national government¹⁰⁴ is established.¹⁰⁵ The Senate, which is tasked with determining the basis upon which the revenue shall be allocated among the counties,¹⁰⁶ can only do so having taken the recommendations furnished by the CRA.¹⁰⁷ As highlighted above, the annual division and allocation of revenue is done through an Act of Parliament, through the introduction of a Division of Revenue Bill for the national government,¹⁰⁸ and a County Allocation of Revenue Bill.¹⁰⁹ Part 5 of the Constitution on budget and spending, provides for the form, content and timing of budgets,¹¹⁰ a helpful guide for both national and county governments.

The accounts and audit of public entities is envisaged under the Constitution, with a directive for the passing of an Act of Parliament which provides for measures for securing efficient and

⁹⁹ The Constitution of Kenya, Article 206(1) (b)

¹⁰⁰ The Constitution of Kenya, Article 208(1)

¹⁰¹ The Constitution of Kenya, Article 208(2)

¹⁰² The Constitution, Article 211(1)

¹⁰³ Part 3 of the Constitution provides for the raising of revenue through imposition of taxes or borrowing. Within the National Treasury, a Public Debt Management Office is established under section 62 of the PFMA whose objectives are to minimize the cost of public debt management and borrowing, promoting the development of the market institutions for government debt securities and ensuring the sustainable sharing of the benefits and costs of public debt between the current and future generations.

¹⁰⁴ The Constitution of Kenya, Article 216(1)

¹⁰⁵ The Constitution of Kenya, Article 215(1)

¹⁰⁶ The Constitution of Kenya, Article 217(1)

¹⁰⁷ The Constitution of Kenya, Article 217 (2)(b)

¹⁰⁸ The Constitution of Kenya, Article 218(1)(a)

¹⁰⁹ The Constitution of Kenya, Article 218(1)(b)

¹¹⁰ The Constitution of Kenya, Article 220

transparent fiscal management and the designation of an accounting officer in every public entity at county and national level.¹¹¹

An analysis of the functions of the CRA reflects the need for the Senate to work only with the recommendations of the CRA. However, these being mere recommendations, there is a possibility that the Senate may completely disregard the recommendations, a challenge which has recently been experienced. The nature of recommendations as this study will interrogate, does not elucidate any enforcement requirement, leading to the disregard experienced recently. The Constitution should have given the pronouncements by the CRA more force, as is discussed shortly.

The CRA reported experiencing challenges such as imprudent and irresponsible use of public money, poor fiscal reporting, inadequate public participation, inadequate checks and balances and recentralization at county level.¹¹² It however observed that based on its challenges, reforming PFM must be inclusive and participatory. It also noted that PFM reforms required political will to maintain and sustain the momentum for reforms.¹¹³

2.3.2.2. The National Treasury

Financial control of public finances is under the mandate of the national Treasury, with the Constitution directing Parliament to enact legislation which will ensure adherence of expenditure control and transparency in both levels of governments.¹¹⁴ The National Treasury is established under the PFMA.

Article 225 of the Constitution bestows immense powers on the National Treasury in relation to PFM. First, the National Treasury has the mandate to ensure both expenditure control and transparency in all governments and establish mechanisms to ensure implementation.¹¹⁵

The Cabinet Secretary responsible for finance may stop the transfer of funds to a State organ or any other public entity.¹¹⁶ Such a directive however, may not be approved by Parliament unless the Controller of Budget has presented a report on the matter¹¹⁷ and the public entity has been given an opportunity to answer to the allegations against it and to state its case before the

¹¹¹ The Constitution of Kenya, Article 226(1)

¹¹² Commission on Revenue Allocation, 'First Commissioners' End Term Report'.

¹¹³ *ibid.*

¹¹⁴ The Constitution of Kenya, Article 225 (2)

¹¹⁵ The Constitution of Kenya, Article 225 (2).

¹¹⁶ The Constitution of Kenya, Article 225 (3).

¹¹⁷ The Constitution of Kenya, Article 225 (7) (a) .

relevant parliamentary committee.¹¹⁸ A plain reading of these provisions reveal the intention of The Constitution to make the Cabinet Secretary accountable for the decisions made in relation to the stoppage of public funds to an entity. The wording seeks to minimize the possibility of decisions not backed by reason, being made in relation to the transfer of funds. The need for the involvement of Parliament with the guidance of the Controller of Budget and the public organ being accorded an opportunity to present its case, ensures proper checks on the decisions from the office of the Cabinet Secretary. Whereas this is an effective way to minimize abuse of power by the Cabinet Secretary, the choice of words may be seen as facilitating and providing leeway for the abuse of this Article. The use of the word ‘may’ instead of ‘shall’ does not couch the provision in mandatory terms but rather, makes it optional. The Constitution being the guiding law should have used mandatory language so as to set the bar for the Act of Parliament it mandates the Legislature to establish in providing a basis for the functions and responsibilities of the National Treasury. Mandatory provisions are clearer on matters enforcement and leave no room for doubt.

2.3.2.3. The Controller of Budget

The Controller of Budget¹¹⁹, as provided for by the Constitution, is nominated and appointed by the President, with the approval of the National Assembly.¹²⁰ At this point, the powers of the President in having control over this office are alleviated, with the possibility of the appointed Controller of Budget being made, indirectly, answerable to the President on matters regarding the budget. The term of the Controller of Budget is eight years, with no option of re-appointment.¹²¹ The negation of reappointment is a step towards the right direction in ensuring openness and accountability, as the personalization of the office is minimized and it is guaranteed that there will always be a new person holding the office. This decreases the possibility of manipulation. Had the possibility of re-appointment, the chances of compromise and manipulation of the appointment to ensure operations at pleasure of the powers of the day would be increase. Despite this laudable provision, there is still a possibility of the functions of the Controller of Budget being frustrated. The eight-year term results in a possibility that the Controller of Budget may serve two different governments during his term. Should the new government not support the functions of office, the Controller may experience difficulties in executing its mandate. It may be especially worse if the government is corrupt while the

¹¹⁸ibid.

¹¹⁹ The Constitution of Kenya, Article 228

¹²⁰The Constitution of Kenya, Article 228(1).

¹²¹The Constitution of Kenya, Article 228 (3).

Controller of Budget is a person of integrity, or vice versa. The possibility of this challenge cannot be overlooked, in studying openness and accountability in PFM. Further, the independence of the Controller of Budget from Parliament may also come into question due to the fact that its operations are partly funded by appropriation from Parliament.¹²² The United Nations Agenda 2030 places emphasis on the importance of building effective, accountable and inclusive institutions at all levels.¹²³

The Controller of Budget is required to submit to the Legislature, a report on the implementation of the budgets of the national and county governments, perhaps in a bid to promote transparency and enhance accountability.¹²⁴

2.3.2.4. The Auditor General¹²⁵

Similar to the Controller of Budget, the Auditor General is nominated and appointed by the President, with the approval of the National Assembly.¹²⁶ Similar challenges arise, with a possibility of interference of the independence of the OAG by the executive. The term of the Auditor General is eight years with no option of re-appointment, which alleviates possibilities of manipulation of the OAG by having one person being reappointment to the office so as to compromise openness and accountability. The concerns raised with the controller of Budget are similar to the ones that may be experienced in the OAG.

The Auditor General is expected to audit and report, within six months after the end of each financial year, the accounts of the country and national government, courts, funds and authorities of the national and county governments, the National and County Assemblies and the Senate, political parties funded from public funds, the public debt and any other entity legislation calls for an audit by the OAG.¹²⁷ However, it is not mandatory for the OAG to audit and report on the accounts of any entity funded by public funds and not listed hereinabove.¹²⁸ The use of the word ‘may’ once again brings in the challenge of some entities not being audited due to the optional nature of the provision, which may be viewed as leeway for the abuse of openness and accountability in PFM.

¹²² The Constitution of Kenya, Article 249 (3)

¹²³ United Nations Agenda 2030, Goal 16

¹²⁴ The Constitution of Kenya, Article 228 (4).

¹²⁵ The Constitution, Article 229

¹²⁶ The Constitution of Kenya, Article 229 (1)

¹²⁷ Constitution of Kenya, Article 229(4).

¹²⁸ Constitution of Kenya, Article 229(5).

Parliament is mandated with considering the report from the OAG and taking the appropriate action which, if taken seriously, and if the report is an accurate and true position of the reality, may result in the promotion of openness and accountability in PFM. In turn, errant officers will be put to task and cases of corruption will experience a significant decrease.

2.3.2.5. The Salaries and Remuneration Commission

The SRC consists of presidential appointees, with each of the following twelve bodies included in nominating one person each, to sit the SRC: person nominated by the Parliamentary Service Commission, the Public Service Commission, the Judicial Service Commission, the Teachers Service Commission, the National Police Service Commission, the Defense Council, the Senate, which acts on behalf of the county governments, umbrella bodies each representing trade unions and employers, a joint forum of professional bodies as provided by legislation, the cabinet secretary responsible for finance and the AG.¹²⁹ In addition to the aforementioned persons, the President appoints a chairperson and a person knowledgeable in the management of human resources in the public service who is nominated by the Cabinet Secretary responsible for public service.¹³⁰ The last three persons however, do not have a vote as stipulated under article 230 (3) of the Constitution, which may bring into the question, their influence in SRC, and whether their recommendations are taken with seriousness. The SRC is guided by, among others, the principle of transparency and fairness, which complements the principle of openness and accountability in PFM as stipulated in Article 201 of the Constitution.

The appointments which are to be done in the manner envisaged in the Constitution, seek to attain a balanced and proper representation and involvement of various sectors within the Republic of Kenya. With this, there is minimal chance of political capture of the SRC as a whole, noting that it is highly likely that not everyone can be compromised. However, a small fraction of the SRC may seek to frustrate the operations of the SRC as a whole, and this challenge cannot be overlooked.

2.3.2.6. The Central Bank of Kenya

With the responsibility of formulating monetary policy, promoting price stability issuing currency and performing other functions contained in legislation,¹³¹ the CBK is not under the

¹²⁹The Constitution of Kenya, Article 230 (2) (d)

¹³⁰ibid.

¹³¹The Constitution of Kenya Article 231(2).

direction or control of any person or authority in the exercise of its function¹³². Parliament enacted the Central Bank of Kenya Act to guide on the proper functioning of the CBK. Independence of the CBK is established under the Constitution and this goes a long way in ensuring that the functions are not influenced by other agencies of the Government.

While it is not disputed that there is need to have in place checks and balances to ensure that the CBK does not act in excess of its powers given the express independence granted to it, the study will, shortly, delve into the contradiction created when discussing the CBK Act.

The importance of setting out in detail and with precision, the standard operating procedures in the management of public finances in Kenya as the Constitution has done, is so that there can be a point of reference in dispensing duties under PFM. The Constitution has gone to great lengths to ensure that each aspect of PFM has been captured, with the organs in charge having their mandate set out with clarity. There still remains the need to ensure that the structures are working effectively in reality. This is through consultation with the government agencies involved, in order that Parliament enacts laws that not only provide for the systems, but ensure the same are working towards achieving openness and accountability.

2.3.3. Public Finance Management Act, 2012

The overarching mandate of the PFMA is to guide the national and county governments in the management of public finances while providing for the oversight authority of Parliament and country assemblies in the public finance management. In line with the Constitution, the PFMA echoes the principle of openness and accountability in management of public finances. The National Treasury established under section 11 of the PFMA, is mandated with, inter alia, the designing and prescription of an efficient financial management system which ensures transparent financial management and standard financial reporting,¹³³ and the promotion of transparency and effective management of accountability in all levels of government.¹³⁴ Under section 12 of the PFMA, the National Treasury consists of the Cabinet Secretary in charge of finance, the Principal Secretary and the department(s) and office(s) of the National Treasury responsible for economic and financial matters. Notably, no other official from any other government sector constitutes the National Treasury. The National Treasury is tasked with the responsibility of designing and prescribing an efficient financial management system to ensure

¹³²The Constitution of Kenya Article 231(3).

¹³³ PFMA Kenya, Section 12(1)(e)

¹³⁴ PFMA Kenya, Section 12(2)(a)

transparent financial management and standard financial reporting in line with article 226 of the Constitution.¹³⁵With obligations such as formulating, implementing and monitoring macro-economic policies involving expenditure and revenue, it would be prudent to have the National Treasury more diverse in its constitution. The general responsibilities of the National Treasury as provided for in section 12 of the PFMA are wide and include the promotion of transparency, effective management and accountability in public finances in the national government and management of the national government's public finances.¹³⁶ Such obligations would be effective if the constitution was, as stated above, more diverse and inclusive.

In addition to the set out functions, the National Treasury is mandated to administer the Consolidated Fund in an account known as the National Exchequer Account kept at the CBK.¹³⁷In ensuring that the National Treasury does not exercise its powers at whims, the PFMA provides that the withdrawal of funds from the Exchequer shall be requisitioned by the National Treasury and the same submitted to the Controller of Budget for approval, after which the CBK will have unconditional authority to pay the amounts requisitioned in accordance with the approval and instructions provided. Here, there is no requirement for the CBK to ensure that the monies paid are for the intended purpose, and are paid for a genuine cause. There is no power given to the CBK to question such payments if it reasonably feels the need, a shortcoming which may result in misappropriation of funds. Openness and accountability may also be hindered as a result of this dynamic.

The Equalization Fund is also administered by the National Treasury which, it is a proposition by this study, should be administered by the CRA subject to the necessary checks and balances, given the mandate of the CRA. A process similar to that in relation to the subsequent payment of monies from the Consolidated Fund, is used in payments from the Equalization Fund.

A different approach is taken in relation to the Contingency Fund, whose administration is the mandate of the Cabinet Secretary.¹³⁸The monies in the Contingency Fund are used in urgent and unforeseen circumstances which arise and threaten serious damage to human life or welfare, the environment and may result in the alleviation of the damage, loss or hardship.¹³⁹In the administration, the Cabinet Secretary is expected to seek approval of the payment from

¹³⁵ PFMA Kenya, Section 12 (1) (e)

¹³⁶ PFMA Kenya, Section 15(1).

¹³⁷ PFMA Kenya, Section 17(2).

¹³⁸ PFMA Kenya, Section 20.

¹³⁹PFMA Kenya, Section 21 (4)

Parliament after the fact, and not later than two months after the payment is made.¹⁴⁰ An approach to this may be to have a more simplified system put in place where approval can be sought faster, all the while the urgency being observed.

A Treasury Single Account is established by the National Treasury where all revenues received by the national government entities are deposited and from which all payments of monies to or on behalf of national government entities shall be made.¹⁴¹ An accounting officer of a national entity is in charge of the bank account which receives monies from the Treasury Single Account, and is to ensure that the bank account of the entity is not overdrawn beyond the limit authorized by the National Treasury.¹⁴²

The National Treasury is given the powers, notwithstanding any previous authority given, to limit or suspend national government expenditure if the Cabinet Secretary in charge of finance deems it fit¹⁴³, which provision may be used to control, for instance, expenditure in institutions where high levels of corruption are being witnessed. Equally, this is a tool that if used effectively, can result in openness and accountability being embraced by agencies at the national government level. Conversely, this provision can be used to channel money to institutions with high levels of corruption, thus enabling the vice.

In ensuring the principle of openness and accountability is adhered during the budget process, the Cabinet Secretary in charge of finance is tasked with guaranteeing public participation throughout the process.¹⁴⁴ Further to the foregoing, the PFMA provides that regulations on public participation may provide for participatory governance.¹⁴⁵ Not only is the language of the PFMA optional on matters that should be covered by the Regulations on public participation, but there is, to date, no regulations to this effect. Public participation under the PFMA therefore has no codified structure. To add to this, there is no Act that can generally guide the public participation process.

Management of public finances appropriated but not utilized must be repaid to the National Exchequer Account and a statement on the same submitted to the Controller of Budget.¹⁴⁶ While this is good for the management of public finances and ensuring proper expenditure, this is only

¹⁴⁰PFMA Kenya, Section 22(1).

¹⁴¹ibid.

¹⁴²PFMA Kenya, Section 28(4)'.
¹⁴³ibid.

¹⁴³ibid.

¹⁴⁴PFMA Kenya, Section 35 (2).

¹⁴⁵PFMA Kenya, Section 207 (1).

¹⁴⁶PFMA Kenya, Section 45(2).

possible if the government officials are honest and proper systems have been put in place to track each and every expenditure by an entity, confirming that it was warranted.

For the proper tracking of loans, the Cabinet Secretary for finance or any other person he designates, is authorized to execute loan documents for borrowing by the National government,¹⁴⁷ with an accounting officer of an entity or any person authorized by legislation to execute such document on behalf of the entity.¹⁴⁸ Additionally, the Cabinet Secretary is accountable to Parliament for the work of the Public Debt Management office.¹⁴⁹ These provisions enhance accountability as they set out the starting point, in seeking to hold a person accountable.

In promoting transparency, the PFMA provides for the responsibilities of accounting officers for the national government, Parliament and judiciary in ensuring that the resources are used in an efficient, effective, economical and transparent manner.¹⁵⁰ The PFMA requires the Internal Auditor General of each government entity to review the governance and transparency and accountability mechanisms in relation to the finances and assets of the entity.¹⁵¹ The PFMA equally places an obligation on each public officer to ensure that the resources within their area of responsibility are managed in an effective and transparent manner.¹⁵² This requirement is an extension of the requirement of public officers under chapter six of the Constitution on Leadership and Integrity .It is therefore an expectation that, in the operation of the government entities in relation to public finances, that each entity has in place proper policies on how it ensures transparency and accountability, together with how the mechanisms work and their effectiveness thereto. Only when such measures are taken, is it possible for the provisions of the PFMA to be seen as yielding the expected results.

Section 205(1) of the PFMA provides that the Cabinet Secretary in charge of finance is mandated to make regulations in tandem with the PFMA, for the effective carrying out of the PFMA. While PFMA has directed that regulations for its effective implementation be made, which has seen seventeen regulations come into force, this study will focus only on the following two regulations pertinent to openness and accountability at national level:

1. The Public Finance Management (National Government) Regulations, 2015; and

¹⁴⁷PFMA Kenya, 2012 Section 52(1) .

¹⁴⁸PFMA Kenya, Section 52(2)

¹⁴⁹PFMA Kenya, Section 64 (1) (d).

¹⁵⁰ PFMA Kenya, Section 68(1)(b)

¹⁵¹ PFMA Kenya, Section 73 (3) (a)

¹⁵² PFMA Kenya, Section 79(2) (b)

2. The Public Finance Management (Senate Monitoring and Evaluation) Regulations, 2018.

2.3.3.1. The Public Finance Management (National Government) Regulations, 2015

The Public Finance Management (National Government) Regulations, 2015 (“the National Government Regulations”) provide for, among other objectives, ensuring accountability, transparency and the effective, economic and efficient collection and utilization of public resources.¹⁵³ While there is no Act detailing how public participation should be carried out, in place, the National Government Regulations provide for the inclusion of the public in financial matters, where information is to be provided in a timely manner.¹⁵⁴ The mandate of the National Treasury in relation to public participation includes:

1. establishing a focal point to facilitate access to financial information; or
2. making information available in the media; or
3. presenting information in national languages, summarized and user-friendly forms; and
4. making financial information available on websites that allow for information to be downloaded.

This is key in ensuring that the public is well informed, with the importance of having user friendly formats having been included. The use of the media is also key in promoting openness and accountability, due to the fact that the media has evolved and is key in information dissemination. Online platforms have also been recognized as a medium of information dissemination.

The procedure for handing over of an officer leaving office has been provided for in the National Government Regulations, with provision that the same is not complete until all the documents are handed over in writing.¹⁵⁵ This promotes accountability, as it is easier to tell when an act took place.

Key to the National Regulations is Regulation 24(4) which provides that delegation of power does not take away the accountability of the Accounting Officer, which is a necessary tool in promoting openness and accountability, as it avoids blame games and confusion.

¹⁵³ The Public Finance Management (National Government) Regulations 2015, Regulation 1(v)

¹⁵⁴ The Public Finance Management (National Government) Regulations 2015, Regulation 6(1)

¹⁵⁵ The Public Finance Management (National Government) Regulations 2015, Regulation 11

2.3.3.2.The Public Finance Management (Senate Monitoring and Evaluation) Regulations, 2018

In seeking to avoid the narrative of devolved corruption since the introduction of the county governments, the Parliamentary Service Commission made the Public Finance Management (Senate Monitoring and Evaluation) Regulations, 2018 ¹⁵⁶(“the Monitoring and valuation Regulations”) to guide the Senate Sessional Committee on Monitoring and Evaluation in the proper administration of the Senate Monitoring and Evaluation Fund. This Senate Monitoring and Evaluation Fund is aimed at facilitating the monitoring and evaluation activities in exercise of the Senate’s oversight role over county governments.¹⁵⁷ The Committee is tasked with ensuring the efficiency and effectiveness in the administration of the Fund, whose end result may be seen as the promotion of openness and accountability.

2.3.4. The Public Procurement and Asset Disposal Act No.33 of 2015

By its very nature, public procurement is the acquisition of goods, works or services from entities by a public entity.¹⁵⁸

In giving effect to Article 227 of the Constitution, the Public Procurement and Asset Disposal Act (PPADA) recognizes the need for the National Treasury to design a procurement management system which promotes transparency in procurement and asset disposal within government agencies.¹⁵⁹ Additionally, the standard procurement and asset disposal documents, more specifically the tender documents, must demonstrate that they contain sufficient information to allow fairness, equitability, transparency, cost effectiveness and competition which in turn promote the principles of public finance as espoused in the Constitution.¹⁶⁰

A reading of the PPADA reveals that the statute borrowed heavily, with subtle departures, from the United Nations Commission on International Trade Law Model Law (“Model Procurement Law”).¹⁶¹ Section 2 of the PPADA provides that its purpose is to, among other objectives, promote competition and ensure fair treatment of the competitors, increase transparency and accountability in the procurement procedures and increase public confidence in those procedures.

¹⁵⁶ The Public Finance Management (Senate Monitoring and Evaluation) Regulations, 2018 Regulation 7(1)

¹⁵⁷ The Public Finance Management Regulations (n156)

¹⁵⁸ Arrowsmith Sue, Treumer Steen, Fejo Jens and Jiang Lili, ‘Public Procurement Regulation, An Introduction’, <https://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/publicprocurementregulationintroduction.pdf> accessed on 4th October 2019

¹⁵⁹ The Public Procurement and Asset Disposal Act (No. 33 of 2015), Section 7 (2) (c)

¹⁶⁰ PPADA, Section 58 (2)

¹⁶¹Thiankolu, Muthomi ‘Reconciling Incongruous Policy Objectives and Benchmarking Kenya’s Public Procurement Law: A Review of the Selex Case’ (2011) 11 451 <<http://muthomikaranja.com/wp-content/uploads/2016/02/LLM-Dissertation.pdf>>.

In the following chapter, the study will interrogate whether the PPADA has met these obligations. At this juncture however, specific attention is drawn to the effectiveness of the PPADA in promoting transparency and accountability in the procedures.

The Constitution provides that the procurement management system should promote transparency and should ensure competitiveness, a provision which is present in the PPADA. Section 29 (3) of the PPADA however goes ahead to provide for the use of restricted tendering or public procurement as an alternative procurement procedure, subject only to the procuring entity receiving written approvals from its tender committee and furnishes records in writing for use of the alternative procurement procedure. Section 74 of the PPADA then goes ahead to list the instances when direct procurement may be used, which include it being satisfied that the circumstances that gave rise to urgency were not foreseeable and no dilatory conduct can be seen on the part of the procurement agency. This argument ties in well with the fact that open tendering is considered more complex and costly to organize than less formal procedures.¹⁶² Kelman argues that open tendering acts as a bar to the exercise of prudent business management and fail to assist public agencies in achieving excellence in the pursuit of their goals¹⁶³.

Nonetheless, restricted tendering has resulted in abuse by some procurement agencies in Kenya. While this study advances the argument that despite restricted tendering not directly being referred to in the Constitution, Parliament was wise in providing for the same as it is in the interest of the public for the procurement of goods which only one person provides the good or service and that no reasonable substitute is available. Nonetheless, the abuse is seen when even in foreseeable circumstances such as the general elections held every five years, the government agency waits until the last minute to start making arrangements, which almost always ends up in direct procurement being resorted to. This not only defeats the principle of competitiveness, but also questions whether openness and accountability is achieved, as there may be seen, the abuse of discretion by a procurement entity. Additionally, concerns arise as to why, if there is more than one supplier for a good or service, the same be subjected to direct sourcing. Goods and services in relation to defense and national security should and are, understandably so, subjected to restricted tendering, due to their sensitive nature. The rest do not have justification enough, save for the highlighted instances, for restricted procurement. Illustrative to this argument is the case of *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance*

¹⁶² Discretion and supplier selection in public procurement, Baltrunaite, OECD,2016

¹⁶³Steven Kelman, *Procurement and Public Management: The Fear of Discretion and the Quality of Government Performance* (American Enterprise Institute for Public Policy Research 1990).

(NASA) Kenya & 6 others.¹⁶⁴ In this matter, which was an appeal from the High Court and previously from the PPARB, the contention was that it was believed that the award of the tender for the supply of election material to Al Ghurair Printing and Publishing LLC was predetermined and calculated to give undue advantage to the incumbent president. An argument advanced in the matter was that public participation is not mandatory in direct procurement. The Court of Appeal, in making a finding on this issue, did in fact concur with the appellant that public participation is not mandatory in direct procurement. It states thus:

“The progressive reduction of the scope and degree of competitiveness in alternative methods of procurement amongst other reasons lead us to find that public participation is not a mandatory requirement prior to a procuring entity making the decision to opt for direct procurement.

Whereas the nature of direct procurement does, to some extent, preclude public participation, the nature goods and services being procured must also be considered. In the above case, the procurement of material to be used during the general elections is, according to this study, a matter of great public importance and would only be effective if the views of the public are reflected.

In reality, transparency in relation to public procurement in Kenya is not as envisaged in the PPADA. Information about procurement plans, annual procurement statistics and details on awarded contracts are rarely posted in the government’s website as is required. Displaying this information in the Government websites goes a long way to ensure that openness and accountability is defeated.

2.3.5. The Public Audit Act No. 34 of 2015;

With the office of the Auditor General having been established under the Constitution, the Public Audit Act No. 34 of 2015 (“PAA”) provides for the functions and powers of the office. The PAA seeks to promote the principles of public finance by defining the term effectiveness to mean prudent, efficient, economic, transparent and accountable use of public funds.¹⁶⁵ This definition is instructive as it acts as a guide to public officer in their use of public resources. Similar to the National Treasury, the Auditor General is tasked with promoting efficiency, accountability,

¹⁶⁴ *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others* 2017 eKLR <http://kenyalaw.org/caselaw/cases/view/138741/> accessed on 1st October 2019

¹⁶⁵ The Public Audit Act No. 34 of 2015, Section 2

effectiveness and transparency on use of public resources,¹⁶⁶ a mandate which if strictly adhered to, will promote the principles of public finance. The role of the Auditor General, in promoting openness and accountability, includes ensuring that the office is satisfied that all public money has been use and applied for the purpose it was intended.¹⁶⁷ The role of the Public in promoting transparency and accountability is enhanced under the PAA granting access to official reports of the Auditor General in line with Article 35 of the Constitution on access to information.¹⁶⁸

There may arise however, a situation where the National Assembly may allocate fewer funds to the OAG, due to, for instance, a report which exposes poor public finance management within the National Assembly, the National Treasury or the Executive. This results in the OAG being insufficient in dispensing its duties and thus lead to substandard reports being generated which do not reflect the true position to be revealed by an audit. This is not to say that the OAG must be given the money as reflects in its budget without question, as the office may be used by corrupt officials to perpetrate various forms of malfeasance. A balance needs to be established where adequate funds are given to the office, with persons who without a doubt satisfy the requirements of integrity. Additionally, once openness and accountability is viewed both as an end and as a means to an end, the end being the effective use and management of public finances.

2.3.6. The Commission on Revenue Allocation Act No. 16 of 2011;

Established under the Constitution, the functions and powers of the CRA are provided for under the Commission on Revenue Allocation Act, whose mandate includes making recommendations to be considered by Parliament prior to it passing a Bill appropriating money from the Equalization Fund.¹⁶⁹

As earlier on stated, by their very nature, recommendations do not connote mandatory adherence, which may be subjected to abuse unless there are systems in place to ensure that there is minimal room for abuse by the relevant players. Similar to the OAG, the CRA receives some of its funds from Parliament, and this may result in frustration tactics being employed by Parliament. The independence of the CRA may, as a result, be brought to question.

¹⁶⁶ PAA, Section3(2)

¹⁶⁷ PAA, Section 7 (c)

¹⁶⁸ PAA, Section 72

¹⁶⁹ The Commission on Revenue Allocation Act, No 16 of 2011, Section (10(1)(a)

Section 10(1)(b) of the CRA Act empower the Senate to request the CRA to make recommendations to it on the basis for allocating among counties, the share of national revenue that is annually allocated to the county levels of the Government. Further, the CRA must submit recommendations on the proposals made for the equitable distribution of revenue between the levels of government to the Senate, the National Assembly, the national executive, County Assembly and the county executive.

2.3.7. The Salaries and Remuneration Commission Act No. 10 of 2011

In addition to setting and regularly reviewing the remuneration and benefits of State officers¹⁷⁰ and advising both levels of government on the remuneration and benefits of all other public officers,¹⁷¹ the powers and functions of the SRC are further enumerated under the Salaries and Remuneration Commission Act. The SRC is mandated, inter alia, with enquiring into and advising on the salaries and remuneration to be paid out of public funds.¹⁷² This is an important role the SRC plays as its recommendations have a bearing on how the National Treasury should go about allocation of remuneration to state officers, while being guided by the principle of equal remuneration to persons for work of equal value.¹⁷³ Additionally, the SRC Act sets out the procedure to be used by the various agencies mentioned earlier on, in nominating each person to sit in the SRC.

Exercising the powers to make regulations, the SRC made the Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulation, 2013 which enables the SRC to manage, harmonize and rationalize remuneration and benefits payable to State and public officers.¹⁷⁴

2.3.8. The Central Bank Act CAP 491

The Central Bank of Kenya Act CAP 491 (“the CBK Act”) provides for the operation of the Central Bank of Kenya, whose object is to formulate and implement monetary policy in order that stability in the general level of prices can be maintained.¹⁷⁵ Being the government’s Bank, the legislation is instructive in interrogating the principle of openness and accountability in public finance management.

The independence of the CBK, as enshrined in the Constitution, was also emphasized in *In the Matter of the National Land Commission*¹⁷⁶ where the Supreme Court took its time to shed light on the importance of independence clause in the Constitution. The court noted that the independence clause was incorporated following the “...regrettable memories of an all-powerful presidency that, since independence in 1963, had emasculated other arms of the government,

¹⁷⁰ The Constitution of Kenya, Article 230 (4) (a)

¹⁷¹ The Constitution of Kenya, Article 230 (4) (b)

¹⁷² The Salaries and Remuneration Commission Act No. 10 of 2011, Section 11(a)

¹⁷³ SRC Act, Section 12

¹⁷⁴ the Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulation, 2013 Regulation 3

¹⁷⁵ The Central Bank of Kenya Act CAP 491, Section 4(1)

¹⁷⁶ *In the Matter of the National Land Commission* 2015 eKLR <http://kenyalaw.org/caselaw/cases/view/116512> accessed on 20th September 2019

even as it irreparably trespassed upon the fundamental rights and freedoms of the individual.”

The court then went on to state as follows:

[60] While bearing in mind that the various Commissions and independent offices are required to function free of subjection to “direction or control by any person or authority”, we hold that this expression is to be accorded its ordinary and natural meaning; and it means that the Commissions and independent offices, in carrying out their functions, are not to take orders or instructions from organs or persons outside their ambit. These Commissions or independent offices must, however, operate within the terms of the Constitution and the law: the “independence clause” does not accord them carte blanche to act or conduct themselves on whim; their independence is, by design, configured to the execution of their mandate, and performance of their functions as prescribed in the Constitution and the law. For due operation in the matrix, “independence” does not mean “detachment”, “isolation” or “disengagement” from other players in public governance. Indeed, for practical purposes, an independent Commission will often find it necessary to co-ordinate and harmonize its activities with those of other institutions of government, or other Commissions, so as to maximize results, in the public interest. Constant consultation and co-ordination with other organs of government, and with civil society as may be necessary, will ensure a seamless, and an efficient and effective rendering of service to the people in whose name the Constitution has instituted the safeguards in question. The moral of this recognition is that Commissions and independent offices are not to plead “independence” as an end in itself; for public-governance tasks are apt to be severely strained by possible “clashes of independences”.

In line with the above pronouncements, and whereas the independence of the CBK is envisaged in the Constitution, the CBK Act under section 4C (2), states that in exceptional circumstances and after consultation with the CBK, the Cabinet Secretary in charge of finance may direct the CBK to adopt a monetary policy as specified by the Cabinet Secretary, which the CBK must adopt notwithstanding any other provision of the CBK Act. This questions whether the section is in line with the provisions of the Constitution on CBK’s independence. No exception to the independence rule has been given under law which can be used to justify the actions of the Cabinet Secretary, which can be argued as direction or control over the function of the CBK. One may argue that public policy may be invoked as an exception, noting that there is need to read

the Constitution holistically and not in isolation. Nonetheless it is important that, if an exception is given under the CBK Act, the same be outlined in clear terms, to avoid such discrepancies and doubts.

Further, there is silence on what happens if, during these consultations, CBK is of a contrary opinion, noting that the statute provides that the CBK must adopt the policy notwithstanding any other provision of the CBK Act. While it has been pronounced that independence does not connote the working in isolation of the independent institutions, the language of the Act making the adoption of CBK of the policy by the National Treasury mandatory, cannot be overlooked as not creating a panacea where the independence of the CBK can be undermined.

2.4. CURRENT DEVELOPMENTS IN THE LEGAL AND LEGISLATIVE FRAMEWORK IN THE PFM IN KENYA

The Public Finance Management (Amendment) Bill, 2019 is before the Senate, seeking to amend section 50 of the PFMA by specifying the exact limit of funds that can be borrowed as six trillion, with a need to ensure that the intended purpose for borrowing and the repayment plan is presented to the National Assembly prior to borrowing. It is also important that this Bill reflects the amount of public participation that has taken place, noting that repayment of the monies borrowed affect the taxpayers' funds and thus, they should be kept in the know. This will be a positive step in enhancing openness and accountability in the PFM system.

The Anti-Corruption and Economic Crimes Act (Amendment) Bill 2019 which sought to amend Section 48 (1) of the Anti-Corruption and Economic Crimes Act and increase the penalty of offences under Part V from not more than one million to not less than one million shillings has been rejected by the National Assembly. This therefore maintains the position advanced by the study that the punitive measures set for corrupt actions create an environment which enables the thriving of such acts, thus undermining openness and accountability in PFM. Further, the rejection by the National Assembly affirms the position that the leadership of the country is not keen to enhance transparency and accountability in the public sector.

2.5. CONCLUSION

In concluding this Chapter, this study has, in analyzing the institutional and legislative framework in relation to the principle of openness and accountability in PFM, identified both good and questionable practices. In general however, the ineffectiveness identified cannot be

wholly responsible for the poor implementation of the principle of openness and accountability. As a matter of fact, this study is advancing the argument that the law, with the identified inadequacies, is not the problem facing the implementation of the openness and accountability principle. the problem is majorly, the individuals expected to implement the recommendations and in general, the principle that will see proper use of public resources. This is discussed in the next chapter Three.

CHAPTER THREE: CHALLENGES FACING THE PROPER IMPLEMENTATION OF PUBLIC FINANCE MANAGEMENT IN KENYA

3.1.INTRODUCTION

Similar to other sub-Saharan African countries as was identified in chapter one of this study, Kenya has faced various challenges in its PFM and has seen some reforms on the same. However, despite the introduction of the reforms, which were done with the aim of revolutionising PFM to make it more effective, the system continues to experience challenges. These challenges are evident from the increase in scandals involving the public finances. There is therefore need to interrogate why, despite the rich legal and legislative framework as discussed earlier in this study, there is still no notable improvement in PFM in Kenya. Studies conducted reveal that African PFM systems in general, suffer from an implementation deficit, where relevant and efficient laws and processes are put in place, but they do not affect the actual behavior of the players.¹⁷⁷ Instructive to this study, it is reported that in Africa, the process of the preparation of the budget is stronger compared to the budget execution and oversight process.¹⁷⁸ This cannot be farther from the truth in the Kenyan context.

There is an increase in the loss of public monies, despite the major institutional and legislative reforms PFM in Kenya has undergone over the years. It has been observed that the level of accountability among public officials in the management of public affairs has consistently declined since independence.¹⁷⁹ Public money continues to be reported as lost with no proper accountability by the public officials. For the period ending 30th June 2016, the OAG noted that in Nairobi County, public funds were blatantly misappropriated, with a bulk of it being guised as expenditure on legal fees.¹⁸⁰ This is one of the many cases of misappropriation of funds at the county level as noted by the OAG, despite the presence of a legal framework on principles that should guide PFM.

¹⁷⁷ Matthew Andrews, 'PFM in Africa Where are we, how did we get here, where should we go? Lessons from recent PEFA date and World Bank Public Financial Management Performance Reports' https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwiH5q2Zpoz1AhUDoVwKHe5qDvgQFjAAegQIAhAC&url=http%3A%2F%2Fweb.worldbank.org%2Farchive%2Fwebsite01531%2FWEB%2FIMAGES%2FPFMIN_AF.DOC&usg=AOvVaw3kzFcMM9v5rFBmeLIsS7eW accessed on 8th October 2019

¹⁷⁸ Matthew Andrews, (n177)

¹⁷⁹ C. Odhiambo Mbai, 'Public Service Accountability and Governance in Kenya Since Independence' (2003) Vol 8. No. 1 <http://erepository.uonbi.ac.ke/bitstream/handle/11295/38889/Fulltext?sequence=1> accessed on 7th March 2019

¹⁸⁰ Public Accounts Committee, 'The Consideration of the Report of the Auditor General on the Financial Statements of Nairobi City County Executive for the Year ended 30th June 2016' <https://nairobiassembly.go.ke/ncca/wp-content/uploads/paperlaid/2018/PAC-Report-on-the-Auditor-Generals-Report-on-the-Financial-Statements-of-the-Executive-for-the-year-ending-June-2016.pdf> accessed on 7th March 2019

Additionally, public finance is perceived as complex, leading to minimal public participation in fiscal decision making.¹⁸¹ Further, the public participation is often viewed as a routine exercise to fulfill the constitutional obligations, rather than an avenue for receiving actual feedback and enriching service delivery by public officials.¹⁸² Inadequate public participation results in a citizenry that cannot ask informed questions and in turn, cannot hold the public officials accountable. Openness can equally not be achieved if the masses are not aware of the processes in the first place.

This chapter discusses in detail, the challenges that the PFM system in Kenya is experiencing, the relevant judicial pronouncements and the scandals involving public funds. Noting that weak management of public finances has the effect of undermining legitimacy and impeding the goal achievement¹⁸³ of a country, the importance of identifying the challenges PFM is facing cannot be gainsaid. The six challenges to be discussed are disregard of the rule of law, political patronage, weaknesses in key institutions, cultural challenges, inadequate involvement by the active civil society and technological challenges. In conclusion, this chapter will give, in summary, the effectiveness of the legal and regulatory structures pertinent *vis* the challenges identified.

This study has addressed the following challenges:

3.1.1. Disregard of the Rule of Law

The United Nations has identified the concept of the Rule of Law to mean a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated.¹⁸⁴ It follows that the Rule of law requires measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.¹⁸⁵

¹⁸¹ Institute of Certified Public Accountants of Kenya, ' Discussion Paper on Citizen Participation in Public Finance Management in Kenya' (2018) <https://www.icpak.com/wp-content/uploads/2018/05/Concept-Note-on-Effective-Citizen-Participation-in-Budget-Monitoring-and-Governance.pdf> accessed on 7th March 2019

¹⁸² There is yet to be put in place, Regulations to govern public participation in PFM

¹⁸³ Matthew Andrews, (n177)

¹⁸⁴ Report of the Secretary-General, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (2004) <https://www.un.org/en/ga/search/view_doc.asp?symbol=S/2004/616> .

¹⁸⁵ *ibid.*

The rule of law was buttressed in *S v Makwanyane*¹⁸⁶ where the court in South Africa made the following pronouncement:

“We have moved from a past characterized by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional state where state action must be such that it is capable of being analyzed and justified rationally. The idea of a constitutional state presupposes a system whose operation can be rationally tested against or in terms of the law.”

Article 10 of the Constitution recognizes the Rule of Law as one of the national values and principles of governance which bind all State organs, State officers, public officers and all persons whenever any of them makes or implements public policy decisions.¹⁸⁷ Article 259(1) (b) ¹⁸⁸ further provides for the interpretation of the Constitution in a manner that advances the rule of law. This principle is therefore enshrined in all the laws in Kenya, including those relating to PFM, and cannot be overlooked. The courts have dealt with the Rule of law in relation to the exercise of power by state organs. In *Council of Governors & 3 others v Senate and 53 others*¹⁸⁹, the court took cognizance of Article 10 of the Constitution by stating that the rule of law being a cardinal principle, requires that only powers given under the Constitution or the law is exercised by anybody or person.¹⁹⁰

3.1.1.1. The Law on Leadership and integrity

Ingredients critical for the successfully implementation of PFM and the reforms thereto include good leadership¹⁹¹ which conforms to high standards of integrity. Pertinent to the principle of openness and accountability is Chapter 6 of the Constitution on Leadership and Integrity. Recruiting, developing and retaining competent leaders and managers is important as they are tasked with the responsibility of transforming the strategic vision, goals and objectives of government into effective service delivery.¹⁹² Article 73 (b) of the Constitution provides that the authority assigned to a State Officer vests in them the responsibility to serve the people rather than the power to rule them, with the guiding principle of leadership and integrity including,

¹⁸⁶ *S v Makwanyane* SA (CC) Para 156

¹⁸⁷ The Constitution of Kenya, 2010.

¹⁸⁸ *ibid.*

¹⁸⁹ *Council of Governors & 3 others v Senate and 53 others* [2015] eKLR

¹⁹⁰ *Ibid* 2015 eKLR

¹⁹¹ Andrew Lawson, ‘Public Financial Management’ (2015) http://gsdrc.org/docs/open/reading-packs/pfm_rp.pdf accessed on 12th October 2019

¹⁹² Tsheletsane I and Fourie D, ‘Factors hindering public financial management and accountability in South Africa’ https://leadershipanddevelopmentorg.files.wordpress.com/2016/12/tsheletsane-fourie_2014.pdf accessed on 7th October 2019

accountability to the public for decisions and actions. Article 232 (1) of the Constitution also provides the values and principles of public service to include accountability for administrative acts and efficient, effective and economic use of resources. Public finances are resources which should be used in an efficient, effective and economic way. Gachagua argues that corruption is rampant in both the public and private sectors, and was to be cured by the introduction of Chapter Six of the Constitution.¹⁹³ She however posits that while the Chapter Six has been in effect since 2010, it has had a meager impact on corruption which continues to increase, with a report of new scandals with each passing day.¹⁹⁴

The Leadership and Integrity Act, No. 19 of 2014 was enacted in order that Chapter Six of the Constitution is operationalized. While it has been argued that the Leadership and Integrity Act has glaring weaknesses,¹⁹⁵ this study will focus on the standard established by the courts on matters of integrity.

In order that the principle of openness and accountability is practiced in the management of public finance, the state officers involved must take part in conduct that is beyond reproach. In *Trusted Society of Human Rights Alliance v The Attorney General and Others*,¹⁹⁶ pronouncements on the integrity of public officers was made, with the court citing with approval, the approach taken by the Supreme Court of Appeal of South Africa where the Court stated as follows:¹⁹⁷

“...In The Shorter Oxford English Dictionary on Historical Principles (1988), inter alia, the following are the meanings attributed to the word ‘integrity’: ‘Unimpaired or uncorrupted state; original perfect condition; soundness; innocence, sinlessness; soundness of moral principle; the character of uncorrupted virtue; uprightness; honesty,

¹⁹³ Gachagua Teresa, ‘Toothless Bulldog? Escalating Corruption Indices in Kenya notwithstanding Chapter Six of the Constitution’,

https://www.academia.edu/13747065/TOOTHLESS_BULLDOG_ESCALATING_CORRUPTION_INDICES_IN_KENYA_NOTWITHSTANDING_CHAPTER_SIX_OF_THE_CONSTITUTION accessed on 30th September 2019

¹⁹⁴ *ibid*

¹⁹⁵ Parliamentary Initiatives Network, Transparency International Kenya, Kenyans for Peace with Truth and Justice and Africa Centre for Open Governance, ‘Towards Hazy Horizons Implementation of Chapter Six of the Constitution of Kenya 2010’

<https://africog.org/wp-content/uploads/2015/10/Implementation-of-Chapter-Six-of-the-Constitution-of-Kenya-20101.pdf> accessed on 9th September 2019.

The Leadership and Integrity Act has been, due to the fact that it was enacted hurriedly, has been faulted for being inconsistent with the Constitution on issues such as barring holders of dual citizenship from being state officer and the widening beyond the constitutional scope, of the confidentiality requirement on public information. The Act has also been faulted for lacking a design that draws its being from best practice.

¹⁹⁶ *Trusted Society of Human Rights Alliance v The Attorney General and Others Nairobi* [2012] eKLR

¹⁹⁷ *In Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly and others Case number* [2011]

sincerity.’ Collins’ Thesaurus (2003) provides the following as words related to the word “integrity”: ‘honesty, principle, honour, virtue, goodness, morality, purity, righteousness, probity, rectitude, truthfulness, trustworthiness, incorruptibility, uprightness, scrupulousness, reputability.’ Under ‘opposites’ the following is noted: ‘corruption, dishonesty, immorality, disrepute, deceit, duplicity.’ On the available evidence the President could in any event not have reached a conclusion favorable to Mr. Simelane, as there were too many unresolved questions concerning his integrity and experience. To our mind, therefore, a person is said to lack integrity when there are serious unresolved questions about his honesty, financial probity, scrupulousness, fairness, reputation, soundness of his moral judgment or his commitment to the national values enumerated in the Constitution. In our view, for purposes of the integrity test in our Constitution, there is no requirement that the behavior, attribute or conduct in question has to rise to the threshold of criminality. It therefore follows that the fact that a person has not been convicted of a criminal offence is not dispositive of the inquiry whether they lack integrity or not. As the *Democratic Alliance* case held, it is enough if there are sufficient serious, plausible allegations which raise substantial unresolved questions about one’s integrity.” (Emphasis added)

The Court, in noting that it was the ultimate guardian of the Constitution on behalf of the people Kenya, went on to conclude in the *Trusted Society case*¹⁹⁸, that:

“...we are persuaded that this is the only approach to the interpretation of Article 73 of the Constitution which maintains fealty to the Constitution and its spirit, values and objects. Kenyans were very clear in their intentions when they entrenched Chapter Six and Article 73 in the Constitution. They were singularly aware that the Constitution has other values such as the presumption of innocence until one is proved guilty. Yet, Kenyans were singularly desirous of cleaning up our politics and governance structures by insisting on high standards of personal integrity among those seeking to govern us or hold public office. They intended that Chapter Six and Article 73 will be enforced in the spirit in which they included them in the Constitution. The people of Kenya did not intend that

¹⁹⁸ Trusted Society Case (n196)

these provisions on integrity and suitability for public offices be merely suggestions, superfluous or ornamental; they did not intend to include these provisions as lofty aspirations. Kenyans intended that the provisions on integrity and suitability for office for public and State offices should have substantive bite. In short, the people of Kenya intended that the provisions on integrity of our leaders and public officers will be enforced and implemented. They desired these collective commitments to ensure good governance in the Republic will be put into practice.”

103.It follows, therefore, that those organs and officials to whom the authority to select officials to certain State Organs and institutions are delegated have an obligation to ensure that the persons selected for the various positions meet the criteria set out in the Constitution and other legislation for those positions...”

In *Benson Riitho Mureithi vs. J.W Wakhungu and 2 others*, the court allowed the petition which questioned the suitability of the appointment of the chairman of the Athi River Water Services Board by the Cabinet Secretary for the Ministry of Environment.¹⁹⁹ In that matter, it was noted that it is trite for an inquiry to be made into the suitability for appointment into a public office, of a person, in order that their integrity to hold office is determined. Nonetheless, this sound judgment was overturned by the Court of Appeal²⁰⁰ citing that the petition before the trial court was not properly pleaded as the character changed from the original complaint of the integrity of the interested party, to consideration of the process of the interested party’s appointment. This decision by the Court of Appeal defeated the principle of leadership and integrity in public institutions. This study argues that the crux of the matter therein was the emphasis of leadership and integrity in public institutions, and that the court should have taken that placed more emphasis on that substance as compared to the form.

From the above pronouncements by the court, the appointment into public office must be of persons who meet the integrity test as stated by the courts in the cases mentioned herein. That is

¹⁹⁹ *Benson Riitho Mureithi vs. J.W Wakhungu and 2 others* [2014] eKLR

²⁰⁰ *Ferdinand Ndung’u Waititu v Benson Riitho Mureithi (suing on his behalf and on behalf of the general public) & 2 others* [2018] eKLR

the Rule of Law. Appointment of persons who have unresolved questions about their integrity therefore is a disregard of the Rule of Law, which trickles down to undermining the principle of openness and accountability later on in the dispensation of the obligations given to such persons. During the subsistence of a public officer's term in office, Article 75 ensures that integrity is adhered to at all times, and mandates disciplinary and subsequent removal of a state officer found in contravention of the tenets of Chapter six.

Perhaps the most illustrative case in relation to the issue of integrity is the clearance of Uhuru Kenyatta and William Samoei Ruto to run for elective seats in 2013 despite the serious charges they were facing before the International Criminal Court, citing the presumption of innocence.²⁰¹ It is worth noting that the presumption of innocence was mentioned in the *Trusted Society case* as not being a reason to defeat the enquiry on integrity. Additionally, the *Democratic Alliance Case* was categorical on the standard of integrity of a person to be appointed into a public office. Having their clearance and subsequent election to public offices defeated the Rule of Law on leadership and integrity.

In the government, some officials who do not meet the set standard of integrity have nonetheless been appointed to sit in public offices. The Public has also aggravated the disregard of the rule of law, by electing leaders who have been linked to corrupt practices and acts which undermine proper PFM. This has, as a result, undermined openness and accountability in the public sector, and has resulted in the unending loss of public funds.

3.1.1.2. Other laws

Disregard of the rule of law, mostly in public procurement, has been experienced in government projects which have turned out to be scandals where public funds have either been misappropriated or lost. Misappropriation or lose of public funds is contextualized under the disregard of the rule of law once it is appreciated that Article 201(d) of the Constitution is couched in mandatory terms, that as a principle of PFM, public funds must be spent in a prudent and responsible way.

The OAG has, in its report on the audit of the accounts of the National Government for the year ended 30th June 2017²⁰², gave an adverse opinion, meaning the statements were either incomplete or misleading, on the financial statements of some government entities, stating that the financial

²⁰¹ *International Centre for Policy and Conflict & 5 others v Attorney General & 5 others* [2013] eKLR

²⁰² Office of the Auditor-General, ' Summary of the Report of the Auditor-General on the Financial Statements for National Government for the year 2016/2017' www.oagkenya.go.ke accessed on 3rd September 2019.

statements availed by those entities were misleading and incomplete.²⁰³The expenditures reported in the adverse opinion amounted to Kshs.381, 724,003,401 or 25.01%.The Report went on to confirm that the financial position of the government and its funds and for the operations of that year ended were not in accordance with IPSAS-Cash Basis and further, did not comply with the Government Financial Regulations and Procedures and the PFMA. The Judiciary was included in the list of departments which received an adverse opinion from the OAG based on the financial statements it provided, which affected overall, the position of the financial statements of the Government. In the same breadth, the OAG gave a qualified opinion on the financial statements which it was stated was not pervasive but nonetheless, material. The qualified opinion was due to various unexplained discrepancies and omission of expenditure from the financial statements. In observing to the rule of law, such discrepancies should be minimal, or non-existent, if indeed there is adherence to the principle of openness and accountability. The reason why qualified opinions remain a concern which needs addressing is due to the fact that, for the year ended 30th June 2017, the qualified opinions amounted to Kshs. 922,452,891,804/- in combined recurrent and development expenditure, translating to 60.44%, which had issues.²⁰⁴ An appreciation of the report by the OAG reveals that the financial information provided by the various MDAs does not meet the standard envisioned by the PFMA and other international standards, which falls under the lack of adherence to the rule of law. Having reports that are qualified from the OAG does not reflect well on the management of public finances in Kenya and can be attributed to the disregard of the rule of law. Should the law be adhered to as codified, each and every individual in the MDAs will do their work diligently and in accordance with the law and policies put in place, resulting in a significant reduction of both qualified and adverse audit opinions.

The scandal that rocked the Maasai Mara University²⁰⁵ which witnessed the alleged misappropriation of public funds, is also evidence of the disregard of the rule of law. According to the media reports, there were allegations of abuse of office on the part of top officials within the Institution which only increased corruption and resulted in the loss and misappropriation of public funds.

²⁰³ *ibid*

²⁰⁴ Office of the Auditor General (n202)

²⁰⁵ An expose was done and aired in a local television station on Sunday 1st September 2019 on the Maasai Mara University where the whistleblowers reported that the Vice Chancellor was misappropriating money and on several occasions, asked for money to be withdrawn without following the proper channels.

All the scandals that have occurred in Kenya which involve the loss and misappropriation of public funds all have an aspect of the disregard of the rule of law. The Anti-Corruption and Economic Crimes Act²⁰⁶ defines the abuse of office²⁰⁷ as the use of a person's office to improperly confer a benefit on the person or any other person. The scandals mentioned in this study all have an aspect of abuse of office by a person, whether in making irregular payments, or influencing the making of irregular payments. The Aror and Kimwarer Dam scandal contained among other offences, abuse of office by key officials, contrary to Section 46 as read with Section 48 of ACEC. This resulted in the DPP releasing a Press Statement where he ordering the arrest of some officials including the Cabinet Secretary in charge of Finance, the Principal Secretary, National Treasury, and the Principal Secretary in the Ministry of EAC.²⁰⁸

The Accountants Act,²⁰⁹ under section 30 (2) imposes upon accountants the duty to observe the ethical guidelines and applicable standards by ICPAK, in discharging their duties. Section 30 (2B) of the Accountants Act goes further to make it mandatory for the ethical guidelines and applicable standards of the accountancy profession to take precedence over any instructions from a client or other person. The ICPAK Code of Ethics and Professional Accountants provides the fundamental principles governing accounts, one of which includes professional competence and due care to be adhered to. In this regard, accountants in various public institutions should ensure that they exercise this principle in dispensing their duties. Loss or misappropriation of public funds, comes with it, a rebuttable assumption that the accountant(s) involved did not exercise professional competence and due care. This principle is applicable to persons who may not be acting as accountants in a public organization, but are nonetheless, accountants by profession.

3.1.2. Weaknesses in key institutions

This study argues that various weaknesses in key institutions are a challenge hindering the proper implementation of PFM in Kenya. For instance, despite the fact that Kenya has introduced performance budgeting for the national government, the input based budgeting is still the norm

²⁰⁶ The Anti-Corruption and Economic Crimes Act No. 3 of 2003

²⁰⁷ ACECA Section 46

²⁰⁸ Office of the DPP, Statement by DPP regarding the ongoing investigations into matters relating to the two proposed dams, <http://www.odpp.go.ke/wp-content/uploads/2019/07/Press-statement-Aror-Kimwarer-22nd-July-2019.pdf> accessed on 30th September 2019

²⁰⁹ The Accountants Act, No. 15 of 2008

in the counties due to capacity challenges.²¹⁰ This, in turn, affects the achievement of value for money in the budget process and thus affecting openness and accountability.

Noting that this study focused only on the national government, the challenges addressed were discussed at the national level. The weaknesses witnesses in these institutions according to this study revolve around either lack of an effective human resource capacity within the institutions, lack of assertion of some level of independence from control, and little to no coordination between the key institutions in harmoniously working together. While there are many institutions that can be identified, this study concentrated on the OAG, the Judiciary and the EACC.

3.1.2.1. The Office of the Auditor General

The OAG, in seeking to enhance openness and accountability in PFM, has enabled the automation of the audit process.²¹¹ This increases efficiency in the audit process and due to the fact that the same is done by a computerized system, the chances of doctoring information are reduced drastically.

As stated earlier in the study, the Constitution recognizes the OAG as an independent office.²¹² Globally, the INTOSAI is aimed at promoting independent and effective auditing and further, supporting its members in the development of their own professional approach in accordance with the SAIs mandate and their national laws.²¹³ However, the funds of the OAG continue to be sourced from monies appropriated by Parliament.²¹⁴ This may raise questions of the independence of the OAG from Parliament, as it is perceived that Parliament may be a barrier to the OAG's independence²¹⁵ by reducing the OAG's budgetary allocation.²¹⁶ It has been

²¹⁰ World Health Organisation, 'Building strong Public Financial Management Systems towards universal health coverage: Key bottlenecks and lessons learnt from country reforms in Africa' 2018 https://www.who.int/health_financing/events/pfm-for-health-in-africa.pdf?ua=1 accessed on 8th October 2019

²¹¹ Sylvester N. Kiini, 'Auditor General's Reports and Public- Sector Accountability' <https://www.icpak.com/wp-content/uploads/2018/02/Auditor-Generals-Report-and-Public-Sector-Accountability-CPA-Sylvester-Kiini.pdf> accessed on 23rd October 2019

²¹² The Constitution of Kenya, Art 248(3) (a)

²¹³ The International Organisation of Supreme Audit Institution, 'Fundamental Principles of Public Sector Auditing' <https://static1.squarespace.com/static/57019a6db6aa607cbb909ab2/t/579931faebbd1af091fef23a/1469657594657/3.9+-ISSAI+100+-Fundamental+Principles+of+Public+Sector+Auditing.pdf> accessed on 10th January 2019

²¹⁴ PAA, S 41 (10) (a)

²¹⁵ State Audit Office of Hungary, 'The Importance of the Lima and the Mexico Declarations' (2014) <https://www.eurosai.org/handle/404?exporturi=/export/sites/eurosai/.content/documents/training/training-events/InSem2014/2.1.-The-importance-of-Lima-and-Mexico-declarations.pdf> accessed on 7th March 2018

²¹⁶ Society for International Development, 'Public Finance Reforms in Kenya: Some emerging issues and their relevance under the context of Devolution' <https://www.sidint.net/sites/www.sidint.net/files/docs/PFM%20PolicyBrief.pdf> accessed on 7th March 2019

admitted that many SAIs in the INTOSAI community continue to experience challenges on their independence.²¹⁷

A report by Transparency International further indicates that the OAG experiences inadequate financial resources, inadequate logistics, inadequate technical capacity in terms of notable gaps in the human resource capacity, inadequate preparation by the auditees and limited mandate of the OAG.²¹⁸ It is reported that there is a high turnover and poor staff retention due to the uncompetitive remuneration offered.²¹⁹

Logistical challenges have also been cited as a challenge within the OAG. This involves lack of adequate motor vehicles and office space.²²⁰

Effective and efficient service delivery by the OAG has also been hampered by inadequacy in funds channeled towards training of state counsels in emerging specialized areas.²²¹ This is a challenge that is connected to human resource capacity, but should nonetheless be highlighted separately. Specialization training is important to enable staff to have a better understanding of their mandate, which results in the overall proper performance of the OAG exercising its mandate.

For efficiency, openness and accountability to be achieved in PFM, technology is being heavily considered and implemented, leading in most functions being computerized. Despite the new automation developments in the OAG discussed hereinabove, there remains limited modernization and automation of services,²²² a fact which poses a challenge in achieving the principle of openness and accountability in the management of public finances. Limited number of computers and access to softwares has also been cited as a challenge within the OAG.

A major challenge experienced in the OAG is the inadequacy of funds and resources to sustain the fight against corruption.²²³ It is worth noting that throughout the study, corruption is the main challenge the PFM system faces. The OAG is a key institution in the fight against corruption and

²¹⁷ INTOSAI Development Initiative, 'Towards Independence' https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=8&cad=rja&uact=8&ved=2ahUKewiqqPP03u_gAhWA_A2MBHdyXC9cQFjAHegQIAxAC&url=https%3A%2F%2Fwww.idi.no%2Fen%2Flibrary%2Fcpd%2Fsai-independence-programme%2F257-sai-independence-programme&usg=AOvVaw26_-6685o87jvs-J_Bg9Lp accessed on 7th March 2018

²¹⁸ A Baseline Survey Report, 'STRENGTHENING PUBLIC AUDIT ACCOUNTABILITY IN KENYA A Baseline Survey Report'.

²¹⁹ The Judiciary, 'State of the Judiciary and the Administration of justice: Annual Report 20170-2018' <https://www.judiciary.go.ke/wp-content/uploads/sojar20172018.pdf> accessed on 3rd October 2019

²²⁰ Kiini (n211)

²²¹ The Judiciary, (n219)

²²² The Judiciary (n219)

²²³ The Judiciary (n219)

it is therefore ironical that it does not have the capacity to execute its mandate. Having limited resources to fight corruption has a ripple effect including exposing the staff to being compromised by MDAs and other public officials. This ties in well with the fact that the staff members are not well paid.

Noting that the function of the OAG as a SAI is to ensure that there is accountability in the government agencies, such challenges only result in the poor performance of its mandate, thus undermining openness and accountability in PFM. Even then, the limited awareness of the public on their role in holding the government accountable, cannot be ignored as a challenge faced by the OAG. The public has a role in ensuring that the government is accountable for how it puts to use, the public finances. It therefore follows that if the public is not well informed in this regard, the OAG is affected as the compromised staff continue to engage in questionable activities.

3.1.2.2. The Ethics and Anti-Corruption Commission

The EACC has, overtime, worked towards proving itself as effective in seeking to enhance openness and accountability in PFM. In 2018, the EACC partnered with Anti-corruption Authorities in Eastern Africa in seeking to enhance asset recovery.²²⁴ This is a positive step in seeking to enhance regional collaboration and cooperation in recovery of assets illegally obtained from misappropriation of public funds, which will see the enhancement of openness and accountability in PFM in Kenya.

In January 2019, the EACC successfully recovered and handed over to the University of Nairobi, a five-acre piece of land valued at two billion Kenya shillings which had been grabbed by a private developer.²²⁵ This increases the confidence in the EACC as an institution and provides reassurance that it can, with the right tools and mindset, be used to enhance openness and accountability in PFM.

Including the ability to make reports on corruption to the EACC through Huduma centres countrywide has greatly improved the accessibility of the EACC by the public. This encourages reporting of corruption instances and thus, enhances openness and accountability in PFM.

The EACC, despite the positive steps made, continues to face challenges which affect the dispensation of its duties. This results in the weakening of the institution. The EACC has been

²²⁴ Ethics and Anti-Corruption Commission, ‘ EACC partners with Anti-Corruption Authorities in Eastern Africa to Enhance Asset Recovery’ <https://www.eacc.go.ke/eacc-partners-with-anti-corruption-authorities-in-eastern-africa-to-enhance-asset-recovery/> accessed on 23rd October 2019

²²⁵ Ethics and Anti-Corruption Commission, ‘ Asset Recovery a key Strategy in Graft Fight’ <https://www.eacc.go.ke/asset-recovery-a-key-strategy-in-the-fight-against-corruption/> accessed on 23rd October 2019

identified as having within it, a slow judicial process, political influence thus lack of independence, inadequate cooperation between the EACC and the OAG and inadequate capacity to investigate suspected misuse of public resources.²²⁶

The independence of the EACC as an institution was emphasized in *Michael Kojo Otieno & another v County Government of Homa Bay & 9 others*²²⁷, where in dismissing the petition, the court noted that it was not feasible for the court to declare that the respondents had engaged in acts of corruption while at the same time, compel the EACC to commence investigations and prosecutions. With this pronouncement, the court was avoiding to interfere with the mandate of the EACC. The EACC should gather information on corruption occurring in government agencies and public sector. The DPP should independently prosecute cases by ensuring proper presentation of evidence and the courts should, based on the effective prosecution, make the necessary findings in ensuring that openness and accountability is upheld.

Top officials within the EACC reported that the EACC experienced inadequate financial capacity due to budget constraints.²²⁸ Further, a complaint on inadequate capacity in terms of human resources was cited as a challenge experienced by the EACC.²²⁹ Weak legal framework and general public lethargy in getting involved in the fight against corruption were also cited as major challenges faced by the EACC.²³⁰

TI has reported that the EACC as an organization, its judicial processes are too slow and that the political interest within it was very high, existence of slow processes in implementing the reports of the OAG and lack of seriousness in sentencing corrupt individuals.²³¹ As mentioned earlier on, the disregard of the rule of law has resulted in the election and appointment of public officers with questionable integrity. This has a spillover effect and is a challenge to the performance of the mandate by the EACC.²³² Internally within the EACC, individuals who do not meet the integrity test have been employed within the organization, a step which only goes to further aggravate the weakness of the institution.

²²⁶Baseline Survey Report (n 218).

²²⁷ *Michael Kojo Otieno & another v County Government of Homa Bay & 9 others* 2018 eKLR <http://kenyalaw.org/caselaw/cases/view/151236/> accessed on 3rd September 2019

²²⁸ Injene Kaome Grace and Ngahu Catherine, 'Challenges faced by the Kenya Ethics and Anticorruption Commission in Implementing the Strategies recommended by the United Nations Convention against Corruption in Kenya' *European Journal of Business and Strategic Management*, Vol 1, pp88-99, 2016 <https://www.iprjb.org/journals/index.php/EJBSM/article/view/18/57> accessed on 1st October 2019

²²⁹ Injene and Ngahu, (n228)

²³⁰Injene and Ngahu, (n228)

²³¹ Injene and Ngahu, (n228)

²³²Injene and Ngahu, (n228)

3.1.3.3.The Judiciary

The Judiciary is instrumental in the management of public finances. According to Sihanya, the Judiciary post 2010, has been constructed in a manner that it is politically, administratively and juridically empowered to execute its mandate independently²³³Its role is to authoritatively and independently implement and defend the Constitution.²³⁴In relation to PFM and in placing emphasis on the role of courts, the High Court in Madras in India is instructive. In *R. Ravichandran v The Additional Commissioner Of Police*,²³⁵ the duty of the court was reiterated thus, in relation to a police officer charged under the Prevention of Corruption Act, 1988:

“...Allowing a person charged with serious acts of corruption or any other misconduct, involving moral turpitude, to discharge his duties and enjoy the fruits of the post, would be against a public policy and it would not be in public interest or to maintain a clean and effective administration.

89. Cases involving serious charges of corruption and misappropriation of money, certainly involve moral turpitude, where there is implied depravity and villiness (sic) of character...[B]y allowing a government servant, facing serious charges of corruption or misappropriation or embezzlement, etc., to be retained in service, public interest would be affected.”²³⁶

In this regard, the courts in Kenya have proven their relevance in the management of public finances and have been active on the fight against corruption. In *Moses Kasaine Lenolkulal vs. Director of Public Prosecutions*,²³⁷ the court in declining to grant the applicant access to his office and maintain the decision of the trial court made the following pronouncement:

“In the matter before me, the Governor of a County, to whom Article 10 and Chapter Six apply is charged with the offence of abuse of office. He is charged with basically enriching himself at the expense of the people of Samburu County who elected him and whom he is expected to serve. Would it serve the public interest for him to go back to office and preside over the finances of the County that he has been charged with embezzling from? What message does it send to the citizen if their leaders are charged

²³³Ben Sihanya, ‘The Role of the Judiciary in the Accountability and Governance of the Devolved Government Structure Presentation to the Institute of Certified Public Accountants of Kenya (ICPAK) 20’ (2012) 6 1.

²³⁴ibid.

²³⁵*R. Ravichandran v The Additional Commissioner of Police* [W.P.No.12590 of 2009] <https://indiankanoon.org/doc/83803/> accessed on 21st October 2019

²³⁶*R. Ravichandran v The Additional Commissioner of Police* [W.P.No.12590 of 2009] <https://indiankanoon.org/doc/83803/> accessed on 21st October 2019

²³⁷*Moses Kasaine Lenolkulal v Director of Public Prosecutions* [2019] eKLR

with serious corruption offences, and are in office the following day, overseeing the affairs of the institution? How effective will prosecution of such state officers be, when their subordinates, who are likely to be witnesses, are under the direct control of the indicted officer?”

From the above matter, the courts are seen to be driven in making decisions which are in the interest of the public and preserving the management of public resources in a manner that is accepted by the Constitution. The same reasoning by the Court in the *Moses Lenolkulal case* was extended in barring the governor of Kiambu County from accessing office, on allegations of abuse of public office and misappropriation of public funds. This resolve by the courts in protecting public resources is evidence that courts support decisions that are made in accordance with the law and in looking out for the interest of the public.

Further, in *David Kinusu Sifuna v Ethics and Anti-Corruption Commission & 3 others*,²³⁸ the court spoke against selective justice and the practice of according different treatment to different public officers, stating that it was discriminatory to subject some public or state officers to the law but not others. Here, the courts bravely came out in speaking against discrimination and reinforced the position that all public officials should be subjected to the law equally. This is important in ensuring that in PFM, each official involved in unacceptable practice in relation to public resources is dealt with as provided by the law, while avoiding instances where top officials make their juniors take the fall for acts touching on misappropriation and loss of public funds.

The Anti-Corruption and Economic Crimes division of the High Court²³⁹ was established in Nairobi, in the interest of the effective case management and expeditious disposal of cases in the Anti-Corruption and Economic Crimes Division.²⁴⁰ The practice directions for this division of the High Court provide that all urgent applications must be heard and determined within sixty days, while all other applications be determined within ninety days, with the court having discretion to extend the time allocated. The Directions are, however, silent on the timeframe within which all matters under the division must be heard and determined, which absence may be used by individuals to frustrate the determination of a matter. All in all, the creation of this division to

²³⁸*David Kinusu Sifuna v Ethics and Anti-Corruption Commission & 3 others* [2017] eKLR

²³⁹Kenya Law, <http://kenyalaw.org/kl/index.php?id=5908> accessed on 21st October 2019

²⁴⁰PRACTICE DIRECTIONS FOR THE ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION OF THE HIGH COURT 2016.

specifically handle corruption and economic crimes matters is a major fete for the judiciary, and is a step towards enhancing openness and accountability in PFM.

It is therefore accurate to state that in general, the judiciary has made laudable strides in enhancing openness and accountability. This however, is not to mean that no challenges have been experienced. Prior to the Constitution being promulgated, the perception by the public was that the judiciary delays the access to justice. Indeed Katiba Institute reports that a major criticism of the Judiciary both in Kenya and other jurisdictions is delay.²⁴¹ Delay is however as a result of other contributing factors which disrupt the proper functioning of the Judiciary.

Noting that the Anti-Corruption and Economic Crimes division of the High Court is established in Nairobi, accessibility to this division is a challenge for those outside Nairobi. This is a major setback in seeking to enhance openness and accountability within PFM as there is no motivation for an individual to travel all the way to Nairobi, from a remote area for instance, to file a matter in the division. Further, the division in Nairobi is susceptible to being overwhelmed by the volumes of matters being filed in the division. This is mainly because the division has jurisdiction on all other matters not within the jurisdiction of the special magistrates appointed under the ACECA.²⁴²

The Practice Directions for the Anti-Corruption and Economic Crimes Division do not provide for a timeline within which the matters filed before it must be heard and determined. This is contrast with, for instance, the Fair Administrative Action Act 2015 which provides that judicial review applications must be determined within ninety days of filing.²⁴³ Even where the ACECA provides that the special magistrates appointed under the Act are to hear a matter on a daily basis until it is concluded, the same does not provide the assurance of a definite timeline.²⁴⁴ This is a major setback in enhancing openness and accountability as individuals may employ tactics which may result in matters running for many years and eventually disappearing. Further, the uncertainty on when a matter before the division will be concluded results in uncertainty on whether and when the public resources will be recovered.

²⁴¹ Katiba Institute, ‘ Achievements and failings of the Judiciary’, <https://www.katibainstitute.org/achievements-and-failings-of-the-judiciary/> accessed on 3rd October 2019

²⁴² the Anti-Corruption and Economic Crimes Division hears matters under the Anti-Corruption and Economic Crimes Act, the Proceeds of Crime and Anti-Money Laundering Act, the Anti-Counterfeit Act, the Leadership and Integrity Act, the PPADA, the Public Officers Ethics Act, the PFMA, the Extradition 9CommonwealthCountries Act)Act, The Prevention of Organized Crimes Act, the Mutual Legal Assistance Act, the Regional and International Treaties and Conventions on Anti-Corruption or any matter filed under any the enabling provision of the law.

²⁴³ Fair Administrative Action Act, 2015 Section 8

²⁴⁴ ACECA, Section 4(4)

The Judiciary in its 2017-2018 Annual Report cited challenges in human resource management and development, stating that it was in the process of engaging SRC, Parliament and the National Treasury to address the human resource and compensational challenges.²⁴⁵

Similar to the institutions mentioned previously, the Judiciary continues to face financial challenges,²⁴⁶ with insufficient allocation by the National Treasury. In deed the Judiciary has reported that it is yet to attain financial independence.²⁴⁷ This is bound to affect service delivery as there will be experienced a high turnover in staff, together with the high likelihood of staff accepting bribes in order that the course of justice is altered.

The use of information technology in achieving transparency and accountability cannot be gainsaid. Once the same is embraced in the key institutions, it will have the ripple effect of promoting the principles of PFM as enshrined in the Constitution. In making the judiciary effective, the standards of openness and accountability will increase throughout the government, with PFM being the biggest recipient. However, the Judiciary has reported that implementation and adoption of ICT solutions has faced challenges which include lack of required skills and expertise to develop and operationalize complex ICT projects and inadequate training of users in the courts.²⁴⁸ A majority of the court stations are reported to lack IC infrastructure to deploy the system, which renders the masterplan inoperable.²⁴⁹ Implementing a project without clear policies and procedures dictating the process means that the project is bound to fail. Similarly, there are no clear procedures and policies driving the implementation of the ICT masterplan, thus indicating a challenge in its operationalization.²⁵⁰

These challenges weaken the Judiciary and undermine its service delivery, which will in turn affect the attainment of openness and accountability in PFM as culprits are likely to go scot free, despite having committed offences in relation to PFM. Additionally, the delay experienced in the administration of justice only aggravates the challenges of achieving openness and accountability in PFM, as culprits will be under the impression that the delays experienced will only make it easier for them to enjoy the proceeds of their wrongdoings.

²⁴⁵ The Judiciary, 'State of the Judiciary and the Administration of justice: Annual Report 2017-2018' <https://www.judiciary.go.ke/wp-content/uploads/sojar20172018.pdf> accessed on 3rd October 2019

²⁴⁶ The Judiciary, (n219)

²⁴⁷ The Judiciary, (n219)

²⁴⁸ The Judiciary, (n219)

²⁴⁹ The Judiciary, (n219)

²⁵⁰ The Judiciary, (n219)

3.1.3. Cultural mindset

Codified in the Constitution under Article 10(2) are the national values and principles of governance which bind all state organs, state officers, public officers and all persons in general. These national values and principles are to be applied whenever one is applying or interpreting the Constitution,²⁵¹ enacts, applies or interprets any law²⁵² or makes or implements public policy decisions²⁵³. These national values and principles include good governance, integrity, transparency and accountability and in that regard, form the value system to be adhered to in the public sector.

Marvin Harris defines culture as the learned, socially acquired traditions and lifestyles of the members of a society, including their patterned, repetitious way of feeling, thinking and acting. Hofstede, a renowned scholar in cultural studies, defined culture as the programming of the mind which distinguishes the members of one group or category of people from another.²⁵⁴

A reading of Article 10 of the Constitution sets out the values which should be adhered to and which, overtime, will translate into the culture of the country. Combining the two definitions of culture as defined above, the culture of transparency and accountability should be embedded within the citizens of Kenya, through learning and acquiring the value system as codified in the Constitution. Thinking and acting within, for purposes of this study, PFM, should espouse transparency and accountability and overtime, the culture of transparency and accountability will be evident. The Constitution is therefore seeking to provide for a culture of transparency and accountability within the public sector.

In reality however, the culture of corruption is prevalent, resulting in a weakened value system and disregard of the principles and values espoused under article 10 of the Constitution. Njuguna posits that corruption is a culture which has pervaded the Kenyan social, political and economic fabric and may not be solved through legislation.²⁵⁵ Corruption refers to any abuse of a position of trust in order to gain an undue advantage and may include bribery, extortion, cronyism, nepotism, patronage, graft and embezzlement.²⁵⁶ Transparency International has defined corruption as behavior on the part of officials in the public sector in which they improperly and

²⁵¹ The Constitution of Kenya, Article 10(1)(a),

²⁵² The Constitution of Kenya, Article 10(1)(b),

²⁵³ The Constitution of Kenya, Article 10(1)(c),

²⁵⁴ Geert Hofstede, 'Dimensionalizing Cultures: The Hofstede Model in Context' (2011) <https://scholarworks.gvsu.edu/cgi/viewcontent.cgi?article=1014&context=orpc> accessed on 15th July 2019

²⁵⁵ Humphey Kimani Njuguna, 'Political Patronage on the Operationalisation of Public Procurement Law in Kenya' <https://pdfs.semanticscholar.org/95f0/317f56f82437052c213efe05904d82f8253a.pdf>.

²⁵⁶ Republic of Kenya, 'Kenya Anti-Corruption Commission Corruption Perception Survey', [Nairobi: KACC, 2010] 8

unlawfully enrich themselves or those close to them by the misuse of the public power entrusted to them.²⁵⁷

In his study which is relevant in addressing this challenge, Njuguna concentrates on abuse of public office, breach of trust, conflict of interest, misappropriation and embezzlement of public funds, theft and plunder of public resources.²⁵⁸ He notes that Kenya has leaders who have been accused of economic crimes, abuse of office among other vices and nonetheless rise to power which in turn sends a negative message to the society, specifically the youth.²⁵⁹ In return, the society ends up aspiring to be like these leaders and see no problem with abuse of office, impunity and plundering public finances. This mindset has resulted in openness and accountability not being adhered to in PFM. Corruption ranked first at 43.6%, as the major challenge facing the country, according to a survey conducted by the EACC²⁶⁰

The culture of corruption continues to rock the country, with the EACC recently recommending to the DPP that criminal charges be preferred against 33 individuals and two corporate entities over allegations of inflation of the construction of the Lake Basin Development Authority (LBDA) Shopping Mall in Kisumu by 2.5 Billion Kenya shillings.²⁶¹

The culture of corruption having been embedded into the Kenyan culture and has over time been normalized, with PFM being on the receiving end. The NYS Saga, the Arror and Kimwarer Dams scandal, the sugar and fertilizer scandal and the Kenya pipeline scandal are among the scandals experienced in Kenya, with direct relation to PFM. The Arror and Kimwarer Dams²⁶² Scandal, took an interesting turn once the irregularities and improprieties surrounding the projects came to light. President Uhuru Kenyatta proceeded to form a Technical Committee to assess the viability of the two dams and make a report to the President. In its Report, the Technical Committee recommended, which the President implemented, that while the Kimwarer Dam was to be discontinued as it was not financially sustainable, the Arror Multipurpose Dam

²⁵⁷ Wycliffe Amukowa, *The Challenges of Anti-Corruption Initiatives: Reflections on Strategies of the defunct Kenya's Anti-Corruption Commission* (Mediterranean Journal of Social Sciences, 2013)

²⁵⁸ Republic of Kenya, The Anti-Corruption and Economic Crimes Act (2003). Kenya Gazette Supplement No. 3 of May 2, 2003, p. 54. Nairobi: Government Printer.

²⁵⁹ Njuguna (n 255).

²⁶⁰ Ethics and Anti-Corruption Commission, 'National Ethics and Corruption Survey, 2017' <https://www.eacc.go.ke/wp-content/uploads/2018/11/EACC-ETHICS-AND-CORRUPTION-SURVEY-2017.pdf> accessed on 10th September 2019

²⁶¹ EACC Press Statement <http://www.eacc.go.ke/wp-content/uploads/2019/09/PRESS-STATEMENT.pdf> accessed on 10th September 2019

²⁶² The Dam scandal resulted in the loss of billions of taxpayers' money, where the Government is alleged to have paid part payments of the project, to a company known as CMC di Ravenna. It was reported that after the alleged payments were made to the Italian Company, some of the money found its way back to the Country, and was wired to some people's individual bank accounts. Both dams were found to have been overpriced at Kshs. 22.2 billion for the Kimwarer dam and Kshs. 28.3 for the Arror Dam.

was to commence, with a new design components and a cost rationalization plan.²⁶³ This executive order by the President makes no mention on how the monies already paid to the contractors for the Kimwarer Dam will be recovered. The taxpayer is therefore at a risk of losing more public funds due to the corruption practices of some public officers.

Corruption turning into a culture in Kenya is not an academic discussion. The EACC has in the past, reported that while it has collaborated with several public bodies in the fight against and prevention of corruption, the same has had minimal impact due to the deeply entrenched culture of high tolerance for corruption.²⁶⁴

Instructive to this study and an indication that the issue may not be the legal framework governing PFM, is a report by SOTU that despite the many laws enacted and institutions established to address corruption between 2013 and 2010, corruption in Kenya and Nigeria has increased.²⁶⁵ This is evidenced, according to SOTU, by the fact that Kenya had, as at 2014, never registered an anti-corruption perception index beyond 30 per cent. This remains to hold true as Kenya scored 27 percent in 2018.²⁶⁶

3.1.4. Political patronage and elite capture

Political patronage has been defined by the World Bank is symbolized by control, management and directing of public resources and the manipulation of public sector by the ruling class.²⁶⁷ Njuguna goes on to state that political patronage is either positive or negative, depending on how it is exercised.²⁶⁸

The management of public finances, due to its very nature, requires as much public participation as possible. Musgrave and Wong define elite capture as the capture of the distribution of resources, project implementation and decision making which negatively impacts non-elites or the target population or is deemed to be corrupt under the law.²⁶⁹ Studies show that participatory programs may experience elite capture and in this regard, there is need for formulation of

²⁶³ Office of the President, President Uhuru Kenyatta receives Report on Kimwarer and Aror Dam Projects, <http://www.president.go.ke/2019/09/18/president-uhuru-kenyatta-receives-report-on-kimwarer-and-aror-dam-projects/> accessed on 30th September 2019

²⁶⁴ Injene and Ngahu (n228)

²⁶⁵ Union Instruments, *Continental Compliance Report 2014 Realizing Africa 's Aspirations* (2014) <http://www.fahamu.org/resources/SOTU-Continental-Compliance-Report-2014-English1.pdf> accessed on 1st October 2019.

²⁶⁶ *ibid.*

²⁶⁷ Department for International Development (DfID) & The World Bank, 'A study on the main lessons of procurement and public administration reform efforts,' [London: Joint Publication of DfID & The World Bank Group, 2010] 3.

²⁶⁸ Njuguna (n255)

²⁶⁹ Musgrave K. Michael and Wong Sam, 'Towards a more nuanced theory of elite capture in development projects. The importance of context and theories of power' (2016) <https://core.ac.uk/download/pdf/41979773.pdf> accessed on 1st October 2019

solutions on how to avoid the same.²⁷⁰ Studies carried out by Fracken, Minten and Swinnen on capture in Madagascar showed that misappropriation of funds was greater in districts in which the program director was either a member of the local elite or had a lower level of education.²⁷¹

Political patronage is not an issue to be taken lightly as it may result in the disregard of the Rule of Law and weakening of institutions. While disregard of the Rule of Law was discussed in relation to leadership and integrity, political patronage may be used to clear for appointment, individuals whose integrity would otherwise be questionable.

Political patronage thrives where there is limited public participation in decision making. In the preparation of the budget for instance, it is not in doubt that the process is perceived as being technical and complex²⁷², resulting in the public shying away from the process. In this regard, the process is left to the ruling class to make the decisions relating to public finances.²⁷³ An illustration is given in relation to the use of program-based format in presenting the annual budget, which was first done in 2013/2014 in Kenya. IBP reported that few citizens know how to read a PBB, an indication that the public lacks information on the same.²⁷⁴ There continues to be need for a broader understanding of the PBB so as to avoid instances of elite capture where the ignorance of the public is used to the advantage of the elite.

Kenya has experienced some unmerited appointment of individuals to public offices, influenced purely by political patronage. With such actions, public resources have been on the receiving end, with reports of misappropriation and loss. The Media has gone to great lengths in reporting scandals involving misappropriation of public funds by some public officials. However, even with the hype surrounding some scandals in the early days, with promises being made that the alleged public officials will be investigated, the issues usually die down and are eventually forgotten. This is due to, among other factors, the influence of political patronage and elite capture.

²⁷⁰ World Bank, 'How Important is Capture? Localising Participation, Does Participation work?' http://siteresources.worldbank.org/INTRES/Resources/469232-1321568702932/8273725-1352313091329/PRR_Localizing_Development_ch4.pdf accessed on 1st October 2019

²⁷¹ World Bank (n270)

²⁷² ICPAK, 'Public Participation in Public Finance Management under the Constitution of Kenya 2010' <https://www.icpak.com/wp-content/uploads/2015/09/Chapters-on-Public-Participation-in-Public-Finance-Management-and-Publi.pdf> accessed on 1st October 2019

²⁷³ ICPAK, (n272)

²⁷⁴ Lakin Jason and Magero Vivian ' IBP Guide, Improving Program-Based Budgeting in Kenya' <https://www.internationalbudget.org/wp-content/uploads/Improving-Program-Based-Budgeting-in-Kenya.pdf> accessed on 8th October 2019

3.1.5. Limited oversight participation by Civil Society Organizations

As corruption remains a challenge facing Africa as a continent, CSOs remain keen on maintaining conversation and public debates aimed at putting governments on the defense in relation to their anti-corruption efforts.²⁷⁵ CSOs are considered as the bridge between the government and ordinary people, thus making their role critical in any country that considers itself a democratic state.²⁷⁶ TI is a good example of how CSOs can be used as tools for social change, through its use of the Corruption Perception Index. The importance of civil society organizations in addressing the challenges in PFM cannot be overstated. The Civil Society Organisation, having been widely recognized as an essential ‘third sector’, is identified as an important agent for change, as it results in the promotion of transparency, effectiveness, openness, responsiveness and accountability in a society.²⁷⁷ Further, incidences of corruption being brought to light are made possible by, inter alia, having vibrant CSOs.²⁷⁸ The use of these organizations as a social tool for change in a society is largely due to the fact that the citizens by themselves do not have the necessary financial muscle to call the government to order and demand accountability in the event there is violation provisions of the law, more so those resulting in the loss of public funds. The Civil Society Organizations can, through their active participation, ensure that there is effective parliamentary oversight²⁷⁹, in addition to the oversight conducted by the Executive and the Judiciary. Transparency International reports on the role of Civil Society organizations in a society, with the following five roles standing out in relation to this study:²⁸⁰

1. ensuring that the rule of law is upheld by state officers and public officers while discharging their duties;
2. ensuring that there is transparency and fairness in the distribution and use of public resources;
3. exposing corrupt conduct of public officials and advocate for accountability and good governance reforms;

²⁷⁵Union Instruments (n 265).

²⁷⁶ William Gumede, ‘ South Africa: Policy Brief 32- How Civil Society can strengthen the capacity of South Africa’s Parliament’ <https://allafrica.com/stories/201812110788.html> accessed on 14th October 2019

²⁷⁷ Parliamentary Initiatives Network (n195)

²⁷⁸ Parliamentary Initiatives Network (n195)

²⁷⁹ Parliamentary Initiatives Network, Transparency International Kenya, Kenyans for Peace with Truth and Justice and Africa Centre for Open Governance, (n278)

²⁸⁰Secretary-General (n 184).

4. ensuring accountability by government officers by instituting public litigation cases, creating public pressure and advocacy; and
5. Acting as the voice of the citizens and providing an arena for the expression of diverse interests, advocate for the needs and concerns of their public and special groups.

In Kenya, the Constitution, under Articles 10, 129 and 232, provides for the participation of people in the execution and implementation of all facets of the law, including without limitation, participation in policy making. CSOs in Kenya are credited with steering some of the many progressive changes seen in Kenya, such as the enactment of the 1990 NGO Act which the Government did not support, and the removal of the removal of the single party KANU and replacing it with the multi-party politics in the 1990s.²⁸¹ Additionally, CSOs have been engaged in areas related to PFM since 2000, such as participating in budget hearings and assisting with the production of public expenditure tracking surveys.

CSOs require support so as to organize awareness on democracy, good governance and transparency.²⁸² A survey report however indicates that CSOs face hostility and non-cooperation from government, which in turn makes it difficult for them to carry out their function as stated hereinabove.²⁸³ Additionally, it has been reported that despite being active, the sustainability of CSOs in Kenya remains in question, with a study showing that they are restricted in their resource mobilization and advocacy activities, thus depending heavily on donors.²⁸⁴ It is also worth noting that the CSOs are yet to fully appreciate and take advantage of the public participation principles, processes and mechanisms available to them in carrying out their mandate,²⁸⁵ thus posing a visibility challenge for them and further, not making them as a ‘third sector’, felt in the exercise of their mandate.

Governments have also been accused of shrinking civic spaces by employing tactics such as making it hard for the CSOs to obtain work permits and visas, restricting financing from foreign donors and harassment of staff and partners, with some resulting in the staffs’ arrest and

²⁸¹Sammy M Keter Rapporteur, ‘STATE OF CIVIL SOCIETY IN KENYA Challenges and Opportunities A REPORT OF CSO DIALOGUES IN KENYA’.

²⁸²Union Instruments (n 265).

²⁸³Baseline Survey Report (n 218).

²⁸⁴Union Instruments (n 265).

²⁸⁵A Status Report, “ *TOWARDS A PROTECTED AND EXPANDED CIVIC SPACE IN KENYA AND BEYOND* ” A Status Report and Strategy Paper Developed for the Civil Society Sector in Kenya (2016).

intimidation.²⁸⁶ In Kenya, the government frustrated the mandate of the CSOs by deregistering several local and international institutions involved in the civic space.²⁸⁷

CSOs have come up with ways to counter some of the challenges they face, including high level engagement with global bodies such as FATF, network building within subsectors and looking into global, regional and national conferencing to learn and adopt best practices.²⁸⁸ Nonetheless, the challenges have resulted in the low level of activities by CSOs in Kenya.

3.1.6. Technological challenges

In March 2013, the Government of Kenya launched the Public Financial Management (PFM) Reform Strategy.²⁸⁹ For the period between 2013 and 2018, the Government reported that it expected to have full integration of IFMIS with other PFM systems in a bid to minimize manual operations and enabling more accuracy and timelines of reporting across all financial operations MDAs and counties. Further, the Government was keen on establishing, within the period, secure, reliable, efficient, effective and fully integrated public financial management systems in both national and county governments. Coupled with the PFM reforms, the Government had capacity building actions which would cover technical skills and acquisition of equipment needed to manage, implement and sustain the reforms.²⁹⁰

Nonetheless, it has been reported that IFMIS continues to face poor connectivity challenges and further, being prone to abuse despite the restrictiveness to access by unauthorized persons.²⁹¹ Specifically in the access by unauthorized personnel, it was reported that some governors' spouses had access to the system.²⁹² Further, ICPAK shows that IFMIS is prone to security challenges such as cyber-attacks and IT security.²⁹³ Shortage of management capacity and resources and poorly implemented trainings are also among the myriad of challenges that

²⁸⁶ibid.

²⁸⁷Rapporteur (n 281).

²⁸⁸Baseline Survey Report (n 218).

²⁸⁹ The National Treasury, 'The Strategy for Public Financial Management Reforms in Kenya 2013-2018' Revised in June 2016 https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=2ahUKEwiv65jwo8bkAhUPA2MBHYSTAXUQFjABegQIABAC&url=http%3A%2F%2Fwww.treasury.go.ke%2Ftax%2Ffacts.html%3Fdownload%3D696%3Athe-strategy-for-public-financial-management-reforms-in-kenya-2013-2018&usg=AOvVaw0vYtiuq1pZTFEOXcg6_SsK accessed on 10th September 2019

²⁹⁰ ibid

²⁹¹ The Kenya Institute for Public Policy Research and Analysis, 'Strengthening Public Finance Management System to support Development in Counties' <http://kippra.or.ke/strengthening-public-finance-management-system-to-support-development-in-counties/> accessed on 1st October 2019

²⁹² The Senate, The Hansard, 25th July 2019 <http://www.parliament.go.ke/sites/default/files/2019-07/Thursday%2C%2025th%20July%2C%202019.pdf>

²⁹³ ICPAK, 'The benefits, challenges and way forward for IFMIS in Kenya' <https://www.icpak.com/wp-content/uploads/2017/07/The-benefits-Challenges-and-way-forward-of-IFMIS-in-Kenya.pdf> accessed on 1st October 2019

IFMIS continues to face.²⁹⁴As a result of the aforementioned challenges, IFMIS does not perform at optimum level and thus openness and accountability in PFM is defeated.

Technological challenges are not only experienced in the use of IFMIS. The Senate Hansard revealed that there are in fact, multiple engines and systems being used.²⁹⁵ It was further revealed that there is reported mischief in how the various systems are used. While it is important for there to be technological options in relation to the management of finances so as to avoid instances of monopoly²⁹⁶ by one system and further, to facilitate a backup system in the event one system is not function, having many engines make the waters murky. South Africa for instance, has in recent years, used simultaneously, at least six financial systems, which result in duplicate or conflicting reports.²⁹⁷ Openness and accountability in such instances is compromised.

Limited services at the OAG have been automated,²⁹⁸a challenge which is technological in nature and thus, affects the proper achievement of openness and accountability within the PFM system. Whilst technology is a tool that is being used in adhering to the principles of PFM as enshrined in the Constitution, it remains underutilized in the OAG. This therefore means that most of the operations of the OAG remain analogue, a practice which is slowly becoming archaic.

3.2. Conclusion

An analysis of the six challenges hereinabove reveals an interconnection between some challenges. For instance, disregard of the rule of law is closely connected with political patronage and elite capture, where the political class and the affluent in the society manipulate the law to fit their needs. These individuals also blatantly disregard the tenets of the law in order that they can have things done to their advantage. In failing to take into account the importance of adhering to the leadership and integrity provisions, individuals who are appointed or voted in and who do not meet the integrity threshold, are susceptible to control by the political and elite class, due to the fact that they do not hold in regard, the value system as enumerated in Article 10 of the Constitution. The cultural mindset can also be attributed to the disregard of the rule of law, where the public are subjected to seeing leaders with questionable attributes, being elected or

²⁹⁴ ICPAK (n293)

²⁹⁵ The Senate, The Hansard, 25th July 2019 <http://www.parliament.go.ke/sites/default/files/2019-07/Thursday%2025th%20July%202019.pdf>

²⁹⁶ It was reported in the Senate that there is monopoly on adaptability and serviceability being experienced by the National Treasury insisting on the use of IFMIS, yet there are many other enterprise resource-planning platforms that can be used.

²⁹⁷ World Health Organisation, ' Building strong Public Financial Management Systems towards universal health coverage: Key bottlenecks and lessons learnt from country reforms in Africa' 2018 https://www.who.int/health_financing/events/pfm-for-health-in-africa.pdf?ua=1 accessed on 8th October 2019

²⁹⁸ The Judiciary (n219)

appointed to senior public offices. Further, ignoring the consequences of abuse of office, corruption and other forms of malfeasance as set out in the law has resulted in a culture where misappropriation of funds is not given the attention it deserves.

Limited oversight by the CSOs may be attributed to political patronage and elite capture, and limited adherence to the rule of law, which demotivates the activities of the CSOs.

Technological challenges being experienced in the key institutions contribute to weakening the institutions, thus inhibiting the implementation of the principle of openness and accountability in PFM.

CHAPTER FOUR: LESSONS FROM THE REPUBLIC OF SOUTH AFRICA

4.1.Introduction

This Chapter discusses in detail, the legislative and institutional framework governing PFM in South Africa. A detailed analysis of how South Africa achieves openness and accountability in PFM is covered, with the useful lessons that Kenya can borrow being noted. By studying the South African perspective in relation to openness and accountability in PFM, this study does not insinuate that the PFM system in South Africa has the perfect model.

PFM systems should, in general, achieve among other objectives, allocative efficiency of public resources and openness and accountability.²⁹⁹ Whereas it has been observed that programme evaluations or value for money audits are not common in developing countries, South Africa has been identified as a middle income country which regularly carries out these programs.³⁰⁰ Kenya will make commendable strides should in draw lessons from South Africa.

Reports by the International Budget Partnership and as far back as 2011, South Africa was named among the few countries which had very extensive mentions of transparency in budget legislation as compared to Kenya, which was observed as being among the countries with minimal mentions of transparency in budget legislation.³⁰¹ It would therefore be of much help, to carry out a comparative study on South Africa as they have long before Kenya, included openness and accountability in their statutes. The PFMA 1999 of South Africa was enacted in the context of major budget reforms after the end of the Apartheid Regime, with transparency as one of its main objectives.

According to a report by TI, South Africa scored 43 out of 100 in the CPI for the year 2018 as opposed to Kenya which scored 27 out of 100. Further, South Africa ranked 43rd out of one hundred and eighty countries, a better position compared to Kenya which ranked one hundred and forty four.³⁰² With better rankings compared to Kenya, a study of the South African position will be instructive in achieving openness and accountability in Kenya.

The selection of South Africa for analysis is due to the fact that compared to Kenya, it is argued that South Africa has more effective procurement regulatory responses to the incidence of

²⁹⁹Andrew Lawson, (n191)

³⁰⁰ibid.

³⁰¹International Budget Partnership, ‘ Transparency and Participation in Public Financial Management: What do Budget Laws say?’ 2011 <https://www.internationalbudget.org/wp-content/uploads/Research-Note-1-Transparency-in-Public-Finance-Laws1.pdf> accessed on 23rd September 2019

³⁰² Transparency International, Corruption Perception Index 2018, <https://www.transparency.org/cpi2018> accessed on 23rd September 2019

corruption, favoritism and other forms of malfeasance in public procurement decision making.³⁰³ Further, Kenya has, in text and structure, borrowed largely from the procurement laws of South Africa. In general, some of the texts of Kenya's laws are, heavily borrowed, from the South African laws. For instance, the Constitution of Kenya, the PFMA and the regulation of procurement and the Public Audit Act are similar to those in South Africa. In studying PFM in South Africa in relation to openness and accountability, helpful lessons will be dawn. This is due to the fact that the study is cognizant to the fact that the South African laws have withstood the test of time and in that regard, practical solutions are formulated.

4.2.The Legislative and Institutional Framework governing Public Finance Management in the Republic of South Africa

4.2.1. The Constitution of the Republic of South Africa, 1996

Adopted on 8th May 1996, Chapter Thirteen of the Constitution makes provision for Finance. From the onset and what this study considers conspicuous in the Constitution of South Africa, is the lack of a provision on the principles of PFM as compared to Kenya which dedicates Article 201 to address the principles governing PFM. Even in the absence of such a provision, South Africa still manages to somewhat entrench the principle of openness and accountability in its PFM system

Section 213³⁰⁴ makes provision for the National Revenue Fund, where all the monies received by the national government must be paid, save for money reasonably excluded by an Act of Parliament. In comparison, the National Revenue Fund in South Africa is equal to the Consolidated Fund administered by the National Treasury in Kenya. Monies from the National Revenue Fund are withdrawn only in terms of an Act of Parliament or as a direct charge against the National Revenue Fund when provided for in the Constitution or an Act of Parliament.³⁰⁵ Section 214 provides for the equitable shares and allocation of revenue raised nationally, among the national, provincial and local spheres of Government, with a directive for the determination of each province's equitable share of the provincial share of that revenue. This can be compared to the provision of equitable distribution of revenue among the counties in the Kenyan context.

³⁰³ Muthomi Thiankolu in Journal on Financing for Development, 'Using Public Procurement as a toll of economic and social development policy in Kenya: Lessons for the United States and South Africa' vol 1 2019 pg 97-126

³⁰⁴ The Constitution of the Republic of South Africa, 1996

³⁰⁵ The Constitution of the Republic of South Africa, Section 213 (2)

In the Provincial context, the Constitution provides for the Provincial Revenue Fund into which all monies received by the provincial government must be paid.³⁰⁶

The Constitution provides for the enactment of an Act of Parliament for the equitable shares and allocations of revenue only after consultation with the provincial governments, organized local government and the Financial and Fiscal Commission.³⁰⁷ Section 215, pertinent to this study, provides that the National, Provincial and municipal budgets and budgetary processes must promote transparency, accountability and the effective financial management of the economy, debt and public sector. Section 215 (2) (c) then goes further to state that the national legislation must prescribe ways in which proposed expenditure will comply with national legislation. This means that in South Africa, the budget and budgetary process must be clear on how transparency and accountability shall be promoted in the proposed expenditure, as there is need for compliance with the principles as set out in the Constitution and the legislation.

The constitutional provision for the content of budgets in each sphere of government in South Africa, is similar to Article 220(1) of the Constitution of Kenya on form, content and timing of budgets. Key to the South African Constitution that is missing in the Constitution of Kenya is the emphasis that the budget and the budgetary process must demonstrate how the proposed expenditure will ensure compliance with national legislation. This is an indication that compliance with transparency and accountability in South Africa is a constitutional directive that must begin at an early stage and prior to budget approval, as compared to Kenya whose Article 226 provides for the enactment of an Act which ensures both expenditure controls and transparency in all governments and the establishment of mechanisms to ensure the same is done, after the budgetary process fact. A higher threshold for compliance has been set in South Africa with the express provision for transparency as a tenet in the budgetary processes, being set out in the Constitution.

Section 216(1) of the Constitution of South Africa, similar to Article 226 (1) of the Constitution of Kenya, provides for the establishment of the National Treasury through national Legislation. South Africa however goes on to mandate that the national legislation must make provision which ensures both transparency and expenditure control in each sphere of government is adhered to by introducing generally recognized accounting practices, uniform expenditure classifications and uniform treasury norms and standards, a step which can be argued to guide

³⁰⁶ The Constitution of South Africa, Section 226 (1)

³⁰⁷The Constitution of the Republic of South Africa, Section 214 (2)

and bring more clarity in the way the National Treasury carries out its duties. Section 216 (2) of the Constitution of South Africa empowers the national treasury to stop where necessary, the transfer of funds to an organ of state if the organ commits a serious or persistent material breach of Section 216 (1), that is, the state organ does not adhere to the generally recognized accounting practices, uniform expenditure classification and uniform treasury norms and standards. Comparatively, the Constitution of Kenya leaves it to the legislation to come up with the measures to ensure the implementation of expenditure controls and transparency.³⁰⁸ Similarly, the National Treasury in Kenya has the mandate to stop the transfer of funds to a state organ which is serious or persistent material breach of the measures set out in the legislation. While both Kenya and South Africa provide for the powers of the National Treasury to stop the transfer of funds to a state organ, there is a variance in the period of such stoppage, with Kenya providing that the stoppage should not be for more than sixty days³⁰⁹, and South Africa providing for not more than one hundred and twenty days at a time.³¹⁰ What is interesting in the Kenyan context is that the stoppage of transfer is for not more than fifty per-cent of the funds due, whereas in South Africa, the wording of the Constitution seems to impose no limit. One can argue that the powers given to the National Treasury of South Africa in this regard, are immense and could actually be used to cripple a state organ or a province, if not monitored. This is unlike its Kenyan counterpart where the state organ is assured of getting at least fifty percent of the appropriation. To counter the likely avenue of abuse by the National Treasury in South Africa, Parliament may approve or renew the decision to stop the transfer subject to the Auditor General giving a report to Parliament.³¹¹ Such decision in Kenya is subject to a report being given to Parliament by the Controller of Budget.³¹² Giving the Auditor General the onus of producing such a report is a better way of approaching the implementation of openness and accountability as part of the duties of the OAG is to audit MDAs. The OAG therefore, being a technical person and more familiar with the operations of the MDAs as compared to the Controller of Budget, is better placed in advising Parliament, based on the record the organ has on matters audit.

Similar to Kenya's Article 227, South Africa under section 217 provides for a procurement system which is fair, equitable, transparent, competitive and cost-effective. Kenya however goes ahead to raise the bar higher in relation to factors to be taken into account in conducting

³⁰⁸ The Constitution of Kenya, Article 226 (2)

³⁰⁹ Constitution of Kenya, Article 226 (5)

³¹⁰ The Constitution of South Africa, Section 216 (3) (a),

³¹¹ The Constitution of South Africa, Section 216 (5) (a),

³¹² The Constitution of Kenya, Article 226 (7)

procurement, providing for sanctions against contractors who have not performed in accordance to professionally regulated procedures, contractual agreements or legislation.³¹³ Further, sanctions against tax obligation defaulters, persons found guilty of corrupt practices or serious violations of fair employment laws and practices.³¹⁴

Section 219 of the Constitution of South Africa provides for the remuneration of persons holding public office, with Parliament tasked with coming up with an Act establishing the framework for determining the salaries, allowances and benefits therein, together with the upper limit of salaries, allowances or benefits of members of provincial legislatures, members of Executive Councils and members of Municipal Councils of the different categories. Recommendations concerning the salaries, allowances and benefits are to be done by an Independent Commission to be established by national legislation as stated under section 219(2) of the Constitution. There is no glaring difference between the constitution of Kenya and that of South Africa in relation to the remuneration, with the independent commission of South Africa being the equivalent of the SRC in Kenya.

4.2.2. The Public Finance Management No. 1 of 1999

Among its objectives, the PFMA 1999 was enacted to ensure that all revenue, expenditure, assets and liabilities of the national and provincial governments are managed effectively and efficiently.³¹⁵ The short title is further complimented by section 2 where transparency, accountability and sound management forms the basis of the application of the PFMA 1999.

The PFMA 1999 expressly defines overspending and unauthorized expenditure. While these definitions may be viewed as obvious and not warranting inclusion in the statute book, their inclusion results in enhancing openness and accountability, as it negates any doubt that may arise in the event issues on the same arise.

The National Treasury of South Africa under section 6 of the PFMA 1999, is mandated with promoting and enforcing transparency and effective management of public finances,³¹⁶ similar to the role given to the National Treasury in Kenya. The National Treasury is further mandated under statute to assist departments and constitutional institutions in building their capacity for efficient, effective and transparent financial management, although the language of the statute is

³¹³ The Constitution of Kenya, Article 227 (2) (c)

³¹⁴ The Constitution of Kenya, Article 227 (2) (c)

³¹⁵ The Public Finance and Management Act, No. 1 of 1999, Short Title

³¹⁶ PFMA South Africa ,Section 6 (g)

not in mandatory terms.³¹⁷In contrast, this mandate in Kenya, is given to the Cabinet Secretary in charge of Finance, which mandate is exercised only by agreement.³¹⁸The approach taken by South Africa in tasking the whole National Treasury is much more effective in ensuring that other constitutional institutions are implementing practices which work towards openness and accountability in PFM, as compared to tasking only the cabinet secretary, as done in Kenya. The South African approach reduces the multiplicity of agents and thus, is easier in establishing accountability. In the Kenyan context, instead of putting only the cabinet secretary to task, the department in charge will also be expressly included in explaining any discrepancies and be held accountable.

The National Treasury also has the powers to withdraw exclusions granted to a national department, a constitutional institution or a national public entity if it of the view that such an act will be necessary for transparency or more effective and accountable financial management.³¹⁹ In South Africa, certain institutions such as the Auditor.

4.2.3. The Preferential Procurement Policy Framework Act No. 5 of 2000

As codified in the General Procurement Guidelines, public procurement in South Africa is anchored upon certain core principles of behavior referred to as the Five Pillars of Procurement.³²⁰ They are value for money, open and effective competition, ethics and fair dealing, accountability and reporting and equity.³²¹

The PPPFA and the regulatory framework for South Africa in general seeks to address and correct the negative effects of apartheid through preferential procurement and enterprise development for businesses owned by historically disadvantage groups.³²² The apartheid system was characterized by discrimination, where state sanctioned racial discrimination and segregation was widely practiced.³²³ During the apartheid system, the white-owned and well established businesses were favored to the detriment of black-owned and small, medium and

³¹⁷ PFMA South Africa, Section 6 (2) (d)

³¹⁸ PFMA Kenya, Section 46(1) (b)

³¹⁹ PFMA South Africa, Section 14 (1) (b)

³²⁰ Government of the Republic of South Africa, 'General Procurement Guidelines' <http://www.treasury.gov.za/legislation/pfma/supplychain/General%20Procurement%20Guidelines.pdf> accessed on 8th October 2019

³²¹ Government of the Republic of South Africa, (n320)

³²² Christopher McCrudden, Buying Social Justice: Equality, Government Procurement, & Legal Change (OUP 2007) 14;

³²³ Thiankolu (n303)

micro enterprises.³²⁴The procurement law in South Africa is largely inspired by the USA experience based on the common history of racial segregation and race-based procurement preferences in both countries.³²⁵

The PPPFA gives state organs discretion to determine and implement its preferential procurement policy within defined parameters as set out in the PPPFA.³²⁶With this provision, significant discretion is given to MDAs in South Africa to integrate various socioeconomic objectives into public procurement.³²⁷ With this wide discretion, there is decentralized decision making, managerial flexibility and achievement of goals, as compared to compliance with the rules set.³²⁸ Discretion is open to abuse and in fact, it has been reported that South Africa has faced challenges relating to corruption, favoritism and other forms of malfeasance as a result of this broadened discretion in public procurement.³²⁹ Whereas wider discretion in public procurement is open to abuse, restricting discretion in public procurement often deprives managers of discretion as they lack authority to make decisions that would promote efficient use of public resources to achieve public goals.³³⁰

Under the Preferential Procurement Regulations, a balanced scorecard must form part of the evaluation criteria in all bids.³³¹ It is through this balanced scorecard and how points were awarded to the successful bidder that openness in public procurement is achieved. This balanced scorecard measures the Broad-Based Black Economic Empowerment and thus, is used to address the historical injustices experienced during apartheid. The PPPFA and the Preferential Procurement Regulations introduce openness and accountability in public procurement in South Africa as they are not only anchored on the Constitution of South Africa, but also the PFMA 1999. Additionally, the preparation of these instruments was done with the drafters having an actual need in mind that needed addressing, thus making the instruments relatively successful in attaining their objectives.

³²⁴ Phoebe Bolton, 'Government Procurement as a Policy Tool in South Africa' (2006) 6 (3) Journal of Public Procurement 193, 195-196.

³²⁵ McCrudden (n322),

³²⁶ The PPPFA, S 2(1)

³²⁷ Thiankolu (n303)

³²⁸ Government Accountability Office, ' Bid protests, Appropriation Law other Legal work' <https://www.gao.gov/legal/> accessed on 8th October 2019

³²⁹ Thiankolu (n303)

³³⁰ Joshua I. Schwartz, 'Regulation and Deregulation in Public Procurement Law Reform in the United States', https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=2ahUKewi1rbjt4aTjAhWBxoUKHSgKAQwQFjACegQIABAC&url=http%3A%2F%2Fwww.ippa.org%2Fimages%2FBOOKS%2FIPPC%2FChapter_9.pdf&usq=AOvAw0N4EzOSngzriYxQ5TEFJve accessed on 8th July 2019

³³¹ The Preferential Procurement Regulations, Regulation 4(1)

Regulation 15 of the Preferential Procurement Regulations provide for a penalty ‘more severe than the theoretical preference associated with the claim which was made in the bid’ should an organ of state detect that a preference in terms of the PPPFA was obtained on a fraudulent basis.³³² With this penalty, it has been argued that the procurement laws in South Africa are designed to ensure that the cost of engaging in corruption, fraud, favoritism and other forms of malfeasance exceed the presumptive benefits.³³³ This in turn enhances openness and accountability in PFM in South Africa. In sharp contrast, the PPADA provides for a general penalty and sanctions of either a fine not exceeding four million shillings, imprisonment for a term not exceeding ten years or to both, if the person convicted is a natural person.³³⁴ In relation to a body corporate, the PPADA provides that the fine should not exceed ten million shillings.³³⁵ Nonetheless, the PPADA provides, in addition to the penalties referred to, the subjecting of a public officer involved, to internal disciplinary action, and debarment for persons not state or public officers,³³⁶ for a period not less than three years.³³⁷ Debarment and prohibition from working in a government entity or where the government holds shares for a period of ten years³³⁸ under the PPADA extends to persons who divulge confidential information under section 66 of the PPADA. The PPADA in this context, inadvertently refers to section 177 (1) (f) as containing an offence for debarment, which section is nonexistent. It therefore only means that the PPADA meant to refer to section 176 (1) (f) of the PPADA.

4.2.4. The Promotion of Access to Information Act, 2000

The PAIC was enacted in order that it may, among other objectives, foster a culture of transparency and accountability in public and private bodies by giving effect to the right of access to information.³³⁹ This applies to transparency in the South African PFM system. In seeking to achieve openness and accountability in the public sector, section 9 provides that PAIC should strive to empower and educate everyone to, inter alia, understand the functions and operations of public bodies³⁴⁰ and enabling them to scrutinize and participate in decision making by public bodies that affect their rights.³⁴¹

³³² The Preferential Procurement Regulations, Regulation 15(1)

³³³ Thiankolu (n303)

³³⁴ PPADA, Section 177(a)

³³⁵ PPADA, Section 177(b)

³³⁶ PPADA, Section 176 (3)

³³⁷ PPADA, Section 41(4)

³³⁸ PPADA, Section 67 (5)

³³⁹ PROMOTION OF ACCESS TO INFORMATION ACT 2 OF 2000’ (2008) 32 1.

³⁴⁰ *ibid.*

³⁴¹ *ibid.*

4.2.5. The Prevention and Combating of Corrupt Activities Act, 2004

South Africa, as referred to previously, is hailed for having a more stringent regime in combating abuse of discretion, corruption, fraud and other forms of malfeasance in public procurement. In relation to debarment of persons, the PCCA extends the same to persons involved in management of such companies and enterprises established by such persons or companies in the future.³⁴² Jurisdiction under the PCCA to impose sanctions is given to all juridical officers irrespective of rank, which ensures that the challenges brought in by pecuniary jurisdiction do not hinder the administration of the penalties.³⁴³ This is key in enhancing openness and accountability.

4.2.6. The Public Audit Act, 2004

The Public Audit Act, in repealing the Auditor General Act, seeks to give effect to the provisions of the 1996 Constitution which establishes and assigns functions to the AGSA.³⁴⁴ The Auditor-General is appointed in office for a fixed, non-renewable term of between five and ten years.³⁴⁵ The preamble of the Public Audit Act in assigning supreme auditing functions to AGSA,³⁴⁶ and recognizing the Auditor General as the SAI in South Africa,³⁴⁷ expressly prohibits any person or state organ from interfering with the functions of AGSA.³⁴⁸ The Auditor General of South Africa is accountable to the National Assembly,³⁴⁹ with PAC mandating the Auditor General with submitting annually, a report to the National Assembly, of his or her activities and the performance of his or her functions.³⁵⁰ Oversight over the Auditor General is through an oversight mechanism which must be provided for by the National Assembly,³⁵¹ with an external auditor being appointed on a yearly basis by the oversight mechanism.³⁵² In Kenya, contrastingly, the external auditor is appointed for a period of four years,³⁵³ which is arguably, enough time for the independence of the external auditor to be compromised. South Africa's approach is much more effective as the constant shuffling of the external auditors reduces the risk of compromise.

³⁴² The Prevention and Combating of Corrupt Activities Act, 2004 Section 28(1) (d)

³⁴³ PCCA, Section 26 (4)

³⁴⁴ The Public Audit Act No. 25 of 2004, Short Title

³⁴⁵ Constitution of South Africa, 1996, Section 189

³⁴⁶ PAA South Africa, Section 2 (a)

³⁴⁷ PAA South Africa, Section 3(a)

³⁴⁸ PAA South Africa, Preamble

³⁴⁹ PAA South Africa, Section 3(d)

³⁵⁰ PAA South Africa, Section 10

³⁵¹ PAA South Africa, Section 10 (3)

³⁵² PAA South Africa, Section 39

³⁵³ The National Assembly, 'Report of Public Accounts Committee on Procurement of External Audit Service for the Office of the Auditor General for the Financial years 2014/15, 2015/16, 2016/17 and 2017/18' <http://www.parliament.go.ke/sites/default/files/2019-07/Report%20of%20PAC%20on%20Procurement%20of%20External%20Audit%20Services%20for%20the%20OAG.pdf> accessed on 10th October 2019

The PAA provides for the accountability in relation to irregular or fruitless and wasteful expenditure in AGSA, where the Deputy Auditor General is liable for the such expenditure authorized by the Deputy Auditor General.³⁵⁴ PAC goes further to make the Deputy Auditor General liable for irregular or fruitless and wasteful expenditure expenditures authorized by the Auditor General, unless the deputy auditor General can prove that he informed the auditor General, in writing, that the expenditure would be fruitless or wasteful, and the Auditor General nonetheless went ahead and authorized the expenditure.³⁵⁵ This is unlike the position in Kenya where the Public Audit Act only adopts the definition of wasteful expenditure as envisaged in the PFMA, but makes no further reference to it. Even under the PFMA, the wasteful expenditure is used only in the context of the county government and no reference to the national government. One is therefore left to wonder whether this was an inadvertent and honest oversight on the part of the Legislature.

4.3. Institutional Framework

4.3.1. The Financial and Fiscal Commission

The Financial and Fiscal Commission is established under Section 220 of the Constitution of South Africa, whose mandate is to make recommendations envisioned under the chapter Thirteen of the Constitution or national legislation, to parliament, provincial legislatures and other authorities determined by national legislation. The FFC plays a similar role to the CRA,³⁵⁶ with the president constitutionally mandated to appoint the members,³⁵⁷ and their tenure established in terms of national legislation.

The FFC, in the delivery of its mandate, ascribes to values which include openness and transparency, humility, integrity and honesty in all its undertakings.³⁵⁸ The CEO of the FFC reported that for the 2018/2019 period, it met all its planned delivery targets and its constitutional mandate and obligations.³⁵⁹ The human resource challenge highlighted in chapter three of this

³⁵⁴ PAA, Section 45(a)

³⁵⁵ PAA 45 (2)

³⁵⁶ Kaburu Njihia Francis, ‘ Fiscal Decentralization in Kenya and South Africa: A comparative Analysis’ https://profiles.uonbi.ac.ke/fkaburu/files/fiscal_decentralisation_in_kenya_and_south_africa_a_comparative_analysis.pdf accessed on 19th September 2019

³⁵⁷ The Constitution of South Africa, Section 221 (1)

³⁵⁸ The Financial and Fiscal Commission, ‘ Annual Report 2018/19’ https://www.ffc.co.za/images/FFC_Annual_Report_2018-2019.pdf accessed on 14th October 2019

³⁵⁹ The Financial and Fiscal Commission (n358)

study is not experienced in the FFC, with it reporting that within it for the 2018/2019 period, were people organized effectively for performance.³⁶⁰

4.3.2. The South African Reserve Bank

The South African Reserve Bank, the equivalent of the Central Bank of Kenya, is established under section 223 of the Constitution, with its primary objective being, as provided for under section 224(1), to protect the value of the currency in the interest of balanced and sustainable economic growth in South Africa. Whilst the Constitution guarantees the independence of the SARB, regular consultation between the Bank and the Cabinet member responsible for national financial matter is made mandatory.

4.4. The role of the National Prosecuting Authority

Established under the National Prosecuting Act,³⁶¹ the NPA seeks to ensure that its actions are in the interest of the victims of crime. Its strategic objectives include increased successful prosecution, removal of profit from crime and ensuring that witnesses are successfully protected.³⁶²

The NPA is sub-programme 4 of the Department of Justice and Constitutional Development and is at the center of the Criminal Justice and its associated processes.³⁶³ The NPA is however having talks on whether it should continue to remain under the Department, or establish its independence, with its own budget.

According to the NPA, it observed an improvement in the relationship and coordination efforts between the investigative arm of the State, the Priority Crime Investigations (DPCI) and other entities which have resulted in it continuing to improve on its performance according to its set targets.³⁶⁴ From this report, the NPA confirms the relevance of the Systems Theory in enhancing effectiveness and promoting openness and accountability. During the 2017/2018 period, the NPA reported that against its set target of 210, 213 government officials were convicted for corruption or offences relating to corruption, with the amounts involved being over five million Rand.³⁶⁵ For the year 2016/2017, the number of government officials convicted stood at 224.³⁶⁶ This

³⁶⁰ The Financial and Fiscal Commission, (n358)

³⁶¹ The National Prosecuting Act, No. 32 of 1998

³⁶² The National Prosecuting Authority, 'Annual Report, National Director of Public Prosecutions 2017/2018 in terms of the NPA Act 32 of 1998' <https://www.npa.gov.za/sites/default/files/annual-reports/NDPP%20Annual%20Report-%202017-18.pdf> accessed on 23rd October 2019

³⁶³ The National Prosecuting Authority (n362)

³⁶⁴ The National Prosecuting Authority (n362)

³⁶⁵ The National Prosecuting Authority (n362)

³⁶⁶ The National Prosecuting Authority (n362)

commendable results were achieved despite the NPA noting that it worked under a significantly reduced budget.³⁶⁷

From its report, the NPA boasts of reduction in corruption by government officials due to the high number of convictions it has managed to get. This is instrumental in enhancing openness and accountability in South Africa's PFM.

It is worth noting that even with such results, the NPA reported challenges such as staff shortages, financial constraints, poor investigations coupled with delays and shortage of foreign language interpreters.³⁶⁸

4.5. The role of the Courts in PFM in South Africa in relation to the principle of openness and accountability

The Public Protector in South Africa, whose equivalent in Kenya is the CAJ, is also instrumental in seeking to enhance openness and accountability in PFM in South Africa. The Public Protector has the power to, among others, investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice.³⁶⁹

In *In the matter between the President of the Republic of South Africa and the Office of the Public Protector and 7 others*,³⁷⁰ the High Court in Gauteng Division in Pretoria dismissed the then President Zuma's challenge against the remedial action sought by the Public Protector. In the matter, the Public Protector released a Report entitled "State of Capture", with recommendations of remedial action of the President appointing a commission of inquiry to look into the allegations and present a report on the same. The Report concerned investigations conducted by the Public Protector into the allegations of alleged improper and unethical conduct by the President, certain state functionaries and the Gupta family. It was alleged that the appointment of certain cabinet ministers and directors of State-owned entities resulted in improper and corrupt award of state contracts and other benefits to businesses of the Gupta family. In acknowledging that the allegations of the Report were of national importance and rejecting the President's arguments against the necessity and appropriateness of the Report, the Court stated as follows:

³⁶⁷ The National Prosecuting Authority (n362)

³⁶⁸ The National Prosecuting Authority (n362)

³⁶⁹ The Constitution of South Africa

³⁷⁰ *In the matter between the President of the Republic of South Africa and the Office of the Public Protector and 7 others* <http://www.saflii.org/za/cases/ZAGPPHC/2017/747.pdf> accessed on 10th October 2019

“...We make the point that the Public Protector’s report has uncovered worrying levels of malfeasance and corruption in the form of utter disregard of good corporate governance principles, some bordering on fraud, in Government departments and SOEs. This invariably involves large amounts of tax payers’ funds and state resources...in our view, the President has no justifiable basis to simply ignore the impact of this corruption in the South African public. His conduct also falls far short of the expectation on him as a Head of State to support institutions of democracy such as the Public Protector...”

The pronouncement by the court in the matter above, and its unequivocal stance on the matter is instrumental in enhancing openness and accountability in PFM in South Africa. Through this decision, the judiciary is seen in the front line in admonishing the disregard of the rule of law by public officials, speaking out on political patronage and elite capture and an example of the harmonious working of key public institutions in enhancing PFM.

In *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly and others*,³⁷¹ the Constitutional Court made orders that the President must not only comply with the remedial action taken against him by the Public Protector, but also reprimand the ministers. The Court also, unequivocally, declared unconstitutional, the actions by the National Assembly of absolving the President against the remedial action. In giving the orders, the Court stated thus:³⁷²

“...For this reason, public office-bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck.”³⁷³

In *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another*,³⁷⁴ the applicants consisting of political parties namely the Economic Freedom Fighters, the United Democratic Movement, the Congress of the People and the Democratic Alliance

³⁷¹*Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly and others* [2016] ZACC 11 <http://www.saflii.org/za/cases/ZACC/2016/11.pdf> accessed on 12th October 2019

³⁷² It is interesting to note that after the judgment was delivered, the President addressed the nation stating that he welcomed the judgment unreservedly and urged all parties to respect the judgment and abide by it. The President however did not obey the court order, prompting the Leader of Opposition moved in the National Assembly, a motion for the removal of the president in terms of section 89 of the Constitution. This move by the Leader of Opposition led to the *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* [2017] ZACC 47.

³⁷³*Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly and others* [2016] ZACC 11 <http://www.saflii.org/za/cases/ZACC/2016/11.pdf> accessed on 12th October 2019

³⁷⁴ *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* [2017] ZACC 47 <http://www.saflii.org/za/cases/ZACC/2017/47.pdf> accessed on 12th October 2019

asked the Constitutional Court of South Africa to consider and make a pronouncement³⁷⁵ upon complaints that the National Assembly had failed in fulfilling some of its constitutional obligations in not making rules regulating the removal of a president in terms of section 89 (1) of the Constitution of South Africa.³⁷⁶ In seeking to hold the then President Jacob Zuma accountable for the upgrades effected to his private residence, the Public Protector yet again released a report which contained remedial actions against the president, actions which were not implemented. In the report, the Public Protector sought remedial action against the President to pay a reasonable percentage of the cost of the non-security ensures effected in his private residence as determined with the assistance of the National Assembly and reprimand the ministers responsible for the manner in which the project was handled and the abuse of public funds that was witnessed. The court then made orders that there was indeed failure on the part of the National Assembly in failing to make rules on the removal of a president and further, that it had breached the Constitution in failing to determine whether the President had breached section 89(1) (a) or (b) of the Constitution.

By making this pronouncement, the Constitutional Court of South Africa is seen to be enhancing the principle of openness and accountability in PFM. Being the arm of the Government tasked with implementing the law, the judiciary is seen to be sending a message of upholding the rule of law and further, setting a precedent on the conduct expected of public officials³⁷⁷ in exposing, explaining and justifying actions.

The above case law in South Africa shows commitment by the Courts in enhancing openness and accountability in PFM in South Africa.³⁷⁸

³⁷⁵ it is worth noting that two judges dissented

³⁷⁶ The crux of the matter was there was need to hold the president accountable for his conduct and failures arising from, and incidental to, the report of the Public Protector. The Applicants also sought the Court to declare that the National Assembly failed to put in place, accountability mechanisms to hold the president accountable for failing to implement the Public Prosecutor's remedial action.

³⁷⁷ Such pronouncements by a court of law against a president are bound, to a larger extent, to deter other state officials from committing acts of abuse of office, malfeasance and other forms of corruption. It is also noteworthy that the political parties in South Africa take center stage in Political parties in acting as a watchdog over the activities of the Government of South Africa in relation to PFM. The political parties in Kenya should equally borrow this practice in ensuring that the principle of accountability and transparency is adhered to.

³⁷⁸ The former President of South Africa Jacob Zuma is set to face corruption trial and is expected to be tried charges which include money laundering, racketeering, fraud and corruption, after a High Court in Kwazulu Natal dismissed his application for stay of prosecution. Jacob Zuma is alleged to have received bribes from a French Arms Company.

4.6. The role of the CSOs in fostering openness and accountability in PFM in South Africa

According to Corruption Watch³⁷⁹, South Africa has a robust civil society which has played a critical role in creating a vibrant democratic culture and holding public officials accountable.³⁸⁰ South Africa boasts a more diverse, dynamic and assertive civil society landscape, which is effective in holding the government accountable, fighting corruption and supporting democracy³⁸¹ compared to Kenya.

The CSOs in South Africa, for instance, are hailed for consistent mobilization which resulted in the forcing out of two presidents, Thabo Mbeki and Jacob Zuma, for their involvement in alleged corruption, manipulation of public institutions for self-enrichment and collapsing public services.³⁸²

The People's Budget Coalition, a civil society coalition comprising of the South African Council of Churches, the South African Non-Governmental Organisation Coalition and the Congress of South African Trade Union, had, as at 2010, consistently tabled proposals on the budget and a participatory budget process.³⁸³ Additionally, it has played a significant role monitoring government expenditure and ensure that the same is done in the manner envisioned under the law.³⁸⁴

Similarly, Section 27 is an active public interest law center in South Africa which seeks to achieve substantive equality and social justice.³⁸⁵ Its aim includes achieving accountability within South Africa, and highlights the systemic failure of the South African Government to adequately provide for learners with disabilities, which falls under PFM systems in a government.³⁸⁶ This is addressed in addition to the poor quality of education in the majority of South Africa's public Schools.

³⁷⁹ Corruption Watch Website, <https://www.corruptionwatch.org.za/about-us/who-we-are/about-corruption-watch/>

Corruption Watch is a non-profit Organisation launched in 2012, which provides a platform for reporting corruption.

³⁸⁰ Corruption Watch, 'How Civil Society has strengthened SA'S Democracy' (2018) <https://www.corruptionwatch.org.za/civil-society-strengthened-democracy-south-africa/> accessed on 14th October 2019

³⁸¹ Corruption Watch (n380)

³⁸² Corruption Watch (n380)

³⁸³ The People's Budget Coalition, ' Submission of the Peoples Budget Coalition to the Standing Committee and Select Committee on Finance on the Medium Term Budget Policy Statement 2010' https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=2ahUKewi8oP3FnJ7lAhXtluAKHZpBB08QFjABegQIAxAC&url=http%3A%2F%2Fpmg.org.za%2Ffiles%2Fdocs%2F101110cosatu_0.doc&usg=AOvVaw0L4I-f2skRXeZcN5E4kf7T accessed on 15th October 2019

³⁸⁵ Section27 website <http://section27.org.za/> accessed on 15th October 2019

³⁸⁶ Section 27, ' Submission on the Right to Education for Persons with Disabilities in South Africa to the Committee on the rights of persons with Disabilities' (2015)

4.7. Creation of Independent Commissions of Inquiry

4.7.1. The Commission of Inquiry into State Capture

South Africa continues to take laudable steps in enhancing openness and accountability in PFM. On 23rd January 2018, in terms of section 84(2) (f) of the Constitution, President Cyril Ramaphosa appointed a Commission of Inquiry³⁸⁷, with the Deputy Chief Justice Honorable Mr. Justice Raymond Mnyamezeli Mlungisi Zondo as its Chairperson.³⁸⁸ This Commission of Inquiry was constituted to investigate allegations, in the national interest, of state capture, corruption and fraud in the Public Sector.³⁸⁹ Specifically, its mandate included the investigation into the nature and extent of corruption, if any, in the awarding of tenders and³⁹⁰ investigation on irregularities, undue enrichment, corruption and undue influence, if any, in the dealings with the Gupta family. Additionally, the Commission of Inquiry has the mandate to investigate whether and whether the then President, Jacob Zuma, or any member of the National Executive, both present and previous, or any public officials or employees of any SOEs breached or violated the constitution or any ethical code or legislation by facilitating the unlawful awarding of tenders.³⁹¹ Commission of Inquiry allows, through its Practice Directions, the media to attend and broadcast the hearing to the public provided that the media house, company or party makes a request of the same in writing, at least one week prior to the date of the hearing.³⁹² In relation to coverage by the media, the Practice Directions expressly prohibit the media from using on any equipment or clothing worn by media representatives, any identifying names, marks, logos or symbols.³⁹³ This is important because it enhances the freedom of the media and further, prevents instances of intimidation on the media to not disseminate the information to the public.

https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=13&ved=2ahUKEwiQxpu5wqPIAhWj3OAKHb9_AvIQFjAMegQIABAC&url=https%3A%2F%2Fwww.ohchr.org%2FDocuments%2FHRBodies%2FCRPD%2FDGD%2F2015%2FSECTION27.doc&usg=AOvVaw0IwO76A3_SYdSX_ShQhiNF accessed on 17th October 2019

³⁸⁷ The Zondo Commission is mandated to make findings and recommendations on whether members of the National Executive, office bearers and/or functionaries employed by office bearers, and state institutions or organs of state or directors of the Boards of SOEs, to what extent and by whom, through any form of inducement or for gain, resulted in corruption, state capture and fraud.

³⁸⁸ Government Notices, Vol 632, No. 41436, https://www.sastatecapture.org.za/uploads/GOVERNMENT_GAZETTE_Vol_632.pdf accessed on 15th October 2019

³⁸⁹ Government Notices (n388)

³⁹⁰ Government Notices, Vol No. 41403 https://www.sastatecapture.org.za/uploads/Terms_Of_Reference.pdf accessed on 17th October 2019

³⁹¹ Government Notices (n388)

³⁹² Government Notices, 'Practice Direction 1 issued in Terms of Rule 12: Guidelines on the Media Coverage of Proceedings of the Commission' (2018) Vol 638, No. 41841 https://www.sastatecapture.org.za/site/files/practicedirections/1/GUIDELINES_ON_THE_MEDIA_COVERAGE_OF_PROCEEDINGS_OF_THE_COMMISSION.pdf accessed on 16th October 2019

³⁹³ Direction 18, Guidelines on the Media Coverage of Proceedings of the Commission'

The Commission of Inquiry, also known as the Zondo Commission, conducts public hearings, and encourages South Africans with knowledge or evidence of ways in which the government entities were misused for the benefit of a few during the Zuma regime, to come forward and reveal their secrets.³⁹⁴ The Zondo Commission is a tool in South Africa, used to uncover the evils that took place using government organs and tools, which resulted in the undue and inappropriate enrichment of some private citizens, due to their enjoying closeness with the political powers of the day. This is a positive approach taken by South Africa in seeking to deter public officials, in future, from engaging in corruption, abuse of public office, and other forms of malfeasance. However, Deputy Chief Justice Zondo has expressed concern at the public's lack of enthusiasm in coming forward with evidence. Additionally, the Zondo Commission faces opposition from some establishments, thus creating an obstacle in delivery of its mandate. Nonetheless, this remains an efficient tool in deterring acts which negatively impact on openness and accountability within the PFM system.

4.7.2. The Commission of Inquiry into Tax Administration and Governance by the South African Revenue Service (“the SARS Commission”)

On 23rd May 2018, President Ramaphosa appointed established the SARS Commission and appointed former Supreme Court of Appeal Judge Honourable Mr. Justice Robert Nugent as commissioner.³⁹⁵ In noting that administrative provisions relating to revenue collection must be transparent, applied fairly and without favor and further, the SARS Commission was mandated to, among other deliverables, investigate any malpractices or allegations of malpractice within SARS, and make recommendations taking into account the transparency in the tax system.³⁹⁶ This is, equally, an effort by the government of South Africa to enhance openness and accountability within the PFM system, in relation to the collection of revenue. Similarly, the SARS Commission is tasked with looking into any irregular award of tenders which resulted in an employee or a person connected to SARS, unduly benefiting from the same. Implementation of the recommendation by the Auditor-General are equally important in enhancing openness and accountability, thus the SARS Commission is tasked with investigating whether the same was done by SARS.

³⁹⁴ Corruption Watch, ‘The Zondo Commission from a Corruption Watch point of view’ (2018) <https://www.corruptionwatch.org.za/wp-content/uploads/2018/08/Zondo-Commission-overview-and-context-for-Corruption-Watch.pdf> accessed on 17th October 2019

³⁹⁵ Proclamation No. 17 of 2018 by the President of the Republic of South Africa, <http://www.inqcomm.co.za/Docs/20180615-gg41652-p17-SARsComms-TOR.pdf> accessed on 17th October 2019

³⁹⁶ Proclamation No. 17 (n395)

Overall, this is a tool which can, if it adheres to its mandate and remains independent, can improve openness and accountability in South Africa on matters PFM. Similar to the effects the Zondo Commission will have how public officials will exercise their mandate, SARS will work tirelessly to ensure that the exercise of its mandate is done in accordance with the law and does not raise concerns.

4.8. Summary of Findings and Lessons from the South African context

The PFM system in relation to openness and accountability is much more advanced compared to the Kenya.

To begin with, the penalties provided for in the procurement system in South Africa are severer than those provided for in Kenya, thus increasing the cost of engaging in acts that result in misappropriation of public resources.

Secondly, the institutions in South Africa do not shy away from calling the government to order on matters relating to PFM. The courts have come forward and made pronouncements against the former President Jacob Zuma, and have supported the implementation of the report of the Public Protector, by making orders that the remedial actions in the report be implemented. The courts have gone further to declare that the acts by the National Assembly in seeking to frustrate the implementation of the remedial action recommended by the Public Protector.

The Public Protector has also been instrumental in enhancing openness and accountability in PFM. This is seen through the publication of the Report on State Capture based on investigations, which contained allegations of improprieties on the part of the former president Jacob Zuma together with members of both the past and present cabinet. This has resulted in Jacob Zuma being summoned before the Zondo Commission on charges of corruption.

The NPA has also been instrumental in enhancing openness and accountability in PFM in South Africa, following the number of convictions it has managed to attain. The DPP in Kenya should also borrow a few lessons from the NPA on how to remain effective even in the face of serious financial constraints.

Thirdly, the activities of CSOs in South Africa have been vigorous to an extent where two presidents have vacated office before expiry of their terms. This is no ordinary fete, and the CSOs in Kenya can borrow lessons on aggressiveness and persistence in seeking to hold the government accountable and thus, enhancing openness and accountability.

Fourthly, the tenure of the independent auditor appointed to audit AGSA is instrumental in seeking to promote openness and accountability in PFM. Appointing the external auditor on a yearly basis reduces the chances of establishing familiarity with the auditor and compromising their mandate.

Fifthly, the Political parties in South Africa have actively taken up the role of monitoring the government and holding it accountable. This complements the role of the CSOs and other institutions, thus exerting more pressure on the government.

Publishing the recommendations given by the FFC together with the Bills is a practice that enhances openness and accountability and that can be useful in the Kenyan context. This will enable the public to ensure that the recommendations are considered in the drafting of Bills.

4.9.Conclusion

From this Chapter, it is established that South Africa takes a much more effective approach towards enhancing openness and accountability in PFM.

The institutions are more active in monitoring the government and ensuring that the rule of law is adhered to, with public officials including the former president, not being excluded from being held accountable for his actions. The institutions work harmoniously in ensuring effectiveness in PFM, thus bringing to life the proposition advanced by the Systems Theory. institutions work towards empowering other institutions, with the courts for instance, empowering the mandate of the Public Protector in reaffirming that the National Assembly acted unconstitutionally in disregarding the remedial actions recommended by the Public Protector.

The penalties under the procurement law in South Africa, compared to Kenya, seek to limit the acts of abuse of office, malfeasance and other forms of corruption. It is therefore accurate to state that corruption in South Africa under the procurement regulation has been made expensive and thus, openness and accountability is enhanced in PFM. The penal system in Kenya does not effectively call out corruption in public procurement as a vice.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

5.1.Introduction

This final Chapter Five provides, based on the study conducted, the recommendations Kenya should adopt should it be keen in enhancing openness and accountability in Public Finance Management in Kenya. This Chapter has three objectives namely restating the finds of the study as enumerated in each chapter, provides lessons Kenya can borrow from the PFM experience in South Africa and finally, provides recommendations aimed at enhancing openness and accountability in PFM in Kenya.

Chapter one of this study defined Public Finance Management in a global context, with inputs from various writers on what can make PFM more effective. The principles of PFM in Kenya were identified as espoused under article 201 of the Constitution. The theoretical framework underpinning the study is explained. This study is based on the Systems Theory and Legal Positivism. The Systems Theory provides that for a system to be fully functional and effective, all the sub-systems within it must work together in a systematic coordination. In comparison, all the institutions in a government must work together in order that the government can be effective and in that regard, adhere to the principle of openness and accountability. Legal positivism on the other hand, provides that the laws as codified in the statute books, must be implemented as they appear, in order that openness and accountability can be attained. This Chapter is concluded by stating that the study will be limited to the principle of openness and accountability, with a comparison to be carried out with South Africa for useful lessons to be borrowed by Kenya.

Chapter Two outlines the legislative and institutional framework in PFM in Kenya. At a regional level, Kenya is bound by the AUCPCC which provides for the prevention of corruption in African countries. The Constitution of Kenya 2010 is outlined, followed by the PFMA and the relevant regulations, the PPADA, the Public Audit Act which provides for the OAG's mandate, the Commission on Revenue Allocation Act which provides for the mandate of the CRA, the Salaries and Remuneration Commission Act which provides for the SCR and the Central Bank of Kenya Act which provides for the CBK. This Chapter was concluded with the current position of the legislative and institutional framework being briefly outlined.

Chapter Three outlined the history of PFM in Kenya, with six challenges undermining openness and accountability in PFM being outlined. This study identified disregard of the rule of law,

weaknesses in key institutions, political patronage and elite capture, cultural mindset, limited oversight participation by CSOs and technological challenges as the major challenges facing PFM in Kenya. The Chapter, in conclusion, attempted to establish a nexus between the challenges identified.

Chapter four of the study identifies the legislative and institutional framework regulating PFM in South Africa. The Constitution of South Africa, the PFMA 1999, the Public Audit Act, the PPPFA, the Promotion of Access to Information Act, and the Prevention and Combating of Corrupt Activities Act were analyzed, with their role in enhancing openness and accountability in PFM in South Africa identified. The FFC and the South Africa Reserve Bank were mentioned in the Chapter as the institutions directly dealing with PFM in South Africa. The role of the courts in enhancing openness and accountability was discussed, with case law being provided on how the courts in South Africa are enhancing the principle of openness and accountability. The active role played by the CSOs was also captured in this Chapter, after which the two independent Commissions established in a bid to address injustices were addressed. The chapter is concluded with a summary of lessons that Kenya can borrow from the PFM South African experience.

5.2.Summary of findings

Having carried out research on the implementation of openness and accountability, the research made the following four findings:

1. The main challenges facing implementation of the principle of openness and accountability in PFM in Kenya are disregard of the rule of law, including the disregard of the tenets of leadership and integrity, weaknesses in key institutions, elite capture and political patronage in the management of public finances, the cultural mindset of corruption, limited participation by CSOs and technological challenges;
2. The existing institutional and legislative framework entrenches to a large extent, the principle of openness and accountability;
3. Whereas the institutional and legislative framework is, to a large extent, effective in achieving the mandate in relation to promoting the principle of openness and accountability within the PFM, the main issue lies with the implementation by the people mandated under the framework; and

4. The Republic of South Africa contains invaluable lessons, based on their practice in implementing the principle openness and accountability, that is instructive to Kenya.

5.3.Recommendations

Based on lessons Kenya can draw from the South African experience as state in Chapter Four, together with the findings of the study in general, the following specific recommendations are made:

5.3.1. To the National Treasury

There is need for the Cabinet Secretary in charge of Finance to publish regulations, as a matter of urgency, on public participation in the national budgeting processes, in line with Section 207 of the PFMA.³⁹⁷ The Regulations should reflect the provisions of Section 207 (2) of the PFMA,³⁹⁸ and adherence to the Regulations must be made mandatory. This will enhance the principle of openness and accountability in PFM in Kenya.

5.3.2. To the Parliament

5.3.2.1. In order that openness and accountability is enhanced, there is need for Parliament to publish with the Bill, the recommendations given by both the CRA and SRC have been considered. From the South African perspective, the FFC's recommendations are annexed to Bills generated on related matters, indicating the extent to which the FFC's recommendations were factored into the legislation.³⁹⁹ This will go a long way in ensuring that while perusing the Bills, one can read the recommendations and establish whether they were taken into consideration during the drafting process.

5.3.2.2. The current position where abuse of office, corruption and other forms of malfeasance are incentivized in Kenya needs to be re-evaluated and the penalties made more severe, as is the case in the PPPFA in South Africa. This will be effective in reducing the instances of political patronage and elite capture.

5.3.2.3. Thirdly, the appointment of the external auditor whose mandate is to audit the OAG, should be yearly, as opposed to the current practice where the external auditor is

³⁹⁷ It should be noted that the use of CSOs in public participation should not be in a way that the organizations are confused as representing the views of the public. Rather, these organizations should organize forums where the members of the public air their views.

³⁹⁸ Section 207 (2) PFMA provides that the Regulations on Public Participation must provide for the structures of participation, mechanisms process and procedures for participation, receipt, processing and consideration of petitions, and complaints lodged by members of the community; notification and public comment procedures; public meetings and hearings, special needs for people who cannot read or write, people with disabilities, women and other disadvantaged groups; matters with regard to which community participation is encouraged; the rights and duties of members of community; and any other matter that enhances community participation.

³⁹⁹ Njihia (n356)

appointed for a period of four years. Once appointed, it should be provided that the external auditor will not be considered for reappointment until the lapse of a certain reasonable period of time.

5.3.2.4. On matters relating to PFM, there is need to do away with the copy and paste practice of drafting laws and instead, ensure that laws are tailor-made to address the situation and alleviate the loss of public funds.

5.3.2.5. There is need for the establishment of a conclusive and effective whistleblowing framework in Kenya which will create more confidence for whistleblowers to come forward with information which will see openness and accountability in PFM improved. This should be done in line with strengthening the implementation of the Witness Protection Act No. 16 of 2006.

5.3.3. To the Government

Just as has been done in South Africa, a conversation must be had on the establishment on a Commission on inquiry into the acts and omissions by public officials in both the present and past regimes, in a bid to bring them to book and all necessary actions taken for the recovery of funds lost or misappropriated. This Commission should have proper and effective whistleblowing mechanisms which will encourage those with evidence to come forward. The executive and legal team of the Commission must be of people beyond reproach, and proper structures introduced to enhance their mandate and their overall security. This will be effective in reducing the instances of political patronage and elite capture as a message will be sent that the same cannot be tolerated.

5.3.4. To the SRC and the CRA

The CRA and the SRC must lobby to ensure that their recommendations are annexed to the Bills and prior to publication, to the Acts. This will ensure that the public has more information to hold the government accountable and thus, enhance openness and accountability.

5.3.5. To the EACC and the ODPP

5.3.5.1. Leadership and integrity should be taken seriously, with the EACC not clearing individuals who do not meet the threshold provided, to vie for political seats or be appointed to public offices. Further, the EACC should conduct proper investigations on public officials accused of improprieties, collect evidence independently and without intimidation, and hand the same over to the ODPP.

5.3.5.2. The ODPP should, based on the evidence given by the investigating bodies, prosecute the matters in court with integrity, professionalism and clarity, in order that there can be an increase in convictions.

5.3.6. The Political class

5.3.6.1. The Political class need to express the political will in ensuring that the PFM reforms are implemented in order that openness and accountability is enhanced. This can be done through the political leaders ensuring that there is heavy public sensitization on ways through which the Public can hold the government accountable.

5.3.6.2. It is also imperative for the political class to work towards adhering with the leadership and integrity tenets and further, holding each other accountable on matters of leadership and integrity.

5.3.7. To the Judiciary

5.3.7.1. The Chief Justice should publish practice directions providing a specific timeline within which matters related to misappropriation of public resources within the PFM system are heard and determined. This study proposes a timeframe of no longer than six months, noting that the ACECA provides that such cases must be heard on a day to day basis until they are concluded. Based on the recommendation to the EACC and the ODPP regarding the quality of evidence, this recommendation will deter individuals who seek to influence decisions to satisfy their self-interests at the interest of the public.

5.3.7.2. The Chief Justice should embark on establishing Anti-Corruption and Economic Crimes Divisions of the High Court are established in all courts throughout the country.

5.3.7.3. The courts should take seriously their constitutional duty to implement the Constitution without fear or favor, as has been illustrated by the courts in South Africa from the case law provided.

5.3.8. To the CSOs

5.3.8.1. The role of the CSOs in enhancing openness and accountability has been exemplified in South Africa. The CSOs in Kenya must borrow a leaf from the CSOs in South Africa and work towards strengthening their activities in the interest of the public. There is need for them to make their presence felt more by the public after which,

they should stand firm against intimidation by the government even as they exercise their mandate. With the public being more aware of the CSOs, they will garner much more support and will be able to hold the government accountable to enhance openness and accountability in PFM.

5.3.8.2. The CSOs should enhance their role as a bridge between the citizenry and the government, by organizing numerous forums where public participation can be carried out.

5.3.8.3. There is need for the CSOs to work towards delivering PFM information in a simplified and unbiased manner, in order that the Public can be able to understand the same and thereafter, as the Government relevant information that will result in enhancing openness and accountability in PFM.

5.3.9. To the Public

Members of the public should seek to enlighten themselves on matters PFM, rather than taking a passive approach. They should approach the CSOs and ask that issues be explained to them, after which they can properly monitor the activities of the government and the leaders.

5.3.10. All Government Institutions

All government institutions must collaborate and work together in their capacity, to enhance openness and accountability within PFM in Kenya.

BIBLIOGRAPHY

Books

Dalton Hugh, Principles of Public Finance, (11th edition, Routledge 1941)

Websites

<http://www.saflii.org/za/cases/>

<http://www.treasury.gov.za/legislation/>

Corruption Watch Website, <https://www.corruptionwatch.org.za/about-us/who-we-are/about-corruption-watch/> accessed on 17th October 2019

Government Notices, 'Practice Direction 1 issued in Terms of Rule 12: Guidelines on the Media Coverage of Proceedings of the Commission' (2018) Vol 638, No. 41841 https://www.sastatecapture.org.za/site/files/practicedirections/1/GUIDELINES_ON_THE_MEDIA_COVERAGE_OF_PROCEEDINGS_OF_THE_COMMISSION.pdf accessed on 16th October 2019

Section27 website <http://section27.org.za/> accessed on 15th October 2019

Government Notices, Vol 632, No. 41436, https://www.sastatecapture.org.za/uploads/GOVERNMENT_GAZETTE_Vol_632.pdf accessed on 15th October 2019

Articles and Journals

Adams Kevin MacGregor, *Systems Theory: A formal construct for understanding systems* (2012) https://www.researchgate.net/publication/264818391_Systems_theory_A_formal_construct_for_understanding_systems

Amukowa W, The Challenges of Anti-Corruption Initiatives: Reflections on Strategies of the defunct Kenya's Anti-Corruption Commission (Mediterranean Journal of Social Sciences, 2013)

Arrowsmith S, Treumer S, Fejo J, and Jiang L, 'Public Procurement Regulation, An Introduction', <https://www.nottingham.ac.uk/pprg/documentsarchive/asialinkmaterials/publicprocurementregulationintroduction.pdf> accessed on 4th October 2019

Bolton P., 'Government Procurement as a Policy Tool in South Africa' (2006) 6 (3) Journal of Public Procurement Grant G, 'Legal Realism: Its Cause and Cure' (1961) 70 The Yale Law 1038 <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=3643&context=fss_papers> accessed on 3rd December 2019

Gumede W., 'South Africa: Policy Brief 32- How Civil Society can strengthen the capacity of South Africa's Parliament' <https://allafrica.com/stories/201812110788.html> accessed on 14th October 2019

Hofstede G, 'Dimensionalizing Cultures: The Hofstede Model in Context' (2011) <https://scholarworks.gvsu.edu/cgi/viewcontent.cgi?article=1014&context=orpc> accessed on 15th July 2019

Independent observer of the Global Fund, 'Mapping Accountability Mechanisms: A Review of In-Country Accountability in Health Systems' (2015)

Institute of Certified Public Accountants of Kenya, 'Discussion Paper on Citizen Participation in Public Finance Management in Kenya' (2018) <https://www.icpak.com/wp-content/uploads/2018/05/Concept-Note-on-Effective-Citizen-Participation-in-Budget-Monitoring-and-Governance.pdf> accessed on 7th March 2019

Institute of Certified Public Accountants of Kenya, PFM Reforms in Kenya, April 2017, <https://www.icpak.com/wp-content/uploads/2017/04/8.-PFM-Reforms-in-Africa-CPA-Benson-Okundi.pdf> accessed on 4th November 2018

International Budget Partnership 'Transparency and Participation in Public Finance Management; What do Budget Laws say?' 2011 <https://www.internationalbudget.org/wp-content/uploads/Research-Note-1-Transparency-in-Public-Finance-Laws1.pdf> accessed on 30th January 2019

Jason L. and Vivian M. 'IBP Guide, Improving Program-Based Budgeting in Kenya' <https://www.internationalbudget.org/wp-content/uploads/Improving-Program-Based-Budgeting-in-Kenya.pdf> accessed on 8th October 2019

- McKee K. and Nicolas van de Walle N., 'Towards an Accountable Budget Process in Sub-Saharan Africa: Problems and Prospects' Social Research, Vol. 77, No. 4, From Impunity to Accountability: Africa's Development in the 21st Century (WINTER 2010), pp. 1281-131
- INTOSAI Development Initiative, 'Towards Independence' https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=8&cad=rja&uact=8&ved=2ahUKEwiqqPP03u_gAhWAA2MBHdyXC9cQFjAHegQIAxAC&url=https%3A%2F%2Fwww.idi.no%2Fen%2Felibrary%2Fcpd%2Fsai-independence-programme%2F257-sai-independence-programme&usg=AOvVaw26_-6685o87jvs-J_Bg9Lp accessed on 7th March 2018
- Kaburu Njihia Francis, 'Fiscal Decentralisation in Kenya and South Africa: A comparative Analysis' [https://profiles.uonbi.ac.ke/fkaburu/files/fiscal decentralisation in kenya and south africa a comparative analysis.pdf](https://profiles.uonbi.ac.ke/fkaburu/files/fiscal%20decentralisation%20in%20kenya%20and%20south%20africa%20a%20comparative%20analysis.pdf) accessed on 19th September 2019
- McCrudden Christopher, Buying Social Justice: Equality, Government Procurement & Legal Change (OUP 2007) 14
- Mkandawire T. 'Aid, Accountability and Democracy in Africa' Social Research, Vol. 77, No. 4, From Impunity to Accountability: Africa's Development in the 21st Century (WINTER 2010), pp. 1149-1182
- Palmer T. Kenneth and Wihry David F. 'The Environment of Public Financial Management: An Economic Perspective', (Fall 1982), Vol 6, pp 282-294, <<https://www.jstor.org/stable/40860139>>, accessed on 9th January 2019
- Serra D., 'Combining Top down and Bottom Up Accountability: Evidence from a Bribery Experiment'(2012) Journal of Law, Economics and Organization, Vol 28 No. 3, <https://vpn.uonbi.ac.ke/proxy/567dbb7c/https/www.jstor.org/stable/pdf/41653650.pdf> accessed on 7th March 2018
- Zhou Yongmei, Strengthening Public Financial Management: Challenges in Africa, <<https://www.worldbank.org/archive/website01531/WEB/IMAGES/3SESSION.PDF>>
- United Nations, 'Globalization and new challenges of Public Finance: Financial Management, transparency and accountability' (Report November 2001) <[https://publicadministration.un.org/publications/content/PDFs/E-Library Archives/2002 Globalization and New Challenges.pdf](https://publicadministration.un.org/publications/content/PDFs/E-Library_Archives/2002_Globalization_and_New_Challenges.pdf)>accessed 10th January 2019
- Sammy M Keter S. M., 'STATE OF CIVIL SOCIETY IN KENYA Challenges and Opportunities A REPORT OF CSO DIALOGUES IN KENYA
- Khalil F., Kim D. and Lawarrée J., 'Contracts offered by bureaucrats' (2013) the Rand Journal of Economics, Vol. 44, No. 4, pp. 686-711 <https://vpn.uonbi.ac.ke/proxy/5f9a6a30/https/www.jstor.org/stable/pdf/43186439.pdf> accessed on 8th March 2019
- Matthew Andrews, 'PFM in Africa Where are we, how did we get here, where should we go? Lessons from recent PEFA date and World Bank Public Financial Management Performance Reports' https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwiH5q2ZpozAhUDoVwKHe5qDvqQFjAAegQIAhAC&url=http%3A%2F%2Fweb.worldbank.org%2Farchive%2Fwebsite01531%2FWEB%2FIMAGES%2FFPFIN_AF.DOC&usg=AOvVaw3kzFcMM9v5rFBmeLIs7eW accessed on 8th October 2019
- Mohammed Aminatu, 'The Impact of Integrated Financial Management Systems on Economic Development: A case of Ghana' <<https://gsis.korea.ac.kr/wp-content/uploads/2015/06/15-2-04-Mohammed-Aminatu.pdf>> accessed on 11th January 2018
- Musgrave K. M. and Wong S, 'Towards a more nuanced theory of elite capture in development projects. The importance of context and theories of power' (2016) <https://core.ac.uk/download/pdf/41979773.pdf> accessed on 1st October 2019
- Njuguna H.K., 'Political Patronage on the Operationalisation of Public Procurement Law in Kenya' <https://pdfs.semanticscholar.org/95f0/317f56f82437052c213efe05904d82f8253a.pdf>.
- Transparency International, 'Public Financial Management Topic Guide' (24th November 2014) <https://www.transparency.org/files/content/corruptionqas/Topic_guide_on_public_financial_management_2014.pdf>accessed on 10th January 2019
- Ministers of Finance and Ministers of Health of Africa, Tunis Declaration on Value for Money, Sustainability and Accountability in the Health Sector, (July

- 2012)<[https://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/Tunis%20declaration%20english%20july%206%20\(2\).pdf](https://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/Tunis%20declaration%20english%20july%206%20(2).pdf)> accessed on 11th January 2019
- Matt Andrews and others, Public Financial Management and its emerging Architecture, 2013<https://www.elibrary.imf.org/staticfiles/misc/pdf/pfmea_chap12_excerpt.pdf> accessed on 11th January 2019
- National Assembly, ‘Interim Report of the Working Group on Socio-Economic Audit of the Constitution of Kenya 2010’ (2015) http://info.mzalendo.com/media_root/file_archive/Socio_Economic_audit_on_the_Constitution_of_Kenya_2010.pdf accessed on 5th March 2019
- Parliamentary Initiatives Network, Transparency International Kenya, Kenyans for Peace with Truth and Justice and Africa Centre for Open Governance, ‘Towards Hazy Horizons Implementation of Chapter Six of the Constitution of Kenya 2010’ <https://africog.org/wp-content/uploads/2015/10/Implementation-of-Chapter-Six-of-the-Constitution-of-Kenya-20101.pdf> accessed on 9th September 2019
- Peters J. Thomas and Waterman Robert and Jr. Waterman, In Search of Excellence: Lessons from America’s Best-Run Companies. (Harper & Row 1982)
- Public Accounts Committee, ‘The Consideration of the Report of the Auditor General on the Financial Statements of Nairobi City County Executive for the Year ended 30th June 2016’ <https://nairobiassembly.go.ke/ncca/wp-content/uploads/paperlaid/2018/PAC-Report-on-the-Auditor-Generals-Report-on-the-Financial-Statements-of-the-Executive-for-the-year-ending-June-2016.pdf> accessed on 7th March 2019
- Schwartz I. Joshua, ‘Regulation and Deregulation in Public Procurement Law Reform in the United States’, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=2ahUKewi1rbjt4aTjAhWBxoUKHSgKAQwQFjACegQIABAC&url=http%3A%2F%2Fwww.ippa.org%2Fimages%2FB0OKS%2FIPPC2%2FChapter_9.pdf&usg=AOvVaw0N4EzOSngzriYxQ5TEFJve accessed on 8th July 2019
- Report of the Secretary-General, ‘The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies’ (2004) <https://www.un.org/en/ga/search/view_doc.asp?symbol=S/2004/616> .
- Sihanya B., ‘The Role of the Judiciary in the Accountability and Governance of the Devolved Government Structure Presentation to the Institute of Certified Public Accountants of Kenya (ICPAK) 20’ (2012) 6 1.
- State Audit Office of Hungary, ‘The Importance of the Lima and the Mexico Declarations’ (2014) <https://www.eurosai.org/handle/404?exporturi=/export/sites/eurosai/.content/documents/training/training-events/InSem2014/2.1.-The-importance-of-Lima-and-Mexico-declarations.pdf> accessed on 7th March 2018
- Swank H. O. and Visser B., ‘Is Transparency to No Avail?’ The Scandinavian Journal of Economics, Vol. 115, No. 4 (October 2013), pp. 967-994
- Society for International Development, ‘Public Finance Reforms in Kenya: Some emerging issues and their relevance under the context of Devolution’ https://www.sidint.net/sites/www.sidint.net/files/docs/PFM%20_PolicyBrief.pdf accessed on 7th March 2019
- The Financial and Fiscal Commission, ‘Annual Report 2018/19’ https://www.ffc.co.za/images/FFC_Annual_Report_2018-2019.pdf accessed on 14th October 2019
- The National Treasury, ‘The Strategy for Public Financial Management Reforms in Kenya 2013-2018’ https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKewiExY6AkuvGAhWNHhQKHfZuBoMQFjAAegQIChAC&url=http%3A%2F%2Fwww.treasury.go.ke%2Ftax%2Ffacts.html%3Fdownload%3D696%3Athe-strategy-for-public-financial-management-reforms-in-kenya-2013-2018&usg=AOvVaw0vYtiuq1pZTFEOXcg6_SsK accessed on 5th March 2019
- The National Treasury, ‘Kenya Country Programme 2016-2020 Governance Thematic Programme – Support To The Public Financial Management Reform Strategy in Kenya’ <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKewi57qqZyu3gAhWZDmMBHQ7XDA4QFjAAegQIChAC&url=http%3A%2F%2Fkenya.um.dk%2F~%2Fmedia>

[%2FKenya%2FDEDs%2FGovernance%2FGov%25201%2520PFMR%2520DED.pdf%3Fla%3Den&usg=AOvVaw3OTK9qDc3w_5I_pxmQUcCj](#) accessed on 6th March 2018

The National Assembly, 'Report of Public Accounts Committee on Procurement of External Audit Service for the Office of the Auditor General for the Financial years 2014/15, 2015/16, 2016/17 and 2017/18'<http://www.parliament.go.ke/sites/default/files/2019-07/Report%20of%20PAC%20on%20Procurement%20of%20External%20Audit%20Services%20for%20the%20OAG.pdf> accessed on 10th October 2019

The National Prosecuting Authority, 'Annual Report, National Director of Public Prosecutions 2017/2018 in terms of the NPA Act 32 of 1998' <https://www.npa.gov.za/sites/default/files/annual-reports/NDPP%20Annual%20Report-%202017-18.pdf> accessed on 23rd October 2019

The People's Budget Coalition, 'Submission of the Peoples Budget Coalition to the Standing Committee and Select Committee on Finance on the Medium Term Budget Policy Statement 2010' https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=2ahUKewi8oP3FnJ71AhXt1uAKHZpBB08QFjABegQIAxAC&url=http%3A%2F%2Fpmg.org.za%2Ffiles%2Fdocs%2F101110cosatu_0.doc&usg=AOvVaw0L4I-f2skRXeZcN5E4kf7T accessed on 15th October 2019

Thiankolu, M. 'Reconciling Incongruous Policy Objectives and Benchmarking Kenya's Public Procurement Law: A Review of the Selex Case' (2011) 11 451 <<http://muthomikaranja.com/wp-content/uploads/2016/02/LLM-Dissertation.pdf>>.

Thiankolu, M. in Journal on Financing for Development, 'Using Public Procurement as a tool of economic and social development policy in Kenya: Lessons for the United States and South Africa' vol 1 2019 pg 97-126

Whiteman J.L., 'Measuring the Capacity and Capability of Public Financial Management Systems' (2013) <http://journals.sfu.ca/ipmr/index.php/ipmr/article/view/132> accessed on 8th March 2019

World Bank, Strengthened Approach to Public Finance Management Reform, <https://www.worldbank.org/publicsector/pe/StrengthenedApproach.pdf> accessed 9th January 2019

World Bank, Public Finance, (5 January, 2015) <https://www.worldbank.org/en/topic/governance/brief/public-finance> accessed 9th January 2019

World Bank Group, 'Increasing Professionalism in Public Finance Management: A Case Study of the United Kingdom', <https://openknowledge.worldbank.org/bitstream/handle/10986/25276/9781464808043.pdf?sequence=2>, > accessed on 9th January 2019.