PUBLIC PROCUREMENT REFORMS IN KENYA: A QUEST FOR EQUITY AND FAIRNESS

RESEARCH PROJECT

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DECLARATION

I, Samson Nyoike, do hereby declare that this Research Paper is my original work and has not been submitted, and it is not currently being submitted in any other university.

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This Research Paper has been submitted for examination with my approval as University Supervisor.

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ABSTRACT

Public procurement in Kenya has undergone various changes in a bid to reform how the Government sources for goods and services using public funds. Public procurement reforms have been undertaken within the wider context of public financial management reforms. Public procurement reforms can be traced from the pre-colonial era, where procurement was mainly undertaken through Crown Agents. In the 1960's, following Kenya's independence, the procurement system was mainly regulated through Treasury circulars. In the 1970's, the supplies' manual was introduced. It is however not until 2001 when real reforms through legal mechanisms were introduced. This study traces public procurement reforms through a historical review of key reform changes until the enactment of the Kenyan Constitution in 2010. The study further analyses the Public Procurement and Disposal Act (PPDA) 2015, through a detailed review of case law and concludes that enabling legislation is not aligned to the ideals of Article 227 of the Constitution that prescribes for setting up of a procurement system that promotes, among other principles, equity and fairness.

The study further provides an analysis of lessons from other jurisdictions in the South East Asia that have also had varying degrees of success. Some countries have established a very strong and effective procurement system that Kenya could learn from, while other countries have had challenges which would also be useful for Kenya in its quest to reform its legislative framework to align it with the principles prescribed under Article 227 of the Constitution.

Key words: public procurement, reforms, equity, fairness, amendment

LIST OF ACRONYMS & ABBREVIATIONS

AGPO	Access to Government Procurement Opportunities
EU	The European Union
FSD	Financial Sector Deepening
GDP	Gross Domestic Product
GJLOS	Governance, Justice, Law and Order Sector
GoK	Government of Kenya
ICB	International Competitive Bidding
IEBC	Independent Electoral and Boundaries Commission
IMF	International Monetary Fund
KACC	Kenya Anti-Corruption Commission
NSSF	National Social Security Fund
OECD	Organisation for Economic Cooperation and Development
PPARB	Public Procurement Administrative Review Board
PPD	Public Procurement Directorate
PPDA	Public Procurement and Disposal Act, 2015
PPRA	Public Procurement Regulatory Authority
SGR	Standard Gauge Railway

SME	Small and Medium Enterprises
SWAps	Sector Wide Approach
TI	Transparency International
ToR	Terms of Reference
UNCITRAL	United Nations Commission on International Trade Law
USA	United States of America
VfM	Value for Money

LIST OF STATUTES & LEGAL INSTRUMENTS

Anti-Corruption and Economic Crimes Act 2003.

Constitution of Kenya, 2010.

Exchequer and Audit Act, Chapter 412 of the Laws of Kenya.

Exchequer and Audit (Public Procurement) Regulations 2001.

Financial Management Act 2004.

Public Procurement and Disposal Act, 2015.

Public Procurement and Disposal Regulations, 2006.

Public Procurement and Disposal (Preference and Reservations) Regulations, 2011.

Public Procurement and Disposal (Preference and Reservations) (Amendment) Regulations, 2013.

Supplies Practitioners Management Act, Act No. 17 of 2007.

The Public Officer Ethics Act 2003.

CHAPTER 1: INTRODUCTION

The reforms in the public procurement in Kenya, can be traced back to the pre-colonial era.[1] During that period, public procurement was used as a tool by the colonial masters to facilitate their key agenda, which was extraction of natural resources from their colonies. Public procurement was therefore undertaken through a procurement agent, Crown Agents that represented the colonial masters in all procurement activities. Later on, after independence in the 1960's up to 1990's, Public Procurement was largely unregulated. During this period, there were no legal mechanisms to regulate public procurement. The system was therefore characterised by inefficiencies including widespread corruption.[2]

Increased cases of corruption and wastage of public resources led to the clamour for more reforms through legal and institutional changes. In 2001, the very first regulations under the Audit and Exchequer Act, were formulated. This represented a very key milestone as it meant that the system of Treasury circulars had been replaced by a more accountable system.[3] Later, the regulations,[4] which constituted subsidiary legislation, were found to be ineffective as they did not command the same level of compliance and sanctions. Cases of

[1] Jerome Ochieng and Mathias Muehle, 'Development and Reform of the Kenyan Public Procurement System' Paper 7-7, 1763, available at http://www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf (accessed on 15 November 2013).

[2] Fred Owegi and Eric Aligula, 'Public Sector Procurement in Kenya: The Need for a Coherent Policy Framework' Nairobi: Kenya Institute for Public Policy Research and Analysis, 2006, available at http://www.gbv.de/dms/zbw/638200644.pdf (accessed on 15 November 2013).

[3] Migai Aketch; 'Development Partners and Governance of Public Procurement in Kenya: Enhancing Democracy in the Administration of Aid' available at http://iilj.org/GAL/documents/AkechPaper_000.pdf (accessed on 2 October 2014).

[4] Exchequer and Audit (Public Procurement) Regulations 2001.

increased corruption due to disregard for the rules continued to be reported.[5] There were minimal incentives (including sanctions) provided in the rules, to promote efficiency and a sound procurement system. The clamour for more reforms therefore continued with calls for a more strengthened legal mechanism that incorporated sanctions and an accountability framework.[6] The renewed calls for procurement reforms, culminated in the enactment of the Public Procurement and Disposal Act, 2005.[7]

The legal and regulatory mechanism for public procurement was further strengthened through the promulgation of the Constitution of Kenya, 2010 (herein after referred to as the Constitution). Article 227 of the Constitution[8] provided for setting up of a procurement system that promoted equity and fairness among other principles.[9] This was perhaps the apex of the procurement reform journey. Following the promulgation of the Constitution, the Public Procurement and Disposal Act, 2015 (herein after referred to as the Act) was enacted to operationalise Article 227 of the Constitution. This study provides a critical analysis of the Act. The analysis in undertaken with the help of court rulings and consideration of lessons learnt from other similar jurisdictions whose public procurement reform journeys are comparable to Kenya's journey in public procurement reform.

[5] Public Procurement in Kenya 'Cash cow for the corrupt or enabler for public service delivery?' Adili Issue 145, June 2014, available at http://tikenya.org/index.php/blog/277-public-procurement-in-kenya-cash-cow-for-the-corrupt-or-enabler-for-public-service-delivery (accessed on 20 September 2019).

[6] Migai Aketch; 'Development Partners and Governance of Public Procurement in Kenya: Enhancing Democracy in the Administration of Aid' available at http://iilj.org/GAL/documents/AkechPaper_000.pdf (accessed on 2 October 2019).

[7] The Public Procurement and Disposal Act, 2005 (Cap 412C of the Laws of Kenya).

[8] The Constitution of Kenya, 2010.

[9] The other principles include; Transparency, Competition and Cost-Effectiveness.

1.1 Background

Public procurement is a powerful tool in the hands of the government. It is akin to a lever which can be used to achieve a variety of goals including shaping the economic, social, technological and environmental future of a country.[10] While there is no agreed upon definition of public procurement, it is widely accepted that it involves the obtaining of goods and services by the public sector through a process encompassing public competition.[11]In developing countries, public procurement expenditure accounts for between 25-30% of the GDP.[12] The effect of public procurement having such a big economic significance, is that, any inefficiencies in the procurement process ultimately results in massive losses for the public.[13]The recognition of this fact has led to prioritization of the reform agenda across both developed and developing countries. The reforms have been primarily aimed at increasing efficiency of the procurement process.[14]However, the substance of the reforms has led to different results with some countries reaping the benefits of considerable savings while others have been left behind.[15]

Singapore and Kenya offer a good example of the different trajectories which have resulted from a bid to reform the public procurement process. In the late 1980s and early 1990s,

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[10] The World Bank Group, 'Benchmarking Public Procurement 2017: Assessing Public Procurement Regulatory Systems in 180 Economies' (The World Bank Group 2016) <http://pubdocs.worldbank.org/en/121001523554026106/BPP17-e-version-Final-compressed-v2.pdf> accessed on 1 September 2019.

[11] Robert Agwot Komakech, 'Public Procurement in Developing Countries: Objectives, Principles & Required Professional Skills' (2016) 6 (8) IISTE <https://pdfs.semanticscholar.org/d3df/5c722d2053d1fd08b26a0b4c083e67b84315.pdf>accessed 1 September 2019.

[12] United Nations Conference on Trade and Development, '*Competition Policy and Public Procurement*' (UNCTAD 2012).

[13] United Nations Conference on Trade and Development (n 8 above).

[14] United Nations Conference on Trade and Development (n 8 above).

[15] United Nations Conference on Trade and Development (n 8 above).

after seemingly getting frustrated by the inefficiencies and the fact that its government was procuring products at inflated prices, Singapore decided to modernize its procurement system emphasizing on protecting competition by making it compulsory for all tenders to be listed on a procurement portal accessible to all.[16]The leadership also enacted heavy sanctions for anti-competitive behaviour such a bid-rigging and handed down strict sanctions on those who were found flouting the regulations. The above reforms led to remarkable improvement in the efficiency of public procurement in Singapore and also increased competition and value for money.

Kenya on the hand, focused on enacting legislations aimed at eliminating corruption in the procurement process. The root cause of why the reforms were urgently needed will be discussed later on in this paper. However, a brief summary is provided. Initially, the system of regulation was through treasury circulars and was not very effective.[17]This resulted in cases of corruption in the procurement system.[18] This called for procurement reforms through enactment of laws and regulations.[19] At that point in time, the lack of regulation was thought to be the real reason for the increased cases of procurement corruption. The rules established, were therefore effectively geared towards curtailing corruption and other forms of abuses.[20] This was against a background, where the legal and institutional

[16] United Nations Conference on Trade and Development (n 8 above).

[17]Migai Aketch; 'Development Partners and Governance of Public Procurement in Kenya: Enhancing Democracy in the Administration of Aid' available athttp://iilj.org/GAL/documents/AkechPaper_000.pdf (accessed on 2 October 2014).

[18] Fred Owegi and Eric Aligula, 'Public Sector Procurement in Kenya: The Need for a Coherent Policy Framework' Nairobi: Kenya Institute for Public Policy Research and Analysis, 2006, available at http://www.gbv.de/dms/zbw/638200644.pdf (accessed on 15 November 2013).

[19] Public Procurement and Disposal Act 2005; Public Procurement and Disposal Regulations 2006.

[20] Migai (n 13 above) 25.

framework for fighting corruption, was non-existent or weak and thus the main objective of the rules was to promote integrity and fair competition in the government procurement and to achieve value for money, through efficient and effective procurement.[21] This process of reform, ultimately reached its highest level with the promulgation of the Constitution. The Constitution prescribed principles which were aimed at radically improving the public procurement process in Kenya. Article 227 specifically provided for a procurement system that would be fair, equitable, competitive, transparent and cost effective. This was followed by the enactment of the Public Procurement and Disposal Act 2015 which was meant to give effect to the constitutional provisions relating to public procurement. The paper provides a critical analysis of the supportive legislation and finds that more needs to be done to ensure greater alignment between the Constitution and the supporting legislation if the intended results in the procurement system in Kenya are to be realised.

In the recent past, questions have been raised as to the effectiveness of the procurement rules to promote fair competition, integrity and achieve value for money. Cases of corruption in the procurement system have continued to be unearthed, some of these cases include: the National Social Security Fund (NSSF) funded Tassia II estate project, the Independent Electoral and Boundaries Commission (IEBC) Biometric voter register/voter identification kit, Laptop project and Standard Gauge Railway (SGR) procurement.[22]

[21]Rambol Management A/S, 'Assessment of the Procurement System in Kenya' 2010, available at http://www.oecd.org/development/effectiveness/41583965.pdf(accessed 25 September 2014).

[22] Public Procurement in Kenya 'Cash cow for the corrupt or enabler for public service delivery?' Adili Issue 145, June 2014, available at http://tikenya.org/index.php/blog/277-public-procurement-in-kenya-cash-cow-for-the-corrupt-or-enabler-for-public-service-delivery (accessed on 20 September 2019).

Cases of inefficiency in procurement have also been rampant, as government still procures goods at overpriced or exorbitant prices despite having a strong legal and regulatory procurement regime.[23]This has resulted in key questions being raised as to whether the approach so far, which has focused on strengthening the legal framework, has been the right one.

This study proposes that the key factor, which has been holding Kenya back from achieving efficiency in the procurement process, is the poor application of the relevant laws. Poor application of the law has been due to ambiguity and vagueness in the law, poor comprehension by the Public Procurement Administrative Review Board and in some documented instances, plain unconstitutionality of the provisions of the relevant laws such as the PPDA 2015. A detailed analysis of case law is provided under chapter 3 of this paper.

In conclusion, this study puts forward the argument that though great strides have been taken to effectively regulate the once loosely regulated public procurement sector, the focus needs to shift so as to ensure that the statutes are aligned to assist in achieving the spirit of the Constitution espoused under Article 227. This demands for steps to be taken to vastly improve the proper application of the provisions of the statutes and where necessary, amendments made to the statutes to ensure that they are in congruence with the Constitution. Further, ambiguous provisions need to be amended so as to comply with provisions of Article 10 of the Constitution which provide for certainty in the law.

[23]Adili (n 18 above) 22.

There is a need to move away from looking at procurement law as a tool to mainly fight corruption by ensuring that the procurement law is fully aligned to the constitutional principles prescribed under Article 227. The principles include equity and fairness and they are meant to address, with more finality, the sticky issues that still hold back full reforms in public procurement in Kenya.

1.2 Issues in this Study

Kenya has come a long way in the regulation of public procurement. For over three decades, the regulation of public procurement was characterised by a multiplicity of legislations.[24] The scenario was therefore disorderly and contributed to increased cases of procurement malpractice. It has been variously[25] observed that the inefficiency in the system was deliberate and meant to weaken oversight mechanisms, thereby facilitating grand corruption and wastage of public resources by those who held positions of power.[26]

Bearing this background in mind, it is evident that Kenya has made great strides in the public procurement reform agenda. The elevation of public procurement, within the larger public finance management reforms, in the Constitution, was perhaps the greatest

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[24] Njuguna Humphrey Kimani, '*The Influence of Political Patronage On The Operationalization Of Public Procurement Law In Kenya*' (2014) PL 6.

[25] Public Procurement Oversight Authority, 'War on Corruption in Public Procurement: Recent Achievements' 2010. Available at http://www.eappf.org/uploads/media/War_on_Corruption_in_PP_-_recent_achievements_by_PPOA_Kenya_01.pdf. (Accessed on 17 November 2013); Rambol Management A/S, 'Assessment of the Procurement System in Kenya' 2010 http://www.oecd.org/development/effectiveness/41583965.pdf (accessed on 14 November 2013); Fred Owegi and Eric Aligula, 'Public Sector Procurement in Kenya: The Need for a Coherent Policy Framework' Nairobi : Kenya Institute for Public Policy Research and Analysis, 2006, available at *http://www.gbv.de/dms/zbw/638200644.pdf* (accessed on 15th November 2013).

[26] Njuguna (n 1 above) 8.

demonstration of the importance placed on public procurement. Insulating the procurement system within the Constitution, offered greater protection to the system which has hitherto not been available as demonstrated from the historical review of the public procurement reforms journey.[27]

Kenya has access to an orderly and constitutionally backed public procurement system.[28] However, despite the elevation of public procurement to a constitutional threshold, cases of procurement corruption and inefficiencies still persist unabated.[29] Instances of purchase of goods and services at inflated prices, non-payment of suppliers and skewed procurement practices continue to be experienced at levels similar to the pre-constitutional period.[30] This scenario questions the effectiveness of the legal order established under the Constitution and thereby forms the basis of the issues canvassed in this study.

Following the promulgation of the Constitution, the Public Procurement and Disposal Act, 2015, was enacted to give effect to Article 227 of the Constitution. The new Act effectively repealed the Public Procurement and Disposal Act, 2005. The provisions of the new Act[31], in most instances demonstrated in this study, did not give full effect to the provisions of the Constitution and in essence do not therefore address Kenya's quest for an equitable and fair procurement system. The Act contains provisions that have been ruled to be

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[27] Jerome Ochieng and Mathias Muehle, 'Development and Reform of the Kenyan Public Procurement System' Paper 7-7, 1763, available at http://www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf (accessed on 15 November 2019).

[28] Njuguna (n 1 above) 9.

[29] Ethics and Anti-Corruption Commission, 'EACC Ethics And Corruption Survey 2017' (2018) www.eacc.go.ke/wp-content/uploads/2018/11/EACC-ETHICS-AND-CORRUPTION-SURVEY-2017.pdf accessed 24 November 2019.

[30] Ethics and Anti-Corruption Commission (n 4 above) 4.

[31] The Public Procurement and Disposal Act, 2015.

unconstitutional. Some provisions of the Act are also manifestly vague as has been demonstrated by the frequent overturning of decisions reached by the Public Procurement Administrative Review Board, at the High Court.

Whereas the Act was enacted to implement the constitutional provisions relating to public procurement, the attendant subsidiary legislation[32] is yet to be amended to align to the Act and the Constitution. The lack of effectiveness in the public procurement system post-constitutional promulgation is attributed to the deficiencies in the enabling legislation which is foreseen in the Constitution to support realisation of the constitutional principles. Article 227 provides thus: *'An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented'*[33].

1.3 Statement of the Problem

The public procurement laws and regulations are not aligned to the Constitution. Article 227 of the Constitution prescribes for a procurement system that is, among other principles, fair and equitable. The Public Procurement and Disposal Act, 2015 was enacted to operationalise the constitutional provisions relating to public procurement. The Act however borrowed heavily from the defunct Act, the Public Procurement and Disposal Act, 2005, that preceded the promulgation of the Constitution. As such, most of the provisions in the new Act, although meant to be fully aligned to the Constitution, do not in effect reflect the main principles espoused in the Constitution, including the quest for equity and

[32] The Public Procurement and Disposal (Preference and Reservations) Regulations, 2011 and the Public Procurement and Disposal (Preference and Reservations) (Amendment) Regulations, 2013.

[33] Treasury Circular No. 02/2016: ref NT/PPD.1/2/02/PART III (75) of 29 March 2016 on *Operationalization of the New Public Procurement and Disposal Act, 2015.*

fairness. This has therefore created a problem in the public procurement reform efforts, where cases of corruption and inefficiencies continue unabated. Lack of a supportive and aligned legislation, has therefore served to undermine the principles prescribed in the Constitution and therefore slowed down public procurement reforms envisioned in the Constitution.

1.4 Objectives of the Study

The main objective of the study is to make a case for the amendment of the vague and in some instances, unconstitutional provisions of the Public Procurement and Disposal Act, 2015, and enactment of relevant regulations to give effect to the constitutional provisions relating to public procurement. The specific objectives are to; firstly, track the history of public procurement reforms in Kenya to understand the clear motivations for the reforms instituted along the different phases of the journey. Secondly, to identify the outstanding issues impacting the full realisation of the constitutional principles by examining the emerging jurisprudence of our courts and undertaking an analysis of lessons learnt from other jurisdictions that share a similar history in procurement reforms, and finally; to propose measures that need to be implemented to address identified gaps impacting full operationalization of the constitutional principles that guarantee achievement of equity and fairness in public procurement.

1.5 Research Questions

The study addresses the following research questions:

1. What did the drafters of the Constitution seek to cure by setting out the principles in Article 227?

2. How has the PPDA 2015 assisted in achieving a procurement system envisioned by Article 227?

3. Which specific provisions of the PPDA can be amended to help achieve the goal set out in Article 227?

4. What lessons can Kenya learn from other countries which have both succeeded and failed in their attempts to reform public procurement?

1.6 Hypotheses

The study contains the following hypotheses; firstly, though numerous steps have been undertaken to improve the public procurement system, the continued existence of least understood, vague and unconstitutional provisions in the statutes, continue to hinder the achievement of the procurement system envisioned under Article 227 of the Constitution. Secondly, this study will identify that the situation in which the country finds itself in, that is, in a process of continuous reforms in the public procurement system, is an attempt to cure previous ills which hampered the proper functioning of the procurement system for close to three decades. These ills include the deliberate weakening of the legal and institutional regime for public procurement, through multiplicity of rules and low budgetary allocations intended to cripple operations of the institutions tasked with the responsibility of ensuring public procurement was conducted in a fair and equitable manner. Due to the historical considerations, the government embarked on public procurement reforms that were mainly premised on combating corruption without lending

full consideration to the need for ensuring a procurement system, as envisioned under Article 227 of the Constitution, was attained.

1.7 Literature Review

Public procurement system in Kenya was for a long time not properly regulated. There was no specific law that regulated procurement. Regulation was through treasury circulars, which tended to be contradictory and not accessible to all. As such, procurement regulation was incoherent and unpredictable. It was impossible for procurement practitioners and participants to know at any one point in time what treasury circular was applicable and which one had been overridden.[34]

As such, procurement discourse in Kenya, post-independence until the enactment of the principal procurement laws in 2005[35], mainly concentrated on identification of the weaknesses of the existing regulatory system or lack thereof. The lack of legal and institutional mechanisms to regulate Public Procurement in Kenya, was blamed for the widespread and pervasive corruption during that period.

Robert R Hunja in his 2001 article, 'Obstacles to Public Procurement Reform in Developing Countries'[36]observes that existence of pervasive corruption during the period,

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[34]Migai Aketch. 'Development Partners and Governance of public Procurement in Kenya: Enhancing Democracy in the Administration of Aid, available at http://iilj.org/GAL/documents/AkechPaper_000.pdf (accessed on 15 October 2014).

[35]Public Procurement and Disposal Act 2005; Public Procurement and Disposal Regulations 2006.

[36]Rober R Hunja, 'Obstacles to Public Procurement Reform in Developing Countries' available at http://www.google.co.ke/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CBwQFjAA&url=http%3A%2F%2Fwww.unpcdc.org%2Fmedia%2F2400%2Fobstacles%2520to%2520public%2520procurement%2520reform%2520in%2520developing%2520countries%2520(copy).doc&ei=J99QVO21Fo_lara4g

was associated with absence of proper regulatory mechanisms. Reforms in this direction were, often frustrated by lack of political will. Top government officials enjoyed the *status quo* and did not therefore see the urgency in facilitating reforms. The author observes that procurement reform should be initiated in developing countries in order to promote transparency and competition; he observes that most common law countries that followed the UK model preferred to use rules as the regulatory regime. These rules however, do not have the appropriate force of law and can be overlooked by buyers. He also observes that procurement reforms, should ideally be implemented through legal instruments, which should be comprehensive and enforceable. His key argument for reform is implementation of laws, which are detailed, in that they provide procedures to be followed, oversight mechanisms and enforcement criteria. He opines that such reforms should be implemented as part of wider governance reforms. He is of the view that donors should be involved to exert pressure on government to implement these reforms.

The author's focus for reforms is demand driven. He indicates that reforms should be undertaken with a view to injecting greater transparency and competition to the system and increasing the accountability of public officials. He further indicates that legal framework should provide for all the procedures that a public entity should follow in carrying out procurement. He however calls for a proper balance and appropriate 'division' between what the law should contain and what should be in the underlying regulations. More importantly, he opines that, careful consideration in drafting should be given, to ensure that

eAC&usg=AFQjCNHTVXBsXdkTF1d8r9DxNnrK8gvYZw&bvm=bv.78597519,d.d2s (accessed on 20 October 2014).

such regulations do not contradict, dilute or compromise the policy objectives provided for in the law itself.

Hunja's work is mainly focused on the need to regulate public procurement in developing countries. The work was published at a time when the regulation of public procurement in most African countries was disorderly and ineffective. It was also published just before legislative reforms were undertaken in earnest. In Kenya, for instance, legislative reforms in the area of public procurement were put in place in 2005 through the enactment of the Public Procurement and Disposal Act, 2005. The author gave greater focus to enactment of laws and regulations to address issues in the public procurement system. The study makes good arguments in advocating for legislative mechanisms for regulating the procurement system to reduce the discretionary power held by government leading to abuse of the procurement process to reward and promote patronage. Hunja's argument for ensuring a balance is attained between the detail included in the regulations and the principal law, to ensure these do not contradict or dilute the principal law are very compelling. The study was however undertaken before public procurement was elevated to a constitutional issue and did not therefore anticipate current issues where regulation of public procurement is negatively impacted by laws and regulations that are vague, complex and non-aligned to the supreme law. This study provides a critical review of the legal and regulatory instruments in place to ensure they are aligned to the supreme law of the land and give effect to procurement principles that enhance fairness and equity.

Professor Migai Aketch in his article of 2005 'Development Partners and Governance of Public Procurement in Kenya: Enhancing Democracy in the Administration of Aid'[37] argues for use of national procurement system in government procurement to enhance accountability. Professor Migai, traces the reforms in public procurement from the era of circulars to the introduction of regulations in 2001.[38]He argues for the need to ensure adequate legislative reforms are put in place to address the issues of pervasive corruption and use of procurement as a tool for political patronage.

The article acknowledges the weaknesses in the procurement regulatory framework in Kenya but decries the use of parallel systems, which ignore or overlook government systems. His argument is based on the procurement regime of the Governance, Justice, Law and Order Sector (GJLOS) reform programme, which was a government programme implementing a Sector Wide approach (SWAp) to development in the governance sector, and which used a parallel procurement system. The author opines that, though the existing procurement regulatory framework was weak as cases of corruption continued to be reported, use of a parallel system was not the solution. The solution, he argued, laid in implementing comprehensive reforms through adoption of the then Public Procurement and Disposal Bill, 2005.

Professor Migai therefore supported reforms through legislative framework to ensure corruption and other forms of abuse in public procurement were curtailed. His view is that the existence of discretion necessitated by a procurement regulatory system comprising of

[37]MigaiAketch. 'Development Partners and Governance of public Procurement in Kenya: Enhancing Democracy in the Administration of Aid, available at http://iilj.org/GAL/documents/AkechPaper_000.pdf (accessed on 15 October 2014).

[38]Exchequer and Audit (Public Procurement) Regulations 2001.

inconsistent and unpredictable circulars, was not tenable. His article appeared to promote reforms through laws, which would be more comprehensive and enforceable.

Professor Migai's argument for addressing weaknesses in the procurement system through legalistalive mechanisms is noted. Migai's arguments were however made before the enactment of the Public Procurement and Disposal Act, 2005 and later the Constitution. The article puts forth an argument that lack of a legislative mechanism[39] to regulate procurement was the biggest hindrance to achievement of reforms in public procurement including addressing issues of corruption in procurement. Our study however notes that, corruption in procurement persisted even after the legal and regulatory mechanism advocated for by scholars,[40] including Professor Migai, were instituted. Our study was also undertaken after the promulgation of the Constitution which elevated public procurement to a constitutional issue. Our study therefore fills the gap by analysing the legal and regulatory regime against the provisions of the Constitution which most scholars have not addressed themselves to, perhaps due to the short time that the enabling Act, which was operationalised in 2016, has been in effect.

[39] Public Procurement and Disposal Act 2005; Public Procurement and Disposal Regulations 2006.

[40] Public Procurement Oversight Authority, 'War on Corruption in Public Procurement: Recent Achievements' 2010. Available at http://www.eappf.org/uploads/media/War_on_Corruption_in_PP_-_recent_achievements_by_PPOA_Kenya_01.pdf. (Accessed on 17 November 2013); Rambol Management A/S, 'Assessment of the Procurement System in Kenya' 2010 http://www.oecd.org/development/effectiveness/41583965.pdf (accessed on 14 November 2013); Fred Owegi and Eric Aligula, 'Public Sector Procurement in Kenya: The Need for a Coherent Policy Framework' Nairobi : Kenya Institute for Public Policy Research and Analysis, 2006 , available at *http://www.gbv.de/dms/zbw/638200644.pdf*(accessed on 15th November 2013).

Jerome Ochieng and Mathias Muehleon in their article in 2012 on 'Development and Reform of the Kenyan Public Procurement System'[41] trace the reforms in the procurement system until the enactment of the new Constitution.[42] The article confirms that corruption continues to persist despite the existence of a procurement law that is stringent and which was designed, largely to curb corruption. The article calls for other means of curtailing corruption including observance of the rule of law. The article makes a key recommendation for the capacity building of procurement professionals to empower them to implement the procurement law effectively. The article further observes that good laws can be ineffective if there are low compliance thresholds. To promote compliance of the law and assist in attainment of the set procurement objectives, the article calls for capacity building of the procurement cadre, through training. The paper therefore addresses the issue of compliance with existing procurement laws through increased capacity of procurement professionals.

Although the paper acknowledges the dearth in compliance with the existing procurement laws, which perpetuates procurement corruption, it proposes a solution that is not focussed on the law itself and the broader reasons for its non- compliance, but on the procurement practitioners and their capacity to implement the law. Lack of deeper interrogation of the law itself to understand the broader reasons, including complexity of the rules, vagueness in the law and existence of provisions that are unconstitutional and misaligned to the supreme law of the land, represent a gap in the article that our study seeks to address.

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[41] Jerome Ochieng and Mathias Muehle, 'Development and Reform of the Kenyan Public Procurement System' Paper 7-7, 1763, available at http://www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf (accessed on 15 November 2013).

[42] The Constitution of Kenya, 2010.

Procurement discourse in Kenya has largely focussed on the non-existence and inadequate legal and regulatory regime in Kenya. As indicated in the literature review above, public procurement in Kenya was largely unregulated. As such, most of the contributions from scholars in this area of study, have tended to emphasize introduction of legislative mechanisms to regulate public procurement. With the enactment of the Public Procurement and Disposal Act, 2005 and the promulgation of the Constitution in 2010, there have not been much analysis of the effectiveness of the procurement system post-implementation of the legal and regulatory mechanisms which were hitherto non-existent and lack of which, dominated debate and discourse in public procurement space.

Public procurement is a useful tool, not only in curbing corruption and ensuring efficient use of public funds, but also in ensuring attainment of social and economic goals[43] including fostering greater fairness and equity as foreseen in the Constitution.[44] Due to the limited literature focussing on public procurement, post-constitutional promulgation, in Kenya. Our literature review extended beyond Kenya and Africa, to other developed countries for a broader understanding of emerging issues in public procurement system that Kenya could learn from.

Paul R Schapper, Joao N, Veiga Malta and Diane L Gilbert in their article in 2006, 'An Analytical Framework for the Management and Reform of Public Procurement'[45]analyse the performance and conformance tension within public procurement reforms. The article

[43] Phoebe Bolton, 'Government Procurement as a Policy tool in South Africa' available athttp://unpcdc.org/media/5376/government%20procurement%20as%20a%20policy%20tool%20in%20south%20africa.pdf (accessed on 12 October 2019).

[44] The Constitution of Kenya, 2010.

[45]Paul R Schapper, Joao N, Veiga Malta and Diane L Gilbert, '*An Analytical Framework for the Management and Reform of Public Procurement*'Journal of Public Procurement, Volume 6, issues 1&3, 1-26, 2006.

analyses the traditional procurement reform mechanisms that focussed on conformance to procurement rules and compared this to the modern reform initiatives that focus on performance. Conformance reforms are associated with stringent and overly prescriptive procurement regimes that do not provide any room for procurement practitioners to exercise any management role. The professional cadre developed from this system, is one that only knows the rules and not how to manage resources. The authors argue for the use of procurement as a tool to promote performance, as such, they advocate for procurement reforms that are geared towards the outcomes and results and not the processes.

This article aligns to our arguments in the study for simplification of procurement laws, which are considered complex and vague, to promote wider participation and achievement of the principles set out in Article 227 of the Constitution including promotion of equity and fairness. The authors' argument for shifting focus from merely conforming to laws and regulations, to enhancing performance, is aligned to our study which is also advocating for procurement laws and regulations that guarantee achievement of the outcomes prescribed in the Constitution in form of guiding principles. These outcomes include attainment of equity and fairness in public procurement reforms. The article under review, however promotes greater discretionary power being in the hands of procurement practitioners, which can be a challenge in developing countries, especially, where cases of procurement corruption persist. The article therefore appears to prescribe solutions that can be considered premature for the Kenyan nascent public procurement system. Our study therefore fills this gap by advocating for alignment of the procurement laws to the Constitution, as part of initial steps to realization of a procurement system that promotes equity and fairness. The study postulates that this alignment is the missing link to ensuring

that the elusive improved and holistic performance in the public procurement system is attained as foreseen in the Constitution.

Steve Kelman in his book 'The Fear of Discretion in Government Procurement' presents an interesting point of view as to why government (referring to the US Federal Government) procurement is not effective. In his view, the rules implemented to ensure that there is open competition in tendering and that government funds are used efficiently, are to blame.[46]Kelman begins by explaining that government procurement is focused on three key activities: fair access by bidders, integrity and economy.[47] Despite the achievement of the three, Kelman explains that it is not unusual for the government to consistently fail at procurement. In his view, the reason why the government fails at procurement, is due to its refrain from having informal relationships and failure to award prior suppliers with whom it has a good track record.[48] The said practice, while having its obvious risks of breeding favouritism and inhibiting competition, result in the government not getting the products it deserves as the suppliers see no need in advising which products are the perfect fit.[49]Kelman therefore proposes a shift in priority, from rules which create a barrier between the procuring officers and the suppliers, to a system which, although encouraging the interactions between the two, would check against corruption by having detailed written decisions justifying a procurement outcome.[50]

[46]Jerry Mashaw, 'The Fear of Discretion in Government Procurement'(1991) 8 (2) Yale Journal on Regulation<https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1192&context=yjreg> accessed 3 September 2019.

[47]Jerry (n 36 above) 6.

[48]Jerry (n 36 above) 6.

[49]Jerry (n 36 above) 7.

[50]Jerry (n 36 above) 8.

Kelman offers an interesting and innovative approach on how public procurement system can be enhanced to achieve greater efficiency. He advocates for more informal relationships with suppliers where the flow of information from either end, is uninhibited. This article aligns with our study in so far as it focusses on the outcomes and less on the rules and processes, which have been found to be ineffective in the fight against procurement corruption. The article however advocates for increased collaboration with suppliers, which may be suited for a more mature procurement system. In Kenya, where the procurement system is still undergoing reforms, allowing for unregulated interaction between procuring entities and suppliers, may limit fair competition in the system. The Kenyan Constitution foresees a procurement system that guarantees fairness and equity. Our study argument is that this is only achievable within a legal system that contains laws and regulations that are fully aligned to the Constitution.

Joshua I. Schwartz, in his 2007 article on 'Regulation and Deregulation in Public Procurement Law Reform in the United States'[51] argues for use of procurement law mainly as a tool for achievement of economic or business goals and less as a tool of governance and fight against corruption. Joshua's article on deregulation is perhaps the closest literature that aligns with the study objectives. His argument against the use of public procurement law as a tool to combat corruption is premised on the fact that, this has largely remained ineffective, as corruption persists even within jurisdictions that have stringent procurement laws. His argument is that, use of procurement law as a tool to fight

[51]Joshua I. Schwartz, 'Regulation and Deregulation in Public Procurement Law Reform in the United States.' in Advancing Public Procurement: Practices, Innovation and Knowledge-Sharing, 177-201, edited by Gustavo Piga&Khi Thai. Boca Raton: PrAcademics Press, 2007.

corruption, leads to a regulatory regime that is complex. The complex regulatory regime, which he argues does not reduce corruption in procurement, leads to inefficiencies as it limits access to procurement and thereby undermines equity and fairness.

His article however, calls for simplification of the process through greater discretion to procurement professionals. He argues for empowerment of procurement practitioners through training and development, to enable them use discretion in managing procurement. His views are that, regulation based on procurement scandals, largely amount to 'knee- jerk reaction' and is abused by politicians who want to show 'leadership and action' in preventing corruption by overregulating the practice. His views are that the law cannot fully eliminate procurement scandals, but with more discretion and empowerment of procurement professionals, a proper balance can be arrived at.

The arguments put forth by the author fully align with our study, to the extent that they advocate for adoption of procurement rules that are clear and less complex. The only departure between the author's arguments and our study, is the proposed mechanism for achieving procurement objectives. Whereas the article strongly advocates for more discretion at the hands of public procurement practitioners, our study's focus is on how a fair and equitable system can be achieved, within the Kenyan perspective, through alignment of laws to the Kenyan Constitution.

1.8 Justification for the Study

Governments all over the world have been recognised as major contributors to the delivery of essential services that include health, education, defence and infrastructure services.[52] Public procurement involves purchasing of goods and services by public entities, to support in their mandate of delivering services to the citizenry. As Government or public entities cannot produce everything internally, they largely rely on public procurement to obtain goods and services necessary for them to fulfil their mandates.

Public procurement is considered as a tool with both economic and political implications and is therefore subjected to enacted regulations in order to protect the wider public interest.[53] As public procurement involves expenditure on public funds, usually taxpayers' funds, the wider public constitutes a key stakeholder that has an interest in proper management of public procurement that includes promotion of competition through fair and transparent processes. The elevation of public procurement to a constitutional issue demonstrated its importance in the overall governance of the nation.

However, despite the elevation of public procurement to a constitutional threshold, cases of procurement corruption and inefficiencies still persist.[54] Instances of purchase of goods and services at inflated prices, non-payment of suppliers and skewed procurement practices continue to be experienced at levels similar to the pre-constitutional period.[55] This scenario questions the effectiveness of the legal order established under the Constitution.

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[52] Walter Odhiambo and Paul Kamau, 'Public Procurement: Lessons from Kenya, Tanzania and Uganda' available at http://www.u4.no/recommended-reading/public-procurement-lessons-from-kenya-tanzania-and-uganda/ (accessed on 2 October 2014).

[53] Ibid.

[54] Ethics and Anti-Corruption Commission, 'EACC Ethics And Corruption Survey 2017' (2018) www.eacc.go.ke/wp-content/uploads/2018/11/EACC-ETHICS-AND-CORRUPTION-SURVEY-2017.pdf accessed 24 November 2019.

[55] Ethics and Anti-Corruption Commission (n 4 above) 4.

Due to the significant role that public procurement plays in economic development of a nation. A role that was recognized with the elevation of public procurement to a constitutional issue. It was necessary to investigate the procurement regime in Kenya, following the promulgation of the Constitution, to establish where the gaps were, for full realization of the principles prescribed in the Constitution.

As indicated above, public procurement is a powerful tool in the hands of the government which can be used to stimulate the economy. A well-functioning public procurement with clear laws and regulations anchored in the Constitution would also serve to promote Kenya as a preferred investment destination thereby contributing to increased productivity, employment and overall economic growth.

This study therefore fills the existing gap, firstly in Kenya, by providing additional scholarship that reviews the emerging jurisprudence from our courts and the provisions of the PPDA 2015 to determine whether indeed the country is on the right track to achieving the public procurement system envisioned by both Article 227 of the Constitution and section 3 of the PPDA 2015. The proposed procurement reforms will therefore be focused on ensuring that the provisions of the PPDA 2015 are fully aligned to the Constitution.

1.9 Theoretical Framework

This study is guided by the indeterminacy theory, pure theory and sociological jurisprudence theory of law.

Indeterminacy theory

Owen Fiss is one of the famous proponents of the indeterminacy theory of law. The proponents of this theory place an emphasis on the need to be concerned with the increasing

indeterminacy of laws as it affects their legitimacy. Joseph Singer posits that substantial determinacy is a requirement of the rule of law. He further states that determinacy is desirable as it restrains arbitrary judicial power.[56]This theory is relevant in this study, as it supports the argument for the need to ensure that indeterminacy in the laws guiding procurement is minimized. One of the issues identified in this study is vagueness of the law enacted to implement Article 227 of the Constitution. Arguments advanced in this theory will support clear identification of issues and recommendations for amending the law to enhance its clarity and contribute to the rule of law.

Timothy Endicott in his book Vagueness in Law, acknowledges that a common feature of the law is that it is extremely vague. He gives the following example to show how the law is linguistically indeterminate: "No person shall take or possess, in the County of Lanark or the Regional Municipality of Ottawa-Carleton, any bullfrog unless the tibia thereof is five centimetres or more in length." He illustrates that the law is indeterminate in that it does not provide for what happens in the event that one tibia is five centimetres and another shorter or in the event where the tibia is four centimetres long when laid beside a ruler but six centimetres long when measured with a tape. He disagrees with Dworkin's claim that indeterminacy in the application of vague language can be eliminated by a rule of interpretation providing that the language shall only be applied in clear cases. Endicott posits that in no way does interpretation of indeterminate laws by judges eliminate indeterminacy as even for them, continued linguistic indeterminacy might lead to a situation where they are also not sure of the positions which they take.

[56]Ken Kress, 'Legal Indeterminacy' (1985) 77(1) California Law Review<https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1873&context=californialawreview> accessed 30th September 2019.

Endicott's work highlight the importance of taking extra consideration with regard to how laws are drafted and uses creative examples to illustrate how indeterminacy can arise from what would seem otherwise straightforward to an ordinary person. The need to avoid indeterminate laws in public procurement is particularly relevant especially in light of the need to reform the procurement laws to make them more clear, less complex and ultimately in line with the provisions of Article 227 of the Constitution.

Pure theory of law

The pure theory of law is also relevant to this study. The pure theory of law is attributable to Hans Kelsen. As the name suggests, one of the characteristics of the pure theory of law, is that the law appears as is, excluding other externalities, such as, the pressures in the society which bring about the enactment of the law.[57] Further, the pure theory of law does not include a study of the consequences of law in a particular society though there is an exception in which Kelsen posits that a legal norm is only valid if it forms part of a legal order which is effective in the society.[58] As such, the pure theory of law does not leave room for citizens to ask such questions as "Is this law being enforced or complied with?" Further, and perhaps what the theory is most famous for, Kelsen's theory is designed to trace the validity of every official act to the ultimate authority of the original state of the Constitution.[59] This theory is particularly important, as it amplifies the need to ensure that

[57]Edwin W. Patterson, 'Hans Kelsen and His Pure Theory of Law' (1952) 40 California Law Review <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=3427&context=californialawreview> accessed 30th September 2019.

[58]Edwin (n 43 above) 12.

[59]Edwin (n 43 above) 12.

the statutes governing procurement law are aligned to the Constitution and also provides a basis for declaring invalid, any legal provision which is in contravention with the Constitution.[60]

Sociological jurisprudence legal theory

The study also looks at the sociological jurisprudence legal theory. Under the sociological jurisprudence, law does not exist in a vacuum; sociological jurisprudence sees law as existing within societal relations. Under this school of thought, there are several ways in which social order can be achieved, these include through education, religion, morality and law. Law just happens to be one of the tools used for social order and social control. One of the proponents of this school of thought is Roscoe Pound.[61] Under the sociological jurisprudence theory, law is basically societal interests that have evolved over time and accepted as law either through codification or through judicial pronouncements (common law). Under this school of thought, the real source of law is not statutes but the activities of the society itself. The activities of the society were defined by Roscoe Pound as societal interests which evolve over time. It is these interests that define how the society is to be controlled or ordered. These interests are sometimes codified in law, but the fact of their codification does not give them any greater legitimacy than how the society holds them through practice or even through interpretation by lawyers and judges, whom Pound refer to as, social engineers.

[60]Edwin (n 43 above) 12.

[61]Pal, Debarati, 'Sociological Jurisprudence - Theory of Roscoe Pound (July 29, 2011). Available at SSRN: http://ssrn.com/abstract=1925790 or http://dx.doi.org/10.2139/ssrn.1925790 (accessed on 18 November 2018).

The sociological legal theory is used to argue against over-regulation in procurement reforms especially in the Kenyan context where regulation has mainly been focused on sealing corruption 'loopholes'. The study argues that this over-regulation has led to the consistent failure to meet the objectives of a procurement system as envisioned in the Constitution under Article 227.

1.10 Research Methodology

The research methodology employed in this study, is the qualitative methodology. This methodology is employed in order to assist in gaining an understanding of why the public procurement system in Kenya, is not reflective of the ideals set out in the Constitution. The main advantage of the qualitative research methodology, is that, it enables the researcher to gain an in-depth understanding of the reasoning behind the judgments of the courts and the Public Procurement Administrative Review Board (PPARB).

In order to support the qualitative research methodology, the study will rely on both primary and secondary data. The primary data, which will form the basic resource for this research, will consist of statutes, bills and regulations. In addition, secondary sources such as, textbooks, law journal articles, and various other sources, including the internet are considered.

1.11 Limitations of the Study

Procurement as a research area, is increasingly gaining prominence from scholars, globally. It is however still not recognized as a mainstream area of research. As such, there is very minimal contribution from scholars, in terms of journals and articles. In Kenya for instance, a lot of focus has been placed on the review of the historical evolution of public procurement reforms, through institution of a legal and regulatory framework. This study focuses on critical analysis of the procurement law to determine if it is aligned to the Constitution and highlight specific areas of non-alignment. There is very minimal literature on this specific review area. The study therefore relies on literature from developed countries, where scholars have ventured beyond generic procurement topics, to provide deeper analysis of emerging procurement issues.

1.12 Chapter Breakdown

Chapter One: Introduction

This chapter introduces the study. It examines the background to the study by highlighting the progress Kenya has made in public procurement reforms, from an era of limited regulations through Treasury circulars, to an era of enhanced legal and institutional mechanisms, including the elevation of public procurement to a constitutional issue through Article 227. The chapter further identifies key study issues including the limitations of the enabling Act to give full effect to the constitutional requirements for a fair and equitable procurement system. Some of the issues identified include complexity and vagueness in the enabling legislation. The chapter has also defined the problem statement, the research questions sought to be answered, the theoretical framework within

which the study is grounded and the study justification. The chapter finally provides an outline of key literature reviewed, the methodology adopted and the limitations thereof.

Chapter Two: The History of Public Procurement in Kenya

The second chapter traces the origin of the ills which have hindered and plagued the procurement system in Kenya. It follows the history of public procurement regulation from a system characterised by multiplicity of rules conveyed through Treasury circulars, to a properly regulated and orderly system. The historical analysis is juxtaposed with the various political administrations and regimes in Kenya. This is undertaken in a bid to reflect on the phases within the procurement reform journey that are tied to specific polices of different administrations. This chapter further seeks to answer one of the research questions relating to what the drafters of the Constitution sought to cure by elevating public procurement to a constitutional threshold through inclusion of Article 227. The chapter concludes by highlighting the underlying reasons for apparent lack of progress in public procurement reform and system as envisaged in the Constitution.

Chapter Three: Analysis of the Courts' Jurisprudence

This chapter introduces and defines the principles prescribed under Article 227 of the Constitution. The chapter highlights the overarching principles of fairness and equity, which are the main focus of this study. Other principles which are considered, include; competition, transparency and cost-effectiveness. This chapter further provides the courts' jurisprudence, through an analysis of select cases and case law, which have in the recent past exposed gaps in the Public Procurement and Disposal Act, 2015. Instances of misapplication of the law by the PPARB, are also highlighted. Through case law analysis, the chapter concludes that the PPDA is not aligned to the Constitution. A number of

identified provisions are considered vague and unconstitutional to give proper effect to Article 227 of the Constitution.

Chapter Four: Lessons from South East Asia Countries

This chapter provides key lessons which Kenya can learn from South East Asian countries, in its quest to reform the public procurement system. In this chapter, the key factors which have led to the success of Singapore in undertaking public procurement reforms, are outlined. The chapter also highlights the missteps which other South East Asian countries have committed and which have led to their goal, of an efficient public procurement system, remaining elusive.

Chapter Five: Findings, Conclusion and Recommendations

This chapter contains findings, conclusion and recommendations from the study. The chapter proposes measures that need to be put in place, to simplify the rules and regulations in public procurement, in order to ensure that they are aligned to the Constitution. These measures include repealing some sections of procurement law and alignment of procurement objectives with the Constitution.

CHAPTER 2: THE HISTORY OF PUBLIC PROCUREMENT IN KENYA

2.1 Introduction

Public procurement in Kenya has undergone different phases of reform. Procurement regulation has evolved from a crude system with no regulations to a legally regulated procurement system in line with International Standards[62]. In the early 1970's to 1990's, procurement system was regulated through circulars from the Ministry of Finance. This system of regulation through Treasury circulars was characterized by opaque procurement procedures that were largely unknown to the public. The lack of transparency and accountability within the circular regulated procurement system, contributed to high levels of government corruption and mismanagement of funds[63]. Towards the end of 1990's, an assessment on procurement system in Kenya was conducted with the assistance of development partners. From the assessment, some progress was made towards legal regulations through the Exchequer and Audit (Public Procurement) Regulations which were enacted in March 2001. The regulations established a procurement oversight body referred to as the Public Procurement Directorate (PPD), which was charged with the responsibility of ensuring efficient management and running of the procurement system in Kenya.

This chapter traces the history of public procurement from the pre-independence period when public procurement was focused on supporting the colonial government and was

[62] Jerome Ochieng and Mathias Muehle, 'Development and Reform of the Kenyan Public Procurement System' Paper 7-7, 1763 <http://www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf> accessed 11 February 2018.

[63] Ibid.

handled by a single organisation, Crown Agents, to the post-independence period where political patronage led to a deliberate effort to sabotage the regulation of public procurement. The chapter also follows the changes which came with the turn of the new millennium which coincided with renewed efforts to put in place a proper framework which would regulate public procurement and the developments which have come forth from the efforts. Further, the chapter explores the changes in public procurement that emanated from the promulgation of the Kenyan Constitution in 2010. The review of the historical perspectives of public procurement reforms in Kenya, seeks to address one of the research questions on what the drafters of the Constitution sought to cure by elevating public procurement to a constitutional threshold.

2.2 Pre-Independence Period

The history of procurement in Kenya can be traced back to the colonial period. The British government maintained a clear economic policy in Kenya and also in most of its colonies: land alienation for European settlers which would be used to produce agricultural outputs for export.[64]Sir Fredrick G. Lugard summarized the policy aptly when he stated that "European brains, capital and energy, have not been, and will never be, expended in developing the resources of Africa from motives of pure philanthropy." To facilitate the procurement of goods and services for the colonial government, a Treasury circular was issued establishing the Central Tender Board in 1955.[65] The Central Tender Board handled local purchases, overseas purchases and colony-wide contracts for the colonial

[64]M.P.K Sorrenson, *Origins of European Settlement in Kenya* (Oxford University Press 1968) 180.

[65]Jerome Ochieng and Mathias Muehle, 'Development and Reform of the Kenyan Public Procurement System' (2014)<http://www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf> accessed 29th September 2019.

government. In 1959, the colonial government established a Supplies and Transport Department under the Ministry of Works which handled all orders from respective ministries.[66]

2.3 Post-Independence Period (The Kenyatta and Moi Regimes)

The gaining of independence from the British colonial masters, did not usher with it any significant changes to the existing pre-colonial procurement system. The first major change to the *status quo*, took place in 1974 when the functions of the Central Tender Board which had been established nineteen years prior, were transferred from the Ministry of Works to the Treasury.[67] During this period, Treasury circulars had become the government's preferred method of regulating the procurement system and were being issued with increasing frequency, leading to confusion as to which was the applicable circular at any given time. During the same period, the closest that the government came to establishing a structured procurement system, was with the introduction of the Supplies Manual in 1978.[68] The apparent lack of structure was however not incidental but a well thought out plan which was aimed at weakening the institutional system for the benefit of a few.[69]

Migai Aketch explains that the corruption which ravaged Kenya during its formative years, was as a result of an institutional problem which favoured arbitrary power. He posits that government officials specifically preferred an absence of effective regulation which

[66]Jerome (n 49 above) 15.

[67] Jerome (n 49 above) 18.

[68]Jerome (n 49 above).

[69]Migai Aketch, 'Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability' (2011) 18(1) Indiana Journal of Global Legal Studies <https://www.jstor.org/stable/10.2979/indjglolegstu.18.1.341> accessed 29 September 2019.

enabled them to exploit the ambiguities and the legal vacuum for their own gain.[70]Further, the ambiguity and weak regulation meant that government officials did not have to fear penalties or sanctions as these were virtually non-existent.[71] The propagation of such a governance structure, maintained to deliberately weaken procurement governance and regulation, meant that it was not a surprise, when in a review of the procurement system in 1999, major shortcomings in the procurement system, such as: lack of clarity in procurement rules, absence of sanctions or penalties against persons who breached the regulations of the Supplies Manual and admission that dispute settlement mechanisms relating to award were weak and unreliable, were highlighted.[72]As described by Migai Aketch, the law had been weakened to the level where it was dispensed with whenever it was convenient to do so.[73]

The turn of the new century brought with it a wave of reforms which sought to eliminate crippling corruption in public procurement in both developed and developing countries.[74]The coming into force of the Exchequer and Audit Act 2001, brought with it major changes in the procurement system. Under the regulations,[75] the Central Tender Board was abolished and replaced with the Public Procurement Directorate (PPD), established as a small department within the Ministry of Finance. The Directorate was

[70]Migai (n 52 above) 8.

[71]Migai (n 52 above) 10.

[72]Jerome (n 49 above) 19.

[73] Migai (n 52 above) 10.

[74]Victor Mosoti, 'Reforming the Laws on Public Procurement in the Developing World: The Example of Kenya' 2005 54(3) The International and Comparative Law Quarterly <https://www.jstor.org/stable/3663452?seq=1&cid=pdf-reference#references_tab_contents> accessed 29 September 2019.

[75] The Exchequer and Audit (Public Procurement) Regulations, 2001.

tasked with monitoring the functioning of the public procurement process in Kenya and ensuring that the officers who were engaged with public procurement, adhered to ethical standards.[76]More importantly, vide Legal Notice 51 of 2001 and Legislative Supplement number 16, the Public Procurement Complaints, Review, and Appeals Board (PPCARB) was created. The Board was tasked with solving complaints filed by unsuccessful tenderers. It was further empowered with a wide array of remedies which it could provide.[77] However, despite the goodwill by the government of the time to reform the public procurement, major shortcomings were apparent. The ghosts of a government which preferred weak systems were still lurking.

2.4 The Kibaki Regime

In 2002, a new regime led by hitherto opposition party leaders, came into power with the promise to overhaul the governance structure within 100 days. It is during this regime that arguably, significant changes were realised in the governance structure with the promulgation of a new Constitution in 2010 and in the public procurement reform space as well.

As indicated under section 2.2 above, the Exchequer and Audit (Public Procurement) Regulations, 2001, established the PPD to provide oversight of public procurement activities in Kenya. This heralded a great step towards legal and institutional strengthening of public procurement in Kenya.[78] The PPD was housed within the Ministry of Finance as

[76]Victor (n 56 above) 15.
[77]Victor (n 56 above) 19.
[78] Ibid.

a department and heavily relied on the Ministry for human and financial resources.[79] The PPD also operated under the direction of the Finance minister. This arrangement, although somewhat better than the circular regime, also presented some challenges in that procurement oversight through the PPD was not independent[80]. Lack of independence of the procurement oversight body established by the regulation, meant that high levels of corruption within government continued unabated. The situation was further exacerbated in 2003 when the then Minister of Finance[81] fired all procurement officials within government including members of the oversight body (PPD), ostensibly because of corruption. Some quarters however argued that the main reason for firing of the officials was to provide an opportunity for the new government (which came into power with the 2002 General Elections) to have control of the procurement function and further the political patronage characterized through offering of government tenders to government cronies[82].

The procurement regulation within the Exchequer and Audit (Public Procurement) Regulations, therefore needed further reforms to entrench real oversight and contribute to independence of the oversight body. As such, legislative reforms were initiated, largely

[79] Dennis Orobo Abere, 'Factors Affecting Compliance With The Public Procurement And Disposal Regulations in Kenya: A Case Study of County Government of Nyamira' (2015) 3(11) International Journal of Economics, Commerce and Management<http://ijecm.co.uk/> accessed 1st October 2019.

[80] Jerome Ochieng and Mathias Muehle, 'Development and Reform of the Kenyan Public Procurement System' Paper 7-7, 1763 <http://www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf> accessed 11 February 2018.

[81] David Mwiraria served as Finance Minister for three years from 2003.

[82] Migai Aketch; Development Partners and Governance of Public Procurement in Kenya: Enhancing democracy in the Administration of Aid' available at http://iilj.org/GAL/documents/AkechPaper_000.pdf (accessed on 2 October 2014).

through pressure from the development partners who withheld their funding support and conditioned it to real reforms within the public financial management system.[83]

The Public Procurement and Disposal Act 2005, was subsequently enacted as a way of curtailing the high level corruption and mismanagement of public funds. The Act was introduced as part of the wider public financial management reform efforts that included enactment of other key legislations that included; the Public Officer Ethics Act 2003, the Anti-Corruption and Economic Crimes Act 2003 and the Financial Management Act 2004. These pieces of legislation were enacted as part of the reform efforts to address issues of corruption, mismanagement of funds and introduce financial accountability.

Enactment of the Public Procurement and Disposal Act, 2005 (PPDA) was a significant step towards entrenching procurement regulation within a legislative framework. The PPDA came into force in January 2007 and established the Public Procurement Oversight Authority, as a body corporate, to regulate and manage the procurement system in Kenya.

However, it was not long before questions were raised as to the validity of some of the proposed provisions. In particular, questions were raised as to section 6 of the draft bill which lent supremacy to international agreements over Kenyan law. The Institute of Economic Affairs specifically recommended for the section to be expunged from the Bill noting that it raised a number of problems with the most apparent being that it ousted Kenyan law without even the requirement of ratification of the international and bilateral

[83] Ibid.

agreements.[84]This particular provision has been subjected to litigation as will be highlighted later in this paper. Despite the above challenges, the PPDA was enacted in 2005 and operationalized in 2007. Among the major changes which it brought forth was the creation of the Public Procurement Oversight Authority (PPOA) and the Public Procurement Administrative Review Board (PPARB).[85]

The setting up of the PPOA and the PPARB as independent bodies, sought to permanently cure the challenge of independence which had been experienced since the times of the Central Tender Boards. However, the dream was short lived, as financial challenges and lack of political will, seemed to erode the benefits.[86] Despite the key role which the PPOA was to play, it found itself starved-off resources and relied on seconding of staff from the Ministry of Finance. Further, between the years 2007 to 2011, the authority operated without a substantive head as the Director-General was still serving on an interim basis. The severe shortage of staffing was evident, in that, by 2010, only forty employees were under its service.[87]

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[84]Dennis Orobo Abere, 'Factors Affecting Compliance With The Public Procurement And Disposal Regulations in Kenya: A Case Study of County Government of Nyamira' (2015) 3(11) International Journal of Economics, Commerce and Management<http://ijecm.co.uk/> accessed 1st October 2019.

[85]Section 8, 9, 21, 22 and 25, Public Procurement and Disposal Act 2005.

[86]Peter KiburuMukura, Noor Shalle, Mark Kemboi Kanda, Peter MakuNgatia, 'Role of Public Procurement Oversight Authority on Procurement Regulations in Kenyan State Corporations. A Case of Kenya Electricity Generating Company (KenGen)' (2016) 6(3) International Journal of Academic Research in Accounting, Finance and Management Sciences <http://dx.doi.org/10.6007/IJARAFMS/v6-i3/2254> accessed 1st October 2019

[87] Rambol Management A/S, 'Assessment of the Procurement System in Kenya' 2010, available at *http://www.oecd.org/development/effectiveness/41583965.pdf* (accessed 25 September 2014).

2.5 The Promulgation of the Constitution

The promulgation of the new Constitution[88] heralded a new dawn for Kenya. The effect on public procurement might even be argued to have been bigger. To understand the importance of a Constitution, one must first understand the basic realities of the modern world. Randall Holcombe explains that the basic truth is that government action is based on coercion.[89]He unapologetically explains that no matter how much people approve or disapprove of their government, they have no option but to obey its laws, follow regulations and ensure that they pay taxes as demanded.[90] He further explains that dictators and tyrants are placed at a position whereby, they can use the government power to divert resources away from activities meant to benefit a nation for their own purposes.[91]

Holcombe argues that the classical solution to the quagmire, is to design a government based on the rule of law in order to protect the rights of the citizens as plunder of their resources has a direct negative effect on them.[92] Having experienced nearly three decades of misrule, it is no surprise that Kenyans did exactly that. Migai Aketch explains that Kenyans were driven by, among other reasons, the desire to exit authoritarianism and establish a just society based on the rule of law.[93] The author fully agrees and posits that Article 227 had a key role to play in this transformation as it sought to cure the defective public procurement system which facilitated both authoritarianism and an unjust society.

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[88] The Constitution of Kenya, 2010.

[89]Randall G Holcombe, 'Constitutions and Democracy' (2001) IDEP 15(1)<http://journals.openedition.org/economiepublique/1563> accessed 3rd October 2019.

[90]Randall (n 63 above).

[91]Randall (n 63 above).

[92]Randall (n 63 above).

[93]Dr Migai Aketch, 'Institutional Reform in the New Constitution of Kenya' (2010) ICTJ <https://www.ictj.org/sites/default/files/ICTJ-Kenya-Institutional-Reform-2010-English.pdf> accessed 3rd October 2019.

The author further argues that the establishment of a procurement system that is: fair, equitable, transparent, competitive and cost-effective was extremely necessary and was not by chance[94].

2.6 The Uhuru Kenyatta Regime

The Presidency of Uhuru Kenyatta commenced on 9 April 2013 after being sworn in as the fourth President of the Republic. Uhuru Kenyatta's administration was the very first under the new constitutional dispensation. There were therefore high expectations that the administration would resolve all historical issues and injustices through full implementation of the Constitution. During this period, there were calls for the amendment of the Public Procurement and Disposal Act, 2005 to align it with the Constitution. Prior to the enactment of the Public Procurement and Disposal Act, 2015, which was intended to give effect to Article 227 of the Constitution, there were other policy decisions and directives that Uhuru's administration had embarked on, in a bid to implement the new constitutional provisions relating to public procurement. The policy decisions were anchored on two legal instruments namely; The Public Procurement and Disposal (Preference and Reservations 2011)[95] and the Public Procurement and Disposal (Amendment) Regulations, 2013.[96] The Purpose of these regulations was to promote local, regional and national industries through defining preference and reservation schemes for marginalized groups including youths, women and persons with disabilities. The

[94] Ibid.

[95] Legal Notice No 58 of 8 June 2011.

[96] Legal Notice No. 114 of 18 June 2013.

regulations were therefore enacted in an attempt to address the principles of fairness and equity prescribed in the Constitution, before the substantive Act[97] was enacted.

Following the promulgation of the Constitution 2010, there were more changes brought forth, as indicated above. These changes included the enactment of the Public Procurement and Disposal (Preference and Reservations 2011) and the Public Procurement and Disposal (County Governments) Regulations 2013. However, despite the new Constitution and a raft of regulations, the same problems from the past seemed to persist, thereby overshadowing the renewed reform efforts. Cases of inefficiencies in the public procurement leading to wastage of billions of shillings, seemed to be on the increase, and it was not long before organizations such as the Transparency International, raised an alarm over the high rate of procurement fraud in government.[98] The coming into force of the PPDA 2015 in the beginning of 2016, did not seem to address or resolve the issue as was evidenced by the radical decision of the president to send home all procurement officers early on in 2018, in an attempt to address the issue of rampant corruption in public procurement.[99]

2.7 Conclusion

This chapter has detailed the history of public procurement in Kenya covering the key changes which have taken place during the tenures of the different administrations that have ruled Kenya since independence. It is clear that the reforms in public procurement have come a long way from the era of Treasury circulars to regulations through legal and

[97] The Public Procurement and Disposal Act, 2015.

[98] Transparency Kenya, 'Fighting Corruption' (2019).

[99]Kennedy Kimanthi, 'Heads of Procurement, accounting to step aside' *Daily Nation*, (Nairobi, 18 January 2018.

institutional mechanisms. The promulgation of the Constitution in Kenya, heralded a new phase in the public procurement reforms in Kenya. The Public Procurement and Disposal Act, 2015, was enacted to operationalise Article 227 of the Constitution which provides the constitutional anchor for public procurement. It is however apparent that the anticipated reforms, emanating from the promulgation of the Constitution, are yet to take root in Kenya. Cases of corruption and other inefficiencies in the public procurement system, continue to persist unabated. This raises a deeper question, as to whether the principles prescribed in the Constitution, have been given full effect by the enabling legislation. The next chapter will explore in greater depth, the principles prescribed in the Constitution for establishment of a fair and equitable procurement system, through an analysis of jurisprudence from the courts, to determine whether indeed the PPDA 2015 is in effect aligned to the Constitution.

CHAPTER 3: ANALYSIS OF THE COURTS' JURISPRUDENCE

3.1 Introduction

Public Procurement and Disposal Act, 2015 was enacted in 2015 and commenced operation on 7 January 2016. The Act was enacted to give effect to Article 227 of the Constitution. Article 227 (1) directs that all public procurement is undertaken *in accordance with a system that is fair, equitable, transparent, competitive and cost-effective*. Article 227(2) provides for enactment of an enabling legislation and states as follows: *An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented*.

This chapter will provide a critical analysis of the enabling legislation to determine whether the provisions of the law are aligned to the directives of the Constitution for establishment of a fair and equitable procurement system. The chapter will assess the alignment of the enabling legislation to the Constitution, through the review of court decisions. This assessment will be undertaken in a bid to answer the research questions on how the PPDA 2015 has assisted in achieving a procurement system envisioned by Article 227 and if not, which specific provisions of the PPDA require to be amended, to facilitate achievement of the principles spelt out in the Constitution.

Whereas Article 227 provides for a procurement system that promotes achievement of five principles, our study will mainly focus on achievement of fairness and equity. These two principles are considered to be overarching with the other three principles playing an important but complementary role.

3.2 Principles of Public Procurement

To understand the importance of Article 227, one must appreciate both the importance and vulnerability of public procurement. The importance of public procurement in acquiring goods and services that support delivery of services by government and use of public procurement as an economic tool, have already been covered in other sections of this study. I will therefore highlight the vulnerabilities. In a report by the OECD, it was highlighted that public procurement remained one of the functions, which was extremely susceptible to corruption due to the massive financial interest, numerous opportunities for corruption through kickbacks, fraud and inflated evaluations, which are at times extremely difficult to flag.[100] Further, in some instances, the misdeeds in procurement might be structured in such a way that the government might be honest but still inefficient. These vulnerabilities thus necessitated the mandatory inclusion of the principles of public procurement in the Constitution, which meant that any violation of the principles, was a violation of the supreme law of the land and also ensured that the said principles could not be derogated from. The principles are discussed below.

3.2.1 Fairness

Robert Agwot postulates that an efficient public procurement system is one which ensures that all participants are given an equal chance to participate and avoids discrimination among bidders.[101] He further states that fairness in the public procurement system, calls

[100]OECD, 'Preventing Corruption in Public Procurement' (2016) <http://www.oecd.org/gov/ethics/Corruption-Public-Procurement-Brochure.pdf> accessed 3 October 2019.

[101]Robert Agwot Komakech, 'Public Procurement in Developing Countries: Objectives, Principles and Required Professional Skills' (2016) 6(8) IISTE<https://pdfs.semanticscholar.org/d3df/5c722d2053d1fd08b26a0b4c083e67b84315.pdf> accessed 4 October 2019.

for similar situations to be treated in the same way, while dissimilar situations to be treated in different ways.[102] Watermeyer, in a report on the procurement system in South Africa, states that fairness in the context of public procurement entails the exclusion of bias.[103] He states that the terms and conditions under which the work is performed must not be so one sided that they unfairly prejudice the interest of the parties.[104] He further states that what is fair depends on the nature and the circumstances surrounding a decision and hence it is not a mechanical application of the law. This has been upheld in the Kenyan courts[105] where the court held that a matter concerning the decision to deregister schools, was reached after considering irrelevant factors. The court further held that bodies exercising administrative power had to ensure that there was observance of the principle of proportionality and that what was fair depended, on the particular circumstances. Failure of such administrative bodies to address their minds to such considerations meant that their actions became draconian. Fairness does not however mean that a person is entitled to an error free system. The need to observe proportionality is therefore key.

3.2.2 Equitableness

"Things alike should be treated alike and unlike should be treated unlike in proportion to their unlikeness."[106]

Bolton has argued that equity in public procurement calls for the levelling of the playground to ensure that those who have been continually discriminated against, get an

[102]Robert (n 72 above).

[103]*Executive Summary* www.cuts-international.org/. Watermeyer was one of the consultants who assisted with the World Bank's Country Procurement Assessment Report *Refining the Public Procurement System in South Africa,* World Bank Report No 25751-SA Feb 2003.

[104]Executive summary (n 74 above) 45.

[105] *Republic v County Director of Education, Nairobi & 4 others Ex-parte Abdukadir Elmi Robleh* (2018).

[106]Aristotle, *Niclomachen Ethics* (1131a).

equal chance. To achieve that, equity makes use of both procedural and substantive equality. Procedural equality demands that all should be subjected to the law. Substantive equality on the other hand, demands that those who experience similar conditions should be treated similarly while those whose conditions and circumstances are dissimilar should be treated unequally.[107]

The Constitution of Kenya 2010, does not expressly define 'equality' and 'non-discrimination' it only describes what the terms entail at Article 27 (1) which provides that every person is equal before the law and has the right to equal protection and equal benefit of the law. Under Article 27 (2) equality includes the full and equal enjoyment of all rights and fundamental freedoms. Article 27 expressly provides that women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social spheres. Grounds, upon which a person may not be discriminated upon either directly or indirectly, are listed under Article 27 (4) and are binding on the state as well as natural and juristic persons. Equality can either be formal or substantive. Formal or procedural equality refers to sameness of treatment among persons placed in similar circumstances while Substantive equality evaluates and addresses the outcome[108] by introducing laws and policies that seek to eliminate inequalities. Treating unequals equally may lead to discrimination and measures such as affirmative action promote substantive equality.[109]

[107] Aristotle (n 77 above).

[108] Phoebe Bolton, '*An analysis of the preferential procurement legislation in South Africa*' (2007) 16(1) Public Procurement Law Review 36 – 67.

[109] Ibid.

3.2.3 Transparency

The dictionary definition of transparency refers to clarity, obviousness, something that is easily understood and frankness. Transparency also means that the decision making process is undertaken in a manner that follows procedures.[110]Transparency in procurement, relates to bidders' access to information on the law, regulations and policies governing procurement.[111]Additionally, it has been stated that a transparent procurement system is one that has clear regulations and procedures, a set of standardized tender documents and entails fairness in the procurement process. Fairness also encompasses a procurement system in which the decisions are widely publicised so as to ensure that everyone is informed. Watermeyer adds that a procurement process cannot be considered fair, if it doesn't encompass the ability to verify the documented procedures and criteria that was indeed applied. This principle is therefore closely related to fairness.

In this study, the focus is mainly on how the two main principles of fairness and equity are realised from enactment of the enabling legislation. This principle has been discussed, as it complements the principle of fairness. As indicated, a procurement process cannot be considered fair in an environment that does not promote transparency.

3.2.4 Competitiveness

The general rule in public procurement is that it should be undertaken through a process that promotes competition, unless there are overriding reasons for not doing so.[112]

[110]Robert Agwot Komakech, 'Public Procurement in Developing Countries: Objectives, Principles and Required Professional Skills' (2016) 6(8) IISTE<https://pdfs.semanticscholar.org/d3df/5c722d2053d1fd08b26a0b4c083e67b84315.pdf> accessed 4 October 2019.

[111]Robert (n 79 above).

[112]Robert (n 79 above).

Competition demands for award of contracts purely based on merit. Other criteria, that do not ensure that the most qualified service provider is awarded the tender, should not be considered for a procurement to be evaluated as competitive. Price, although key in determination of a procurement process and award, should not be the only criteria for consideration. Other factors such as the product life and quality, should be considered and integrated in the evaluation process to guarantee competition.[113] The principle of competition is therefore closely related to cost effectiveness and attainment of value for money in procurement. Achievement of a competitive procurement process, ultimately requires that goods and services are specified in such a manner that allows tenderers to exactly know what they are bidding for and to also be afforded adequate time to prepare responsive bids.[114]

This principle complements fairness, as one of the identified key principles of focus for this study. There cannot be fairness, if a procurement process is not competitive. The competition must also be undertaken fairly, by ensuring all interested parties are availed same information to enable them respond to requests fully and substantively. Selective sharing of information or withholding critical information from particular service providers, would not result to a fair competition among the bidders.

3.2.5 Cost-effectiveness

This principle is closely linked to efficiency. A procurement process should contribute to attainment of value for money. Value for money is achieved through a process that is economical, efficient and that supports achievement of stated objectives. Cost-

[113]Executive summary (n 74 above) 45.

[114]Robert (n 79 above).

effectiveness should not therefore be approached with a narrow vision. It needs to be applied throughout the procurement process from initial price paid to the cost of maintenance of a product or service, to achieve set objectives (effectiveness).[115] Cost effectiveness is also concerned with the timeliness within which goods and services are delivered. An effective public procurement has therefore been defined as: acquiring the right fit item, at the right time, for the fairest price in order to support government actions.[116] These criteria also supports fairness in public procurement. As such cost-effectives as a principle, compliments fairness as well.

The study focuses on two main principles of fairness and equity. These two principles are considered core and overarching, with the other principles complimenting the two. Attainment of the two core principles, effectively leads or contributes to the attainment of the other three principles. For instance, if fairness in the bidding process is achieved, then competitiveness will increase as it is the logical consequence of levelling the playing field. Consequently, increased competitiveness will lead to cost effectiveness as the bidders quote competitive prices in order to be awarded tenders.

3.3 Analysis of Case Law

This section will examine court decisions relating to interpretation and application of the Public Procurement and Disposal Act, 2015, an Act of Parliament enacted to give effect to Article 227 of the Constitution. Public procurement system in Kenya is anchored in the Constitution through Article 227. This study has hypothesised that the enabling legislation

[115]Phoebe Bolton, *The Law of Government Procurement in South Africa* (2007) pg 43.

[116]Reza Tajarlou and Behzad Ghorbany Darabad, 'The review of Principles Governing Public Procurement'(2017) 4(3) IAJE <http://iaiest.com/dl/journals/1-%20IAJ%20of%20Economics/v4-i3-jul-sep2017/paper3.pdf> accessed 4 October 2019.

is not aligned to the Constitution and that it does not therefore promote the constitutional principles of fairness and equity. The examined cases will assist in identifying whether the enabling legislation is indeed misaligned with the Constitution, and the areas which require to be amended or repealed to ensure the legislation can give full effect to the constitutional imperatives for a fair and equitable system of public procurement.

A number of provisions in the enabling legislation have been identified, through the selected court decisions, to be unconstitutional. The court decisions have also identified provisions which are manifestly vague. Vague law inhibit its application and overall rule of law. This argument is grounded in the indeterminacy theory of law that identifies the need for laws to be determinate in order to facilitate access to justice and fair adjudication of conflicts. The vague and unconstitutional provisions have therefore contributed to the inability of the enabling legislation to assure a public procurement system that promotes fairness and equity, as prescribed in the Constitution. A detailed examination of the cases is provided below.

Republic v Public Procurement Administrative Review Board & another Exparte Kleen Homes Security Services Limited [2017] e KLR[117]

In this case, the court ruled that the provisions under sections 175(3) and 175(5) of PPDA were unconstitutional. These provisions relate to timelines for adjudication of procurement matters at the High Court. The sections provide a time limit of 45 days within which the High Court should reach a determination failure to which the decision of the Public

[117] *Judicial Review 503/502 of 2016.*

Procurement and Administrative Review Board (PPARB), shall be final and binding to all parties. The High Court held the provisions to be unconstitutional as they contradicted clear provisions relating to the authority of courts to uphold and enforce the Bill of Rights (Article 23), access to justice (Article 48) and the right to a fair hearing (Article 50). The Court, while acknowledging the need for specifying timelines to enhance efficiency in the procurement process, indicated that the Act should not have been so prescriptive since no such timelines were expressly provided for or foreseen in the Constitution.

In this matter, the Ex-Parte applicant instituted judicial review proceedings seeking to quash the decision of the PPARB. On 4 October 2016, the High Court granted the applicant leave to file its judicial review application within 21 days. On 8 November 2016, the ex-parte applicant dutifully filed the substantive motion. It was not until 23 January 2017, when the procuring entity (2nd respondent) filed a replying affidavit raising a preliminary objection on a point of law. The respondent contended that, since the High Court proceedings had been active for more than 45 days, then by virtue of sections 175 (3) and 175 (5) of PPDA, the Court no longer had jurisdiction to conclude the matter.

The 2nd respondent's arguments were that the timelines set in the enabling statute were not merely illustrative but were binding on the court. The applicants argued against enforcement of the timeliness, as this would deny them their right to a fair hearing as per the Constitution. The High Court finally ruled that the provisions in the procurement legislation, that sought to oust the jurisdiction of the Court, by prescribing timelines which were not expressly foreseen in the Constitution and which violated the principles of fair hearing and access to justice, were unconstitutional.

The court decision confirmed existence of provisions in the public procurement enabling statute that were unconstitutional. A system that ousts the jurisdiction of the court to afford a fair hearing to injured parties, cannot be considered to be in line with the procurement system envisioned under Article 227. This therefore supports the call for the amendment of the enabling statute to ensure it is fully aligned to the Constitution and can therefore promote a public procurement system that is fair.

Article 227 prescribes for establishment of a procurement system that is fair. Fairness extends to ensuring that all bidders have access to judicial determination when they are aggrieved, including by procurement decisions and determinations from procuring entities and PPARB, respectively.

Simba Pharmaceuticals Limited & another v Public Procurement Administrative Review Board & another [2017][118]

This case relates to application of preferences and reservations in the evaluation of public procurement bids. Article 227 provides for a system of public procurement that is fair and equitable. The use of preferences and reservations seeks to promote equity in public procurement. The principle of equity acknowledges the need for similar treatment for people in similar conditions and dissimilar treatment for people under dissimilar circumstances to achieve desired and fair outcomes. The law therefore promotes affirmative action to ensure that people who have previously been marginalised or excluded from economic participation, including in public procurement, are facilitated to

[118]*Miscellaneous Civil Application no.185 OF 2017.*

participate. Article 227 provides for use of preferences and reservations to promote equity as well as to promote local industries. Section 155 of the PPDA makes provision for operationalization of Article 227 of the Constitution relating to application of preferences and reservations. Section 155 provides that only items *manufactured* in Kenya are eligible for preferential procurement.

In this case, the High Court overturned the decision of PPARB to award a margin of preference to bidders who were not considered to be *manufacturers*. The issue however, was the vagueness in the law relating to who a manufacturer was for purposes of section 155 of the PPDA. Despite the clear significance of the term manufacturer in application of certain critical provisions of the PPDA, the definition of who a manufacturer is, has not been included under section 2 of the Act, contributing to vagueness in the procurement enabling law. This study has argued that, because of vagueness in the PPDA, an Act which is supposed to give effect to Article 227, then the Act is not aligned to the Constitution and does not therefore support the implementation of a procurement system which is fair and *equitable*. This study therefore calls for the amendment of the vague sections of the law to ensure that the enabling statute is able to give full effect to the ideals of the Constitution as espoused under Article 227.

In this matter, Simba Pharmaceuticals Limited were awarded a contract to supply pharmaceutical products to Kenya Medical Supplies Agency (KEMSA), the procuring entity. Questa Care limited, who were one of the unsuccessful bidders, lodged a review application with PPARB. Following the review, PPARB quashed the decision to award the tender to Simba Pharmaceuticals, prompting them to lodge a judicial review at the High Court. Simba Pharmaceuticals argued that Questa Care limited was not a *manufacturer* of

the antiretroviral drugs (ARVs) which they sought to supply to KEMSA, but were only engaged in packaging, storage and labelling of the drugs sourced from Mylan Labs limited in India. As such, PPARB should not have awarded them the 15% margin of preference, which is reserved for Kenyan manufacturers. The High Court held that packaging, storage and labelling did not amount to manufacturing and therefore overturned the decision of PPARB to award a preferential margin to a bidder who was not a manufacturer. The High Court encountered difficulties in arriving at the decision, as the PPDA, which was meant to have clearly provided the circumstances when section 155 on preferences and reservations would apply, was vague on the definition of a manufacturer. Due to the vagueness in the law, the PPARB reached a decision which could not be upheld at the High Court.

This case provides further evidence that PPDA 2015, due to vague provisions, is not aligned to the Constitution and does not therefore adequately promote a procurement system that is envisaged under Article 227 of the Constitution. Article 227 seeks to promote fairness and equity, by attempting to make level the playground which has for so long been skewed in favour of foreign-owned companies participating in public procurement.[119]

[119] ECI Africa; 'Procurement and supply in Kenya: The Market for Small and Medium Enterprises' July 2008, available at http://www.fsdkenya.org/pdf_documents/07.08.FSD_Procurement_Supply_Kenya.pdf (accessed on 21 October 2019).

Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Transcend Media Group Limited [2018] eKLR[120]

This case related to interpretation of PPDA to give effect to the constitutional principle of equity. The case involves the vague definition of a '*citizen contractor*'. Whereas section 2 of PPDA provides for a broad definition of who a citizen contractor is, it is apparent from the decision of the court in this case, that the provisions of the PPDA are vague. The vagueness in the enabling law, led to the misapplication of the law by PPARB. This case demonstrates how vagueness in law can inhibit realisation of a procurement system prescribed under Article 227 of the Constitution. The case specifically demonstrates how the principle of equity was impacted by the vagueness of the law in defining who a citizen contractor is. The principle of equity provides for unequal treatment of parties that are not equal or alike, in proportion to their unlikeness. To ensure that the nuances in the principles are reflected in the enabling law, the enabling law should be clearly drafted and should also provide explicit definitions. Vagueness in law may introduce loopholes which can be used by unscrupulous parties to benefit unfairly from the lack of clarity. This was highlighted in the High Court's decision in this case.

In this matter, two public relations (PR) firms, Transcend Media Group (Transcend) and Scanad Kenya limited (Scanad), tendered for provision of communication services to the Independent Electoral and Boundaries Commission (IEBC). Transcend was not satisfied with the decision of PPARB, which failed to determine that Transcend was eligible for a

[120] *Judicial Review Application No. 468 OF 2017.*

20% margin of preference for being a citizen contractor in accordance with sections 86 (2) and 157 (8) of PPDA. PPARB considered both firms to be citizen contractors. As such, no margin of preference was applicable. PPARB based its decision on section 2, to determine that Scanad, whose majority shareholder was a Kenyan registered company, was also a citizen contractor as it was owned by a Kenyan legal entity. PPARB failed to lift the veil of incorporation to determine the actual shareholding structure of Scanad's majority shareholding company. The High Court, while overturning this decision, found PPARB to have misapplied the law by failing to consider the actual shareholding of Scanad by Kenyan citizens. The High Court rejected the argument that since Scanad's majority shareholding company was registered in Kenya, then Scanad qualified to be considered a citizen contractor for purposes of section 2. The court ruled that the relevant factors which should determine whether a person or a firm was wholly owned or controlled by persons who were Kenyans was the ownership and control of a firm and not the fact that it was registered in Kenya.

This case demonstrates the apparent vagueness of PPDA, specifically section 2 definition of a citizen contractor. The Act provides a very broad and vague definition of a citizen contractor, leading to potential abuse of the law by unscrupulous bidders who may wish to take advantage of the vague definition. This case is a further demonstration of how vagueness in law can hinder realisation of constitutional ideals for a procurement system that promotes fairness and equity.

Republic v Public Procurement Administrative Review Board & 2 others Ex-parte Coast Water Services Board & another [2016] eKLR[121]

This case related to application of section 6 (1) of the PPDA. Section 6 (1) provides guidance on the applicable law in cases where the Republic of Kenya enters into obligations arising from treaties, agreements or conventions which she has ratified. In case of conflict between the PPDA and provisions of such instruments, the provisions of the instruments take precedence. This section, as observed in chapter 2, has elicited much debate and controversy through the journey for procurement legal reforms. The section was copied from the repealed PPDA 2005. As such, it is arguable that the section does not reflect the ideals of the new Constitution for which PPDA 2015 seeks to operationalise.

The courts have also been less than bold in declaring this section to be unconstitutional. The courts have often taken a narrow interpretation of this section, by indicating that their hands are tied by the provisions and that only Parliament, through legislation, can give proper effect to this section. Our study however concludes that this section is unconstitutional. This position is grounded on the fact that, the section was borrowed from the repealed PPDA 2005 which preceeded the Constitution. When the Constitution was promulgated, the section should have been aligned to Article 227 which prescribed principles of procurement needed for a well-functioning procurement system. The provision is also indicated to be applicable, 'subject to the Constitution', as such, our study disagrees with the court's hesitancy to declare the section unconstitutional on the basis that

[121]*Miscellaneous Application No 116 of 2016.*

their hands are tied. It is our contention that the section does not oust the Constitution and thereby does not oust the Courts' jurisdiction and power to consider it unconstitutional. This section has been used to exclude certain high level "Government to Government" procurements on the basis that they are guided by the treaties and bilateral agreements, which are however not open to public scrutiny. This section has therefore helped to perpetuate corruption in procurement as it does not support a procurement system envisioned by Article 227, which is a procurement system that is fair, competitive, transparent and equitable.

In this matter, Coastal Water Services Board (the Board) awarded a tender to Chico Group Limited in accordance with the World Bank procurement procedures. The contract was funded by the World Bank. One of the unsuccessful bidders, Toddy Engineering Company, filed an application for review of the procurement process by PPARB. The PPARB quashed the decision of the procuring entity (the Board) and awarded the tender to Toddy Engineering. The matter was filed for review at the High Court. One of the arguments by the Board was that since the tender was donor funded, section 6 (1) operated to oust the jurisdiction of PPARB. The Court upheld the decision that provisions of donor agreements superseded provisions of the Act but declined to rule that this ousted the jurisdiction of PPARB. The Court held that the existence of a conflict between the provisions of the Act and the conditions imposed by donors, did not mean that the PPARB lost jurisdiction in its entirety to entertain a matter, all it did was to provide that in the event of a conflict, the PPARB would have to give priority to the provisions, including the terms and conditions of the donor agreement. The Court further noted that the Board's jurisdiction would only

be ousted, if the terms and conditions of the donor agreement expressly excluded the application of the Act.

The gravity of the provision was however highlighted in the matter **Okiya Omtatah Okoiti & Another v Attorney General & 3 Others [2014] eKLR.** In this matter, the court held that its hands were tied and it could not therefore answer questions relating to applicability of the PPDA to the procurement activities for the Standard Gauge Railway (SGR). The court instead held that its duty was limited to interpreting the law as made by Parliament and could not rewrite it to suit the popular opinions, regardless of how strong these were. As indicated above, our study does not fully agree with the court's sentiments regarding section 6 of the PPDA.

This study argues that the continued presence of section 6 of the PPDA, is against the constitutional principles of Article 227. One of the reasons for this contention is that the section provides an avenue through which large tenders, especially those financed through negotiated loans which still cost taxpayers large sums of money in repayment, are excluded from the principles of public procurement including fairness and equity.

3.4 Conclusion

The Public Procurement and Disposal Act 2015 is not aligned to Article 227 of the Constitution. This chapter has analysed various court decisions and established that the PPDA, which is meant to give effect to the Constitution, contains provisions which are unconstitutional and vague. Provisions relating to timelines for judicial review of procurement decisions by the High Court, were found to be unconstitutional, as they had potential to hinder access to justice and fair hearing. Other provisions relating to definition of a manufacturer and citizen contractors, were found to be vague. These terms are

considered critical for operationalization of preferences and reserves, which is one of the tools prescribed in the Constitution for promoting equity through increased participation of local industries.

In order to enhance the achievement of a procurement system envisioned in Article 227 of the Constitution, that is, a procurement system that promotes fairness and equity. It is crucial that the offending provisions in the enabling statute are amended and replaced by clearly drafted provisions that are in line with the Constitution.

This chapter has addressed the identified research questions relating to whether the PPDA is aligned to Article 227 and has established, through an analysis of court decisions, that the Act is not aligned to the Constitution. Specific provisions which need to be amended to ensure full alignment of the Act with the Constitution have also been identified. The next chapter will seek to understand what lessons Kenya can learn from other jurisdictions which have succeeded in their public procurement reform journeys and lessons she can learn from those that have failed, in order to support the ongoing reform agenda of public procurement to enhance attainment of fairness and equity.

CHAPTER 4: LESSONS FROM SOUTH EAST ASIA COUNTRIES

4.1 Introduction

This chapter analyses the public procurement regimes of countries in South East Asia for lessons which can be learnt by Kenya. The reason for choosing the South East Asian countries is that, despite their remarkably similar history and economic development, there is a clear distinction. Some of the countries have been successful in eliminating procurement corruption, while others have continued to suffer the mess unable to get rid of the crippling inefficiency in their public procurement systems.[122] This therefore presents an informed and balanced view for what Kenya should adopt, in her quest for public procurement reforms.

Countries in the South East Asia, experienced remarkable economic transformation in the 1980's and 1990's leading to the nickname "Asian Tigers.[123]"The effect of this economic transformation was exponential increase in the standards of living, especially in Singapore, which was able to achieve Western like living standards by mid 1980s.[124]Other countries such as Malaysia and Thailand, also experienced economic growth although to a lesser level than Singapore. However, despite the apparent success in the economic development, it was recognised early on that the only way in which the Asian Tigers could sustain the economic growth, was through the reduction of waste, inefficiency and corruption. Public procurement system was identified as one area that needed urgent reforms.[125]

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[122]David S Jones, 'Public Procurement in South East Asia: Challenges & Reform' (2007) 7(1) Journal of Public Procurement <http://www.ippa.org/jopp/download/vol7/issue-1/Article_1_JONES.pdf> accessed 6 October 2019.

[123]David (n 96 above) 15.

[124]David (n 96 above) 19.

[125]David (n 96 above) 22.

4.1.1 The Pre-reform era

Fragmentation, ambiguities and limited scope of laws characterized the legal framework for regulation of public procurement in most South East Asian countries.[126]This ultimately gave rise to inconsistency, confusion and lack of accountability. To illustrate, the Philippines had more than sixty laws, executive orders and presidential decrees which governed public procurement, ultimately leading to confusion and irregularities in public procurement.[127]This situation was also prevalent in Vietnam and Cambodia.

In a report by the World Bank in 2001, it was noted that the multiplicity of laws, decrees and regulations, exacerbated by inconsistent provisions and a lack of clarity in important policy and procedural requirements, posed a high risk for corruption.

4.1.2 The Reform era

It was not long before a wave of reforms in the procurement system swept through South East Asia. The preceding years to the turn of the new millennium, were characterised by increased activities aimed at streamlining the inefficient public procurement regimes. In countries such as Vietnam and Indonesia, decrees were issued to repeal the numerous regulations and introduce all-embracing laws that sought to comprehensively address public procurement regulation. The initiated reforms were successful. Improved procurement processes and clarity in the systems was noted. However, the efficiency which had been envisioned was yet to be fully realised. More needed to be done beyond legal and regulatory changes. Singapore offers great insights on areas which can be considered for

[126]David (n 96 above) 25.

[127]David (n 96 above) 28.

wider procurement reforms and improved efficiency. This is due to the successful nature of procurement reforms undertaken by Singapore.

4.2 A Case Study of Singapore

Singapore was ahead of its peers in public procurement reforms. While the rest of the Asian Tigers were still struggling to adopt reforms aimed at streamlining their procurement systems in the mid-2000s, Singapore already had a streamlined and efficient procurement system. As early as 1994, Singapore had already entered into the World Trade Organization's Agreement on Government Procurement.[128] Singapore further ensured that their procurement system was streamlined, by enacting the Government Procurement Act in 1997. Under this legislation, a comprehensive procurement manual was drafted to guide all procurement activities.[129] One key difference between Singapore and the rest of the South East Asian countries, is that, in addition to enacting arguably one of the most precise and clear laws, Singapore also ensured high thresholds of compliance with their provisions. The key tenets of the Singaporean public procurement system are examined in the following sections.

4.2.1 Comprehensive Procurement System

All procurement processes are undertaken through the government electronic business website.[130] All request for quotations and tenders are publicized and awarded through the electronic website.[131] Manual quotations are strictly prohibited and the only exception to

[128]OECD, 'Anti-corruption policies in Asia and the Pacific: Thematic review on provisions and practices to curb corruption in public procurement' (2009) <https://www.oecd.org/site/adboecdanti-corruptioninitiative/policyanalysis/35054589.pdf> accessed 6 October 2019.

[129]OECD (n 102 above) 50.

[130]David (n 96 above) 40.

[131]David (n 96 above) 40.

the requirement to bid electronically applies to small value purchases which are sourced directly from the suppliers without inviting quotations.[132]

4.2.2 Model Tender Documents

The Government Procurement Act explicitly require that all ministries, departments and statutory boards, use standard conditions of contracts and instructions to tenderers.[133]

4.2.3 Encouraging Competition

In order to encourage competition in the procurement system, the procurement law of Singapore only requires a bid security, if the goods and services being procured are above US$ 500,000. In addition, open tendering is set as the default procurement method subject to minimal and well justified exceptions. Decisions on the applicable procurement method are subject to stringent checks in a bid to minimize risks associated with restricted tendering. Sufficient bidding time is also provided for in the manual in order to encourage and promote competitive bidding.

4.2.4 Criteria for Award

To ensure that only the most suitable bidder is awarded a tender, the Government Procurement regulations expressly provide for an award criteria, which focuses on other elements in addition to price. These include: transport, insurance and currency fluctuations.[134] Further, in order to ensure that the criterion is streamlined, supporting decisions for tender awards are required to be maintained for a minimum period of three years and are also subjected to external audit.[135]

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[132]David (n 96 above) 42.
[133]David (n 96 above) 45.
[134]OECD (n 102 above) 50.
[135]OECD (n 102 above) 50.

4.2.5 Transparency

In order to ensure that transparency is promoted. The government electronic business publishes award notices containing the name of the successful tenderer, contract sum, a brief description of the tender details along with the name and address of the tendering entity. Further, the regulations require that at the request of the unsuccessful tenderers, procuring entities should provide detailed feedback on the procurement outcome.[136]

4.2.6 Administrative Sanctions

The key difference between the success of Singapore and the failure of other South East Asian countries, is the will to ensure that the procurement system is rid of any corruption. This is evidenced by the corruption perception index which rated Singapore's efforts at 9.4/10 while the closest South East Asian country was Thailand with an average 5.1/10.[137]

4.3 Key Lessons for Kenya

This study argues that in order to achieve an efficient procurement system, the instituting of clear laws and elimination of any ambiguity is a clear first step as evidenced by the efforts of the South East Asian countries. However, in order to achieve the desired levels of efficiency, the government must also ensure strict compliance with the enacted laws.

4.4 Conclusion

The analysis of the lessons from South East Asia illustrate how Kenya can adopt good practices and avoid challenges associated with public procurement reforms. The chapter, illustrates the need for legal and regulatory mechanisms to support public procurement

[136]OECD (n 102 above) 52.

[137]OECD (n 102 above) 55.

reforms but cautions against non-compliance with the instituted laws and regulations. This chapter has sought to answer the final research question on what lessons Kenya can learn from other countries which have both succeeded and failed in their attempts to reform public procurement.

CHAPTER 5: FINDINGS, CONCLUSION AND RECOMMENDATIONS

5.1 Findings

Public procurement in Kenya has undergone various phases of reforms. The promulgation of the Constitution is considered to have been the peak of these reforms. Through Article 227, public procurement in Kenya was elevated to a constitutional threshold. Article 227 prescribed for setting up of a system of procurement that is fair and equitable. This study sought to examine the extent to which the public procurement system, as foreseen in the Constitution, had been realised. The study reviewed the enabling legislation to assess if this was aligned to the Constitution and if not, identify the offending provisions of the enabling law that needed to be amended or repealed.

The study was undertaken through literature review and analysis of secondary data including articles, journals and online publications. The study was also undertaken through a detailed examination and analysis of case law to establish the court's jurisprudence in this area of study.

This study finds that:

i) The procurement system envisioned under Article 227 is yet to be fully realised. The enabling Act, which is meant to give effect to the Constitution, is not aligned to Article 227 of the Constitution.

ii) The history of public procurement in Kenya influenced the legal and regulatory reforms put in place. Cases of widespread corruption in procurement were associated with a weak procurement regulatory mechanism. As such, laws were enacted with the main purpose of assisting in combating corruption. This study finds that the focus of legal

reforms purely on procurement corruption, has negatively impacted the speed for attainment of a procurement system envisioned in the Constitution.

iii) A number of provisions in the procurement law, PPDA, are unconstitutional, while others are vague. These vague and unconstitutional provisions impact the ability of the statute to give effect to a public procurement system that guarantees fairness and equity, as decreed in the Constitution.

iv) Although Kenya had instituted legal and regulatory mechanisms for procurement reforms. Enactment of laws and regulations, as observed from lessons from South East Asian countries, are not a panacea to establishment of an effective and efficient public procurement system, strict compliance with the laws was also critical to attainment of the desired public procurement system.

5.2 Conclusion

This study sought to answer four key questions including; what the drafters of the Constitution sought to cure by setting out the principles of procurement, including fairness and equity, in the Constitution. The study also sought to answer whether the provisions of the PPDA 2015 were aligned to the Constitution and if not, what provisions needed to be amended to ensure the Act gave full effect to the Constitution. Finally, the study sought to find if there were lessons from other jurisdictions that Kenya could learn from, in its journey for reforms in public procurement.

The study hypothesized that the enabling Act was not aligned to the Constitution and that this was hindering the attainment of a procurement system envisioned under Article 227.

It is the conclusion of this study that indeed the PPDA, 2015 is not aligned to the Constitution. The PPDA contains unconstitutional and vague provisions that need to be amended, to ensure PPDA can give full effect to the Constitutional imperative for a procurement system that guarantees fairness and equity.

5.3 Recommendations

In undertaking this study, I provided a number of justifications that reflected on the importance of public procurement to governments. Governments have key mandate of delivering services to their citizenry. To enable them to deliver services, they need public procurement to source goods and services from private sector. As public procurement involves use of public funds, regulation through legal and institutional mechanism is key for the protection of wider public interest.

This study has identified key findings that require action from policy makers, including varied government actors. The following recommendations are proposed:

i) The PPDA should be amended to ensure it is not only aligned to the Constitution but that the identified offending provisions are repealed. This study recommends for amendment of sections 175 (3) and 175 (5), which have been declared as unconstitutional. The sections provide for timelines within which the High Court should make final determination on procurement judicial review matters. These sections inhibit access to justice and fair hearing and should therefore be repealed.

ii) The study proposes for amendment of section 6 (1) which has been used to exclude procurements supported through bilateral agreements, from the operation of the Act. The section should be amended to align to the constitutional requirements for transparency, fairness and equity.

iii) The study further recommends for the amendment of the identified vague provisions through drafting of clear provisions that adequately define, among other terms, *manufacture* and *citizen contractors*.

The above recommendations are proposed for implementation in the short term. In the medium to longer term;

iv) The study recommends for increased political will and strict compliance with the enacted laws as part of lessons learnt from other jurisdictions.

v) The study further recommends for increased use of Information and Communications Technologies (ICT), for improved efficiency in public procurement as part of lessons from other jurisdictions including Singapore, that have shown great effectiveness in public procurement due to the adoption of ICT.

This study contends that implementation of the above measures will promote the establishment of a public procurement system that is fair and equitable.

BIBLIOGRAPHY.

Books

1 H.W.O. Okoth-Ogendo (1999) "The Quest for Constitutional Government," in Goran Hyden, Dele Olowu& H.W.O. Okoth-Ogendo (1999) African Perspectives on Governance, Africa World Press, Trenton, pp. 33-60.

2 Joshua I. Schwartz, 'Regulation and Deregulation in Public Procurement Law Reform in the United States.' in Advancing Public Procurement: Practices, Innovation and Knowledge-Sharing, 177-201, edited by Gustavo Piga&Khi Thai. Boca Raton: PrAcademics Press, 2007.

3 Jim Dator, Dick Pratt and Yongseok Seo, 'Fairness, Globalization and Public Institutions: East Asia and Beyond (2006) University of Hawaii Press P l- 34.

4 M.P.K Sorrenson, *Origins of European Settlement in Kenya* (Oxford University Press 1968) 180.

Journal Articles

5 Ben Sihanya, 'Reconstructing the Kenyan Constitution and State, 1963-2009: Lessons from German and American Constitutionalism' Law Society of Kenya Journal, 2010.

6 Dong-Hun Kim, 'Political institutions and the Government Procurement Agreement of the WTO' Public Procurement Law Review P.P.L.R. 2009, 1, 1-17.

7 Francis Ssennoga, 'Examining discriminatory procurement practices in developing countries' Journal of Public Procurement, Volume 6, Issue 3, 218-249.

8 Paul R Schapper, Joao N, Veiga Malta and Diane L Gilbert, 'An Analytical Framework for the Management and Reform of Public Procurement' Journal of Public Procurement, Volume 6, issues 1&3, 1-26, 2006.

9 Phoebe Bolton, ‘An analysis of the preferential procurement legislation in South Africa’ (2007) 16(1) Public Procurement Law Review 36 – 67.

10 Ron Watermeyer, ‘The use of targeted procurement as an instrument of poverty alleviation and job creation in infrastructure projects’ Public Procurement Law Review, Number 5, pages 226 to 250; NA105-NA123, Sweet and Maxwell, 2000.

11 Steven L. Schooner, ‘Desiderata: Objectives for a System of Government Contract Law’, Public Procurement Law Review, Vol. 11, p. 103, 2002.

12 Steven L. Schooner, ‘Mixed Messages: Heightened Complexity In Social Policies Favoring Small Business Interests’, 8 Public Procurement Law Review CS78 (No. 3, 1999).

13 Sue Arrowsmith, ‘Public procurement as an instrument of policy and the impact of marketliberalisation ’ Journal of Public Procurement, Volume 2, Issue 2, 291-300.

14 Sue Arrowsmith, John Linarelli& Don Wallace Jr,‘Regulating Public Procurement’ Kluwer Law international 35.

15 Xinglin Zhang, ‘Supplier Review as a Mechanism for Securing Compliance with Government Public Procurement Rules: a Critical Perspective’, Public Procurement Law Review, 5 (2007), 321-51.

16 Transparency Kenya, ‘Fighting Corruption’ (2019).

17 Executive Summary www.cuts-international.org/. Watermeyer was one of the consultants who assisted with the World Bank’s Country Procurement Assessment Report Refining the Public Procurement System in South Africa, WorldBank Report No 25751-SA Feb 2003.

18 Ricardo Gosalbo-Bono, 'The Significance of the Rule Of Law And Its Implications For The European Union And The United States (2010) 72(229) University of Pittsburgh Law Review PL 230.

19 Njuguna Humphrey Kimani, 'The Influence of Political Patronage On The Operationalization Of Public Procurement Law In Kenya' (2014) PL 6.

Websites & Hyperlinks

20 Christopher McCrudden, 'Using Public Procurement to achieve Social Outcomes' available at http://www.edf.org.uk/blog/wp-content/uploads/2006/03/ChrisMcCruddenPaper.pdf (accessed on 20 October 2014).

21 Colin Henning, 'Criticisms of the Neo-Classical Development Model' 2008' available at http://www.colorado.edu/economics/morey/4999Ethics/essays/StudentEssays/4999HenningEssay1_CriticismNeoclassDevModel.pdf (accessed on 17 November 2013).

22 ECI Africa; 'Procurement and supply in Kenya: The Market for Small and Medium Enterprises' July 2008, available at http://www.fsdkenya.org/pdf_documents/07.08.FSD_Procurement_Supply_Kenya.pdf (accessed on 21 October 2014).

23 Fred Owegi and Eric Aligula, 'Public Sector Procurement in Kenya: The Need for a Coherent Policy Framework' Nairobi: Kenya Institute for Public Policy Research and Analysis, 2006, available at http://www.gbv.de/dms/zbw/638200644.pdf (accessed on 15 November 2013).

24 International Trade Centre,' A Practical Guide for Assessing and Developing Public Procurement Programmes to Assist SMEs' Available at

http://www.wto.org/english/tratop_e/gproc_e/wkshop_tanz_jan03/itcdemo3_e.pdf (accessed on 20 October 2014)

25 Jerome Ochieng and Mathias Muehle, 'Development and Reform of the Kenyan Public Procurement System' Paper 7-7, 1763, available at http://www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf (accessed on 15 November 2013).

26 Kenya Economic Survey 2009 Highlights, available at http://www.knbs.or.ke/index.php?option...economic...economic (accessed on 2 October 2014).

27 Kommerskollegium, Swedish National Board of Trade; ''Cross- border Procurement an EU perspective' available at http://www.kommers.se/Documents/dokumentarkiv/publikationer/2011/rapporter/Report%20-%20Cross-border%20Public%20Procurement.pdf (accessed on 2 October 2014).

28 Michael H. Rothkopf , Ronald M. Harstad , Yuhong Fu, ' Is Subsidizing Inefficient Bidders Actually Costly?' available at http://www.jstor.org/discover/10.2307/822585?uid=2&uid=4&sid=21104396969701 (accessed on 22 October 2014).

29 MigaiAketch; 'Development Partners and Governance of Public Procurement in Kenya: Enhancing Democracy in the Administration of Aid' available at http://iilj.org/GAL/documents/AkechPaper_000.pdf (accessed on 2 October 2014).

30 Mosoti ,Victor; ' The WTO Agreement on Government Procurement: A necessary evil in the legal strategy for development in the poor world? Available at

https://www.law.upenn.edu/journals/jil/articles/volume25/issue2/Mosoti25U.Pa.J.Int'lEcon.L.593(2004).pdf (accessed on 27 February 2014).

31 Pal, Debarati, 'Sociological Jurisprudence - Theory of Roscoe Pound (July 29, 2011). Available at SSRN: http://ssrn.com/abstract=1925790 or http://dx.doi.org/10.2139/ssrn.1925790 (accessed on 18 November 2013).

32 Phoebe Bolton, 'Government Procurement as a Policy tool in South Africa' available athttp://unpcdc.org/media/5376/government%20procurement%20as%20a%20policy%20tool%20in%20south%20africa.pdf (accessed on 1 October 2014).

33 Prof.GelaseMutahaba and Benson A. Bana; 'Strengthening Regulatory and Oversight Role of Public Administration Institutions in African Countries' available at www.nairobi.ksg.ac.ke/.../33-(accessed on 10 February 2014).

34 Public Procurement in Kenya 'Cash cow for the corrupt or enabler for public service delivery?' Adili Issue 145, June 2014, available at http://tikenya.org/index.php/blog/277-public-procurement-in-kenya-cash-cow-for-the-corrupt-or-enabler-for-public-service-delivery (accessed on 20 September 2014).

35 Public Procurement Oversight Authority, 'War on Corruption in Public Procurement: Recent Achievements' 2010. Available at http://www.eappf.org/uploads/media/War_on_Corruption_in_PP_-_recent_achievements_by_PPOA_Kenya_01.pdf. (Accessed on 17 November 2013).

36 Public Procurement Oversight Authority (PPOA), 'Procurement Circular no. 1 2014' available at http://ppoa.go.ke/index.php?option=com_jdownloads&task=view.download&catid=57&cid=907 (accessed on 20 October 2014).

37 Rambol Management A/S, 'Assessment of the Procurement System in Kenya' 2010, available at http://www.oecd.org/development/effectiveness/41583965.pdf(accessed 25 September 2014).

38 Rober R Hunja, 'Obstacles to Public Procurement Reform in Developing Countries' available at http://www.google.co.ke/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&ved=0CBwQFjAA&url=http%3A%2F%2Fwww.unpcdc.org%2Fmedia%2F2400%2Fobstacles%2520to%2520public%2520procurement%2520reform%2520in%2520developing%2520countries%2520(copy).doc&ei=J99QVO21Fo_lara4geAC&usg=AFQjCNHTVXBsXdkTF1d8r9DxNnrK8gvYZw&bvm=bv.78597519,d.d2s (accessed on 20 October 2014).

39 Simon J. Evenett , Bernard M. Hoekman, 'Government Procurement: Market Access, Transparency, and Multilateral Trade Rules' available at http://www.wto.org/english/tratop_e/gproc_e/gptran_symp_oct02_pdf_files/symp_oct02_2_hoe_eve_e.pdf (accessed on 2 October 2014).

40 Steven L. Schooner & Christopher R. Yukins, 'Public Procurement: Focus on people, Value for Money and Systemic Integrity, Not Protectionism' available at: http://ssrn.com/abstract=1356170 (accessed on 25 October 2014).

41 Steven L. Schooner, Daniel I. Gordon, and Jessica L. Clark, 'Public Procurement Systems: Unpacking Stakeholder Aspirations and Expectations' available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1133234 (accessed on 19 October 2014).

42 Walter Odhiambo and Paul Kamau, 'Public Procurement: Lessons from Kenya, Tanzania and Uganda' available at http://www.u4.no/recommended-reading/public-procurement-lessons-from-kenya-tanzania-and-uganda/ (accessed on 2 October 2014).

43 The World Bank Group, 'Benchmarking Public Procurement 2017: Assessing Public Procurement Regulatory Systems in 180 Economies' (The World Bank Group 2016) <http://pubdocs.worldbank.org/en/121001523554026106/BPP17-e-version-Final-compressed-v2.pdf> (accessed on 1 September 2019).

44 Robert AgwotKomakech, Public Procurement in Developing Countries: Objectives, Principles & Required Professional Skills ' (2016) 6 (8) IISTE <https://pdfs.semanticscholar.org/d3df/5c722d2053d1fd08b26a0b4c083e67b84315.pdf>accessed 1 September 2019.

45 Harry Jones, 'Equity in Development: Why it is important and how to achieve it' (2009) Overseas Development Institute Working Paper 311<https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/4577.pdf> accessed 12 October 2019.

46 The World Bank Group, 'Benchmarking Public Procurement 2017: Assessing Public Procurement Regulatory Systems in 180 Economies' (The World Bank Group 2016) <http://pubdocs.worldbank.org/en/121001523554026106/BPP17-e-version-Final-compressed-v2.pdf> accessed on 1 September 2019.

47 Jerry Mashaw, 'The Fear of Discretion in Government Procurement'(1991) 8 (2) Yale Journal on Regulation<https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?referer=https://

www.google.com/&httpsredir=1&article=1192&context=yjreg> accessed 3 September 2019.

48 Ken Kress, 'Legal Indeterminacy' (1985) 77(1) California Law Review<https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1873&context=californialawreview> accessed 30 September 2019.

49 Edwin W. Patterson, 'Hans Kelsen and His Pure Theory of Law' (1952) 40 California Law Review <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=3427&context=californialawreview> accessed 30 September 2019.

50 MigaiAketch, 'Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability' (2011) 18(1) Indiana Journal of Global Legal Studies <https://www.jstor.org/stable/10.2979/indjglolegstu.18.1.341> accessed 29 September 2019.

51 Dennis OroboAbere, 'Factors Affecting Compliance With The Public Procurement And Disposal Regulations in Kenya: A Case Study of County Government of Nyamira' (2015) 3(11) International Journal of Economics, Commerce and Management<http://ijecm.co.uk/> accessed 1 October 2019.

52 Peter Kiburu Mukura, Noor Shalle, Mark Kemboi Kanda, Peter Maku Ngatia, 'Role of Public Procurement Oversight Authority on Procurement Regulations in Kenyan State Corporations. A Case of Kenya Electricity Generating Company (KenGen)' (2016) 6(3) International Journal of Academic Research in Accounting, Finance and Management Sciences <http://dx.doi.org/10.6007/IJARAFMS/v6-i3/2254> accessed 1 October 2019.

53 Randall G Holcombe, ‘Constitutions and Democracy’ (2001) IDEP 15(1)<http://journals.openedition.org/economiepublique/1563> accessed 3 October 2019.

54 Dr Migai Aketch, ‘Institutional Reform in the New Constitution of Kenya’ (2010) ICTJ <https://www.ictj.org/sites/default/files/ICTJ-Kenya-Institutional-Reform-2010-English.pdf> accessed 3 October 2019.

55 OECD, ‘Preventing Corruption in Public Procurement’ (2016) <http://www.oecd.org/gov/ethics/Corruption-Public-Procurement-Brochure.pdf> accessed 3 October 2019.

56 Charles E Carpenter, ‘Court Decisions and Common Law’ (1917) 17(7) Columbia Law Reviewhttps://www.jstor.org/stable/1112172 accessed 3 October 2019.

57 Mark Elliot and Robert Thomas, ‘Tribunal Justice and Proportionate Dispute Resolution'(2012) 71(2) Cambridge Law Journal https://www.jstor.org/stable/23253648 accessed 6 October 2019.

58 OECD, ‘Anti-corruption policies in Asia and the Pacific: Thematic review on provisions and practices to curb corruption in public procurement’ (2009) <https://www.oecd.org/site/adboecdanti-corruptioninitiative/policyanalysis/35054589.pdf> accessed 6 October 2019.

59 David S Jones, ‘Public Procurement in Southeast Asia: Challenges & Reform’ (2007) 7(1) Journal of Public Procurement <http://www.ippa.org/jopp/download/vol7/issue-1/Article_1_JONES.pdf> accessed 6 October 2019.

60 Reza Tajarlou and BehzadGhorbanyDarabad, ‘The review of Principles Governing Public Procurement’(2017) 4(3) IAJE <http://iaiest.com/dl/journals/1-

%20IAJ%20of%20Economics/v4-i3-jul-sep2017/paper3.pdf> accessed 4 October 2019.