BALANCING ECONOMIC AND SOCIAL OBJECTIVES IN PUBLIC PROCUREMENT IN KENYA: A REVIEW OF THE LAW, THE POLICY AND THE PRACTICE

THESIS SUBMITTED IN FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF THE DEGREE OF DOCTOR OF PHILOSOPHY (PH.D.)

BY:
MUTHOMI THIANKOLU
(REG. NO. G80/98270/2015)

TO:
THE UNIVERSITY OF NAIROBI
(SCHOOL OF LAW)

DATE: MONDAY, 14 SEPTEMBER 2020

WORD COUNT (EXCLUDING BIBLIOGRAPHY AND APPENDICES):79,795

TABLE OF CONTENTS

DECLARATION OF ORIGINALITY IX

ACRONYMS AND ABBREVIATIONS XI

LIST OF STATUTES XIII

Kenyan Statutes xiii

United States Statutes xiv

South African Statutes xv

LIST OF CASES XVII

Kenya Cases xvii

United States Cases xxv

South African Cases xxvi

United Kingdom Cases xxvii

Tanzanian Cases xxviii

LIST OF POLICY DOCUMENTS XXIX

DEDICATION XXX

ACKNOWLEDGMENTS XXXI

ABSTRACT XXXIII

CHAPTER 1: INTRODUCTION 1

1.1 Background 1

1.2 Statement of the Problem 4

1.3 Objectives 5

1.4 Research Questions 6

1.5 Hypotheses 6

1.6 Theoretical Framework 6

1.6.1 Administrative Law 9

1.6.2 Law and Economics 12

1.7 Justification 16

1.8 Literature Review 16

1.8.1 Design, Principles and Objects of Public Procurement Regulation 17

1.8.2 Interplay between Public Procurement and International Trade 20

1.8.3 Interplay between Economic and Social Objectives 23

1.9 Methodology 28

1.9.1 Qualitative Research 28

Figure 1. Professional Distribution of Participants 30

1.9.2 Desk Review of Primary and Secondary Sources 31

1.9.3 Comparative and Case Studies 31

1.9.4 Ethical Requirements 32

1.10 Scope and Limitations 32

1.11 Chapter Outline 33

CHAPTER 2: LAW, ECONOMICS AND THE RESOLUTION OF CONFLICTING ECONOMIC AND SOCIAL OBJECTIVES IN PUBLIC PROCUREMENT 36

2.1 Introduction 36

2.2 The Nature of Public Procurement 37

2.3 The Problem of Discretion and its Implications for Public Procurement 41

2.4 The Nature of Public Procurement Regulation 44

2.4.1 Economic Objectives of Public Procurement Regulation 48

2.4.2 Social Objectives of Public Procurement Regulation 53

2.4.3 Cross-Cutting Objectives of Public Procurement Regulation 58

2.5 The Role of Law and Economics in Resolving Conflicting Objectives 64

CHAPTER 3: INTERPLAY OF ECONOMIC AND SOCIAL OBJECTIVES, THE PROBLEM OF DISCRETION AND EVOLUTION OF POLICY AND REGULATORY FRAMEWORKS FOR PUBLIC PROCUREMENT IN KENYA 70

3.1 Introduction 70

3.2 Relationship between Government Policy and Law 71

3.3 Policy and Regulatory Frameworks 1963-2000 74

3.3.1 The Sessional Paper No. 10 of 1965 76

3.3.2 The Ndegwa Report 78

Table 1: Main Objective of Kenyan Public Procurement Policy 81

3.4 Policy and Regulatory Frameworks 2001—2010 83

3.4.1 The 2001 Regulations 83

3.4.2 The 2005 Procurement Act 90

3.4.3 The Kenya Vision 2030 95

3.4.4 The Draft Procurement Policy 97

3.5 Policy and Regulatory Frameworks after 2010 99

3.5.1 The 2010 Constitution 99

Figure 2: Resolving the Dilemma of Conflicting Objectives 117

3.5.2 The 2015 Procurement Act 119

Table 2: Incidence of Corruption, Favouritism and Malfeasance 132

Figure 3: Discretion and the Incidence of Malfeasance 136

Figure 4: Main Economic Objectives of Kenyan Public Procurement Laws . 142

Table 3: Main Social Objectives of Kenyan Public Procurement Laws 143

3.6 Summary of Findings 152

CHAPTER 4: CASE STUDIES OF THE INTERPLAY OF ECONOMIC AND SOCIAL OBJECTIVES AND THE PROBLEM OF DISCRETION IN PUBLIC PROCUREMENT DECISION MAKING IN KENYA 155

4.1 Introduction 155

4.2 Procurement of Ballot Papers for the 2017 General Election 156

4.2.1 First Tender 158

4.2.2 First Administrative Review Proceedings 161

4.2.3 First High Court Proceedings 165

4.2.4 First Appellate Proceedings 165

4.2.5 Second Tender 166

4.2.6 Second Administrative Review Proceedings 167

4.2.7 Second High Court Proceedings 170

4.2.9 Third High Court Proceedings....172

4.2.10 Second Appellate Proceedings....173

4.2.11 Interplay of Economic and Social Objectives....178

Figure 5: Economic Objectives and the Procurement of Ballot Papers....178

Figure 6: Whether IEBC had the Discretion to Integrate Social Objectives....180

4.2.12 Discretion and Incidence of Malfeasance....182

4.3 Procurement of Laptops for Primary Schools....182

4.3.1 First Tender....185

4.3.2 Second Tender....186

4.3.3 Administrative Review Proceedings....189

4.3.4 High Court Proceedings....193

4.3.5 Appellate Proceedings....196

4.3.6 The Third Tender (Shift from Laptops to Tablets)....197

4.3.7 Abandonment of the Digital Literacy Programme....199

4.3.8 Interplay of Economic and Social Objectives....200

Figure 7: Economic Objectives of the Tender for Procurement of Laptops....201

Figure 8: Social Objectives of the Tender for Procurement of Laptops....202

Figure 9: Interplay of Economic and Social Objectives....203

Figure 10: Incidence of Corruption, Favouritism and Malfeasance....203

4.4.2 Discretion and Incidence of Malfeasance....207

CHAPTER 5: INTERPLAY OF ECONOMIC AND SOCIAL OBJECTIVES AND THE PROBLEM OF DISCRETION IN THE US AND SOUTH AFRICAN PUBLIC PROCUREMENT SYSTEMS 212

5.1 Introduction 212

5.2 Interplay of Economic Objectives, Social Objectives and Discretion in the US Federal Procurement System 213

5.2.1 Overview of the US Public Procurement Regulatory System 213

5.2.2 Interplay of Economic and Social Objectives 215

5.2.3 Discretion, Corruption, Favouritism and Other Forms of Malfeasance 224

5.2.4 Implication of the US Experience for Kenya 235

5.3 Interplay of Economic Objectives, Social Objectives and Discretion in the South African Public Procurement System 239

5.3.1 Overview of South Africa's Public Procurement Regulatory System ... 239

5.3.2 Interplay of Economic and Social Objectives 240

5.3.3 Discretion, Corruption, Favouritism and Other Forms of Malfeasance 255

5.3.4 Implication of the South African Experience for Kenya 266

5.4 Summary of Findings 268

CHAPTER 6: CONCLUSION AND RECOMMENDATIONS 270

6.1 Conclusion and Recommendations 270

BIBLIOGRAPHY 277

Books 277

Journals 281

Working, Discussion and Conference Papers 290

Dissertations and Monographs 292

Reports 293

Newspapers, Magazines, Websites and Blogs 294

APPENDICES 298

Appendix 1: Letter of Provisional Admission 298

Appendix 2: Request for Extension of Provisional Registration 300

Appendix 3: Extension of Provisional Registration 301

Appendix 4: Memo on Oral Defence of the Research Proposal 302

Appendix 5: Letter of Full Registration 303

Appendix 6: Research Permits 305

Appendix 7: General Questionnaire 306

Appendix 8: Interview Schedule 314

Appendix 9: Questionnaire on Procurement of Ballot Papers 322

Appendix 10: Questionnaire on Procurement of Laptops 327

Appendix 11: Questionnaire on the United States Public Procurement System 332

Appendix 12: Questionnaire on the South African Public Procurement System 340

DECLARATION OF ORIGINALITY

Candidate's Name:	Muthomi Thiankolu
Registration Number:	G80/98270/2015
College:	Humanities and Social Sciences
Faculty/School/Institute:	School of Law
Department:	Public Law
Course Name:	Doctor of Philosophy (Ph.D.)
Title of the Thesis:	Balancing Economic and social Objectives in Public Procurement in Kenya: A Review of the Law, the Policy and the Practice

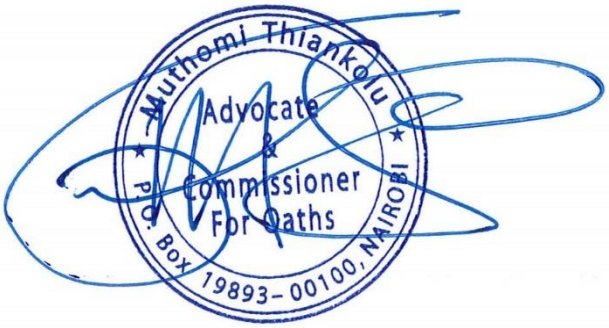
DECLARATION:

1. I understand what Plagiarism is and I am aware of the University's policy in this regard.

2. I declare that this thesis is my original work and has not been submitted elsewhere for examination, award of a degree or publication. Where other people's work or my own work has been used, this has properly been acknowledged and referenced in accordance with the University of Nairobi's requirements.

3. I have not sought or used the services of any professional agencies to produce this work.

4. I have not allowed and shall not allow anyone to copy my work with the intention of passing it off as his/her own work.
5. I understand that any false claim in respect of this work shall result in disciplinary action, in accordance with the University of Nairobi Plagiarism Policy.



……

MUTHOMI THIANKOLU
(Candidate)
MONDAY, 14 SEPTEMBER 2020

This Thesis has been submitted for examination with our approval as university supervisors:

……

PROF MIGAI AKECH
University of Nairobi School of Law
MONDAY, 14 SEPTEMBER 2020

……

DR. KEN OBURA
University of Nairobi School of Law
MONDAY, 14 SEPTEMBER 2020

ACRONYMS AND ABBREVIATIONS

BEE Policy	Black Economic Empowerment Policy.
B-BBEE Policy	Broad-based Black Economic Empowerment Policy.
CORD	Coalition for Reforms and Democracy.
FAR	Federal Acquisition Regulation.
GAO	Government Accountability Office.
GATT	General Agreement on Tariffs and Trade.
GoK	Government of the Republic of Kenya.
IEBC	Independent Electoral and Boundaries Commission.
ITO Charter	Havana Charter for an International Trade Organisation.
KIPPRA	Kenya Institute for Public Policy Research and Analysis.
KLR	Kenya Law Reports.
LRC	Law Reports of the Commonwealth.

MoEST	Ministry of Education, Science and Technology
NA	National Assembly.
NARC	The National Rainbow Coalition.
NASA	The National Super Alliance (NASA) Kenya.
NGOs	Nongovernmental Organisations.
PPOA	Public Procurement Oversight Authority.
PPRA	Public Procurement Regulatory Authority.
Review Board	Public Procurement Administrative Review Board.
TNA	The National Alliance.
URP	The United Republican Party.
WTO	World Trade Organisation.

LIST OF STATUTES

Kenyan Statutes

The Constitution of Kenya, 2010.

The Election Laws (Amendments) Act, 2016 (Act No. 36 of 2016).

The Election Laws (Amendments) Act, 2017 (Act. No. 1 of 2017).

The Elections Act, 2011.

The Ethics and Integrity Act, 2012.

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

The Leadership and Integrity Act, 2012.

The Public-Private Partnerships Act, 2013.

The Public Procurement and Asset Disposal Act, 2015.

The Anti-Corruption and Economic Crimes Act, 2003.

The Public Officer Ethics Act, 2003.

The Public Procurement and Asset Disposal Regulations, 2020.

The Public Procurement and Disposal (County Governments) Regulations, 2013.

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

The Public Procurement and Disposal Act, 2005.

The Science, Technology and Innovation Act, 2013.

The Statutory Instruments Act, 2013.

United States Statutes

The Administrative Procedures Act.

The Armed Forces Act.

The Buy American Act.

The Competition in Contracting Act.

The False Claims Act.

The Federal Acquisition Regulation.

The Office of Federal Procurement Policy Reauthorization Act.

The Public Contracts Act.

The Small Business Act.

The Small Business Mobilisation Act.

The Tucker Act.

South African Statutes

The Broad-Based Black Economic Empowerment Act, 2003.

The Broad-Based Black Economic Empowerment Act.

The Constitution of South Africa, 1996.

The Employment Equity Act, 1998.

The General Procurement Guidelines.

The Municipal Supply Chain Management Regulations.

The Local Government: Municipal Financial Management Act, 2003.

The Local Government: Municipal Systems Act, 2000.

The Preferential Procurement Policy Framework Act, 2000.

The Preferential Procurement Regulations, 2017.

The Prevention and Combating of Corrupt Activities Act, 2004.

The Promotion of Administrative Justice Act, 2000.

The Promotion of Equality and Prevention of Unfair Discrimination Act, 2002.

The Public Administration Management Act, 2014.

The Public Finance Management Act, 1999.

The Public Service Act, 1994

The Treasury Regulations for Departments, Trading Entities, Constitutional Institutions and Public Entities.

LIST OF CASES

Kenya Cases

Abdalla Abubakar Miraj & Another v Kenya Ferry Services, High Court of Kenya (Mombasa) Constitutional Petition No. 1 of 2015.

Al Ghurair Printing and Publishing LLC v Coalition for Reforms and Democracy & 2 Others, Civil Appeal (Nairobi) No. 63 of 2017.

Alliance Technologies Solutions Ltd v Public Procurement Oversight Authority (2008-2010) PPLR 759.

Arprim Consultants v the Accounting Officer (Parliamentary Joint Services) Parliamentary Service Commission & Another, Review Board Application No. 57 of 2020.

Association of Retirement Benefits Schemes v Attorney General & 3 Others, High Court of Kenya (Nairobi) Constitutional Petition No. 170 of 2016.

Avante International Technology Inc. v Independent Electoral and Boundaries Commission, Public Procurement Administrative Review Board Application No. 19 of 2017.

Bevaj v Kenya School of Monetary Studies, Public Procurement Administrative Review Board Application No. 24 of 2013.

Cecil James Oyugi v Public Procurement Administrative Review Board & Another, High Court of Kenya (Nairobi) Constitutional Petition No. 241 of 2017.

China Overseas Engineering Group Company Ltd v Kenya Rural Roads Authority, Public Procurement Administrative Review Board Application No. 7 of 2016.

Communications Commission of Kenya v Royal Media Services & 5 Others, Supreme Court Petition No. 14 of 2014.

Electoral Commission of Kenya v Attorney General & 2 Others, High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 415 of 2008.

Erick Okeyo v County Government of Kisumu & 2 Others, High Court of Kenya (Kisumu) Constitutional Petition No. 1A of 2014.

Eunice Khalwali Miima v Independent Electoral and Boundaries Commission & Another, Civil Appeal (Nairobi) No. 263 of 2017.

Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others, Supreme Court Petition No. 2B of 2014.

George Bala v Attorney General, High Court (Nairobi) Constitutional Petition No. 238 of 2016.

Githunguri Dairy Farmers Co-operative Society Ltd v Attorney General & 2 Others, High Court of Kenya (Nairobi) Constitutional Petition No. 257 of 2015.

H Young & Co. (EA) Limited & Another v Kenya National Highways Authority, Public Procurement Administrative Review Board Application No. 47 of 2016.

Haier Electrical Appliances Corporation Limited v Ministry of Education, Science and Technology, Public Procurement Administrative Review Board Application No. 4 of 2014.

Hewlett-Packard Europe BV, Amsterdam, Myerin Branch v Ministry of Education, Science and Technology, Public Procurement Administrative Review Board Application No. 3 of 2014.

Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others, Civil Appeal (Nairobi) No. 105 of 2017.

Independent Electoral and Boundaries Commission (IEBC) v The National Super Alliance (NASA) Kenya & 6 Others, Civil Appeal (Nairobi) No. 224 of 2017.

Kenya Human Rights Commission v Non-Governmental Organisations Co-ordination Board, High Court of Kenya (Nairobi) Constitutional Petition No. 495 of 2015.

Kenya Medical Supplies Authority v Revital Health (EPZ) Limited & 2 Others, Civil Appeal (Mombasa) No. 65 of 2016.

Kenya Transport Association v Municipal Council of Mombasa & Another, High Court of Kenya (Mombasa) Constitutional Petition No. 6 of 2011.

Kones v Republic & Another ex-parte Kimani Wanyoike & 4 Others [2008] 3 KLR (EP) 291.

Lindscan Advanced & Tank Services v Kenya Pipeline Company Ltd, Public Procurement Administrative Review Board Application No. 16 of 2012.

Milicon's Limited v Accounting Officer Konza Technopolis Development Authority & 2 Others, Public Procurement Administrative Review Board Application No. 102 of 2020.

Mulialia Okumu v Independent Electoral and Boundaries Commission & 2 Others, High Court of Kenya (Nairobi) Constitutional Petition No. 69 of 2017.

MEA Limited v National Cereals and Produce Board, Public Procurement Administrative Review Board Application No. 4 of 2012.

National Treasury and Others v Opposition to Urban Tolling Alliance and Others [2012] ZACC 18.

Njoya & Others v Attorney General & Others [2004] 4 LRC 559.

Odd Jobs v Mubia [1970] EA 476.

Okiya Omtatah Okoiti & 2 Others v Attorney General & 3 Others, High Court of Kenya (Nairobi) Constitutional Petition No. 58 of 2014.

Okiya Omtatah Okoiti & Another v Attorney General & 3 Others, High Court of Kenya (Nairobi) Constitutional Petition No. 58 of 2014.

Okiya Omtatah Okoiti & Another v Attorney General & 4 Others, Civil Appeal (Nairobi) No. 13 of 2015

Olive Telecommunications PVT Limited v Public Procurement Administrative Review Board & 3 Others, Civil Appeal (Nairobi) No. 315 of 2014.

Paarl Media (PTY) Limited v Independent Electoral and Boundaries Commission & 2 Others, Public Procurement Administrative Review Board Application No. 93 of 2016.

Patrick Ouma Onyango & 12 Others v Attorney General & 2 Others, High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 677 of 2005.

Questa Care Limited v Kenya Medical Supplies Authority & Another, Public Procurement Administrative Review Board Application No. 10 of 2017.

Questa Care Limited v Kenya Medical Supplies Authority & Another, Public Procurement Administrative Review Board Application No. 28 of 2017.

Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others, Supreme Court Presidential Petition No. 1 of 2017.

Raila Odinga v Independent Electoral and Boundaries Commission & 3 Others, Supreme Court Petition No. 5 of 2013.

Republic v Independent Electoral and Boundaries Commission & Another Ex-parte Coalition for Reform and Democracy & 2 Others, High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 637 of 2016.

Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex-parte National Super Alliance (NASA) Kenya & 6 Others, High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 378 of 2017.

Republic v Judicial Service Commission ex-parte Pareno [2004] 1 KLR 203.

Republic v Kenya Revenue Authority Ex-parte Webb Fontaine Group FZ-LLC & 3 Others [2015] eKLR.

Republic v Public-Private Partnerships Petition Committee (The Petition Committee) 2 Others ex-parte International Container Terminal Services Inc. & Another, High Court of Kenya (Nairobi) Miscellaneous Civil Applications Nos. 10 and 30 of 2016.

Republic v Public-Private Partnerships Petition Committee (The Petition Committee) & 3 Others Ex-parte A P M Terminals, High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 298 of 2015.

Republic v Public Procurement Administrative Review Board & 2 Others ex-parte MIG International & Another, High Court of Kenya (Nairobi) Miscellaneous Civil Applications Nos. 356 and 362 of 2015.

Republic v Public Procurement Administrative Review Board & 2 Others ex-parte Kenya Power and Lighting Company Limited, High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 207 of 2018.

Republic v Public Procurement Administrative Review Board & 2 Others ex-parte Kenya Power & Lighting Company Ltd, High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 302 of 2016.

Republic v Public Procurement Administrative Review Board & 2 Others ex-parte Microhouse Technologies Ltd, High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 334 of 2015.

Republic v Public Procurement Administrative Review Board & 3 Others ex-parte Olive Telecommunication PVT Ltd [2014] eKLR.

Republic v Public Procurement Administrative Review Board & Another, High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 540 of 2008.

Republic v Public Procurement Administrative Review Board & Another ex-parte Selex Sistemi Integrati [2008] KLR 728.

Republic v Public Procurement Administrative Review Board ex-parte Simba Pharmaceuticals Ltd & 2 Others, High Court (Nairobi) Miscellaneous Civil Application No. 185 of 2017.

Republic v Speaker National Assembly & 4 Others ex-parte Coalition for Reform and Democracy (CORD), High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 657 of 2016.

Revital Health (EPZ) Limited v Public Procurement Oversight Authority & 6 Others, High Court of Kenya (Mombasa) Constitutional Petition No. 75 of 2012.

Roads and Civil Engineering Contractors Association & Another v Attorney General & 3 Others, High Court of Kenya (Nairobi) Constitutional Petition No. E226 of 2020.

Roben Aberdare (K) Ltd v Kenya Rural Roads Authority, Public Procurement Administrative Review Board Application No. 11 of 2017.

Rosecate Promotions and Supplies Ltd v Independent Electoral and Boundaries Commission & 3 Others, Public Procurement Administrative Review Board Application No. 44 of 2017.

Speaker of the National Assembly v Karume [2008] 1 KLR (EP) 425.

Speaker of the Senate & Another v Attorney General & 4 Others [2013] 2 Supreme Court Digest 1.

Stephen Kemei Kiptum & 2 Others v National Police Service Commission, Employment and Labour Relations Court (Nairobi) Constitutional Petition No. 13 of 2015.

Suchan Investment Limited v Ministry of National Heritage & Culture & 3 Others, Civil Appeal (Nairobi) No. 46 of 2012.

Tropical Technology Ltd v Ministry of Interior and Coordination of National Government, Public Procurement Administrative Review Board Application No. 28 of 2015.

Wanyoike v Election Commission & Another (No. 2) [2008] 2 KLR (EP) 43.

United States Cases

Adarand Constructors, Inc. v Pena 515 U.S. 200 (1995).

AgustaWestland North America v United States, United States Court of Appeals for the Federal Circuit Appeal No. 2017-1082.

Baltimore Gas & Electric Co. & Others v Natural Resources Defense Council 462 U. S. 87 (1983).

City of Richmond v J A Croson 488 U.S. 469 (1989).

Evaluations Enhanced Property Appraisals (Pty) Ltd v Buffalo City Metropolitan Municipality and Another [2014] 3 All SA 560.

Fullilove v Klutznick 448 U.S. 448 (1980).

Impresa Construzioni Geom. Domenico Garufi v United States 238 F.3d 1324 (Fed. Cir. 2001).

Myers Investigative and Security Services Inc. v United States 47 Fed. Cl 605 (2000).

Phoenix Management Inc. v The United States, United States Court of Federal Claims Case No. 16-78.

Rothe Development Corp. v Department of Defence 545 F. 3d 1023 (2008).

Serco Inc. v United States, 81 Fed. Cl. 463, 491 (2008).

South African Cases

AllPay Consolidated Investment Holdings (Pty) Ltd & Others v Chief Executive Officer of the South African Social Security Agency & Others, Constitutional Court of South Africa Case No. 48 of 2013.

Cash Paymaster Services (Pty) Ltd v The Province of the Eastern Cape [1997] 4 All SA 363 (CK).

City of Cape Town v Reader & Others 2008] ZASCA 130.

City of Cape Town v South African National Roads Agency Ltd and Others [2013] ZAWCHC 74.

DDP Valuers (Pty) Ltd v Madibeng Local Municipality & Another, Supreme Court of Appeal of South Africa Case No. 233 of 2015.

Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining And Development Company Ltd and Others [2013] ZACC 48.

Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality [2014] ZASCA 21.

Evaluations Enhanced Property Appraisals (Pty) Ltd v Buffalo City Metropolitan Municipality and Another [2014] 3 All SA 560.

Jurgens Johannes Steenkamp NO v Provincial Tender Board of the Eastern Cape [2006] ZACC 16.

Koyabe and Others v Minister for Home Affairs and Others [2009] ZACC 23.

National Treasury and Others v Opposition to Urban Tolling Alliance and Others [2012] ZACC 18.

Rainbow Civils CC v Minister of Transport and Public Works, Western Cape [2013] ZAWCHC 3.

Steenkamp NO v Provincial Tender Board of the Eastern Cape [2007] 3 SA 121 (CC).

United Kingdom Cases

R (UNISON) v Lord Chancellor [2017] 3 WLR 409.

Tanzanian Cases

Dyanabo v Attorney General [2001] 2 EA 485.

LIST OF POLICY DOCUMENTS

Government of Kenya, 'African Socialism and its Application to Planning in Kenya' (Government Printer 1965).

Government of Kenya, 'Kenya Vision 2030: A Globally Competitive and Prosperous Kenya' (Government Printer 2008).

Government of Kenya, 'The Draft Long-Term Policy Framework for Public Procurement in Kenya' (Public Procurement Oversight Authority, 2009).

DEDICATION

To my loving parents, Lucy Kaimbi Muchiri and Thiankolu Kaibi Thirua:

My life would be bleak but for your selfless sacrifices and unwavering support. Mum's reprimand at the sight of my first nursery school report card in 1987 is indelibly inscribed on my mind. My defence of a twelfth-class rank when mum pointed out a relative's superior ninth rank, on the ground that twelve was numerically bigger than nine, shows how far I have come. Dad made enormous sacrifices, in the face of extreme financial and social constraints, to give me a good education. Moreover, Dad's wise and invaluable counsel has often spared me the blushes, regrets and tears that often come with the folly and foibles of youth.

To my loving and beautiful wife, Kanana Rose Edna Mutwiri:

I am heavily indebted for the love, patience and support that you gave me throughout the study. The torturous sleep deprivation that you endured, as I banged the computer keyboard till the wee hours, greatly motivated me to complete the journey.

To my lovely children, Reagan Munene, Alyssa Ntinyari and Maya Kawira:

Your brilliance, wit and charm have always given me hope of better days, and a reason to work even harder.

To all my teachers, from nursery school to graduate school:

This work is the culmination of your selfless efforts and sacrifices, throughout the last thirty-one years. The plaudits belong to you, jointly and severally.

……..……..…….

MUTHOMI THIANKOLU
MONDAY, 14 SEPTEMBER 2020

ACKNOWLEDGMENTS

Many people, few of whom are mentioned here, gave unwavering support to this study. Prof. Migai Akech and Dr. Ken Obura, who served as supervisors and academic advisors, painstakingly reviewed countless draft manuscripts and offered invaluable advice and moral support throughout the study.

Prof. Phillip Mbithi gave me a critical waiver on tuition fees during his tenure as Deputy Vice-Chancellor for Administration and Finance.

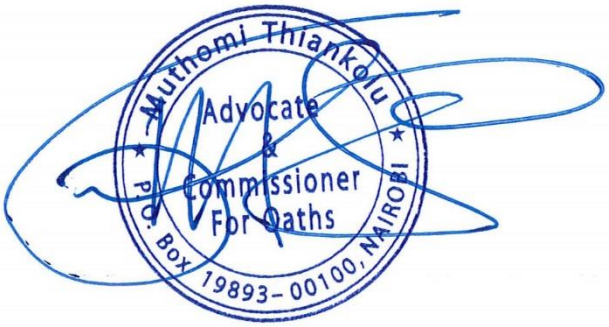
Prof. Patricia Kameri-Mbote eased my teaching workload during her tenure as Dean, University of Nairobi School of Law. Prof Kiarie Mwaura allowed me to continue enjoying the reduced workload during his tenure as Dean, School of Law. The Honourable Lady Justice (Dr.) Nancy Baraza excused my non-attendance of many meetings and events during her tenure as Chair of the University of Nairobi's Department of Public Law. Prof. Attiya Waris, the Director of Research and Enterprise at the University of Nairobi, gently and firmly pointed out the incoherence of my initial thoughts and concept note, besides giving me regular advice and encouragement throughout the course of the study. Dr. Njaramba Gichuki, the Chair of the Postgraduate Studies Committee at the University of Nairobi School of Law, gave me invaluable tips and encouragement.

Prof. Karuti Kanyinga of the University of Nairobi's Institute for Development Studies gave invaluable insights into piloting the research tools, monitored my progress and continually encouraged me to complete the study.

Mr. Paul Gicheru of the Public Procurement Administrative Review Board and Mr. Philemon Kiprop of the Public Procurement Regulatory Authority ensured I obtained copies of many relevant documents, besides securing interviews with key informants.

Mr. Samuel Karanja, the Managing Partner of Muthomi & Karanja Advocates, allowed me to enjoy a regular income from the Firm even when I spent more time on the study. Messrs Luke Scot Aol and Vincent Odhiambo Oloo, both of Muthomi & Karanja Advocates, proofread the manuscript for typos and other presentational errors.

Having enjoyed the unfailing love and support of so many people throughout the study, all errors and omissions in this Thesis are wholly attributable to me.



……

MUTHOMI THIANKOLU
MONDAY, 14 SEPTEMBER 2020

ABSTRACT

The coexistence of economic and social objectives in a system of public procurement regulation often results in conflict and dilemma. The conflict and dilemma occur when government bureaucrats make economically efficient but socially undesirable decisions, or socially desirable but economically inefficient decisions. Moreover, and closely related to the uneasy coexistence of economic and social objectives, Kenyan public procurement laws often give government bureaucrats discretion to decide the extent and the ends for which they can use procurement as a tool of economic or social policy. Although discretion is inevitable in any system of public procurement regulation, and public administration in general, it is also highly amenable to abuse. The objectives of this study are twofold. The first is to establish whether the Kenyan policy and regulatory frameworks for public procurement facilitate the resolution of conflicts between economic and social objectives. Secondly, this study seeks to establish the link between the discretion that Kenyan public procurement laws confer on government bureaucrats and the country's unusually high incidence of corruption, favouritism and other forms of malfeasance in public procurement decision making. This study seeks, therefore, to answer two questions. The first is whether the regulatory framework for public procurement in Kenya facilitates the resolution of conflicts between economic and social objectives. The second is whether the discretion that Kenyan public procurement laws confer on government bureaucrats creates incentives for corruption, favouritism and other forms of malfeasance. This study makes four main findings. First, although the objectives of public procurement regulation transcend multiple disciplinary and theoretical boundaries, the underlying concerns generally revolve around resolving five main problems, namely: (i) market failure, (ii) discretion, (iii) agency, (iv) public choice and (v) wealth (re)distribution.

Secondly, the dilemma created by the uneasy and often conflictual coexistence of economic and social policy objectives in a system of public procurement regulation does not necessarily require a choice between good and bad, or superior and inferior. Instead, the dilemma requires judicious trade-offs between the two species of objectives, through a holistic approach to public procurement decision making that is not unduly encumbered by doctrinaire or inflexible commitment to either markets (that is, economics) or social policy. Thirdly, compared to Kenya, the United States and South Africa have more effective regulatory responses to the problems of (i) conflictual coexistence of economic and social objectives, (ii) discretion, and (iii) the incidence of corruption, favouritism and other forms of malfeasance in public procurement decision-making. Lastly, the Kenyan public procurement system is characterised by stakeholder indifference to the issue of interplay of economic and social objectives and an unusually high incidence of corruption, favouritism and other forms of malfeasance. The central thesis of this study may be summarised into five propositions. First, the regulatory framework for public procurement in Kenya does not facilitate the resolution of conflicts between economic and social objectives. Secondly, the regulatory framework for public procurement in Kenya is structurally flawed to the extent that it confers broad and poorly circumscribed discretion on government bureaucrats. Thirdly, Kenya's structurally flawed public procurement regulatory framework creates strong incentives for corruption, favouritism and other forms of malfeasance. Fourthly, this situation (of a structurally flawed regulatory framework and a high incidence of corruption, favouritism and other forms of malfeasance) is inimical to the achievement of both economic and social objectives. Lastly, the disciplines of administrative law and law and economics offer useful conceptual tools which, if creatively harnessed by policymakers and legislative drafters, can result in a public procurement regulatory framework that resolves: (i)

conflicts between economic and social objectives and (ii) the problem of discretion and its correlation to the incidence of corruption, favouritism and other forms of malfeasance. In view of the foregoing, this study recommends a rule-based approach to public procurement in Kenya, characterised by controlled discretion and commitment to the values of competition, transparency and accountability. The study also recommends an urgent review and redesign of Kenya's regulatory framework for public procurement. The review and redesign should focus on: (i) the interplay of economic and social objectives; (ii) the problem of discretion; and (iii) establishment of strong and effective safeguards against corruption, favouritism and other forms of malfeasance.

CHAPTER 1: INTRODUCTION

1.1 Background

Public procurement, i.e. the activity whereby public bodies purchase goods and services from private suppliers (usually through competitive bidding) in order to carry out their functions and responsibilities,[1] is an important economic activity.[2] It constitutes a significant portion of the gross domestic product in many countries.[3] Public procurement is also a powerful and strategic tool for promoting (socioeconomic or political) policies that are unconnected with the need for the relevant goods, works or services.[4] Such policies may include: protection of the environment,[5] promotion of employment (or fair employment practices),[6] protection or advancement of marginalised persons or groups,[7] suppression of corruption and other unethical

---

[1] Simon Lester and Bryan Mercurio, *World Trade Law, Text, Materials and Commentary* (Hart Publishing 2008) 665.

[2] Ibid.

[3] Peter Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (OUP 2004) 11, Arrowsmith S, Linarelli J and Wallace D, Regulating Public Procurement: National and International Perspectives (Kluwer Law International 2000) 7, Louise Knight and others (eds) *Public Procurement: International Cases and Commentary* (Routledge 2007) 19, Christopher McCrudden, *Buying Social Justice: Equality, Government Procurement, & Legal Change* (OUP 2007) 14, Walter Odhiambo and Paul Kamau, 'Public Procurement: Lessons from Kenya, Tanzania and Uganda' (2003) OECD Working Paper No. 208, 10-11 < *http://www.oecd.org/countries/uganda/2503452.pdf*>accessed 15 January 2015 and John Robinson Jnr 'Social Public Procurement: Corporate Responsibility Without Regulation' (2013) < *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2327999*> accessed 5 May 2015.

[4] Arie Reich, International Public Procurement Law: The Evolution of International Regimes on Public Purchasing (Studies in Transnational Economic Law) (Kluwer Law International 1999) 2. See also Arrowsmith, Linarelli and Wallace (n 3) 10-11 and Phoebe Bolton, 'Government Procurement as a Policy Tool in South Africa' (2006) 6 (3) Journal of Public Procurement 193, 195-196.

[5] Rolf H. Weber, 'Development Promotion as a Secondary Policy in Public Procurement' (2009) 4 Public Procurement Law Review 184.

[6] ibid 188. See also Arthur S Miller, 'Government Contracts and Social Control: A Preliminary Inquiry' (1955) 41 (1) Virginia Law Review 27, 33.

[7] The Constitution of Kenya, 2010, art 227 (2).

practices,[8] enforcement of standards,[9] promotion of strategic industries or sectors of the economy[10] and the isolation of foreign states.[11] Public procurement can also have a significant impact on a (poor) country's development goals,[12] especially due to the multiple strategic ends to which it easily lends itself as a policy tool and its size relative to the national economy.[13]

The use of public procurement as a policy tool, however, is a complex and controversial issue.[14] According to one view, the use of public procurement as a policy tool is inconsistent with the '*main*' objective of public procurement regulation, which is to ensure that public agencies obtain goods, works and services on the best possible (*economic*) terms.[15] Closely related to this is the argument that the use of public procurement as a policy tool leads to misallocation of resources,[16] especially when a

---

[8] ibid.

[9] ibid.

[10] Victor Mosoti, 'The WTO Agreement on Government Procurement: A Necessary Evil in the Legal Strategy for Development in the Poor World?' (2004) 25 (2) University of Pennsylvania Journal of International Economic Law 593, 595.

[11] Christopher McCrudden, 'International Economic Law and the Pursuit of Human Rights: A Framework for Discussion of the Legality of 'Selective Purchasing' Laws under the WTO Government Procurement Agreement' (1999) 2 (1) Journal of International Economic Law 3, 5-7.

[12] Mosoti (n 10) *599*-601.

[13] ibid.

[14] Weber (n 5) 185 and 200, Arrowsmith, Linarelli and Wallace (n 3) 11. See also Ron Watermeyer, 'The Use of Targeted Procurement as an Instrument of Poverty Alleviation and Job Creation in Infrastructure Projects' (2000) 5 Public Procurement Law Review 226, 231.

[15] Joe Arnould, 'Secondary Policies in Public Procurement: The Innovations of the New Directives' (2004) 4 Public Procurement Law Review 187. See also Sue Arrowsmith, 'Public Procurement as an Instrument of Policy and the Impact of Market Liberalisation' (1995) 111 Law Quarterly Review 235, 284. According to this view, procurement regulation should mainly focus on economic considerations, any other policy objective is secondary or ancillary.

[16] Francis Ssenoga, 'Examining Discriminatory Procurement Practices in Developing Countries' (2006) 6 (3) Journal of Public Procurement 218, Federico Trionfetti, 'Discriminatory Public Procurement and International Trade' (2000) 23 (1) World Economy 57, 68, and Simon J Evenette and Bernard M Hoekman 'Government Procurement: Market Access, Transparency and Multilateral Trade Rules' (2002) World Bank Policy Research Working Paper No. 3195<http://elibrary.worldbank.org/doi/abs/10.1596/1813-9450-3195> accessed 20 November 2015.

legally entrenched regime of preferences and reservations favours economically inefficient producers or suppliers.[17] According to another view, the use of public procurement as a policy tool impedes the liberalisation of regional and international trade.[18] Moreover, according to yet another view, public procurement is a highly visible and politically sensitive activity among multiple stakeholders, representing diverse and often conflicting interests.[19] In particular, the multiplicity of stakeholders and their varied and conflicting interests make the use of public procurement as a policy tool highly amenable to controversy.[20] Further, the use of public procurement as a policy tool can easily fall into abuse, especially in countries with endemic corruption, political patronage and other governance problems. In particular, the use of procurement as a policy tool could easily be (ab)used to reward (*inter alia*) political friends and companies that support the country's political establishment.

The use of public procurement as a policy tool in Kenya has acquired increased significance in recent years. This is evidenced by the enactment of laws that expressly sanction the use of public procurement as a policy tool,[21] relevant pronouncements by

---

[17] ibid.

[18] ibid.

[19] Arnould (n 15), Bolton (n 4), and Weber (n 5) 184. See also Christopher McCrudden and Stuart S Gross 'WTO Government Procurement Rules and the Local Dynamics of Procurement Policies: A Malaysian Case Study' (2006) 17 (1) European Journal of International Law 151, 154.

[20] Trepte (n 3) 6.

[21] Article 227 (2) of the Constitution of Kenya, 2010, ss 155 to 158 of the Public Procurement and Asset Disposal Act, 2015, the Public Procurement and Disposal (Preference and Reservations) Regulations, 2011 and the Public Procurement and Disposal (County Governments) Regulations, 2013.

the country's political leadership[22] and the formulation and adoption of policy blueprints that espouse the use of public procurement as a policy tool.[23]

1.2 Statement of the Problem

The problem examined in this study has two distinct but interrelated aspects. First, Kenyan procurement laws espouse the pursuit of both economic and social objectives, creating a potential for conflict. The conflict occurs when government bureaucrats make: (i) economically efficient but socially undesirable decisions, or (ii) socially desirable but economically inefficient decisions.

Secondly, and closely related to the uneasy coexistence of economic and social objectives, Kenyan procurement laws give government bureaucrats broad discretion to decide the extent and the ends for which they can use procurement as a tool of

---

[22] For details on some of the pronouncements, visit *http://www.agpo.go.ke/*<accessed 15 January 2015.

[23] See, e.g. the Jubilee Coalition, 'The Shared Manifesto of the Coalition between the National Alliance (TNA) the United Republican Party the National Rainbow Coalition (NARC) and the Republican Congress Party' (2013-2017) 15, 29 and 36. See also GoK 'The Draft Long-term Policy Framework for Public Procurement in Kenya' (PPOA 2009) 77-79 and GoK, 'Policy Statement on Public Private Partnerships' (PPP Unit 2011). Although public procurement regulation and the interplay between economic and social objectives in public procurement systems are matters of recent academic and regulatory interest, the broader ideological question of the interplay between the market and social justice in Kenya has been a contentious matter since the 1960s. The Sessional Paper No. 10 of 1965, arguably the foremost policy blueprint ever produced by the government of Kenya, dismissed both western capitalism and eastern communism as unsuitable for Kenya and her peoples. Sessional Paper No. 10 of 1965 espoused African Socialism as the official policy and ideology of the Kenyan state instead of a purely capitalist or a purely communist ideology. Further, the sessional paper identified the key objectives of the Kenyan state as Africanisation of the economy, social justice, human dignity, economic welfare for all, and socially desirable economic growth. The sessional paper did not, however, mention or identify public procurement as a tool for the achievement of any of these objectives.

economic or social policy.[24] Although discretion may enhance administrative efficiency, the Kenyan experience shows that it is also highly amenable to abuse. Specifically, the Kenyan experience shows that discretion tends to create incentives for corruption, favouritism and other forms of malfeasance.[25] Abuse of discretion undermines the achievement of not only the economic and social objectives embodied in Kenyan public procurement laws but also important constitutional and administrative law precepts, especially those relating to fair competition, cost-effectiveness,[26] equality and non-discrimination,[27] national values and principles[28] and the use and management of public finances.[29]

The twin challenges that arise from the above problem, which form the focus of this study, are: (i) resolving conflicts between the economic and social objectives embodied in Kenyan public procurement laws and (ii) deterring public procurement officers from abusing discretion.

1.3 Objectives

This study has two objectives. First, it seeks to examine the policy and regulatory frameworks for public procurement in Kenya, with a view to establishing whether

---

[24] Article 227 (2) of the Constitution of Kenya, 2010, ss 155 to 158 of the Public Procurement and Asset Disposal Act, 2015, the Public Procurement and Disposal (Preference and Reservations) Regulations, 2011, and the Public Procurement and Disposal (County Governments) Regulations, 2013.

[25] NA Deb 5 July 2005, 2114-2122. On the links among poor institutional design, arbitrary power, and corruption in Kenya, see Migai Akech, 'Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability?' (2011) 18 (1) Indiana Journal of Global Legal Studies 340.

[26] The Constitution of Kenya, 2010, Article 227 (1).

[27] ibid Article 27.

[28] ibid Article 10.

[29] ibid Article 201.

they facilitate the resolution of conflicts between economic and social objectives. Secondly, this study seeks to examine the link between the discretion that Kenyan public procurement laws confer on government bureaucrats and the country's unusually high incidence of corruption, favouritism and other forms of malfeasance.

1.4 Research Questions

This study seeks to answer two questions. The first is whether the regulatory framework for public procurement in Kenya facilitates the resolution of conflicts between economic and social objectives. The second is whether the discretion that Kenyan public procurement laws confer on government bureaucrats creates incentives for corruption, favouritism and other forms of malfeasance.

1.5 Hypotheses

This study seeks to test the two key hypotheses. The first is that the regulatory framework for public procurement in Kenya does not facilitate the resolution of conflicts between economic and social objectives. The second is that the discretion that Kenyan public procurement laws confer on government bureaucrats creates incentives for corruption, favouritism and other forms of malfeasance.

1.6 Theoretical Framework

Scholars have not devoted much effort to examining the theoretical foundations of public procurement regulation.[30] According to a recent audit, only 29% of the Articles

[30] Bennon C Basheka, 'The Science of Public Procurement Management and Administration,' in Albano G, Snider K and Thai K (eds), *Charting a Course in Public Procurement Innovation and Knowledge Sharing* (PrAcademics Press 2013) 289, 290, Keith F Snider and Rene G Rendon,

published in the Journal of Public Procurement between 2001 and 2013 had a discernible theoretical grounding.[31] The audit revealed multiple theoretical and disciplinary influences among the authors,[32] broadly categorised as economic, sociological, psychological and managerial.[33]

The dearth of theoretical analysis and rigour in public procurement research is attributable to many factors. First among them is the recent entry of public procurement into academic ranks.[34] Secondly, most writers tend to focus on practitioner concerns.[35] Thirdly, the subject of public procurement is characterised by definitional ambiguity[36] and porous disciplinary boundaries.[37] As Basheka observes:

> Public procurement is now a subject claimed by many disciplines…In public procurement, political scientists will be interested in the internal and external political forces that may influence a procurement decision to award a contract to a particular bidder…Economists are generally concerned with production, consumption and distribution of wealth…Their concern will be on the costs and benefits of a particular procurement decision and their pre-occupation is not the process…Lawyers will be concerned with the laws, rules and procedures for public procurement…public administration experts will most probably be concerned with how a procurement decision will be used to promote efficiency and effectiveness in the running of

---

'Public Procurement Policy: Implications for Theory and Practice' (2008) 8 (3) Journal of Public Procurement 310, 311.

[31] Anthony Flynn and Paul Davis, 'Theory in Public Procurement Research' (2014) 14 (21) Journal of Public Procurement 139, 154. There are three main conceptions of what "*theory*" means in social science research, namely *covering laws or generalisations* that explain or predict social phenomena, a *tool of enlightenment* that helps to unfamiliarise and clear away conventional notions, paving way for artful and exciting insights and a tool of *narrative*. For further insights on "*theory*" and its role in social science research, see Paul J DiMaggio, 'Comments on what Theory is Not' (1995) 40 (3) Administrative Science Quarterly 391.

[32] Flynn and Davis (n 31) 155-156.

[33] ibid 139.

[34] ibid 141.

[35] ibid.

[36] ibid 142.

[37] ibid.

> governmental activities….sociologists need to concern themselves on the social forces that influence a procurement decision…[38]

The imprecise nature of social sciences, which often makes it difficult to meaningfully research or explain phenomena by reference to a single theory or concepts resident within a single theory,[39] may also have contributed to the dearth of theoretical analysis and rigour in public procurement research and writing.

Public procurement research, therefore, might result in different or significantly nuanced findings and conclusions on the same or similar research questions, depending on the underlying disciplinary or theoretical foundation. As explained in chapter 2 below, however, public procurement regulation generally seeks to solve or preempt problems relating to market failure, discretion, agency, public choice and wealth (re)distribution.

The most frequent and intractable challenges associated with public procurement in Kenya usually revolve around *corruption, favouritism* and *cost-effectiveness*.[40] These challenges inspired the formulation of the problem, objectives and research questions investigated in this study. Further, these challenges naturally pointed to the disciplines of *administrative law* and *law and economics* as the appropriate sources of the theoretical framework for this study. The specific rationale for choosing theories and conceptual tools drawn from these two disciplines is set out in sections 1.6.1 and 1.6.2 below.

---

[38] Basheka (n 30) 299, 318-319. See also Paul Schapper, Veiga Malta and Diane Gilbert, 'An Analytical Framework for the Management and Reform of Public Procurement' (2002) 6 (1) Journal of Public Procurement 1, 15.

[39] See Sitwala Imenda, 'Is there a Conceptual Difference between Theoretical and Conceptual Frameworks?' (2014) 38 (2) Journal of Social Science 185, 189.

[40] See Chapter 4 of this study.

1.6.1 Administrative Law

Administrative law is the branch of the law concerned with the control of the exercise of governmental power, *including discretion*, and the performance of public duties.[41] Administrative law seeks to prescribe behaviour within public entities, and to delineate relationships between those within an administration and those outside it[42] (in our case, procurement officers on one hand and suppliers on the other). The primary function of administrative law is to promote the rule of law:[43]

> The legitimating principles of any Western system of administrative law are found in the twin ideals of democracy and the rule of law…the rule of law is arguably the more significant of these two principles…while an administrative law system can–and may have to–function outside a system of democratic government, a system of democratic government that does not observe the rule of law is simply paradoxical.[44]

Administrative law, therefore, keeps the powers of government within their legal bounds[45] and, accordingly, protects citizens from the abuse of those powers.[46] Besides the control function, which most common law commentators tend to emphasize, administrative law also provides an effective framework for public administration,[47] in terms of rules, practices and procedures.[48]

---

[41] William Wade and Christopher Forsyth, *Administrative Law* (9th edn, OUP 2004) 4.
[42] Martin Shapiro, 'Administrative Law Unbounded' (2001) 8 (2) Indiana Journal of Global Legal Studies 369.
[43] Carol Harlow, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17 (1) European Journal of International Law 187, 190-191.
[44] ibid.
[45] ibid.
[46] ibid.
[47] ibid.
[48] ibid.

There are two main theories of administrative law, namely the '*red-light*' theory and the '*green light*' theory.[49] The *red light* theory of administrative law—which underlies most common law legal systems, including Kenya's— seeks to curb abuse of power (*and discretion*), promote the rule of law, and ensure that public authorities are compelled to perform their duties (lawfully) if they make default.[50] The *green light* theory of administrative law seeks to ensure a realist and functionalist jurisprudence designed to make administration easier and better.[51]

Administrative law extensively overlaps with constitutional law,[52] making it difficult to draw sharp conceptual distinctions between the two subjects.[53] Both subjects share constitutionalism and the rule of law (read control of governmental power) as their primary purposes.[54] There is a subtle but important distinction, however, between the two subjects. Constitutional law is mainly concerned with establishing the institutions of the state and the structural apparatus of governance[55] while administrative law provides the detailed rules for the actual control of the myriad micro-level day-to-day interactions between citizens and the state bureaucracy.[56]

---

[49] Wade and Forsyth (n 41) 6.
[50] ibid 5 and 20.
[51] ibid 6.
[52] Tom Ginsburg, 'Written Constitutions and the Administrative State: on the Constitutional Character of Administrative Law' (2010) University of Chicago Public Law and Legal Theory Working Paper No. 331, 123-126<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1697222> accessed 23 April 2015. See also Migai Akech, *Administrative Law* (Strathmore University Press 2016) 22-23.
[53] ibid.
[54] ibid.
[55] ibid.
[56] ibid. Ginsburg discusses other important differences between the two subjects (hierarchy, localism, endurance and symbolism) which are not relevant to this study.

The rationale for approaching the study from a predominantly administrative law perspective (as opposed to a constitutional law perspective) is two-fold. First, public procurement is an important aspect of public administration.[57] Secondly, and more importantly, the traditional administrative law concerns of transparency, integrity, rationality, effectiveness, fairness, participation and accountability[58]—which go to the rule of law[59]—have significantly influenced the evolution of public procurement regulation at both domestic and international levels.[60] Indeed, these administrative law concerns are fundamental features of Kenya's public procurement law.[61] Kenyan courts have also recognized these administrative law concerns as the core objectives of public procurement regulation in the country.[62]

Those parts of the study that deal with the problem of discretion and abuse of the use of procurement as a policy tool proceed from the *red-light* theory of administrative law. The rationale for this is that Kenya operates a decentralised procurement system in which procuring entities enjoy broad discretion to determine their own procurement

---

[57] Alexandru V Roman, 'Public Procurement Specialists: They are Not Who We Thought They Were' (2015) 15 (1) Journal of Public Procurement 38. For fuller insights on interlinks between public procurement and public administration, see Basheka (n 30). To the extent public procurement is an important aspect of public administration, it is subject to the constitutional requirement of fair administrative action. Article 47 of the Constitution of Kenya, 2010 states that '*every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair...*'

[58] See Harlow (n 43) 193.

[59] ibid.

[60] McCrudden and Gross (n 19) 161.

[61] Article 227 (1) of the Constitution of Kenya, 2010 and s 3 of the Public Procurement and Asset Disposal Act, 2015. Ironically, public procurement procedures in Kenya have often been associated with various forms of malfeasance, fundamentally at odds with these constitutional and administrative law requirements.

[62] *Republic v Public Procurement Administrative Review Board & Another ex-parte Selex Sistemi Integrati* [2008] KLR 728. See also *Republic v Public Procurement Administrative Review Board & 3 Others ex-parte Olive Telecommunication PVT Ltd,* High Court (Nairobi Miscellaneous Civil Application No. 106 of 2014, discussed in Chapter 4 of this study.

needs and procedures within a highly permissive legal framework.[63] Moreover, the Kenyan procurement system is highly susceptible to abuse, patronage, conflicts of interest, corruption and other forms of malfeasance, which form the main concerns of administrative law.[64] To address these issues, Article 227 (1) of the constitution requires public agencies to procure goods and services '*in accordance with a system that is fair, equitable, transparent, competitive and cost-effective*.'[65] Put differently, the constitution requires state organs and public entities to have a sound system of administrative law (in terms of rules, procedures and principles) for the conduct of procurement.

1.6.2 Law and Economics

Generally, the discipline of economics is concerned with the allocation of resources *(which are inherently scarce and finite)* to meet competing human needs and wants (*which tend to be multiple and infinite*).[66] The discipline of law and economics, also known as the economic analysis of law, uses the tools of microeconomic theory to analyse the efficiency and effectiveness of legal rules and institutions.[67]

---

[63] Odhiambo and Kamau (n 3) 10, 14 and 39. See also Mosoti (n 10) 603.

[64] NA Deb 5-6 July 2005 2114-2219 and Migai Akech, 'Development Partners and Governance of Public Procurement in Kenya: Enhancing Democracy in the Administration of Aid' (2005) 37 (4) New York University Journal of International Law and Economics 829, 847-853. Although Migai's focus is the 2001 regulations and the legal regime obtaining prior to those regulations, the issues discussed in the Article largely remain unaddressed. Indeed, five Kenyan Cabinet Secretaries were forced to leave office in 2015 because of allegations of corruption, most of which revolved around public procurement.

[65] Again, Article 227 of the Constitution of Kenya, 2010 only confirms that the issues discussed by Migai Akech (n 64) largely remain unaddressed.

[66] Azuike Ikena, 'Economic Analysis of Law-A Feminist Critique' (2001) 8 UCL Jurisprudence Review 139, Ali Moazed, '*Posner in Pursuit of Wealth: Taking Rights Seriously*' (1997) 4 UCL Jurisprudence Review 1.

[67] ibid.

The economic analysis of law proceeds on the assumption that decision-makers are rational, act in self-interest and interpersonal utility comparisons and tastes are irrelevant when individuals interact with economic forces.[68] The mainstream model of the subject centres on wealth maximisation and the promotion of economic efficiency.[69] There are two main propositions under this model. The first is that *legal rules are efficient* or, alternatively, ought to promote economic efficiency.[70] The second is that because of humanity's rational character, *individuals tend to respond to legal rules economically*.[71]

The logical consequence under the above assumptions is that individual choices largely reflect a rational assessment—in economic terms—of the costs, benefits, incentives and risks involved in the choice. The typical exponent of law and economics, therefore, would see the main objective of a legal system, in our case the law on public procurement regulation, as the promotion of the efficient allocation of resources and the avoidance of wastage.[72] Critics, however, have questioned the

---

[68] Azuike (n 66) 145.

[69] ibid. This model is commonly known as the "*neo-classical*" model. Neo-classical economics is generally regarded as the mainstream or orthodox economics.

[70] There are two main approaches to the assessment of the economic efficiency of a legal rule or transaction, i.e. *pareto superiority* and *pareto optimality*. Pareto superiority refers to situations where both parties to a transaction are made better off and no third party is injured (i.e. made worse off, in economic terms). Pareto optimality, on the other hand, refers to situations where no further transactions or exchanges can be made without injuring others or making them worse off than before. See Azuike (n 66) 148.

[71] Kornhauser Lewis, 'The Economic Analysis of Law' (Stanford Encyclopaedia of Philosophy, 26 November 2001) <*http://plato.stanford.edu/entries/legal-econanalysis/*>accessed 11 January 2016.

[72] Ironically, this is somewhat irreconcilable with the underlying assumptions in law and economics that individuals act in self-interest and that laws tend to promote economic efficiency. In the real world, selfish individual pursuits often lead to inefficiency, impelling governments to respond by way of regulation (including public procurement regulation).

philosophical and ideological underpinnings of the discipline of law and economics.[73] The main shortcoming of the discipline, critics argue, is its over-emphasis of economic analysis and disregard for important non-economic considerations and values that often influence human behaviour:

> The notion of economic efficiency has been elevated to an unprecedented status in our times. It has become a dogma of modern society, often eclipsing pre-existing fundamental values and even overriding the moral conscience of mankind. In this era of economics, theorists have extended the scope of economic analysis beyond the traditional realm of market transactions between individuals and organisations and contend that the governing conceptual apparatus and principles of economics are general in nature and are capable of governing all aspects of human behaviour.[74]

Critics further argue that the discipline of law and economics, especially the model propounded by Posner and the Chicago School,[75] is too brutish to the extent that its focus on efficiency and wealth maximisation tends to blind any concern for inherent human rights and values.[76] In particular, critics argue that by accepting rights only to the extent that they promote economic efficiency, the exponents of law and economics fail to recognize the notion of inherent human value, which comes prior to the market:[77]

---

[73] See Azuike (n 66) 139.

[74] Moazed (n 66) 1. See also Dani Rodrick, Economics Rules: *Why Economics Works, When it Fails, and How to Tell the Difference* (OUP 2015) 17. On limitations of various theoretical approaches to corruption, see Sope Williams-Elegbe, 'A Perspective on Corruption and Public Procurement in Africa,' in Geo Quinot and Sue Arrowsmith (eds), *Public Procurement Regulation in Africa* (Cambridge University Press 2013) 336, 339-341.

[75] Richard Posner, *The Economics of Justice* (Harvard University Press 1981), Economic *Analysis of Law* (6th edn, Aspen 2003).

[76] Moazed (n 66) 8-9.

[77] ibid. See also Alfred C Aman Jnr, 'An Administrative Law Perspective on Government Social Service Contracts: Outsourcing Prison Health Care in New York City (2007) 14 (2) Indiana Journal of Global Legal Studies 301, 305.

> To many, economics and the economic analysis of law are just the mechanics of a utilitarian state, concerned with maximising wealth whilst disregarding such moral issues as distributive justice and moral entitlements to property. Posner himself, perhaps the most prominent legal economist, concedes that 'there is more to justice than economics' but provides no clues as to what more there may be.[78]

Article 227 of the constitution envisions a procurement system that is *competitive and cost-effective.* These requirements (of competition and cost-effectiveness) extol economic considerations in the award of public procurement contracts. Article 227 of the constitution, however, also espouses non-economic considerations in the award of public procurement contracts, including fairness, equity and the use of public procurement as a policy tool, the protection and advancement of persons or groups previously disadvantaged by unfair competition or discrimination and the suppression of unfair employment practices. This study examines the interplay between the economic and social objectives espoused by Kenyan public procurement laws, with a view to finding what balance, if any, ought to be struck between them.

Those parts of the study that deal with the issue of conflict between the economic and social objectives underlying Kenya's public procurement laws proceed from a law and economics perspective. The rationale for this lies in the intractable issue of the tension between economic and non-economic objectives in public procurement regulation, which pervades the existing academic literature. The other rationale for approaching the study from a law and economics perspective is that most legal scholars agree that

---

[78] Adam Ohringer, '*Freeing Posner from His Capitalist Chains*' (1999) 6 UCL Jurisprudence Review 241. The crux of the Article, though, is that economic analysis has a moral content that is acceptable to the secular reader irrespective of political belief. For similar and other criticisms of the economic analysis of law, see Michael Freeman, *Lloyd's Introduction to Jurisprudence* (8th edn, Sweet & Maxwell 2008) 625-627.

public procurement is an important economic activity (especially because public procurement constitutes a significant portion of the Gross Domestic Product (GDP) of many countries). Many scholars, especially those of a law and economics bend, espouse the view that public agencies, just like the typical private purchaser, should only consider economic considerations when making purchases from the market. Government choices, however, often turn on both economic and social considerations.[79] In any one given context, for instance, the social (or even political) exigencies of the day may impel governments to procure goods or services in a particular manner or from a particular source irrespective of the economic logic of the transaction in question.[80]

1.7 Justification

There is little academic commentary on the legal and regulatory framework for the use of public procurement as a policy tool in Kenya. There is a dearth of academic literature on the interplay between the economic and social objectives imbedded in Kenyan public procurement laws. This study, therefore, makes a useful contribution to the existing literature and knowledge.

1.8 Literature Review

The existing literature on public procurement regulation may be thematically categorised based on the main concerns addressed by various commentators. Generally, the current literature revolves around three major concerns, namely: (i) the design, principles and objects of public procurement regulation, (ii) the interplay

[79] Trepte (n 3) 69.
[80] ibid.

between public procurement and (iii) international trade and the use of public procurement as a policy tool.

The ensuing literature review is organised thematically in three sections. Section 1.8.1 sets out a *brief analysis* of the literature on the design, principles and objects of public procurement regulation.[81] Section 1.8.2 sets out a *brief analysis* of the literature on the interplay between public procurement international trade, which has greatly preoccupied global and academic debates in recent years.[82] Section 1.8.3 gives a detailed analysis of academic literature on the use of public procurement as a policy tool and the interplay between economic and social objectives, which is of direct relevance and the focus of this study.

1.8.1 Design, Principles and Objects of Public Procurement Regulation

Many scholars support the idea that there are certain immutable goals, principles and objectives that either inform or ought to inform the design of a sound system of public procurement regulation.[83] This idea is to be found in the works of (*inter alia*)

[81] Though relevant, the design principles and objects of public procurement regulation is not the focus of this study. Accordingly, we have only set out an overview of the relevant literature.
[82] Though relevant, the interplay between public procurement regulation and the liberalisation of international trade is not the focus of this study. Accordingly, we have only set out an overview of the relevant literature.
[83] Trepte (n 3) 3.

Arrowsmith, Linarelli and Wallace,[84] Allen,[85] Erridge and McElroy[86] and Schooner.[87] The goals, principles and objects oft-cited by commentators in this regard include: competition, integrity, fairness, transparency, accountability, efficiency, end-user satisfaction, value for money, wealth distribution, risk avoidance, and uniformity.[88] Peter Trepte's *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation*[89] is easily the most comprehensive and insightful study on the design, principles and objects of public procurement regulation.[90] Trepte's central argument is that it is important to identify, in a contextual rather than a universal or *'one size fits all'* approach, the core underlying objectives before designing (or analysing) any system of public procurement regulation.[91] Trepte propounds three *abstract models* of public procurement regulation (*economic, social and international*),[92] and points out that most procurement systems tend to combine, in varying degrees, elements of the three.[93]

---

[84] Arrowsmith, Linarelli and Wallace (n 3) 12.

[85] Rand L. Allen, '*Integrity: Maintaining a Level Playing Field*' (2002) 2 Public Procurement Law Review 111.

[86] Andrew Erridge and John Mcllroy, 'Public Procurement and Supply Management Strategies' (2002) 17 (1) Public Policy and Administration 52, Andrew Erridge, 'UK Public Procurement Policy and the Delivery of Public Value' in Khi V Thai and others (eds), *Challenges in Public Procurement: An International Perspective* (PrAcademics Press 2005) 335, 336.

[87] Steven L. Schooner, 'Desiderata: Objectives for a System of Government Contract Law' (2002) 2 Public Procurement Law Review 103, Steven L. Schooner, Daniel I. Gordon and Jessica L. Clark, 'Public Procurement Systems: Unpacking Stakeholder Aspirations and Expectations' (2008) GWU Law School Public Law Research Paper No. 1133234.

[88] Trepte (n 3) 3.

[89] ibid.

[90] ibid.

[91] ibid 40, 48 and 58. Aaditya Mattoo explains the shortcomings of a 'one size fits all' approach in the following terms: 'in a world where imperfectly informed procurers purchase from imperfectly competitive firms on behalf of imperfectly informed tax-payers, it is not easy to devise rules which would be optimal in all situations.' For further insights, see Aaditya Mattoo, 'The Government Procurement Agreement: Implications of Economic Theory' (1996) WTO Staff Working Paper No. TISD-96-03<*http://www.econstor.eu/bitstream/10419/90696/2/773883878.pdf*>accessed 10 June 2015.

[92] Trepte (n 3) chs 2, 3 and 4.

[93] ibid 8, 59 and 386.

Although Trepte strongly argues against a *'one size fits all'* approach to public procurement regulation,[94] his (and many other authors') inclination towards the economic model is not only easily discernible but also firmly established in the available literature:

> I am convinced that procurement law and regulation cannot be dissociated from the economics of procurement. To do so is to lose the basis for a fundamental understanding of the nature and purpose of such regulation…It should be stated at the outset that the focus of this book is on the regulation of procurement in the context of a market economy…[95]

On the tension between economic and social objectives, Trepte posits that 'a procurement system explicitly based on the principle of economic efficiency (which many are) and which at the same time… [permits the use of procurement as a policy tool] is inherently contradictory.' [96] His study did not, however, aim or attempt to resolve this contradiction.

The literature on the design, principles and objects of public procurement regulation tends to have many shared drawbacks. First, it is often too abstract or idealistic in approach.[97] Secondly, this cluster of the extant literature tends to overemphasise the role of economics and the ideals of free markets in public procurement regulation. Put differently, the existing literature often fails to appreciate or address issues that go beyond markets and the structural aspects of public procurement regulation

---

[94] ibid 4, 7, 41, 48, 58 and 385. This argument has an easy logical and pragmatic appeal and is supported by the diversity of public procurement regulatory systems across the world.

[95] ibid viii, 5 and 28, Arrowsmith, Linarelli and Wallace (n 3) 12, Ssenoga (n 16) and Bolton (n 4).

[96] Trepte (n 3) 60. Interpolation added.

[97] Trepte makes a noteworthy disclaimer in this regard: "it is not suggested that any of these [abstract] models exists in isolation in the real world…" See Trepte (n 3) 8.

(discussed under subheadings 1.8.2 and 1.8.3 below).[98] Thirdly, the goals, principles and objects extolled by many commentators as fundamental to a sound system of public procurement regulation often conflict.[99] This makes it difficult, *in the real world*, to observe fidelity to all those goals, principles and objects.[100] Moreover, there is no authoritative list of universally accepted goals, principles, objects or characteristics of a sound system of public procurement regulation. Public procurement regulation systems invariably operate in diverse social, political and/or economic contexts.[101]

1.8.2 Interplay between Public Procurement and International Trade

The interplay between public procurement and the liberalisation of international trade has been an intractable issue for many decades.[102] On one extreme, which appears to reflect the dominant view, commentators argue that preferential procurement or the use of public procurement as a policy tool constitutes a non-tariff barrier to international trade.[103] Those commentators who espouse this view often support the

---

[98] For a critique of market fundamentalism (that is the idea that markets of and in themselves solve all societal problems) see Joseph Stiglitz, '*The Future of Global Governance*' in Joseph Stiglitz and Narcís Serra (eds) *The Washington Consensus Reconsidered: Towards a New Global Governance* (OUP 2008) 309-323. For a compelling discussion on the strengths and shortcomings of the discipline of economics in general, see Dani Rodrick, *Economics Rules: Why Economics Works, When it Fails, and How to Tell the Difference* (OUP 2015).

[99] Khi V Thai, 'International Public Procurement: Concepts and Practices' in Khi V. Thai (Ed) International Handbook of Public Procurement (CRC Press 2009) 2-3, Louise Knight and others (eds) *Public Procurement: International Cases and Commentary* (Routledge 2007) 20, Schapper, Malta and Gilbert (n 38), 1 and 5, Erridge and Mcllroy (n 86) and Muthomi Thiankolu, 'Reconciling Incongruous Policy Objectives and Benchmarking Kenya's Public Procurement Law: A Review of the Selex Case' (2011) 11 (4) Journal of Public Procurement 451, 458-467.

[100] ibid.

[101] Trepte (n 3) 7.

[102] The controversy is as old as the negotiations for the abortive Charter for an International Trade Organisation (hereinafter, "the ITO Charter") and the General Agreement on Tariffs and Trade ("the GATT") between 1946 and 1948. See Lester and Mercurio (n 1) 665.

[103] Ssenoga (n 16), Mosoti (n 10), Federico Trionfetti, 'Discriminatory Public Procurement and International Trade' (2000) 23 (1) World Economy 57, Preston R McAfee and John McMillan, 'Government Procurement and International Trade' (1989) 26 Journal of International Economics 291 and Christopher Yukins and Steven Schooner, 'Incrementalism: Eroding the

subjecting public procurement to international trade rules, especially those under the framework of the World Trade Organisation (hereinafter, "the WTO").[104]

The idea that preferential procurement (or the use procurement as a policy tool in general) is presumptively distortive of international trade, however, is highly contested. Different studies, employing different theoretical models, have yielded mixed results.[105] According to one such study, preferential procurement has no trade effects—especially where government demand is a small or insignificant part of the total domestic demand, and foreign goods are perfect substitutes for domestic goods.[106] Sometimes, even staunch supporters of free trade and the liberalisation of procurement have been ambivalent on whether preferential procurement (or use of procurement as a policy tool generally) is presumptively distortive of international trade.[107]

The literature on the interplay between procurement and international trade, especially by commentators who support the mainstream view, tends to overemphasize the global welfare benefits of free trade and the intellectual merit of

---

Impediments to a Global Public Procurement Market' (2007) 38 Georgetown Journal of International Law 529. See also Allan V Deardorff and Robert M Stern, 'Measurement of Non-Tariff Barriers' (1997) OECD Working Paper No. 179<*http://www.oecd-ilibrary.org/docserver/download/5lgsjhvj865f.pdf?expires=1433842363&id=id&accname=guest&checksum=BE1EFE1FB1EE32761C447F6B0DDF1575*> accessed 9 June 2015.

[104] Efforts to establish a multilateral agreement on public procurement within the WTO have been unfruitful. Many countries that the non-discrimination and market access commitments that underlie most WTO agreements would undermine the discretion to use procurement as a tool of domestic policy. The current WTO agreement (and its predecessors) on public procurement is plurilateral (i.e. optional to willing WTO members).

[105] Trionfetti (n 103) 65-70. See also Mattoo (n 91) 6 and the studies discussed therein.

[106] ibid.

[107] Ssenoga, for instance, has notably remarked that 'discriminatory procurement does not necessarily constitute a barrier to trade, nor does it necessarily affect international specialisation.' See Ssenoga (n 16) 222.

the underlying economic theory.[108] Put differently, exponents of the liberalisation of procurement markets tend to downplay or disregard the practical (and political?) issue of whether countries equally benefit from free trade.[109] The exponents of free trade also tend to downplay the social and political dynamics of public procurement at the national level,[110] which may constrain governments to include non-trade or non-economic objectives in the design of public procurement regulation systems.[111] Further, many exponents of free trade tend to accept, without interrogation, the contestable premise that the use of public procurement as an instrument of policy is presumptively illegitimate.[112] Indeed, some commentators have suggested that the liberalisation of international trade, just as the promotion of social policy, is a 'secondary' goal of public procurement regulation:

> these [trade liberalisation] instruments can all be viewed as endorsing the use of procurement for horizontal policy purposes in that free trade, global market integration or open competition may in itself be viewed as a horizontal policy, that is a policy objective external to the [functional] purpose of the procurement of goods, services or construction in a given instance.[113]

---

[108] The main (economic) theory underlying free trade is the theory of comparative advantage, propounded by David Ricardo. The major premise of the theory is that overall global welfare would increase if countries concentrated on producing the goods and services in which they have a comparative advantage and imported other goods from the countries that have a comparative advantage in the production of those goods. For further insights, see Lester and Mercurio (n 1) 46-55. On free trade theories generally, see Paul R Krugman, 'Is Free Trade Passé?' (1987) 1 (2) Journal of Economic Perspectives 131.

[109] On theoretical weaknesses of the case for liberalisation of procurement markets, see Mattoo (n 91).

[110] For an insightful discourse on this, see McCrudden and Gross (n 19) 151.

[111] ibid.

[112] Ssenoga (n 16).

[113] Geo Quinot, 'Promotion of Social Policy through Public Procurement in Africa,' in Geo Quinot and Sue Arrowsmith (eds), *Public Procurement Regulation in Africa* (Cambridge University Press 2013) 370, 372.

The presumed primacy of trade liberalisation as a goal of public procurement regulation (and the attendant presumed illegitimacy of the use of public procurement as an instrument of social policy) embodied in the extant literature, therefore, is difficult to maintain. Public procurement is a powerful tool for advancing many undeniably legitimate purposes.[114] Whereas arguments like '*integration of developing countries in the global economy is a powerful force for economic growth and poverty reduction*'[115] have an easy theoretical appeal, the opening procurement markets is not the sole means through which developing countries can integrate into the global economy. In any event, previous efforts by developing countries to liberalise their markets and integrate into the global economy through multilateral trade agreements (especially under the framework of the WTO) have not yielded much economic growth (or, more importantly, economic development).[116]

1.8.3 Interplay between Economic and Social Objectives

The use of public procurement as a policy tool is prevalent in both developed and developing countries.[117] There are many publications (mainly from an economics or trade perspective) on the merits of such use of public procurement. Commentators

---

[114] Such purposes include promotion of human rights, minimizing wealth and developmental disparities among peoples and regions (hence fostering political stability). For a discourse on how the unrestrained pursuit of free markets (and democracy) can yield unintended and undesirable consequences, see Amy Chua, *World on Fire: How Exporting Free Market Democracy Breeds Ethnic Hatred and Global Instability* (Anchor Books 2004).

[115] Ssenoga (n 16) 222.

[116] Ssenoga, a proponent of free trade, makes notable concessions in this regard. According to him, 'free trade between countries with very different endowments and capabilities, presumably with large asymmetrical commercial power, is illusory... simply expanding the realms of free trade has, in many cases, resulted in an actual increase in poverty and environmental degradation and has had an adverse impact on women and food security across the developing world.' See Ssenoga (n 16) 232.

[117] Arrowsmith, Linarelli and Wallace (n 3) 238.

tend to take strong economics or trade-oriented positions, resulting in a dearth of commentary on the appropriate balance between economic and social objectives that underlie most domestic procurement systems.

On one extreme, the available literature extols free markets and economic considerations as the decisive criteria for designing a system of public procurement regulation and the award of public procurement contracts.[118] To do otherwise, according to this school of thought, would inevitably lead to inefficiency and misallocation of resources.[119] On the other extreme, some scholars argue that free markets and economic considerations need not necessarily be the sole or decisive considerations in the design of public procurement systems or the award of public procurement contracts.[120] According to this school of thought, the use of public procurement as a policy tool is just as legitimate as the commitment to economics and free markets.[121]

The arguments for and against the use of procurement as a policy tool are often ideological, coinciding with commentators' inclination to the three *models* of public procurement regulation.[122] The arguments *for* the use of procurement as a policy tool

---

[118] See, e.g. Ssenoga (n 16).
[119] ibid.
[120] McCrudden, *Buying Social Justice* (n 3), Erridge (n 86) and Erridge and Mcllroy (n 86).
[121] ibid. See also Bolton (n 4) and Phoebe Bolton, 'An Analysis of the Preferential Procurement Legislation in South Africa' (2007) 1 Public Procurement Law Review 36.
[122] For an exposition of the arguments in favour of and against the use of public procurement as a tool of social policy, see McCrudden, *Buying Social Justice* (n 3) 114-128. See also Erridge (n 86) 337-341.

include:[123] the inadequacy of alternative methods for promoting social policy,[124] the need to '*mainstream*' social policy issues across all spheres of government,[125] the inherently flawed nature of the market (especially the need to internalize externalities[126] and supply public goods[127]) and the need to include all segments of the society in procurement markets.[128] The arguments *against* the use of procurement as a policy tool, on the other hand, include:[129] the irrelevance of social policy to the procurement function,[130] extra or hidden costs,[131] the unfairness or discriminatory nature of social procurement,[132] the perceived greater effectiveness of alternative

---

[123] On the arguments in favour of and against the use of public procurement as a tool of social policy, see McCrudden, *Buying Social Justice* (n 3) 114-128. See also Bolton (n 4) 195 and Erridge (n 86) 337-341.

[124] For a contrary view, see Sue Arrowsmith, 'The EC Procurement Directives, National Procurement Policies and Better Governance: The Case for a New Approach' (2002) 27 (1) European Law Review 3, 13.

[125] McCrudden, *Buying Social Justice* (n 3) 114-128.

[126] ibid. See also Trepte (n 3) 9-10. In economics parlance, the term '*externality*' refers to a situation where a person's production or consumption decision affects another person's production or consumption decision without that effect being reflected in the market price. Externalities may confer either a benefit (positive externality) or a detriment (negative externality) to the latter person. The commonest given example of an externality is pollution from a factory affecting a neighbouring village where the cost of the pollution is not reflected in the price of the good(s) sold by the factory. The economic and regulatory significance of externalities is their zero effect on the market price, since the person benefiting does not pay for the benefit and the person damaged does not get compensation through a lower price. Accordingly, many commentators see externalities as one of the causes of market failure and a justification for regulatory intervention. In the context of this study, externalities would provide a plausible theoretical foundation for the provisions of Article 227 (2) of the Constitution of Kenya, 2010.

[127] McCrudden, *Buying Social Justice* (n 3) 114-128. In economics parlance, the term, '*public goods*' refers to those goods which even if consumed by one person can still be consumed by other people, such as clean air. Because of the nature of public goods, a private individual (or the market) has no incentive to invest in their production, because any such production would not be profitable.

[128] ibid.

[129] Ibid.

[130] Miller (n 6) 29-30 and Trepte (n 3) 171.

[131] ibid.

[132] ibid.

methods for promoting social policies,[133] risk of regulatory capture by vested interests, [134] and governance problems.[135]

Christopher McCrudden, easily the leading scholar on the use of public procurement as a policy tool, has published many influential works in this regard.[136] His works extensively discuss the historical development and use of public procurement as a policy tool in (*inter alia*) the US, the EU, Canada, Australia, Malaysia and South Africa. One of the main premises of these works is that the use of public procurement as a policy tool is just as legitimate as the commitment to economics and free markets:

> There should be no presumption that the use of public procurement for social policy purpose is presumptively illegitimate.[137]

McCrudden also examined the tension between economic and social policy objectives in public procurement regulation. His main conclusions in this regard were that procurement regulation '*is now frequently seen as attempting to lessen the political [read social] and to increase the economic*'[138] and that it is possible, albeit difficult, to reconcile

---

[133] Sue Arrowsmith, 'The EC Procurement Directives, National Procurement Policies and Better Governance: The Case for a New Approach' (2002) 27 (1) European Law Review 3, 13. On the more direct methods of promoting social policies, see McCrudden, *Buying Social Justice* (n 3) 1.
[134] McCrudden, *Buying Social Justice* (n 3) 114-128.
[135] ibid.
[136] Ibid. Christopher McCrudden, 'International Economic Law and the Pursuit of Human Rights: A Framework for Discussion of the Legality of 'Selective Purchasing' Laws under the WTO Government Procurement Agreement' (n 11), McCrudden and Gross (n 19), Christopher McCrudden, 'Using Public Procurement to Achieve Social Outcomes' (2004) 28 (4) Natural Resources Forum 257 and Christopher McCrudden, 'Corporate Social Responsibility and Public Procurement' (2010) Oxford Legal Studies Research Paper No. 9/2006,< *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=899686*>accessed 5 May 2015. McCrudden invariably uses the term "*linkage*" to describe the use of procurement as a tool of social policy.
[137] McCrudden (n 11) 6. See also Schapper, Malta and Gilbert (n 38) 11. See also Trepte (n 3) 169.
[138] McCrudden, *Buying Social Justice* (n 3) 576.

economic and social policy objectives in public procurement regulation.[139] While the latter conclusion is relevant to this study, it is of limited practical utility. The latter conclusion is somewhat abstract to the extent that it is not an empirical assessment of any of the multiple procurement systems discussed in McCrudden's works.

The current literature on the use of public procurement as a policy tool, including McCrudden's seminal works, relates mainly to developed and middle-income countries:

> The United States & Canada has (*sic*) been the primary source of public procurement research, accounting for seventy-two [articles] (42%) of the total number of Articles. Europe has been the second most important region. It accounts for forty-three Articles (25%). Africa comes third (8%), followed by Asia & Oceania (6%) and all other regions (4%).[140]

The available literature, therefore, offers little insight into the use of procurement as a policy tool in poor or developing countries like Kenya, which is the focus of this study. Moreover, the current literature consists mainly of either abstract or technical analyses of the relevant policy and regulatory frameworks. It says little about the actual impact, experiences or effectiveness of the use of public procurement as a policy tool. This study, therefore, employed qualitative research methods as a means for establishing the insights and experiences of persons who had used, studied or otherwise closely interacted with the Kenyan public procurement system. Lastly, although the available literature says much about the commercial and egalitarian merits of social

---

[139] ibid 576-578. McCrudden discusses ten '*general*' principles shared by exponents of economic and social approaches to public procurement regulation. The principles resemble the objectives discussed in Steven Schooner (n 87).

[140] Flynn and Davis (n 31) 162. North American and European scholars, therefore, contributed 67% of all the Articles published in the Journal of Public Procurement between 2001 and 2013.

procurement, it says little on abuse or the risk (often a reality) of its capture by special interests, who may not necessarily be the intended beneficiaries. In Kenya, for instance, critics pejoratively referred to a social procurement programme targeting the youth as '*Kazi Kwa Vijana, Pesa Kwa Wazee.*'[141]

1.9 Methodology

The question of appropriate methodology for public procurement research and scholarship is unsettled, due mainly to: (i) the porous disciplinary boundaries of the subject, (ii) the unresolved debate of whether public procurement is an art or a science or both and (iii) the related issue of whether procurement research should employ qualitative, quantitative or mixed methods.[142]

The methodology for this study included: (i) qualitative research, (ii) desk-based review of primary and secondary sources, (iii) case studies of two public procurement projects and (iv) comparative studies of the public procurement regulatory frameworks of the United States and South Africa. The rationale for adopting each of these aspects of the methodology is set out in sections 1.9.1, 1.9.2 and 1.9.3 below.

1.9.1 Qualitative Research

The nature and objectives of the study commended qualitative research as part of the methodology.[143] Specifically, the nature and objectives of the study commended an

---

[141] Translated: 'The Work is for the Youth; the Money is for the Old.' See NA Deb 3 March 2010, 24, 44.
[142] Basheka (n 30) 319-323.
[143] For insights on qualitative researching, see generally Jennifer Mason, *Qualitative Researching* (2nd edn, SAGE 2002).

approach to data collection that focused more on depth, nuance, actual human experience, context and detail as opposed to merely quantitative, generalised or statistical information.[144] The qualitative research relied on semi-structured questionnaires and interview schedules, templates of which are set out in Appendices 7, 8, 9 and 10 to this dissertation.[145] The research tools (that is, Appendices 7, 8, 9 and 10 to this dissertation) were first piloted with a few respondents before deployment. The piloting helped in improving the usefulness of the research tools.

The field research revolved around the two issues that form the focus of this study, namely: (i) interplay of the economic and social objectives embodied in Kenyan public procurement laws and (ii) the link between the discretion that Kenyan public procurement laws confer on government bureaucrats and the incidence of corruption, favouritism and other forms of malfeasance. The participants were key informants selected on the basis of their knowledge of, and actual experience with, the regulatory framework for public procurement in Kenya.[146] The rationale for relying on key informants (as opposed to random sampling) lay in the complex nature of the subject of public procurement and, specifically, the unlikelihood of collecting useful data from randomly picked members of the general public.

---

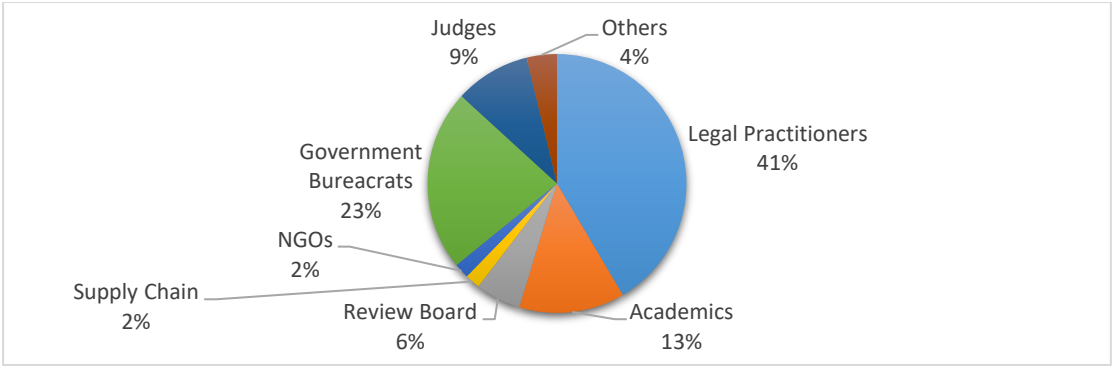
[144] Ibid 2.

[145] Semi-structured interviews rely on both open-ended questions and questions with predetermined responses. For further insights, see Olive Mugenda and Abel Mugenda, *Research Methods: Qualitative & Quantitative Approaches* (Acts Press 2003) 86.

[146] This non-statistical research method, in which a researcher chooses subjects based on the information they possess with respect to the objectives of the study, is called purposive sampling. For further insights, see Mugenda and Mugenda (n 144) 50.

The field research involved one hundred key informants. Fifty participants, forty-two males and eight females, filled and returned questionnaires, representing a response rate of 50%. Fourteen of the fifty participants gave an oral interview in addition to completing the questionnaires. Professionally, the participants included: 22 legal practitioners, 7 law scholars, 3 members of the Review Board, 12 civil servants and 3 judges. Fourteen participants, i.e. is 28% of all the participants, were directly involved in the procurement of ballot papers for the 2017 general election and the ensuing litigation.[147] Seven participants, i.e. is 14% of all the participants, were directly involved in the procurement of laptops for primary schools and the ensuing litigation.[148] Figure 1 below sets out a graphical representation of the professional distribution of the participants.

Figure 1. Professional Distribution of Participants



[147] The procurement of ballot papers for the 2017 general election was selected as a case study for testing the hypotheses of this study. The results of the case study are set out in chapter 4 below.

[148] The procurement of laptops for primary schools was also selected as a case study for testing the hypotheses of this study. The results of the case study are set out in chapter 4 below.

The data collected through the questionnaires and the interviews were summarized into pie charts and frequency distribution tables, which are set out and analysed in the ensuing chapters of this study.

1.9.2 Desk Review of Primary and Secondary Sources

Besides qualitative research, this study entailed a comprehensive desk-based review of both primary and secondary sources, relying significantly on materials available at the University of Nairobi Library. The primary sources reviewed for this study included statutory laws, subsidiary legislation and government policy documents. The secondary sources consisted mainly of scholarly literature set out in books, academic and professional journals, working papers, academic theses and web-based publications.

1.9.3 Comparative and Case Studies

This study also entailed a comparative analysis of the interplay of economic and social objectives, the problem of discretion and the incidence of corruption, favouritism and other forms of malfeasance in the United States and South African public procurement systems.[149] The rationale for the comparative analysis and benchmarking lay mainly in the fact that the United States and South Africa, just like Kenya, practise social procurement within the context of a predominantly market-oriented economy. Lastly, this study included case studies of two public procurement projects,[150] selected on the basis of: (i) the huge public expenditures involved in each of the projects, (ii) the

[149] See Chapter 5 below.
[150] See Chapter 4 below.

strategic opportunities the projects offered for integrating social objectives into public procurement and (iii) unusually protected litigation and serious governance challenges, revolving around abuse of discretion, corruption, favouritism and other forms of malfeasance, that characterised the projects.

1.9.4 Ethical Requirements

The research for this study complied with the research policy and ethical requirements of the University of Nairobi and the Government of the Republic of Kenya. Participants were informed (*inter alia*) of their rights to voluntarily participate in the study, informed consent, refuse to participate in the study, anonymity, confidentiality, and withdrawal from the study. The National Commission for Science, Technology and Innovation authorised the study through Research Permits issued on 13th April 2016 and 26th July 2017.[151]

1.10 Scope and Limitations

Although the relevant Kenyan laws apply to both procurement and the disposal of assets, the scope of this study is confined to the procurement component. The rationale for this is that the problem that forms the focus of the study is, in practice, more acute in the procurement of goods and services than in the disposal of assets.

This study has three interrelated limitations. First, although the study examines the multiple disciplinary and theoretical perspectives that public procurement regulation

[151] In accordance with the provisions of the Science, Technology and Innovation Act, 2013 (Chapter 250 of the Laws of Kenya).

commends itself to, it is essentially legal in character. It is not feasible to undertake a single study that accommodates all the multiple theoretical and disciplinary perspectives that the subject of public procurement commends itself to. Indeed, it is not feasible, even within legal scholarship, to undertake a coherent study on public procurement regulation that accommodates all the relevant theoretical perspectives (e.g. economic analysis, feminist jurisprudence, sociological jurisprudence, critical legal studies etc.).

Different disciplinary and theoretical approaches to public procurement regulation in Kenya, therefore, may commend or prioritise research questions that are very different from those that are covered in this study. Further, although this study broaches the general theme of the use of public procurement as a policy tool in Kenya, its specific focus is on how Kenyan laws facilitate or impede resolution of: (i) conflicts between economic and social objectives and (ii) the problem of discretion and its correlation to the incidence of corruption, favouritism and other forms of malfeasance. Secondly, the scope of this study does not extend to the quantitative assessment of the social or economic impact of using public procurement as a policy tool. Lastly, while the nature and objectives of this study naturally commended qualitative methods of data collection and analysis, the adoption of such methods and resource constraints precluded the collection of quantitative data that might have shed light on the actual impact (social or economic) of using public procurement as a policy tool in Kenya.

1.11 Chapter Outline

This study is organised into six chapters.

Chapter 1 sets out the context, scope and structure of the study. This includes the Background, Statement of the Problem, Hypotheses, Objectives, Research Questions, Justification, Literature Review and Methodology.

Chapter 2 examines, using the conceptual tools of administrative law and economics, issues of: (i) conflictual coexistence of economic and social objectives in a system of public procurement regulation, (ii) the conceptual foundations of the two species of objectives and (iii) the best regulatory approach for resolving conflicts between the two species of objectives. It also examines the problem of discretion and its link to the incidence of corruption, favouritism and other forms of malfeasance in public procurement decision making.

Chapter 3 examines: (i) the evolution of policy and regulatory frameworks for public procurement in Kenya, (ii) interplay of the economic and social objectives embodied in Kenyan public procurement laws and (iii) the problem of discretion and its connection to the incidence of corruption, favouritism and other forms of malfeasance in public procurement decision making in Kenya.

Chapter 4 is a case study of the interplay of economic and social objectives, the problem of discretion and the incidence of corruption, favouritism and other forms of malfeasance in (i) the procurement of ballot papers for the 2017 general election and (ii) the procurement laptops for primary schools. The rationale for selecting the two procurements as case studies lay in: (i) the significant financial resources involved in each of them, (ii) the potential opportunities they offered on the pursuit of social objectives and (iii) governance challenges—relating to abuse of discretion—that arose in the two procurement processes.

Chapter 5 is a comparative study of the use of public procurement as a policy tool in the United States and South Africa. As explained, the rationale for benchmarking against the two countries was the established use of procurement as a policy tool and the coexistence of social procurement with a strong market economy in both countries, which made them apt choices for comparison with Kenya.

Chapter 6 sets out the conclusion and recommendations.

CHAPTER 2: LAW, ECONOMICS AND THE RESOLUTION OF CONFLICTING ECONOMIC AND SOCIAL OBJECTIVES IN PUBLIC PROCUREMENT

2.1 Introduction

This chapter examines the interplay between economic and social objectives of public procurement, the conceptual foundations of those objectives and the resolution of the conflict and dilemma that often arise from the coexistence of the two species of objectives in a system of public procurement regulation. It provides conceptual tools for addressing the research questions for this study.

This chapter argues that the mandate of government is characterised by significant interdependence, complementarity and overlap between economic and social policy, and that the pursuit of both economic and social objectives is often necessary and inevitable in any scheme of public procurement regulation. It also argues that administrative law and economics offer useful tools that could be used to resolve conflicts between the two species of objectives whenever they conflict. Lastly, the chapter proposes a rule-based approach to public procurement regulation, characterised by circumscribed discretion and commitment to the values of competition, transparency and accountability. Such a system, the chapter argues, would mitigate the agency and public choice problems inherent in public procurement decisions, correct market and institutional failures and provide a means for the optimal pursuit of both economic and social objectives.

The chapter is organised as follows. Section 2.2 examines the nature of public procurement, the factors that make it a subject of regulatory and academic interest and

why it differs from other forms of regulation. Section 2.3 examines the problem of discretion and its implications for public procurement regulation. Section 2.4 examines the economic and social objectives of public procurement regulation and the challenges that often arise from the concurrent pursuit of both sets of objectives. Section 2.5 makes a case for the use of administrative law and economics to resolve the problems of discretion and conflict between economic and social objectives in public procurement regulation.

2.2 The Nature of Public Procurement

Public procurement generally refers to the process through which public bodies purchase, usually through competitive bidding, the goods and services that they need to carry out their functions and responsibilities.[1] Academic literature variously refers to this process as government procurement,[2] government contracting,[3] public contracting[4] and public purchasing.[5]

---

[1] Simon Lester and Bryan Mercurio, *World Trade Law, Text, Materials and Commentary* (Hart Publishing 2008) 665. See also Arrowsmith S, Linarelli J and Wallace D, *Regulating Public Procurement: National and International Perspectives* (Kluwer Law International 2000) 1. For technical or legal definitions, see *inter alia* Article 2 of the UNCITRAL Model Law on Public Procurement and section 2 of Kenya's Public Procurement and Asset Disposal Act, 2015.

[2] Peter Trepte, Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation (OUP 2004) 27.

[3] Arthur S Miller, 'Government Contracts and Social Control: A Preliminary Inquiry' (1955) 41 (1) Virginia Law Review 27, 33.

[4] Frank Anechiarico and James Jacobs, 'Purging Corruption from Public Contracting' (1995) 40 New York Law School Law Review 143.

[5] Jan Stentoft Arlbjørn, 'Public Procurement vs Private Purchasing' (2012) 25 (3) International Journal of Public Sector Management 203, 208.

There are many significant differences between public and private procurement,[6] usually revolving around the risk of malfeasance and objectives,[7] which account for greater scholarly and regulatory interest in the former.[8] The driving concern of private sector procurement, for instance, is to obtain the relevant goods or services on the best possible economic terms, based mainly on rational cost-benefit analysis. Public procurement, on the other hand, is often driven by broader considerations that go beyond merely obtaining the relevant goods or services on the best possible economic terms.[9] As explained in Chapter 1, these broader objectives may include, *inter alia*, the effect of the transaction on the economy or selected demographic groups.[10] These broader objectives also often conflict, leading to significant challenges and dilemmas for governments, procurement officers, regulators and other stakeholders.[11]

The multiple policy objectives to which public procurement commends itself, the consequent risk of malfeasance and the frequent absence of an incentive to obtain the relevant goods or services on the best possible economic terms often give rise to problems which cannot be resolved without recourse to regulation.[12] Generally, these problems usually revolve around: (i) conflict between the selfish private interests of individual procurement officers and the collective interest of a dispersed citizenry and

---

[6] Clifford McCue, Eric Pier and David Swanson, 'Five Dilemmas in Public Procurement' (2015) 15 (2) Journal of Public Procurement 177, 182 and Pablo T. Spiller, 'An Institutional Theory of Public Contracts: Regulatory Implications' (2008) National Bureau of Economic Research Working Paper No. 14152<*https://www.webssa.net/files/ssrn-id1231682.pdf*> accessed 03 June 2017.

[7] Ibid.

[8] Ibid.

[9] William J. Baumol, 'Notes on the Theory of Government Procurement' (1947) 14 (53) Economica 1.

[10] Ibid. See also Stentoft (n 5) 208.

[11] McCue, Pier and Swanson (n 6) 178-179.

[12] Trepte (n 2) 135-140.

(ii) various forms of market and institutional failures.[13] These problems—which often take the form of corruption, favouritism and other forms of malfeasance—are exacerbated by the inevitability of delegated discretionary powers in any system of public administration, and the typical public procurement officer's temptation to abuse discretion.

There are many conceptual approaches to the regulatory challenges that arise from the nature of public procurement,[14] and public administration in general. The most frequent approaches, based on current public procurement scholarship, have their foundations in the principal-agent theory, the public choice theory and the new public management.[15] The principal-agent theory holds that the relationship between citizens (or their democratically elected representatives) and government bureaucrats is analogous to that of principal and agent respectively.[16] This relationship, the theory further holds, is characterised by informational asymmetry, the inevitable exercise of delegated power and discretion and a natural conflict between the interests of the principal and those of the agent.[17]

---

[13] Ibid.

[14] Anthony Flynn and Paul Davis, 'Theory in Public Procurement Research' (2014) 14 (21) Journal of Public Procurement 139. See also Bennon C Basheka, 'The Science of Public Procurement Management and Administration,' in Albano G, Snider K and Thai K (eds), *Charting a Course in Public Procurement Innovation and Knowledge Sharing* (PrAcademics Press 2013) 289, 290, Keith F Snider and Rene G Rendon, 'Public Procurement Policy: Implications for Theory and Practice' (2008) 8 (3) Journal of Public Procurement 310.

[15] Migai Akech, *Administrative Law* (Strathmore University Press 2016) 89-92. See also Jo Barraket, Robyn Keast and Craig Furneaux, *Social Procurement and New Public Governance* (Routledge 2016).

[16] Trepte (n 2) 70-85. An alternative but substantially similar expression of the theory is that a public servant is the agent of a specific public body (i.e. the principal), and that he/she is employed to promote the public (body's) interest.

[17] Ibid.

A principal-agent approach to public procurement, therefore, espouses a regulatory framework that controls discretion and aligns the private selfish interests of individual procurement officers to the collective interests of a dispersed citizenry,[18] through an appropriate and effective scheme of incentives and sanctions.[19] The basic premise of the agency theory is that a rational agent will disregard the public interest (or subordinate the public interest to his private ends) where the net benefits of engaging in corruption, favouritism and other forms of malfeasance exceed the net costs. The practical implication of the agency theory, therefore, is that the design and implementation of public procurement laws should encourage probity on the part of government bureaucrats, by ensuring that the net costs of engaging in corruption, favouritism and other forms of malfeasance always exceed the net benefits.[20]

The public choice theory, on the other hand, holds that government bureaucrats tend to (ab)use public office to increase their individual private welfare to the detriment of the public in the absence of effective regulatory constraints.[21] New public management, which seeks to combine the conceptual tools of the principal-agent and public choice theories,[22] espouses the centrality of citizens in public decision making and accountability of public officers for their public decisions.[23]

---

[18] Ibid.
[19] Ibid.
[20] Sope Williams-Elegbe, 'A Perspective on Corruption and Public Procurement in Africa,' in Geo Quinot and Sue Arrowsmith (eds), *Public Procurement Regulation in Africa* (Cambridge University Press 2013) 336, 339.
[21] Migai (n 15) 89-92.
[22] Ibid.
[23] Ibid.

2.3 The Problem of Discretion and its Implications for Public Procurement

Generally, the term 'discretion' connotes wise conduct and management, cautious discernment, prudence, individual judgment and the power of free decision making.[24] In legal parlance, discretion refers to the idea of trusting and giving public officers the autonomy, freedom or power to decide what should be done in a particular situation.[25] In the particular context of public procurement regulation, discretion connotes the idea of trusting and giving procurement officers the freedom or power to decide what should be done in various contexts without being unduly fettered by the constraints of laws and regulations.

Discretion, or more particularly the risk of its abuse is a major problem not only in public procurement but also in public administration in general.[26] Generally, discretion tends to increase transaction costs[27] and create incentives for corruption and other unethical conduct.[28] Some studies, however, have made compelling arguments in favour of enhanced discretion in public procurement regulation, on the assumption that the flexibility of bargaining associated with broad discretion leads to more optimal economic outcomes.[29] In particular, these studies argue that enhanced

---

[24] Bryan A Garner (Ed), *Black's Law Dictionary* (9th edn, West Publishing 2009) 534.

[25] Albert S Hornby (Ed), Oxford Advanced Learner's Dictionary: International Student's Edition (8th edn, OUP 2010) 416.

[26] McCue, Pier and Swanson (n 6) 187.

[27] Arrowsmith, Linarelli and Wallace (n 1) 36, 74-77, Sue Arrowsmith, 'Horizontal Policies in Public Procurement: A Taxonomy' (2010) 10 (2) Journal of Public Procurement 149, 167-168.

[28] Susan Rose-Ackerman, 'The Political Economy of Corruption—Causes and Consequences' (1996) World Bank Note 74<*http://siteresources.worldbank.org/EXTFINANCIALSECTOR/Resources/282884-1303327122200/074ackerm.pdf*> accessed 06 June 2017.

[29] See e.g. Steven Kelman, *Procurement and Public Management: The Fear of Discretion and the Quality of Government Performance* (American Enterprise Institute Studies 1990). See also Isaac

discretion on the part of public procurement officers reduces red tape and increases economic and administrative efficiency. These studies, however, tend to suppress the reality of the agency and public choice problems inherent in public procurement and various forms of market and institutional failures that justify the regulation of public procurement in the first place.

A public procurement regulatory system characterised by broad or unchecked discretionary powers would be anomalous in two significant respects. First, it would lack a sound theoretical grounding. As explained in section 2.5 below, economic and administrative law theories, and all public administration theories generally, acknowledge the need to mitigate the risk of abuse of discretion. Second, and more importantly, a public procurement regulatory system characterised by broad or unchecked discretionary powers would be inconsistent with the need to reduce the risk of corruption, favouritism and other forms of malfeasance.

Malfeasance tends to vitiate any economic or operational efficiency gains that might arise from deregulation or enhanced discretion in public procurement. Broad and unchecked discretionary powers often, almost invariably, create incentives for opportunistic behaviour among public procurement officers, due to humanity's rational and selfish nature. This points to an inverse relationship between discretion and the achievement of the objectives of public procurement regulation, both economic and social.

Simiyu Kuloba 'Regulation of Discretion in Public Procurement in Kenya' (LLM Dissertation, University of Nairobi 2011) 8 and See also Steven Kelman, 'Remaking Federal Procurement' (2001) John F. Kennedy School of Government Working Paper No. 3 <*http://www.innovations.harvard.edu/sites/default/files/7131.pdf*>accessed 24 September 2018.

Most public procurement laws, therefore, tend to circumscribe the discretion exercised by procurement officers.[30] The rationale for this lies in the underlying economic and administrative law theories, and in particular the general tendency of public officers to abuse discretion by pursuing their own private selfish interests at the expense of the public interest.[31] Abuse of discretion aggravates the agency and public choice problems inherent in public procurement and various forms of market and institutional failures,[32] which in turn undermines the achievement of both economic and social objectives of public procurement regulation.

Although discretion is amenable to abuse, the incidence of discretion is an inevitable and unavoidable aspect of public administration.[33] A completely prescriptive regulatory approach, in which every minutiae aspect of public decision making is expressly controlled by statute or subsidiary legislation, does not exist and would not work in the real world:

> It used to be thought to be classical constitutional doctrine that wide discretionary power was incompatible with the rule of law. But this dogma cannot be taken seriously today, and indeed it never contained much truth. What the rule of law demands is not that wide discretionary power should be eliminated, but that the law should control its exercise.[34]

---

[30] Trepte (n 2) 71, 102, Arrowsmith, Linarelli and Wallace (n 1) 36, 74-77.
[31] Ibid.
[32] Ibid.
[33] William Wade and Christopher Forsyth, *Administrative Law* (9th edn, OUP 2004) 286. See also Migai (n 15) 15.
[34] Ibid.

The inevitability of discretionary powers in every system of public administration, therefore, means the regulatory solution does not lie in eliminating discretion. Instead, the solution lies in designing and implementing a regulatory framework that effectively pre-empts the problems associated with abuse of discretion—especially corruption, favouritism and other forms of malfeasance or maladministration. As explained in section 2.5 below, the design of such a framework should adopt a contextual rather than an abstract or 'one size fits all' approach, based on the level of pervasiveness or entrenchment of corruption, favouritism and other forms of malfeasance.[35] In other words, the uncritical 'copying and pasting' of model laws, or laws of other countries, is unlikely to yield a regulatory framework that appropriately responds to the unique challenges of any one county's public procurement system.[36]

2.4 The Nature of Public Procurement Regulation

Regulation refers to measures or instruments employed by the state to promote its economic and social policies.[37] A commonly used definition of the term is 'sustained and focused control exercised by a public agency, on the basis of a legislative mandate, over activities that are socially valued.'[38] All regulation—including public procurement regulation—therefore, is a means of social control, entailing mechanisms

---

[35] Trepte (n 2) 48.

[36] Muthomi Thiankolu, 'Reconciling Incongruous Policy Objectives and Benchmarking Kenya's Public Procurement Law: A Review of the Selex Case' (2011) 11 (4) Journal of Public Procurement 451, 472.

[37] Trepte (n 2) 45.

[38] Ibid, quoting from Selznick 'Focusing Organisational Research on Regulation' in Noll (Ed), *Regulatory Policy and the Social Sciences* (University of California Press 1985) 363. See also Eric Windholz and Graeme Hodge, 'Conceptualising Social and Economic Regulation: Implications for Modern Regulators and Regulatory Activity' (2012) 38 (2) Monash University Law Review 212, 217.

by which individuals are persuaded or compelled to conform to prescribed standards or values.[39]

Public procurement regulation differs from other types of regulation in a fundamental way. Although regulation generally entails governmental control of the activities of private actors, public procurement regulation mainly focuses on controlling the activities of government and government officers.[40] This unique feature of public procurement regulation is informed by the inherently flawed nature of the government as a purchaser,[41] and the government's natural inability to benefit from a market economy without some form of control.[42] The government's inability to benefit from a market economy arises from three main factors. First, public procurement is often characterised by a conflict between the private selfish interests of individual procurement officers and the broader interests of society as represented by the government. This conflict of interests replaces the rational cost-benefit analysis inherent in private economic transactions with perverse incentives for corruption and other forms of unethical conduct on the part of procurement officers. This, in turn, tends to undermine the achievement of the objectives of public procurement regulation—whether social, economic or political—if left unresolved. Secondly, the incentives for corruption and other forms of unethical conduct often lead to abuse of any discretionary powers conferred upon public procurement officers. Thirdly, although market economies are based on the theoretical construct of perfect

---

[39] Miller (n 3) 27. On the use of law as a tool of social control, see Roscoe Pound, 'The End or Purpose of Law' in Michael Freeman, *Lloyd's Introduction to Jurisprudence* (9th edn, Sweet & Maxwell 2014) 763-765.
[40] Trepte (n 2) 46.
[41] Ibid.
[42] Ibid.

competition, the real world is characterised by various forms of market and institutional failures.[43]

The risk of corruption and other forms of unethical conduct provides the main justification, from both economic and administrative law points of view, for public procurement regulation.[44] Put differently, the main rationale for public procurement regulation is to correct agency and public choice problems and various forms of market and institutional failures that tend to undermine achievement of the objectives underlying a country's public procurement system.[45] Regulation also provides a structured framework for dealing with the challenges and dilemmas posed by the multiple, often conflicting, policy objectives to which public procurement commends itself.

Regulation, therefore, is the traditional approach to tackling complexities, problems and risks relating to public procurement—especially in situations where the dominant concerns include probity, transparency, accountability, equity or fair dealing.[46] Policymakers also often adopt other approaches, either alone or in combination with regulation, to address those complexities, problems and risks.[47] These other

---

[43] See Trepte (n 2) ch 2 on the theoretical construct of perfect competition and how the inapplicability of the assumptions that underlie the construct in the real world informs the formulation of public procurement regulation.

[44] Ibid.

[45] Ibid.

[46] Paul Schapper, Veiga Malta and Diane Gilbert, 'An Analytical Framework for the Management and Reform of Public Procurement' (2002) 6 (1) Journal of Public Procurement 1, 5-6 and 13. See also McCue, Pier and Swanson (n 6) and Ohad Soudry, 'A Principal Agent Analysis of Accountability in Public Procurement' in Gustavo Piga and Thai Khi V (eds), *Advancing Public Procurement: Practices, Innovation and Knowledge-sharing* (2007 PrAcademics Press) 433.

[47] Ibid.

approaches include managerialism, decentralisation, devolution, *ex-ante* approvals, ethical codes, administrative guidelines and *ex-post* oversight and monitoring.[48]

Public procurement regulation may be prescriptive or directory in nature.[49] A prescriptive approach to public procurement regulation is characterised by circumscribed discretion and stringent formal rules and procedures. It is the main or traditional approach to public procurement. It is considered appropriate in situations of real or presumed likelihood of abuse, malfeasance or undue influence.[50] A directory approach to public procurement regulation, on the other hand, is characterised by informality and flexibility, usually by reliance on administrative guidelines and general principles as opposed to formal binding rules and procedures.

The justifications for using public procurement as a policy tool include: (i) its effectiveness compared to other regulatory tools,[51] (ii) its flexibility in the face of uncertainty as to legality of other regulatory tools,[52] (iii) the need to associate government with the highest possible standards and lawful behaviour,[53] (iv) greater effectiveness of public procurement compared to more direct means of regulation,[54] and (v) creating a level playing field for bidders.[55]

---

[48] Ibid.

[49] On various forms of regulation, see Arrowsmith, Linarelli and Wallace (n 1) 86-87.

[50] Paul Schapper, Veiga Malta and Diane Gilbert, 'An Analytical Framework for the Management and Reform of Public Procurement' (2002) 6 (1) Journal of Public Procurement 1, 5-6. See also Miller (n 3) 27, 53.

[51] Ibid.

[52] Ibid.

[53] Sue Arrowsmith, 'Horizontal Policies in Public Procurement: A Taxonomy' (2010) 10 (2) Journal of Public Procurement 149,154 and 159. See also P E Morris, 'Legal Regulation of Contract Compliance: An Anglo-American Comparison' (1990) 19 Anglo-American Law Review 87, 88.

[54] Ibid.

[55] Ibid.

Public procurement regulation is a means to diverse, often conflicting, ends. These ends, or objectives, may be economic or social/political.[56] Some objectives of public procurement regulation, however, are 'cross-cutting' to the extent that they transcend economic and social policy domains. Further, and as discussed in the ensuing sections of this chapter, the conceptual foundations of the objectives of public procurement regulation tranced multiple disciplines, making it inappropriate or difficult to classify them as strictly economic or social.

2.4.1 Economic Objectives of Public Procurement Regulation

The phrase 'economic objectives,' as used in this study, refers to all such objectives of public procurement regulation as are based on the neoclassical economic idea of reliance on market forces as the appropriate mechanism for allocating society's scarce resources. The economic approach to public procurement regulation is based on the theoretical construct of an ideal market characterised by perfect competition.[57] In summary, economists posit that this notional market is characterised by:[58] multiple individual buyers motivated by self-interest and acting to maximize utility, multiple individual sellers motivated by self-interest and acting to maximise profits in atomistic industries or contestable markets, the inability of any one individual buyer or seller to exert any control over market prices, price as a guidepost for decision makers in the market to communicate scarcity, homogeneous products, the absence of barriers to entry or exit from the market, perfect flow of information among buyers and sellers as

[56] See Trepte (n 2) chs 2, 3 and 4 on the economic, social/political and international models of public procurement regulation.
[57] Ibid 63-132.
[58] Ibid.

to the terms of all market transactions, the holding of resources in private property and the full enforcement of prevailing laws through the state.[59]

Neoclassical economic theory assumes that markets are self-regulating,[60] and that regulation or government intervention in the market should be limited to the correction of market failure.[61] The phrase 'market failure' refers to a situation where any one or more of the assumptions that underlie the theoretical construction of perfect competition does not hold.[62] It should be noted at the outset that unlike the notional perfectly competitive market, real markets are frequently, almost invariably, characterised by a failure of one or more of the assumptions.

Neoclassical economics also places great emphasis on the relationships among production costs, price and global welfare—a concept generally referred to as efficiency. Simply explained, efficiency is the idea that economic resources should be used prudently, in a manner that maximizes wealth and utility while at the same time minimising waste. In the specific context of public procurement regulation, efficiency refers to the idea that the government should procure goods and services at the lowest possible cost.[63]

---

[59] Ibid.
[60] Temidayo Akenroye, 'An Appraisal of the use of Social Criteria in Public Procurement in Nigeria' (2013) 13 (3) Journal of Public Procurement 364.
[61] See generally Trepte (n 2) ch 2.
[62] Ibid.
[63] Arrowsmith, Linarelli and Wallace (n 1) 31, Trepte (n 2) 128, Steven L. Schooner, 'Desiderata: Objectives for a System of Government Contract Law' (2002) 2 Public Procurement Law Review 103, 107.

Neoclassical economic theory assumes that efficient markets naturally result not only in optimal use of scarce resources but also in global wealth maximisation. The discipline of economics assumes that undistorted or perfectly competitive markets result in the optimal use of the society's scarce resources, a concept commonly referred to as allocative efficiency.

Allocative efficiency refers to a state of the economy in which production reflects consumer preferences and prices reflect the marginal cost of production.[64] In particular, it refers to a state of the economy where every good or service is produced only up to the point where the last unit provides a marginal benefit to consumers equal to the marginal cost of production.[65] As explained in Chapter 1, perfect markets, or more realistically, near-perfect markets, tend towards either the Pareto or the Kaldor-Hicks degrees of efficiency.[66] In sum, perfectly competitive markets do not allow individual sellers to make supernormal profits, or individual buyers to exert unprofitable bargains.

Since the efficient use or allocation of resources is the main concern of neoclassical economics, allocative efficiency is arguably the ultimate economic objective of public procurement regulation and all regulation in general. An economic approach to public procurement, therefore, implies awarding public procurement contracts to bidders who can produce the most efficient outcomes. Ordinarily, this would result in the award of public procurement contracts to bidders who can supply the required goods

---

[64] Trepte (n 2) 64-66.
[65] McCue, Pier and Swanson (n 6) 180.
[66] For further insights, see Azuike Ikena, 'Economic Analysis of Law-A Feminist Critique' (2001) 8 UCL Jurisprudence Review 139, 148 and Trepte (n 2) 64-66.

or services at the lowest price. An award to a different bidder, however, is economically justifiable where the lowest price is deceptive when considered in the context of externalities, hidden costs or market failures.[67] The efficiency requirements of public procurement regulation, therefore, seek to correct the agency and public choice problems of tendency to waste.[68] In particular, the objective of efficiency seeks to correct the absence of a profit motive and the typical public procurement officer's lack of incentive to engage in the rational cost-benefit analysis that is naturally inherent in private economic transactions.[69]

The objective of efficiency is not unique to the discipline of economics. It transcends many other disciplines.[70] In the administrative law context of public procurement regulation, efficiency connotes a procurement system characterised by expeditious decision making, the absence of red tape and finality of decisions. An undue regard to administrative efficiency, however, can easily undermine the achievement of other important objectives of public procurement regulation:

> The intention of [administrative] efficiency is noble and must be appreciated if the development agenda is to be achieved. The Court cannot ignore that objective because it is meant for a wider public good…However, the Court must put all public interest considerations in the scales and not only the finality consideration. The said Act also has other objectives namely to promote the integrity and fairness of the procurement procedures and to increase transparency and

---

[67] Akenroye (n 59) 371-362. See also Trepte (n 2) ch 2 generally.

[68] Ibid 77-82.

[69] Erridge, 'UK Public Procurement Policy and the Delivery of Public Value' in Khi V Thai and others (eds), *Challenges in Public Procurement: An International Perspective* (PrAcademics Press 2005) 335, 336.

[70] In Kenya, for instance, the objective of efficiency pervades most chapters of the Constitution of Kenya 2010, including those relating to: fair administrative action, national land policy, elections, administration of justice, decentralisation of county government services, fiscal management, and principles of the public service. See *inter alia* Articles 47, 60, 81, 172, 176, 226, 227, and 232 of the Constitution of Kenya, 2010.

> accountability. Fairness, transparency and accountability are core values of a modern society like Kenya. They are equally important and may not be sacrificed at the altar of finality.[71]

Although allocative efficiency is arguably the main or ultimate economic objective of public procurement regulation, many scholars identify competition, transparency, integrity, end-user satisfaction, wealth distribution, risk avoidance and uniformity as other economic objectives of public procurement regulation.[72] It might be more accurate, however, to describe the relationship between allocative efficiency and these other objectives as one of *end* and *means*, with allocative efficiency being the end and these other objectives being the means.

Since markets in the real world are seldom perfectly competitive, the disciplines of economics and administrative law counsel the adoption of a regulatory framework characterised by adherence to these other objectives as a means for achieving both allocative and administrative efficiency. Further, as explained in section 2.5 below, the objectives of competition, transparency, integrity, end-user satisfaction, wealth distribution, risk avoidance and uniformity transcend economic and social policy domains.

---

[71] Per Nyamu J (as he then was) in *Republic v Public Procurement Administrative Review Board & Another ex-parte Selex Sistemi Integrati* [2008] KLR 728, 743. See also *Republic v Kenya Revenue Authority Ex-parte Webb Fontaine Group FZ-LLC & 3 Others* [2015] eKLR.

[72] See e.g. Schooner (n 62) 103-104, Arrowsmith, Linarelli & Wallace (n 1) 27-88 and Trepte (n 2) ch 2.

2.4.2 Social Objectives of Public Procurement Regulation

The phrase 'social objectives,' as used in this study, refers to all such objectives of public procurement regulation as are not based on the neoclassical economic idea of primacy of markets, or reliance on markets, as the appropriate mechanism for allocating society's scarce resources. Generally, social objectives of public procurement regulation tend to concentrate on protection or enhancement of employment rights and conditions, human rights, gender or racial equality, minority interest rights, small businesses and environmental quality.[73] There is no exhaustive or authoritative taxonomy or listing, however, of social objectives of public procurement regulation,[74] due largely to their diverse and overlapping nature.[75]

The existing taxonomies generally classify social objectives based either on the segment of society or economy targeted by such objectives or the mechanisms through which public procurement regulation enforces them. Trepte, for instance, classifies them into three broad categories, namely: (i) strategic policies, (ii) protective policies and (iii) proactive policies.[76] In summary, these categories respectively refer to policies that seek to: (i) stimulate economic activity or create a comparative advantage in an industry,[77] (ii) shield domestic products and suppliers from foreign competition[78] and (iii) promote social goals respectively.[79] Arrowsmith, on the other hand, classifies them into three different but equally broad categories, namely: (i) policies limited to seeking

---

[73] Trepte (n 2) 169-170.
[74] Ibid 139.
[75] Ibid.
[76] Ibid.
[77] Ibid 140.
[78] Ibid 152.
[79] Ibid 169.

compliance with legal requirements and those that go beyond such requirements, (ii) policies applied only to the award of the contract and those that go beyond it, and (iii) mechanisms through which policies are implemented in the procurement process.[80]

Scholars variably describe the social objectives of public procurement regulation as secondary,[81] collateral,[82] ancillary, horizontal,[83] socioeconomic[84] or parallel.[85] These descriptions tend to emanate from exponents of an economic approach to public procurement regulation, who variably argue that: (i) the pursuit of social policies tends to undermine economic efficiency by increasing transaction costs and (ii) the pursuit of social policies through public procurement tends to undermine the objectives of fair competition, integrity, and transparency. The description of social objectives of public procurement regulation as secondary, collateral or ancillary, however, is apt to mislead or misrepresent the true nature and purpose of such objectives. To illustrate, the sole or decisive reason for engaging in procurement may be, and often is, to implement social policy.[86] Governments are also often constrained to abandon a procurement that makes perfect economic sense because of social policy concerns, for

---

[80] Sue Arrowsmith, 'Horizontal Policies in Public Procurement: A Taxonomy' (2010) 10 (2) Journal of Public Procurement 149, 154 and 159.

[81] Arrowsmith, Linarelli and Wallace (n 1) 237, Rolf H. Weber, 'Development Promotion as a Secondary Policy in Public Procurement' (2009) 4 Public Procurement Law Review 184, Joe Arnould, 'Secondary Policies in Public Procurement: The Innovations of the New Directives' (2004) 4 Public Procurement Law Review 187 and Ron Watermeyer 'Facilitating Sustainable Development through Public and Donor Procurement Regimes: Tools and Techniques' (2004) 1 Public Procurement Law Review 30.

[82] Arrowsmith, Linarelli and Wallace (n 1) 237.

[83] Sue Arrowsmith, 'Horizontal Policies in Public Procurement: A Taxonomy' (2010) 10 (2) Journal of Public Procurement 149,154.

[84] Ibid 149.

[85] Geo Quinot, 'Promotion of Social Policy through Public Procurement in Africa,' in Geo Quinot and Sue Arrowsmith (eds), *Public Procurement Regulation in Africa* (Cambridge University Press 2013) 370, 371.

[86] Trepte (n 2) 134.

example, adverse environmental impact.[87] Further, the promotion of social objectives, as opposed to the achievement of economic efficiency, may be a 'primary' objective of a system of public procurement regulation.[88]

The description of social objectives of public procurement as secondary, collateral or ancillary also tends to reinforce the contentious idea that economic efficiency is the universal, ultimate, sole or decisive basis of all public procurement regulation. Further, such descriptions are abstract to the extent that they suppress the broad nature of the mandate of government and the reality of interdependence and complementarity between economic and social policy.[89] Moreover, the use of public procurement as a tool for promoting social policies is not necessarily inherently incompatible with sound economics.[90]

---

[87] Ibid.

[88] Ibid.

[89] Barraket, Keast and Furneaux (n 15) 5.

[90] Buy Social Canada, 'What is Social Purchasing?'<*http://buysocialcanada.ca/about-us/*> accessed 29 March 2016. See also Social Procurement Australasia, 'What is Social Procurement?'<*http://socialprocurementaustralasia.com/*> accessed 29 March 2016.

The current literature variably describes the pursuit of social objectives through public procurement as social procurement,[91] socially responsible public procurement,[92] affirmative procurement,[93] sustainable procurement,[94] linkage[95] and contract compliance.[96] The idea underlying all these descriptions is the leveraging of public procurement as a strategic tool for stimulating society-wide impacts that go beyond the typical economist's narrow concern for optimal or efficient allocation of resources.[97] In other words, the idea behind using public procurement as a policy tool goes beyond the purely commercial concern of value for money to the broader concern of ensuring social and environmental equity,[98] an outcome variously described in academic literature as public value, social value or social justice.[99] There are several

---

[91] Christopher McCrudden, *Buying Social Justice: Equality, Government Procurement, & Legal Change* (OUP 2007) 14, Christopher McCrudden, 'International Economic Law and the Pursuit of Human Rights: A Framework for Discussion of the Legality of 'Selective Purchasing' Laws under the WTO Government Procurement Agreement' (1999) 2 (1) Journal of International Economic Law 3, Christopher McCrudden and Stuart S Gross 'WTO Government Procurement Rules and the Local Dynamics of Procurement Policies: A Malaysian Case Study' (2006) 17 (1) European Journal of International Law 151, 154, Christopher McCrudden, 'Using Public Procurement to Achieve Social Outcomes' (2004) 28 (4) Natural Resources Forum 257 and Christopher McCrudden, 'Corporate Social Responsibility and Public Procurement' (2010) Oxford Legal Studies Research Paper No. 9/2006,< *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=899686*>accessed 5 May 2015. McCrudden invariably uses the term "*linkage*" to describe the use of procurement as a tool of social policy.

[92] Barraket, Keast and Furneaux (n 15) 2 and 4. See also Akenroye (n 59) and European Commission, Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement (2010) 7<*http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=606&type=2&furtherPubs=yes*> accessed 31 March 2016.

[93] K Raga and N Nano, 'Legislative and Administrative Directives Governing Procurement Procedures: A Local Government Perspective' (2011) 4 (1) African Journal of Public Affairs, 130, 135.

[94] Stephen Brammer, 'Sustainable Procurement in the Public Sector: An International Comparative Study' (2011) 31 (4) International Journal of Operations & Production Management 452, 454. See also Ama Eyo, 'Corruption and the Challenge to Sustainable Public Procurement (SPP): A perspective on Africa' (2017) 12 (3) European Public Procurement and Public Private Partnership Law Review 253.

[95] McCrudden, *Buying Social Justice* (n 89).

[96] Arrowsmith, Linarelli and Wallace (n 1) 256 and Morris (n 52) 87.

[97] Barraket, Keast and Furneaux (n 15) 2 and 4.

[98] Ibid.

[99] See generally McCrudden, *Buying Social Justice* (n 86). See Akenroye (n 59) 367.

possible mechanisms for generating such broader value from public procurement, including:[100] (i) statutory compliance requirements, (ii) contract compliance requirements, (iii) eligibility requirements, (iv) selection and qualification criteria, (v) technical specifications, (vi) preferences, reservations and (vii) contract award criteria.[101]

The main drivers of social procurement include: (i) dwindling tax revenues, (ii) the need to address socioeconomic inequalities, (iii) the perverse effects of globalization and the pursuit of neoliberal market policies and ineffectiveness of more direct solutions to social, economic and political problems.[102] These drivers of social procurement tend to present 'wicked problems,'[103] that is, problems that do not respond to conventional solutions.[104]

Social exclusion, commonly defined as "processes [by] which individuals or entire groups of people are systematically blocked from rights, opportunities and resources (e.g. housing, employment, healthcare, civic and democratic participation) that are normally available to members of society and are considered to be the foundations of social cohesion,"[105] is a common intractable or wicked problem. Some studies have suggested that uncritical commitment to markets and neoliberal economic theories

---

[100] Trepte (n 2) 187-204, Akenroye (n 59) 368, Erridge (n 68) 336-337 and Sue Arrowsmith, 'Horizontal Policies in Public Procurement: A Taxonomy' (2010) 10 (2) Journal of Public Procurement 149.
[101] Ibid.
[102] Barraket, Keast and Furneaux (n 15) 3, 13-27. See also Christopher McCrudden, 'Social Policy Choices and the International and National Law of Government Procurement: South Africa as a Case Study' (2009) Acta Juridica 123, 126.
[103] Ibid.
[104] Ibid.
[105] Ibid.

tends to marginalise entire groups and communities,[106] thereby leading to general disaffection and political instability.[107]

Social exclusion and other wicked problems often make an economic approach to procurement regulation—which is characterized by a staunch commitment to markets and purely economic considerations—inappropriate or impracticable.[108] The co-existence of economic and social objectives in a system of public procurement regulation, therefore, reflects the economic, social and political reality that prevails in many countries. It is also a testament to the weakness of the idea that economic efficiency is the sole or 'primary' justification for all public procurement regulation.

2.4.3 Cross-Cutting Objectives of Public Procurement Regulation

As stated, the objectives of competition, transparency, integrity, end-user satisfaction, wealth distribution, risk avoidance and uniformity transcend economic and social policy domains.[109] This study espouses the idea of the cross-cutting nature of these objectives, as they are a *sine qua non* for realising the overarching goals—whether economic or social—of any system of public procurement regulation. It should be noted at the outset, however, that these cross-cutting objectives are often seen as fundamental requirements of not only public procurement regulation but also public

---

[106] See e.g. Amy Chua, 'Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development' (1998) 108 (1) Yale Law Journal 1. See also Amy Chua, *World on Fire: How Exporting Free Market Democracy Breeds Ethnic Hatred and Global Instability* (Anchor Books 2004).
[107] Ibid. See also See also Michela Wrong, *It's Our Turn to Eat: The Story of a Kenyan Whistle-Blower* (HarperCollins Publishers 2009) 115, 324-325.
[108] Barraket, Keast and Furneaux (n 15) 25. On the inappropriateness of an atomistic analysis of public procurement, see Baumol (n 9) 2.
[109] Trepte (n 2) 134, 205-206, and McCrudden, *Buying Social Justice* (n 82) 576-578.

administration in general.[110] In other words, this study argues that the values embodied in these cross-cutting objectives are complementary to both economic and social policy, and that compliance with them is a prerequisite for realising both economic and social objectives of public procurement regulation.

The objective of competition, for instance, is based on the assumption that public bodies get the best value from procurement when a wide pool of private contractors, led purely by the rational and selfish desire of making a profit, endeavour to outdo one another in terms of quality, price, terms and conditions, technology and other parameters.[111] It should be noted, however, that competition often comes at a price, in the form of additional (bureaucratic) costs and inefficiency.[112] The benefits of competitive procurement procedures, however, usually outweigh these costs.[113] Most public procurement regulatory systems, therefore, embody elements of competitive supply.[114] Indeed, competitive bidding is the preferred method of procurement under most modern public procurement regulatory systems.[115]

Although the conceptual foundations of the objective of competition are to be found mainly in economic theory, competition is a fundamental prerequisite for the achievement of all objectives, whether economic or social, of public procurement

---

[110] Elia Armstrong, 'Integrity, Transparency and Accountability in Public Administration: Recent Trends, Regional and International Developments and Emerging Issues' (2005) United Nations Department of Social and Economic Affairs 1.

[111] Schooner (n 62) 104, Arrowsmith, Linarelli & Wallace (n 1) 27-88 and Erridge (n 68) 336.

[112] Soudry (n 45) 444.

[113] Ibid.

[114] Trepte (n 2) 118.

[115] Ibid. See e.g. the preamble and Article 28 of the UNCITRAL Model Law on Public Procurement 2011, section 2 of the World Bank's Guidelines for Procurement under IBRD Loans and IDA Credits (2015 edition) ("the World Bank Guidelines") and Article XIII of the Government Procurement Agreement.

regulation.[116] It is difficult, perhaps impossible, to achieve the objectives of public procurement regulation, whether social or economic, without engaging in some form of competitive bidding. Competition, therefore, offers the best chance of getting the most value out of public procurement even where the main concern is the implementation of social policies.

Likewise, the objective of transparency refers to the idea that procurement procedures should be characterised by:[117] (i) clear rules which are known by all participants, (ii) the means to verify compliance with those rules,[118] (iii) significant limits on the discretion of procurement officers[119] and (iv) timely availability to all potential bidders of information relating to specific procurement opportunities and the applicable tender evaluation and award criteria.[120] Transparency provides a regulatory tool for correcting informational asymmetry, the agency and public choice problems inherent in public procurement and various forms of market and institutional failures.[121] In particular, transparency reduces the opportunities for corruption, abuse and other forms of unethical conduct.[122] The transparency requirements of public procurement regulation, however, often come with high implementation costs and reduced administrative efficiency.[123] Most public procurement scholars locate the theoretical foundations of transparency in the discipline of economics. Transparency, however, is

---

[116] Trepte (n 2) 146.
[117] Arrowsmith, Linarelli & Wallace (n 1) 73-76 and Trepte (n 2) 84.
[118] Ibid.
[119] Geo Quinot, 'Promotion of Social Policy through Public Procurement in Africa,' in Geo Quinot and Sue Arrowsmith (eds), *Public Procurement Regulation in Africa* (Cambridge University Press 2013) 370, 379.
[120] Thiankolu (n 35) 461.
[121] Trepte (n 2) 76, 84 and 93-94.
[122] McCue, Pier and Swanson (n 6) 183.
[123] Ibid.

a core value that transcends many disciplines, and an essential prerequisite for good public administration.[124]

The objective of accountability can be viewed similarly. This objective refers to the idea that public officers should explain, defend or justify their conduct.[125] More importantly, accountability connotes the imposition of appropriate and effective sanctions or penalties for corruption and other forms of unethical or unlawful conduct.[126] Accountability provides, from both an economic and administrative law points of view, a powerful tool for fostering integrity and preventing the abuse of power and corruption.[127] It is especially critical in regulatory systems characterised by the exercise of discretionary powers, especially when the exercise of such powers adversely affects the rights or interests of citizens or, in our case, other stakeholders of the public procurement system. Accountability is realised through the transparency of actions taken within a formal network of internal and external controls.[128] In other words, the objectives of transparency and accountability are complementary, with the result that a proper procurement regulatory system requires both.

---

[124] Thus, the objective of transparency pervades most chapters of the Constitution of Kenya 2010, including those relating to national values and principles, land policy, the electoral system, the judiciary and administration of justice, fiscal management, public procurement, salaries and remuneration, public service and the national police service. See *inter alia* Articles 10, 60, 81, 82, 86, 172, 225 to 227, 230 and 232 of the 2010 Constitution.

[125] Migai (n 15) 49.

[126] For an economic approach to corruption, as opposed to a merely moral or social approach, see Pranab Bardhan, 'The Economist's Approach to the Problem of Corruption' (2006) 34 (2) World Development 341. This study espouses Pranab Bardhan's idea that the law should punish either the demand or supply side of corruption, as opposed to both the demand and supply sides. Kenyan laws are structurally flawed to the extent that they punish both the demand and supply sides of corruption, as this creates a mutual incentive between the two sides to frustrate any efforts to investigate or punish corruption. On the causes and consequences of corruption, see Susan Rose-Ackerman, (n 27).

[127] Migai (n 15) 50.

[128] McCue, Pier and Swanson (n 6) 190.

The theoretical foundations for the objective of accountability lie in the disciplines of economics and administrative law.[129] Its practical basis in the context of public procurement regulation lies in the need to: control the exercise of discretion,[130] correct market and institutional failures and, more particularly, ensure the prudent utilisation of public funds. A sound public procurement regulatory framework should require government officers to explain or defend their actions and decisions either as a matter of course or when challenged by disaffected bidders or other stakeholders.[131]

A public procurement regulatory system can only meet the objective of accountability, and indeed all its economic or social objectives, if it is characterised by enforcement of the rules and imposition of deterrent or effective sanctions against all persons who participate in or are complicit in the breach of those rules.[132] Regulatory frameworks that look good on paper or in theory serve no useful purpose unless faithfully implemented.[133] Impunity (that is, the opposite of accountability), undermines the achievement of all objectives of public procurement regulation, whether economic or social. In short, the enforcement of the procurement rules tends to promote the objective of accountability. This, in turn, tends to promote both economic and

---

[129] Soudry (n 45) 433.

[130] McCue, Pier and Swanson (n 6) 183.

[131] Thiankolu (n 35) 461.

[132] Ibid.

[133] Geo Quinot, 'A Comparative Perspective on Supplier Remedies in African Public Procurement Systems,' in Geo Quinot and Sue Arrowsmith (eds), *Public Procurement Regulation in Africa* (Cambridge University Press 2013) 308. See also Annika Engelbert, Markus Kaltenborn and Nina-Anette Reit-Born, *Effective Corruption Control: Supplier Remedies in Public Procurement in Kenya, Uganda and Tanzania-A Comparative Analysis of Mechanisms and their Implementation* (Logos Verlag 2016) 11.

administrative efficiency,[134] by reducing additional costs that would otherwise arise from corruption, favouritism and other forms of malfeasance.[135]

The objective of integrity (or probity) relates to the conduct of procurement officials, bidders and other players in the procurement process.[136] It seeks to correct the agency and public choice problems inherent in public procurement and various forms of market and institutional failures, by reducing the incidence or risk of malfeasance. Integrity is not only an important feature of a sound approach to public procurement regulation but also a fundamental principle of sound public administration in general.[137]

The objective of value for money refers to the idea of obtaining the relevant goods or services on the best possible terms and ensuring that they are fit for the intended purpose.[138] Value for money is often a combination of different variables,[139] both economic and social, and hence not always synonymous with the highest quality or the lowest price.[140] Although value for money is the main objective of public procurement regulation, especially from a financial or economic point of view,

---

[134] Soudry (n 45) 433.

[135] Ibid.

[136] Schooner (n 62) 104-105.

[137] See e.g. Articles 73-80 of the 2010 Constitution, the Ethics and Integrity Act, 2012, the Public Officer Ethics Act, 2003 and section 3 (d) of the Public Procurement and Asset Disposal Act, 2015.

[138] Arrowsmith, Linarelli & Wallace (n 1) 27-31.

[139] Ibid.

[140] Ibid. See also Sope Williams-Elegbe, 'A Perspective on Corruption and Public Procurement in Africa,' in Geo Quinot and Sue Arrowsmith (eds), *Public Procurement Regulation in Africa* (Cambridge University Press 2013) 336, 353. For disputes in which the lowest bid was alleged to be the most expensive when considered in the context of whole life cost or total cost of ownership, see *Alliance Technologies Solutions Ltd v Public Procurement Oversight Authority* (2008-2010) PPLR 759 and *Lindscan Advanced & Tank Services v Kenya Pipeline Company Ltd*, Review Board Application No. 16 of 2012.

countries often trade off financial value with social value,[141] commonly defined as 'non-financial impacts of programmes, organisations and interventions, including the wellbeing of individuals and communities, social capital and the environment.'[142] The concept of value for money, therefore, connotes idea of striving to obtain the best possible outcome when all relevant economic and social factors of a particular procurement are considered.

2.5 The Role of Law and Economics in Resolving Conflicting Objectives

Although the objectives of public procurement regulation transcend multiple disciplinary and theoretical boundaries, the underlying concerns generally revolve around resolving five main problems, namely: (i) market failure, (ii) discretion, (iii) agency, (iv) public choice and (v) wealth (re)distribution. Many scholars extoll an exclusionary approach to public procurement regulation, characterized by a staunch commitment to either economic or social objectives. In practice, public procurement decision making is generally characterised by frequent interdependence, complementarity and overlap between economic and social policy.[143] In particular, economic policy is seldom a neutral activity driven solely by market forces.[144] Instead, economic policy is often a reflection and product of various social and political struggles.[145] A procurement to build a health centre or a school in a marginalised rural village, for instance, can hardly be strictly pigeonholed as being driven exclusively by

---

[141] Trepte (n 2) 47.
[142] Akenroye (n 59) 367-368.
[143] McCrudden, *Buying Social Justice* (n 86) 576-578. See also Eric Windholz and Graeme Hodge, 'Conceptualising Social and Economic Regulation: Implications for Modern Regulators and Regulatory Activity' (2012) 38 (2) Monash University Law Review 212, 222-224.
[144] John Justin McMurtry, 'The Political Economy of Public Procurement' (2014) 40 (1) Canadian Public Policy S26.
[145] Ibid.

economic or social policy.[146] It might be more accurate to describe the objectives of such a procurement as socioeconomic or, depending on the underlying context, even socio-political. Further, as the preceding discussion demonstrates, many of the objectives of public procurement regulation that the current literature classifies as economic or social have their theoretical foundations in multiple disciplines.

Although economic and social objectives of public procurement often conflict, the coexistence of the two species of objectives in a system of public procurement regulation is not inherently bad. On the contrary, the frequent coexistence of the two species of objectives in public procurement laws is merely a reflection of the political nature and broad mandate of governments, [147] which often demand a regulatory approach that goes beyond commitment to markets and the achievement of economic efficiency.[148] The entrenchment of the two species of objectives in any system of public procurement regulation, including Kenya's, therefore, should be seen in this context.[149]

The conflictual coexistence of economic and social policy objectives in a system of public procurement regulation, which is one of the twin issues that form the focus of this study, arises from the different practical and theoretical rationales that underlie the two species of objectives. The conflict is usually stark when procurement officers accord undue regard to either species of objectives at the expense of the other. The

---

[146] On the nuanced nature of regulation, and shortcomings of conceptualising regulatory objectives as strictly social or economic, see Eric Windholz and Graeme Hodge, 'Conceptualising Social and Economic Regulation: Implications for Modern Regulators and Regulatory Activity' (2012) 38 (2) Monash University Law Review 212.

[147] Trepte (n 2) 47.

[148] Ibid.

[149] On similar legal entrenchment of both economic and non-economic policy objectives in public procurement regulation, see the UK's Public Services (Social Value) Act 2012 and South Africa's Broad-Based Black Economic Empowerment Act, 2003.

dilemma created by the uneasy and often conflictual coexistence of economic and social policy objectives in a system of public procurement regulation, however, does not necessarily require a choice between good and bad, or superior and inferior. Instead, the dilemma usually represents a choice between efficiency and equity,[150] the former being economic and the latter political.[151] The choice, which often turns on the prevailing ideology,[152] requires a judicious balance and occasional trade-offs between the two species of objectives, depending on the socioeconomic and political realities of each country.[153]

As the preceding discussion demonstrates, many objectives of public procurement regulation have their conceptual foundations in (*inter alia*) the disciplines of administrative law and law and economics. The disciplines of administrative law and law and economics share, as the main focus, the prevention of abuse of discretionary powers in public administration. The conceptual tools of the two disciplines can help in designing a public procurement regulatory framework that: (i) facilitates resolution of conflicts between economic and social objectives, (ii) resolves the agency and public choice problems inherent in public procurement and (iii) corrects various forms of market and institutional failures. The disciplines of administrative law and law and economics also share, as major objectives, the prevention of abuse of public power and the prudent use of public resources. The two disciplines strive to achieve these objectives by requiring public servants to abide by certain values and principles in the

[150] Trepte (n 2) 135 and 204.
[151] Ibid.
[152] Ibid.
[153] Arrowsmith, Linarelli and Wallace (n 1) 28.

discharge of their public duties.[154] These values and principles include:[155] (i) integrity, (ii) legality, (iii) rationality, (iv) procedural fairness, (v) proportionality, (vi) transparency and (vii) accountability.

The disciplines of administrative law and law and economics espouse a regulatory approach to public procurement that is characterised by controlled discretion and effective safeguards against the risk of corruption, favouritism and other forms of malfeasance. They also espouse a regulatory approach that promotes prudent or efficient use of resources—by correcting the agency and public choice problems inherent in public procurement and various forms of market and institutional failures. Since the agency, public choice and discretion problems inherent in public procurement are major challenges even where the main objective is the implementation of social policies, the conceptual tools of the two disciplines counsel for the adoption of a similar approach irrespective of whether the public procurement system is oriented towards the economic or social model. In other words, the conceptual tools of administrative law and economics are relevant to the design of a sound public procurement regulatory system irrespective of whether such a system is oriented towards economic or social objectives.

So, how can governments and regulators resolve the problem of discretion and resolve conflicts between the economic and social objectives of public procurement? The solution, based on the preceding discussion, lies in designing and implementing a rule-based public procurement regulatory system characterised by circumscribed

---

[154] Migai (n 15) 27-55.
[155] Ibid.

discretion and commitment to the values of competition, transparency and accountability. The observance of these core values would guarantee the optimal pursuit of all objectives, whether social or economic, of any system of public procurement regulation. A public procurement regulatory system that lacks any of these core values would be prone to agency and public choice problems and various forms of market and institutional failures which, in turn, would undermine the achievement of the underlying economic or social objectives.

This study espouses a rule-based or prescriptive approach to public procurement regulation, as opposed to a guideline approach, because it entails a narrower margin of discretion on the part of public procurement officers.[156] Enforcement of procurement rules, especially in so far as they relate to the ideals of competition, transparency and accountability, would not only circumscribe discretion but also induce 'market-like' behaviour on both the demand and supply sides of public procurement even when the main concern is enforcement of social policies. Put differently, commitment to the ideals of competition, transparency and accountability would guarantee the most feasible and efficient means for the optimal implementation of both economic and social policies in public procurement.

The proposed regulatory approach promises to resolve the problem that is the subject of this study in three ways. First, it could mitigate the impact of the agency and public choice problems, and various forms of market and institutional failures, which tend to justify an undue emphasis on economic efficiency and an economic approach to public

[156] Soudry (n 45) 437.

procurement regulation. Secondly, it could alleviate the problems associated with discretion, especially corruption, favouritism and other forms of malfeasance. Lastly, the proposed regulatory framework could ensure that the pursuit of social policies in public procurement is done in conditions that approximate those prevailing in competitive markets. In other words, the proposed regulatory approach could ensure that the implementation of social policies in public procurement is done as efficiently as possible, even if the quality of such efficiency does not equal the allocative, Pareto or Kaldor-Hicks degrees of efficiency envisioned by economic theory.

CHAPTER 3: INTERPLAY OF ECONOMIC AND SOCIAL OBJECTIVES, THE PROBLEM OF DISCRETION AND EVOLUTION OF POLICY AND REGULATORY FRAMEWORKS FOR PUBLIC PROCUREMENT IN KENYA

3.1 Introduction

This chapter examines the evolution of policy and regulatory frameworks for public procurement in Kenya. The main focus of the chapter is how Kenya has dealt with the interplay of economic and social objectives (see the first research question) and the link between discretion and the incidence of corruption, favouritism and other forms of malfeasance (see the second research question) at various epochs of the evolution of policy and regulatory frameworks. Further, the chapter examines regulatory and stakeholder interest in the interplay of economic and social objectives and the link between discretion and the incidence of corruption, favouritism and other forms of malfeasance in public procurement decision making in Kenya.

The chapter is organized as follows. Section 3.2 examines the relationship between government policy and law. Sections 3.3, 3.4 and 3.5 examine the evolution of legal and policy frameworks for public procurement in Kenya at various epochs, the factors that have influenced that evolution and the handling of the issues that form the focus of the study (that is, interplay of economic and social objectives and the link between discretion various forms of malfeasance) during each epoch. Section 3.6 is a summary of the findings.

3.2 Relationship between Government Policy and Law

The relationship between government policy and law is arguably one of ends and means respectively. Generally, policy explains 'why' the government regulates a specified activity, by outlining the underlying rationale, objectives and desired regulatory outcomes. Law, on the other hand, provides the means (that is the 'how') for achieving the regulatory objectives and outcomes set out in government policy, through a rational scheme of technical rules and procedures. Ideally, therefore, policy formulation ought to precede the drafting and enactment of laws.

Although policy formulation should ideally precede the enactment of laws, the evolution of policy and regulatory frameworks for public procurement in Kenya has generally followed the reverse sequence.[1] Specifically, and as elaborated in the ensuing sections of this chapter, Kenya has adopted, repealed and replaced public procurement laws several times without a coherent policy framework and then attempted, *ex-post*, to formulate a coherent public procurement policy framework.

Kenya's reverse approach (of enacting public procurement laws first and formulating the underlying policy later) is apt to lead to confusion, controversy and suboptimal regulatory outcomes.[2] This approach also tends to entrench an erroneous notion, that there exists an ideal or universal approach to public procurement regulation that is suitable for addressing every country's unique challenges and circumstances. As

---

[1] Fred Owegi and Eric Aligula, 'Public Sector Procurement in Kenya: The Need for a Coherent Policy Framework' (KIPPRA Discussion Paper No. 62, 2006) 1.

[2] Kenya Institute for Public Policy Research and Analysis, '*Public Procurement Policy in Kenya: The Need for a Coherent Policy Framework*' (Policy Brief No. 3/2006) 1.

explained in chapter 1 above, a one-size-fits-all approach to public procurement regulation is apt to lead to disappointment and suboptimal outcomes:

> there is no one ideal form of procurement regulation, there is only regulation which is particularly suited or adopted to the objectives pursued in the territory or territories in which it applies. It is the failure to recognise or the tendency to misinterpret the underlying objectives which often leads to confusion and false expectation.[3]

The absence of a coherent policy framework for public procurement in Kenya has had three discernible effects. First, and as discussed in the ensuing sections of this chapter, it has encouraged uncritical 'copy-pasting' of regulatory models.[4] In particular, a close examination of the prevailing and past Kenyan public procurement laws indicates that they are largely a rehash of the UNCITRAL Model Law on Procurement of Goods, Construction and Services 1994 (hereinafter, "the 1994 UNCITRAL Model Procurement Law").[5] Secondly, the enactment of procurement laws without a coherent policy framework has contributed to regulatory ineffectiveness.[6] Specifically, it has resulted in procurement laws that appear good on paper but fail to serve their intended or presumptive goals, such as reducing the incidence of corruption, favouritism and other forms of malfeasance. Lastly, the absence of a coherent policy framework for public procurement in Kenya has often resulted in the enactment of ill-conceived foreign-driven public procurement laws that are ill-suited to address the

---

[3] Peter Trepte, Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation (OUP 2004) 135.

[4] Muthomi Thiankolu, 'Reconciling Incongruous Policy Objectives and Benchmarking Kenya's Public Procurement Law: A Review of the Selex Case' (2011) 11 (4) Journal of Public Procurement 451, 472.

[5] Ibid.

[6] Owegi and Aligula (n 1) 1.

unique social, economic and political challenges afflicting public procurement in Kenya:

> Procurement reforms [in Kenya] have often been triggered by external pressures of corruption scandals, leading to hasty and piecemeal reforms that focus more on adding controls and legislations rather than developing a thorough understanding of the underlying causes of the problems and feasible options to address them. The role of political patronage in the workings of public procurement [for instance] has not been adequately addressed, more so in developing countries [like Kenya] where public procurement plays a critical role in economic growth and development.[7]

Although Kenya did not have a comprehensive official policy framework for public procurement as at the time of this study, two macroeconomic development blueprints, namely the Sessional Paper No. 10 of 1965 on African Socialism and its Application to Planning in Kenya, and the Kenya Vision 2030, were considered relevant to this study. The relevance of the two blueprints was twofold. First, the two blueprints established the overarching long-term social, economic and political objectives of the Kenyan state for many years. Secondly, the long-term and overarching status effectively required subordination and alignment of all other government policies, including public procurement policies, to the two blueprints. The Draft Long-term Policy Framework (2009) for Public Procurement in Kenya, which lay on government shelves for several years, was considered directly relevant to the study. The report of a study commissioned by the Government in 1970 on terms of service for government

---

[7] Njuguna Humphrey Kimani, 'The Influence of Political Patronage on the Operationalization of Public Procurement Law in Kenya' (Fifth International Public Procurement Conference, Seattle, 2012) 1592, 1610<*http://www.ippa.org/IPPC5/Proceedings/Part6/PAPER6-14.pdf*>accessed 1st November 2017). Interpolations added for clarity. See also Njuguna Humphrey Kimani, 'Political Patronage on the Operationalisation of Public Procurement Law in Kenya' (PhD Thesis, University of Nairobi 2017).

bureaucrats, commonly known as the Ndegwa Report, was also considered relevant.[8] The relevancy of the Ndegwa Report lay in the agency and public choice problems inherent in its controversial recommendation that public servants should be allowed to engage in private business.[9]

The evolution of policy and regulatory frameworks for public procurement in Kenya may be conveniently classified into three distinct epochs, namely: (i) 1963-2000, (ii) 2001-2010 and (iii) post-2010.[10] Sections 3.3 3.4 and 3.5 of this chapter examine the main developments and state practice during these epochs.

3.3 Policy and Regulatory Frameworks 1963-2000

Kenya had no formal policy or legal frameworks for public procurement between 1963 and 2000. During this period, public servants relied on circulars and guidelines issued by the Ministry of Finance (commonly referred to as the National Treasury).[11] The 1963–2000 period was also characterised by the absence of sanctions (other than

---

[8] GoK, 'Report of the Commission of Inquiry on Public Service Structure and Remuneration' (Government Printer 1971).

[9] Ibid 13-15. See also Charles Hornsby, *Kenya: A History Since Independence* (I. B. Tauris & Co. Ltd 2013) 264 and 312-314.

[10] For a comprehensive account of the evolution of the legal framework for public procurement in Kenya, see and Jerome Ochieng and Mathias Muehle, 'Development and Reform of the Kenyan Public Procurement System' (Fifth International Public Procurement Conference, Seattle, 2012) <*http://www.ippa.org/IPPC5/Proceedings/Part7/PAPER7-7.pdf*>accessed 1st November 2017. See also Kimani (n 7).

[11] Kingsley Tochi Udeh, 'The Regulatory Framework for Public Procurement in Kenya,' in Geo Quinot and Sue Arrowsmith (eds), *Public Procurement Regulation in Africa* (Cambridge University Press 2013) 100, 109.

internal disciplinary procedures) against corruption, favouritism and other forms of malfeasance in public procurement.[12]

The absence of a regulatory framework for public procurement during the 1963-2000 epoch resulted in a procurement system characterised by uncontrolled discretion on the part of the (now defunct) central, ministerial and district tender committees. The uncontrolled discretion, and more specifically, the absence of effective regulatory sanctions against its abuse, led to an ever-increasing incidence of corruption, favouritism and other forms of malfeasance.[13] The absence of a coherent regulatory framework for public procurement in Kenya between 1963 and 2000 also created perfect conditions for primitive accumulation of illicit wealth through corruption, political patronage and other forms of favouritism and abuse.[14]

As explained in sections 3.3.1 and 3.3.2 below, the twin issues of (i) interplay of economic and social objectives and (ii) use of public procurement as a tool of social policy did not feature in policy and regulatory debates between 1963 and 2000. Some studies, however, have alluded to pro-African procurement practices during the 1960s and 1970s.[15] Those pro-African procurement practices, however, were merely a small aspect of the then broader policy of Africanisation of the post-colonial economy. In other words, and as explained in sections 3.3.1 and 3.3.2 below, a review of policy and

---

[12] Kimani (n 7) 1604.

[13] Migai Akech, 'Development Partners and Governance of Public Procurement in Kenya: Enhancing Democracy in the Administration of Aid' (2005) 37 (4) New York University Journal of International Law and Economics 829, 840-855.

[14] Public Procurement and Disposal Bill, 2005 Deb 05 July 2005 2116-2134.

[15] See e.g. Hornsby (n 9) 198.

regulatory frameworks and state practice between 1963 and 2000 does not disclose any sustained or coherent integration of social policies into public procurement.

3.3.1 The Sessional Paper No. 10 of 1965

The Sessional Paper No. 10 of 1965 on African Socialism and its Application to Planning in Kenya (hereinafter, "the 1965 blueprint") is arguably one of the most important and comprehensive policy documents ever developed by the Kenyan government.[16] Adopted shortly after the end of British colonial rule, and during the cold war, the 1965 blueprint served as Kenya's long-term macroeconomic development blueprint for many years. On paper, the 1965 blueprint extolled African socialism as the overarching ideology and approach to public affairs in Kenya. In practice, however, Kenya pursued a brutish capitalist ideology and market policies. [17] The unmitigated pursuit of such policies created inequality and other sociopolitical problems, which were aggravated by ethnic politics and primitive accumulation of illicit wealth by political elites and senior government bureaucrats.[18]

The 1965 blueprint encouraged, in a contradictory departure from its lofty (perhaps rhetorical) ideal of African socialism, the concentration of development and infrastructural investment in resource-rich regions. [19] The 1965 blueprint justified this overtly discriminatory approach to development on the assumption that the resource-

---

[16] GoK, 'African Socialism and its Application to Planning in Kenya' (Government Printer 1965).
[17] Amy Chua, 'Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development' (1998) 108 (1) Yale Law Journal 1.
[18] Ibid 51-56.
[19] GoK (n 16) 46-47.

rich regions, coincidentally occupied by a few large ethnic groups, guaranteed higher economic efficiency.[20] This official discrimination created multiple intractable socioeconomic and political problems in Kenya. Specifically, it led to social exclusion, extreme inequalities, ethnic hatred, patronage politics and political instability.[21] The skewed initial allocation of resources by the colonial and post-colonial states, the primitive accumulation of illicit wealth by political elites and top government bureaucrats and the perverse effects brutish capitalism aggravated these problems over the years, to a level that threatened the long-term viability of the Kenyan nation-state. In other words, the official discrimination embodied in the 1965 blueprint created many wicked problems (that is complex socioeconomic and political problems which are not easily solved through markets, regulation or direct government intervention) in Kenya.[22]

The 1965 blueprint did not, expressly or by implication, address the subject of public procurement regulation. It did not also address what might now be considered an obvious link between public procurement and the achievement of the long-term economic and social objectives embodied therein. These oversights might appear serious by contemporary standards. Public procurement was not, however, a subject of serious academic, policy or regulatory interest as at 1965.

---

[20] Ibid.

[21] Chua (n 17) 40, 50-56.

[22] Jo Barraket, Robyn Keast and Craig Furneaux, *Social Procurement and New Public Governance* (Routledge 2016) 20. As explained in the ensuing sections of this chapter, the post-2005 policy and regulatory frameworks for public procurement in Kenya have sought to reverse this legacy through elaborate schemes of preferences and reservations.

3.3.2 The Ndegwa Report

The Government appointed the Commission of Inquiry on Public Service Structure and Remuneration (hereinafter, "the Ndegwa Commission") on 9th July 1970.[23] The mandate of the Ndegwa Commission was to advise the Government on the structure, methods of recruitment, conditions of employment and retention of properly qualified personnel in the Kenyan public services.[24] The appointing instrument required the Ndegwa Commission to pay special regard to (*inter alia*) 'the need to improve efficiency and economy in administration.'[25]

One of the knotty issues addressed by the Ndegwa Commission was whether public servants ought to engage in private business.[26] The underlying concerns revolved around conflicts of interest and the agency and public choice problems that are naturally inherent in allowing public servants to do business with the state.[27] The specific concern was whether allowing public servants to engage in private business would compromise the integrity, efficiency, honesty and fairness with which they were expected to carry out their duties.[28] The Ndegwa Commission, however, inexplicably dismissed these genuine concerns and recommended a policy and regulatory approach that permitted public servants to engage in private business:

> there ought in theory to be no objection to the ownership of property or involvement in [private] business by members of the public services to

---

[23] Gazette Notice No. 131 of 9th January 1970.
[24] Ibid.
[25] Ibid.
[26] GoK, 'Report of the Commission of Inquiry on Public Service Structure and Remuneration' (Government Printer 1971) 13-15.
[27] Ibid.
[28] Ibid 13.

> a point where their wealth is augmented and perhaps substantially by such activities.[29]

The Ndegwa Commission's denial of theoretical objections to allowing public servants to engage in private business is not only inexplicable but also patently wrong. There are many theoretical objections to allowing government bureaucrats to engage in private business, especially with the state. As explained in chapter 2 above, those theoretical objections revolve mainly around: (i) the agency problem, (ii) public choice problems and (iii) various forms of market and institutional failures.

The Ndegwa Commission's recommendation, which allowed public servants to engage in private business, ignores or downplays the theoretical foundations for regulation in general, and public procurement regulation in particular. Notably, the recommendation appears to have influenced the evolution of policy and regulatory frameworks for public procurement in Kenya.[30] This is evidenced by (*inter alia*) the enactment of public procurement laws that only establish partial, lax and or easily surmountable restrictions on the eligibility of public servants and corporations associated with such servants to bid for public procurement contracts. To illustrate, the present and past public procurement rules on conflicts of interest do not expressly apply to members of a public servant's extended family.[31] Moreover, those rules have

---

[29] Ibid 14.

[30] On the general issue of whether Kenyan public servants can engage in private business, see *Stephen Kemei Kiptum & 2 Others v National Police Service Commission*, Employment and Labour Relations Court (Nairobi) Constitutional Petition No. 13 of 2015.

[31] See e.g. s 43 of the Public Procurement and Disposal Act, 2005. See also ss 55 (2), (3) and 66 of the Public Procurement and Asset Disposal Act, 2015.

always been drafted in a manner that easily lends them to circumvention or abuse, through intricate webs of offshore, shell, holding, subsidiary or related companies.

Kenya's practice of allowing public servants and corporations associated with such servants to bid for public procurement contracts can lead to many perverse outcomes. The practice could easily aggravate the agency and public choice problems that are naturally inherent in public procurement, by creating incentives for government bureaucrats to abuse discretion and selfishly exploit the informational asymmetry that naturally exists between them and the citizens. The practice can undermine the ultimate regulatory objective of Kenyan public procurement laws, which is to ensure that government bureaucrats make procurement decisions that promote the public interest as opposed to their own selfish private interests. It could also entrench governance challenges in the public procurement system, including corruption, favouritism and other forms of malfeasance.[32] In other words, Kenya's practice of allowing public servants and corporations associated with such servants to bid for public procurement contracts has arguably contributed to the phenomenon of regulatory ineffectiveness alluded to in section 3.2 of this chapter.

This study sought to establish regulatory and stakeholder perspectives on the prevailing Kenyan public procurement policy as discerned from state practice, in view of the absence of a comprehensive official policy framework on the subject. The key informants that participated in the study were asked, before introducing the

[32] Hornsby (n 9) 369-370.

dichotomy of economic and social policy objectives and the distinctions between them, to state what they perceived or believed to be the prevailing public procurement policy in Kenya and its main or overarching objective. Table 1 below sets out a summary of the data that were collected in this regard.

Table 1: Main Objective of Kenyan Public Procurement Policy

Response	**Frequency**	**Percentage**
Transparency	19	17%
Value for Money	17	15%
Efficiency	15	13%
Prevention of Corruption	11	10%
Fairness	11	10%
Equity	8	7%
Accountability	8	7%
Competition	6	5%
Obtaining the best quality goods and services	5	5%
Standardisation of Processes and Procedures	4	3%
Regulation of Processes and Procedures	3	3%
Promotion of Social Policy	3	3%
Facilitation of Acquisition of Goods and Services	1	1%
Public Confidence in the Procurement System	1	1%

Totals	**112**	**100**%

Participants variously identified fourteen different objectives as the main or overarching goals of the prevailing public procurement policy in Kenya (see Table 1 above). The responses depict regulatory and stakeholder confusion as to Kenya's public procurement policy and its main characteristics. It is difficult to establish an effective public procurement system where regulators and key stakeholders, such as the key informants that participated in this study, do not have a broad consensus on the overarching policy goals. The regulatory and stakeholder confusion implicit in the data set out in Table 1 vindicates the criticism, in section 3.2 above, of Kenya's tendency to enact public procurement laws before formulating a coherent public procurement policy framework.

Transparency, value for money, efficiency, probity (that is, prevention of corruption) and fairness respectively emerged as the main or overarching policy objectives of Kenyan public procurement laws, with a cumulative response frequency rate of 67% (See Table 1 above). This depicts regulatory and stakeholder inclination towards a predominantly market-oriented or economic approach to public procurement.[33] A general inclination to an economic approach to procurement is also evidenced by the fact that equity, which is arguably the general or overarching objective of social procurement, ranked sixth in the frequency rates of responses to the relevant

[33] See chapter 2 of this study on the cross-cutting or overlapping nature of some of objectives set out in Table 1, and their compatibility with both economic and social approaches to public procurement.

questions. Moreover, promotion of social policy ranked even lower, with a response frequency rate of 3%. The regulatory and stakeholder inclination to an economic approach to procurement, however, is fundamentally inconsistent with the prevailing laws.[34]

3.4 Policy and Regulatory Frameworks 2001—2010

The 2001-2010 years were characterised by the adoption of various policy and regulatory frameworks for public procurement in Kenya. As explained below, however, those policy and regulatory frameworks appeared ineffective and/or ill-suited for resolving the governance challenges that had characterised the pre-2001 years. Specifically, they appeared ineffective and/or ill-suited for resolving the Kenyan public procurement system's perennial problem of an ever-increasing incidence of corruption, favouritism and other forms of malfeasance. Further, and as explained below, the Government appeared apathetic to strict enforcement of the policy and regulatory frameworks for public procurement adopted during the 2001-2010 epoch.

3.4.1 The 2001 Regulations

In 2001, following pressure from the local business community, anti-corruption crusaders and multilateral donors (especially the World Bank and the International Monetary Fund), the Government of Kenya reluctantly adopted subsidiary legislation

[34] As discussed in section 3.5 below, the Public Procurement and Asset Disposal Act, 2015 obliges public agencies to: (i) integrate social objectives into all public procurements and (ii) commit 'at least' thirty percent their procurement budgets to promotion of social objectives.

for regulation of public procurement under the Exchequer and Audit Act.[35] The Exchequer and Audit (Public Procurement) Regulations, 2001 (hereinafter, "the 2001 regulations")[36] were based on the 1994 UNCITRAL Model Procurement Law.[37] The adoption of the 2001 regulations marked the beginning of formal legal regulation of public procurement in Kenya.

The 2001 regulations introduced many positive changes to the Kenyan public procurement system. These included: (i) establishment of a central organ for public procurement policy formulation and oversight of public procurement processes,[38] (ii) maintenance of public procurement records, (iii) publishing of all public procurement contract awards,[39] (iv) prohibition of all forms of discrimination,[40] (v) prohibition of the giving of inducements to government bureaucrats[41] and (vi) use of open tendering as the preferred method of procurement.[42] The 2001 regulations also introduced bid protest procedures, allowing disaffected tenderers to challenge public procurement

[35] The Exchequer and Audit Act, Chapter 412 of the Laws of Kenya. For further insights, see Udeh (n 11) 109-110.
[36] Ochieng and Muehle (n 10) 1767, Kimani (n 7) 1595-1596. See also Walter Odhiambo and Paul Kamau, 'Public Procurement: Lessons from Kenya, Tanzania and Uganda' (2003) OECD Working Paper No. 208, 17-20< *http://www.oecd.org/countries/uganda/2503452.pdf*>accessed 30 October 2017.
[37] Migai (n 13) 846.
[38] The 2001 regulations, reg 7.
[39] Ibid reg 10.
[40] Ibid reg 11.
[41] Ibid reg 16.
[42] Ibid reg 17.

decisions for the first time in Kenya's history.[43] Lastly, the 2001 regulations established sanctions (that is, fines and debarment) for malfeasance.[44]

The promulgation of the 2001 regulations was an important landmark in the evolution of regulatory frameworks for public procurement in Kenya, especially in view of the positive changes described in the preceding paragraph. The 2001 regulations, however, had many structural shortcomings. First, they did not provide for an effective standstill or suspension of procurement proceedings upon the filing of a bid protest.[45] This loophole effectively meant that procuring entities could frustrate or pre-empt administrative review of impugned public procurement decisions by entering into a contract with a preferred tenderer.[46] Secondly, the main sanction set out in the 2001 regulations, namely a fine of Kenya Shillings Two Million for individuals and Kenya Shillings Five Million for corporations, was too lenient to deter government bureaucrats from engaging in corruption, favouritism and other forms of malfeasance.[47] Thirdly, the subsidiary status of the 2001 regulations created a leeway for the Minister for Finance to amend or abrogate them at will.[48] Lastly, and as stated, the 2001 regulations were largely a rehash of the 1994 UNCITRAL Model Procurement

---

[43] Ibid regs 40-42.

[44] Ibid reg 46. The regulation stated that any person who breached any provision of the 2001 regulations 'commits an offence…' The maximum fine was Kenya Shillings Two Million for individuals, and Kenya Shillings Five Million for corporations.

[45] Ibid regs 33 (4) and 42 (5) (d).

[46] The research for this study did not find evidence of frequent or systemic abuse of the loophole.

[47] It is also debatable whether the constitutional framework prevailing in Kenya in 2001 (or even today) permitted the creation of criminal offences through subsidiary legislation in the absence of an enabling substantive statutory provision. The Exchequer and Audit Act, under which the 2001 regulations were promulgated, did not authorize the Minister for Finance to establish criminal offences.

[48] Migai (n 13) 846. The research for this study did not find evidence of capricious conduct by the Minister in this regard.

Law.[49] The 2001 regulations, therefore, were unlikely to effectively resolve the unique governance problems that had bogged down the Kenyan public procurement system for years. In other words, the external origins of the 2001 regulations and the omission to adapt for local circumstances made them ill-suited to address the entrenchment of corruption, favouritism and other forms of malfeasance in the Kenyan public procurement system.

Corruption, favouritism and other forms of malfeasance continued to thrive despite the adoption of the 2001 regulations and subsequent public procurement regulatory frameworks in Kenya. Commentators have attributed this paradox to two main factors. According to one view, the Government of Kenya had no real intention or incentive to enforce the 2001 regulations—having reluctantly adopted them merely to meet foreign donor conditionality and placate anti-corruption lobbies.[50] According to another view, the paradox is attributable to the unique history and political economy of Kenya.[51] The latter view attributes the ineffectiveness of the 2001 regulations and subsequent public procurement regulatory frameworks in Kenya to 'the *dirty trio*' of corruption, tribalism and impunity.[52]

Although historical and political economy explanations for the ineffectiveness of the 2001 regulations and subsequent public procurement regulatory frameworks in Kenya have considerable merit, they tend to proceed on the contestable assumption of the

---

[49] Udeh (n 11) 101-102.
[50] Ibid 844-845.
[51] See e.g. Kimani (n 7) 1597-1598.
[52] Ibid 1608.

structural soundness of the relevant regulatory frameworks. It is contradictory, and arguably anomalous, to describe a country whose procurement system is characterised by corruption, political patronage and other forms of favouritism and abuse as having a sound regulatory framework.[53] This study attributes the so-called '*dirty trio*' of corruption, tribalism and impunity to structural flaws in the present and past policy and regulatory frameworks for public procurement in Kenya. These structural flaws include: (i) formal grants of broad or insufficiently controlled discretion to government bureaucrats, (iii) permitting government bureaucrats and politicians to do business with the state and (iii) ill-thought sanctions for corruption, favouritism and other forms of malfeasance.

The 2001 regulations, which introduced formal public procurement regulation in Kenya for the first time, did not mention or even allude to social objectives. They did not also cover the broader idea of using public procurement as a policy tool. Instead, the 2001 regulations focused on economic or commercial objectives:

> The [main] purpose of these Regulations is to promote economy and efficiency in public procurement to ensure that public procurement procedures are conducted in a fair, transparent and non-discriminatory manner thereby contributing towards the creation of a sound business climate in Kenya.[54]

The economic or market orientation of the 2001 regulations can also be discerned from their provisions on choice of procurement method, termination of procurement

---

[53] For an excellent discussion on the weaknesses of similar studies, neopatrimonialism and the clash between formal laws and the prevailing political reality in Africa, see Migai Akech, *Administrative Law* (Strathmore University Press 2016) 13-18.

[54] The 2001 regulations, reg 4.

proceedings and tender award criteria. The 2001 regulations only allowed departure from open tendering 'exceptionally.'[55] Exceptional circumstances, however, were not sufficient to warrant departure from open tendering. The 2001 regulations additionally required government bureaucrats to justify departures from open tendering on 'sound economic grounds.'[56] Further, the 2001 regulations only permitted the termination of procurement proceedings on 'sound economic grounds.'[57] Lastly, the 2001 regulations provided for two alternative tender award criteria, both of which were largely economic in orientation. Specifically, the 2001 regulations permitted procuring entities to award public contracts to either: (i) the tenderer offering the lowest evaluated price, or (ii) the tenderer offering the lowest evaluated tender 'ascertained based on factors affecting the economic value' of the tender.[58]

The omission of social objectives from the 2001 regulations is hardly reconcilable with Kenya's status as a poor developing country, the history of discriminatory government policies (such as the 1965 blueprint) and the need to undo the legacy of such policies. Although the 1994 UNCITRAL Model Procurement Law (on which the 2001 regulations were modelled) was largely market-oriented, it permitted use of public procurement as a tool of social policy.[59] The Bretton Woods institutions' preference for a market approach to regulation, therefore, might offer a plausible explanation for the omission of social objectives from the 2001 regulations. As explained, Kenya adopted the 2001 regulations due mainly to pressure from the IMF and the World Bank. Critics

---

[55] Ibid reg 17 (4).
[56] Ibid.
[57] Ibid reg 15 (1).
[58] Ibid reg 30 (8).
[59] See e.g. Articles 34 and 39 of the 1994 UNCITRAL Model Procurement Law.

often accuse the two institutions of market fundamentalism, and, specifically, of unfairly requiring third world countries to adopt market-oriented regulation as a precondition for lending.[60]

The research for this study did not find any notable case law or commentary on the interplay between economic and social objectives under the 2001 regulations. This may be attributed to the market orientation of the 2001 regulations. Concerns over the high incidence of corruption, favouritism or other forms of malfeasance in the Kenyan public procurement system may also have overshadowed the question of interplay between economic and social objectives. Indeed, and as explained in the ensuing sections of this chapter, regulator and stakeholder interest in public procurement in Kenya has traditionally focused on: (i) economic objectives, (ii) procedural breaches and (iii) the incidence corruption, favouritism or other forms of malfeasance. In other words, social objectives did not feature in policy and regulatory discourses relating to the 2001 regulations.

The National Rainbow Coalition (hereinafter, "NARC"), a coalition of opposition political parties, won the 2002 general election. This ended the reign of the Kenya African National Union (hereinafter, "KANU"), the political party that ruled Kenya between the formal end of British colonial rule in 1963 and 2002. KANU's 40-year rule had been characterised by endemic corruption, human rights abuses and other

---

[60] For a critique of the Bretton Woods Institutions and their preference for a one-size-fits-all and largely market oriented approach to regulation in the third world, see Ngaire Woods, *The Globalizers: The IMF, the World Bank, and their Borrowers* (Cornell University Press 2006). See also Joseph Stiglitz and Narcís Serra (eds) *The Washington Consensus Reconsidered: Towards a New Global Governance* (OUP 2008).

governance challenges. The perverse socioeconomic and political consequences of these governance challenges had progressively led to deterioration and near collapse of the Kenyan economy by the year 2002.

NARC won the 2002 general election on the (rhetorical) promise of 'zero tolerance for corruption,' good governance and various public-sector reforms.[61] Indeed, NARC adopted many policies, governance and regulatory reforms to reverse the legacy of KANU's 40-year (mis)rule. The NARC reforms included the enactment of new public procurement, ethics and anti-corruption laws.

3.4.2 The 2005 Procurement Act

In 2005, the NARC government enacted the Public Procurement and Disposal Act (hereinafter, "the 2005 Procurement Act").[62] Rhetorically, the enactment of the 2005 Procurement Act easily passed off as part of NARC's policy of zero tolerance for corruption. In reality, the 2005 Procurement Act was part of a cluster of public finance management and good governance laws that multilateral donors—especially the World Bank and the International Monetary Fund—had required Kenya to enact as a precondition for the full resumption of lending.[63]

---

[61] Hornsby (n 9) 687.
[62] Act No. 3 of 2005.
[63] The others were the Anti-Corruption and Economic Crimes Act, 2003 and the Public Officer Ethics Act, 2003.

The 2005 Procurement Act carried forward most of, if not all, the structural shortcomings of the 2001 regulations.[64] Specifically, the 2005 Procurement Act was largely a rehash of the 2001 regulations, the only major difference between it and the latter being a superior status as a substantive Act of Parliament.[65] Moreover, the Government appeared reluctant to enforce the 2005 Procurement Act, just as it had shown a reluctance to adopt the 2001 regulations. Specifically, the Government delayed the implementation of the 2005 Procurement Act for two years, by failing to enact enabling subsidiary legislation.[66]

The delay in the enactment of the 2005 Procurement Act it may be attributed to several factors. These include: (i) lack of political will, (ii) the external origins of the 2005 Procurement Act (through foreign donor pressure) and (iii) resurgence of large-scale procurement corruption during the reign of the NARC government. Indeed, although NARC had won the 2002 general election on the mantra of 'zero tolerance for corruption,' procurement-related corruption scandals soon became its bane. The most notorious public procurement corruption scandal during the reign of NARC, popularly known as 'Anglo-Leasing,' revolved around eighteen multi-billion security contracts with a phantom company allegedly based in the United Kingdom. [67]

---

[64] Thiankolu (n 4) 451.
[65] Udeh (n 11) 109.
[66] Ochieng and Muehle (n 10) 1768.
[67] For a compelling account of public procurement corruption scandals under NARC, see Michela Wrong, *It's Our Turn to Eat: The Story of a Kenyan Whistle-Blower* (HarperCollins Publishers 2009).

After what appeared to be a deliberate two-year delay, the Government eventually promulgated subsidiary legislation to facilitate the implementation of the 2005 Procurement Act. The subsidiary legislation included the Public Procurement and Disposal Regulations, 2006 (hereinafter, "the 2006 regulations"),[68] the Public Procurement and Disposal (Preference and Reservations) Regulations, 2011 (hereinafter, "the 2011 Regulations"),[69] and the Public Procurement and Disposal (County Government) Regulations, 2013 (hereinafter, "the county government regulations"). [70]

The 2005 Procurement Act permitted the pursuit of both economic and social objectives.[71] It did not, however, give much guidance on interplay or resolution of conflicts between economic and social objectives. Instead, it simply empowered the Minister for Finance (now the Cabinet Secretary for Finance) to prescribe a regime of preferences and reservations 'in consideration of economic and social development factors.'[72]

A close examination of section 39 of the 2005 Procurement Act suggests that Parliament expected the Minister for Finance to consider the interplay of economic and social objectives in formulating schemes of preferences and reservations. The text of section 39 also suggests that Parliament expected the Minister to prescribe, through

---

[68] Legal Notice No. 174 of 2006.
[69] Legal Notice No. 58 of 2011.
[70] Legal Notice No. 60 of 2013.
[71] The 2005 Procurement Act, ss 2 and 39.
[72] Ibid s 39 (2).

subsidiary legislation, guidelines for resolving conflicts between economic and social objectives. The subsidiary legislation that the Minister for Finance made under the 2005 Procurement Act did not, however, provide any such guidelines. Instead, the subsidiary legislation simply required procuring entities to accord margins of preference and reserve certain tenders for specified groups. In any case, the Government did not promulgate any policy on the interplay between the economic and social objectives embodied in the 2005 Procurement Act. Further, the Government has never disclosed the specific 'economic and social development factors' that it considered in formulating the schemes of preferences and reservations embodied in subsidiary legislation promulgated under the 2005 Procurement Act.[73]

Although the 2005 Procurement Act allowed the pursuit of both economic and social objectives, its wording and structure suggested that it was founded on the assumption of the primacy of economic objectives over social objectives. To illustrate, section 2 of the 2005 Procurement Act set out six underlying objectives, only one of which was clearly social in character.[74] The listing of a single social objective against many economic objectives and the (intentional?) placement of that single social objective at

---

[73] There are three sets of relevant subsidiary legislation in this regard, namely: (i) the 2006 regulations, (ii) the 2011 Regulations and (iii) the county government regulations.

[74] Section 2 of the 2005 Procurement Act provided as follows:

2. Purpose of the Act

The purpose of this Act is to establish procedures for procurement and the disposal of unserviceable, obsolete or surplus stores and equipment by public entities to achieve the following objectives: —

(a) to maximise economy and efficiency;
(b) to promote competition and ensure that competitors are treated fairly;
(c) to promote the integrity and fairness of those procedures;
(d) to increase transparency and accountability in those procedures;
(e) to increase public confidence in those procedures; and
(f) to facilitate the promotion of local industry and economic development.

the bottom of the list led many public agencies to subordinate social objectives to economic objectives.

The market orientation of the 2005 Procurement Act led some agencies to disregard social objectives in their public procurements altogether. In *Republic v Public Procurement Administrative Review Board & Another* (hereinafter, "the De La Rue case"), for instance, the dispute revolved around two types of preferences, both tied to the objective of promoting domestic industry. The procuring entity declined to accord the complainant exclusive preference based on its Kenyan nationality because the value of the contract was above the threshold set out in Regulation 28 (1) of the 2006 regulations. The procuring entity omitted to consider Regulation 28 (2) of the 2006 regulations, which required it to give a 15% margin preference to candidates offering goods manufactured, mined, extracted and grown in Kenya. When challenged on this omission, the procuring entity argued that: (i) the social objectives embodied in the 2006 regulations were couched in discretionary language, (ii) the law granted it a discretion to decide whether to accord the complainant a margin of preference and (iii) it was not obliged to integrate social objectives into the procurement in question. The High Court rejected these arguments and quashed the procuring entity's decision. Notably, the High Court held that public agencies were obliged to integrate social objectives into their procurements even where the relevant legal provisions were couched in discretionary terms.[75]

[75] *Republic v Public Procurement Administrative Review Board & Another*, High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 540 of 2008.

The High Court gave two legalistic reasons for its decision in the De La Rue case. First, the procuring entity had failed to consider the full impact of all the relevant legal provisions. Secondly, the procuring entity had ignored the express terms of the tender documents, which had promised a 15% margin preference to candidates offering goods manufactured, mined, extracted and grown in Kenya.[76] The Court, however, might have offered a more cogent explanation by basing its decision on the need to promote a holistic approach to public procurement. Specifically, the Court could have based its decision on the need to encourage public entities to consider both economic and social objectives in all their procurements.[77]

3.4.3 The Kenya Vision 2030

The Kenya Vision 2030 (hereinafter, "the Vision 2030"), arguably the most important policy document formulated by NARC, was the prevailing long-term development policy blueprint for Kenya at the time of this study.[78] The main economic objective of the Vision 2030 is to transform Kenya into a 'globally competitive and prosperous country with a high quality of life by [the year] 2030.'[79] To achieve this objective, the Vision 2030 requires the Government to make huge infrastructural investments,

---

[76] Section 39 (8) (b) (i) of the 2005 Procurement Act stated, at the time of the dispute, that a prescribed margin of preference '*may*' be given in evaluation of bids to candidates offering goods manufactured, mined extracted and grown in Kenya. The word '*may*' connotes a discretion on the part of procuring entities.

[77] Parliament amended section 39 (8) (b) (i) of the 2005 Procurement Act following this decision, by replacing the word '*may*' with '*shall*.' This effectively put to rest the question of whether the integration of social objectives was mandatory or discretionary. As explained, section 2 of the 2005 Procurement Act required procuring entities to consider and promote both economic and social objectives.

[78] GoK, 'Kenya Vision 2030: A Globally Competitive and Prosperous Kenya' (Government Printer 2008).

[79] Ibid 93.

through flagship projects, in strategic sectors of the economy.[80] The main social objective of the Vision 2030, on the other hand, is to establish 'a just and cohesive society that enjoys equitable social development in a clean and secure environment.'[81] This is to be achieved through strategic investments and interventions in various social sectors, including: (i) education, (ii) health, (iii) water, (iv) sanitation, (iv) the environment and (v) housing.[82]

The achievement of the ambitious economic and social objectives embodied in the Vision 2030 depends on the existence of a sound regulatory framework for public procurement. Specifically, the delivery of the huge flagship infrastructural projects envisioned in the Vision 2030 entails huge public procurement expenditures for several consecutive years. The Vision 2030 does not, however, substantively address the subject of public procurement regulation. Instead, it only mentions public procurement in passing, in the context of general administrative and governance reforms required to achieve its ambitious development agenda.

Serious public procurement scandals and disputes have bogged down the delivery of important Vision 2030 flagship projects, due perhaps to the omission to substantively address the subject of public procurement regulation. Three illustrations may be given in this regard. First, and as elaborated in chapter 4 below, the Government was constrained to fundamentally alter a project for the provision of laptops to school

[80] Ibid vii.
[81] Ibid vii.
[82] Ibid 93-157.

children, which was designed to integrate information and communication technologies in the provision of basic education, due to incessant procurement disputes. Secondly, the procurement of a standard gauge railway, easily the single largest infrastructural project in Kenya's post-colonial history, was bogged down by serious transparency, probity and economic efficiency challenges.[83] Lastly, the Government was constrained to abandon the concession of a container terminal at Kenya's main seaport due to incessant procurement disputes.[84]

3.4.4 The Draft Procurement Policy

The Draft Long Term Policy Framework for Public Procurement in Kenya (hereinafter, "the Draft Procurement Policy") arguably embodies the most cogent effort to establish a coherent policy framework for public procurement in Kenya.[85] The Draft Procurement Policy espouses the pursuit of both economic and social objectives and calls for the integration of public procurement policy into Kenya's long-term macroeconomic development policy blueprints.[86] Further, the Draft Procurement Policy supports a contextual approach, as opposed to a doctrinaire, 'copy-paste' or

---

[83] See e.g. *Okiya Omtatah Okoiti & Another v Attorney General & 3 Others*, High Court of Kenya (Nairobi) Constitutional Petition No. 58 of 2014. As explained in the ensuing sections of this chapter, the High Court dismissed the case and controversially held that the Kenyan regulatory framework for public procurement did not apply to projects financed by foreign donors.

[84] See the decisions in *Republic v Public Private Partnerships Petition Committee (The Petition Committee) & 3 Others Ex-parte A P M Terminals*, High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 298 of 2015 and *Republic v Public Private Partnerships Petition Committee (The Petition Committee) 2 Others ex-parte International Container Terminal Services Inc. & Another*, High Court of Kenya (Nairobi) Miscellaneous Civil Applications Nos. 10 and 30 of 2016.

[85] GoK 'The Draft Long-term Policy Framework for Public Procurement in Kenya' (PPOA 2009).

[86] Ibid 22, 28.

one-size-fits-all approach, to public procurement regulation in Kenya.[87] The Government of Kenya, however, had not officially adopted (or rejected) the Draft Procurement Policy as at the time of this study.

Efficiency is the main, and arguably sole, economic objective of the Draft Procurement Policy. The social objectives of the Draft Procurement Policy, on the other hand, include: (i) the protection of the environment,[88] (ii) the promotion of micro, small and medium enterprises,[89] (iii) the promotion of domestic industry,[90] and (iv) the promotion of the employment of citizens.[91] The Draft Procurement Policy also espouses, as a means for achieving both economic and social objectives, commitment to the complementary or cross-cutting principles of (*inter alia*): transparency, accountability, competition, probity and fair dealing.[92]

The Draft Procurement Policy calls for a holistic approach to public procurement that takes due account of both economic and social objectives. In other words, the Draft Procurement Policy requires public agencies to strive to achieve a balance between economic and social objectives in their public procurements. Two examples may be given in this regard. First, the Draft Procurement Policy requires procuring entities to compile procurement specifications that include 'social, economic and environmental

[87] Ibid 47.
[88] Ibid 5.
[89] Ibid 11.
[90] Ibid 21.
[91] Ibid.
[92] Ibid 24-27.

policy objectives.'[93] Secondly, the Draft Procurement Policy emphasizes that 'price alone is not a sound indicator and procuring entities cannot necessarily get the best value for money by accepting the lowest bid.'[94]

3.5 Policy and Regulatory Frameworks after 2010

Various civic and religious groups incessantly pressed the Government to facilitate large-scale constitutional and legal reforms between the early 1990s and the early 2000s.[95] Generally, the clamour for comprehensive constitutional and legal reforms revolved around two main factors. These are: (i) egregious human rights violations by the KANU regime and (ii) the removal, between 1963 and 1990, of democratic and good governance safeguards imbedded in the independence constitution.[96]

3.5.1 The 2010 Constitution

On 27th August 2010, Kenya adopted a new Constitution (hereinafter, "the 2010 Constitution"). Kenyans adopted the 2010 Constitution as a means for securing long-term political stability following the eruption of large-scale violence after the declaration of the results of the disputed 2007 presidential election.[97] The 2010

---

[93] Ibid 22.

[94] Ibid.

[95] On the clamour for constitutional reforms in Kenya, and the legal controversies surrounding it, see Muthomi Thiankolu, 'The Constitutional Review Cases: Emerging Issues in Kenyan Jurisprudence' [2005] 2 East African Law Journal 122. See also *Njoya & Others v Attorney General & Others* [2004] 4 LRC 559 and *Patrick Ouma Onyango & 12 Others v Attorney General & 2 Others*, High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 677 of 2005.

[96] Ibid.

[97] GoK, 'Final Report of the Committee of Experts on Constitutional Review (Government Printer, 2010) 21-24.

Constitution was the most important regulatory framework for public procurement in Kenya at the time of this study, due to its special status as the supreme law of the Republic.[98]

The 2010 Constitution is 'transformative' in character.[99] This means that it seeks to bring large-scale egalitarian social change. In other words, the agenda of the 2010 Constitution goes beyond the typical liberal constitution's core objective of establishing and demarcating the mandates of the key organs of state.[100] Due to the transformative agenda, the regulatory scope of the 2010 Constitution transcends many matters which most countries regulate through ordinary legislation.[101] These include: (i) public procurement,[102] (ii) land and environment[103] and (iii) leadership and integrity.[104]

The achievement of the transformative agenda of the 2010 Constitution requires a value-centric approach, as opposed to a legal-centric or process-centric approach, to the interpretation and implementation of the normative and regulatory frameworks

---

[98] The 2010 Constitution, art 2.

[99] Godfrey Musila, 'Realizing the Transformative Promise of the Constitution and New Electoral Laws' in Godfrey Musila (Ed), *Handbook on Election Disputes in Kenya: Context, Legal Framework, Institutions and Jurisprudence* (Law Society of Kenya 2013) 2. For judicial opinions on the transformative character of the 2010 Constitution, see (*inter alia*) *Speaker of the Senate & Another v Attorney General & 4 Others* [2013] 2 Supreme Court Digest 1, 21-22, *George Bala v Attorney General*, High Court (Nairobi) Constitutional Petition No. 238 of 2016, para 57 et seq and *Republic v Speaker National Assembly & 4 Others ex-parte Coalition for Reform and Democracy (CORD)*, High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 657 of 2016, paras 85-95.

[100] Ibid.

[101] Ibid.

[102] The 2010 Constitution, art 227.

[103] Ibid, arts 60 to 72.

[104] Ibid arts 73 to 80.

set out therein.[105] Indeed, the courts have frequently disavowed a legalistic approach to the interpretation of the 2010 Constitution. In *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*,[106] for instance, the Supreme Court emphasized the need to consider nonlegal phenomena—such as the historical, social, cultural and political contexts of the country—when interpreting the 2010 Constitution.[107]

As the ensuing parts of this chapter will show, the 2010 Constitution pervades many aspects of public procurement regulation in Kenya. The 'constitutionalisation' of public procurement, that is the express and extensive application of constitutional norms to public procurement, however, is not a common approach to public procurement regulation.[108] The drafters of the 2010 Constitution seem to have borrowed this approach from South Africa. This is evidenced by the textual similarity between the constitutional provisions governing public procurement in the two countries. The similarity between Article 227 of the 2010 Constitution and section 217 of the Constitution of South Africa, which are almost identical, cannot be merely coincidental.

---

[105] *Communications Commission of Kenya v Royal Media Services & 5 Others*, Supreme Court Petition No. 14 of 2014, paras 364-368.
[106] *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*, Supreme Court Petition No. 2B of 2014.
[107] Ibid paras 232-234. See also *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others*, Civil Appeal (Nairobi) No. 105 of 2017 and *Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex-parte National Super Alliance (NASA) Kenya & 6 Others*, High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 378 of 2017.
[108] Phoebe Bolton, 'Government Procurement as a Policy Tool in South Africa' (2006) 6 (3) Journal of Public Procurement 193, 203.

Although Kenya borrowed the 'constitutionalisation' of public procurement (and much more) from South Africa, there are at least three significant contextual differences between the two countries. First, whereas both Kenya and South Africa have previously pursued discriminatory government policies, South Africa's experience has been remarkably different from Kenya's in terms of the scale, pervasiveness, legal entrenchment and pernicious effects of such policies. It is difficult, therefore, to justify Kenya's imitation of South Africa's constitutionalisation of public procurement regulation. Secondly, the application of constitutional norms to public procurement regulation in Kenya is more pervasive than in South Africa. Specifically, and as explained in the ensuing sections of this chapter, Kenya applies multiple constitutional provisions to public procurement, some of which have only become clearer in litigation. The application of the constitutional requirement of public participation to public procurement decisions, for instance, only became apparent to most stakeholders following high stakes litigation on a procurement for the printing of ballot papers for the 2017 general election.[109] Lastly, it is not clear whether the constitutionalisation of public procurement in Kenya was driven by its strategic importance as a tool for redressing past injustices, which was the main reason for constitutionalisation in South Africa.[110]

The absence of a policy statement on constitutionalisation of public procurement in Kenya, and the silence of preparatory documents preceding the promulgation of the

---

[109] *Independent Electoral and Boundaries Commission (IEBC) v The National Super Alliance (NASA) Kenya & 6 Others*, Civil Appeal (Nairobi) No. 224 of 2017. For a comprehensive analysis of this project, see Chapter 4 of this study.

[110] Bolton (n 32) 203. See also Phoebe Bolton, 'An Analysis of the Preferential Procurement Legislation in South Africa' (2007) 1 Public Procurement Law Review 36, 39.

2010 Constitution have left the issue to debate and speculation. Indeed, even the courts seem unsure of the reasons underlying the constitutionalisation of public procurement regulation in Kenya. As the Court of Appeal has observed:

> The mode of procurement of goods and services has thus been given constitutional significance. That demonstrates the importance Kenyans attached to public procurement, *perhaps* out of the realization that huge amounts of public resources are spent in procuring goods and services.[111]

Although public finance implications may offer a plausible explanation for the constitutionalisation of public procurement in Kenya, such implications are not unique to Kenya. As explained in chapter 1 above, public procurement has significant public finance implications in all countries. The governance challenges that have historically been associated with public procurement in Kenya, especially the high incidence of corruption, favouritism and other forms of malfeasance, might offer a more cogent explanation for the extensive application of constitutional norms to public procurement. The following excerpt, from a 2005 parliamentary debate, offers an apt situational depiction of the incidence of malfeasance in the Kenyan public procurement system:

> Procurement is also important because it is the single largest route through which misappropriation of public resources also occurs. It is the route through which a lot of funds are siphoned out of the Government and the Government is always short-changed. Indeed, the people of Kenya have lost billions of shillings through irregular procurement…a company called Anglo-Leasing was reportedly registered somewhere abroad…Nobody had ever seen the owners or directors of the company and yet the Government entered into a multi-billion shilling contract with it...The Goldenberg scandal occurred as a

---

[111] *Al Ghurair Printing and Publishing LLC v Coalition for Reforms and Democracy & 2 Others*, Civil Appeal (Nairobi) No. 63 of 2017, para 68.

> result of this country procuring services and goods which were never delivered...this country lost, according to a Public Investments Committee Report, money to the tune of Kshs.138 billion [that is, about US$1.3 billion]…We went to Kilifi District and found that the District Commissioner's house had been condemned to be inhabitable…then given to the DC's wife. The Government went to rent that same property which had been condemned and paid rent to the DC's wife…a High Court Judge was given six houses which had been condemned. He stayed in one and rented out the other five…[112]

The regulatory framework for public procurement set out in the 2010 Constitution may be divided into three main normative clusters. First, the 2010 Constitution establishes overarching values and principles that apply not only to public procurement but also to all other aspects of public administration. Secondly, the 2010 Constitution establishes specific values and principles for public procurement and the broader subject of public finance management. Thirdly, the 2010 Constitution expressly permits the use of public procurement as a policy tool and, for purposes of this study, as an instrument of social policy.

The conceptual foundations of the constitutional values, principles and objectives that apply to public procurement in Kenya transcend multiple disciplines. Accordingly, those values, principles and objectives might pull in different directions in any one given procurement context, hence the need for regulatory guidance on the resolution of conflicts among them. As explained in chapter 1 above, the common thread that runs through the values and principles set out in the 2010 Constitution, which forms the overarching agenda of the 2010 Constitution, is the establishment of a sound system of public administration in Kenya. Indeed, Article 47 of the 2010 Constitution,

---

[112] Public Procurement and Disposal Bill, 2005 Deb 05 July 2005 2116-2134.

which provides for the fundamental right to fair administrative action, applies to public procurement.[113] The 2010 Constitution also seeks to establish a public procurement system that embodies elements of sound economics while at the same time permitting the pursuit of broader social policy objectives necessary to establish a stable, egalitarian and cohesive society in Kenya.

Article 10 of the 2010 Constitution sets out 'national values and principles of governance' which transcend all spheres of public administration in Kenya. These values and principles include: (i) national unity, (ii) the rule of law, (iii) democracy, (iv) public participation, (v) equity, (vi) social justice, (vii) protection of the marginalised, (viii) good governance, (ix) integrity, (x) transparency and (xii) accountability.[114] These national values and principles of governance bind all state organs, state officers, public officers and all persons whenever any of them: (i) applies or interprets the 2010 Constitution, (ii) enacts, applies or interprets any law, or (iii) makes or implements public policy decisions.[115]

The national values and principles of governance set out in the 2010 Constitution apply to public procurement notwithstanding the existence of specific constitutional

---

[113] *Independent Electoral and Boundaries Commission (IEBC) v The National Super Alliance (NASA) Kenya & 6 Others*, Civil Appeal (Nairobi) No. 224 of 2017. On the application of the right of fair administrative action to public procurement in South Africa, see Phoebe Bolton, 'The Exclusion of Contractors from Government Contract Awards' (2006) 10 (1) Law, Democracy and Development 25, 43. The provisions of Article 47 of the 2010 Constitution on fair administrative action appear to be a 'copy paste' from section 33 of the Constitution of South Africa.

[114] The 2010 Constitution, arts 4 (2) and 10. See also *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others*, Civil Appeal (Nairobi) No. 105 of 2017.

[115] The 2010 Constitution, arts 4 (2) and 10. See also the 2015 Procurement Act, s 3 (a).

provisions dedicated to public procurement. In *Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex-parte National Super Alliance (NASA) Kenya & 6 Others*, an issue arose as to whether the national value and principle of public participation, set out in Article 10 (2) (a) of the 2010 Constitution, applied to a tender for the supply of ballot papers and other election materials.[116] The IEBC argued that it was not obliged to incorporate public participation into the tender since this national value and principle was not expressly imported into Article 227, which specifically dealt with the subject of public procurement. The High Court rejected this argument and held that the national values and principles set out in Article 10 of the 2010 Constitution formed the foundation of the nation and thus bound all state organs, state officers, public officers and all persons at all times.[117]

The Court of Appeal held, in an appeal from the case discussed in the preceding paragraph, that the national values and principles of governance set out in Article 10 of the 2010 Constitution are immediate and justiciable.[118] In other words, the national values and principles of governance set out in Article 10 of the 2010 Constitution are not merely aspirational or directory.[119] This means, *inter alia*, that a disaffected person can lodge a legal challenge against a public procurement decision which is inconsistent

---

[116] *Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex-parte National Super Alliance (NASA) Kenya & 6 Others*, High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 378 of 2017.
[117] Ibid paras 171-173. See also *Independent Electoral and Boundaries Commission (IEBC) v The National Super Alliance (NASA) Kenya & 6 Others*, Civil Appeal (Nairobi) No. 224 of 2017, para 123.
[118] *Independent Electoral and Boundaries Commission (IEBC) v The National Super Alliance (NASA) Kenya & 6 Others*, Civil Appeal (Nairobi) No. 224 of 2017, para 76.
[119] Ibid.

with the national values and principles of governance even where the procuring entity has not breached any technical or procedural procurement rules.

In *Abdalla Abubakar Miraj & Another v Kenya Ferry Services*, however, the High Court held that alleged breaches of the principles set out in Article 227 of the 2010 Constitution must be ventilated in accordance with the procedural framework set out in relevant public procurement laws.[120] This decision is wrong and *per incuriam*.[121] In particular, the decision is inconsistent with the text of the 2010 Constitution, which gives every person a right to institute court proceedings, usually in the form of a constitutional petition, claiming its contravention.[122]

Parliament has, through legislation, expressly incorporated the national values and principles of governance to the regulatory framework for public procurement.[123] Whereas this parliamentary intervention is laudable, it is arguably superfluous. The 2010 Constitution demands mandatory compliance with the national values and

---

[120] *Abdalla Abubakar Miraj & Another v Kenya Ferry Services*, High Court of Kenya (Mombasa) Constitutional Petition No. 1 of 2015.

[121] The decision is based on a controversial rule developed by the courts prior to the adoption of the 2010 Constitution. The rule, which requires litigants to invoke statutory dispute resolution procedures instead of filing constitutional petitions, evolved mainly in the context of election petitions and other political disputes. For leading cases on the rule, see (*inter alia*) *Speaker of the National Assembly v Karume* [2008] 1 KLR (EP) 425, *Kones v Republic & Another ex-parte Kimani Wanyoike & 4 Others* [2008] 3 KLR (EP) 291 and *Wanyoike v Election Commission & Another* (No. 2) [2008] 2 KLR (EP) 43.

[122] The 2010 Constitution, arts 3 (1), 22 (1) and 258 (1).

[123] The 2015 Procurement Act, s 3 (a):

3. Guiding principles

Public procurement and asset disposal by State organs and public entities shall be guided by the following values and principles of the Constitution and relevant legislation—

(a) the national values and principles provided for under Article 10;

(b) …

principles of governance at all times, without exception and irrespective of any parliamentary enactment.[124] Indeed, Parliament has no power to enact any laws purporting to amend the national values and principles of governance set out in Article 10 of the 2010 Constitution.[125]

Article 227 (1) of the 2010 Constitution sets out specific values and principles for public procurement. It provides that when a state organ or any other public entity contracts for goods or services, it shall do so 'in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.' As explained in chapter 1 above, Article 227 (1) of the 2010 Constitution embodies both economic and social approaches to public procurement. The difficulty that arises from this, as stated, is the resolution of the conflict that often arises from the concurrent pursuit of the two species of objectives. The conjunctive language used in Article 227 (1), which suggests compliance with all the listed values and principles in all public procurement contexts, complicates the problem, especially in situations where economic and social objectives pull in different directions. The 2010 Constitution, however, does not offer any guidance on resolving conflicts between the two species of objectives.

As explained in chapter 1 above, public procurement constitutes a significant portion of government expenditure.[126] It is not merely coincidental, therefore, that Article 227

---

[124] *Independent Electoral and Boundaries Commission (IEBC) v The National Super Alliance (NASA) Kenya & 6 Others*, Civil Appeal (Nairobi) No. 224 of 2017, paras 76-81. See also *Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex-parte National Super Alliance (NASA) Kenya & 6 Others*, High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 378 of 2017, para 175.
[125] The 2010 Constitution, art 255 (1) (d).
[126] Migai (n 13) 839.

appears in the public finance chapter of the 2010 Constitution.[127] The 2010 Constitution sets out, in addition to the specific values and principles for public procurement set out in Article 227 (1), several normative values and principles for the broader subject of public finance management.[128] These values and principles (of public finance management) include: (i) public participation, (ii) inter-generational equity, (iii) equitable development of the country, (iv) special provision for marginalised groups and (v) prudent and responsible use of public money.[129] These values and principles have their foundation in the 2010 Constitution's transformative agenda of establishing social justice and a more egalitarian, stable and cohesive society in Kenya. Their application to public procurement, therefore, is an acknowledgment of the strategic role that public procurement can play in promoting social justice and redressing social exclusion, extreme inequalities and other wicked problems in Kenya.

As explained in section 3.5.2 below, Parliament has expressly applied the constitutional values and principles of public finance management to public procurement.[130] This may have been informed by public finance implications of public procurement, which, as explained in chapter 1 above, constitutes a significant portion of public expenditure. Parliament has also expressly applied the 2010 Constitution's provisions on: equality and freedom from discrimination, affirmative action programmes and principles of public service to public procurement.[131]

---

[127] The 2010 Constitution, arts 201 to 227.
[128] Ibid art 201.
[129] Ibid art 201.
[130] The 2015 Procurement Act, s 3 (e).
[131] Ibid ss 3 (b), (c) and (f).

Article 227 (2) of the 2010 Constitution requires Parliament to prescribe, through legislation, 'a framework within which policies relating to procurement and asset disposal shall be implemented.' Such policies, Article 227 (2) of the 2010 Constitution further states, may include categories of preference in the allocation of contracts and the protection or advancement of persons or groups previously disadvantaged by unfair competition or discrimination. The historical context for this lies in Kenya's history of discriminatory government policies (such as the 1965 blueprint) and the country's failure to take measures to mitigate the distortions and inequalities that often arise from the unmitigated pursuit of free-market policies. Article 227 (2) of the 2010 Constitution also permits the use of public procurement as a tool for imposing sanctions against: (i) contractors who have not performed according to professionally regulated procedures, contractual agreements or legislation (ii) persons who have defaulted on their tax obligations, (iii) persons who have been guilty of corrupt practices, or (iv) persons who have been guilty of serious violations of fair employment laws and practices.

Most of the objectives set out in Article 227 (2) of the 2010 Constitution are indisputably social in character. In other words, Article 227 (2) of the 2010 Constitution has little to do with economic efficiency or commitment to markets as the appropriate mechanism for allocating society's scarce resources. It is possible, however, to provide a cogent economic rationale and justification for those same objectives.[132] To illustrate, rational selfish tenderers seeking to maximize profit would naturally have a strong incentive

[132] For a superb analysis of the interplay between economic and social regulation, including conceptualisations of the former as a subset of the latter and vice versa, see Eric Windholz and Graeme Hodge, 'Conceptualising Social and Economic Regulation: Implications for Modern Regulators and Regulatory Activity' (2012) 38 (2) Monash University Law Review 212.

to (*inter alia*): (i) disregard professional procedures or prescribed standards, (ii) evade tax, or (iii) breach fair employment rights in the absence of the sanctions envisioned in Article 227 (2) of the 2010 Constitution. This, in turn, would distort public procurement markets and undermine the economic objective of (fair) competition. To put it in economics parlance, the economic rationale for the social objectives set out in Article 227 (2) of the 2010 Constitution lies in the need to internalise externalities and factor hidden costs. As explained in chapter 2 above, externalities and hidden costs are frequent causes of the market failures that form the main economic basis for public procurement regulation.[133]

The wording of Article 227 (2) of the 2010 Constitution suggests that the policies and objectives listed therein are merely illustrative. In other words, Article 227 (2) of the 2010 Constitution gives a wide discretion on the types of social objectives that can be integrated into Kenya's regulatory framework for public procurement. Indeed, and as explained in section 3.5.2 below, Parliament has integrated social objectives that are not expressly mentioned in Article 227 (2) of the 2010 Constitution into the regulatory framework for public procurement in Kenya.

The 2010 Constitution demands mandatory compliance with the values and principles of set out therein.[134] As explained in section 3.5.2 below, however, the courts have been equivocal on the application of constitutional values and principles to procurements that are characterised by foreign financing or urgency. There are three possible

[133] Trepte (n 3) 9-10.
[134] The Constitution, arts 3 and 10 (1).

explanations for this. First, strict enforcement of constitutional values and principles, especially those relating to transparency and competitive bidding, might be impracticable in such contexts. Foreign donors, for instance, often insist that contracts for projects that they finance be awarded to specified contractors or contractors from specified countries, which offends the constitutional principle of competitive procurement. Secondly, the reluctance of the courts to enforce constitutional values and principles in these contexts might reflect Kenya's apparently entrenched culture of impunity and reluctance to strictly enforce the regulatory framework for public procurement. Lastly, the reluctance may be evidence of practical difficulties that may arise from poor or ill-thought constitutional design, especially regarding public procurements that are characterised by foreign financing and urgency. In other words, the reluctance of the courts to strictly enforce constitutional values and principles in certain procurement contexts might be attributed to Kenya's uncritical imitation of existing public procurement regulatory models without adapting them to local needs and circumstances.

A few examples may be given of the courts' reluctance to strictly enforce constitutional values and principles in certain public procurement contexts. In *Independent Electoral and Boundaries Commission (IEBC) v The National Super Alliance (NASA) Kenya & 6 Others*,[135] the IEBC repeatedly bungled the procurement of ballot papers for the 2017 general election, apparently with a view to creating an artificial urgency and thus justifying the award of the tender to a pre-determined tenderer through direct

[135] *Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex-parte National Super Alliance (NASA) Kenya & 6 Others*, High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 378 of 2017. For a comprehensive discussion of this and related cases, see Chapter 4 of this study.

procurement.[136] This triggered multiple cases at the Review Board and in the courts. On 7th July 2017, just a month to the general election, the High Court nullified the tender for breach of various constitutional values and principles, especially the one relating to public participation, and directed the IEBC to commence the procurement process *de novo*.[137] A fortnight later, the Court of Appeal reversed the decision and held, contrary to a plain reading of Article 10 of the 2010 Constitution, that the principle of public participation did not apply to direct procurement or procurements characterised by urgency and other public interest considerations.[138] This decision contradicts a prior decision of the Court of Appeal on the same tender.

In *Al Ghurair Printing and Publishing LLC v Coalition for Reforms and Democracy & 2 Others*, the Court of Appeal had affirmed a High Court decision to the effect that a breach of constitutional values and principles applicable to public procurement could not be excused on urgency and other public interest considerations.[139] The contradictions between the two judgments create regulatory confusion and ineffectiveness. The contradictions also aggravate the agency and public choice problems that are naturally inherent in public procurement, by creating perverse incentives for government bureaucrats to deliberately delay or bungle public

---

[136] The IEBC had similarly deliberately delayed and bungled the procurement of election materials for the 2013 general election, leading to a catastrophic failure of the technology employed in that election. For further insights on this, see *Raila Odinga v Independent Electoral and Boundaries Commission & 3 Others*, Supreme Court Petition No. 5 of 2013, para 234.

[137] *Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex-parte National Super Alliance (NASA) Kenya & 6 Others*, High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 378 of 2017, paras 231-236.

[138] *Independent Electoral and Boundaries Commission (IEBC) v The National Super Alliance (NASA) Kenya & 6 Others*, Civil Appeal (Nairobi) No. 224 of 2017.

[139] *Al Ghurair Printing and Publishing LLC v Coalition for Reforms and Democracy & 2 Others*, Civil Appeal (Nairobi) No. 63 of 2017 para 99.

procurement processes with a view to awarding tenders to preferred or predetermined tenderers by way of direct procurement.

In *Okiya Omtatah Okoiti & Another v Attorney General & 3 Others*,[140] the petitioner alleged that the Government of Kenya had awarded a contract for the construction of a 500-kilometre standard gauge railway to a Chinese company without competitive bidding, contrary to Article 227 (1) of the 2010 Constitution. The petitioner also contended that the contract price, estimated at US$ 4 billion, was grossly inflated (presumably to facilitate the payment of kickbacks to government bureaucrats). The respondents, on the other hand, contended that the contract in question had been awarded by way of government-to-government procurement, and that such procurements were exempt from the regulatory framework set out in the 2005 Procurement Act.[141] The High Court dismissed the case and held, contrary to a plain reading of Article 227 (1) of the 2010 Constitution, that the 2005 Procurement Act did not apply to procurements financed by loans or grants negotiated with foreign governments.[142] The court further held that it had no jurisdiction to interrogate whether a condition in the lending agreement requiring the procuring entity to award the contract to a specified contractor was oppressive.[143]

---

[140] *Okiya Omtatah Okoiti & Another v Attorney General & 3 Others*, High Court of Kenya (Nairobi) Constitutional Petition No. 58 of 2014.
[141] The 2005 Procurement Act, s 6 (1).
[142] *Okiya Omtatah Okoiti & Another v Attorney General & 3 Others*, High Court of Kenya (Nairobi) Constitutional Petition No. 58 of 2014, paras 65-66.
[143] Ibid. The Court of Appeal reversed the High Court's decision on the issue of exemption of the project from the provisions of Article 227 of the Constitution. For further details, see *Okiya Omtatah Okoiti & Another v Attorney General & 4 Others*, Civil Appeal (Nairobi) No. 13 of 2015.

The courts have exempted many other donor-funded projects from the regulatory framework for public procurement.[144] The cumulative effect of the relevant decisions has been to exempt the so-called government-to-government procurement and donor-funded projects from the regulatory framework set out in the 2010 Constitution and relevant public procurement laws. The courts might have unwittingly created this perverse outcome out of a genuine and pragmatic need to allow the Government to harness desperately needed foreign aid in delivering important development projects. The relevant court decisions, however, offend the 2010 Constitution in three ways. First, they have entrenched an extra-legal procurement method (that is the so-called 'government-to-government' procurement).[145] Secondly, they have given government bureaucrats a leeway for evading the transparency and accountability mechanisms set out in the 2010 Constitution and relevant public procurement laws. Lastly, the exemption of certain public procurements from regulation violates the constitutional requirement for all public procurements to be done in a manner that is 'fair, equitable, transparent, competitive and cost-effective,' and in accordance with a regulatory framework enacted by Parliament.[146]

The 2010 Constitution is arguably the most important landmark in the evolution of regulatory frameworks for public procurement in Kenya, especially in view of its special status as the supreme law of the Republic. As explained in Chapter 1, the

---

[144] See e.g. the decisions in *Revital Health (EPZ) Limited v Public Procurement Oversight Authority & 6 Others*, High Court of Kenya (Mombasa) Constitutional Petition No. 75 of 2012 and *Kenya Medical Supplies Authority v Revital Health (EPZ) Limited & 2 Others*, Civil Appeal (Mombasa) No. 65 of 2016.

[145] The so-called 'government-to-government' procurement method has increasingly become popular in Kenya, especially in high-value infrastructure projects.

[146] The 2010 Constitution, art 227.

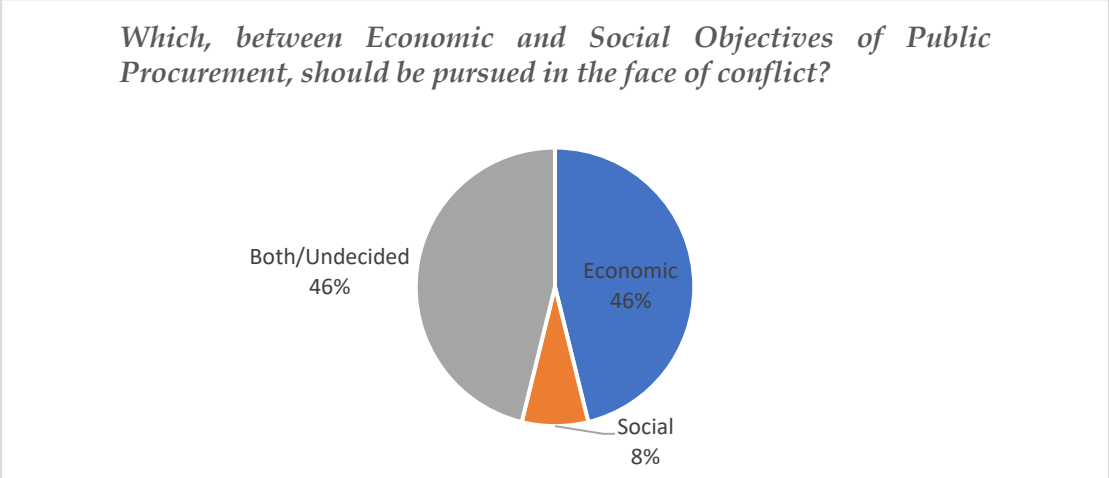
constitutional requirement for Kenya's procurement system to be transparent, competitive and cost-effective points to an economic or market approach to public procurement. The constitutional requirement for the public procurement system to promote (*inter alia*): fairness, equity, equality, marginalised groups and equitable development of the country, on the other hand, points to a social or egalitarian approach to public procurement. Further, the constitutional sanction for the use of public procurement to enforce (*inter alia*): tax laws, professional and other standards and anti-corruption laws points to the broader idea of using public procurement as a tool for promoting various economic, social and political objectives.

The 2010 Constitution does not, expressly or by implication, give primacy to either economic or social objectives in public procurement. Instead, it espouses a holistic approach to public procurement characterised by the pursuit of both species of objectives. Further, the 2010 Constitution does not embody the dichotomy of 'primary' and 'secondary' objectives of public procurement regulation found in most academic literature. Lastly, and more importantly for this study, the 2010 Constitution does not address the resolution of the conflict that often arises from the concurrent pursuit of both economic and social objectives in public procurement. This study, therefore, sought to establish regulatory and stakeholder perspectives on whether economic or social objectives should enjoy priority or primacy in cases of conflict between the two species of objectives.

Sixty-five percent of the key informants that participated in the study agreed that the economic and social objectives embodied Kenyan public procurement laws often conflict. This result is consistent with the existence of the problem that forms the focus

of this study. Forty-six percent of the participants stated that economic objectives should enjoy priority or primacy over social objectives. An equal percentage of participants (that is, forty-six percent), did not express a preference for either economic or social objectives as a means for resolving the conflict. Figure 2 below sets out a summary of data collected on the resolution of conflicts between economic and social objectives.

Figure 2: Resolving the Dilemma of Conflicting Objectives



The data in Figure 2 above confirms the first hypothesis of this study (that the regulatory framework for public procurement in Kenya does not facilitate the resolution of conflicts between economic and social objectives). The data in Figure 2 above also casts doubt on the correctness of the frequent depiction, discussed in chapter 2 above, of economic efficiency as the 'primary' or overriding objective of public procurement regulation. The 46% response frequency rate for economic objectives, though significant, was less than half of the total response frequency rates. Moreover, the 46% response frequency rate for 'both/undecided' is consistent with

the idea, discussed in chapter 2 above, of interdependence, complementarity and overlap between economic and social policy.

The conjunctive language used in Article 227 of the 2010 Constitution, and the multiple constitutional values and principles that apply to public procurement in Kenya, with diverse conceptual foundations, complicate the challenge of resolving conflicts between economic and social objectives. The holistic interpretational approach adopted in *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others*,[147] which requires courts to rationalise and give effect to all constitutional provisions even in the face of apparent gaps and conflicts, also complicates the challenge.[148] The Court of Appeal adopted this holistic interpretational approach to avoid the perverse consequences of the atomistic approach that the IEBC had urged in order to avoid the application of Article 10 of the 2010 Constitution, which sets out national values and principles of governance, to its public procurements.

Public procurement disputes litigated in the courts from a constitutional perspective have had ample potential opportunities for amplifying the law on interplay and resolution of conflicts between economic and social objectives. Litigants, however, tend to focus on: (i) technical legalistic interpretations, (ii) economic objectives and (iii) procedural irregularities.[149] Put differently, there had been no notable constitutional

---

[147] *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others*, Civil Appeal (Nairobi) No. 105 of 2017.
[148] Ibid paras 172-173.
[149] See e.g. *Republic v Public Procurement Administrative Review Board ex-parte Simba Pharmaceuticals Ltd & 2 Others,* High Court (Nairobi) Miscellaneous Civil Application No. 185 of 2017.

litigation, as at the time of this study, on interplay or resolution of conflicts between economic and social objectives of public procurement regulation in Kenya.

The 2010 Constitution required Parliament to enact new laws on diverse subjects within specified timeframes.[150] Specifically, the 2010 Constitution required Parliament to enact a new regulatory framework for public procurement within four years.[151] The Government inexplicably failed to meet this constitutional deadline, which initially fell on 27th August 2014. On 18th December 2015, sixteen months after the initial deadline, Parliament enacted the Public Procurement and Asset Disposal Act, 2015 (hereinafter, "the 2015 Procurement Act").

3.5.2 The 2015 Procurement Act

The 2015 Procurement Act, which came into effect on 7th January 2015, repealed and replaced the 2005 Procurement Act. The 2010 Constitution envisioned a transformative new public procurement law, radically different from the 2005 Procurement Act. Specifically, the 2010 Constitution envisioned a public procurement law carefully designed to facilitate the achievement of the overarching transformative agenda of establishing a just, cohesive and egalitarian society in Kenya. This can be gleaned from (*inter alia*) the provisions of Article 261 of the 2010 Constitution as read with the Fifth and Sixth Schedules. Article 261 required Parliament to enact many new laws, including a new public procurement law, to give effect to the 2010 Constitution. Indeed, the entire 2010 Constitution was based on the presumption of obsolescence or

[150] The 2010 Constitution, art 261 (1).
[151] Ibid art 227 (2) (as read with the Fifth Schedule).

the unsuitability of pre-existing laws, including the 2005 Procurement Act. This presumption lies at the heart of the requirement to read all pre-existing laws (including the 2005 Procurement Act) with the alterations, adaptations, qualifications and exceptions necessary to bring them into conformity with the 2010 Constitution.[152]

The 2015 Procurement Act is arguably inconsistent with the underlying constitutional agenda of transformation of the Kenyan nation-state to the extent that it is a rehash of the 2005 Procurement Act. One could also argue that the statutory framework for the regulation of public procurement in Kenya has not changed much since 2001. This is because: (i) the 2015 Act is largely a rehash of the 2005 Procurement Act, (ii) the latter was largely a rehash of the 2001 regulations and (iii) the last was largely a rehash of the 1994 UNCITRAL Model Procurement Law.

Generally, the 2015 Procurement Act applies to all Kenyan state organs and public entities.[153] State organs and public entities cannot, therefore, claim exemption from the regulatory scheme set out in the 2015 Procurement Act. Some entities, however, have sought exemption from Kenyan public procurement laws, either generally or with respect to specific procurements.

In *Githunguri Dairy Farmers Co-operative Society Ltd v Attorney General & 2 Others*,[154] for instance, the petitioner contested the constitutionality of section 3 of the 2005

---

[152] Ibid Sixth Schedule, Clause 7 (1).
[153] The 2015 Procurement Act, s 4 (1).
[154] *Githunguri Dairy Farmers Co-Operative Society Ltd v Attorney General & 2 Others*, High Court of Kenya (Nairobi) Constitutional Petition No. 257 of 2015.

Procurement Act and circulars issued by the National Treasury and the Public Procurement Regulatory Authority (hereinafter, "the PPRA") in 2015. The circulars had extended the regulatory framework for public procurement to cooperative societies. The petitioner contended that cooperative societies that neither received nor used public funds were not public entities. Accordingly, the petitioner further argued, it was unconstitutional and an unreasonable restriction of the freedom of contract for Parliament to subject cooperatives to public procurement laws. The High Court upheld this argument and rejected the state's contention that the huge social and economic role played by cooperatives in the country justified the application of public procurement laws to them.

In *Electoral Commission of Kenya v Attorney General & 2 Others*,[155] the defunct Electoral Commission of Kenya (hereinafter, "the ECK") claimed exemption from the regulatory framework set out in the 2005 Procurement Act. Specifically, the ECK argued that since it was subject to alternative transparency and accountability mechanisms, which entailed making regular reports to Parliament, it should not have been subjected to the regulatory framework set out in the 2005 Procurement Act. The High Court controversially upheld this spurious argument, contrary to the express inclusion of 'commissions established under the Constitution' as public entities to which the 2005 Procurement Act was applicable.[156] In *Association of Retirement Benefits Schemes v Attorney General & 3 Others*,[157] however, the High Court rejected a similar

---

[155] *Electoral Commission of Kenya v Attorney General & 2 Others*, High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 415 of 2008.
[156] The 2005 Procurement Act, s 3.
[157] *Association of Retirement Benefits Schemes v Attorney General & 3 Others*, High Court of Kenya (Nairobi) Constitutional Petition No. 170 of 2016.

argument and held that the subjection of retirement benefits schemes to the regulatory framework for public procurement was constitutional.

The regulatory scope of the 2015 Procurement Act extends to: (i) procurement planning, (ii) procurement processing, (iii) inventory and asset management, (iv) disposal of assets and (v) contract management.[158] In other words, the regulatory scope of the 2015 Procurement Act extends to the entire supply chain.[159]

Section 4 (2) of the 2015 Procurement Act exempts (*inter alia*) public-private partnerships and procurements under bilateral or multilateral agreements from the regulatory framework set out therein.[160] These exemptions are arguably unconstitutional in two respects. First, the 2010 Constitution envisions a single public procurement regulatory framework that applies to all state organs, and all public entities, at all times.[161] The exemption of certain types of public procurement from the regulatory scheme set out in the 2015 Procurement Act, or regulation of various aspects of public procurement through different statutes, therefore, is of questionable constitutional validity. Secondly, the exemptions set out in section 4 (2) of the 2015

---

[158] The 2015 Procurement Act, s 4 (1).

[159] Section 47 (1) of the 2015 Procurement Act requires public agencies to ensure that procurement professionals head their procurement departments. Section 2 of the 2015 Procurement Act defines a procurement professional as 'a person who has professional qualifications in procurement or supply chain management from a recognised institution and is a member of the Kenya Institute of Supplies Management established under the Supplies Practitioners Management Act, 2007 (No. 20 of 2007.'

[160] Prior to 2013, Kenya regulated public private partnerships through public procurement laws. The current regulatory framework for public private partnerships is set out in the Public Private Partnerships Act, 2013 and subsidiary legislation made thereunder.

[161] The 2010 Constitution, art 227 (2).

Procurement Act leave certain public procurements, especially those involving foreign donors and lenders, unregulated.[162]

Although Parliament has exempted public-private partnerships from the regulatory framework set out in the 2015 Procurement Act, the courts have held that such arrangements are public procurements and hence subject to the regulatory scope of the 2010 Constitution. In *Erick Okeyo v County Government of Kisumu & 2 Others*,[163] for instance, the High Court quashed a 15-year public-private partnership contract for solid waste management, estimated at US$ 12 million, because it had been awarded without competitive bidding and public participation. Specifically, the High Court held that public-private partnerships are public procurements within the meaning of Article 227 of the 2010 Constitution and hence subject to the requirements of competitive bidding and public participation. In *Kenya Transport Association v Municipal Council of Mombasa & Another*,[164] the High Court similarly nullified a public-private partnership contract, holding that it had been awarded in contravention of the 2010 Constitution and the law. Here, the respondent had secretly awarded a contract for the management of parking within the Kenyan coastal city of Mombasa. Under the contract, the private entity was to collect US$ 8.50 for every motor vehicle parked in the municipality, but only remit US$ 3.00 to the County Government.

---

[162] See e.g. *Okiya Omtatah Okoiti & 2 Others v Attorney General & 3 Others*, High Court of Kenya (Nairobi) Constitutional Petition No. 58 of 2014.
[163] *Erick Okeyo v County Government of Kisumu & 2 Others*, for instance, High Court of Kenya (Kisumu) Constitutional Petition No. 1A of 2014.
[164] *Kenya Transport Association v Municipal Council of Mombasa & Another*, High Court of Kenya (Mombasa) Constitutional Petition No. 6 of 2011.

The overall objective of the 2015 Procurement Act is to give effect to Article 227 of the 2010 Constitution and to establish procedures for efficient public procurement and disposal of assets by public entities.[165]Although the preamble is not clear on the point, a holistic reading of the 2015 Procurement Act suggests that the phrase 'efficient public procurement' refers to efficiency in both the strict economic sense of allocative efficiency and the broader sense of bureaucratic or administrative expedition.

Although the preamble to the 2015 Procurement Act says that its overall objective is to implement Article 227 of the 2010 Constitution, the application of constitutional norms to public procurement in Kenya is not confined to Article 227. The 2015 Procurement Act incorporates, in addition to Article 227, many other constitutional provisions into the regulatory framework for public procurement.[166] These include the provisions on: (i) national values and principles of governance,[167] (ii) equality and freedom from discrimination,[168] (iii) affirmative action programs,[169] (iv) principles of public finance,[170] and (v) values and principles of the public service.[171]

Although the overall objective of the 2015 Procurement Act is to give effect to Article 227 of the 2010 Constitution, the Act contains provisions that are either patently unconstitutional or of doubtful constitutional validity. To illustrate, the 2015 Act

---

[165] The 2015 Procurement Act, preamble.
[166] Ibid s 3.
[167] The 2010 Constitution, art 10.
[168] Ibid art 27.
[169] Ibid arts 55 and 56.
[170] Ibid art 201.
[171] Ibid art 232.

requires disaffected tenderers to deposit at least 10% of the value of the contract as a precondition for seeking redress at the Review Board and the courts.[172] This requirement has the potential to vitiate many constitutional provisions, including those relating to: access to justice,[173] fair administrative action,[174] equality and non-discrimination,[175] fair trial,[176] and fairness and transparency in public procurement procedures.[177] The Review Board had, as at the time of this study, struck out at least one case and refused to consider the issue of the constitutionality of the requirement for disaffected bidders to pay huge deposits as a precondition for admissibility of disputes.[178]

The 2015 Procurement Act also contains many provisions that unreasonably interfere with judicial power and discretion, contrary to constitutional provisions on judicial independence and separation of powers. Section 169 of the 2015 Procurement Act, for instance, purports to allow the Review Board's Secretariat, a non-judicial body, to reject requests for review for non-payment of fees. Sections 175 (3), (4) and (5), on the other hand, purport to give effect to decisions of the Review Board where the courts are unable to determine judicial review applications and appeals within prescribed

---

[172] The 2015 Procurement Act, ss 167 (2) 169, 175 (2).

[173] The 2010 Constitution, art 48. On the interplay between the right of access to justice and cash deposit requirements, see *Dyanabo v Attorney General* [2001] 2 EA 485 and *R (UNISON) v Lord Chancellor* [2017] 3 WLR 409.

[174] The 2010 Constitution, art 47.

[175] Ibid art 27.

[176] Ibid art 50.

[177] Ibid art 227 (1).

[178] *Milicon's Limited v Accounting Officer Konza Technopolis Development Authority & 2 Others*, Review Board Application No. 102 of 2020. The courts were still considering the issue of the constitutionality of legal requirements for the payment of huge deposits as a precondition for administrative and judicial review of impugned public procurement decisions as at the time of this study, in *Roads and Civil Engineering Contractors Association & Another v Attorney General & 3 Others*, High Court of Kenya (Nairobi) Constitutional Petition No. E226 of 2020.

timelines, contrary to the courts' refusal to enforce similar provisions under the 2005 Procurement Act. The courts had refused, long before the enactment of the 2015 Procurement Act, to enforce provisions purporting to give effect to the Review Board's decisions merely because the judiciary had failed to determine procurement disputes within a given time frame.[179]

Strictly speaking, the 2010 Constitution only required Parliament to enact a public procurement law confined to the implementation of Article 227.[180] The inclusion of other constitutional provisions in the regulatory framework for public procurement, however, is consistent with the need for a holistic interpretation and implementation of the 2010 Constitution.[181] The 2015 Procurement Act also includes, in addition to constitutional values and principles, (i) principles of integrity under the Leadership and Integrity Act, 2012, (ii) maximisation of value for money, (iii) promotion of local industry, (iv) sustainable development, (v) protection of the environment and (vi) promotion of citizen contractors as the guiding values and principles of the Kenyan public procurement regulatory framework.[182]

The detailed statutory framework for the pursuit of social objectives in public procurement in Kenya as at the time of this study was set out in sections 3 and 155-158 of the 2015 Procurement Act and the Public Procurement and Asset Disposal

---

[179] See e.g. *Republic v Public Procurement Administrative Review Board & Another ex-parte Selex Sitemi Integrati* [2008] KLR 728, comprehensively discussed in Thiankolu (n 4).
[180] The 2010 Constitution, art 227 (2) as read with the Fifth Schedule thereof.
[181] See, *inter alia*, *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others*, Civil Appeal (Nairobi) No. 105 of 2017, para 172-173.
[182] The 2015 Procurement Act, s 3.

Regulations, 2020 (hereinafter, "the 2020 Regulations").[183] Section 155 (1) of the 2015 Procurement Act obliges public entities to include social objectives in all procurements, even where the dominant concern is the promotion of economic efficiency. Section 158 (1) of the 2015 Procurement Act, on the other hand, requires procuring entities to 'integrate preferences and reservations in their procurement plans.'[184] The prevailing case law also supports the mandatory integration of social objectives into all public procurements.

The Review Board has reiterated the mandatory integration of social objectives into public procurement in many cases, to stem a frequent tendency by procuring entities to disregard the relevant legal provisions. Relevant cases include: (i) *Bevaj v Kenya School of Monetary Studies* (hereinafter, "the Bevaj Furniture Case"),[185] (ii) *H Young & Co. (EA) Limited & Another v Kenya National Highways Authority*,[186] and (iii) *Tropical Technology Ltd v Ministry of Interior and Coordination of National Government*.[187]

The prevailing case law requires procuring entities to consider whether any tenderer is entitled to benefit from the regime of preferences and reservations during the evaluation of tenders.[188] A procuring entity's failure to consider this issue during the

---

[183] Legal Notice No. 69 of 2020.
[184].See also *Bevaj v Kenya School of Monetary Studies*, Review Board Application No. 24 of 2013.
[185] *Bevaj v Kenya School of Monetary Studies*, Review Board Application No. 24 of 2013.
[186] *H Young & Co. (EA) Limited & Another v Kenya National Highways Authority*, Review Board Application No. 47 of 2016.
[187] *Tropical Technology Ltd v Ministry of Interior and Coordination of National Government*, Review Board Application No. 28 of 2015.
[188] *Republic v Public Procurement Administrative Review Board & 2 Others ex-parte Microhouse Technologies Ltd*, High Court of Kenya (Nairobi) Miscellaneous Civil Application

evaluation of tenders will usually result in the nullification of a decision to award a public procurement contract.[189] The Review Board's failure to consider the issue of preferences and reservations will also normally result in a reversal of its decision or remission of the case for consideration of the issue. In *Republic v Public Procurement Administrative Review Board & 2 Others ex-parte Microhouse Technologies Ltd*,[190] the Review Board omitted to consider whether the complainant was entitled to benefit from the scheme of preferences and reservations set out in the 2006 regulations. The High Court held that the issue was relevant and remitted the case to the Review Board for reconsideration.[191]

Although the 2015 Procurement Act and the prevailing case law oblige procuring entities to integrate social objectives into all their public procurements, there is no firm constitutional foundation for this approach to public procurement.[192] Article 227 (2) of the 2010 Constitution only permits, without obliging, state organs and public entities to integrate social objectives in their public procurements. In other words, and as explained in chapter 1 above, the 2010 Constitution gives state organs and public

---

No. 334 of 2015. See also H Young & Co. (EA) Limited & Another v Kenya National Highways Authority, Review Board Application No. 47 of 2016.

[189] Ibid.

[190] *Republic v Public Procurement Administrative Review Board & 2 Others ex-parte Microhouse Technologies Ltd*, High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 334 of 2015.

[191] Ibid paras 53-56.

[192] In *H Young & Co. (EA) Limited & Another v Kenya National Highways Authority*, Review Board Application No. 47 of 2016, the Review Board held that Article 227 (2) of the 2010 Constitution requires mandatory integration of social objectives in all public procurements. This view, however, is not consistent with the merely permissive and illustrative language of Article 227 (2) of the 2010 Constitution.

entities broad discretion to decide whether, when, the extent and the ends for which they can integrate social objectives in public procurement.

The 2015 Procurement Act establishes, mainly through schemes of preferences and reservations, an elaborate regulatory framework for the pursuit of various social objectives. Just like its predecessor, the 2015 Procurement Act empowers the Cabinet Secretary for finance to prescribe preferences and reservations 'in consideration of economic and social development factors.'[193] Again, just like its predecessor, the 2015 Procurement Act does not specify the type of economic and social development factors that the Cabinet Secretary may consider in prescribing the preferences and reservations. In other words, the 2015 Procurement Act gives the Cabinet Secretary discretion to decide the economic and social development factors to be considered in the formulation of schemes of preferences and reservations.

The 2015 Procurement Act provides—presumably as a safeguard against corruption, favouritism and other forms of misfeasance in the implementation of social policies—that all preferences and reservations must: (i) be non-discriminatory in respect of the targeted groups, (ii) allow competition among the eligible persons and (iii) be monitored by the PPRA.[194] Other safeguards include: (i) registration of target groups and firms intending to benefit from the regime of preferences and reservations,[195] (iii) limits on how long an entity can enjoy preferences and reservations,[196] (iv) compulsory

[193] The 2015 Procurement Act, s 157 (2).
[194] Ibid s 157 (3).
[195] The 2011 Regulations, reg 6.
[196] Ibid reg 22.

payment of monies into bank accounts actually held by target groups,[197] (v) reporting of tenders awarded to target groups,[198] (vi) and publication of the names of firms benefiting from the regime of preferences and reservations.[199]

On 22nd April 2020, the Cabinet Secretary for the National Treasury published the 2020 Regulations.[200] The purpose of the 2020 Regulations was to facilitate the implementation of the 2015 Procurement Act.[201] The 2020 Regulations, however, were largely a rehash and amalgam of the 2006 Regulations and the 2011 Regulations, differing with their predecessors only in respect of changes introduced by the 2015 Procurement Act.[202]

The promulgation of the 2020 Regulations, just like the promulgation of preceding Kenyan public procurement regulatory frameworks, was characterised by many controversies. The first was an unusual, unexplained and unprecedented four-year delay.[203] Secondly, the Cabinet Secretary appeared to take legal shortcuts by (*inter alia*) fixing a commencement date for the 2020 Regulations (2nd July 2020)[204] that preceded the Senate's approval (on 21st July 2020).[205] Thirdly, the Senate approved the 2020

---

[197] The 2015 Procurement Act, s 157 (11).
[198] Ibid ss 157 (12) and 158 (3). See also the 2011 Regulations, reg 30.
[199] The 2011 Regulations, reg 27.
[200] Legal Notice No. 69 (22 April 2020).
[201] The 2015 Procurement Act, s 180.
[202] Consequently, and in view of the preceding discussion, a detailed analysis of the 2020 Regulations was deemed unnecessary.
[203] The 2015 Procurement Act, whose implementation the 2020 Regulations sought to facilitate, came into effect on 7th January 2016.
[204] Legal Notice No. 4957 (10 July 2020).
[205] Sen Deb 21 July 2020.

Regulations in spite of doubts as to their compatibility with the 2015 Procurement Act:[206]

> The Committee also met the Cabinet Secretary (CS) for National Treasury and Planning on 17th June, 2020. The Committee expressed its reservations in a few of the provisions of the Regulations, which needed to be aligned to the parent Act and the Statutory Instruments Act, 2013...At its 25th sitting held on 4th July 2020, the Committee resolved to approve the Public Procurement and Asset Disposal Regulations, 2020.[207]

Fourthly, the Review Board issued conflicting decisions on its jurisdiction to interrogate whether the process leading up to the promulgation of the 2020 Regulations had complied with the relevant provisions of the 2015 Procurement Act and the Statutory Instruments Act, 2013.[208] Lastly, the Review Board deliberately ignored an order from the High Court suspending provisions of the 2020 Regulations that required disaffected bidders to pay huge deposits as a precondition for administrative review of impugned public procurement decisions.[209]

As explained in section 3.2 above, the safeguards embodied in Kenyan public procurement laws have been ineffective in achieving their intended or presumptive regulatory objective of curbing the incidence of corruption, favouritism and other

---

[206] Ibid.
[207] Ibid.
[208] See e.g. the decisions in *Arprim Consultants v the Accounting Officer (Parliamentary Joint Services) Parliamentary Service Commission & Another*, Review Board Application No. 57 of 2020 and *Milicon's Limited v Accounting Officer Konza Technopolis Development Authority & 2 Others*, Review Board Application No. 102 of 2020.
[209] *Milicon's Limited v Accounting Officer Konza Technopolis Development Authority & 2 Others*, Review Board Application No. 102 of 2020. For the High Court's order, which was served on the Review Board two days before the issuance of this decision, see *Roads and Civil Engineering Contractors Association & Another v Attorney General & 3 Others*, High Court of Kenya (Nairobi) Constitutional Petition No. E226 of 2020.

forms of malfeasance. This study sought to establish the link between discretion and the incidence of these governance challenges (see chapter 1 above). Specifically, this study sought to establish key informant views on whether Kenyan government bureaucrats engage in specified forms of corruption, favouritism and malfeasance when making public procurement decisions (see entries 2 and 7 to 15 of Table 2 below).

This study also sought to establish key informant views on the correlation, if any, between discretion and the specified forms of corruption, favouritism and malfeasance (see Figure 3 below).

Table 2: Incidence of Corruption, Favouritism and Malfeasance

Please indicate whether any of the following happens when public officers apply the law on the use of public procurement as a tool of social policy					
Issue		**Response Frequency and Percentage**			
		Yes	**No**	**Unsure**	**Total**
1	Reservation of tenders for specified persons or groups, e.g. women, youth, persons with disabilities and marginalised groups.	25, *93%*	00, *0%*	02, *7%*	27
2	Award of reserved tenders to persons or groups not entitled or intended to benefit from the scheme of reservations	19, *70%*	06, *22%*	02, *7%*	27

Please indicate whether any of the following happens when public officers apply the law on the use of public procurement as a tool of social policy					
Issue		**Response Frequency and Percentage**			
		Yes	**No**	**Unsure**	**Total**
3	Preference for goods sourced, produced or manufactured in Kenya	15, *56%*	10, *37%*	02, *7%*	27
4	Preference for goods produced through environmentally friendly technologies	05, *18%*	21, *75%*	02, *7%*	28
5	Preference for local or citizen contractors and service providers	18, *67%*	08, *30%*	01, *4%*	27
6	Application of preferences to contractors, goods or services not entitled or intended to benefit from the scheme of preferences	16, *59%*	10, *37%*	01, *4%*	27
7	Favouring companies owned by or associated with public officers	21, *78%*	03, *11%*	03, *11%*	27
8	Favouring companies owned by or associated with the relatives or friends of public officers	20, *77%*	03, *12%*	03, *12%*	26
9	Favouring contractors who pay or are willing to pay bribes or kickbacks to public officers	24, *89%*	02, *7%*	01, *4%*	27
10	Favouring contractors who finance the political campaigns of the ruling party and/or senior politicians	23, *85%*	03, *11%*	01, *4%*	27

Please indicate whether any of the following happens when public officers apply the law on the use of public procurement as a tool of social policy					
Issue		**Response Frequency and Percentage**			
		Yes	**No**	**Unsure**	**Total**
11	Award of tenders at inflated prices	24, *89%*	02, *7%*	01, *4%*	27
12	Payment or excessive payment for goods or services that have not been supplied or supplied in full	21, *78%*	05, *19%*	01, *4%*	27
13	Payment or excessive payment for substandard or defective goods	23, *85%*	03, *11%*	01, *4%*	27
14	Payment or excessive payment for services that have not been rendered or adequately rendered	21, *78%*	05, *19%*	01, *4%*	27
15	Wilful or careless failure to comply with the law and/or policy on public procurement	22, *81%*	03, *11%*	02, *7%*	27

The data in Table 2 above depicts a public procurement system that is characterized by a very high incidence corruption, favouritism and other forms of malfeasance. It also points to a flawed or ineffective public procurement regulatory framework which, though apparently or arguably good on paper, is incapable of achieving its intended or presumptive objectives. This is evidenced by (*inter alia*) the 70% response frequency rate for award of reserved tenders to persons not entitled to benefit from social

procurement set-asides, the 89% response frequency rate for payment of bribes and kickbacks to government bureaucrats (see entry 9), and the 89% response frequency rate for award of tenders at inflated prices (see entry 11).

The data in Table 2 also suggests the existence of a direct correlation between corruption and inflated prices, and an inverse relationship between corruption and economic efficiency. Further, and as can be seen from entries 7 to 10 of Table 2, the frequency of various forms of favouritism is very high, generally ranging from 77% to 89%. Indeed, the average response frequency rate for the existence of the specified types of corruption, favouritism and malfeasance examined in the study is 79% (see entries 2 and 6 to 15). In sum, the data in Table 2 above depicts a state of affairs that is inimical to the achievement of all objectives, both economic and social, embodied in Kenyan public procurement laws.

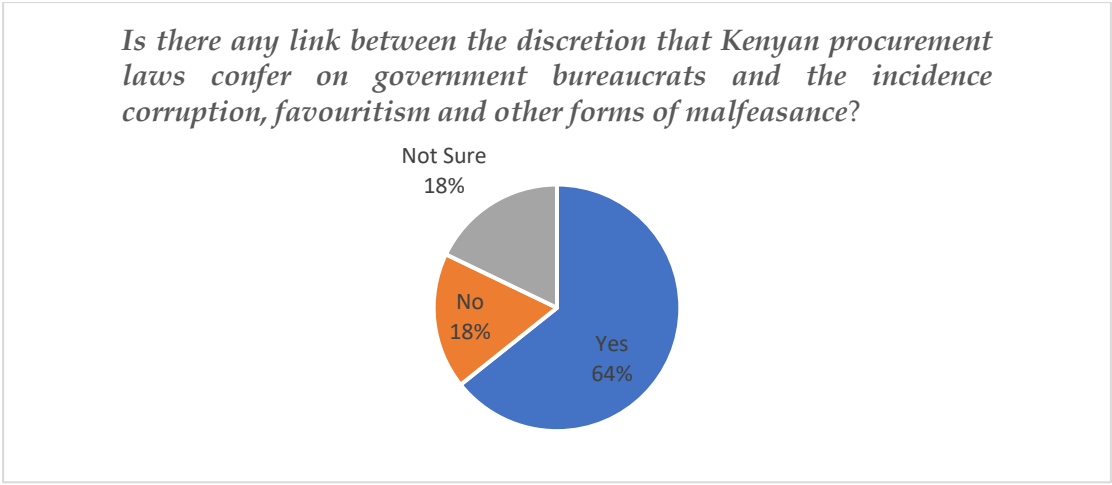
There are three main explanations for the existence of an inverse relationship between corruption and the achievement of both economic and social objectives of public procurement regulation. First, corruption generally tends to increase public spending without a corresponding increase in public welfare.[210] Secondly, corruption encourages the (mis)allocation of funds to capital-intensive infrastructure procurement projects (for bigger kickbacks) instead of high-priority but 'less profitable' projects that would have a bigger economic or social impact on the country

[210] Sope Williams-Elegbe, 'A Perspective on Corruption and Public Procurement in Africa,' in Geo Quinot and Sue Arrowsmith (eds), *Public Procurement Regulation in Africa* (Cambridge University Press 2013) 336, 342..

and its citizens (e.g. water, sanitation or healthcare).[211] Lastly, public procurement corruption usually leads to the purchase of low-quality goods and services, which endanger the health and safety of users.[212]

As shown in Figure 3 below, almost two-thirds of the participants (that is, 64%) attributed the high incidence of corruption, favouritism and other forms of malfeasance to formal grants of broad or insufficiently controlled discretion. These results are consistent with second hypothesis of this study (that the discretion that Kenyan public procurement laws confer on government bureaucrats creates incentives for corruption, favouritism and other forms of malfeasance).

Figure 3: Discretion and the Incidence of Malfeasance



[211] Annika Engelbert, Markus Kaltenborn and Nina-Anette Reit-Born, *Effective Corruption Control: Supplier Remedies in Public Procurement in Kenya, Uganda and Tanzania-A Comparative Analysis of Mechanisms and their Implementation* (Logos Verlag 2016) 10. See also Andrea Appolloni and Jean Marie Mushagalusa Nshombo, 'Public Procurement and Corruption in Africa: A Literature Review, in Decarolis F and others (eds), *Public Procurement's Place in the World* (Servizio Italiano Publicazioni Internazionali 2014) 185, 186.
[212] Ibid.

As can be seen from Figure 3 above, only a small minority of participants, that is 18% of all the key informants, emphatically denied the existence of a link between discretion and the incidence of the eleven forms of corruption, favouritism and malfeasance to discretion set out in Table 2. Another 18% of the participants gave inconclusive responses on the existence of a connection between discretion and the incidence of the eleven forms of corruption, favouritism and malfeasance.

The data in Table 2 and Figure 3 above are consistent with the second hypothesis of this study (that the discretion that Kenyan public procurement laws confer on government bureaucrats creates incentives for corruption, favouritism and other forms of malfeasance). The data in Table 2 and Figure 3 also confirm that discretion, and more specifically, its endemic or pervasive abuse, is a major impediment to the achievement of the objectives underlying the regulatory framework for public procurement in Kenya. It may be argued, therefore, that there is an inverse relationship between discretion and the achievement of the economic and social objectives embedded in Kenyan public procurement laws. The data in Table 2 and Figure 3 also resonate with the main recommendation of this study, namely the adoption of a rule-based approach characterised by circumscribed discretion and commitment to the values of competition, transparency and accountability.

In summary, the social objectives embodied in the 2015 Procurement Act revolve around: promotion of local industry, empowerment of specified target groups, sustainable development, fair employment rights and enforcement of technical and professional standards. Procuring entities usually enforce these social objectives through: (i) schemes of preferences and reservations, (ii) eligibility requirements, (iii)

tender evaluation criteria, (iv) contract award criteria and (v) contract performance requirements.

Although the 2015 Procurement Act provides for diverse social objectives, disputes filed before the Review Board and the courts tend to revolve around the objective of promoting local industry. Generally, this objective concerns the origin of goods and the nationality of bidding firms and their shareholders. A firm that seeks to participate in public procurement is deemed to be a local contractor if it is registered in Kenya, and a citizen contractor if its owners and shareholders are Kenyan citizens.[213] The 2015 Procurement Act also allows foreign firms that enter into joint ventures or subcontracting arrangements with local contractors to participate in the regime of preferences and reservations relating to the promotion of local industry.[214] Such joint ventures or contracting arrangements, however, must give local contractors a majority share.[215] A qualifying foreign firm is entitled to a ten percent margin of preference in the evaluated price of a tender.[216]

The 2015 Procurement Act promotes local industry in four main ways. First, and as a general rule, state organs and other public entities are only permitted to procure articles, materials or supplies that are wholly manufactured, mined or produced in Kenya.[217] Secondly, all foreign tenderers participating in international tenders must

---

[213] The 2011 Regulations, reg 7.
[214] Ibid reg 8.
[215] Ibid.
[216] Ibid reg 16.
[217] The 2015 Procurement Act, s 155 (2). On whether preferential treatment can be applied to goods manufactured in an export processing zone, see *Republic v Public Procurement*

source at least forty percent of their supplies from citizen contractors.[218] Thirdly, citizen contractors are entitled to exclusive preference in tenders falling below prescribed financial thresholds where the financing for such tenders comes exclusively from the Government of Kenya.[219] They may also do this by according preferential treatment or reserving (that is, setting aside) tenders for firms in which Kenyans hold more than fifty-one percent of the shareholding.[220]

Foreign firms that are registered in Kenya and enter into joint ventures or subcontracting arrangements with local contractors may also participate in this category of preferences and reservations.[221] Fourthly, procuring entities must give a margin of preference to tenderers based on the percentage of shareholding by Kenyan citizens. The prescribed margins of preference are: (i) six percent of the evaluated tender price where Kenyan citizens own less than twenty percent of the shareholding of the tendering firm, (ii) eight percent of the evaluated tender price where Kenyan citizens own less than fifty-one percent but more than twenty percent of the shareholding of the tendering firm and (iii) ten percent of the evaluated tender price where Kenyan citizens own more than fifty-one percent of the shareholding of the tendering firm.[222]

Administrative Review Board & Another, High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 540 of 2008.

[218] The 2015 Procurement Act, s 157 (9).

[219] Ibid s 157 (8) (a). See also the 2011 Regulations, reg 13. The prescribed financial thresholds are: (i) one billion shillings for procurements of road works, construction materials and other materials used in transition and conduction of electricity of which the material is made in Kenya, (ii) five hundred million shillings in respect of other works, (iii) one hundred million shillings for procurement of goods and (iv) fifty million shillings for procurement of services.

[220] The 2015 Procurement Act, s 155 (3) (b) and (4).

[221] The 2011 Regulations, regs 7 (a) and 8.

[222] Ibid reg 15.

Kenya also relies on schemes of preferences and reservations to empower specified target groups. Under the 2011 Regulations, the phrase 'target group' includes: small enterprises, micro-enterprises, citizen contractors and local contractors.[223] The 2011 Regulations define 'disadvantaged group' as:

> persons perceived to be denied, by mainstream society access to resources and tools which are useful for their survival in a way that disadvantages them, or individuals who have been subjected to prejudice or cultural bias because of their identities as members of groups without regard to their individual qualities, and includes women, the youth and persons with disabilities.

The above definition of 'disadvantaged group' approximates the concept of social exclusion, discussed in chapter 2 above. The mitigation of the ravages of social exclusion, extreme inequality and past discrimination, therefore, is a major driver of social procurement in Kenya. The historical context for the preferences and reservations relating to marginalized and disadvantaged groups arguably lies in Kenya's past legacy of: (i) discriminatory government policies (such as the 1965 blueprint, (ii) the perverse consequences of uncritical pursuit of market policies and (iii) the distortionary effects of endemic corruption, impunity and divisive ethnic politics.[224] This past legacy culminated in the economic marginalization of entire geographic regions and various ethnic and demographic groups in Kenya.[225] This, in

---

[223] Ibid reg 3.

[224] Amy Chua, 'Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development' (1998) 108 (1) Yale Law Journal 1, 40. See also Michela Wrong, *It's Our Turn to Eat: The Story of a Kenyan Whistle-Blower* (HarperCollins Publishers 2009) 324-325, GoK, '*Report of the Commission of Inquiry into Post Election Violence* (Government Printer 2008) 23-38 and XN Iraki, 'How Raila Odinga's Victory Could Have Checked the Excesses of Capitalism' *The Standard* (Nairobi 20 August 2017)<*https://www.standardmedia.co.ke/business/article/2001251905/how-raila-odinga-s-victory-could-have-checked-excesses-of-*> accessed 31 August 2017.

[225] Ibid.

turn, created moments of general disaffection that threatened the long-term viability and political stability of the Kenyan nation-state.[226]

The 2015 Procurement Act obliges every procuring entity to reserve and allocate at least thirty percent of its annual procurement spend to disadvantaged groups, and in particular to enterprises owned by youth, women and persons living with disabilities.[227] Further, the 2011 Regulations forbid procuring entities from requiring tender security (and presumably other onerous requirements) in procurements reserved for small and micro-enterprises or enterprises owned by women, youth, persons with disabilities and other disadvantaged groups.[228]

The 2015 Procurement Act provides for the pursuit of both economic and social objectives. The objectives of the 2015 Procurement Act relating to *inter alia*: transparency, accountability, competition, cost-effectiveness, efficiency and value for money embody an economic or market approach to public procurement. The objectives of the 2015 Procurement Act relating to (*inter alia*): (i) equality and freedom from discrimination, (ii) affirmative action programs, (iii) promotion of local industry, (iv) sustainable development and (v) promotion of citizen contractors set out in the 2015 Procurement Act, on the other hand, embody a social approach to public procurement.

---

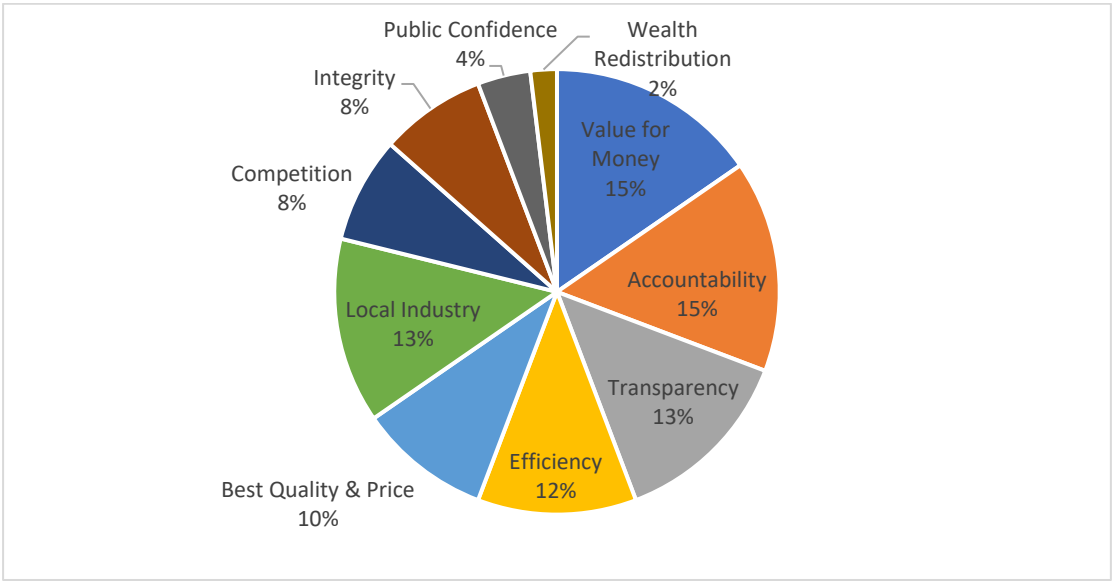
[226] Ibid.

[227] The 2015 Procurement Act, s 157 (5). See also the 2011 Regulations, reg 31 (1). Again, this gave procuring entities a wide margin of discretion on the extent and the ends for which they can integrate social objectives in seventy percent of their annual procurement spend.

[228] The 2015 Procurement Act, s 61 (5). See also the 2011 Regulations, reg 21.

This study sought to establish, in view of the constitutional and statutory entrenchment of the two species of objectives, key informant perspectives on the 'main economic objective' and the 'main social objective' of the regulatory framework for public procurement in Kenya. Value for money and accountability emerged as the main economic objectives of public procurement regulation in Kenya, with a combined response frequency rate of 30% (see Figure 4 below). Equality and equity, on the other hand, emerged as the main social objectives of the regulatory framework for public procurement in Kenya (see Table 3 below).

Figure 4: Main Economic Objectives of Kenyan Public Procurement Laws



The promotion of local industry, which is not usually treated as an 'economic' objective of public procurement regulation in academic literature, ranked third with a response frequency rate of 13%. Efficiency, which is often identified as the overarching economic objective of public procurement regulation and all regulation in general, ranked fifth with a frequency of 12%. The apparent low ranking of efficiency, however, is arguably a matter of data interpretation, as the notion of efficiency is generally

embedded in the objectives of obtaining value for money and the best quality and price, which scored a cumulative frequency of 25%. Differently put, the results in Figure 4 are compatible with the orthodox view of efficiency as the main objective of public procurement regulation from an economic point of view. This inference is buttressed by the combined response frequency rates of objectives that are unarguably social in character, namely: (i) promotion of local industry (13%) and (ii) wealth redistribution (2%). Table 3 below sets out a summary of the data collected in relation to *the main social objectives* of the regulatory framework for public procurement in Kenya.

Table 3: Main Social Objectives of Kenyan Public Procurement Laws

Response	**Frequency**	**Percentage**
Equality and Equity	28	45%
Integrity	7	11%
Protection of the Environment	7	11%
Local Industry	6	10%
Transparency	4	6%
Fair Labour Practices	4	6%
Public Confidence	2	3%
Efficiency	2	3%
Fairness	2	3%
Totals	**62**	**100%**

The emergence of equality and equity as the main social objectives of the regulatory framework for public procurement in Kenya (see Table 3 above) resonates with the transformative and egalitarian objectives of the 2010 Constitution, discussed in section 3.5.1 above. Promotion of integrity (or probity) in public life and protection of the environment tied at the second position, with response frequency rates of 11% each. Promotion of local industry, which is the dominant concern of most commentators on social procurement in view of its presumed trade distortive effects, garnered a response frequency rate of 10%. This suggests that protectionism is not a major motivation for the schemes of preferences and reservations embodied in Kenyan procurement laws. The 3% frequency for efficiency depicts stakeholder indifference to the issue of balance between economic and social objectives.

The 2015 Procurement Act hardly offers any guidance on the resolution of conflicts between economic and social objectives. Instead, it merely provides for apparent safeguards against the potential for abuse of social objectives. The safeguards, which include registration, monitoring and reporting requirements on the implementation of the regime of preferences and reservations, cannot prevent unreasonable economic efficiency costs that may potentially arise from the pursuit of social objectives. The regime of reservations, for instance, can result in procurement contract awards that have significant economic inefficiency even where there is no corruption, favouritism or other forms of malfeasance. Specifically, even though procurements under the regime of reservations are done competitively, it is possible for all potential tenderers from the target group to be grossly inefficient.

Although the 2015 Procurement Act requires the mandatory integration of social objectives into all public procurements in Kenya, regulators and other stakeholders generally tend to focus on economic objectives. Specifically, and as elaborated in the ensuing parts of this chapter, regulators and other stakeholders generally tend to eschew the issue of conflict between economic and social objectives, even in cases that offer apt opportunities to clarify the law on the subject. Instead, Regulators and stakeholders of the Kenyan procurement system have largely focused on: (i) economic objectives, (ii) procedural irregularities and (iii) the incidence of corruption, favouritism and other forms of malfeasance. This has created a dearth of knowledge on the interplay of economic and social objectives in Kenya's public procurement system, and the resolution of conflicts between the two species of objectives.

Three factors demonstrate regulators' and stakeholders' general disinterest in the interplay of economic and social objectives in Kenya's public procurement system. First, case law on this issue remains scanty several years after the decision in *De La Rue*,[229] which made the integration of social objectives into public procurement mandatory even where the relevant procurement laws were couched in discretionary language.

Secondly, litigators and adjudicators have generally eschewed the issue of the interplay between economic and social objectives even where the extra costs of social procurement, on the facts of the relevant cases, warranted a serious inquiry into the

[229] *Republic v Public Procurement Administrative Review Board & Another*, High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 540 of 2008.

issue. The public entities involved in the procurements discussed in Chapter 4 of this work, for instance, appeared either oblivious or disinterested in integrating social objectives into the respective projects. The multiple courts and tribunals that heard disputes relating to those procurements also failed to address the implications of failing to integrate social objectives into those procurements when the country's laws mandatorily required the integration of social policies.

Thirdly, the Review Board and the courts usually approach disputes relating to social objectives from a merely technical, procedural or legalistic perspective, and seldom delve into the issue of conflicts between economic and social objectives. Put differently, the Review Board and the courts seldom undertake any economic or social analysis of impugned public procurement decisions. Instead, they tend to focus on the technical meanings of the relevant legal texts and compliance with the applicable technical public procurement rules and procedures.

There are many cases, only a few of which are outlined in this chapter, which illustrate the Review Board's (and the courts') general reluctance to delve into the issues of interplay and resolution of conflicts between economic and social objectives. In *Roben Aberdare (K) Ltd v Kenya Rural Roads Authority*, the difference between the price quoted by the successful local tenderer and a foreign tenderer who would have won the tender but for the regime of preferences and reservations was more than US$ 10 million.[230] The procuring entity omitted to accord the local tenderer a margin of preference,

[230] *Roben Aberdare (K) Ltd v Kenya Rural Roads Authority*, Review Board Application No. 11 of 2017.

contrary to section 39 of the 2005 Procurement Act and the 2011 Regulations. Although the Review Board noted this breach, it did not fault the procuring entity for it.

In the *Bevaj Furniture Case*, the complainant's tender was at least US$ 176,000.00 higher than the successful candidate's bid. The Review Board upheld the complainant's claim for preferential treatment based solely on the complainant's local shareholding, without interrogating the economic or social justification for incurring the extra cost of US$ 176,000.00 to import furniture, which could easily have been sourced from domestic industry. The Review Board could, on the facts of the case, have done a better inquiry by asking whether the economic costs of applying the margin of preference outweighed the intended or presumptive social benefits.

In *Questa Care Limited v Kenya Medical Supplies Authority & Another*, the procuring entity invited bids for a US$ 11 million contract for the supply of antiretroviral drugs.[231] All the tenderers offered to supply antiretroviral drugs manufactured outside Kenya. The complainant, however, contended that it was entitled to a 10% margin of preference because of its Kenyan shareholding. The Review Board upheld the argument and ordered a re-evaluation of the bids. The procuring entity accorded the complainant a 10% margin of preference because of local shareholding in the re-evaluation, but the complainant still lost to the original winner of the tender. The complainant filed a second request for review contending that it was entitled to a 15% margin of preference because of local manufacturing, even though it had only

[231] *Questa Care Limited v Kenya Medical Supplies Authority & Another*, Review Board Application No. 10 of 2017.

packaged antiretroviral drugs manufactured in India. The Review Board upheld the claim for 15% margin of preference, relying purely on technical/legalistic interpretations of relevant pharmaceutical laws:

> the present case deals with the issue of drugs which is almost exclusively dealt with and regulated by the provisions of the Pharmacy and Poisons Act and the World Health Organisation Good Manufacturing Practices for pharmaceutical products…[which] recognize packaging as part of manufacturing…the Board therefore holds that the Applicant is entitled to a 15% margin of preference…[232]

Although the above dictum is correct from a purely legalistic point of view, the Review Board and the High Court, the latter of which reversed the decision on equally legalistic grounds, could have done a better inquiry by interrogating the economic or social justification for according preferential treatment to a local tenderer who only packaged drugs manufactured in a foreign country.[233] Specifically, the Review Board and the High Court could have inquired whether treating the complainant's antiretroviral drugs as domestically manufactured, when they had been fully manufactured in India but only domestically packaged, was consistent with the socioeconomic objectives embodied in Kenya's public procurement laws. Such an inquiry might have revealed that extending preferential treatment to the complainant would not necessarily have achieved the socioeconomic objectives of promoting domestic industry and employment. Such an inquiry would have revealed that extending preferential treatment to the complainant only distorted competition and, more worryingly, indefensibly increased the cost of procuring the antiretroviral drugs.

---

[232] *Questa Care Limited v Kenya Medical Supplies Authority & Another*, Review Board Application No. 28 of 2017.

[233] For the High Court's decision, see *Republic v Public Procurement Administrative Review Board ex-parte Simba Pharmaceuticals Ltd & 2 Others,* High Court (Nairobi) Miscellaneous Civil Application No. 185 of 2017.

A proper inquiry would also have asked whether the extra expenditure of US$ 375,000.00 entailed in giving preferential treatment to the complainant could have purchased more units of the antiretroviral drugs, an outcome that would have been more consistent with both the economic and social objectives embodied in the regulatory framework for public procurement in Kenya.

The case of *China Overseas Engineering Group Company Ltd v Kenya Rural Roads Authority* also exemplifies regulators' frequent failure to appreciate inherent contradictions in the regime of social objectives embodied in Kenyan public procurement laws and potential economic efficiency issues that may arise from those contradictions.[234] The complainant, a Chinese company, had promised to use materials mined and manufactured in Kenya in upgrading certain rural roads to bitumen standards. The successful tenderer, a local contractor, made no such commitment. The procuring entity awarded the tender to the local contractor after applying a 10% margin of preference because of its Kenyan shareholding. The economic effect of giving the margin of preference to the local contractor was an extra cost of about US$ 2 million. The complainant contended that although it was a foreign company, it was entitled to a 15% margin of preference because of its commitment to exclusively use materials mined and manufactured in Kenya. The Review Board dismissed the complaint, because the 2011 Regulations only allowed foreign companies to benefit from the regime of preferences and reservations where they had entered a joint venture or subcontracting arrangements with local contractors.

---

[234] *China Overseas Engineering Group Company Ltd v Kenya Rural Roads Authority*, Review Board Application No. 7 of 2016.

The decision of the Review Board in *China Overseas Engineering Group Company Ltd v Kenya Rural Roads Authority* is only correct from a legalistic point of view. A proper inquiry would have questioned the economic rationale for incurring the extra cost of US$ 2 million on a local contractor where a foreign contractor has committed to using materials exclusively manufactured and mined in Kenya. Further, a proper inquiry would have asked whether the foreign tenderer's offer promised, on the facts of the case, greater social or economic benefits to Kenya in terms of promoting domestic industry and employment.

As explained in chapter 2 above, a sound regulatory framework for public procurement ought to have sufficient and effective safeguards against the risk of abuse of discretion, especially in view of the agency and public choice problems inherent in public procurement and various forms of market and institutional failures. Specifically, a sound public procurement regulatory framework should have effective safeguards against the risk of corruption, favouritism and other forms of malfeasance. It is a major premise of this study that the Kenyan regulatory framework is defective to the extent that it confers broad and unchecked discretionary powers on public procurement officers. This view is buttressed by the results set out in Figure 3 above, which confirm the existence of a direct link between discretion and Kenya's unusually high incidence of corruption, favouritism and other forms of malfeasance in public procurement decision making.

The problem of broad and unchecked discretionary powers is evident in five main aspects of the 2015 Procurement Act and, indeed, all previous regulatory frameworks for public procurement in Kenya. First, the 2015 Procurement Act only controls the

discretion to pursue social objectives up to 30% of the annual procurement spend. The practical consequence of this is that procuring entities could lawfully relegate economic efficiency to the periphery. To illustrate, a procuring entity could lawfully reserve 80% of its annual procurement spend to the pursuit of social objectives. Secondly, the provisions of the 2015 Act (and the 2010 Constitution) relating to social objectives are crafted in illustrative as opposed to exhaustive language. This effectively gives government bureaucrats discretion to integrate an infinite range of social policies into public procurement.

Thirdly, the 2015 Procurement Act confers broad or insufficiently checked powers on accounting officers, often conflating them with the public agencies in which they work.[235] In particular, the 2015 Procurement Act transferred most of the powers and functions that were previously vested on procuring entities to accounting officers. This concentration of power and discretion is irreconcilable with the idea of segregation of responsibilities and corporate, systematic and structured decision making that is (rhetorically?) embodied in the 2015 Procurement Act.[236] Fourthly, the 2015 Procurement Act does not offer much guidance, other than merely prescribing margins of preference, on the balance to be struck between economic and social objectives. Differently put, the 2015 Procurement Act gives procurement officers the discretion to decide, on a case by case basis, the balance to be struck between economic

[235] For an interesting judicial opinion, embodying a spurious distinction between the actions of an accounting officer and those of a procuring entity, and the reviewability of the former but not the latter, see *Republic v Public Procurement Administrative Review Board & 2 Others ex-parte Kenya Power & Lighting Company Ltd*, High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 302 of 2016, paras 88 to 92.

[236] The 2015 Procurement Act, s 45.

and social objectives of public procurement. Lastly, the 2015 Procurement Act confers too much power and discretion on the Cabinet Secretary for Finance, by leaving too many aspects of regulation to prescription by way of regulations.[237]

3.6 Summary of Findings

This chapter has examined the evolution of policy and regulatory frameworks for public procurement in Kenya and the factors that have influenced that evolution. The chapter has specifically focused on the interplay of economic and social objectives, and structural flaws in the policy and regulatory frameworks for public procurement that Kenya has adopted since 1963. The chapter has also examined the problem of discretion that Kenyan public procurement laws confer on government officers, and the correlation between that discretion and the incidence of corruption, favouritism and other forms of malfeasance.

This chapter sought to answer the two research questions of the study, as set out in chapter 1 above, based on both desk and field research. The findings of the chapter may be summarised into the following propositions. First, the regulatory framework for public procurement in Kenya does not facilitate the resolution of conflicts between economic and social objectives (see the first research question). Secondly, the discretion that Kenyan public procurement laws confer on government bureaucrats creates strong incentives for corruption, favouritism and other forms of malfeasance (see the second research question). Thirdly, the absence of a coherent policy

[237] See *inter alia* ss 4 (2) (f), 7, 24 (5) (d), 29 (1) (b), 29 (3), 33 (3), 41 (3) (b), 41 (5), 46, 46 (8), 47 (3) and 180 of the 2015 Procurement Act.

framework for public procurement has led to uncritical imitation of public procurement regulatory models, without adapting them to address Kenya's unique and apparently entrenched culture of: (i) corruption, (ii) impunity, (iii) political patronage and (iv) various forms of favouritism and malfeasance. Fourthly, the regulatory framework for public procurement in Kenya lacks appropriate mechanisms for resolving conflicts between economic and social objectives. Fifthly, the regulatory framework for public procurement in Kenya is characterized by broad or insufficiently controlled discretion and ineffective safeguards against the incidence of corruption, favouritism and other forms of malfeasance. Sixthly, the Government has traditionally been apathetic to strict enforcement of regulatory frameworks for public procurement. The apathy may be attributed to an entrenched culture of: (i) corruption, (ii) impunity, (iii) political patronage and (iv) various forms of favouritism and malfeasance. It may also be attributed to practical difficulties of enforcing the lofty ideals and requirements set out in the policy and regulatory frameworks. Lastly, although the regulatory framework for public procurement in Kenya permits the pursuit of both economic and social objectives, most stakeholders—including regulators, bureaucrats, tenderers and commentators—have focused more on economic objectives and governance challenges than social objectives. In other words, most stakeholders have been indifferent to the issue of interplay of economic and social objectives. This finding is evidenced by, *inter alia*: (i) few substantive legal provisions on social objectives, (ii) paucity of litigation on social objectives and (iii) limited academic commentary on the interplay between economic and social objectives.

The above findings suggest that Kenya lacks sound policy and regulatory frameworks for public procurement from both economic and administrative law points of view.

They also point to a need for overhauling the current Kenyan public procurement regulatory framework, to establish effective safeguards against corruption, favouritism and other forms of malfeasance.

CHAPTER 4: CASE STUDIES OF THE INTERPLAY OF ECONOMIC AND SOCIAL OBJECTIVES AND THE PROBLEM OF DISCRETION IN PUBLIC PROCUREMENT DECISION MAKING IN KENYA

4.1 Introduction

This chapter examines the interplay of economic and social objectives, the problem of discretion and the incidence of corruption, favouritism and other forms of malfeasance in the procurement of ballot papers for the 2017 general election and the procurement of laptops for primary schools in 2013. The chapter seeks to establish, using real procurement projects, how Kenya has dealt with the interplay of economic and social objectives (see the first research question) and the link between discretion and the incidence of corruption, favouritism and other forms of malfeasance (see the second research question).

The rationale for selecting the two projects was threefold. First, each project involved an expenditure of a significant amount of public funds. Secondly, each project offered strategic opportunities for integrating social objectives into public procurement. Lastly, the procurement processes for the two projects were characterised by unusually protracted litigation and serious governance challenges, revolving around abuse of discretion, corruption, favouritism and other forms of malfeasance.

This chapter makes three main findings. First, Kenyan government bureaucrats are generally indifferent to the issue of the interplay of the economic and social objectives

embodied in the country's public procurement laws. Secondly, Kenyan government bureaucrats generally tend to abuse discretion through systematic manipulation of the public procurement system to corruptly, irregularly or unfairly award public procurement contracts to favoured or pre-determined suppliers. The entrenched culture of abuse and manipulation impedes the realisation of both the economic and social objectives embodied in the Kenyan public procurement laws. Lastly, although the Kenyan public procurement regulatory system may appear structurally sound on paper, it is ineffective in curbing abuse of power and discretion and the incidence of corruption, favouritism and other forms of malfeasance.

This chapter is organised as follows. Section 4.2 examines the procurement of ballot papers for the 2017 general election. Section 4.3 examines the procurement of laptops for primary schools. Section 4.4 examines the problem of discretion and interplay of economic and social objectives, as demonstrated by the controversies that characterised the two procurement processes. Section 4.5 is a summary of the main findings.

4.2 Procurement of Ballot Papers for the 2017 General Election

The 2013 and 2017 general elections were characterised by (*inter alia*) public procurement corruption and malpractice.[1] In 2013, the IEBC spent about US$ 80 million to procure faulty electronic voting kits, which crashed within a few hours of

[1] Joe Khamisi, Kenya: Looters and Grabbers: 54 Years of Corruption and Plunder by the Elite, 1963-2017 (Jodey Book Publishers 2018) 471-472.

the commencement of that year's general election.[2] The IEBC also received an extra US$ 2 million from the exchequer, ostensibly to procure the same electronic voting kits, but failed to account for the funds.[3] The procurement became a major issue in court proceedings challenging the 2013 presidential election.[4] The Supreme Court, which heard disputes relating to the 2013 presidential election, concluded that the procurement was marred by 'competing interests involving impropriety, or even criminality' on the part of IEBC Commissioners and staff.[5] Consequently, the Supreme Court recommended the investigation and prosecution of IEBC Commissioners and staff.[6] A year later, a British court convicted the directors of Smith & Ouzman Limited, a London based company, of paying more than US$ 500,000.00 in bribes and kickbacks to IEBC officials to win a tender for the printing of ballot papers in 2013.[7] Allegations of public procurement corruption, favouritism and other forms of malfeasance, strikingly similar to those of 2013, also characterised the 2017 general election.[8]

---

[2] Office of the Auditor General, 'Special Audit on Procurement of Electronic Voting Devices for the 2013 General Election by the Independent Electoral and Boundaries Commission' (June 2014) 14. See also Edwin Mutai, 'IEBC Official Put on the Spot over Inflation of Tender' *Business Daily* (Nairobi, 05 August 2015) 2.

[3] Ibid.

[4] *Raila Odinga v Independent Electoral and Boundaries Commission & 3 Others*, Supreme Court Petition No. 5 of 2013. See also John Njagi, 'Hassan Tried to Sway BVR Tender' Daily Nation (Nairobi, 22 July 2015) 6.

[5] *Raila Odinga v Independent Electoral and Boundaries Commission & 3 Others*, Supreme Court Petition No. 5 of 2013, para 234.

[6] Ibid.

[7] Khamisi (n 1) 559-562. See also Stephen Copp and Alison Cronin, 'New Models of Corporate Criminality: The Development and Relative Effectiveness of "Failure to Prevent" Offences' (2018) 39 (4) Company Lawyer 104, 115 and Serious Fraud Office, 'Smith & Ouzman Ltd'<*https://www.sfo.gov.uk/cases/smith-ouzman-ltd/*> accessed 18 April 2018. See also.

[8] See Ouma Wanzala, 'Row Over Tender Ends as IEBC Gives in' *Daily Nation* (Nairobi, 16 March 2017) 11, Patrick Lang'at and John Ngirachu, 'Sh3bn Poll System Tender Cancelled' *Daily Nation* (Nairobi, 23 March 2017) 63 and Nation Team, 'IEBC Defied its Evaluation Team in Shs.4bn Tender' *Daily Nation* (Nairobi, 28 March 2017) 4. See also *Avante International Technology Inc. v Independent Electoral and Boundaries Commission*, Review Board Application No. 19 of 2017, 30-31.

The apparent entrenchment of corruption, favouritism and other forms of malfeasance in Kenyan elections, and the huge finances involved in such elections, inspired the examination of the procurement of ballot papers for the 2017 general election as part of this study. The (missed) opportunities for pursuing social objectives also inspired the examination of the procurement of ballot papers for the 2017 general election as part of the study.

4.2.1 First Tender

On 17th August 2016, the IEBC advertised an international open tender for the supply of ballot papers, statutory election result declaration forms and poll registers to be used in the 2017 general election.[9] The tender documents violated procurement laws in two ways, both of which revolve around the interplay of economic and social objectives. First, the choice of international competitive bidding offended section 89 of the 2015 Procurement Act, which restricts the participation of foreign tenderers to situations in which 'there will not be effective competition for a procurement unless foreign tenderers participate.' The IEBC did not satisfy itself that there would be no effective local competition before opening the tender to foreign tenderers. Secondly, the IEBC inexplicably omitted to integrate social objectives into the tender, contrary to the provisions of sections 155-158 of the 2015 Procurement Act.[10]

---

[9]Tender No. IEBC/01/2016-2017. The 2017 general election, which comprised six separate and distinct elections, was held on 8th August 2017. For relevant legal provisions, see the 2010 Constitution arts 101 (1), 136 (2) (a), 177 (1) (a) and 180 (1).

[10] As explained in Chapter 3 of this study, Kenyan procurement laws, and the prevailing case law, require the mandatory integration of social objectives into all public procurements.

On 6th October 2016, before the completion of the evaluation and award of the tender, IEBC Commissioners resigned from office.[11] The resignations came after months of violent street protests, revolving around the integrity of IEBC Commissioners and staff. The conviction and imprisonment, in the United Kingdom, of the directors of a London based company of paying bribes and kickbacks to win a printing tender from the IEBC in 2013, and Kenyan authorities' apparent unwillingness to investigate and prosecute IEBC Commissioners, formed one of the main drivers of the street protests.[12]

The resignations of IEBC Commissioners raised legal questions on the fate of the tender. The Elections Act, 2011 required 'at least half' of IEBC Commissioners to participate in making all decisions, including a decision to award a tender.[13] The IEBC secretariat, however, proceeded with the evaluation of the tender despite this clear stipulation of the law.

Five of the nine tenderers that submitted bids failed at the preliminary evaluation stage, allegedly for omitting to attach one or more of the ten mandatory documents set out in the preliminary evaluation criteria.[14] Three of the remaining four tenderers

---

[11] Isaac Ongiri, 'IEBC Chairman and Commissioners Resign' Daily Nation (Nairobi, 06 July 2016) <*https://www.nation.co.ke/news/1056-3406560-5j3ynkz/*> accessed 24 April 2018. See also Benjamin Wafula, 'Nairobi Businesses Lost Thousands during Anti-IEBC Protests–Survey' (Daily Nation, 02 August 2016) <*https://citizentv.co.ke/news/nairobi-businesses-lost-thousands-during-anti-iebc-protests-survey-135703/*> accessed 25 April 2018.

[12] The UK convictions contrasted sharply with Kenyan authorities' slow progress in implementing the Supreme Court's recommendation for investigation and possible prosecution of IEBC Commissioners and officers Kenya. Indeed, Kenya had not made any notable progress or achievement in investigating or prosecuting IEBC Commissioners and officials as at the date of this study.

[13] The Elections Act, 2011 s 8.

[14] *Paarl Media (PTY) Limited v Independent Electoral and Boundaries Commission & 2 Others*, Review Board Application No. 93 of 2016, 10-14.

failed at the technical evaluation stage, for failing to garner the minimum pass mark of 80% required to proceed to the financial stage of the tender evaluation process.[15] One tenderer, Al Ghurair Printing and Publishing LLC (hereinafter, "Al Ghurair"), garnered a 99.7% pass mark at the technical evaluation and thus proceeded to the final/financial stage of the tender evaluation process.[16] Subsequent developments, discussed below, however, cast doubts on not only on the objectiveness of the evaluation but also Al Ghurair's remarkable pass mark of 99.7% in a tender in which all other tenderers allegedly failed to meet basic requirements.[17]

On 18th October 2016, whilst the offices of IEBC Commissioners were still vacant, the IEBC secretariat awarded the tender to Al Ghurair at the sum of US$ 25 million.[18] This translated to an average price of about US$ 0.2 per ballot paper. Questions soon arose as to the economic efficiency of the award, as many countries had paid half or a third of Al Ghurair's average price of US$ 0.2 per ballot paper.[19] The IEBC, however, dismissed these efficiency concerns on three spurious grounds. The first was that

---

[15] Ibid 15-16.

[16] Ibid.

[17] Section 80 (3) (a) of the 2015 Procurement Act provides that tender evaluation criteria 'shall, to the extent possible, be objective and quantifiable.' Our perusal of the Technical Evaluation Report showed that the IEBC heavily penalised some bidders for minor deviations from the technical specifications, especially those relating to the colour of ballot papers. Further, IEBC awarded Al Ghurair the maximum score for thirty out of thirty-one technical evaluation parameters, resulting in a peculiar score of 149.5/150 marks.

[18] Dennis Odunga, 'Bid to Cancel Sh2.5bn Ballots Tender Rejected' *Daily Nation* (Nairobi, 29 November 2016) 5.

[19] Moses Michira, 'Kuchezwa? How Much Kenyans are Paying for Each Ballot Paper as Compared to Other Countries in East Africa' *The Standard* (Nairobi, 20 June 2017) <*https://www.sde.co.ke/article/2001244188/kuchezwa-how-much-kenyans-are-paying-for-each-ballot-paper-as-compared-to-other-countries-in-east-africa*> accessed 25 April 2018.

ballot papers 'are not standard goods with known market prices.'[20] Secondly, the IEBC refused to compare Al Ghurair's average unit cost with regional or global averages because 'the electoral structure and political orientation in Kenya is not similar to any other country.'[21] Lastly, the IEBC ignored efficiency concerns because Al Ghurair's average unit prices 'were generally lower than those of the 2013 general election.'[22]

4.2.2 First Administrative Review Proceedings

On 7th November 2016, Paarl (PTY) Limited (hereinafter, "Paarl"), who had been disqualified at the preliminary evaluation stage for failing to submit five out of ten mandatory documents, lodged a complaint with the Review Board.[23] On 24th November 2016, the Review Board allowed the Jubilee Party (hereinafter, "Jubilee") and CORD, the ruling party and coalition of opposition parties respectively, to join the case as interested parties.[24]

Paarl and CORD contended that the IEBC secretariat could not award a tender in the absence of IEBC Commissioners, and that the tender specifications and process infringed the 2010 Constitution and the Elections Act, 2011. Paarl and CORD also

---

[20] IEBC, Tender Evaluation Report for Tender No. IEBC/01/2016-2017: Supply and Delivery of Ballot Papers for Elections, Election Results Declaration Forms and Poll Registers (22 September 2016) 45.

[21] Ibid.

[22] Ibid 52.

[23] *Paarl Media (PTY) Limited v Independent Electoral and Boundaries Commission & 2 Others*, Review Board Application No. 93 of 2016. According to the evaluation report, the complainant had failed to submit: (i) a certificate for the ISO Standard 9001 or its equivalent and ISO 27001, (ii) a valid tender security, (iii) a duly filled confidential business questionnaire, (iv) audited accounts for the latest three consecutive years and (v) samples of ballot papers and election result declaration forms.

[24] Ibid 20. On the joinder of interested and third parties to proceedings before the Review Board, see section 170 of the 2015 Procurement Act.

complained that the tender process adopted by the IEBC was inconsistent with the regulatory objectives of fairness, equity, transparency, cost-effectiveness and competition.

The gist of Paarl and CORD's first complaint was that the legal mandate to award the tender lay with IEBC Commissioners as opposed to the secretariat. The complaint revolved around the provisions of Article 250 (1) of the 2010 Constitution, which states that 'each commission shall consist of at least three, but not more than nine, members.'[25] Paarl and CORD contended that the 2010 Constitution's references to the IEBC were references to its commissioners, and that the existence of the IEBC depended on the existence of substantive holders of its offices.[26] Accordingly, the decision of the secretariat to award the tender could not be attributed to the IEBC since it had been made at a time when all the offices of IEBC Commissioners were vacant.

The thrust of Paarl and CORD's second complaint was that the technical specifications of the tender were based on a manual electoral system contrary to the provisions of the Elections Act, 2011. Specifically, Paarl and CORD complained that the IEBC had structured the tender in contemplation of a manual voting system contrary to a legal requirement for 'an integrated electronic electoral system' comprising biometric voter registration, biometric voter identification and electronic result transmission system.[27]

---

[25] The 2010 Constitution, art 250 (1).

[26] Ibid art 259 (3) (b).

[27] The Elections Act, s 44 and 44A (as amended by the Election Laws (Amendment Act, 2016 and the Election Laws (Amendment) Act, 2017). On 1st September 2017, the Supreme Court nullified the presidential election for (*inter alia*) illegalities and irregularities in the electronic transmission of election results.

The IEBC made four main responses to the complaint. First, the IEBC contended that the complaint was incompetent to the extent that Paarl had not deposited security of at least 10% of the contract price as required under section 167 (2) of the 2015 Procurement Act.[28] Secondly, Paarl had filed the complaint outside the prescribed statutory period of fourteen days following the notification of successful and unsuccessful tenderers.[29] Thirdly, Paarl did not cite the successful tenderer (that is, Al Ghurair) as a respondent to the case. Lastly, the IEBC contended that Paarl had not submitted a responsive bid. Lastly, the IEBC contended that Paarl had not submitted a responsive bid.

On 28th November 2016, the Review Board dismissed Paarl's complaint on mainly technical legalistic grounds. The Review Board held, *inter alia*, that: (i) the person who had filed and signed Paarl's complaint did not have a valid power of attorney or other formal authorisation, (ii) Paarl had submitted a non-responsive tender and (iii) the complaint was not supported by a valid statement or affidavit to confirm the allegations of fact set out therein.[30] Further, the Review Board ruled that sections 167 and 173 of the 2015 Procurement Act limited its jurisdiction to public procurement disputes *stricto sensu* and, accordingly, it could not entertain or redress complaints relating to alleged breaches of the 2010 Constitution and electoral laws.[31]

---

[28] The 2015 Procurement Act, s 167 (2). As explained in Chapter 3 of this study, sections 167 (2), 169 and 175 (2) of the 2015 Procurement Act, which require litigants to deposit a security of at least 10% of the contract price as a precondition for lodging disputes before the Review Board and the courts, are unconstitutional.

[29] The 2015 Procurement Act, s 167 (1).

[30] *Paarl Media (PTY) Limited v Independent Electoral and Boundaries Commission & 2 Others*, Review Board Application No. 93 of 2016, 54, 60, 63 and 70.

[31] Ibid 68.

The Review Board's decision to dismiss the Paarl's complaint on mainly technical grounds offended the 2010 Constitution, which enjoins all courts and tribunals to administer justice 'without undue regard to procedural technicalities.'[32] The Review Board's refusal to delve into grievances relating to breaches of the 2010 Constitution and election laws embodied four fundamental errors. First, the decision is *per incuriam* to the extent that superior courts had previously upheld the competence of the Review Board to enforce the 2010 Constitution.[33] Secondly, the Review Board's decision on this aspect of the dispute is incompatible with the status of the 2015 Procurement Act as 'an Act of Parliament to give effect to Article 227 of the Constitution….'[34] Thirdly, the Review Board's refusal to address complaints relating to breaches of the constitution is incompatible with the extensive application of the 2010 Constitution to public procurement regulation, as explained in chapter 3 above. Lastly, the refusal to entertain constitutional grievances is incompatible with the Review Board's earlier decision to the effect that CORD and Jubilee had sufficient stakes in the general election that was the subject of the procurement.[35]

---

[32] The 2010 Constitution, art 159 (2) (d).

[33] See e.g. *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others*, Supreme Court Petition No. 14 of 2014, para 341. See also *Republic v Public Procurement Administrative Review Board & 2 Others ex-parte MIG International & Another*, High Court of Kenya (Nairobi) Miscellaneous Civil Applications Nos. 356 and 362 of 2015, paras 133-134.

[34] The 2015 Procurement Act, preamble.

[35] *Paarl Media (PTY) Limited v Independent Electoral and Boundaries Commission & 2 Others*, Review Board Application No. 93 of 2016, 20.

4.2.3 First High Court Proceedings

On 19th December 2016, CORD instituted judicial review proceedings against the IEBC secretariat's decision to award the Tender to Al Ghurair.[36] In summary, CORD's judicial review case revolved around breaches of the 2010 Constitution and election laws, which the Review Board had declined to address. On 13th February 2017, the High Court upheld CORD's complaints, annulled the contract signed between the IEBC and Al Ghurair and directed the IEBC to restart the tender process in compliance with the 2010 Constitution, the 2015 Procurement Act and relevant election laws.[37] The High Court also rejected the IEBC's argument that urgency and the public interest in ensuring the general election were held on the constitutionally stipulated date militated against the nullification of the tender.[38]

4.2.4 First Appellate Proceedings

Al Ghurair appealed the High Court's decision.[39] On 26th April 2017, the Court of Appeal upheld the High Court's decision.[40] In summary, the Court of Appeal held that: (i) the IEBC was obliged to conduct its procurements in accordance with the 2010 Constitution, (ii) the IEBC secretariat had no power to award the tender when all the offices of IEBC Commissioners were vacant, (iii) the contract purportedly signed

---

[36] *Republic v Independent Electoral and Boundaries Commission & Another Ex-parte Coalition for Reform and Democracy & 2 Others*, High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 637 of 2016.
[37] Ibid paras 195-203, 241.
[38] *Republic v Independent Electoral and Boundaries Commission & Another Ex-parte Coalition for Reform and Democracy & 2 Others*, High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 637 of 2016, para 202.
[39] *Al Ghurair Printing and Publishing LLC v Coalition for Reforms and Democracy & 2 Others*, Civil Appeal (Nairobi) No. 63 of 2017.
[40] Ibid.

between the IEBC and Al Ghurair was *ultra vires* the powers of the secretariat hence void and (iv) the tender specifications were invalid to the extent that they were inconsistent with relevant election laws.[41] The Court of Appeal also upheld the High Court's decision that urgency and public interest considerations could not excuse breaches of the 2010 Constitution and the 2015 Procurement Act.[42]

4.2.5 Second Tender

On 18th April 2017, the IEBC re-advertised the tender.[43] The advert stated that the procurement method was open competitive bidding, and that the tender was 'open to all tenderers with ISO 9001 and ISO 27001 (ISM) certified or equivalent.'[44] In other words, the IEBC, yet again: (i) breached section 89 of the 2015 Procurement Act and (ii) omitted to integrate social objectives into the tender.

Although the second tender was 'open to all tenderers with ISO 9001 and ISO 27001 (ISM) certified or equivalent,' the IEBC distorted the conditions of competition in many ways. First, the IEBC arbitrarily emailed advance copies of the tender advert and documents to thirteen firms. This discriminatory conduct, which IEBC disingenuously attempted to explain off as restricted tendering, gave the thirteen firms a head-start and an unfair advantage in the preparation of their bids.[45] Secondly, the IEBC

---

[41] Ibid paras 78-84, 97.
[42] Ibid para 99.
[43] Tender No. IEBC/48/2016-2017.
[44] On the conditions for the participation of foreign firms in Kenyan public procurement markets, see the 2015 Procurement Act, s 89.
[45] *Rosecate Promotions and Supplies Ltd v Independent Electoral and Boundaries Commission & 3 Others*, Review Board Application No. 44 of 2017, 56-60.

published the tender advert and documents six days to the deadline for submission of bids. Notably, the IEBC published the tender advert and documents several days after emailing them to the thirteen firms. This not only unfairly favoured the thirteen firms but also denied other tenderers the minimum statutory tender preparation period of twenty-one days.[46] Further, the IEBC held a pre-tender conference with the thirteen firms before publishing the tender documents to other potential tenderers. Again, this gave the thirteen firms an unfair advantage in the preparation of their bids.

4.2.6 Second Administrative Review Proceedings

Rosecate Promotions and Supplies Limited (hereinafter, "Rosecate") chanced upon the tender advert and documents on the IEBC website. On 3rd May 2017, Rosecate purchased the tender documents from the IEBC and submitted a bid. Rosecate, however, feared that they could not fairly compete against the thirteen firms, as the latter had received the tender advert and documents much earlier.

On 9th May 2017, before the completion of the evaluation and award of the tender, Rosecate lodged a complaint with the Review Board.[47] Rosecate contended that the IEBC had failed to: (i) take reasonable steps to bring the tender advert and documents to the attention of the public and all potential tenderers,[48] (ii) give some tenderers adequate time to prepare and submit their bids,[49] and (iii) adopt unambiguous,

---

[46] The 2015 Procurement Act, s 89 (c), the 2006 Regulations, reg 36.
[47] *Rosecate Promotions and Supplies Ltd v Independent Electoral and Boundaries Commission & 3 Others*, Review Board Application No. 44 of 2017.
[48] The 2015 Procurement Act, s 96.
[49] Ibid s 89 (c).

objective and quantifiable tender evaluation criteria. Rosecate further contended that the IEBC had: (iv) conducted the tender in an opaque, secretive and discriminatory manner and (v) failed to comply with the decisions of the High Court and the Court of Appeal directing it to conduct the tender in accordance with the 2010 Constitution, the 2015 Procurement Act and relevant election laws.

The IEBC raised five main responses to Rosecate's complaint. First, the complaint was incompetent to the extent that it purported to challenge the IEBC's choice of procurement method.[50] Secondly, although the tender documents described the procurement as 'open to all tenderers with ISO 9001 and ISO 27001 (ISM) certified or equivalent,' the intention of the IEBC was to procure by restricted tendering. Specifically, the IEBC contended that it had all along intended to restrict participation to firms which had either submitted a tender or made inquiries in relation to the first tender. This intention, the IEBC contended, provided the justification for emailing the tender documents and holding a pre-tender conference with the thirteen firms.[51] Thirdly, the publication of the tender advert and documents on the IEBC website was 'merely for general information to the public in fulfilment of transparency obligations attaching to public entities.' The publication of the tender advert and documents on the website did not, the IEBC contended, invite bids from Rosecate or any other firm. Fourthly, Rosecate had no *locus standi* to institute the complaint since it was not among the thirteen firms specifically invited to participate in the restricted tendering. Lastly, public interest necessitated the adoption of restricted tendering. Specifically, the

[50] Ibid s 167 (4) (a).

[51] Six of the thirteen firms, however, had neither submitted a tender nor made inquiries regarding the first tender.

choice of restricted tendering was necessitated by time constraints and the need for expedition, as the 2017 general election was only three months away.[52]

On 19th May 2017, the Review Board nullified the tender. The Review Board held (*inter alia*) that the IEBC could not arbitrarily or discriminatorily send the tender advert and documents to select firms or invite bids from firms selected based on no known criteria.[53] The Review Board also condemned the procurement process as a sham, fundamentally flawed and a grave violation of the regulatory framework for public procurement in Kenya. It noted:

> the procurement process and the tender document in this case are so fundamentally flawed that the same cannot pass the test set out in the 2010 Constitution and the Act…The process was to say the least a sham and embarrassing and was conducted with such casualness, and lack of diligence at the level that leaves the Board wondering whether the Procuring Entity's Procurement Department appreciated the enormity of the assignment and the gravity of the matter at hand.[54]

The Review Board also held that the IEBC had: (i) used contradictory and ambiguous tender evaluation and award criteria, (ii) engaged in discriminatory practices, (iii) leaked the bids of some candidates to third parties and (iv) abused discretion. The Review Board further held that the IEBC had: (v) failed to adopt objective and quantifiable tender evaluation criteria and (vi) breached the provisions of (*inter alia*)

---

[52] Under Kenyan laws, urgency and time constraints are not justifications for recourse to restricted tendering. On the conditions for the use of this procurement method, see the 2015 Procurement Act, s 102.

[53] *Rosecate Promotions and Supplies Ltd v Independent Electoral and Boundaries Commission & 3 Others*, Review Board Application No. 44 of 2017, 56-60.

[54] Ibid 78.

articles 27 and 227 of the 2010 Constitution as read with sections 3 (b), 67, 80 (3), 89 (c), 92, 93, 94, 95 and 102 of the 2015 Procurement Act.

The Review Board allowed the IEBC discretion to repeat the tender 'using such [procurement] method as it may consider appropriate taking into account the time left…and all such other factors as it may consider necessary.'[55] The rationale for giving the IEBC this broad discretion lay in the imminence of the 2017 general election, which was just eighty days away.[56] The decision to give the IEBC broad discretion, however, unwittingly encouraged malfeasance. Specifically, it appeared to encourage the multiple deliberate fundamental errors and irregularities revealed by the complaint, and the IEBC's apparent predetermination to award the tender to Al Ghurair.

4.2.7 Second High Court Proceedings

The Review Board's decision to give the IEBC a wide discretion on the choice of procurement method immediately triggered further litigation at the High Court.[57] In *Cecil James Oyugi v Public Procurement Administrative Review Board & Another*, for instance, the petitioner contended that the IEBC had deliberately 'set out to frustrate the procurement process in order to justify single-sourcing [i.e. direct procurement].'[58] The petitioner also contended that the Review Board's decision effectively: (i) gave the

---

[55] Ibid 84.
[56] Ibid.
[57] See e.g. *Hillary Mulialia Okumu v Independent Electoral and Boundaries Commission & 2 Others*, High Court of Kenya (Nairobi) Constitutional Petition No. 69 of 2017 and *Cecil James Oyugi v Public Procurement Administrative Review Board & Another*, High Court of Kenya (Nairobi) Constitutional Petition No. 241 of 2017.
[58] *Cecil James Oyugi v Public Procurement Administrative Review Board & Another*, High Court of Kenya (Nairobi) Constitutional Petition No. 241 of 2017, para 8.

IEBC 'a perfect excuse' to single source the ballot papers,[59] and (ii) subordinated the public interest to 'shady, private interests and therefore violates the national values and principles of governance' set out in Article 10 of the 2010 Constitution.[60] Accordingly, the petitioner urged the High Court to restrain the IEBC from awarding the tender [to Al Ghurair] by way of direct procurement.

The High Court censured the way the IEBC set out to procure the ballot papers, but dismissed the contention that the IEBC had deliberately bungled the procurement process to waste time and ultimately justify recourse to direct procurement, stating that:

> Whereas I agree that the manner in which it [i.e. the IEBC] set out to procure the materials in question leaves a lot to be desired as was found by the 1st Respondent [i.e. the Review Board], to contend that it intends to single source for the materials in question is at this stage speculative and amounts to conjecture. This Court…must rely on concrete grounds and is not expected to rely on mere conjectures…the Petitioner must place before the Court facts which show that there is a probability as opposed to mere possibility...If and when the 2nd Respondent [i.e. the IEBC] proceeds in a manner that violates the law and the Constitution a party aggrieved would be at liberty to move the 1st Respondent [i.e. the Review Board] and the Court appropriately.[61]

4.2.8 Direct Procurement

On 29th May 2017, the IEBC awarded the contract for the supply of the ballot papers to Al Ghurair by way of direct procurement. A week later, on 8th June 2017, the IEBC and Al Ghurair signed a two-year framework contract. The IEBC justified the decision to

---

[59] Affidavit sworn by Cecil James Oyugi (31 May 2017) para 10.
[60] Notice of Motion Application by Cecil Oyugi for conservatory orders (31 May 2017) para 7.
[61] Ibid para 9.

award the tender to Al Ghurair by way of direct procurement on, *inter alia*, the company's reliability, urgency, time constraints and the public interest in holding the general election on the date set out in the 2010 Constitution. The IEBC informed the public of the award of contract seventeen days later, through a media briefing.

4.2.9 Third High Court Proceedings

The National Super Alliance Kenya (hereinafter, "NASA"), a coalition of opposition political parties, instituted judicial review proceedings against the IEBC's decision to award the tender to Al Ghurair by direct procurement.[62] In summary, NASA contended that: (i) the IEBC had breached the constitutional principle of public participation, (ii) Al Ghurair had printed ballot papers in multiple disputed elections across the globe and (iii) the IEBC had deliberately bungled previous tendering processes and engaged in dilatory conduct to justify an apparently predetermined decision to award the tender to Al Ghurair at all costs. NASA also contended that the directors and shareholders of Al Ghurair were too close to the incumbent president of Kenya, who was also a candidate in the election. On 7th July 2017, exactly one month to the general election, the High Court held that the IEBC had breached the constitutional principle of public participation and ordered the IEBC to commence the procurement of presidential election ballot papers *de novo*.[63] The High Court further held, this time with a degree of equivocation, that the IEBC's infringements of the

---

[62] *Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex-parte National Super Alliance (NASA) Kenya & 6 Others*, High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 378 of 2017.
[63] Ibid para 236.

regulatory framework for public procurement could not be excused on public interest considerations.[64]

4.2.10 Second Appellate Proceedings

The IEBC appealed the decision of the High Court.[65] The appeal revolved around two key issues. First, the IEBC contended that the High Court ought to have excused its breaches of the 2010 Constitution and the 2015 Procurement Act in view of the public interest in holding the 2017 general election on schedule. Secondly, the IEBC contended that the decision of the High Court was erroneous to the extent that it applied the constitutional principle of public participation to direct procurement.

The IEBC's invocation of the public interest as a ground of appeal was curious, as the Review Board, the High Court and Court of Appeal had consistently rejected this argument in previous litigation. The IEBC's persistent invocation of the argument strongly pointed to a perverse strategy of repeatedly bungling the tender until the election date approached and, consequently, citing time constraints as a justification for awarding the tender to Al Ghurair by way of direct procurement. Indeed, the chain of events, and specifically the persistent award of the tender to Al Ghurair, strongly pointed to such a strategy.

The IEBC's contention that the constitutional principle of public participation did not apply to direct procurement was inconsistent with the text of the 2010 Constitution.

---

[64] Ibid paras 208-226.
[65] *Independent Electoral and Boundaries Commission (IEBC) v The National Super Alliance (NASA) Kenya & 6 Others*, Civil Appeal (Nairobi) No. 224 of 2017.

As explained in chapter 3 above, the 2010 Constitution states that the national values and principles of governance bind all state organs, state officers, public officers and all persons '*whenever*' any of them: (i) applies or interprets the 2010 Constitution, (ii) enacts, applies or interprets any law, or (iii) makes or implements public policy decisions.[66]

On 20th July 2017, the Court of Appeal allowed the appeal and upheld the IEBC's decision to award the tender to Al Ghurair by way of direct procurement. The Court of Appeal faulted the High Court for failing to accord paramountcy to the public interest in holding the 2017 general election on the constitutionally scheduled date.[67] The Court of Appeal also faulted and reversed the High Court's decision to the effect that the constitutional principle of public participation, which the IEBC had disregarded, applied to direct procurement and all other methods of procurement.

The Court of Appeal's decision was internally inconsistent, and irreconcilable with previous decisions on the same tender, in many ways. First, the Review Board, the High Court and the Court of Appeal had all previously ruled that the IEBC could not justify breaches of the 2010 Constitution, or the 2015 Procurement Act, on time constraints and other 'public interest' considerations.[68] Indeed, the pre-existing

---

[66] The 2010 Constitution, arts 4 (2) and 10 (1). See also the 2015 Procurement Act, s 3 (a), which expressly applies the national values and principles of governance set out in Article 10 of the Constitution to public procurement decision making.

[67] *Independent Electoral and Boundaries Commission (IEBC) v The National Super Alliance (NASA) Kenya & 6 Others*, Civil Appeal (Nairobi) No. 224 of 2017, para 214.

[68] *Rosecate Promotions and Supplies Ltd v Independent Electoral and Boundaries Commission & 3 Others*, Review Board Application No. 44 of 2017, 74-77, *Republic v Independent Electoral and Boundaries Commission & Another Ex-parte Coalition for Reform and Democracy & 2 Others*, High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 637 of 2016, para 202, *Al*

jurisprudence had consistently emphasised strict adherence to the rule of law, and specifically strict adherence to public procurement laws, as the best means of promoting the public interest.[69]

It was capricious, perhaps even disingenuous, therefore, for the Court of Appeal to invoke arguably spurious public interest as the justification for reversing the High Court's decision. Moreover, the Court of Appeal's sudden about-turn on the issue of public interest is irreconcilable with its holding that that constitutional values and principles, including public participation, 'can never be sacrificed at the altar of time constraints.'[70] The about-turn also contradicts the Court of Appeal's decision that it was futile to hold a non-transparent and flawed general election 'simply because time is a constraint.'[71] The Court of Appeal also curiously failed to appreciate that the so-called public interest was, in reality, a clever but dishonest disguise for 'the insatiable [mercantilist] interest that surrounds lucrative government procurements.'[72] Further, the Court of Appeal equivocated by holding that the constitutional principle of public participation applies to all public procurements on the one hand and creating an untenable exemption for direct procurement on the other hand.[73]

Ghurair Printing and Publishing LLC v Coalition for Reforms and Democracy & 2 Others, Civil Appeal (Nairobi) No. 63 of 2017, para 99.

[69] *Republic v Public Procurement Administrative Review Board & 3 Others ex-parte Olive Telecommunication PVT Ltd,* High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 106 of 2014, paras 163-164.

[70] *Independent Electoral and Boundaries Commission (IEBC) v The National Super Alliance (NASA) Kenya & 6 Others*, Civil Appeal (Nairobi) No. 224 of 2017, para 123.

[71] Ibid.

[72] *Republic v Public Procurement Administrative Review Board & 3 Others ex-parte Olive Telecommunication PVT Ltd,* High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 106 of 2014, para 164.

[73] *Independent Electoral and Boundaries Commission (IEBC) v The National Super Alliance (NASA) Kenya & 6 Others*, Civil Appeal (Nairobi) No. 224 of 2017, para 213.

The Court of Appeal's decision also flips the formal hierarchy of norms in the Kenyan legal system, by using the 2015 Procurement Act to create an exemption to a constitutional principle when that exemption is neither provided for nor envisioned by the 2010 Constitution.[74] In other words, the Court of Appeal ignored a salient constitutional question, namely whether the non-competitive nature of direct procurement was compatible with the constitutional obligation of the IEBC to procure the ballot papers 'in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.'[75]

The Court of Appeal exonerated the IEBC of all accusations, including those relating to dilatory conduct and bias. First, the Court of Appeal held that the IEBC had merely obeyed various court orders and, in the process, lost valuable time to litigation.[76] On bias, which revolved around persistent illegal manoeuvres to award the tender to Al Ghurair at all costs, the Court of Appeal held that 'when a person [i.e. Al Ghurair] consistently wins a tender award, an inference could also be drawn that other tenderers consistently did not meet the tender criteria.'[77] The Court of Appeal's conclusions on dilatory conduct and bias, however, were inconsistent with the facts of the case. The Review Board had censured the IEBC for bias, breaching court orders and persistent flagrant breaches of procurement laws:

---

[74] Ibid paras 166-168. On the hierarchy of laws under the Kenyan legal system, see the Judicature Act, s 3. See also the 2010 Constitution, art 2.
[75] The 2010 Constitution, art 227 (1).
[76] *Independent Electoral and Boundaries Commission (IEBC) v The National Super Alliance (NASA) Kenya & 6 Others*, Civil Appeal (Nairobi) No. 224 of 2017, para 125.
[77] Ibid para 65.

> The Board further finds that it would amount to a dereliction of its duty under the provisions of the Constitution and Act [i.e. the 2015 Procurement] if it were to allow a tender process where the tenderers are selected on the basis of an advertisement/invitation to tender which has already been quashed by the court and where the decision on who should or should not submit a tender is left to the whims of the head of the procuring entity's procurement department…[78]

The Court of Appeal's decision on the issue of public interest creates a dangerous precedent. It encourages government bureaucrats to abuse discretion, through corruption, favouritism and other forms of malfeasance, in the name of 'public interest' considerations. Specifically, it (unwittingly) encourages government bureaucrats to deliberately breach public procurement laws or delay public tendering processes safe in the knowledge that they can disingenuously invoke urgency or other 'public interest' considerations as a justification for awarding public contracts to favoured or predetermined firms. The High Court's decision reflects a better, more holistic and sustainable judicial approach to the problem of creating perverse incentives under the cloak of urgency and other 'public interest' considerations:

> balancing between (*sic*) the public interest and the rights of successful litigants before the court is a fact-intensive inquiry. It must be based on facts and permissible inferences of the likely consequences…It is not enough for a party to warn the Court that administrative chaos will ensue, that the heavens will shatter, and that the sky will fall down if the orders sought are granted…There can never be public interest in breach of the law, and the decision of the Respondent is indefensible on public interest [grounds] because public interest must accord to the Constitution and the law…[A] party cannot transgress the law with impunity and then tell the Court that public interest dictates the action should not be reversed. Such posture will be frowned upon by the court.[79]

---

[78] *Rosecate Promotions and Supplies Ltd v Independent Electoral and Boundaries Commission & 3 Others*, Review Board Application No. 44 of 2017, 79.

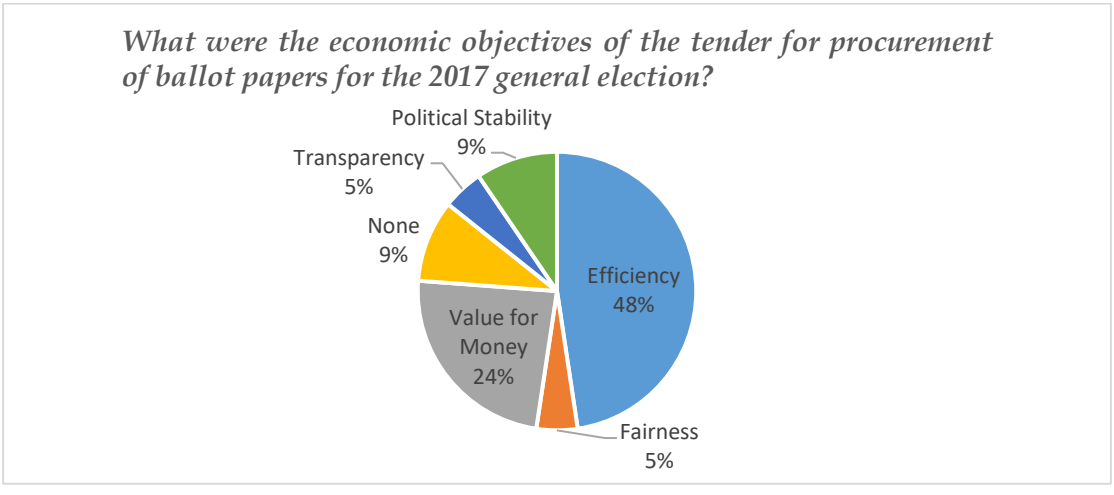
[79] *Republic v Speaker National Assembly & 4 Others ex-parte Coalition for Reform and Democracy (CORD)*, High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 657 of 2016, paras 197-206.

4.2.11 Interplay of Economic and Social Objectives

As explained in chapter 1 and section 4.2.1 above, the selection of the procurement of ballot papers for the 2017 general election as a case study was informed by the relevance of the project to the research questions and need to test the hypotheses of this study against an actual procurement project. Specifically, the controversies about the IEBC procuring the ballot papers at a price that was twice or thrice the global average unit price raised serious economic efficiency questions. The allegations of abuse of discretion, corruption, favouritism and other forms of malfeasance that characterized the protracted litigation also made the project an apt choice for the case study.

The key informants that participated in this study included (*inter alia*) IEBC officials who had either advised on or participated in making critical decisions relating to tender. The questionnaires and interviews focused on establishing participants' views on the economic and social objectives of the tender (see questions 1 to 8 of Appendix 9).

Figure 5: Economic Objectives and the Procurement of Ballot Papers



Participants perceived efficiency and value for money as the main economic objectives of the tender for the procurement of ballot papers for the 2017 general election, with response frequency rates of 48% and 24% respectively (see Figure 5 above). Notably, a significant number of participants (that is, 9% of all participants) did not ascribe any economic objectives to the tender. Further, transparency and fairness, both of which are key elements of an economic approach to public procurement, scored low response frequency rates of 5% each.

As explained in chapter 1 above, the key informants that participated in the qualitative research for this study included IEBC staff and independent professionals who had advised the IEBC at various stages of the procurement of ballot papers for the 2017 general election. Three inferences may be drawn from the data set out in Figure 5 above based on this demographic. First, the results in Figure 5 are arguably reflective of the IEBC's infidelity to the values of transparency and fairness.[80] Secondly, the 9% response frequency rate for '*none*' depicts bureaucratic ignorance of, or indifference to, the economic objectives embodied in Kenyan public procurement laws. Lastly, 48% and 24% response frequency rates for efficiency and value for money suggest that IEBC officers knew but deliberately disregarded the imperative of procuring the ballot papers in a cost-effective manner.[81]

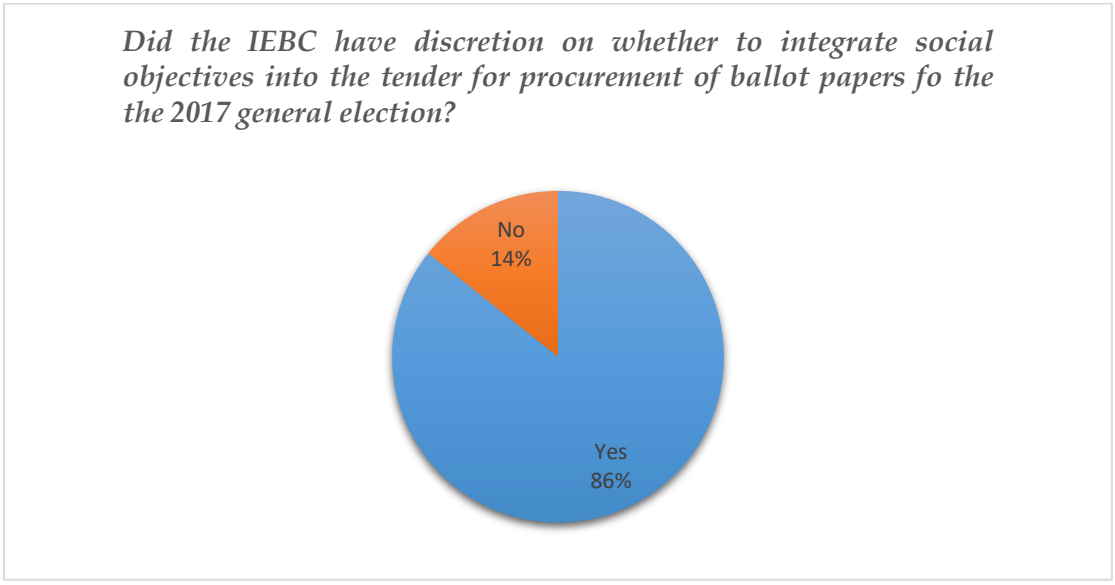
---

[80] This may explain the unusually high incidence of corruption, favouritism and other forms of malpractice that characterised the tender, discussed in section 6.5.3 below.

[81] See *inter alia* Moses Michira, 'Kuchezwa? How Much Kenyans are Paying for Each Ballot Paper as Compared to Other Countries in East Africa' *The Standard* (Nairobi, 20 June 2017) <*https://www.sde.co.ke/article/2001244188/kuchezwa-how-much-kenyans-are-paying-for-each-ballot-paper-as-compared-to-other-countries-in-east-africa*> accessed 25 April 2018.

All participants stated that the IEBC did not integrate any social objectives into the tender (see Appendix 9, Question 4). This confirms a major breach of the 2015 Procurement Act, which, as discussed in chapter 3 above, obliges procurement entities to integrate social objectives into all public procurements.[82] Further, as shown in Figure 6 below, 86% of the participants believed, contrary to the express provisions of the 2015 Procurement Act and the prevailing case law, that the IEBC had discretion on whether to integrate social objectives into the tender.[83] As explained below, this manifests a more pernicious dimension of the problem of discretion, which goes beyond abuse of formally granted discretion. Specifically, it manifests a situation in which government bureaucrats arrogate to themselves, as a means of facilitating nefarious conduct, discretion that is either unanticipated or expressly forbidden by the law.

Figure 6: Whether IEBC had the Discretion to Integrate Social Objectives



[82] The 2015 Procurement Act, ss 155 (1) and 157 (10).

[83] See the discussion at section 4.4 below on illegal arrogation of power and discretion.

The key informants that participated in the qualitative research for this study, especially those drawn from the IEBC, gave many curious and spurious explanations for the omission to integrate social objectives into the tender for the procurement of ballot papers for the 2017 general election. First, the imperative of having an undisputed election overrode the need to implement the social objectives embedded into the 2015 Procurement Act. This may explain why 'political stability' unexpectedly featured as an economic objective of the tender, with a significant response frequency rate of 9% (see Figure 5 above). Secondly, according to one of the questionnaires returned from the IEBC, it was '*not fathomable in the Kenyan context that ballot papers can be printed by local suppliers*.'[84] Thirdly, domestic suppliers lacked the technical, financial and experiential capabilities needed to print and deliver the ballot papers in time for the general election. Fourthly, the omission to integrate social objectives was not a major issue since local transporters were allowed to distribute the ballot papers to various polling stations. Further, some participants deemed the international open tendering procurement method initially adopted by the IEBC compatible with the promotion of domestic industry since it did not bar local suppliers from bidding. Lastly, one of the responses to the questionnaires administered on IEBC officers stated that the 'feel-good effect' associated with foreign supply of the ballot papers, especially in view of political distrust of local printers, justified the omission of social objectives from the tender.

[84] All participants from the IEBC requested anonymity in the analyses of any data that they supplied in questionnaires and interviews.

4.2.12 Discretion and Incidence of Malfeasance

The endless controversies and protracted litigation that bogged down the procurement of ballot papers for the 2017 general election were driven by allegations of corruption, favouritism and other forms of malfeasance. This study, therefore, to establish whether and the extent to which the tender was characterised by corruption, favouritism and other forms of malfeasance (see Appendix 9, Question 9). Most participants (that is, 70% of all participants) stated that the tender for the procurement of ballot papers for the 2017 general election was characterised by corruption, favouritism and other forms of malfeasance. Participants attributed the incidence of corruption, favouritism and other forms of malfeasance to: (i) political interference, (ii) conflicts of interest, (iii) delinquent government bureaucrats, (iv) vague evaluation and award criteria, (v) conflicts of interests and (vi) the discretion that the 2015 Procurement Act gave the IEBC on termination of tender proceedings and choice of procurement method.

4.3 Procurement of Laptops for Primary Schools

The role of ICT in the provision of education, and the provision of government services in general, was a key issue in political campaigns for the 2013 general election.[85] The Jubilee Party won the 2013 general election on the promise that it would, *inter alia*, 'work with international partners to provide solar-powered lap-top computers

[85] Thomas Sharples and Klas Moldéus, 'Ready or Not, Here ICT Comes: A Case Study of the e-Readiness and Governance in Kenya's Laptop Project' (2014) Lund University Research Paper 4446302, 14<*http://lup.lub.lu.se/student-papers/record/4446302*> accessed 17 May 2018.

equipped with relevant content for every school-age child in Kenya.'[86] The cost of this ambitious socioeconomic objective, a flagship of Jubilee's Digital Learning Programme, was estimated at US$ 610 million.[87] The successful implementation of the Digital Learning Programme also required the electrification of more than ten thousand primary schools, at the cost of about US$ 230 million.[88]

The Digital Learning Programme entailed giving a laptop computer, with digital learning content, to some primary school teachers and every child that joined standard one in 2014 and subsequent years.[89] The specific objectives of the Digital Learning Programme were: (i) the entrenchment of ICT in teaching, learning and management of education, (ii) provision of appropriate ICT infrastructure in public primary schools and (iii) development and accreditation of appropriate digital learning content that would enhance acquisition of 21st-century skills.[90]

The Digital Learning Programme faced many criticisms.[91] The main and arguably most cogent criticism questioned the rationale of giving laptops to standard one pupils in a poor country where a large portion of the national population lacked basic amenities

---

[86] Jubilee, 'The Shared Manifesto of the Coalition between the National Alliance (TNA) the United Republican Party the National Rainbow Coalition (NARC) and the Republican Congress Party' (2013-2017) 26.
[87] Sharples and Moldéus (n 85) 15.
[88] Ibid.
[89] Felix Olick, 'Laptop Project is Unstoppable, say President Uhuru Kenyatta, Deputy President William Ruto' *The Standard* (Nairobi, 13 July 2013) <*https://www.standardmedia.co.ke/?articleID=2000088261*> accessed 06 May 2018.
[90] ICT Authority, 'Digital Learning Programme Progress May 2016'<*http://icta.go.ke/digital-literacy-Programme-progress-may-2016/*> accessed 13 May 2018.
[91] Sharples and Moldéus (n 75) 15.

such as clean water and sanitation.[92] Relatedly, critics questioned Jubilee's enthusiastic prioritisation of laptops at a time when most Kenyan public primary schools lacked habitable classrooms, electricity connection, toilets, libraries and other critical infrastructure.[93] Further, critics questioned the utility of giving laptops to standard one pupils, as such pupils were too young to understand ICT concepts.[94] Lastly, some critics dismissed the Digital Learning Programme as a mercantilist conspiracy to misappropriate taxpayers' funds through public procurement fraud and corruption, stating that:

> It is easy to conclude that the person who came up with the idea of laptops for all standard one pupils is a mercantile man, a supplier, who, guided by greed saw the bulk market available in our primary schools.[95]

The mercantilist conspiracy line of criticism suggested that the provision of laptops to standard one pupils had little to do with the ostensible socioeconomic objective of integrating ICT in the provision of basic education. Instead, according to this criticism, the real motive of the proponents of the project was to use the public procurement process as a conduit for siphoning funds out of the public purse. The incidence of malfeasance and the controversies that characterised the procurement process,

---

[92] Mark Graham, 'Kenya's Laptops for Schools Dream Fails to Address Reality' *The Guardian* (London, 27 June 2013) <*https://www.theguardian.com/global-development/poverty-matters/2013/jun/27/kenya-laptops-schools*> accessed 17 May 2018.

[93] Parents Magazine Africa, 'The Big Laptops Debate' < *https://parentsafrica.com/2013/07/08/laptops/*> accessed 28 May 2018.

[94] See e.g. Augustine Oduor, 'How Indian Firm Landed Sh24b Tender' *The Standard* (Nairobi, 08 February 2014) 5.

[95] Ben Arum, 'Yes, I fear laptops for all pupils is just populist rhetoric' *The Standard* (Nairobi, 17 April 2013) <*https://www.standardmedia.co.ke/article/2000081722/yes-i-fear-laptops-for-all-pupils-is-just-populist-rhetoric*> accessed 06 May 2018.

discussed below, vindicate the perception that the project was merely a mercantilist conspiracy to siphon funds out of the public purse.

4.3.1 First Tender

On 2nd August 2013, the Ministry of Education, Science and Technology (hereinafter, "MoEST") advertised an international competitive tender for the supply, delivery, installation and commissioning of ICT integration in education portable computing devices and solutions for primary schools in Kenya.[96] According to the tender document, the MoEST needed 1,224,176 laptops, 20,637 printers and 20,637 projectors.[97] The tender document required tenderers, *inter alia*, to: (i) be original equipment manufacturers of the required hardware gadgets, (ii) have 'demonstrable manufacturing capacity,' with at least ten years' experience, (iii) be willing to set up a local manufacturing or assembly facility in Kenya employing local residents, (iv) prove ability to provide skills and knowledge transfer to Kenyan citizens and (v) demonstrate eligibility to participate in the schemes of preferences and reservations set out in Kenya's public procurement laws.[98]

On 13th October 2013, MoEST terminated the tender.[99] The termination letter, which was anchored on section 36 of the 2005 Procurement Act, stated that MoEST had

---

[96] MoEST, 'International Competitive Bidding (ICB) No. MoEST/1/2013-2014: Supply, Delivery, Installation and Commissioning of Computing Devices and Solutions for ICT Integration in Education in Primary Schools' *Daily Nation* (Nairobi, 02 August 2013) 17.
[97] The tender document, schedule of requirements.
[98] The Tender Document, clause 3. As explained in Chapter 3 of this study, the 2011 Regulations allowed foreign bidders to benefit from the schemes of preferences and reservations where they bid in consortia or joint ventures with companies registered in Kenya.
[99] Letter from Belio Kipsang to Hewlett Packard East Africa Limited (16 October 2013).

'insufficient funds to finance the procurement of the computing devices.'[100] The alleged lack of funds, however, contradicted the tender advert, which stated that the Government had 'established a budget line' for the procurement of the devices.[101] Moreover, the alleged absence of funds was legally unavailable as a ground for terminating the tender. Specifically, section 26 (5) of the 2005 Procurement Act forbid public agencies from commencing a procurement process in the absence of sufficient finances.[102] Subsequent developments, discussed in the ensuing sections of this chapter, suggested that the real reason for the termination of the tender was to give MoEST a chance to lower eligibility requirements and technical specifications to accommodate a preferred tenderer.

4.3.2 Second Tender

On 28th October 2013, MoEST requested the Public Procurement Oversight Authority (hereinafter, "the PPOA") to approve the use of special procurement procedures for the tender.[103] MoEST gave four reasons for the request, namely: (i) time constraints, (ii) budgetary constraints, (iii) complexity of manufacturing and distribution processes

---

[100] Ibid. For judicial insights on termination of procurement proceedings under section 36 of the 2005 Procurement Act, see *Republic v Public Procurement Administrative Review Board & Another ex-parte Selex Sistemi Integrati* High Court (Nairobi) Miscellaneous Civil Application No. 1260 of 2007. See also Muthomi Thiankolu, 'Reconciling Incongruous Policy Objectives and Benchmarking Kenya's Public Procurement Law: A Review of the Selex Case' (2011) 11 (4) Journal of Public Procurement 451.

[101] MoEST (n 86).

[102] The 2005 Procurement Act, s 26 (6): 'A procuring entity shall not commence any procurement procedure until it is satisfied that sufficient funds have been set aside in its budget to meet the obligations of the resulting contract.' Section 63 (1) (b) of the 2015 Procurement Act provides for 'inadequate budgetary provision' as a ground for terminating procurement proceedings. It is not clear whether the procurement of laptops for primary school inspired this shift from the rule set out in s 26 (6) of the 2005 Procurement Act.

[103] Letter from Belio Kipsang to the Director General, Public Procurement Oversight Authority (28 October 2013).

and (iv) the need to get a better-specified project.[104] The first three 'reasons,' however, had little or nothing to do with section 31 (7) of the 2005 Procurement Act, as they had no bearing on enhancement of the efficiency of the procurement process or the implementation of the project.

The PPOA granted the request within twenty-four hours, a remarkably quick turnaround time in view of delays usually associated with government bureaucracy in Kenya.[105] Specifically, the PPOA allowed MoEST to use a five-stage international competitive bidding process comprising five key stages, namely: (i) advertisement, (ii) evaluation of technical offers, (iii) evaluation of financial offers, (iv) competitive negotiations and (v) best and final offer.[106] This specially-permitted process only differed from the conventional international competitive bidding in respect of the fourth and fifth stages. The idea behind the fourth and fifth stages was to encourage tenderers to lower the prices of the laptops and provide value additions at no extra cost.[107]

MoEST re-advertised the tender on 30th October 2013, within 24 hours of obtaining PPOA's approval to use specially permitted procurement procedures. The new tender documents differed from the tender document used in the terminated procurement

---

[104] Ibid.

[105] Letter from M J O Juma to Belio Kipsang (29 October 2013).

[106] Ibid. Notably, the PPOA instructed MoEST to adopt a 'fair, transparent and competitive' procurement process.

[107] MoEST, *Competitive Negotiations Report* (10 December 2013) 4. Subsequently, the Government introduced competitive negotiations as a distinct method of procurement. Under section 131 of the 2015 Procurement Act, a procuring entity may use competitive negotiations where: (i) there is a tie between two or more best tenderers, (ii) the lowest evaluated price is in excess of available budget, or (iii) there is an urgent need that can be met by several known suppliers.

process in many cardinal respects. First, MoEST replaced a requirement for unique identifiers, originally intended to facilitate the tracking and recovery of stolen devices, with the less stringent requirement of unique colours as a form of branding.[108] Secondly, MoEST dropped the requirement for tenderers to have 'demonstrable manufacturing capacity.'[109] MoEST also dropped the requirements for tenderers to: (i) be willing to set up a local manufacturing or assembly facility in Kenya employing local residents, (ii) prove ability to provide skills and knowledge transfer to Kenyan citizens and (iii) demonstrate eligibility to participate in the schemes of preferences and reservations set out in Kenya public procurement laws. MoEST, however, retained margins of preference, ranging from 6% to 20%, based on the shares held by Kenyan citizens in the bidding firms and whether the goods offered were manufactured, mined, extracted or grown in Kenya. In other words, MoEST dropped the most significant mechanisms embedded in the original tender documents to integrate social objectives into the tender.[110] Thirdly, MoEST lowered the required experience from ten years to five years.[111] Fourthly, MoEST substituted a requirement for tenderers to demonstrate the capacity to distribute the computing devices to 'each district nationally' with a less stringent requirement for capacity to distribute the devices to 'Nairobi and Mombasa.'[112]

Sixteen firms submitted bids for the second tender. Of these, six were Kenyan, five Chinese, two Dutch, one Indian, one Portuguese and one Ghanaian. Thirteen of the

---

[108] Original Technical Specifications, clause 3.1.3, revised Technical Specifications, clause 2.2.3.
[109] Original tender document, clause 3.6, revised tender document, clause 3.6.
[110] Revised tender document, clause 33.1.
[111] Ibid.
[112] Original tender document, clause 3.6, revised tender document, clause 3.6.

sixteen firms failed at the preliminary and technical evaluation stages. Three firms, from the Netherlands, China and India, proceeded to the final stage of the specially permitted procurement procedures. On 7th February 2014, MoEST awarded the tender to an Indian company, Olive Telecommunications PVT Limited (hereinafter, "Olive"), which had been ranked second at the penultimate stage of the specially permitted procedures, at the sum of US$ 284,813,957.[113]

4.3.3 Administrative Review Proceedings

On 13th February 2014, Hewlett Packard Europe BV (hereinafter, "HP"), who had been ranked first at the penultimate stage of the specially permitted procurement procedures, filed a complaint with the Review Board.[114] On 14th February 2014, Haier Electrical Appliances Corporation Limited (hereinafter, "Haier"), who had been ranked third at the penultimate stage of the specially permitted procurement procedures, also filed a complaint with the Review Board.[115]

The complainants accused MoEST of egregious breaches of public procurement laws and serious abuses of power and discretion. First, MoEST had dishonestly invoked a lack of funds as the reason for terminating the original tender process when its real motive was to create a leeway for downgrading the eligibility, experiential and capacity requirements to accommodate a pre-determined winner, namely Olive. The

---

[113] Letter from Belio Kipsang to the Managing Director, Olive Communications PVT Ltd (07 February 2014).
[114] *Hewlett-Packard Europe BV, Amsterdam, Myerin Branch v Ministry of Education, Science and Technology*, Review Board Application No. 3 of 2014.
[115] *Haier Electrical Appliances Corporation Limited v Ministry of Education, Science and Technology*, Review Board Application No. 4 of 2014.

basis for this complaint lay in the fact that: (i) MoEST eventually awarded the tender at a price that was two times higher than the disclosed budget and (ii) Olive did not meet the eligibility, experiential and capacity requirements set out in the original terminated tender process.[116] MoEST's own due diligence report appeared to confirm these contentions. To illustrate, the due diligence report gave the dates of incorporation for Olive and its alleged joint venture partner as 17th April 2008 and 2007 respectively.[117] In other words, neither Olive nor its alleged joint venture partner met the ten-year experience threshold set out in the original tender documents.

The complainants also contended that MoEST had rigged the tender by illegally divulging some tenderers' unit prices. Further, the complainants contended, MoEST had failed to use objective and transparent tender evaluation criteria. This complaint revolved around MoEST's introduction of extrinsic evaluation criteria, comprising a sixteen-question template, in the competitive negotiations stage of the evaluation. The sixteen parameters of the competitive negotiations, and specifically the scores attached to the sixteen questions, were not set out in the tender documents.

The fourth major complaint, according to HP and Haier, was that, Olive, the successful tenderer, did not even meet the downgraded eligibility, experiential and capacity

---

[116] MoEST's request for approval of specially permitted procedures gave the Ministry's budget for the project at KShs.12 billion, about half of Olive's award price of US$ 284,813,957.

[117] MoEST, *Due Diligence Report* (31 January 2014) 4, 12. Interestingly, the due diligence report referred to contractual arrangements between Olive and companies that could easily have met the eligibility, experiential and capacity requirements set out in the tender documents, raising questions as to why olive did not form a joint venture with any of those companies.

requirements.[118] Specifically, the complainants contended that Olive, the successful tenderer, was not an original equipment manufacturer and hence lacked the minimum financial, technical and production capabilities set out in the revised tender documents.[119] Lastly, the complainants contended that MoEST had awarded the Tender at a price that was US$ 15,914,258 higher than the successful tenderer's best and final offer.[120] Specifically, the complainants contended that MoEST had awarded the Tender to Olive at the price of US$ 284,813,957 yet Olive's best and final offer was US$ 268,899,699.

MoEST urged the Review Board to consider two factors in deciding the case. First, MoEST had chosen to procure the laptops under the 2005 Procurement Act when it could easily have evaded the stringent transparency and accountability mechanisms embedded in that Act by resorting to donor financing.[121] Secondly, the procurement in question was one of great public interest. Accordingly, MoEST urged the Review Board to uphold the award to Olive even if the complainants proved their allegations.[122] On whether the successful tenderer was an original equipment manufacturer, MoEST contended that the issue was one of intellectual property rights

---

[118] *Hewlett-Packard Europe BV, Amsterdam, Myerin Branch & Another v Ministry of Education, Science and Technology*, Public Procurement Administrative Review Board Applications Nos. 3 and 4 of 2014, 13-16.
[119] Ibid.
[120] Ibid 19-22.
[121] Ibid 22-26.
[122] Ibid. On invocation of public interest as a basis for upholding a flawed public procurement process, see *MEA Limited v National Cereals and Produce Board*, Review Board Application No. 4 of 2012.

(as opposed to an issue of public procurement law) and hence beyond the jurisdiction of the Review Board.[123]

Olive, the successful tenderer, contended that the phrase 'original equipment manufacturer' did not necessarily refer to the actual manufacturer of a product. Equally, Olive further contended, the phrase 'original equipment manufacturer' did not necessarily require the ownership of a factory. Specifically, Olive contended that it was an original equipment manufacturer to the extent that it worked with customers and manufacturers to give end-to-end solutions.[124] On its alleged lack of capacity and experience, Olive contended that its joint venture partner was a properly qualified and experienced firm.[125]

On 11th March 2014, the Review Board held, *inter alia*, that: (i) Olive lacked the financial, technical and production capabilities required to perform the contract, (ii) Olive ought to have been disqualified at the preliminary evaluation stage and (iii) MoEST had unlawfully awarded the tender at a price that was US$ 15,914,288 higher than the successful tenderer's offer.[126] Additionally, the Board held that: (iv) the tender was only open to original equipment manufacturers, (v) Olive was not an original

---

[123] *Hewlett-Packard Europe BV, Amsterdam, Myerin Branch & Another v Ministry of Education, Science and Technology*, Public Procurement Administrative Review Board Applications Nos. 3 and 4 of 2014, 28.

[124] Generally, the phrase 'end-to-end solution' refers to an arrangement where the vendor is responsible for meeting both hardware and software needs of the purchaser. For further insights, visit<*https://www.techopedia.com/definition/19057/end-to-end-solution-e2es*> accessed 15 July 2018.

[125] *Hewlett-Packard Europe BV, Amsterdam, Myerin Branch & Another v Ministry of Education, Science and Technology*, Public Procurement Administrative Review Board Applications Nos. 3 and 4 of 2014 31-33.

[126] Ibid 36-63.

equipment manufacturer and (vi) Olive did not tender as a joint venture or in consortium with an original equipment manufacturer.[127] Further, the Review Board held that public interest considerations could not cure or excuse the serious breaches of public procurement laws revealed by the complaints. Ultimately, the Review Board upheld the two complaints and directed MoEST to: (i) re-evaluate the tender from the best and final offer stage within 45 days and (ii) treat Olive's tender as non-responsive for lack of the requisite minimum financial, technical and production capabilities.[128]

4.3.4 High Court Proceedings

On 21st March 2014, Olive instituted judicial review proceedings against the Review Board's decision.[129] Olive contended that the Review Board had: (i) based its decision on unpleaded issues, (ii) ignored relevant evidence, (iii) considered irrelevant matters, (iv) made an irrational and *ultra vires* decision, (v) been biased and (vi) erroneously concluded that having a factory was a prerequisite for qualifying as an original equipment manufacturer.[130]

---

[127] Ibid. The Board dismissed a memorandum of understanding between the successful bidder and its bidding partner, the latter of whom it claimed was an original equipment manufacturer. Clause 6 of the memorandum of understanding stated 'this MOU is not intended to create a legal and binding obligation to expend funds or resources by either party…'

[128] Olive sponsored a full-page publication in one of the dailies castigating the Review Board's decision. See Nation Media Group, 'Vested Interests versus the Children of Kenya: The Truth about the Laptops Tender' *Daily Nation* (Nairobi, 14 March 2014) 35.

[129] *Republic v Public Procurement Administrative Review Board & 3 Others ex-parte Olive Telecommunication PVT Ltd,* High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 106 of 2014.

[130] Ibid paras 12-28. Courts and tribunals must, generally, confine their decisions to the issues raised in the pleadings. A judicial decision, however, may proceed on unpleaded issues if the parties to the dispute canvass such issues at the trial and it appears from the course followed at the trial that the issues were left to the court or tribunal for determination. For further insights on this, see *Odd Jobs v Mubia* [1970] EA 476.

The Review Board, HP and Haier denied Olive's contentions.[131] They also contended that Olive was effectively inviting the High Court to conduct a merit review of the impugned decision, a matter outside the province of judicial review. Although neutrality would arguably have been more compatible with its position as a procuring entity, MoEST supported Olive's contentions.[132]

On 24th September 2014, the High Court nullified the tender and directed MoEST to commence the procurement process *de novo*, in accordance with provisions of article 227 of the 2010 Constitution and the 2005 Procurement Act.[133] The High Court held that it had no jurisdiction to conduct a merit review of the impugned decision. This common law approach to judicial review, which focuses on the process rather than the merits of impugned decisions, is a relic of a bygone era.[134] Specifically, the common law approach to judicial review, which eschews the merits of impugned decisions, is incompatible with the transformative agenda of the 2010 Constitution.[135]

The High Court's refusal to delve into the merits of the Review Board's decision also creates perverse incentives. Specifically, it encourages the Review Board and other

---

[131] *Republic v Public Procurement Administrative Review Board & 3 Others ex-parte Olive Telecommunication PVT Ltd,* High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 106 of 2014, paras 55-92.
[132] Ibid paras 30-54.
[133] Ibid para 166.
[134] *Kenya Human Rights Commission v Non-Governmental Organisations Co-Ordination Board,* High Court of Kenya (Nairobi) Constitutional Petition No. 495 of 2015, paras 46-48.
[135] Walter Khobe, 'The Architectonics of Administrative Law in Kenya Post-2010' (2016) 2 Journal of Law and Ethics 8-10. See also O'Kubasu Duncan Munabi, 'Concerning (Non) Existence of Administrative Law and the Implication of Constitutionalisation in Kenya' (2016) 2 Journal of Law and Ethics 13 and Eric Kibet, 'The Constitutionalisation of Administrative Law as an Opportunity for Reconfiguration: A Reply to O'Kubasu Munabi' (2016) 2 Journal of Law and Ethics 35.

administrative tribunals to make erroneous decisions safe in the knowledge that judicial review courts cannot examine the merits of the decisions. Further, refusal to review the merits of impugned decisions is apt to result in a miscarriage of justice, as judicial review is the only means of challenging the Review Board's decisions. In *Eunice Khalwali Miima v Independent Electoral and Boundaries Commission & Another*, the Court of Appeal disapproved the common law approach of restricting the scope of judicial review to an examination of the process rather than the merits of impugned decisions:

> the trial court took a narrow view of the matter and omitted to consider the relevance and impact of the constitutional provisions cited in the application before it…The process of decision making as well as the merits of the decision fell for consideration in equal measure. In those circumstances, we are entitled to interfere with the exercise of the trial court's discretion.[136]

The High Court also dismissed the contention that the Review Board had based its decision on unpleaded or extraneous matters.[137] Notably, the High Court erroneously faulted the Review Board for: (i) ignoring relevant evidence relating to Olive's financial, technical and production capabilities, (ii) adopting a discriminatory approach to the issue of price variation, (iii) relying on a definition of the phrase 'original equipment manufacturer' that was not set out in the tender documents and (iv) exceeding its jurisdiction by debarring Olive from further participation in the

---

[136] *Eunice Khalwali Miima v Independent Electoral and Boundaries Commission & Another*, Civil Appeal (Nairobi) No. 263 of 2017, para 17. See also *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 Others*, Civil Appeal (Nairobi) No. 46 of 2012, paras 55-61. On the appropriateness of the common law approach to judicial review under the 2010 Constitution, see Cora Hoexter, 'Administrative Justice in Kenya: Learning from South Africa's Mistakes' (2018) 62 (1) Journal of African Law 105.

[137] *Republic v Public Procurement Administrative Review Board & 3 Others ex-parte Olive Telecommunication PVT Ltd,* High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 106 of 2014, paras 94, 119 and 134.

tender.[138] Lastly, the High Court censured MoEST for using ambiguous tender documents and, consequently, confusing tenderers on the issues of an original equipment manufacturer and price variations.[139]

4.3.5 Appellate Proceedings

On 13th November 2014, Olive appealed the High Court's decision.[140] The appeal, just like the proceedings before the Review Board and the High Court, revolved around Olive's financial, technical and production capabilities. Olive contended that the High Court ought to have quashed the Review Board's decision and sustained the MoEST's decision to award it the tender. The rationale for this, Olive contended, was that the High Court had faulted the Review Board for: (i) mishandling the evidence relating to its financial, technical and production capabilities (ii) treating the issue of price variation in a discriminatory manner and (iii) relying on a definition of original equipment manufacturer other than the one set out in the tender documents.

On 10th December 2014, HP filed a cross-appeal. In summary, the cross-appeal contended that the High Court had erred by: (i) annulling the whole procurement process instead of remitting the case to the Review Board for reconsideration and (ii) granting judicial review orders in the absence of proof of illegality, irrationality or procedural impropriety on the part of the Review Board. The cross-appeal also

---

[138] Ibid paras 145-159. Our review of the court record did not find any basis for these conclusions.

[139] Ibid paras 155, 165.

[140] *Olive Telecommunications PVT Limited v Public Procurement Administrative Review Board & 3 Others*, Civil Appeal (Nairobi) No. 315 of 2014.

contended that the High Court had erred by: (iii) equating the disqualification of Olive with debarment, (iv) treating Olive's certificate of incorporation as proof of requisite experience, (v) finding that all tenderers had made provision for additional services [and prices], (vi) holding that the Review Board had been biased and (vii) holding that Olive had bid in consortium with another company. A review of the documents submitted before the Review Board vindicated most of the assertions set out in the cross-appeal.

On 24th November 2016, Olive withdrew the appeal.[141] Olive did not offer any reasons for the decision to withdraw the appeal. The voluntary withdrawal of the appeal contrasted sharply with the protracted litigation that had hitherto characterised the tender. The Court of Appeal allowed the withdrawal of the appeal and dismissed HP's cross-appeal for non-attendance of its counsel.[142] This marked the end of litigation relating to the tender.

4.3.6 The Third Tender (Shift from Laptops to Tablets)

On 7th September 2015, the Information and Communication Technology Authority (hereinafter, "the ICT Authority") invited expressions of interest for the provision of goods and related services for the implementation of the Digital Learning Programme in public primary schools in Kenya.[143] The advertisement embodied three significant

---

[141] Interview with Irene Kashindi, Partner, Hamilton Harris & Mathews Advocates (1st Floor Delta Suites, Nairobi, 17 May 2018).
[142] Ibid.
[143] ICT Authority, 'Tender No. EOI/ICTA/DLP/01/2015-2016: Expression of Interest for the Provision of Goods and Related Services for the Implementation of the Digital Learning Programme in Public Primary Schools in

policy changes. First, the Government had chosen the ICT Authority, rather than MoEST, to lead the procurement process.[144] Secondly, the Government was no longer interested in procuring laptops. Instead, it would procure computing tablets, referred in the tender documents as digital learning devices and digital teaching devices. Lastly, and notably for this study, the Government integrated several social objectives into the tender. These included: (i) promotion of local industry, (ii) enhancement of local job creation and (iii) [considering] the needs of learners with hearing and visual impairments. The Government planned to achieve these social objectives by restricting eligibility to tender to 'institutions in Kenya, either individually or in a duly signed consortium or joint venture agreement where they are the lead partner,' and requiring tenderers to offer locally assembled or manufactured devices.

Twenty-five firms, including eight local universities, submitted expressions of interest in supplying the digital learning devices and related services.[145] On 27th November 2015, the ICT Authority invited ten consortia, eight of which had a local university as a leader or participant, to submit bids for the supply of the digital devices and the learning content.[146]

Kenya'<*http://supplier.treasury.go.ke/site/tenders.go/index.php/public/tender_view/3406*> accessed 16 May 2018.

[144] Although the Government did not clearly articulate the point, the legal foundation for shifting the procurement responsibility from MoEST to the ICT Authority lay in section 27 (5) of the 2005 Procurement Act, which permitted a public agency to outsource its procurement function from another public entity.

[145] Simon Ciuri and Stellar Murumba, 'Eight Varsities Eye Sh17bn bid to Supply Schools with Computers' *Business Daily* (Nairobi, 23 September 2015) 5.

[146] Lillian Ochieng,' 'Varsities Seek a Piece of Sh17bn Laptop Cash Pie' *Daily Nation* (Nairobi, 04 December 2015) 4. Two global tech firms, namely Lenovo and HP, made it to the shortlist.

On 9th February 2016, the ICT Authority awarded the tender to two consortia, at a total cost of Kenya Shillings Seventeen Billion (about US$ 170 million).[147] This reflected a cost saving of at least Kenya Shillings Seven Billion (about US$ 70 million) compared with the initial award price to Olive. The first consortium, comprising Moi University and a Portuguese research and investing team, was tasked with the supply, installation and commissioning of the digital learning solution for primary schools in twenty-six out of Kenya's forty-seven counties. The other consortium, comprising the Jomo Kenyatta University of Science and Technology and an Argentinian tech firm, was allocated the remaining twenty-one counties.[148]

4.3.7 Abandonment of the Digital Literacy Programme

On 3rd May 2018, the Government announced the abandonment of the Digital Learning Programme.[149] The announcement meant that the Government would not give a computer to every child that joined standard one in 2014 and subsequent years.[150] Instead, the Government would give a single consignment of computers to each primary school based on standard one enrolment for the year 2014.[151] Public procurement controversies, delays and budgetary cuts had bogged down the

---

[147] Okuttah Mark, 'JKUAT and Moi Varsities Win School Devices Tender' Business Daily (Nairobi, 09 February 2016) <*https://www.businessdailyafrica.com/news/JKUAT-and-Moi-win-Sh17bn-laptops-tender-/539546-3068820-mrgcvt/index.html*> accessed 21 May 2018.

[148] MoEST had rejected the tenders of some of the members of these consortia during the specially-permitted phase of the procurement process. See e.g. letters from Belio Kipsang to JP SA Couto and the Jomo Kenyatta University of Agriculture and Technology (07 February 2014).

[149] Boniface Otieno, 'School Laptops Budget Jumps to Sh12 Billion' Business Daily (Nairobi, 03 May 2018) <*https://www.businessdailyafrica.com/news/School-laptops-budget-jumps-to-Sh12-billion--/539546-4543980-q3oi1sz/index.html*> accessed 13 May 2018.

[150] Interview with Joshua Opondo, Programme Officer, ICT Authority (23rd Floor Teleposta Towers, Nairobi, 27 August 2018).

[151] Ibid.

programme prior to the announcement of this major alteration.[152] The abrupt abandonment of the initial promise of giving a computer every child that joined standard one in 2014 and subsequent years, barely a year after the commencement of the Digital Learning Programme, cast doubts on the government's commitment to the lofty socioeconomic objective of integrating ICT into the provision basic education. It also raises serious doubt as to the achievement of both the economic and social objectives that had been embedded into the highly contested public procurement process.

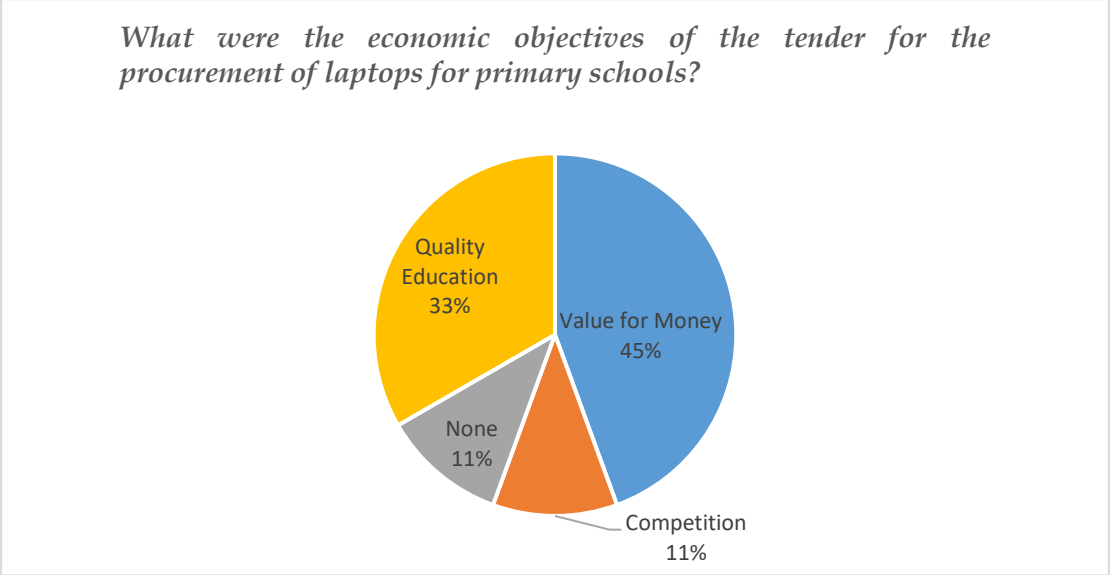
4.3.8 Interplay of Economic and Social Objectives

Allegations of mercantilist conspiracies, and serious economic efficiency concerns, partly inspired the field research on the interplay of the economic and social objectives of the tender for procurement of laptops for primary schools. Participants identified value for money and promotion of quality education as the main economic objectives of the tender for the procurement of laptops for primary schools, with response frequency rates of 45% and 33% respectively (see Figure 7 below). The promotion of quality education also emerged as a major social objective of the tender (see Figure 8 below). In other words, the promotion of quality education transcended the economic and social policy domains. This demonstrates complementarity and overlap between economic and social policy, as explained in chapter 2 above. It also demonstrates the inherent shortcomings of an approach to public procurement regulation that is based

[152] Otieno (n 149).

on a strict dichotomy of 'primary' and 'ancillary' objectives, which frequently appears in the current literature.

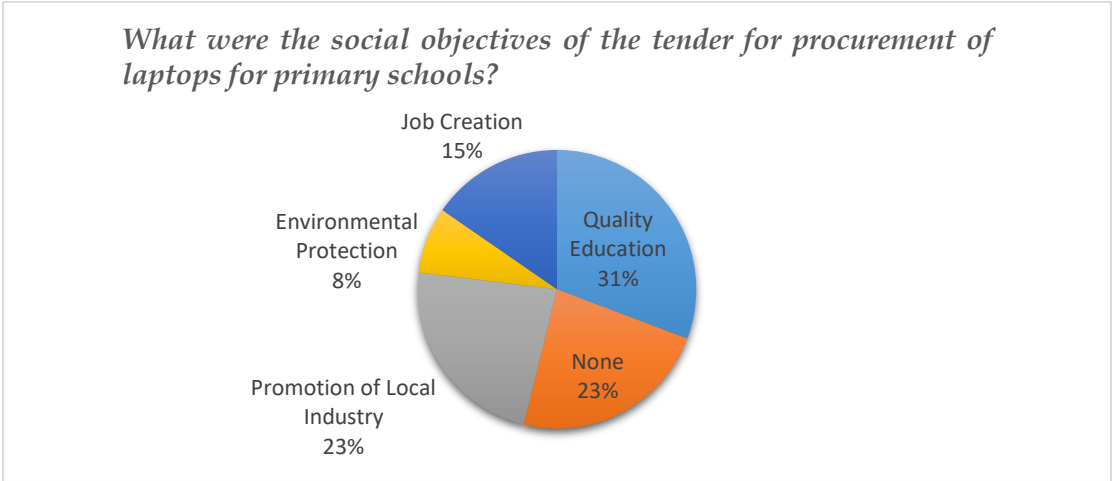
Figure 7: Economic Objectives of the Tender for Procurement of Laptops



A significant number of participants did not attribute any economic objectives to the tender for the procurement of laptops for primary schools (see the 11% response frequency rate for 'none' in Figure 7 above). This depicts indifference to the regulatory imperative of making economically efficient or cost-effective public procurement decisions. Moreover, participants did not expressly cite efficiency as an economic objective of the tender (though it is arguably implicit in the responses relating to value for money and competition). Bureaucratic indifference to economic efficiency is also evidenced by MoEST's decisions to: (i) terminate the first tender due to lack of 'insufficient funds'; and (ii) award the second tender at a price that was twice the original budget, as discussed at section 4.3.2 above.

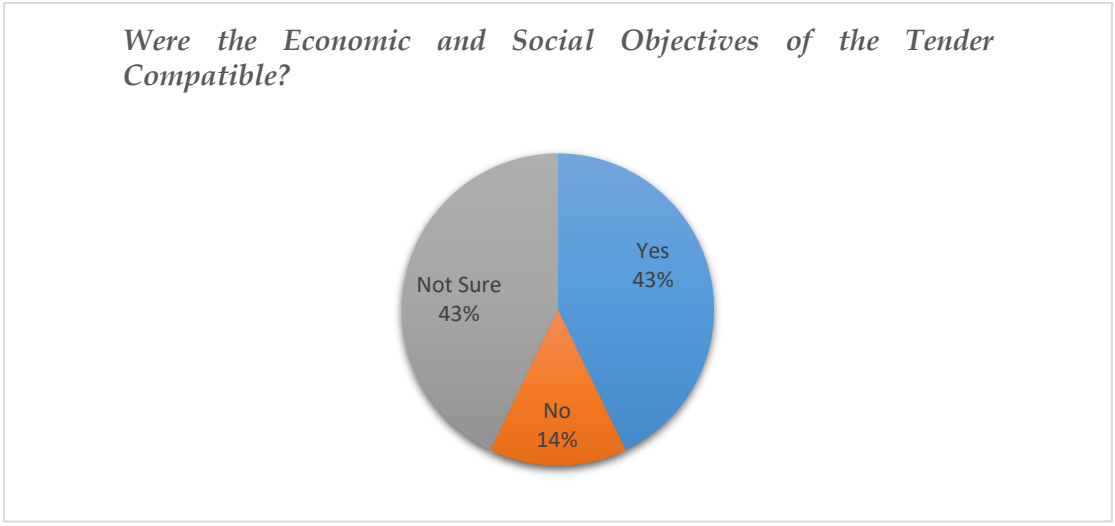
As can be seen from Figure 8 below, Participants identified quality education, promotion of local industry, job creation and protection of the environment as the social objectives underlying the tender for procurement of laptops, with response frequency rates of 31%, 23%, 15% and 8% respectively. A significant number of the participants, close to a quarter, did not associate the tender with any social objectives (see the response frequency rate of 23% for 'none') in Figure 8 below). Again, this shows stakeholder indifference to the rule requiring mandatory integration of social objectives into all public procurements.

Figure 8: Social Objectives of the Tender for Procurement of Laptops



Responses to questions on the balance of economic and social objectives of the tender for the procurement of laptops were inconclusive. As can be seen from Figure 9 below, there was a 43% frequency of responses in favour of compatibility of the two species of objectives, against an equal frequency (that is, 43%) for indecision. Only a small minority (14%), however, was emphatic on non-compatibility of the two species of objectives.

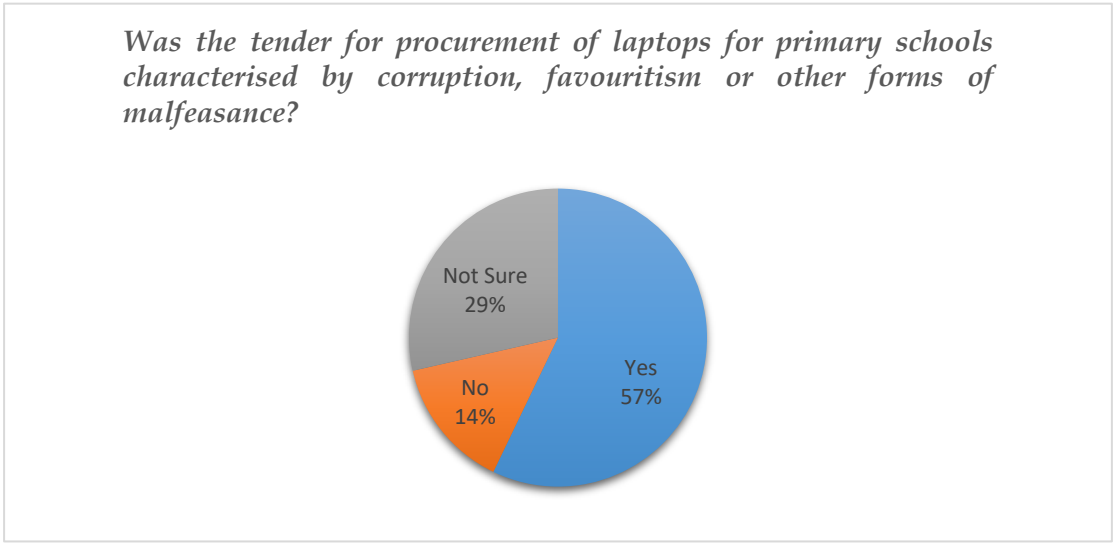
Figure 9: Interplay of Economic and Social Objectives



4.3.9 Discretion and Incidence of Malfeasance

The procurement of laptops for primary schools was characterised by multiple controversies, driven by allegations of corruption, favouritism and other forms of malfeasance. The field research for this study, therefore, sought to establish the link between the controversies and the incidence of these governance challenges (see Appendix 10, questions 9 and 10).

Figure 10: Incidence of Corruption, Favouritism and Malfeasance



Most of the participants, that is 57%, believed that the tender for procurement of laptops for primary schools was characterised by corruption, favouritism and other forms of malfeasance. Twenty-nine percent of the participants were not sure whether this was the case. A small minority (that is, 14%) did not believe that the tender was characterised by corruption, favouritism or other forms malfeasance. These results, and the Government's restructuring of the mode of delivery to avoid the spectre of endless controversies and litigation, point to a high incidence of corruption, favouritism and other forms of malfeasance.

4.4 Summary of Findings

The case studies examined in this chapter raise serious concerns on the issue of interplay of the economic and social objectives embodied in Kenyan public procurement laws, and the link between discretion and the incidence of corruption, favouritism and other forms of malfeasance. The findings of the research on the two projects are summarised in sections 4.4.1 and 4.4.2 below.

4.4.1 Interplay of Economic and Social Objectives

The general picture that emerges from the protracted litigation, desk review of relevant materials and qualitative research on the procurement of ballot papers for the 2017 general election and procurement of laptops for primary schools is that of government institutions (namely the IEBC and MoEST) that are disinterested in achieving efficiency or cost-effectiveness in their public procurement decisions. This is evidenced by, *inter alia*, the IEBC's exorbitant award price, which was two to three times the global average, and MoEST's award of the tender for the procurement of

laptops at a price that was US$ 15,914,258 higher than the successful tenderer's best and final offer. The case studies also depict a general aversion to, or disinterest in, the integration of social objectives into public procurement.

The case studies examined in this chapter depict a general tendency to elevate or prioritise economic objectives over social objectives. The IEBC, for instance, completely omitted, without any legal or other justification, to integrate social objectives into the tender for the procurement of ballot papers for the 2017 general election.[153] MoEST, on the other hand, appeared ambivalent about the integration of social objectives into the procurement of laptops for primary schools. This is evidenced by, *inter alia*, the abandonment, in the second tender, of the requirements for tenderers to: (i) set up a local manufacturing or assembly facility in Kenya employing local residents, (ii) prove ability to provide skills and knowledge transfer to Kenyan citizens and (iii) demonstrate eligibility to participate in the schemes of preferences and reservations set out in Kenyan public procurement laws. The abrupt abandonment of the digital learning programme, barely a year after the commencement of the implementation, creates serious doubt as to whether the Government was committed to achieving either the economic or the social objectives of the tender. Indeed, the abrupt abandonment of the programme creates doubt as to whether the government was committed to achieving the main socio-economic objective of the tender, namely the integration of ICT in the provision of basic education.

[153] As explained in Chapter 3 of this study, sections 155-158 of the 2015 Procurement Act require the mandatory integration of social objectives into all public procurements.

The IEBC's omission to integrate social objectives into the procurement of ballot papers for the 2017 general election and the ambivalence of MoEST towards the integration of such objectives into the procurement of laptops for primary schools were not only illegal but also curious. The omission of social objectives from the procurement of printing services, for instance, can hardly be justified on any economic or social ground in a poor developing country characterised by a high incidence of poverty and unemployment. Indeed, the omission of social objectives from the tender for the printing of ballot papers was ironical to the extent that it almost coincided with public expenditure of about US$ 10 million to bail out a collapsed paper manufacturing company.[154] MoEST's ambivalence on local manufacturing and technology transfer was also at odds with the country's youth unemployment and Kenya's status as a poor developing country.

The issue of omission of social objectives, and the broader issue of the interplay between economic and social objectives, did not feature in any of the multiple court cases relating to the two procurement processes. The general tendency of Kenyan stakeholders to ignore or disregard social objectives of public procurement, discussed in chapter 3 above, might explain why the issue did not feature in the litigation:

> Public officers in Kenya do not fully comply with the law on social objectives. Some of them misunderstand the law. Some of them just refuse to comply. Main spenders like Kenya Power, and Kenya Railways, often have very huge or complex tenders, which makes it

[154] Edwin Mutai, 'Pan-Paper's Sh1bn Bailout Loss to Taxpayers' Business Daily (Nairobi, 29 June 2016) <*https://www.businessdailyafrica.com/corporate/Pan-Paper-s-Sh1bn-bailout-loss-to-taxpayers/539550-3273284-11427eh/index.html*> accessed 06 May 2018. See also Brian Ngugi, 'Bid to Recover State's Sh1bn Lost in Failed Pan Paper Revival' Daily Nation (Nairobi, 15 February 2018) <*https://www.nation.co.ke/business/-Sh1bn-lost-in-failed-Pan-Paper-revival/996-4306754-11rmvhhz/index.html*>accessed 06 May 2018.

> impossible for the target groups to bid. It is also difficult for such procuring entities to comply with the rule requiring them to reserve at least 30% of their procurement budget to women, youth and persons with disabilities. This is because a single tender for such procuring entities may exceed 30% of its procurement budget.[155]

4.4.2 Discretion and Incidence of Malfeasance

As explained in chapter 2 above, a sound regulatory framework for public procurement ought to have effective safeguards against the abuse of power and discretion. A high incidence of favouritism and other forms of malfeasance in a country's public procurement system is symptomatic of an unsound or ineffective regulatory framework. The procurement of ballot papers for the 2017 general election, and laptops for primary schools, discussed in sections 4.2 and 4.3 above, indicates that Kenya lacks a sound public procurement regulatory framework. Specifically, the case studies examined in sections 4.2 and 4.3 above depict a public procurement regulatory framework that is highly susceptible to endemic and systematic abuse, subversion and manipulation by government bureaucrats.

The ineffectiveness of Kenyan public procurement laws in curbing the abuse of power and discretion, and specifically the incidence of corruption, favouritism and other forms of malfeasance, may be attributed to three main factors. First, and as explained in chapters 1 and 3 of this study, Kenyan public procurement laws confer broad or insufficiently controlled discretion on government bureaucrats. Secondly, the predominant technical or legalistic judicial approach to public procurement disputes (and litigation in general) encourages abuse of power and discretion. Thirdly, Kenya's

---

[155] Interview with Peter Wangai, Programme Officer, Public Procurement Regulatory Authority (10th Floor National Bank Building, Nairobi, 18 June 2018).

culture of impunity, also discussed in chapter 3 of this study, encourages government bureaucrats to abuse power and discretion.

Examples of formal grants of broad discretionary powers under the Kenyan regulatory framework for public procurement are to be found in legal provisions relating to (*inter alia*): termination or cancellation of procurement processes,[156] choice of procurement method,[157] powers of the cabinet secretary and accounting officers[158] and choice of social objectives.[159] The IEBC and MoEST exploited such legal provisions to not only subvert regulatory objectives, both economic and social, but also defeat legitimate complaints. In other words, formal grants of broad discretionary powers enabled the IEBC and MoEST to get away with acts and omissions that appeared to be tainted with corruption, favouritism and other forms of malfeasance. To illustrate, the IEBC deliberately bungled the procurement of ballot papers several times but ultimately justified the decision to award the tender to an apparently predetermined tenderer under the guise of urgency. MoEST, on the other hand, abused the powers relating to termination of procurement proceedings, under the guise of budgetary constraints, to accommodate a preferred tenderer.

Kenya's predominantly technical or legalistic judicial approach to public procurement disputes exacerbates the problem of discretion and the risk of its abuse. The case

---

[156] The 2015 Procurement Act, ss 63 and 167 (4) (b).
[157] Ibid s 167 (4) (a).
[158] The 2015 Procurement Act mentions accounting officers and the cabinet secretary 152 and 42 times respectively, invariably granting them power or discretion over various aspects of the procurement process.
[159] See the 2010 Constitution, art 227 (2), the 2015 Procurement Act, ss 155-158 and the 2020 Regulations.

studies above depict a judicial system that is either oblivious or unmindful of the inherent dangers of wide discretionary powers. Specifically, the case studies depict a judicial system that recklessly (perhaps complicity) invokes legal sophistry to whitewash or excuse corruption, favouritism or other forms of malfeasance in the public procurement system. The Review Board's ultimate decision to give the IEBC broad discretion to use 'such method as it may consider appropriate' is arguably the best illustration of this judicial shortcoming, especially when viewed against the IEBC's apparent predetermination to award the tender to Al Ghurair at all costs. The Court of Appeal's inexplicable acceptance of the disingenuous urgency/public interest argument, in a case that had all the indices of deliberate delay and bungling of procurement processes to achieve a predetermined outcome, provides another perfect example of how the courts can unwittingly (or wittingly) encourage the abuse of public power and discretion.

The Review Board and the courts appeared unable, or unwilling, to punish IEBC and MoEST officials for bungling the two procurement processes. Judicial reluctance to punish malfeasance encourages impunity. This, in turn, gives government bureaucrats greater incentives to abuse power and discretion. In other words, and as explained in chapter 2 above, it is not enough to have a public procurement regulatory framework that only establishes paper sanctions for corruption, favouritism and other forms of malpractice. The procurement processes discussed in sections 4.2 and 4.3 above amply demonstrate that government bureaucrats are naturally inclined to engage in corruption, favouritism and other forms of malpractice if rational cost-benefit analysis suggests they can get away with it. Moreover, the regime of sanctions and penalties should focus on natural persons more than the corporate entities that they own or

control, as the owners of debarred or offending corporations could otherwise circumvent it by establishing new corporate entities.[160] The consistent failure of the Review Board and the courts to punish IEBC and MoEST officials, even where they found evidence of breach of procurement laws, or subversion and manipulation of public procurement processes, encourages abuse of power and discretion. In other words, impunity creates and entrenches a culture of public procurement corruption and malpractice. It is no surprise, for instance, that the same or largely similar public procurement malpractices affected both the 2013 and 2017 general elections.

The case studies examined in sections 4.2 and 4.3 above focused on abuse of formally granted (that is *de jure*) powers and discretion. A more pernicious problem, of illegal arrogation of power and discretion, featured in the two procurement processes. The IEBC and MoEST conducted the procurement processes as if they had the discretion to obey or ignore mandatory legal requirements. Examples of this include: (i) the IEBC's complete omission of social objectives from the procurement of ballot papers, (ii) the IEBC's recourse to extra-legal procurement methods, (iii) MoEST's initial omission of social objectives from the procurement of laptops for primary schools and (iv) MoEST's recourse to extrinsic tender evaluation criteria. In other words, the IEBC and MoEST acted as if: (i) public procurement laws did not exist and (ii) all critical decisions regarding the respective public procurement projects depended on their absolute discretion.

[160] Interview with Mohochi Samuel Mukira, Chief Executive Officer, International Commission of Jurists-Kenya (Laikipia Town Houses, Nairobi, 14 June 2018).

The findings from the case studies examined in this chapter may be summarised into five propositions, all of which revolve around the structural soundness and effectiveness of the regulatory framework for public procurement in Kenya. First, although Kenyan public procurement laws may appear good on paper, they are highly susceptible to abuse, subversion and manipulation by government bureaucrats, which undermines the achievement of their intended or presumptive regulatory goals. Differently put, public procurement laws are structurally flawed to the extent that it they are ineffective in curbing the abuse of power and discretion. Secondly, Kenyan government bureaucrats tend to corruptly, irregularly or unfairly award public procurement contracts to favoured or pre-determined suppliers. Thirdly, abuse of power and discretion impedes the realisation of the economic and social objectives embodied in the Kenyan public procurement laws. Fourthly, the predominant technical or legalistic judicial approach to public procurement disputes encourages impunity and abuse of power and discretion. This happens especially when courts and tribunals create perverse incentives by invoking legal and procedural technicalities to whitewash or excuse corruption, favouritism or other forms of malfeasance in public procurement. This judicial culture hurts the achievement of both the both economic and social objectives embedded in Kenyan public procurement laws. Lastly, and as discussed in chapter 3 above, a review of the procurement of ballot papers for the 2017 general election and laptops for primary schools reveals a tendency by government bureaucrats to ignore legal provisions requiring mandatory integration of social objectives into public procurement.

CHAPTER 5: INTERPLAY OF ECONOMIC AND SOCIAL OBJECTIVES AND THE PROBLEM OF DISCRETION IN THE US AND SOUTH AFRICAN PUBLIC PROCUREMENT SYSTEMS

5.1 Introduction

This chapter is a comparative study of: (i) the interplay of economic and social objectives, (ii) the problem of discretion, (iii) the incidence of corruption, favouritism and other forms of malfeasance in the United States and South African public procurement systems and (iv) the implications of these procurement systems for Kenya. Two factors inspired the selection of the US and South Africa for comparative analysis. First, just like Kenya, the US and South Africa practise social procurement within the context of a predominantly market-oriented economy. Secondly, the regulatory frameworks for social procurement in all three countries are somewhat interrelated. The interrelation is twofold. First, and as explained in chapter 3 above, Kenya extensively borrowed the text and structure of its public procurement laws from South Africa. Secondly, American experiences with social procurement inspired the design of South Africa's post-apartheid public procurement regulatory frameworks.

This chapter contends that compared to Kenya, the United States (hereinafter, "the US") and South Africa have more effective regulatory responses to the problems of: (i) conflictual coexistence of economic and social objectives, (ii) discretion, and (iii) the incidence of corruption, favouritism and other forms of malfeasance in public

procurement decision-making. The chapter also contends that adoption of strong accountability mechanisms such as those that apply in the US (and to a large extent, those that apply in South Africa) would provide an effective counterpoise against formal grants of broad discretionary powers in Kenya and thus reduce the incidence of corruption, favouritism and other forms of malfeasance in public procurement decision making.

The chapter is organized as follows. Sections 5.2 and 5.3 examine the interplay of economic and social objectives and the problem of discretion in the US and South African public procurement systems respectively. Section 5.4 sets out a summary of the findings of the comparative study.

5.2 Interplay of Economic Objectives, Social Objectives and Discretion in the US Federal Procurement System

5.2.1 Overview of the US Public Procurement Regulatory System

The US regulates public procurement at both federal and state levels.[1] This chapter focuses on the US federal public procurement regulatory framework, as state regulatory frameworks are too many and too disparate to be coherently examined in a single study.

[1] Nicholas S Vonortas, 'Innovation and Public Procurement in the United States,' in Charles Edquist and others (eds), *Public Procurement for Innovation* (Edward Elgar Publishing 2015) 147, 150.

The principal regulatory framework for public procurement in the US is the Federal Acquisition Regulation (hereinafter, "the FAR").[2] The Office of Federal Procurement Policy Reauthorization Act provides statutory anchorage for the FAR. Three institutions jointly issue and maintain the FAR.[3] These institutions are: (i) the Secretary of Defence, (ii) the Administrator of General Services and (ii) the Administrator of the National Aeronautics and Space Administration.

Although the FAR is unarguably the most important source of public procurement regulation in the US, many important aspects of US public procurement regulatory system are set out in other instruments. These include federal laws, presidential executive orders and circulars and guidelines issued by (among others) the Office of Management and Budget and the General Services Administration.[4]

The FAR is an unusually long and complex legal instrument.[5] Many federal agencies, therefore, substitute or supplement it with their own simpler but substantially similar procurement rules.[6] Such deviations and supplements may implement agency-specific socioeconomic objectives.[7] In other words, and as explained below, the FAR gives contracting officers broad discretion to decide the specific social objectives of each

---

[2] Ibid.

[3] Kristi D Caravella Robinson, 'US Federal Government Procurement: Organizational Structure, Process and Current Issues,' in Khi V Thai (Ed), *International Handbook of Public Procurement* (CRC Press 2009) 291, 304.

[4] Vonortas (n 1) 150-153.

[5] The FAR is available at *https://www.acquisition.gov/browsefar* (accessed 28 July 2018).

[6] Vonortas (n 1) 154-158. See also Martin J Golub and Sandra Lee Fenske, 'US Government Procurement: Opportunities and Obstacles for Foreign Contractors' (1986-1987) 20 George Washington Journal of International Law and Economics 567, 568.

[7] Robinson (n 3) 294.

agency and each procurement. The leeway for federal agencies to adopt rules that deviate from the FAR, however, is subject to certain authorization, notification and comment requirements.[8] The leeway for federal agencies to substitute or supplement the FAR with their own procurement regulations is also subject to the following important restrictions: [9]

> (a) Agency acquisition regulations shall not—
>
> (1) unnecessarily repeat, paraphrase or otherwise restate material contained in the FAR or higher-level agency acquisition regulations, or
>
> (2) except as required by law or as provided in subpart 1.4, conflict or be inconsistent with FAR content.[10]

Agency heads authorize deviations for individual contracts. Agency heads, in consultation with the Defence Acquisition Regulatory Council (for defence procurements) or the Civilian Agency Acquisition Council (for civilian procurements), authorize class or permanent deviations from the FAR.

5.2.2 Interplay of Economic and Social Objectives

The regulatory framework for public procurement in the US, just like its Kenyan counterpart, permits the pursuit of both economic and social objectives.[11] The US public procurement regulatory system, however, is predominantly economic in character. The economic orientation of the US public procurement regulatory system is evident in at least four aspects. First, although the FAR's statement of guiding

---

[8] The FAR, § 1.402.
[9] Ibid §§ 1.304 (b) (1) and (2).
[10] Ibid.
[11] Ibid parts 1, 19 and 22 to 26. See also the 2015 Procurement Act, ss 3 and 155-158.

principles expressly mentions market principles, it only covers social policies by implication.[12] Secondly, the FAR frequently imposes a market-oriented restriction on the pursuit of social objectives in federal procurement, by mandating the award of relevant contracts at 'a fair market price.'[13] Thirdly, virtually all the relevant laws and regulations require US federal agencies to: (i) adopt 'full and open competition' and (ii) use 'competitive procedures' in all their procurements.[14] Lastly, the FAR obliges the head of each federal agency to designate a senior official, other than the contracting officer or the procurement staff, as an independent 'advocate for competition.'[15] The role of the advocate for competition is to regularly review public procurement processes, with a view to identifying barriers to competition and advising on their removal.[16]

---

[12] The FAR § 1.102:

> (b) The Federal Acquisition System will—
>
> (1) Satisfy the customer in terms of cost, quality, and timeliness of the delivered product or service by, for example—
>
> (i) Maximizing the use of commercial products and services;
>
> (ii) Using contractors who have a track record of successful past performance or who demonstrate a current superior ability to perform; and
>
> (iii) Promoting competition;
>
> (2) Minimize administrative operating costs;
>
> (3) Conduct business with integrity, fairness, and openness; and
>
> (4) Fulfil public policy objectives.

[13] Ibid § 19.501 (g), on set-asides for small business. See also § 19.1305 (b) (2) on set asides for the historically underutilized business zones, and § 9.1405 (b) 2) on set-asides for service-disabled veteran owned small businesses. Further, see Jarrod D. Reece, 'Revisiting Class-Based Affirmative Action in Government Contracting' (2011) 88 Washington University Law Review 1309, 1336.

[14] Golub and Fenske (n 6) 570. See also the Competition in Contracting Act 1984; the FAR, § 6.101; the Armed Forces Act, § 2304; and the Public Contracts Act, § 3301.

[15] The FAR, §§ 6.501-6.502. See also the Public Contracts Act, §1705.

[16] Ibid.

The US has a long history of using public procurement as a tool of social policy.[17] Social procurement in the US began by way of presidential executive orders rather than substantive legislative enactments. The earliest executive order was inspired by exigencies of the Second World War and, specifically, the need to secure the support of all racial groups in the defence of the US.[18] The war-time executive orders lacked enforcement mechanisms and, consequently, had little impact on the integration of social objectives into federal procurement.[19] Eventually, social procurement gained momentum in the US as a form of 'affirmative action' following the civil rights movement riots of the 1960s.[20]

The social objectives of the US public procurement system mainly revolve around affirmative action programs. Generally, the relevant programs seek to promote equality and empowerment of economically and socially disadvantaged groups.[21] The target groups include: (i) ethnic/racial minorities, (ii) women, (iii) small businesses, (iv) war veterans, (v) persons living with disabilities and (vi) contractors from labour-surplus or historically underutilized business zones.[22] The US also uses federal procurement to promote: (vii) innovation, (viii) domestic industry, (ix) employment

---

[17] Jarrod (n 13) 1309. See also Yihua Qiao, Khi V Thai and Glenn Cummings, 'State and Local Procurement Preferences: A Survey' (2009) 9 (3) & (4) Journal of Public Procurement 371.
[18] William J Bogard, 'Presumed Disadvantaged: Constitutional Incongruity in Federal Contract Procurement and Acquisition Regulations' (2012) 115 Virginia Law Review 847, 852.
[19] P E Morris, 'Legal Regulation of Contract Compliance: An Anglo-American Comparison' (1990) 19 Anglo-American Law Review 87, 122.
[20] Christopher McCrudden, *Buying Social Justice: Equality, Government Procurement, & Legal Change* (OUP 2007) 131. See also Christopher McCrudden, 'Social Policy Choices and the International and National Law of Government Procurement: South Africa as a Case Study' (2009) Acta Juridica 123, 124.
[21] Christopher R Noon, 'The Use of Racial Preferences in Public Procurement for Social Stability' (2009) 38 (3) Public Contract Law Journal 611. See also Jarrod (n 13) and Vonortas (n 1).
[22] Ibid. See also McCrudden, *Buying Social Justice* (n 20) 167.

(in labour-surplus areas), (x) fair employment practices, (xi) environmental protection and (xii) isolation of hostile foreign states.[23]

The social objectives of public procurement in the US are set out in a highly fragmented regulatory framework, which includes: (i) the FAR,[24] (ii) the Buy American Act,[25] (iii) the Competition in Contracting Act,[26] (iv) the Public Contracts Act,[27] (v) the False Claims Act,[28] (vi) the Tucker Act,[29] (vii) the Administrative Procedures Act,[30] (viii) the Small Business Mobilisation Act[31] and (ix) the Small Business Act.[32]Like Kenya, the US integrates social objectives into public procurement through schemes of preferences and reservations.[33] The margins of preference for certain social objectives in the US are much higher than those applied in Kenya. The US applies, for instance, higher margins of preference in procurements that have the promotion of domestic industry or a favourable balance of payments as dominant social objectives.[34]

---

[23] Golub and Fenske (n 6) 594-595 and McCrudden, *Buying Social Justice* (n 20) 155. See also Linda Weiss and Elizabeth Thurbon, 'The Business of Buying American: Public Procurement as a Trade Strategy in the US' (2006) 13 (5) Review of International Political Economy 701.
[24] 48 C.F.R. 1.
[25] 41 U.S.C. 83.
[26] 41 U.S.C. 253.
[27] 41 U.S.C. 65.
[28] 31 U.S.C. §§ 3729–3733.
[29] 28 U.S.C. § 1491.
[30] 5 U.S.C. §§ 551-559.
[31] 50 U.S.C. §§ 1101-1112.
[32] 15 U.S.C. 14A.
[33] McCrudden, *Buying Social Justice* (n 20) 167. See also Jarrod (n 13) 1333-1337. US laws generally use the phrase 'set asides,' rather than 'reservations,' to describe restriction of competition for certain government tenders to specified business or demographic groups.
[34] Golub and Fenske (n 6) 581, discussing the application of a 50% price preference under the balance of payments program.

Social procurement in the US is intricately linked with the legacies of slavery, racial segregation, war and the civil rights movement.[35] The use of public procurement to promote equality in the US, for instance, first emerged during the Second World War as a means for enlisting all citizens 'regardless of race, creed, colour, or national origin' to defend the country.'[36] Similarly, the use of public procurement to promote small businesses first emerged when the US congress enacted the Small Business Mobilisation Act in 1942 as a means for securing defence supplies by all sectors of the economy.[37]

The social objectives embodied in US federal procurement laws are generally uncontested. The use of set-asides (that is, reservations) to promote racial equality, however, has stirred significant legal and political controversies.[38] The current literature on social procurement in the US generally focuses on the controversies of race-based preferences and set-asides. This has resulted in a dearth of commentary on other social objectives of the US federal procurement regulatory system. The dearth of commentary on other aspects of social procurement in the US inevitably limited the scope of the comparative analysis set out in this chapter. In line with the available literature, therefore, the comparative analysis set out in this chapter generally focuses on use of public procurement as a tool for promoting racial equality in the US.

---

[35] Christopher R Yukins, 'The US Federal Procurement System: An Introduction' (2017) George Washington Legal Studies Research Paper No. 2017-75< *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3063559##*> accessed 02 February 2019.
[36] Bogard (n 18) 852.
[37] Ibid. See also the Small Business Mobilisation Act 50 U.S.C. §§ 1101-1112.
[38] Vonortas (n 1). See also Jarrod (n 13), Noon (n 21), McCrudden, *Buying Social Justice* (n 20) and McCrudden, 'Social Policy Choices' (n 20).

Controversies relating to race-based social procurement in the US revolve around two main issues, namely: (i) reverse discrimination and (ii) economic justification for the enormous extra costs usually entailed in the relevant social programs. Critics have also claimed that race-based procurement preferences tend to produce anomalous or unintended results.[39] One common anomalous result is the tendency of race-based procurement preferences to benefit privileged and well-off individuals on account of merely belonging to a target ethnic or racial minority group.[40] Due to these controversies, race-based procurement preferences in the US have often resulted in protracted litigation and remarkably long filibusters before the US Congress.[41]

Due to political sensitivity and the contentious nature of race-based procurement preferences and reservations, the US government has traditionally anchored the relevant programs on presidential executive orders instead of substantive legislative enactments.[42] The most important executive orders in this regard are arguably those by Presidents John F. Kennedy and Lyndon Johnson in 1961 and 1967 respectively. President Kennedy's executive order (No. 10925) required federal contractors to 'take affirmative action' to avoid discrimination of employees based on race, colour, creed or national origin. President Johnson's executive order (No. 11246) established the

---

[39] Jarrod (n 13) 1322. See also McCrudden, *Buying Social Justice* (n 20) 169.

[40] Ibid The problem of 'fronting,' in which members of the economically dominant racial group fraudulently attempts to benefit from social procurement programs meant for economically marginalised racial groups, is not a serious problem in the US. As explained in section 5.3 below, fronting is a common problem with social procurement in South Africa.

[41] Jarrod (n 13) 1309, noting that some states in the US have taken the extreme step of banning race-based affirmative action programs by ballot. See also McCrudden, *Buying Social Justice* (n 20) 133-139 and 173 and Morris (n 19) 125.

[42] McCrudden, *Buying Social Justice* (n 20) 139. For a historical account of the various executive orders, see Martin J Sweet, 'Minority Business Enterprise Programmes in the United States of America: An Empirical Investigation' (2006) 33 (1) Journal of Law and Society 160.

'Philadelphia Plan,' which obliged federal contractors, initially in Philadelphia and later in 55 other cities, to utilize minority employees as a precondition for award of federal public procurement contracts.[43]

United States courts generally disavow the use of federal procurement to promote racial equality and redress the effects of past racial discrimination. The prevailing case law on the issue may be summarised into four main propositions.[44] First, although the constitutional validity of a race-based public procurement preference may be suspect, such preferences are not per se unconstitutional. In other words, the social objective of promoting racial equality through federal procurement is not presumptively illegitimate. Secondly, race-based preferences in federal procurement must, if challenged in the courts, be subjected to *strict scrutiny* (that is, the severest level of judicial examination of executive action).[45] The rationale for strict scrutiny is that racial classifications are 'potentially harmful to the entire body politic' and 'too pernicious to permit any but the most exact connection between justification and classification.'[46] Thirdly, federal agencies must have a 'compelling interest' as a precondition for adopting racial preferences in their public procurements.[47] The rationale for requiring a compelling interest as a precondition for the use of racial preferences in federal procurement is that racial characteristics 'seldom provide a relevant basis for disparate

---

[43] Ibid.

[44] City of Richmond v J A Croson 488 U.S. 469 (1989). See also *Adarand Constructors v Pena* 515 U.S. 200 (1995) and Rothe Development Corp. v Department of Defence 545 F. 3d 1023 (2008).

[45] Ibid. Previously, American courts subjected race-based affirmative action procurement programmes to a deferential standard of review, namely intermediate scrutiny. For a judicial opinion applying the intermediate scrutiny standard of review, see *Fullilove v Klutznick* 448 U.S. 448 (1980).

[46] *Adarand Constructors v Pena* 515 U.S. 200 (1995).

[47] McCrudden, *Buying Social Justice* (n 20) 170-174.

treatment.'[48] Generally, the prevailing judicial view in the US is that the only compelling interest that would justify racial preferences is the need to correct the perverse effects of past racial discrimination. Lastly, racial preferences must be 'narrowly tailored' to serve the specific compelling interest underlying their adoption.[49] In sum, therefore, the US judiciary is generally hostile to race-based procurement preferences.[50]

The US government has generally used three broad strategies to surmount judicial restrictions on race-based federal procurement preferences.[51] The first entails looking for 'loopholes' in the relevant judgments, which enables the US government to maintain race-based procurement preferences while 'technically' complying with relevant judicial decisions.[52] The second entails redesigning race-based federal procurement preferences to make them facially race-neutral.[53] Lastly, the US government adopts need-based criteria, as opposed to race, as the dominant consideration for participation in social procurement programs.[54]

As explained in section 5.2.3 below, US courts seldom interrogate trade-offs made by federal agencies in balancing economic and social objectives, this being a matter in the realm of executive discretion. In theory, this judicial attitude would encourage bold

---

[48] *Adarand Constructors v Pena* 515 U.S. 200 (1995) 236.
[49] Ibid.
[50] Sweet (n 42) 164.
[51] Jarrod (n 13) 1318-1319.
[52] Ibid.
[53] Ibid.
[54] Ibid.

attempts to resolve conflicts between economic and social objectives. In practice, however, most federal agencies refrain from making trade-offs between economic and social objectives for fear of bid protests. Consequently, most US federal agencies simply select the lowest technically responsive tender instead of attempting to resolve conflicts between economic and social objectives. These two factors (that is, the prevailing judicial attitude and the tendency by contracting agencies to eschew social objectives) have resulted in a dearth of academic commentary on how the US approaches the problem of conflictual coexistence of economic and social objectives in its federal procurement laws. The comparative analysis set out in this chapter on the balance of economic and social objectives of public procurement in the US, therefore, mainly focuses on the relevant legal texts.

The US public procurement regulatory system attempts to balance economic and social objectives in three broad ways. First, the FAR sets out 'best value' as a core objective of the US public procurement regulatory system.[55] According to section 1.102 of the FAR, best value 'must be viewed from a broad perspective and is achieved by balancing the many competing interests.'[56] The requirement for a broad perspective and the balancing of many competing interests suggests an approach to public procurement that is not unduly encumbered by market principles or economics.

[55] The FAR, § 1.102 (a).
[56] Ibid §§ 1.102-1.

Secondly, United States procurement laws permit abandonment of social objectives where the extra costs of their pursuit are unreasonable.[57] Generally, extra costs are deemed unreasonable where the lowest offer from a bidder belonging to a target group, say racial minorities, is higher than the best offer even after the application of the relevant margin of preference.[58]

Lastly, the FAR gives federal agencies discretion to make reasoned trade-offs between price and quality where the perceived benefits of a higher-priced bid exceed the extra costs.[59] Price/quality trade-offs are subject to two qualifications. First, agencies must document the rationale for their decision whenever they make any such trade-offs. The documentation provides an avenue for holding government bureaucrats accountable for their exercise of discretion in public procurement decision-making. Secondly, federal agencies cannot promote social objectives by capriciously ignoring or making price merely a nominal factor in evaluation of bids.[60]

5.2.3 Discretion, Corruption, Favouritism and Other Forms of Malfeasance

The US public procurement system has evolved through alternating epochs of deregulation and strict regulation, characterised by broad and highly circumscribed discretion respectively.[61] Two factors have led to this 'swinging pendulum' of

---

[57] Golub and Fenske (n 6) 576-579.
[58] The FAR, § 25.105 (c).
[59] Ibid § 15.101.
[60] *Serco Inc. v United States*, 81 Fed. Cl. 463, 491 (2008).
[61] Robinson (n 3) 295-296. See also Steven Kelman, 'Remaking Federal Procurement' (2001) John F. Kennedy School of Government Working Paper No. 3 <*https://sites.hks.harvard.edu/fs/skelman/Remaking%20Federal%20Procurement%20Visions%20paper.pdf*> accessed 16 June 2019.

procurement reform.[62] The first is a knee-jerk congressional reaction to specific federal procurement scandals and, specifically, legislators' tendency to treat such scandals as symptoms of structural weaknesses in the regulatory framework.[63] The second is conflicting perceptions, among US legislators and policymakers, of the problem of discretion and the propensity of government bureaucrats to abuse it.[64] The following excerpt aptly captures the conflicting perceptions on the problem of discretion that have shaped the evolution of public procurement regulation in the US:

> Historically, much of United States' federal procurement law has been founded on a pessimistic view of the operation of government and the capabilities and honesty of government employees. The premise often seems to be that procurement officials should not be allowed to exercise significant discretion, because left to their own unguided discretion, members of the federal acquisition workforce will make undesirable decisions…A central problem engendered by this approach is that it is easier to write rigid rules to prohibit or command certain types of behaviour than it is to achieve subtler goals of the procurement system, such as obtaining "best value" for the expenditure of government funds or optimally advancing the mission of the agency. Accordingly, rigid attachment to rule-bound procurement systems has costs, even though it also serves the procurement system objectives of integrity, equity and efficiency. From time to time the costs of adherence to such rule-driven approaches will appear to be excessive, promoting a counter-reaction of deregulation. [65]

There is no consensus, therefore, among US intelligentsia and policymakers on the correct approach to the problem of discretion and its correlation to public procurement corruption, favouritism and other forms of malfeasance. Generally, however, the

---

[62] Joshua I Schwartz, 'Regulation and Deregulation in Public Procurement Law Reform in the United States' in Gustavo Piga and Thai Khi V (eds), *Advancing Public Procurement: Practices, Innovation and Knowledge-sharing* (2007 PrAcademics Press) 177.
[63] Ibid.
[64] William E Kovacic, 'The Civil False Claims Act as a Deterrent to Participation in Government Procurement Markets' (1998) 6 Supreme Court Economic Review 201, 205-210.
[65] Schwartz (n 62) 179-181.

regulatory framework for public procurement in the US gives government bureaucrats significant discretion in the choice of economic and social objectives:[66]

> The substantive [economic and social] policies, however, are mostly left to the discretion of the acquiring federal agency…Discretion is given to the individual agency to decide what they think should be a qualifying condition for a vendor…Each agency has a fair amount of discretion in setting its standards and procedures under the wide umbrella of process rules laid down by FAR…While procurement in the United States is subject to a mesh of regulations issued and administered by a wide range of actors, significant decision-making power is left to the procurement manager in each agency. The substantive policies are mostly left to the discretion of each acquiring federal agency…The independence of each bureau to come up with its procurement needs is based on the overall federal practice of giving maximum discretion to the end client or to the acquiring agency in laying down procurement rules fitting to the agency's overall mission…[67]

American courts' approach to the problem of discretion is substantially similar to the approach taken by Kenyan and most common law courts. The dominant judicial view in the US is that contracting officers are 'entitled to exercise discretion upon a broad range of issues confronting them' in the procurement process, and that a disaffected tenderer who alleges wrongful exercise of discretion bears a heavy burden of proof.[68] United States courts, therefore, invariably uphold impugned federal procurement decisions where a contracting agency offers a coherent and reasonable explanation for its exercise of discretion.[69] A US federal contracting agency is deemed to have offered a coherent and reasonable explanation for its exercise of discretion when it has 'considered relevant factors and articulated a rational connection between the facts

---

[66] Vonortas (n 1) 149-153.

[67] Ibid.

[68] *Impresa Construzioni Geom. Domenico Garufi v United States* 238 F.3d 1324, 1332. See also *AgustaWestland North America v United States*, United States Court of Appeals for the Federal Circuit Appeal No. 2017-1082, 10.

[69] Ibid.

found and the choice made.'[70] The statutory foundation for this judicial approach lies in provisions of the FAR that permit contracting officers to 'exercise personal initiative and sound business judgment' and 'assume if a specific strategy, policy or procedure is in the best interest of the government.'[71] Moreover, United States courts, just like their Kenyan counterparts, tend to uphold the exercise of discretion once a rational and coherent explanation is offered, notwithstanding that the judge(s) would have exercised it differently had they been trusted with the making of the impugned decision.[72]

The US has experienced a significant incidence of corruption, favouritism and other forms of malfeasance, arising arguably from the broad discretionary powers its regulatory framework for public procurement confers on government officials.[73] The general perception in the US, however, is that the incidence of these governance challenges is confined to US defence procurement.[74] Studies attribute this perception (of localization of public procurement to the Department of Defence) to: (i) shadowy budgeting and financial reporting and (ii) the sheer size of US military procurement

---

[70] *Baltimore Gas & Electric Co. & Others v Natural Resources Defense Council* 462 U. S. 87, 105 (1983).
[71] The FAR, § 1.102 (4) (b).
[72] *Phoenix Management Inc. v The United States*, United States Court of Federal Claims Case No. 16-78, 5. See also *Myers Investigative and Security Services Inc. v United States* 47 Fed. Cl 605 (2000). On general application of the rule in Kenya, see *Republic v Judicial Service Commission ex-parte Pareno* [2004] 1 KLR 203. On application of the rule in public procurement contexts in Kenya, see *Republic v Public Procurement Administrative Review Board & 2 Others ex-parte Kenya Power and Lighting Company Limited*, High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 207 of 2018, para 116-118.
[73] Robinson (n 3) 296. As explained in chapter 2 above, discretion generally tends to create incentives for corruption, favouritism and other forms of malfeasance in public procurement decision making.
[74] William Sims Curry, *Government Abuse: Fraud, Waste and Incompetence in Awarding Contracts in the United States* (Routledge 2017) 1.

relative to all other federal procurements.[75] These two factors may also have shifted regulatory and academic attention from the incidence of public corruption, favouritism and malfeasance in the procurements of other US federal agencies. The relative frequencies of bid protests usually filed against the Department of Defence and other US federal agencies, however, seems to vindicate the perception.[76]

The Department of Defence is by far the largest procurement entity in the US in terms of expenditure,[77] accounting for more than the combined procurement expenditure of all other federal agencies.[78] The prevalence of corruption, favouritism and other forms of malfeasance in defence procurement, therefore, is arguably generalisable to the entire US public procurement system. Indeed, a leading commentator has described the US federal procurement system as characterised by 'the unholy trinity of waste, fraud and abuse…where contractors run roughshod over the public and hapless agencies.'[79] A more comprehensive study on the issue described the US federal defence procurement as one that is traditionally characterised by 'fraud, incompetence, waste and abuse… [and] collaboration between corrupt corporate representatives and incompetent or similarly nefarious public servants.'[80] The US has also experienced

---

[75] Anthony H Cordesman, 'America's Military Spending and the Uncertain Costs of Its Wars: The Need for Transparent Reporting'<*https://www.csis.org/analysis/americas-military-spending-and-uncertain-costs-its-wars-need-transparent-reporting*> accessed 26 May 2019.

[76] See e.g. Moshe Schwartz and Kate M Manuel, 'GAO Bid Protests: Tends and Analysis' Congressional Research Service Report No. 40227 (July 2015) 8 and 15, discussing a 100% increase in the number of bid protests filed against the Department of Defence against a 45% increase in all bid protests between the years 2001 and 2014.

[77] Robinson (n 3) 292.

[78] Sims (n 74) 1 and 9. According to Sims, the total federal procurement expenditure for the financial year 2010 stood at US$516,713,547,000.00, of which US$331,221,413,000 (that is 64%) represented Department of Defence procurement expenditure.

[79] Kelman (n 61) 44.

[80] Sims (n 74) 1.

abuses of social procurement programmes, including allowing ineligible contractors to participate in set-asides for economically and socially disadvantaged groups.[81]

The US has adopted a broad range of innovative, robust and mutually complementary mechanisms for dealing with the problems of discretion, corruption, favouritism and other forms of malfeasance in federal procurement.[82] As explained below, the mechanisms include: (i) legal rules that oblige (rather than merely empower) courts to set aside federal procurement decisions tainted by abuse of discretion, (ii) availability of alternative forums for bid protests and (iii) reliance on both public and private enforcement of rules against corruption, favouritism and other forms of malfeasance. Further, and perhaps most importantly, the US regulatory framework for public procurement contains a regime of sanctions that ensures the costs of engaging in corruption, favouritism and other malfeasance exceed the potential benefits.

The Tucker Act obliges US courts to hold as unlawful, and set aside, federal procurement decisions found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.[83] Specifically, US courts must determine whether a federal agency has 'considered relevant factors and articulated a rational connection between the facts found and the choice made.'[84] The dominant judicial view, however, is that: (i) the Tucker Act espouses a deferential standard of review

---

[81] Ibid 10.

[82] Yukins (n 35) 89-93

[83] The Tucker Act 28 U.S.C. §1491 (b) (1), as read with the Administrative Procedures Act 5 U.S.C. § 706 (2) (A). For insights on judicial review of federal procurement decisions in the US, see *Phoenix Management Inc. v The United States,* United States Court of Federal Claims Case No. 16-78.

[84] *Baltimore Gas & Electric Co. & Others v Natural Resources Defense Council* 462 U. S. 87, 105 (1983).

and (ii) the courts should uphold impugned procurement decisions where a federal agency provides a coherent and reasonable explanation of its exercise of discretion.[85]

The False Claims Act imposes stiff monetary penalties (ranging between US$5,0000.00 and US$10,0000.00) and treble damages for public procurement fraud.[86] This law also permits private citizens and whistle-blowers to sue fraudulent contractors on behalf of the state and get a share of damages, ranging from 10% to 30%, if the suit succeeds.[87] These suits, which are commonly known as 'relator suits' (or '*qui tam* suits' in medieval parlance) greatly complement traditional law enforcement.

Relator suits are very effective in combating corruption and malfeasance in the US public procurement system. This is evidenced by the huge sums of money often recovered through them.[88] Three factors account for the effectiveness of relator suits in curbing the incidence of corruption, favouritism and other forms of malpractice in the US federal procurement system. First, relator suits are driven by a private profit motive, which typical public investigators, prosecutors and other law enforcement officers often lack.[89] Secondly, the False Claims Act confers *locus standi* on a broad range of actors, including private citizens and employees of both government

---

[85] *Phoenix Management Inc. v The United States,* United States Court of Federal Claims Case No. 16-78.

[86] The False Claims Act, §§ 3729 (a) (1) and 3730 (b) (1) and (2).

[87] Ibid. For a critical analysis of the Act, see Kovacic (n 64).

[88] See e.g. United States Department of Justice, 'Justice Department Recovers Over $4.7 Billion from False Claims Act Cases in Fiscal Year 2016: Third Highest Annual Recovery in FCA History'<*https://www.justice.gov/opa/pr/justice-department-recovers-over-47-billion-false-claims-act-cases-fiscal-year-2016*>accessed 02 February 2019.

[89] Kovacic (n 64) 201.

contractors and government agencies, to file relator suits.[90] This ensures compliance with regulatory norms even where the demand and supply sides of public procurement corruption have a mutual incentive to frustrate investigation and prosecution. Lastly, the False Claims Act protects government officers who file or assist in the filing or prosecution of relator suits from reprisals such as dismissal, threats, suspension, harassment and discrimination.[91] These three factors may explain why the US public procurement system does not have endemic levels of public procurement corruption and malfeasance in spite of formal grants of broad discretionary powers on government bureaucrats.

An effective bid protest mechanism is an important feature of a sound regulatory framework for public procurement, and a sine qua non for accountability in public procurement decision making.[92] Specifically, effective bid protest mechanisms facilitate fair resolution of disputes relating to (*inter alia*): (i) balance of economic and social objectives, (ii) abuse of discretion and (iii) incidence of corruption, favouritism and other forms of malfeasance in public procurement decision-making.

Unlike Kenya, the US has a long history of bid protests, dating back to the 1920s.[93] US laws permit any 'actual or prospective bidder or offeror whose direct economic interest would be affected' by the award of a federal procurement contract or by failure

---

[90] Ibid 212.
[91] Ibid 217.
[92] Daniel I Gordon, 'Bid Protests: The Costs are Real, but the Benefits Outweigh Them' (2013) 42 (3) Public Contract Law Journal 489, 492-493.
[93] Ibid 490.

to award such a contract to lodge a bid protest with: (i) the contracting agency, (ii) the Government Accountability Office (hereinafter, "GAO") or (iii) the United States Court of Federal Contract Claims.[94] Most bid protests in the US revolve around perceptions of a material error on the part 'inexperienced or insufficiently trained' federal procurement workforce.[95] Many protesters also allege: (i) failure to adhere to established evaluation criteria, (ii) flawed selection decisions, (iii) unreasonable technical evaluations and (iv) failure to treat all bidders equally.[96]

GAO is the main bid protest forum in the US, in terms of the number of protests filed every year.[97] It conducts an administrative review of impugned federal procurement decisions and is analogous to Kenya's Review Board in terms of functions and general powers.[98] The United States Court of Federal Claims, on the other hand, conducts judicial review of impugned federal procurement decisions in the US.[99] US laws oblige GAO to ensure 'inexpensive and expeditious resolution' of bid protests to the greatest extent practicable and to issue a final decision within 100 days of the filing of a protest.[100] Unlike the decisions of Kenya's Review Board, GAO decisions are not

---

[94] The FAR, § 33.102. See also 31 U.S.C. §§ 3551 (2) (A), 3553 and 3556. Part 19.3 of the FAR vests the jurisdiction to hear bid protests relating to certifications for eligibility to participate in set-asides for some social procurement programs in the Small Business Administration.
[95] Moshe and Manuel (n 76) 11-13.
[96] Ibid.
[97] Ibid 2. See also Gordon (n 92) 496.
[98] Unlike Kenya's Review Board, which is an organ within the executive organ of government, GAO is an agency of the US Congress and thus falls within the legislative organ of government.
[99] 31 U.S.C. §§ 3551 (2) (A), 3553 and 3556. The functions and powers the US Court of Federal Claims in matters relating to public procurement are analogous to the functions and powers of the High Court of Kenya under section 175 of the 2015 Procurement Act.
[100] 31 U.S.C. § 3554 (a). Kenya's Review Board must determine a bid protest within a much shorter period, of 21 days. See the 2015 Procurement Act, s 171 (1).

legally binding on federal contracting agencies.[101] In practice, US federal agencies invariably comply with GAO decisions notwithstanding their non-binding character.[102] Disaffected tenderers who are aggrieved by GAO decisions on bid protests can seek reconsideration (a remedy unavailable under Kenyan procurement laws) or, alternatively, file a protest with the United States Court of Federal Claims.[103]

US procurement laws, just like their Kenyan counterparts, provide for: (i) a standstill upon the notification of an award of a public procurement contract and (ii) automatic suspension of procurement proceedings upon the filing of a bid protest.[104] US laws, however, permit federal agencies to proceed with the award or performance of a procurement contract notwithstanding the filing of a bid protest, upon a written finding that urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for resolution of the protest.[105] Contracting agencies must notify the Comptroller General of GAO before proceeding with the award or performance of a contract during the pendency of GAO protests.[106] Additionally, contracting agencies must obtain approval from a level higher than the contracting officer before proceeding with the award or performance of a contract

---

[101] Moshe Schwartz and Kate M Manuel, 'GAO Bid Protests: An Overview of Time Frames and Procedures' Congressional Research Service Report No. 40228 (January 2016) 16. The reason for this lies in the doctrine of separation of powers; GAO is an agency of Congress (the legislative arm of government in the US) and thus generally deemed incapable of directing executive agencies on the conduct of their day-to-day operations.

[102] Ibid 3.

[103] 31 U.S.C. § 3556.

[104] Ibid § 3553 (c) (1). See also the FAR, § 33.103 (f) (3) and the 2015 Procurement Act, s 168. Automatic suspension of procurement proceedings only applies to protests filed with the contracting agency and GAO. A protester who files a claim at the United States Court of Federal Claims (just like an applicant for judicial review in Kenya) must apply for injunctive relief, which the court may grant or decline based on the circumstances of the case.

[105] 31 U.S.C. § 3553 (c) (2). See also the FAR, §§ 33.103 (f) (3).

[106] Ibid.

during the pendency of agency protests.[107] The filing of a bid protest before the United States Court of Federal Claims (just like the filing of judicial review application before Kenya's High Court) does not, however, result in the automatic suspension of an impugned decision.[108]

The US bid protest mechanism has a high effectiveness rate, with fear of bid protests often influencing bureaucratic behaviour.[109] Specifically, the fear of bid protests often inspires US contracting officials to: (i) conduct more rigorous market research, (ii) adopt more thorough and fair competition (as opposed to sole-source selection) and (iii) structure federal procurement in a manner likely to be contested.[110] The fear of protests also tends to discourage US contracting officials from making trade-offs necessary to achievement of the FAR's overriding objective of best value.[111] The fear of bid protests in the US, therefore, tends to discourage the resolution of conflicts between economic and social objectives, especially to the extent that it inspires contracting officials to take the 'safe' approach of simply awarding contracts to contractors that offering the lowest-priced technically acceptable proposals.[112]

---

[107] Ibid.

[108] 28 U.S.C. § 1491 (b) (2). This leaves the issue of suspension of the procurement process to the discretion of the United States Court of Federal Claims.

[109] Moshe and Manuel (n 76) 4-5, showing that protesting tenderers obtained relief in 42% of the protests filed between the years 2010 and 2015. For a critique of the methodology used by GAO to calculate the effectiveness rate, see Gordon (n 92) 498-501.

[110] Moshe and Manuel (n 76) 12.

[111] Ibid.

[112] Ibid.

5.2.4 Implication of the US Experience for Kenya

There are many textual similarities, and contextual differences, between the US and Kenyan public procurement regulatory systems. The lessons that emerge from the comparative analysis of the two regulatory systems are set out below.

The US regulatory emphasis of 'best value,' and the pursuit of such value by 'balancing the many competing interests,' offers an integrated approach to the problem of conflictual coexistence of economic and social objectives in public procurement. This integrated approach is better than Kenya's mechanical approach of promoting social objectives through set-asides and percentage price premiums (that is, margins of preference). As explained in chapter 3 above, the extra costs of social procurement under the Kenyan regulatory system generally tend to increase with every increase in the value of public procurement contracts. The US approach to conflicts between the two species of objectives is also superior to Kenya's to the extent that it empowers contracting officers to: (i) make reasoned trade-offs between price and quality, (ii) forgo the pursuit of social objectives in cases where the extra costs are unreasonable and (ii) insist on payment of 'a fair market price' to beneficiaries of social procurement.[113]

Strong accountability mechanisms, such as those set out in the Tucker Act and the False Claims Act, would provide an effective counterpoise against formal grants of broad discretionary powers if adopted in Kenya. Although both Kenya and the US

[113] See e.g. the FAR, §§ 15.101, 19.501 (g) and 19.1305 (b) (2).

have highly prescriptive public procurement regulatory systems, US practice is generally characterised by an emphasis on a discretion-oriented approach to federal procurement decision making.[114] The emphasis of a discretion-based approach to public procurement decision making in the US, in the face of a highly prescriptive regulatory framework, stems from the general perception that the US federal procurement system is characterised by a low incidence of corruption, favouritism and other forms of malfeasance. Kelman, the leading exponent of enhanced discretion in public procurement management in the US, acknowledges the superiority of a rule-based approach to a discretion-based approach in societies where corruption, favouritism and other forms of malfeasance are endemic:

> Obviously, if abuse is the common practice rather than the exception—the case, possibly, with procurement corruption in some times and places—then the argument that a rule generally produces better decisions than greater discretion, with only occasional anomalies, regains its force.[115]

Although judicial approaches to the problem of abuse of discretion in Kenya and the US are substantially similar, the US regulatory framework has a subtle but important distinction. The distinction lies in the fact US laws expressly oblige federal courts to hold as unlawful, and set aside, public procurement decisions found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.[116] This approach is superior to Kenya's approach, which generally leaves the issue of

---

[114] As explained in chapter 3 above, the Kenyan public procurement system is generally characterised by a pervasive incidence of the so-called '*dirty trio*' of corruption, tribalism and impunity.

[115] Kelman (n 61) 13.

[116] The Tucker Act, § 1491 (b) (1).

remedies to the discretion of the Review Board and the courts even where a complainant proves abuse of discretion or breach of procurement laws.[117] Kenya could borrow a useful lesson, therefore, by amending the 2015 Procurement Act to oblige (rather than merely empower) the Review Board and the Courts to nullify procurement decisions that are arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law. The Kenyan judiciary should also reconsider case law that gives courts a leeway to refuse to grant judicial review remedies (usually, in public interest) even where a complainant establishes a case for the grant of such remedies.[118]

The US approach of relying on both public and private-driven sanctions to address abuse of discretion, corruption, favouritism and other forms of malfeasance would be particularly useful if adopted in Kenya. Specifically, relator suits and false claims proceedings would boost the war against public procurement corruption and malfeasance if adopted in Kenya. The rationale for this is two-fold. First, relator suits would ensure the imposition of sanctions even where public officers and government contractors conspire to ensure impunity for nefarious conduct. False claims suits, on the other hand, would greatly help in checking nefarious conduct on the part of private sector suppliers if adopted in Kenya. Secondly, private suitors, driven by the rational profit motive of getting a share of punitive damages or stiff monetary penalties, would

---

[117] The 2015 Procurement Act, ss 173 and 175. See also section 11 (2) of the Fair Administrative Action Act, 2015.

[118] *Republic v Judicial Service Commission ex-parte Pareno* [2004] 1 KLR 203. See also *Independent Electoral and Boundaries Commission (IEBC) v The National Super Alliance (NASA) Kenya & 6 Others*, Civil Appeal (Nairobi) No. 224 of 2017, paras 114 and 194. The view that judicial review orders are discretionary has its roots in old English common law principles, and is arguably incompatible with the provisions of the 2010 Constitution.

fight corruption, favouritism and other forms of malfeasance in public procurement more enthusiastically than public investigators and prosecutors. Public investigators and prosecutors, unlike private citizens who file relator suits, lack a private profit motive in pursuing delinquent contractors and government bureaucrats. In sum, relator suits would greatly complement the efforts of Kenyan public investigators, prosecutors and other law enforcement officers, who are generally underpaid, overworked and (consequently) demotivated.

The US bid protest mechanism compares better than its Kenyan counterpart in at least two ways. First, disaffected tenderers in the US have three alternative forums for filing bid protests, namely: (i) the procuring agency, (ii) the Government Accountability Office or (iii) the United States Court of Federal Claims.[119] The availability of alternative bid protest forums reduces the incentives for judicial impunity and unaccountability, by encouraging each forum to make decisions that are honest and legally sound. Specifically, the availability of alternative bid protest forums not only gives viable options to disaffected tenderers but also ensures that an incompetent or corrupt forum falls into disuse and disrepute. Secondly, the US bid protest mechanism facilitates a quicker resolution of disputes by allowing contracting agencies to take corrective action before the conclusion of bid protest proceedings.[120]

---

[119] The FAR, § 33.101-33.106. See also Gordon (n 99) 491.

[120] Government Accountability Office, 'Bid Protests, Appropriations Law, & Other Legal Work'<*https://www.gao.gov/legal/bid-protests/faqs*/> accessed 07 May 2019.

5.3 Interplay of Economic Objectives, Social Objectives and Discretion in the South African Public Procurement System

5.3.1 Overview of South Africa's Public Procurement Regulatory System

The South African public procurement regulatory system is founded on five core objectives, which govern the behaviour of government bureaucrats and private sector suppliers.[121] The core objectives are: value for money, open and effective competition, ethics and fair dealing, accountability and reporting and equity.[122] The South African government sees these objectives as 'the five pillars of procurement,' because 'if any one of them is broken the [public] procurement system falls down.'[123] These objectives are established and elaborated in multiple laws and regulations, including:[124] (i) the Constitution of the Republic of South Africa,[125] (ii) the Broad-Based Black Economic Empowerment Act,[126] (iii) the Preferential Procurement Policy Framework Act,[127] (iv) the Preferential Procurement Regulations, 2017 and (v) the General Procurement Guidelines.[128]

---

[121] Government of the Republic of South Africa, 'General Procurement Guidelines' <*http://www.treasury.gov.za/legislation/pfma/supplychain/General%20Procurement%20Guidelines.pdf*> Accessed 26 July 2018.
[122] Ibid.
[123] Ibid.
[124] Christian Helmrich, 'Equality-Oriented Horizontal Policies in South African Public Procurement' (2014) 1 African Public Procurement Law Journal 61, 71.
[125] The Constitution of South Africa, 1996.
[126] The Broad-Based Black Economic Empowerment Act, 2003.
[127] The Preferential Procurement Policy Framework Act, 2000.
[128] Government of the Republic of South Africa (n 121).

5.3.2 Interplay of Economic and Social Objectives

For many years, South Africa practised apartheid, a system that entailed state-sanctioned racial discrimination and segregation in all spheres of life. Apartheid resulted in extreme social exclusion, characterised by a market-dominant white racial minority and an impoverished black racial majority.[129] The apartheid era was also characterised by a predominantly market-oriented approach to public procurement, which tended to: (i) favour large white-owned and well-established businesses and (ii) exclude black-owned and small, medium and micro-enterprises.[130]

Following the formal end of apartheid in 1994, South Africa adopted policies and laws aimed at: (i) promoting good governance, (ii) extensive economic redistribution and (iii) maintenance of a market-oriented economy.[131] The main post-apartheid policies in this regard were: (i) the Reconstruction and Development Programme (hereinafter, "the RDP Policy"), (ii) the Black Economic Empowerment Policy (hereinafter, "the BEE Policy"), (iii) the Broad-Based Black Economic Empowerment Policy (hereinafter, "the B-BBEE Policy") and (iv) the Green Paper on Public Sector Procurement Reform.[132]

---

[129] McCrudden, 'Social Policy Choices' (n 20) 126-127. See also International Institute for Sustainable Development, *Implementing Sustainable Public Procurement in South Africa: Where to Start* (IISD Report, 2014) 7. The definition of the term 'black people' under section 1 of the Broad-Based Black Economic Empowerment Act includes Africans, coloureds and Indians who: (i) are citizens of South Africa by birth or decent or (ii) had become South African citizens by naturalisation on or before 27th April 1994.

[130] Phoebe Bolton, 'Government Procurement as a Policy Tool in South Africa' (2006) 6 (3) Journal of Public Procurement 193.

[131] McCrudden, *Buying Social Justice* (n 20) 75. See also Interher Marcus Ambe, 'Procurement Challenges in the South African Public Sector' (2012) Journal of Transport and Supply Chain Management 242, 245.

[132] Helmrich (n 124) 71.

The social objectives embedded in South African public procurement laws are to be found mainly in the B-BBEE Policy. The correction of social exclusion, and specifically the amelioration of the extreme inter-racial inequalities created by apartheid, therefore, is the core social objective of the South African public procurement system.[133] Other social objectives include: (i) advancement of SMEs and historically disadvantaged individuals, (ii) promotion of women and physically handicapped people, (iii) job creation and (iv) promotion of local industry.[134]

The South African regulatory framework for public procurement seeks to correct the perverse effects of apartheid through preferential procurement and enterprise development for businesses owned by historically disadvantaged individuals (generally, black South Africans).[135] This objective is embedded in multiple South African laws, including: (i) the Constitution of South Africa 1996, (ii) the Preferential Procurement Policy Framework Act 2000, (iii) the Broad-Based Black Economic Empowerment Act 2003, (iii) the Employment Equity Act 1998, (iv) the Promotion of Equality and Prevention of Unfair Discrimination Act 2002, (v) the Public Finance Management Act 1999, (vi) the Local Government: Municipal Financial Management Act 2003 and (vii) various subsidiary legislation.[136] Just like the US, and unlike Kenya,

---

[133] Phoebe Bolton, 'The Public Procurement System in South Africa: Main Characteristics' (2008) 37 (4) Public Contract Law Journal 781, 785.

[134] Government of the Republic of South Africa (n 121). See also McCrudden, 'Social Policy Choices' (n 20) 128-130. For a comprehensive list of specific social objectives of the South African public procurement regulatory system, see section 2 (1) of the Preferential Public Procurement Policy Framework Act 2000, as read with regulations 3 and 4 of Preferential Procurement Policy Regulations, 2017 (hereinafter, "the PPPFA Regulations").

[135] McCrudden, *Buying Social Justice* (n 20) 75. See also International Labour Organisation, 'Targeted Procurement in the Republic of South Africa: An Independent Assessment' (2002) 19-32. As explained in Chapter 3 above, Kenya borrowed (apparently 'copy-pasted') article 227 of the 2010 Constitution from section 217 of the South African Constitution.

[136] McCrudden, 'Social Policy Choices' (n 20) 131-141.

therefore, South Africa has a highly fragmented regulatory framework for public procurement, various facets of which are set out in different laws and regulations.[137]

Social procurement in South Africa revolves almost exclusively around the B-BBEE Policy. In other words, South Africa implements most of the social objectives embodied in its public procurement laws, including those that are unconnected with reversing the legacy of apartheid, within the broad framework of the B-BBEE Policy. The comparative analysis set out in this chapter, therefore, discusses social procurement in South Africa within the broad context of the B-BBEE Policy and B-BBEE laws.

The Preferential Procurement Policy Framework Act (hereinafter, "the PPPFA") and the Broad-Based Black Economic Empowerment Act (hereinafter, "the B-BBEEA") establish the core normative framework for social procurement in South Africa. The detailed procedural rules for public procurement in South Africa, on the other hand, are set out in: (i) the Municipal Supply Chain Management Regulations (made under the Local Government: Municipal Finance Management Act, 2003) and (iii) the Treasury Regulations (made under the Public Finance Management Act, 1999).

---

[137] Gezani Phineas Mazibuko, 'Analysis of the Administration of Procurement Practices in the South African Public Sector' (PhD Thesis, University of Pretoria 2018) 112-113. See also Geo Quinot, 'Enforcement of Procurement Law from a South African Perspective' (The Public Procurement: Global Revolution V Conference, Copenhagen, October 210) 2 <*https://scholar.sun.ac.za/handle/10019.1/46327*> accessed 16 June 2019.

The PPPFA gives every organ of state discretion to determine and implement its preferential procurement policy and the specific social objectives of such policy, within defined parameters.[138] The B-BBEEA, on the other hand, establishes diverse but integrated strategies for the viable economic empowerment of black South Africans, with special focus on black women, workers, youth, people with disabilities and people living in rural areas.[139] In summary, the overall aim of the B-BBEEA is to reverse the legacy of apartheid by increasing the number of black people that manage, own and control the South African economy.[140]

The B-BBEEA seeks to encourage private enterprises, through preferential procurement, to adopt and comply with prescribed codes of good practice for reversing the legacy of apartheid.[141] Enterprises that comply with the prescribed codes of good practice also enjoy advantages in: (i) issuance of licenses, concessions or other business authorisations, (ii) sale of state-owned enterprises and (iii) public-private partnerships.[142] Bidders seeking to benefit from preferential procurement must submit B-BBEE status level certificates.[143]

---

[138] The PPPFA, s 2 (1). See also the PPPFA Regulations, reg 3.

[139] The B-BBEEA, ss 1 and 2.

[140] Intaher Marcus Ambe, 'Public Procurement Trends and Developments in South Africa' (2016) 3 (4) Research Journal of Business and Management 277, 284.

[141] Ibid.

[142] Ibid.

[143] Ibid. See also the PPPFA Regulations, reg 6 (4). The B-BBEEA empowers the Minister for Finance to establish a B-BBEE Verification Professional Regulator, which is responsible for accrediting B-BBEE Verification Agencies. B-BBEE Verification Agencies are responsible for issuance of B-BBEE status level certificates.

South African public agencies evaluate the B-BBEE status of tenderers using a seven-pillar scorecard. Each pillar of the scorecard has a relative weighting in terms of preference points for purposes of the dual scales established by the PPPFA.[144] The seven pillars of the scorecard, which are deemed indices of a tenderer's compliance with prescribed codes of good practice, are: (i) equity ownership, (ii) management, (iii) employment equity, (iv) skills development, (v) preferential procurement, (vi) enterprise development and (vii) socioeconomic development of black people.[145] The number of preference points obtainable under dual scales established by the PPPFA generally depends on a tenderer's B-BBEEA status level certification.[146]

South Africa extensively reviewed US experiences with social procurement before designing her own regulatory frameworks.[147] Two factors inspired the review, namely: (i) the two countries' shared history of racial segregation and (ii) legal controversies that had bogged down race-based procurement preferences in the US.[148] The review shaped two important aspects of the South African regulatory framework for public procurement. First, South Africa opted to implement social objectives through a preference points system as opposed to set-asides.[149] Moreover, South African policymakers generally considered set-asides incompatible with the constitutional edict that requires public agencies to conduct public procurement in accordance with

---

144 International Institute for Sustainable Development (n 129) 9. As explained below, the PPPFA establishes two dual-scales, the 80/20 and 90/10 scales, for purposes of award of tenders under the preferential procurement policy.
145 Ibid.
146 Ambe (n 140) 283.
147 McCrudden, *Buying Social Justice* (n 20) 131.
148 Ibid.
149 Ibid.

a system that is 'fair, equitable, transparent, competitive and cost-effective.'[150] Secondly, South Africa opted to 'secure' the legal validity of social procurement by expressly providing for it in the text of the post-apartheid constitution.[151] The rationale for 'constitutionalisation' of social procurement was simple: the architects of post-apartheid South Africa considered public procurement a critical and indispensable tool for redressing past racial injustices, hence the need to safeguard it against judicial declarations of unconstitutionality.[152]

As stated, price was the overriding criterion for the award of public procurement contracts in apartheid South Africa. The redistributive policies of the post-apartheid era envisioned a public procurement regulatory framework that espoused both economic and social objectives. The current regulatory framework requires South African procurement officers to not only encourage 'effective competition through procurement methods suited to market circumstances' but also ensure that all public procurement complies with the social objectives set out in the PPPFA.[153] Further, just like Kenya, South African public procurement laws require: (i) mandatory integration of social objectives into all public procurements and (ii) consideration of both price and non-price factors in awarding public contracts.[154]

---

[150] International Labour Organisation (n 135) 28. The South African constitution does not, however, expressly prohibit the implementation of social procurement by way of set-asides.
[151] McCrudden, 'Social Policy Choices' (n 20) 131.
[152] Ibid.
[153] Government of the Republic of South Africa (n 121).
[154] Helmrich (n 124) 70.

Unlike their Kenyan counterparts, South African courts emphasize an integrated approach to public procurement that avoids inflexible obsession with either economic or social objectives. In *Cash Paymaster Services (Pty) Ltd v The Province of the Eastern Cape*, for instance, the South African High Court censured a procurement decision that sought to promote social objectives at an unreasonable economic cost in the following terms:

> I do not believe that the Constitution intended to elevate [social objectives] to the one and only consideration to be applied by a Tender Board… [T]his court accepts without reservation that it was at all times and will always be incumbent upon a Tender Board to consider the [social objectives] of each and every tender… It is however of the greatest importance that it should be understood that that aspect does not override all other considerations such as fairness, competitiveness and the like… the decision of the Tender Board to award a contract (the total value of which is in the vicinity of R300 to R400 million) to tenderers who have quoted in the vicinity of R200 million more for the same service purely on ideological considerations is untenable.[155]

South African courts have also held that it is not cost-effective to award a tender to a bidder who merely 'ticks the right boxes as regards price and preference, but is unable to get the job done properly– whether through lack of experience, adequate personnel or financial resources.'[156]

South Africa uses a preference points system of dual scales, based on the value of the contract and the Broad-based Black Economic Empowerment status of bidders, as the principal method for integrating social objectives into public procurement.[157] The

---

[155] *Cash Paymaster Services (Pty) Ltd v The Province of the Eastern Cape* [1997] 4 All SA 363 (ck).
[156] *Rainbow Civils CC v Minister of Transport and Public Works, Western Cape* [2013] ZAWCHC 3.
[157] Helmrich (n 124) 71-72. Regulation 9 of the PPPFA Regulations provides for subcontracting arrangements as an additional method for promoting social objectives. In summary, the

Preferential Procurement Regulations, 2017 provide for subcontracting arrangements as an additional method for promoting social objectives.[158] In summary, procuring entities may require successful tenderers to subcontract at least 30% of the contract value to small enterprises that are at least 51% owned by black people. Procuring entities may also require successful tenderers to subcontract at least 30% of the contract value to small enterprises that are at least 51% owned by black people who: (i) are youth, (ii) are women, (iii) with disabilities, (iv) living in rural or underdeveloped areas or townships, (v) are military veterans.[159]

South African laws establish two graduated scales for purposes of preferential procurement, namely the 80/20 scale and the 90/10 scale.[160] Under the 80/20 scale, tenderers get a maximum of 20 evaluation points, out of 100, for: (i) being a historically disadvantaged individual, (ii) subcontracting an historically disadvantaged individual, (iii) subcontracting an enterprise that is least 51% owned by historically disadvantaged individuals and/or (iv) meeting any other specified social objectives in procurements valued between thirty thousand and fifty million South African Rand (that is between US$2,000 and US$3,370,000.00).[161] Under the 90/10 scale, tenderers get a maximum of 10 evaluation points, out of 100, for: (i) being a historically disadvantaged individual, (i) subcontracting a historically disadvantaged individual,

---

regulation allows procuring entities to require successful tenderers to subcontract at least 30% of the contract value to small enterprises that are at least 51% owned by black people or black people who: (i) are youth, (ii) are women, (iii) with disabilities, (iv) living in rural or underdeveloped areas or townships, (v) are military veterans.

158 The PPPFA Regulations, reg 9.

159 Ibid.

160 Helmrich (n 124) 71-72. See also Geo Quinot, 'Promotion of Social Policy through Public Procurement in Africa,' in Geo Quinot and Sue Arrowsmith (eds), *Public Procurement Regulation in Africa* (Cambridge University Press 2013) 370, 396.

161 The PPPFA, s 2 (1) (b) (ii). See also the PPPFA Regulations, reg 6.

(iii) subcontracting an enterprise that is least 51% owned by historically disadvantaged individuals and/or (iv) meeting any other specified social objectives in procurements valued over fifty million South African Rand.[162]

In summary, the dual scale preference point system works as follows. First, the lowest acceptable tender gets maximum points for price, which is 80 or 90 points depending on the applicable scale.[163] Secondly, all other acceptable tenders which are higher in price must score fewer points for price, which is fewer than 80 or 90 points depending on the applicable scale, on a *pro-rata* basis in accordance with a prescribed formula. Thirdly, procuring entities must award the contract to the bidder who scores the highest combined points for price and preference unless objective criteria justify an award to another bidder.[164] Fourthly, procuring entities must specify the social objectives of each procurement and the preference points attached to each social objective, in tender solicitation documents.[165] Lastly, South African public procurement entities are obliged to simply award the number of preference points out of 10 or 20 (depending on the value of the contract) based on each bidder's BEE certificate as set out in the tables found in the Preferential Procurement Regulations,

---

[162] Ibid s 2 (1) (b) (i), as read with the PPPFA Regulations, reg 7. See also Geo Quinot, 'The Role of Quality in the Adjudication of Public Tenders' (2014) 17 (3) Potchefstroom Electronic Law Journal 1110, 1116.

[163] The PPPFA, s 2 (1) (b) (i) and (ii). The PPPFA defines an acceptable tender as one which, 'in all respects, complies with the specifications and conditions of tender as set out in the tender document.'

[164] Ibid, s 2 (1) (f).

[165] Ibid s 2 (1) (e), as read the PPPFA Regulations, reg 3.

2017.[166] The distribution of preference points under the 80/20 scale must accord with the following table:[167]

B-BBEE Status Level of Contributor/Tenderer (as evidenced by Certificate)	**Points**
1	20
2	18
3	14
4	12
5	8
6	6
7	4
8	2
Non-Compliant Contributor/Tenderer	0

The distribution of preference points under the 90/10 scale, on the other hand, must accord with the following table:[168]

B-BBEE Status Level of Contributor/Tenderer (as evidenced by Certificate)	**Points**
1	10
2	9
3	6

[166] The PPPFA Regulations, regs 6 and 7.
[167] Ibid reg 6 (2).
[168] Ibid reg 7 (2).

B-BBEE Status Level of Contributor/Tenderer (as evidenced by Certificate)	**Points**
4	5
5	4
6	3
7	2
8	1
Non-Compliant Contributor/Tenderer	0

Although the South African public procurement regulatory framework places great emphasis on social objectives, price remains the dominant criterion for awarding public contracts.[169] The predominance of price is evident from two aspects of the South African public procurement regulatory framework. First, South Africa has capped social policy preference points at twenty percent of total tender evaluation points, except for tenders reserved for promotion of social policy.[170] The dual-scale preference point system generally awards most of tender evaluation points, which is 80% or 90%, based on price.[171] Secondly, the dual-scale system generally awards more social policy preference points in low-value procurements and fewer social policy preference points for high-value procurements.[172] The emphasis on social objectives, therefore, tends to decrease as the value of an envisioned public procurement contract increases.[173] South

[169] Bolton (n 130) 207-213 and Quinot (n 160) 396.
[170] Regulation 4 of the PPPFA Regulations gives South African public entities discretion to reserve (i.e. set aside) tenders based on social policy considerations (e.g. BEE status). There is no cap on the weight attached to social considerations in such cases, as social policy considerations carry a 100% weighting given their role as qualification criteria.
[171] Bolton (n 133) 793.
[172] Ibid.
[173] Ibid.

Africa's preference point system, therefore, is more inclined towards an economic rather than a social approach to public procurement.[174]

The predominance of economic objectives over social objectives in South Africa, especially in situations where the pursuit of the latter entails enormous extra costs, is clearly discernible from the prevailing case law. In *Cash Paymaster Services (Pty) Ltd v The Province of the Eastern Cape*, for instance, the court held that social objectives could not trump the objective of value for money (read 'economic efficiency').[175] Accordingly, the court further held, the pursuit of social objectives could not justify extra costs where a tender is awarded to a bidder whose offer exceeds other qualified bidders by 200 million South African Rand (that is about US$ 14 million).[176] The court's interrogation of the interplay between economic and social objectives, and specifically the justifiability of the extra cost of promoting social objectives, substantially differs from the mechanical approach in the Kenyan cases discussed in chapter 3 above.[177]

The legal validity of social procurement in South Africa is generally accepted by most stakeholders, due to its anchorage in the constitution.[178] Indeed, and as explained, the constitutionalisation of social procurement in South Africa sought to avoid the legal challenges that had bogged down the use of public procurement as a tool for

---

[174] Helmrich (n 124) 96.
[175] *Cash Paymaster Services (Pty) Ltd v The Province of the Eastern Cape* [1997] 4 All SA 363 (ck).
[176] Ibid.
[177] See e.g. the discussion on *Questa Care Limited v Kenya Medical Supplies Authority & Another*, Review Board Application No. 28 of 2017 and *China Overseas Engineering Group Company Ltd v Kenya Rural Roads Authority*, Review Board Application No. 7 of 2016.
[178] Helmrich (n 124) 74.

promoting racial equality in the US. Moreover, and as explained above, South African policymakers considered public procurement an indispensable tool for addressing the deep socioeconomic inequalities created by apartheid.

Although there has been little controversy on whether South African public agencies ought to use public procurement as a tool of social policy, some studies have questioned the effectiveness of social procurement in achieving the desired policy outcomes. There are three main criticisms. First, the South African regulatory framework for public procurement places undue emphasis on black economic empowerment, at the expense of other social objectives.[179] Secondly, critics argue that the results of social procurement are often 'not good enough,' or 'the [extra] costs are too high.'[180] Lastly, critics have argued that social procurement tends to benefit a small elite of well-established or privileged blacks instead of promoting intended structural changes such as social inclusion, alleviation of inequality and distributive justice.[181] This line of criticism has featured in an important South African judicial opinion:

> [T]the RDP factor [read 'social procurement'] was never intended to enrich already successful members of the previously disadvantaged society…when one talks about the RDP, the intention is to improve the lot of those people that have suffered from the consequences of the inequalities of the past and not the lot of those that have succeeded in being successful in spite of them. To regard as RDP the enrichment of a small black minority in place of a small white minority who benefited

[179] A reading of the texts of the B-BBEEA and the PPPFA shows there is a considerable merit in this criticism. The study by the Institute for Sustainable Development (n 107), however concluded, that this criticism is 'limited to intellectual or theoretical exercises more than it is founded in empirical research.'

[180] Helmrich (n 124) 89.

[181] Ibid 93-96. See also Sweet (n 42) 166-170, Ambe (n 131) 253 and Luyando Martha Katiyatiya, 'Substantive Equality, Affirmative Action and the Alleviation of Poverty in South Africa: A Socio-Legal Inquiry' (LLD Thesis, Stellenbosch University 2014).

> in the past, does not seem to me to be a proper application of the principle.[182]

In summary, South African public procurement laws address the problem of conflictual co-existence of economic and social objectives as follows. First, the dual scale preference point system establishes a clear, weighted, integrated and objective regulatory mechanism for prioritising the two species of objectives. Secondly, every social objective integrated into public procurement under the dual scale preference point system must be measurable, quantifiable and monitored for compliance.[183] Thirdly, procuring entities have the discretion to cancel, without prejudice to any other legal remedy, contracts awarded on account of false information furnished by a tenderer to secure preference.[184] Fourthly, the Preferential Procurement Regulations, 2017 forbid organs of state from awarding a contract to any tenderer under the dual scale preference point system if the price offered by that tenderer is 'not market-related.'[185] Lastly, where functionality is part of the evaluation process and two or more leading tenderers score equal total points for price and equal preference points for B-BBEE, the contract must be awarded to the tenderer that scored the highest points for functionality.[186]

South African procurement law defines 'functionality' as 'the ability of a tenderer to provide goods or services in accordance with specifications as set out in the tender

---

[182] *Cash Paymaster Services (Pty) Ltd v The Province of the Eastern Cape* [1997] 4 All SA 363 (ck) (Pickard JP).
[183] The PPPFA, s 2 (2).
[184] Ibid s 2 (1) (g). See also the B-BBEEA, s 13A.
[185] The PPPFA Regulations, reg 6 (9) and 7 (9).
[186] Ibid reg 10 (2).

documents.'[187] The requirement to demonstrate such an ability is an essential feature of an effective public procurement regulatory system. Functionality is not, however, a mandatory aspect of tender evaluation in South Africa.[188] Specifically, the PPPFA Regulations give organs of state discretion to decide 'if' a tender will be evaluated on functionality.[189]

Where functionality is part of the evaluation process in South Africa, tenders are first evaluated on functional requirements (based on objective and quantifiable criteria) before proceeding for price and preference evaluation in accordance with the applicable 80/20 or 90/10 scale.[190] Only those tenders which achieve a threshold score for functionality proceed to price and preference evaluation in such cases.[191] Technically, B-BBEEA non-compliant tenderers can beat B-BBEEA compliant tenderers under the dual-scale preference point system established by the PPPFA, especially where there are significant price differences between the two categories of tenderers. The Preferential Procurement Regulations, 2017 give procuring entities discretion (perhaps to pre-empt such outcomes) to use: (i) B-BBEEA compliance and (ii) sub-contracting with target groups as 'pre-qualifying criteria.'[192]

---

[187] Ibid reg 1.

[188] In Kenya, functionality is evaluated as part of responsiveness of tenders. See the 2015 Procurement Act, s 79.

[189] The PPPFA Regulations, reg 5 (1).

[190] Ibid reg 10 (2).

[191] Ibid.

[192] Ibid reg 4. This discretion, introduced in 2017, empowers South African procuring entities to preclude B-BBEEA non-compliant bidders from participating in government tenders irrespective of how functional or cost-effective such bidders might be. The discretion is also arguably *ultra vires* the PPPFA, which envisions price as the dominant criterion for award of public procurement contracts in South Africa.

5.3.3 Discretion, Corruption, Favouritism and Other Forms of Malfeasance

South African laws give public agencies discretion to integrate various social objectives into public procurement. Moreover, South African public procurement laws emphasize decentralised decision making, managerial flexibility and achievement of goals more than compliance with set rules.[193] These aspects of the South African regulatory system for public procurement create an environment in which public procurement corruption, favouritism and other forms of malfeasance can easily thrive.[194]Indeed, South Africa has faced significant governance challenges relating to corruption, favouritism and other forms malfeasance, arguably attributable to the broad discretion its public procurement laws confer on government officers. Available literature suggests that these governance challenges are pervasive and endemic.[195] One study compared the relationship between the South African public sector procurement system and corruption to Siamese twins, because 'whenever one of the two is mentioned, the other one has to follow in the next line.'[196] Other studies have estimated that South Africa loses about 20% of its government budget to public procurement corruption and malfeasance every year.[197]

Commentators have variously attributed the incidence of corruption, favouritism and other forms malfeasance in the South African public procurement system to: (i) poorly

---

[193] International Institute for Sustainable Development (n 129) 8.

[194] As explained in chapter two above, the incidence of public procurement corruption, favouritism and other forms of malfeasance is generally directly proportional to the amount of discretion that government bureaucrats enjoy under the applicable regulatory framework.

[195] Ambe (n 140) 278. See also Ambe (n 131) 251-254.

[196] Pandelani Harry Munzhedzi, 'South African Public Sector Procurement and Corruption: Inseparable Twins?' (2016) 10 (1) Journal of Transport and Supply Chain Management 197.

[197] Ambe and Johanna (n 143) 438. See also Sope Williams and Geo Quinot, 'Public Procurement and Corruption: The South African Response' (2007) South African Law Journal 3398.

circumscribed discretion, (ii) impunity, (iii) decentralisation of the procurement system and (iv) non-compliance with the applicable policy and regulatory frameworks.[198] A common governance challenge revolves around fronting, a practice in which an essentially white-owned company, which is not entitled to benefit from the schemes of preferences and reservations, 'rents-a-black' for purposes of winning a public contract.[199] Political patronage has also been a serious problem, with politically connected and wealthy blacks benefitting from the schemes of preferences at the expense of the intended small and medium-sized black businesses.[200]

Comparatively, South Africa has more effective sanctions against: (i) abuse of public procurement discretion and (ii) corruption, favouritism and other forms of malfeasance than Kenya. Specifically, persons convicted of public procurement corruption and malfeasance in South Africa are liable for a wider and severer range of sanctions compared to their Kenyan counterparts. The Prevention and Combating of Corrupt Activities Act, for instance, provides for: (i) imprisonment for periods ranging from five years to life, (ii) a fine equal to five times the value of gratification involved in the offence, (iii) endorsement on the register of tender defaulters and automatic debarment for a period ranging from five to ten years.[201] The Preferential Procurement Regulations, 2017 also impose stiff penalties on contractors who fraudulently claim entitlement to preferential treatment, including: (i) debarment for a period not exceeding ten years, (ii) damages, (iii) termination of the contract and (iv) a financial

---

[198] Ibid.
[199] Helmrich (n 124) 72. See also Bolton (n 130) 212.
[200] Noon (n 21) 629-630.
[201] The Prevention and Combating of Corrupt Activities Act, 2004, ss 12, 13, 26 and 28.

penalty.[202] Similarly, the B-BBEEA imposes sanctions in the form of: (i) imprisonment for a period not exceeding ten years and (ii) fines of up to ten percent of an enterprise's annual turnover.[203]

The sanctions embodied in South African laws are carefully designed to ensure that the cost of engaging in public procurement corruption, fraud, favouritism or other forms of malfeasance exceed the presumptive benefits. This differs starkly from Kenya's standard fines (of Kenya Shillings four million for natural persons and ten million shillings for corporate bodies irrespective of the value of the benefit gained by the offender) and debarment for a period of three to ten years.[204] Moreover, South Africa's debarment regime is more stringent than Kenya's to the extent that it applies not only to persons or companies involved in malfeasance but also persons involved in the management of such companies and enterprises established by such persons or companies in the future.[205] Further, South Africa's sanctions for abuse of discretion, corruption, favouritism and other forms of malfeasance are designed in a way that gives jurisdiction to all judicial officers, irrespective of rank, to impose them. This ensures, for instance, that offenders to not get light penalties due to statutory limits on the pecuniary jurisdiction of magistrates.[206]

---

[202] The PPPFA Regulations, reg 14. Regulation 15 (2) (c) of the Preferential Procurement Regulations, 2001 imposed penalties 'more severe than the theoretical financial preference associated with the claim.'

[203] The B-BBEEA, s 13O.

[204] The 2015 Procurement Act, ss 41 (4), 67 (5), 176 (2).

[205] The Prevention and Combating of Corrupt Activities Act, 2004, s 28 (1) (d).

[206] See e.g. the B-BBEEA, s 13O (6) and the Prevention and Combating of Corrupt Activities Act, 2004 s 26 (4).

South Africa's regime of incentives and sanctions for abuse of discretion, corruption, favouritism and other forms of malfeasance in public procurement decision making, therefore, is superior to Kenya's. Moreover, and perhaps most importantly, South Africa, unlike Kenya, expressly prohibits state employees at all levels of government from doing business with the State.[207] South Africa's Public Administration Management Act 2014 provides as follows:[208]

> (2) An employee may not—
>
> (a) conduct business with the State; or
>
> (b) be a director of a public or private company conducting business with the State.
>
> (3) A contravention of subsection (2)—
>
> (a) is an offence, and any person found guilty of the offence is liable to a fine or imprisonment for a period not exceeding 5 years or both such fine and imprisonment; and
>
> (b) constitute[s] serious misconduct which may result in the termination of employment by the employer.

South Africa's prohibition of civil servants from doing business with the state is an important tool for combating corruption, favouritism and other forms of malfeasance in public procurement decision making. The preclusion of South African civil servants from doing business with the state is very different from Kenya's official policy, as captured in the Ndegwa Report. As discussed in chapters 2 and 3 above, precluding civil servants from doing business with the state facilitates resolution of the agency and public choice problems that are naturally inherent in public procurement decision

---

[207] The Public Service Regulations, 2016 (issued under the Public Service Act, 1994), reg 13.
[208] Public Administration Management Act 2014, s 8. This Act had not yet come into force as at the date of this study. See also the Municipal Supply Chain Management Regulations, reg 44 and the Treasury Regulations, regs 16A8 and 16A9.

making.[209] Lastly, and as explained in section 5.3.4 below, public procurement decisions constitute 'administrative action' under South African administrative law.[210] South African administrative law permits 'any person' whose rights are adversely affected to seek judicial review of administrative action for (*inter alia*): abuse of discretion, bias (that is, favouritism), illegality, irrationality and procedural impropriety.[211]

The prevailing case law on judicial review of public procurement decisions in South Africa may be summarised into five main propositions. First, although an invitation to tender and its acceptance may be susceptible to common law rules of contract, an organ of state that engages in public procurement acts within the domain of administrative law.[212] Consequently, public procurement decisions constitute 'administrative action' within the meaning of section 33 of Constitution of South Africa and section 1 of the Promotion of Administrative Justice Act.[213] Secondly, every failure of administrative justice in public procurement decision making amounts to a breach of constitutional duty, since the procurement of goods and services involves exercise of power derived from the constitution and laws designed to give effect to

---

[209] See the discussion in chapters 2 and 3 above.
[210] Quinot (n 137) 8.
[211] The Constitution of South Africa, s. 33. See also the Promotion of Administrative Justice Act, 2000 ss 1 and 6.
[212] *Jurgens Johannes Steenkamp NO v Provincial Tender Board of the Eastern Cape* [2006] ZACC 16, paras 20-21. See also *AllPay Consolidated Investment Holdings (Pty) Ltd & Others v Chief Executive Officer of the South African Social Security Agency & Others*, Constitutional Court of South Africa Case No. 48 of 2013, which held (*inter alia*) that a private company that enters into a public procurement contract is constitutionally accountable to citizens and thus subject to public law remedies even where the contract between it and an organ of state is governed by private law.
[213] Ibid.

constitutional goals.[214] Thirdly, organs of state must adopt a holistic approach to interplay of the economic and social objectives in public procurement decision making.[215] Fourthly, every improper performance of administrative function (and exercise of discretion) will normally: (i) lead to a finding of invalidity; and (ii) entitle the aggrieved party to appropriate relief.[216] The phrase 'appropriate relief' connotes a multi-dimensional judicial inquiry and, specifically, a balanced remedy that: (i) is fair to affected members of the public and (ii) effectively vindicates violations of the rights of disaffected tenderers.[217] Lastly, prove of corruption or fraud will invariably lead to invalidation of affected public procurement decisions; since corruption and fraud inevitably undermine the achievement of relevant constitutional principles: [218]

> The award of public tenders is governed by s 217 of the Constitution [of South Africa]. It requires awards to be made in accordance with a system that is 'fair, equitable, transparent, competitive and cost-effective'. The interests of the members of the community who are to benefit from the supply of water via the pipeline must be assessed against their interest, and that of the public at large, that this constitutional imperative be given effect to; that the tender process is

---

[214] *Jurgens Johannes Steenkamp NO v Provincial Tender Board of the Eastern Cape* [2006] ZACC 16, paragraphs 20 and 37.

[215] *Cash Paymaster Services (Pty) Ltd v The Province of the Eastern Cape* [1997] 4 All SA 363 (ck).

[216] *Jurgens Johannes Steenkamp NO v Provincial Tender Board of the Eastern Cape* [2006] ZACC 16, para 29. The Constitutional Court of South Africa held that public policy considerations precluded a successful tenderer from claiming damages in tort for out-of-pocket expenses in preparation for the execution of a public procurement contract (for payment of social welfare grants) which was subsequently set aside on judicial review due to the procuring entity's negligent but *bona fide* exercise of discretion. Section 8 (1) (c) (ii) (bb) of the Promotion of Administrative Justice Act empowers South African courts to (*inter alia*) order the payment of compensation in 'exceptional cases' such as this one, but was inapplicable on account of having come into force after the events in question.

[217] Ibid.

[218] *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* [2014] ZASCA 21, reversing a High Court decision to permit the implementation of a construction contract (for a water pipeline) resulting from a tender process marred by fronting and payment of kickbacks to public officials. The High Court had declined to set the contract aside on pragmatic public interest considerations, and specifically because it believed setting it aside would 'not serve to protect the interests of those who were to benefit from the construction of the pipeline.'

> free from corruption and fraud; and that public moneys do not land up in the pockets of corrupt officials and business people... [219]

As explained in section 5.2.2 above, the bid protest mechanism of a sound public procurement regulatory framework must provide effective sanctions against abuse of discretion, corruption, favouritism and other forms of malfeasance. Comparatively, the South African bid protest system is inferior to its Kenyan counterpart in at least four critical respects. First, although South African procurement laws provide for internal remedies, which are absent in Kenya, those remedies are arguably ineffective to the extent that: (i) there is no standstill upon the notification of award of contract, (ii) there is no automatic suspension of procurement proceedings upon the filing of a bid protest [220] and (iii) internal remedy forums cannot vary or revoke rights accrued under an impugned decision.[221] In other words, and as explained below, although disaffected tenderers in South Africa must exhaust internal remedies as a precondition for recourse to judicial review, they can only stop the signing or implementation of an impugned public procurement contract by applying for interim relief from the courts.[222]

---

[219] Ibid para 26. This approach differs from Kenyan courts occasional tendency to uphold flawed public procurement decisions on 'public interest' considerations, as happened in *Independent Electoral and Boundaries Commission (IEBC) v The National Super Alliance (NASA) Kenya & 6 Others*, Civil Appeal (Nairobi) No. 224 of 2017.

[220] In practice, this is a small lacuna. South African Courts, unlike their Kenyan counterparts, usually provide appropriate relief to deserving complainants even where the contract has been signed and performed. For further insights on this aspect, see Kingsley Tochukwu Udeh, 'A Comparative Study of the Effectiveness of Bidder Remedies in South Africa and Nigeria' (LLD Thesis, Stellenbosch University 2018) 122-123.

[221] *DDP Valuers (Pty) Ltd v Madibeng Local Municipality & Another*, Supreme Court of Appeal of South Africa Case No. 233 of 2015, paras 14-20. See also *City of Cape Town v Reader & Others* 2008] ZASCA 130 on the appeal provided for by section 62 of the Local Government: Municipal Systems Act, which provides as follows:

> The appeal authority must consider the appeal, and confirm, vary or revoke the decision, but no such a variation or revocation of a decision may detract from any rights that may have accrued as a result of the decision.

[222] Quinot (n 137) 6-8.

Secondly, non-judicial bid protest forums in South Africa (that is, provincial and national treasuries) have no coercive powers. Instead, non-judicial bid protest forums in South Africa can only 'make recommendations' for remedial actions where a disaffected tenderer proves corruption, fraud, any criminal offences or non-compliance with any norms and standards.[223] Thirdly, South African procurement laws, unlike their Kenyan counterparts, do not prescribe specific timeframes within which internal remedy forums, or the courts, must determine bid protests.[224] Lastly, unlike Kenya, South Africa does not have a central body, court or tribunal tasked with: (i) administrative (that is, non-judicial) review of impugned public procurement decisions or (ii) enforcement of procurement laws.[225]

Judicial review is, in practice, the main and often only means of challenging public procurement decisions in South Africa.[226] The availability of judicial review remedies in South Africa, however, is subject to exhaustion of internal remedies available under any law.[227] Internal remedies for purposes of this rule generally take the form of sequential appeals to: (i) the contracting agency, (ii) provincial treasuries and (ii) the

---

[223] The Treasury Regulations, reg 16A9.3 (b). Section 173 of the 2015 Procurement Act, in contrast, gives Kenya's Review Board substantive coercive powers, including the power to annul anything done by the contracting agency and to make binding orders and directions.
[224] Udeh (n 2008) 141-142. For the timeframes set out in Kenyan procurement laws, see the 2015 Procurement Act, ss 171 (1), 175 (3) and 175 (4).
[225] Geo Quinot, 'A Comparative Perspective on Supplier Remedies in African Public Procurement Systems,' in Geo Quinot and Sue Arrowsmith (eds), *Public Procurement Regulation in Africa* (Cambridge University Press 2013) 308, 311-312. See also Quinot (n 137) 6.
[226] Andrew Molver and Gavin Noeth, 'South Africa,' in Jonathan Harvey and Amy Gatenby (eds) *The Government Procurement Review* (5th edn, Law Business Research Ltd 2017) 224.
[227] The Promotion of Administrative Justice Act, s 7 (2) (a). See *Evaluations Enhanced Property Appraisals (Pty) Ltd v Buffalo City Metropolitan Municipality and Another* [2014] 3 All SA 560, where the court dismissed a judicial review application for failure to exhaust the appellate mechanism set out in section 62 of the Local Government: Municipal Systems Act.

national treasury respectively.[228] A disaffected tenderer who wishes to pursue internal remedies in South Africa must invoke those remedies within 21 days of the impugned decision.[229] The 'dispute, objection, complaint or query' must be resolved within sixty days. [230] The aggrieved tenderer may refer the dispute to the provincial treasury if: (i) the dispute is not resolved within sixty days or (ii) the municipality or municipal entity does not respond within sixty days.[231] Further, any aggrieved party may refer the dispute to the National Treasury for resolution if the provincial treasury does not or cannot resolve it.[232]

The rule on exhaustion of internal remedies as a precondition to judicial review of public procurement decisions is not absolute. South African courts have the discretion to exempt an applicant from the rule 'in exceptional circumstances…' where it deems it 'in the interest of justice' to do so.[233] Further, an applicant for judicial review need

---

[228] See the Local Government: Municipal Systems Act, s 62 and the Treasury Regulations, reg 16A9.3 and the Municipal Supply Chain Management Regulations, regs 49 and 50. Many South African contracting agencies often provide for internal review of their procurement decisions in tender documents. The law on agency-level internal remedies, however, only applies to procurements by municipalities and municipal entities. For further insights on this, see Udeh (n 2008) 124.

[229] The Local Government: Municipal Systems Act, s 62. See *Koyabe and Others v Minister for Home Affairs and Others* [2009] ZACC 23, where the Constitutional Court of South Africa held that the mere lapsing of the time-period for exercising an internal remedy does not: (i) mean that the internal remedy has been exhausted or (ii) constitute exceptional circumstances for purposes of the exception to the rule on exhaustion of internal remedies as a precondition for recourse to judicial review.

[230] The Municipal Supply Chain Management Regulations, regs 49 and 50. See also the National Treasury Regulations, reg 16A9.3.

[231] The Municipal Supply Chain Management Regulations, reg 50 (5).

[232] Ibid reg 50 (6).

[233] The Promotion of Administrative Justice Act, s 7 (2) (c). See *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining And Development Company Ltd and Others* [2013] ZACC 48, where the Constitutional Court of South Africa held that: (i) the jurisdiction of the judicial review court is deferred until the exhaustion of local remedies and (ii) the judicial review court has a discretion (and thus not obliged) to grant an exemption from the rule even where the applicant establishes exceptional circumstances.

not exhaust illusory, ineffective or inadequate internal remedies. In *DDP Valuers (Pty) Ltd v Madibeng Local Municipality & Another*, for instance, the Supreme Court of Appeal of South Africa held that Regulation 50 of the Municipal Supply Chain Management Regulations did not constitute an internal remedy for purposes of judicial review because the envisioned administrative tribunal did not have the powers to declare a tender award invalid and set it aside.[234] The court also held that the rule on exhaustion of internal remedies does not apply to situations where such remedies are tainted by the alleged illegality.[235] In *City of Cape Town v Reader & Others,* the Supreme Court of Appeal of South Africa held that failure to exhaust the appeal mechanism set out in section 62 of the Local Government: Municipal Systems Act does not preclude disaffected tenderers from filing for judicial review where the procuring entity has signed a contract with the successful tenderer.[236] Again, the rationale for this decision was that the internal remedy of appeal is illusory or ineffective in such cases, as the relevant statute precludes the appeal tribunal from varying or revoking any accrued contractual rights.[237]

In summary, the rules governing judicial review of public procurement decisions in South Africa may be summarised as follows. First, public procurement decisions

---

[234] *DDP Valuers (Pty) Ltd v Madibeng Local Municipality & Another*, Supreme Court of Appeal of South Africa Case No. 233 of 2015, paragraphs 14-20. The court held that Regulation 50 of the Municipal Supply Chain Management Regulations does not provide an internal remedy because (*inter alia*) the tribunal does not have the powers to declare the award of the tender invalid and set it aside.

[235] *DDP Valuers (Pty) Ltd v Madibeng Local Municipality & Another*, Supreme Court of Appeal of South Africa Case No. 233 of 2015, paragraphs 14-20. The court held that Regulation 50 of the Municipal Supply Chain Management Regulations does not provide an internal remedy because (*inter alia*) the tribunal does not have the powers to declare the award of the tender invalid and set it aside.

[236] *City of Cape Town v Reader & Others* 2008] ZASCA 130.

[237] Ibid. See the Local Government: Municipal Systems Act, s 62 (3).

constitute 'administrative action' within the meaning of the law that governs judicial review in South Africa (that is, the Promotion of Administrative Justice Act, 2000).[238] Secondly, applications for judicial review of procurement decisions and other administrative actions must be made 'without unreasonable delay.' [239] Additionally, applications for judicial review in South Africa must be filed within 180 days of: (i) the date the complainant became aware of the impugned decision (or might reasonably be expected to have become aware of it) or (ii) exhaustion of any applicable internal remedies.[240] Thirdly, the requirement to institute judicial review proceedings 'without unreasonable delay' is independent of the requirement to institute them within 180 days.[241] Fourthly, the institution of judicial review proceedings (or an internal remedy proceeding) does not result in automatic suspension of an impugned decision.[242] An aggrieved tenderer, however, can apply for interim relief (usually in the form of an injunction).

---

[238] Kenya appears to have borrowed the text of its Fair Administrative Action Act, 2015 from South Africa's Promotion of Administrative Justice Act. Section 9 (2) of the Fair Administrative Action Act, 2015 provides for exhaustion of alternative remedies as a precondition for seeking judicial review. In *Al Ghurair Printing and Publishing LLC v Coalition for Reforms and Democracy & 2 Others*, Civil Appeal (Nairobi) No. 63 of 2017, however, the Court of Appeal held that an aggrieved person who was not a bidder (and thus technically precluded from lodging a complaint with the Review Board) could challenge a public procurement decision by filing judicial review proceedings.

[239] The Promotion of Administrative Justice Act, s 7 (1).

[240] Ibid.

[241] Molver and Noeth (n 225) 224. Consequently, South African courts can dismiss judicial review proceedings on account of unreasonable delay notwithstanding the institution of such proceedings within the 180 days period.

[242] Geo Quinot, 'A Comparative Perspective on Supplier Remedies in African Public Procurement Systems,' in Geo Quinot and Sue Arrowsmith (eds), *Public Procurement Regulation in Africa* (Cambridge University Press 2013) 308, 321. Moreover, unlike Kenyan laws, South African laws do not provide for automatic standstill between the award and signing of a public procurement contract. The South African Constitutional has addressed the potential perverse incentives of this gap by holding, in *Steenkamp NO v Provincial Tender Board of the Eastern Cape* [2007] 3 SA 121 (CC), that a successful bidder should wait to see of an award of contract would be challenged instead of rushing to implement the same.

South African courts treat the grant or denial of interim relief as a matter of judicial discretion. In other words, South African courts have the discretion to deny interim relief even where the applicant meets the applicable legal threshold.[243] The threshold for obtaining such relief under South African laws is quite high.[244] Consequently, many applicants face challenges in obtaining interim relief in South Africa.[245] Lastly, unlike their Kenyan counterparts, South African courts are generally amenable to both procedural and merit review of impugned public procurement decisions.[246]

5.3.4 Implication of the South African Experience for Kenya

Although the respective legal texts may appear similar, there are many important differences of context and practice between the South African and Kenyan public procurement regulatory systems. The two countries share, in varying degrees, challenges relating to discretion, the interplay of economic and social objectives and the incidence of corruption, favouritism and other forms of malfeasance. The

---

[243] See e.g. *City of Cape Town v South African National Roads Agency Ltd and Others* [2013] ZAWCHC 74, para 62:

> The remedy is discretionary. Thus even if an applicant satisfies all the requirements, it remains within the discretion of the court (obviously to be exercised judicially) to grant or decline an interim interdict. The court assesses the evidence holistically to determine whether the requirements have been satisfied and, if they have, how to exercise its discretion.

[244]The conditions for grant of interim relief under South African administrative law are substantially similar to those that govern the grant of interlocutory injunctions in Kenya. They are: (i) a prima facie case; (ii) a reasonable apprehension of irreparable harm; (iii) a balance of convenience in favour of granting interim relief; and (iv) absence of a suitable alternative remedy. For a summary of relevant South African case law on this issue, see *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* [2012] ZACC 18, para 41.

[245] Quinot (n 137) 6-8.

[246] Ibid 9, discussing cases in which South African courts have held that judicial review of impugned public procurement decisions entailed considerations of both process and merits of those decisions.

implications of these contextual similarities and differences between Kenya and South Africa are summarised below.

The South African preference points system is more likely to resolve conflicts between economic and social objectives than Kenya's system of reservations and percentage price premiums. The two approaches can lead to vastly different outcomes in terms of the extra costs of social procurement. The South African approach mitigates the extra costs of social procurement by capping the preference points to twenty or ten depending on the value of the envisioned contract. Under the Kenyan approach, the extra costs of social procurement are generally directly proportional to the value of the contract. The perverse consequences of the Kenyan approach can be discerned from *Questa Care Limited v Kenya Medical Supplies Authority & Another*, *China Overseas Engineering Group Company Ltd v Kenya Rural Roads Authority* and the other cases discussed in chapter 3 above.[247]

South African courts have adopted a better approach to the issue of interplay of economic and social objectives than their Kenyan counterparts. Specifically, South African courts' willingness to weigh social value against extra costs, which Kenyan courts appear loathe to, would pre-empt lopsided procurement decisions that disproportionately lean towards either markets or social policy.

---

[247] See *Questa Care Limited v Kenya Medical Supplies Authority & Another*, Review Board Application No. 28 of 2017 and *China Overseas Engineering Group Company Ltd v Kenya Rural Roads Authority*, Review Board Application No. 7 of 2016.

South Africa's regime of sanctions against public procurement corruption, abuse of discretion, favouritism and other forms of malfeasance is stronger and more effective than its Kenyan counterpart, especially to the extent that it is carefully designed to ensure the costs of nefarious conduct exceed the presumptive benefits. Specifically, and as discussed in the preceding section, South Africa's regime of quintuple fines (or fines up to ten percent of an offending tenderer's annual turnover), (ii) endorsement on the register of tender defaulters and (iii) debarment for both offenders and persons/enterprises affiliated to them is more effective and deterrent than Kenya's regime of sanctions for corruption and various forms of malfeasance. Lastly, Kenya would derive significant benefits, in terms of combating corruption, favouritism and other forms of malfeasance in public procurement decision making, by adopting South Africa's approach of barring civil servants from doing business with the state.

5.4 Summary of Findings

This chapter has provided a comparative study of: (i) the interplay of economic and social objectives, (ii) the problem of discretion, (iii) the incidence of corruption, favouritism and other forms of malfeasance in the United States and South African public procurement systems and (iv) the implications of these procurement systems for Kenya. The lessons from the comparative study may be summarised as follows. First, although Kenyan, American and South African public procurement laws espouse facially similar economic and social objectives, the respective underlying historical contexts are very different. Specifically, the dominant social objective of public procurement laws of the US and South Africa is to correct social exclusion and deep inequalities arising from the two countries' shared history of state-sanctioned racial segregation and discrimination, which is inapplicable to (post-colonial) Kenya.

Secondly, the US (and in many ways, South Africa) has more effective regulatory responses to the problems of: (i) conflictual coexistence of economic and social objectives of public procurement and (ii) discretion than Kenya. Thirdly, adoption of strong accountability mechanisms such as those that apply in the US (and to a large extent, those that apply in South Africa) would provide an effective counterpoise against formal grants of broad discretionary powers in Kenya and thus reduce the incidence of corruption, favouritism and other forms of malfeasance in public procurement decision making. Lastly, each of the three countries has a significant incidence of public procurement corruption and other forms of malfeasance, attributable to formal grants of discretionary powers on government bureaucrats.

CHAPTER 6: CONCLUSION AND RECOMMENDATIONS

6.1 Conclusion and Recommendations

This study sought to establish whether: (i) the regulatory framework for public procurement in Kenya facilitates the resolution of conflicts between economic and social objectives and (ii) the discretion that Kenyan public procurement laws confer on government bureaucrats creates incentives for corruption, favouritism and other forms of malfeasance. The study relied on: (i) desk-based review of primary and secondary sources, (i) key informant interviews and questionnaires, (iii) case studies and (iv) comparative studies to answer the two research questions. Further, the study employed theoretical and conceptual tools of: (i) administrative law and (ii) law and economics to address the two research questions. The rationale for the study lay in: (i) the conflictual coexistence of economic and social objectives in Kenya's public procurement regulatory system and (ii) a strong correlation between the discretion that Kenyan public procurement laws confer on government bureaucrats and the incidence of corruption, favouritism and other forms of malfeasance.

Chapter 2 of the study examined the nature of public procurement, the conceptual foundations of public procurement regulation and the factors that make public procurement a subject of special academic and regulatory interest. Problems relating to the management of: (i) discretion, (ii) agency, (iii) public choice, (iv) market failures, (v) institutional failures and (vi) wealth re(distribution) emerged as key drivers of

public procurement regulation from both administrative law and law and economics points of view.

The following lessons and conclusions emerged from chapter 2 and the study in general. First, the frequent depiction of the objectives of public procurement regulation as strictly either economic or social is generally only useful for pedagogical, conceptual or ideological clarity. As the data set out in Figure 2, Figure 4 and Table 3 and the accompanying analyses demonstrate, the conceptual foundations of the objectives of public procurement regulation transcend multiple theoretical, conceptual and disciplinary boundaries. Secondly, the interdependence, complementarity and overlap of economic and social policy domains call for judicious tradeoffs between economic and social objectives in public procurement decision making.

A holistic or integrated approach to public procurement decision, therefore, should not be unduly encumbered by doctrinaire or inflexible commitment to markets (that is, economics) or social policy. Differently put, the conflictual coexistence of economic and social objectives in public procurement regulation does not require a choice between good and bad, or superior and inferior. Thirdly, uncontrolled or poorly circumscribed discretion is generally inimical to the achievement of both economic and social objectives of public procurement regulation (see Table 2 and Figure 3 and the accompanying analyses). Fourthly, the disciplines of administrative law and law and economics offer useful conceptual tools which, if creatively harnessed by policymakers and legislative drafters, can result in a public procurement regulatory framework that resolves: (i) conflicts between economic and social objectives and (ii) the problem of discretion and its correlation to the incidence of corruption, favouritism

and other forms of malfeasance. The disciplines of administrative law and law and economics counsel for a rule-based approach (as opposed to discretion or guideline-based approach) to public procurement decision making, especially in countries (such as Kenya) that are characterised by endemic corruption, favouritism and other forms of malfeasance. Kenya, therefore, should adopt a rule-based approach to public procurement—characterised by controlled discretion and commitment to the values of competition, transparency and accountability.

Chapter 3 of the study reviewed the evolution of policy and regulatory frameworks for public procurement in Kenya across several epochs. Many interrelated findings, lessons, conclusions and recommendations emerged from the review. First, the prevailing practice of the Kenyan state is characterised by confusion among key stakeholders on the issue of the main or overarching goals of the country's public procurement system (see the data set out in Table 1, Figure 2, Figure 4 and Table 3 and the accompanying analyses). Secondly, this state of confusion (which is mainly attributable to reckless 'copy-pasting' of foreign-driven regulatory models) calls for: (i) the formulation and adoption of a coherent policy framework for public procurement Kenya and (ii) abandonment of the country's bizarre or 'reverse' sequence of enacting public procurement laws and then attempting, ex-post, to formulate a coherent policy framework. Thirdly, the Kenyan public procurement system that is characterised by a paradox of elaborate public procurement laws that deceptively appear sound on paper but fail to achieve their intended or presumptive regulatory objectives (see entries 2 and 6 to 15 of Table 2 and the accompanying analysis). This paradox is attributable to certain features of the Kenyan public procurement regulatory framework, especially: (i) granting government bureaucrats

broad and poorly circumscribed discretion, (ii) allowing government bureaucrats to do business with the state, (iii) reckless imitation of foreign-driven public procurement laws without due regard to the local context, (iv) a predominantly technical or legalistic judicial approach to public procurement disputes and (iv) stakeholder indifference to the two issues that form the focus of this study (i.e. interplay of economic and social objectives and the co-relation between discretion and the incidence of corruption, favouritism and other forms of malfeasance). Fourthly, there is a direct correlation between the grant of uncontrolled or poorly circumscribed and Kenya's unusually high incidence of corruption, favouritism and other forms of malfeasance in public procurement decision making (see the data set out in Figure 3 and the accompanying analysis).

Chapter 4 sought to establish, through case studies of two procurement projects, the prevailing Kenyan practice on the issues of: (i) interplay between economic and social objectives and (ii) the link between discretion and the incidence of corruption, favouritism and other forms of malfeasance. The main criterion for selecting the two projects was their relevance to: (i) the statement of the problem; (ii) the objectives of the study; and (iii) the two research questions.

The two case studies revealed four main things. The first (which also emerged from chapters 2 and 3) is complementarity and overlap between economic and social policy domains, as evidenced by key informant perceptions of the economic and social objectives of each of the two projects (aww Figures 5, 7, 8 and 9 and the accompanying analyses). Secondly, the Kenyan public procurement system is characterised by stakeholder indifference to the issue of interplay between economic and social

objectives, as evidenced by omissions by litigants and the courts to broach the issue in spite of the protracted litigation that bogged down the two projects. Thirdly, the Kenyan public procurement system is charactrised by systematic abuse of power and discretion, as evidenced by the manipulative steps the IEBC and MoESt took to orchestrate the award of tenders to apparently predetermined contractors. Fourthly, the Kenyan public procurement system is characterised by a very high incidence of corruption, favouritism and other forms of malfeasance. To illustrate, most of the key informants who participated in this study believed that the two projects were characterised by corruption, favouritism and other forms of malfeasance (see the discussion under section 4.2.12 and Figure 10).

Chapter 5 benchmarked the Kenyan regulatory framework for public procurement against its US and South African counterparts. The comparative analysis revealed significant textual and structural similarities among the public procurement regulatory frameworks of the three countries. The textual similarities of the three countries' regulatory frameworks, however, are apt to mislead. This is because the historical contexts underlying the American and South African public procurement regulatory frameworks are very different from Kenya's. Moreover, the differences of history and context cast doubt on the rationale or justification for Kenya's apparent imitation of US and South African approaches to public procurement regulation.

Chapter 5 revealed many structural strengths of the United States public procurement regulatory system over its Kenyan counterpart, the adoption of which this study recommends for Kenya. They include: (i) a holistic or integrated approach to public procurement that emphasises '*best value*' and '*balancing the many competing interests*' in

resolving conflicts between economic and social objectives and (ii) reliance on both public-driven and private-driven safeguards against abuse of discretion and the incidence of corruption, favouritism and other forms of malfeasance and (iii) the concurrent availability of multiple bid protest forums. The comparative analysis also revealed aspects of the United States public procurement system that would not be appropriate for the Kenyan context, including: (i) conferment of broad discretion and (ii) judicial hostility to the use of public procurement as a tool for addressing inequality.

Chapter 5 also revealed many structural strengths of the South African public procurement regulatory system over its Kenyan counterpart, the adoption of which this study recommends for Kenya. They include: (i) prohibition of public servants from doing business with the state, (ii) judicial willingness to interrogate the interplay of economic and social objectives in impugned public procurement decisions; (iii) the preference point system (which is more likely to resolve conflicts between economic and social objectives than Kenya's system of set-asides and percentage price premiums) and (iv) the regime of safeguards against abuse of discretion the incidence of corruption, favouritism and other forms of malfeasance (which is integrated and carefully designed to ensure that the net costs of nefarious conduct always outweigh the net benefits). Just like in the case of the United States, chapter 5 revealed aspects of the South African public procurement regulatory system that would not produce optimal results in the Kenyan context. They include: (i) absence of a centralized and coherent system of administrative review of public procurement decisions; and (ii) absence of an automatic standstill and suspension of the procurement process upon the institution of public procurement disputes.

In view of the foregoing, the answers to the two research questions are as follows. First, the regulatory framework for public procurement in Kenya does not facilitate the resolution of conflicts between economic and social objectives. Secondly, the discretion that Kenyan public procurement laws confer on government bureaucrats creates strong incentives for corruption, favouritism and other forms of malfeasance. In sum, therefore, this study recommends an urgent review of, and fundamental changes to, the policy and regulatory frameworks for public procurement in Kenya. The proposed review should focus on: (i) resolution of conflicts between economic and social objectives; (ii) the problem of discretion; and (iii) establishment of effective safeguards against corruption, favouritism and other forms of malfeasance.

BIBLIOGRAPHY

Books

Albano G, Snider K and Thai K (Eds), *Charting a Course in Public Procurement Innovation and Knowledge Sharing* (PrAcademics Press 2013).

Arrowsmith S, Linarelli J and Wallace D, *Regulating Public Procurement: National and International Perspectives* (Kluwer Law International 2000).

Barraket J, Robyn K and Furneaux C, *Social Procurement and New Public Governance* (Routledge 2016).

Charles E and others (eds), *Public Procurement for Innovation* (Edward Elgar Publishing 2015).

Chua A, *World on Fire: How Exporting Free Market Democracy Breeds Ethnic Hatred and Global Instability* (Anchor Books 2004).

Curry W S, *Government Abuse: Fraud, Waste, and Incompetence in Awarding Contracts in the United States* (Routledge 2017).

Decarolis F and others (eds), *Public Procurement's Place in the World* (Servizio Italiano Publicazioni Internazionali 2014).

Engelbert A, Kaltenborn M and Reit-Born N, *Effective Corruption Control: Supplier Remedies in Public Procurement in Kenya, Uganda and Tanzania-A Comparative Analysis of Mechanisms and their Implementation* (Logos Verlag 2016).

Freeman M, *Lloyd's Introduction to Jurisprudence* (8th Edn, Sweet & Maxwell 2008).

Freeman M, *Lloyd's Introduction to Jurisprudence* (9th Edn, Sweet & Maxwell 2014).

Harvey J and Gatenby A (Eds) *The Government Procurement Review* (5th Edn, Law Business Research Ltd 2017).

Hornsby C, *Kenya: A History Since Independence* (I. B. Tauris & Co. Ltd 2013).

Jose M M F, *The EC Public Procurement Rules: A Critical Analysis* (OUP 1996).

Kelman S, *Procurement and Public Management: The Fear of Discretion and the Quality of Government Performance* (American Enterprise Institute Studies 1990).

Khamisi J, *Kenya: Looters and Grabbers: 54 Years of Corruption and Plunder by the Elite, 1963-2017* (Jodey Book Publishers 2018).

Khi V Thai (Ed), *International Handbook of Public Procurement* (CRC Press 2009).

Khi V Thai and others (Eds), *Challenges in Public Procurement: An International Perspective* (PrAcademics Press 2005).

Knight L and Others (Eds), *Public Procurement: International Cases and Commentary* (Routledge 2007).

Lester S and Mercurio B, *World Trade Law, Text, Materials and Commentary* (Hart Publishing 2008).

Lowenfeld A, *International Economic Law* (2nd Edn, OUP 2008).

Mason J, *Qualitative Researching* (2nd Edn, SAGE 2002).

McCrudden C, *Buying Social Justice: Equality, Government Procurement, & Legal Change* (OUP 2007).

Migai A, *Administrative Law* (Strathmore University Press 2016).

Mugenda O and Mugenda A, *Research Methods: Qualitative & Quantitative Approaches* (Acts Press 2003).

Musila G (Ed), *Handbook on Election Disputes in Kenya: Context, Legal Framework, Institutions and Jurisprudence* (Law Society of Kenya 2013).

Piga G and Khi V (Eds), *Advancing Public Procurement: Practices, Innovation and Knowledge-sharing* (2007 PrAcademics Press).

Posner R, *Economic Analysis of Law* (6th Edn, Aspen 2003).

Posner R, *The Economics of Justice* (Harvard University Press 1981).

Quinot G and Arrowsmith S (Eds), *Public Procurement Regulation in Africa* (Cambridge University Press 2013).

Reich A, *International Public Procurement Law: The Evolution of International Regimes on Public Purchasing (Studies in Transnational Economic Law)* (Kluwer Law International 1999).

Rodrick D, *Economics Rules: Why Economics Works, When it Fails, and How to Tell the Difference* (OUP 2015).

Stiglitz J and Narcís S (Eds), *The Washington Consensus Reconsidered: Towards a New Global Governance* (OUP 2008).

Trepte P, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (OUP 2004).

Wade W and Forsyth C, *Administrative Law* (9th Edn, OUP 2004).

Woods N, *The Globalizers: The IMF, the World Bank, and their Borrowers* (Cornell University Press 2006).

Wrong M, *It's Our Turn to Eat: The Story of a Kenyan Whistle-Blower* (HarperCollins Publishers 2009).

Journals

Akech M, 'Abuse of Power and Corruption in Kenya: Will the New Constitution Enhance Government Accountability?' (2011) 18 (1) Indiana Journal of Global Legal Studies 340.

Akech M, 'Development Partners and Governance of Public Procurement in Kenya: Enhancing Democracy in the Administration of Aid' (2005) 37 (4) New York University Journal of International Law and Economics 829.

Akenroye T, 'An Appraisal of the use of Social Criteria in Public Procurement in Nigeria' (2013) 13 (3) Journal of Public Procurement 364.

Alexandru V R, 'Public Procurement Specialists: They are Not Who We Thought They Were' (2015) 15 (1) Journal of Public Procurement 38.

Allen R L, 'Integrity: Maintaining a Level Playing Field' (2002) 2 Public Procurement Law Review 111.

Ambe I M, 'Procurement Challenges in the South African Public Sector' (2012) Journal of Transport and Supply Chain Management 242.

Ambe I M, 'Public Procurement Trends and Developments in South Africa' (2016) 3 (4) Research Journal of Business and Management 277.

Aman A C, 'An Administrative Law Perspective on Government Social Service Contracts: Outsourcing Prison Health Care in New York City (2007) 14 (2) Indiana Journal of Global Legal Studies 301.

Anechiarico F and Jacobs J, 'Purging Corruption from Public Contracting' (1995) 40 New York Law School Law Review 143.

Arlbjørn J S, 'Public Procurement vs Private Purchasing' (2012) 25 (3) International Journal of Public Sector Management 203.

Arrowsmith S, 'Public Procurement as an Instrument of Policy and the Impact of Market Liberalisation' (1995) 111 Law Quarterly Review 235.

Arrowsmith S, 'The EC Procurement Directives, National Procurement Policies and Better Governance: The Case for a New Approach' (2002) 27 (1) European Law Review 3.

Arrowsmith, S 'Horizontal Policies in Public Procurement: A Taxonomy' (2010) 10 (2) Journal of Public Procurement 149.

Azuike I, 'Economic Analysis of Law-A Feminist Critique' (2001) 8 UCL Jurisprudence Review 139.

Bardhan P, 'The Economist's Approach to the Problem of Corruption' (2006) 34 (2) World Development 341.

Baumol J W, 'Notes on the Theory of Government Procurement' (1947) 14 (53) Economica 1.

Bogard W J, 'Presumed Disadvantaged: Constitutional Incongruity in Federal Contract Procurement and Acquisition Regulations' (2012) 115 Virginia Law Review 847.

Bolton P, 'An Analysis of the Preferential Procurement Legislation in South Africa' (2007) 1 Public Procurement Law Review 36.

Bolton P, 'Government Procurement as a Policy Tool in South Africa' (2006) 6 (3) Journal of Public Procurement 193.

Bolton P, 'The Exclusion of Contractors from Government Contract Awards' (2006) 10 (1) Law Democracy and Development 25.

Bolton P, 'The Public Procurement System in South Africa: Main Characteristics' (2008) 37 (4) Public Contract Law Journal 781.

Brammer S, 'Sustainable Procurement in the Public Sector: An International Comparative Study' (2011) 31 (4) International Journal of Operations & Production Management 452.

Carol H, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17 (1) European Journal of International Law 187.

Chua A, 'Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development' (1998) 108 (1) Yale Law Journal 1.

Copp S and Cronin A, 'New Models of Corporate Criminality: The Development and Relative Effectiveness of "Failure to Prevent" Offences' (2018) 39 (4) Company Lawyer 104.

DiMaggio P J, 'Comments on what Theory is Not' (1995) 40 Administrative Science Quarterly 391.

Erridge E and McElroy J, 'Public Procurement and Supply Management Strategies' (2002) 17 (1) Public Policy and Administration 52.

Eyo A, 'Corruption and the Challenge to Sustainable Public Procurement (SPP): A perspective on Africa' (2017) 12 (3) European Public Procurement and Public Private Partnership Law Review 253.

Flynn A and Davis P, 'Theory in Public Procurement Research' (2014) 14 (21) Journal of Public Procurement 139.

Golub M J and Fenske S L, 'US Government Procurement: Opportunities and Obstacles for Foreign Contractors' (1986-1987) 20 George Washington Journal of International Law and Economics 567.

Gordon D I, 'Bid Protests: The Costs are Real, but the Benefits Outweigh Them' (2013) 42 (3) Public Contract Law Journal 489.

Helmrich C, 'Equality-Oriented Horizontal Policies in South African Public Procurement' (2014) 1 African Public Procurement Law Journal 61.

Hoexter C, 'Administrative Justice in Kenya: Learning from South Africa's Mistakes' (2018) 62 (1) Journal of African Law 105.

Imenda S, 'Is there a Conceptual Difference between Theoretical and Conceptual Frameworks?' (2014) 38 (2) Journal of Social Science 185.

Ketchen D and Hult T, 'Building Theory about Supply Chain Management: Some Tools from the Organizational Sciences' (2011) 47 (2) Journal of Supply Chain Management 12.

Khobe W, 'The Architectonics of Administrative Law in Kenya Post-2010' (2016) 2 Journal of Law and Ethics 1.

Kibet E, 'The Constitutionalisation of Administrative Law as an Opportunity for Reconfiguration: A Reply to O'Kubasu Munabi' (2016) 2 Journal of Law and Ethics 35.

Kovacic W E, 'The Civil False Claims Act as a Deterrent to Participation in Government Procurement Markets' (1998) 6 Supreme Court Economic Review 201.

Krugman P R, 'Is Free Trade Passé?' (1987) 1 (2) Journal of Economic Perspectives 131.

McAfee R P and McMillan J, 'Government Procurement and International Trade' (1989) 26 Journal of International Economics 291.

McCrudden C and Gross S, 'WTO Government Procurement Rules and the Local Dynamics of Procurement Policies: A Malaysian Case Study' (2006) 17 (1) European Journal of International Law 151.

McCrudden C, 'International Economic Law and the Pursuit of Human Rights: A Framework for Discussion of the Legality of 'Selective Purchasing' Laws under the WTO Government Procurement Agreement' (1999) 2 (1) Journal of International Economic Law 3.

McCrudden C, 'Social Policy Choices and the International and National Law of Government Procurement: South Africa as a Case Study' (2009) Acta Juridica 123.

McCrudden C, 'Using Public Procurement to Achieve Social Outcomes' (2004) 28 (4) Natural Resources Forum 257.

McCue C, Pier E and Swanson D, 'Five Dilemmas in Public Procurement' (2015) 15 (2) Journal of Public Procurement 177.

McMurtry J J, 'The Political Economy of Public Procurement' (2014) 40 (1) Canadian Public Policy S26.

Miller A S, 'Government Contracts and Social Control: A Preliminary Inquiry' (1955) 41 (1) Virginia Law Review 27.

Moazed A, 'Posner in Pursuit of Wealth: Taking Rights Seriously' (1997) 4 UCL Jurisprudence Review 1.

Morris P E, 'Legal Regulation of Contract Compliance: An Anglo-American Comparison' (1990) 19 Anglo-American Law Review 87.

Mosoti V, 'The WTO Agreement on Government Procurement: A Necessary Evil in the Legal Strategy for Development in the Poor World?' (2004) 25 (2) University of Pennsylvania Journal of International Economic Law 593.

Munabi O D, 'Concerning (Non) Existence of Administrative Law and the Implication of Constitutionalisation in Kenya' (2016) 2 Journal of Law and Ethics 13.

Munzhedzi P H, 'South African Public Sector Procurement and Corruption: Inseparable Twins?' (2016) 10 (1) Journal of Transport and Supply Chain Management 197.

Noon C R, 'The Use of Racial Preferences in Public Procurement for Social Stability' (2009) 38 (3) Public Contract Law Journal 611.

Ohringer A, 'Freeing Posner from His Capitalist Chains' (1999) 6 UCL Jurisprudence Review 241.

Qiao Y, Thai KV and Cummings G, 'State and Local Procurement Preferences: A Survey' (2009) 9 (3) & (4) Journal of Public Procurement 371.

Quinot G, 'The Role of Quality in the Adjudication of Public Tenders' (2014) 17 (3) Potchefstroom Electronic Law Journal 1110.

Raga K and Nano N, 'Legislative and Administrative Directives Governing Procurement Procedures: A Local Government Perspective' (2011) 4 (1) African Journal of Public Affairs, 130.

Reece J D, 'Revisiting Class-Based Affirmative Action in Government Contracting' (2011) 88 Washington University Law Review 1309.

Schapper P, Malta V and Gilbert D, 'An Analytical Framework for the Management and Reform of Public Procurement' (2002) 6 (1) Journal of Public Procurement 1.

Schooner S L, 'Desiderata: Objectives for a System of Government Contract Law' (2002) 2 Public Procurement Law Review 103.

Shapiro M, 'Administrative Law Unbounded' (2001) 8 (2) Indiana Journal of Global Legal Studies, 369.

Snider K F and Rendon R G, 'Public Procurement Policy: Implications for Theory and Practice' (2008) 8 (3) Journal of Public Procurement 310.

Ssenoga F, 'Examining Discriminatory Procurement Practices in Developing Countries' (2006) 6 (3) Journal of Public Procurement 218.

Sweet M J, 'Minority Business Enterprise Programmes in the United States of America: An Empirical Investigation' (2006) 33 (1) Journal of Law and Society 160.

Thiankolu M, 'Reconciling Incongruous Policy Objectives and Benchmarking Kenya's Public Procurement Law: A Review of the Selex Case' (2011) 11 (4) Journal of Public Procurement 451.

Thiankolu M, 'The Constitutional Review Cases, Emerging Issues in Kenyan Jurisprudence' [2005] 2 East African Law Journal 122.

Trionfetti F, 'Discriminatory Public Procurement and International Trade' (2000) 23 (1) World Economy 57.

Watermeyer R, 'Facilitating Sustainable Development through Public and Donor Procurement Regimes: Tools and Techniques' (2004) 1 Public Procurement Law Review 30.

Watermeyer R, 'The Use of Targeted Procurement as an Instrument of Poverty Alleviation and Job Creation in Infrastructure Projects' (2000) 5 Public Procurement Law Review 226.

Weber R H, 'Development Promotion as a Secondary Policy in Public Procurement' (2009) 4 Public Procurement Law Review 184.

Weiss L and Thurbon E, 'The Business of Buying American: Public Procurement as a Trade Strategy in the US' (2006) 13 (5) Review of International Political Economy 701.

Williams S and Quinot G, 'Public Procurement and Corruption: The South African Response' (2007) South African Law Journal 339.

Windholz E and Hodge G, 'Conceptualising Social and Economic Regulation: Implications for Modern Regulators and Regulatory Activity' (2012) 38 (2) Monash University Law Review 212.

Yukins C and Schooner S, 'Incrementalism: Eroding the Impediments to a Global Public Procurement Market' (2007) 38 Georgetown Journal of International Law 529.

Working, Discussion and Conference Papers

Ackerman S R, 'The Political Economy of Corruption—Causes and Consequences' (1996) World Bank Note 74.

Armstrong E, 'Integrity, Transparency and Accountability in Public Administration: Recent Trends, Regional and International Developments and Emerging Issues' (2005) United Nations Department of Social and Economic Affairs 1.

Deardorff A V and Stern R M, 'Measurement of Non-Tariff Barriers' (1997) OECD Working Paper No. 179.

Erridge A, 'UK Public Procurement Policy and the Delivery of Public Value' (2005).

Ginsburg T, 'Written Constitutions and the Administrative State: on the Constitutional Character of Administrative Law' (2010) University of Chicago Public Law and Legal Theory Working Paper No. 331.

Ambe I M and Badenhorst-Weiss JA, 'A Review of Procurement Practices in the South African Public Sector' (Fifth International Public Procurement Conference, Seattle, August 2012).

Kelman S, 'Remaking Federal Procurement' (2001) John F. Kennedy School of Government Working Paper No. 3.

Kimani H N, 'The Influence of Political Patronage on the Operationalization of Public Procurement Law in Kenya' (Fifth Public Procurement Conference, Seattle, 2012).

Mattoo A, 'The Government Procurement Agreement: Implications of Economic Theory' (1996) WTO Staff Working Paper No. TISD-96-03.

McCrudden C, 'Corporate Social Responsibility and Public Procurement' (2010) Oxford Legal Studies Research Paper No. 9/2006.

Ochieng J and Muehle M, '*Development and Reform of the Kenyan Public Procurement System*' (Fifth International Public Procurement Conference, Seattle, 2012).

Odhiambo W and Kamau P, 'Public Procurement: Lessons from Kenya, Tanzania and Uganda' (2003) OECD Working Paper No. 208.

Owegi F and Aligula E, 'Public Sector Procurement in Kenya: The Need for a Coherent Policy Framework' (2006) KIPPRA Discussion Paper No. 62, 2006.

Quinot G, 'Enforcement of Procurement Law from a South African Perspective' (The Public Procurement: Global Revolution V Conference, Copenhagen, October 210).

Schooner S L, Gordon DI and Clark J L, 'Public Procurement Systems: Unpacking Stakeholder Aspirations and Expectations' (2008) GWU Law School Public Law Research Paper No. 1133234.

Sharples T. and Moldéus K, 'Ready or Not, Here ICT Comes: A Case Study of the e-Readiness and Governance in Kenya's Laptop Project' (2014) Lund University Research Paper 4446302.

Spiller P T, 'An Institutional Theory of Public Contracts: Regulatory Implications,' (2008) National Bureau of Economic Research Working Paper No. 14152.

Yukins C R, 'The US Federal Procurement System: An Introduction' (2017) GW Legal Studies Research Paper No. 2017-75.

Dissertations and Monographs

Kimani H N, 'Political Patronage on the Operationalisation of Public Procurement Law in Kenya' (PhD Thesis, University of Nairobi 2017).

Katiyatiya L M, 'Substantive Equality, Affirmative Action and the Alleviation of Poverty in South Africa: A Socio-Legal Inquiry' (LLD Thesis, Stellenbosch University 2014).

Kuloba, I S, 'Regulation of Discretion in Public Procurement in Kenya' (LLM Dissertation, University of Nairobi 2011).

Mazibuko G P, 'Analysis of the Administration of Procurement Practices in the South African Public Sector' (Ph.D. Thesis, University of Pretoria 2018).

Udeh K T, 'A Comparative Study of the Effectiveness of Bidder Remedies in South Africa and Nigeria' (LLD Thesis, Stellenbosch University 2018).

Reports

GoK, 'Final Report of the Committee of Experts on Constitutional Review (Government Printer, 2010).

GoK, '*Report of the Commission of Inquiry into Post Election Violence* (Government Printer 2008).

GoK, 'Report of the Commission of Inquiry on Public Service Structure and Remuneration' (Government Printer 1971).

International Labour Organisation, 'Targeted Procurement in the Republic of South Africa: An Independent Assessment' (2002).

Office of the Auditor General, 'Special Audit on Procurement of Electronic Voting Devices for the 2013 General Election by the Independent Electoral and Boundaries Commission' (June 2014).

Schwartz M and Manuel K M, 'GAO Bid Protests: Trends and Analysis' Congressional Research Service Report No. 40227 (July 2015).

Schwartz M and Manuel K M, 'GAO Bid Protests: An Overview of Time Frames and Procedures' Congressional Research Service Report No. 40228 (January 2016).

Newspapers, Magazines, Websites and Blogs

Arum B, 'Yes, I fear laptops for all pupils is just populist rhetoric' *The Standard* (Nairobi, 17 April 2013) <*https://www.standardmedia.co.ke/article/2000081722/yes-i-fear-laptops-for-all-pupils-is-just-populist-rhetoric*> accessed 06 May 2018.

Ciuri S and Murumba S, 'Eight Varsities Eye Sh17bn bid to Supply Schools with Computers' *Business Daily* (Nairobi, 23 September 2015) 5.

Government of the Republic of South Africa, 'General Procurement Guidelines' <*http://www.treasury.gov.za/legislation/pfma/supplychain/General%20Procurement%20Guidelines.pdf*> Accessed 26 July 2018.

Graham M, 'Kenya's Laptops for Schools Dream Fails to Address Reality' *The Guardian* (London, 27 June 2013) <*https://www.theguardian.com/global-development/poverty-matters/2013/jun/27/kenya-laptops-schools*> accessed 17 May 2018.

Iraki XN, 'How Raila Odinga's Victory Could Have Checked the Excesses of Capitalism' *The Standard* (Nairobi 20 August 2017).

Lang'at P and Ngirachu J, 'Sh3bn Poll System Tender Cancelled' *Daily Nation* (Nairobi, 23 March 2017) 63.

Michira M, 'Kuchezwa? How much Kenyans are paying for each ballot paper as compared to other countries in East Africa' *The Standard* (Nairobi, 20 June 2017) <*https://www.sde.co.ke/article/2001244188/kuchezwa-how-much-kenyans-are-paying-for-each-ballot-paper-as-compared-to-other-countries-in-east-africa*> accessed 25 April 2018.

Mutai E, 'IEBC Official put on the Spot Over Inflation of Tender' *Business Daily* (Nairobi, 05 August 2015) 2.

Mutai E, 'Pan-Paper's Sh1bn Bailout Loss to Taxpayers' *Business Daily* (Nairobi, 29 June 2016) <*https://www.businessdailyafrica.com/corporate/Pan-Paper-s-Sh1bn-bailout-loss-to-taxpayers/539550-3273284-11427eh/index.html*> accessed 06 May 2018.

Nation Media Group, 'IEBC Defied its Evaluation Team in Shs.4bn Tender' *Daily Nation* (Nairobi, 28 March 2017) 4.

Nation Media Group, 'Vested Interests versus the Children of Kenya: The Truth about the Laptops Tender' *Daily Nation* (Nairobi, 14 March 2014) 35.

Ngugi B, 'Bid to Recover State's Sh1bn Lost in Failed Pan Paper Revival' *Daily Nation* (Nairobi, 15 February 2018) *https://www.nation.co.ke/business/-Sh1bn-lost-in-failed-Pan-Paper-revival/996-4306754-11rmvhhz/index.html accessed 06 May 2018*.

Njagi J, 'Hassan Tried to Sway BVR Tender' *Daily Nation* (Nairobi, 22 July 2015) 6.

Odunga D, 'Bid to Cancel Sh2.5bn Ballots Tender Rejected' *Daily Nation* (Nairobi, 29 November 2016) 5.

Ochieng' L, 'Varsities Seek a Piece of Sh17bn Laptop Cash Pie' *Daily Nation* (Nairobi, 04 December 2015) 4.

Oduor A, 'How Indian Firm Landed Sh24b Tender' *The Standard* (Nairobi, 08 February 2014) 5.

Olick F, 'Laptop project is unstoppable, say President Uhuru Kenyatta, Deputy President William Ruto' *The Standard* (Nairobi, 13 July 2013) <*https://www.standardmedia.co.ke/?articleID=2000088261*> accessed 06 May 2018.

Okuttah M, 'JKUAT and Moi Varsities Win School Devices Tender' *Business Daily* (Nairobi, 09 February 2016) < *https://www.businessdailyafrica.com/news/JKUAT-and-Moi-win-Sh17bn-laptops-tender-/539546-3068820-mrgcvt/index.html* > accessed 21 May 2018.

Ongiri I, 'IEBC Chairman and Commissioners Resign' Daily Nation (Nairobi, 06 July 2016)< *https://www.nation.co.ke/news/1056-3406560-5j3ynkz/*> accessed 24 April 2018.

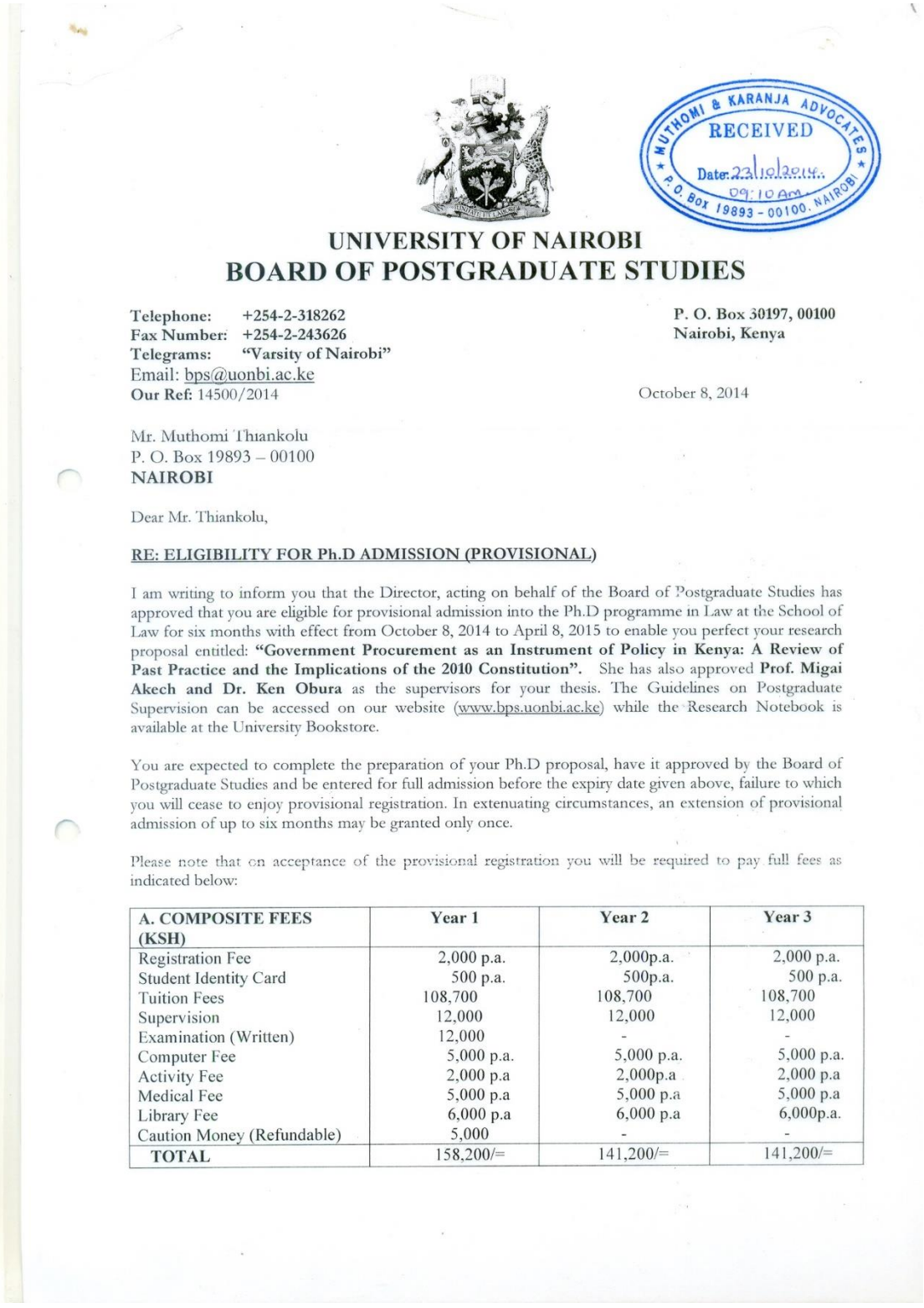
Otieno B, 'School Laptops Budget Jumps to Sh12 Billion' *Business Daily* (Nairobi, 03 May 2018) <*https://www.businessdailyafrica.com/news/School-laptops-budget-jumps-to-Sh12-billion--/539546-4543980-q3oi1sz/index.html*> accessed 13 May 2018.

Parents Magazine Africa, 'The Big Laptops Debate' <*https://parentsafrica.com/2013/07/08/laptops/*> accessed 28 May 2018.

Wafula B, 'Nairobi Businesses Lost Thousands during Anti-IEBC Protests–Survey' (*Daily Nation*, 02 August 2016) <*https://citizentv.co.ke/news/nairobi-businesses-lost-thousands-during-anti-iebc-protests-survey-135703/*> accessed 25 April 2018.

Wanzala O, 'Row Over Tender Ends as IEBC Gives in' *Daily Nation* (Nairobi, 16 March 2017) 11.

Appendix 1: Letter of Provisional Admission



MUTHOMI & KARANJA ADVOCATES
RECEIVED
Date: 23/10/2014
09:10 Am
P.O. Box 19893 - 00100, NAIROBI

UNIVERSITY OF NAIROBI
BOARD OF POSTGRADUATE STUDIES

Telephone: +254-2-318262
Fax Number: +254-2-243626
Telegrams: "Varsity of Nairobi"
Email: bps@uonbi.ac.ke
Our Ref: 14500/2014

P. O. Box 30197, 00100
Nairobi, Kenya

October 8, 2014

Mr. Muthomi Thiankolu
P. O. Box 19893 – 00100
NAIROBI

Dear Mr. Thiankolu,

RE: ELIGIBILITY FOR Ph.D ADMISSION (PROVISIONAL)

I am writing to inform you that the Director, acting on behalf of the Board of Postgraduate Studies has approved that you are eligible for provisional admission into the Ph.D programme in Law at the School of Law for six months with effect from October 8, 2014 to April 8, 2015 to enable you perfect your research proposal entitled: **"Government Procurement as an Instrument of Policy in Kenya: A Review of Past Practice and the Implications of the 2010 Constitution".** She has also approved **Prof. Migai Akech and Dr. Ken Obura** as the supervisors for your thesis. The Guidelines on Postgraduate Supervision can be accessed on our website (www.bps.uonbi.ac.ke) while the Research Notebook is available at the University Bookstore.

You are expected to complete the preparation of your Ph.D proposal, have it approved by the Board of Postgraduate Studies and be entered for full admission before the expiry date given above, failure to which you will cease to enjoy provisional registration. In extenuating circumstances, an extension of provisional admission of up to six months may be granted only once.

Please note that on acceptance of the provisional registration you will be required to pay full fees as indicated below:

A. COMPOSITE FEES (KSH)	Year 1	Year 2	Year 3
Registration Fee	2,000 p.a.	2,000p.a.	2,000 p.a.
Student Identity Card	500 p.a.	500p.a.	500 p.a.
Tuition Fees	108,700	108,700	108,700
Supervision	12,000	12,000	12,000
Examination (Written)	12,000	-	-
Computer Fee	5,000 p.a.	5,000 p.a.	5,000 p.a.
Activity Fee	2,000 p.a	2,000p.a	2,000 p.a
Medical Fee	5,000 p.a	5,000 p.a	5,000 p.a
Library Fee	6,000 p.a	6,000 p.a	6,000p.a.
Caution Money (Refundable)	5,000	-	-
TOTAL	158,200/=	141,200/=	141,200/=

B. OTHER CHARGES:

1.	Extension of registration period	-	Kshs. 3,000 p.a.
2.	Extension of correction period	-	Kshs. 1,000 per three months
3.	Extension of revision period	-	Kshs. 3,000 p.a.
4.	Extension of supervision	-	Kshs. 12,000
5.	Examination of revised thesis	-	Kshs. 9,000

The degree for which you are registered will be offered by research and thesis and in this connection the guidelines for research money are:

Arts Based Research	-	Kshs. 150,000
Science Research	-	Kshs. 200,000
Clinicals Research	-	Kshs. 250,000
Book Allowance	-	Kshs. 40,000

Foreign students from outside the partner states of the Northern Corridor Integration Project (Republics of Burundi, Rwanda, Uganda and South Sudan) to add 25% on all charges.

Please note that all fees and other charges due shall be paid by Direct Cash Deposits, EFT or RTGS to UNES/UON collection Account No. 03-073-1021554 at Barclays Bank, Westlands Branch, Nairobi, Kenya or at any Barclays Bank Branch countrywide using the Reference Number quoted above. Personal Cheques, Bankers Cheques or Institutional Cheques are NOT acceptable. The student account will be updated the next working day and can be accessed through the student online portal (http://smis.uonbi.ac.ke)available in the University website (www.uonbi.ac.ke).

As the University does not provide accommodation for postgraduate students, you must make your own accommodation arrangements. We estimate that you will need over Ksh. 50,000.00 per month to cover this and other personal expenses.

You are advised that all fees and other charges may be subject to change without prior notice.

Yours sincerely,

J. K. GACHUNGA
FOR: DIRECTOR, BOARD OF POSTGRADUATE STUDIES

cc. Dean, School of Law
Prof. Migai Akech (Supervisor) – Department of Commercial Law
Dr. Ken Obura (Supervisor) – Department of Commercial Law

JKG/do

Appendix 2: Request for Extension of Provisional Registration

MUTHOMI THIANKOLU

LLM (Distinction)Warwick
Dip.. Kenya School of Law
LL.B. (Hons.) Nairobi

P. O. BOX 19893-00100
Nairobi Kenya
Telephone: +254 720 781 449
PIN Number: A003987276U
E-Mail: *thiankolu@uonbi.ac.ke*

YOUR REF	MY REF	DATE:
T. B. A.	*MT/PhD*	*1 April, 2015*

The Director
Board of Postgraduate Studies
University of Nairobi
P. O. Box 30197-00100
Nairobi

Dear Madam/Sir,

RE: PHD

EXTENSION OF PROVISIONAL REGISTRATION

Reference is made to our previous correspondence.

This is to kindly request for an extension of my provisional registration, which expires on 8th April 2015.

As you will note from the enclosed draft, I have made significant improvements on the original version of the proposal. I only need a little more time to perfect the proposal and arrange for the oral presentation/defence.

Yours faithfully,

MUTHOMI THIANKOLU
PF No.: MDI-20865

COPY

UNIVERSITY OF NAIROBI
P.O. Box 30197-NAIROBI
02 APR 2015
DIRECTOR BOARD OF POSTGRADUATE STUDIES

CC Prof. Migai Akech (Supervisor)
Dr. Ken Obura (Supervisor)

Appendix 3: Extension of Provisional Registration

UNIVERSITY OF NAIROBI
BOARD OF POSTGRADUATE STUDIES

Telephone: 318262 2 Ext. 28267
Fax Number: 243626
Telegrams: "Varsity of Nairobi"
E-mail: bps@uonbi.ac.ke
Your Ref:

P. O. Box 30197-00100
NAIROBI, KENYA

Our Ref: G80/98270/2015

April 29, 2015

Mr. Muthomi Thiankolu
C/o Department of Public Law
School of Law

Dear Mr. Thiankolu,

EXTENSION OF PROVISIONAL PhD REGISTRATION PERIOD

Reference is made to your letter dated April 1, 2015 on the above subject.

I am pleased to inform you that the Director, acting on behalf of the Board of Postgraduate Studies, has approved extension of your provisional registration for **six (6) months** with effect from the date of this letter.

Yours sincerely,

MARIAM S. LUGONZO
DEPUTY REGISTRAR, BPS

c.c. Dean, School of Law

MUTHOMI & KARANJA ADVOCATES
RECEIVED
Date: 14/05/2015 03:32PM
P.O. Box 19893 - 00100, NAIROBI

MSL/do

Appendix 4: Memo on Oral Defence of the Research Proposal

UNIVERSITY OF NAIROBI
SCHOOL OF LAW

Internal Memo

FROM: Chair, Postgraduate Committee **DATE:** 8 September, 2015

TO: See Below **REF:** G80/98270/2015

1.	Prof. Albert Mumma	-	Chair
2.	Prof. Migai Akech	-	Supervisor
3.	Dr. Ken Obura	-	Supervisor
4.	Prof. Kiarie Mwaura	-	Board Member
5.	Dr. Attiya Waris	-	Board Member

RE: Muthomi Thiankolu PhD Proposal Titled: "*Balancing Social and Economic Policy Objectives in Public Procurement in Kenya: A Review of the Law, Policy and Practice*"

This is to invite you to the defence of the Ph. D Proposal for the above named candidate. The panelists are expected to agree and fix defence date by the end of October, 2015.

The role of Board members is to read the Proposal and engage the student during the defense citing areas that need to be reworked or improved to enable the candidate revise the proposal. The Chair will convene the defence once a date has been nailed.

In terms of process the candidate should be given at least thirty minutes to make his presentation. Ideally, the entire oral defence meeting should last for about an hour.

The five members of the academic staff named above constitute the proposal defence panel and will advise the School on the **registrability** of the Proposal.

Prof. Edwin Abuya
Chair, Postgraduate Studies Committee

Cc. Dean, School of Law
Assistant Registrar, School of Law
Senior Administrative Assistant, School of Law

EA/zk

Appendix 5: Letter of Full Registration

UNIVERSITY OF NAIROBI
BOARD OF POSTGRADUATE STUDIES

Telephone: +254-2-318262
Fax Number: +254-2-243626
Telegrams: "Varsity of Nairobi"
Email: bps@uonbi.ac.ke

P. O. Box 30197, 00100
NAIROBI, KENYA

Our Ref: G80/98270/2015

February 9, 2016

Mr. Muthomi Thiankolu
C/o Dean
School of Law

Dear Mr. Thiankolu,

FULL ADMISSION TO POSTGRADUATE STUDIES (DOCTORATE)

Following your application for a higher degree at this University, I am pleased to inform you that the Director, acting on behalf of the Board of Postgraduate Studies has approved your application for full registration for the degree of Doctor of Philosophy in Law at the School of Law. She has also approved **Prof. Migai Akech** and **Dr. Ken Obura** as the supervisors of your thesis. The Guidelines on Postgraduate Supervision can be accessed on our website (www.bps.uonbi.ac.ke) while the Research Notebook is available at the University Bookstore.

The degree for which you are registered will be offered by research and thesis.

Your admission into the programme commenced on 8th October 2014 as approved by Director, BPS. Also note that your registration is governed by the common regulations for the degree of Doctor of Philosophy in all Faculties/Schools/Institutes. **You will be expected to carry out supervised thesis research in your chosen area of study for a minimum period of six (6) semesters, with effect from the date of this letter, culminating in a doctoral thesis.**

Please note that upon acceptance of full Ph.D registration you will be required to pay full fees as indicated below:

A. COMPOSITE FEES (KSH)	Year 1	Year 2	Year 3
Registration Fee	2,000p.a.	2,000 p.a.	2,000p.a.
Student Identity Card	1,000p.a.	1,000p.a.	1,000 p.a.
Tuition Fees	108,700	108,700	108,700
Supervision	12,000	12,000	12,000
Examination (Written)	12,000	-	-
Computer Fee	5,000p.a.	5,000 p.a.	5,000 p.a.
Activity Fee	2,000p.a	2,000p.a	2,000 p.a
Medical Fee	5,000p.a	5,000p.a	5,000 p.a
Library Fee	6,000 p.a	6,000 p.a	6,000 p.a.
Caution Money (Refundable)	5,000	-	-
TOTAL	158,700/=	141,700/=	141,700/=

B. OTHER CHARGES:

1.	Extension of registration period	-	Kshs. 3,000 p.a.
2.	Extension of correction period	-	Kshs. 1,000 per three months
3.	Extension of revision period	-	Kshs. 3,000 p.a.
4.	Extension of supervision	-	Kshs. 12,000
5.	Examination of revised thesis	-	Kshs. 9,000

The degree for which you are registered will be offered by research and thesis and in this connection the guidelines for research money are:

Arts Based Research	-	Kshs. 150,000
Science based Research	-	Kshs. 200,000
Clinicals Research	-	Kshs. 250,000
Book Allowance	-	Kshs. 40,000

Foreign students from outside the partner states of the Northern Corridor Integration Project (Republics of Burundi, Rwanda, Uganda and South Sudan) to add 25% on all charges.

Please note that all fees and other charges due shall be paid by **Direct Cash Deposits, EFT (Swift Code is "BARCKENX) or RTGS** transfer to **UON CESSP Collection Account No. 2032771362** at Barclays Bank of Kenya, Barclays Plaza, Nairobi, Kenya or at any Barclays Bank Branch countrywide using the Reference Number quoted above. Personal Cheques, Bankers Cheques or Institutional Cheques are **NOT acceptable**. The student account will be updated the next working day and can be accessed through the student online portal (http://smis.uonbi.ac.ke) available in the University website (www.uonbi.ac.ke). Once you have paid fees, kindly report to the Board of Postgraduate Studies with a copy of the fees statement for registration. Thereafter, you will report to the Dean's office, **School of Law** for other registration formalities.

As the University does not provide accommodation for postgraduate students, you must make your own accommodation arrangements. We estimate that you will need over Ksh. 50,000.00 per month to cover this and other personal expenses.

You are advised that all fees and other charges may be subject to change without prior notice.

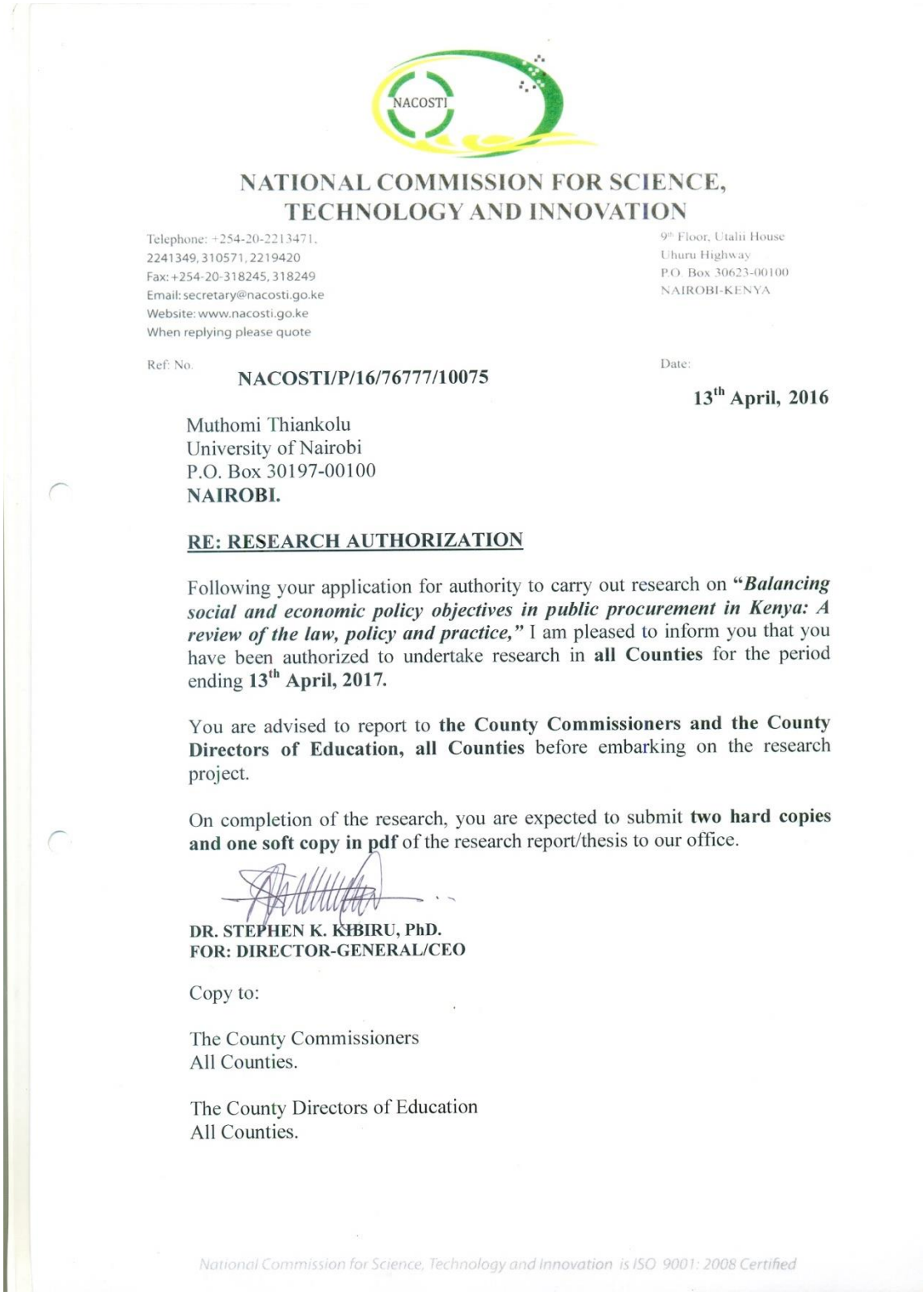
Yours sincerely,

MARIAM S. LUGONZO
DEPUTY REGISTRAR, BPS

c.c. Dean, School of Law
Prof. Migai Akech (Supervisor) – C/o Dean, School of Law
Dr. Ken Obura (Supervisor) – C/o Dean, School of Law

MSL/mv

Appendix 6: Research Permits



NACOSTI

NATIONAL COMMISSION FOR SCIENCE, TECHNOLOGY AND INNOVATION

Telephone: +254-20-2213471, 2241349, 310571, 2219420
Fax: +254-20-318245, 318249
Email: secretary@nacosti.go.ke
Website: www.nacosti.go.ke
When replying please quote

9th Floor, Utalii House
Uhuru Highway
P.O. Box 30623-00100
NAIROBI-KENYA

Ref: No. **NACOSTI/P/16/76777/10075**

Date: **13th April, 2016**

Muthomi Thiankolu
University of Nairobi
P.O. Box 30197-00100
NAIROBI.

RE: RESEARCH AUTHORIZATION

Following your application for authority to carry out research on ***"Balancing social and economic policy objectives in public procurement in Kenya: A review of the law, policy and practice,"*** I am pleased to inform you that you have been authorized to undertake research in **all Counties** for the period ending **13th April, 2017.**

You are advised to report to **the County Commissioners and the County Directors of Education, all Counties** before embarking on the research project.

On completion of the research, you are expected to submit **two hard copies and one soft copy in pdf** of the research report/thesis to our office.

DR. STEPHEN K. KIBIRU, PhD.
FOR: DIRECTOR-GENERAL/CEO

Copy to:

The County Commissioners
All Counties.

The County Directors of Education
All Counties.

National Commission for Science, Technology and Innovation is ISO 9001: 2008 Certified

Appendix 7: General Questionnaire

MUTHOMI THIANKOLU

LLM (DISTINCTION)WARWICK
Dip., Kenya School of Law
LL.B. (HONS.) NAIROBI

Branton Court, Maisonette A6
Ndemi Lane, Off Ngong Road
P. O. Box 19893-00100
Nairobi Kenya

Telephone: +254 720 781 449

PIN Number: A003987276U

E-Mail: *thiankolu@uonbi.ac.ke*

YOUR REF	MY REF	DATE:
T. B. A.	*MT/PhD*	*14/09/2020*

Dear Madam/Sir,

RE: RESEARCH QUESTIONNAIRE

BALANCING ECONOMIC AND SOCIAL POLICY OBJECTIVES IN PUBLIC PROCUREMENT IN KENYA: A REVIEW OF THE LAW, POLICY AND PRACTICE

Part A: Introduction

My name is Muthomi Thiankolu, a research candidate at the University of Nairobi School of Law. The focus of the research is: (i) interplay of the economic and social policy objectives embodied in Kenyan procurement laws, (ii) the discretion enjoyed by public officers in the use of public procurement as a policy tool: and (iii) the link between discretion and the incidence of corruption, favouritism and other forms of malfeasance.

This is to kindly request you to consider completing the Questionnaire set out below and, subject to your convenience, granting me an interview.

The research is governed by the ethical requirements of the University of Nairobi, and the laws of the Republic of Kenya. The National Commission for Science, Technology and Innovation has authorised the research, through a Research Permit No. NACOSTI/P/17/76777/18199 dated 26th July 2017.

Your participation in the research should be voluntary. This means you have an unqualified right to decline any request to: (i) complete the whole or any part of the Questionnaire, (ii) grant me an interview, or (iii) otherwise participate in the research. In addition, you have the right to have any data that you may supply withdrawn from the study any time before the submission of my thesis. Lastly, you are entitled to anonymity and utmost confidentiality regarding any information that you may supply.

IMPORTANT NOTES: In this Questionnaire:

(1) "*public procurement*" refers to the purchase or acquisition by government agencies, from private sector suppliers, of such goods and/or services as government agencies may need to carry out their constitutional or statutory functions,

(2) "*public procurement regulation*" refers to all laws, regulations, legal notices, codes and government circulars relating to public procurement in Kenya,

(3) '*economic objectives*' refers to all such objectives of public procurement regulation as are based on the idea of reliance on market forces as the appropriate means for allocating society's scarce resources and

(4) '*social objectives*' refers to all such objectives of public procurement regulation as are not based on the idea of reliance on market forces as

the appropriate means for allocating society's scarce resources. Social objectives of public procurement regulation may include, among others, protection of the environment, wealth redistribution, promotion of fair employment practices and the protection or advancement of marginalised persons, regions and communities.

Part B: General Information

Please insert a tick (✓) where appropriate in the space(s) provided in the table below.

<table>
<tr><td>Name (Optional)</td><td colspan="3"></td></tr>
<tr><td>Gender</td><td colspan="3">Male | Female</td></tr>
<tr><td rowspan="9">Occupation</td><td colspan="3">Procurement Regulator</td></tr>
<tr><td colspan="3">Legal Practitioner</td></tr>
<tr><td colspan="3">Economist</td></tr>
<tr><td colspan="3">Academic</td></tr>
<tr><td colspan="3">Contractor</td></tr>
<tr><td colspan="3">Review Board</td></tr>
<tr><td colspan="3">Supply Chain Management Professional</td></tr>
<tr><td rowspan="2">NGO</td><td>Working on Corruption</td></tr>
<tr><td>Working with Government</td></tr>
</table>

	Civil Servant
	KIPPRA
	Political Scientist
	Judicial Officer
	Other (*Please specify*)
Part C: Kenyan Policy and Legal Frameworks for Public Procurement	
The Policy Framework	
1 What is the main purpose of Kenya's present policy framework ("**the policy**") for public procurement?	
2 What are the main strengths of the policy?	
3 What are the main weaknesses of the policy?	
4 What are the main economic objectives of the policy?	
5 What are the main social objectives of the policy?	
6 In your opinion, is there any conflict between the economic and social objectives of the policy?	
7 Please explain your answer in (6) above	
8 If your answer to (6) above is "*yes*," which of the two types of objectives do you think should be pursued? Economic or social?	

9	Does the policy give public officers broad discretion or freedom to choose *whether, when, the extent, or the ends* for which they can use procurement as a policy tool?	
10	Please explain your answer in (9) above	
The Legal Framework		
11	What is the main purpose of Kenyan public procurement laws?	
12	What are the main strengths of Kenyan public procurement laws?	
13	What are the main weaknesses of Kenyan public procurement laws?	
14	What, in your opinion, are the main economic objectives of Kenyan public procurement laws?	
15	What, in your opinion, are the main social objectives of Kenyan public procurement laws?	
16	Is there any conflict between the economic and social objectives embodied in Kenyan public procurement laws?	
17	Please explain your answer in (16) above.	
18	Do Kenyan public procurement laws provide any guidance on how to resolve conflicts between the economic and social objectives?	

19 Do Kenyan public procurement laws give public officers broad discretion or freedom to choose *whether, when, the extent or the ends* for which they can use public procurement as a policy tool?	
20 Please explain your answer in (19) above	
Part D: Compliance and Various Forms of Misfeasance & Malfeasance	
21 In your opinion, do public officers comply with the law on the use of public procurement as a policy tool?	
22 Please explain your answer in (21) above.	

23 Please indicate whether any of the following happens when public officers apply the law on the use of public procurement as a policy tool:

ISSUE	YES	NO
Reservation of tenders for specified persons or groups, e.g. women, youth, persons with disabilities and marginalised groups.		
Award of reserved tenders to persons or groups not entitled or intended to benefit from the scheme of reservations		
Preference for goods sourced, produced or manufactured in Kenya		
Preference for goods produced through environmentally friendly technologies		
Preference for local or citizen contractors and service providers		
Application of preferences to contractors, goods or services not entitled or intended to benefit from the scheme of preferences		

Favouring companies owned by or associated with public officers		
Favouring companies owned by or associated with the relatives or friends of public officers		
Favouring contractors who pay or are willing to pay bribes or kickbacks to public officers		
Favouring contractors who finance the political campaigns of the ruling party and/or senior politicians		
Award of tenders at inflated prices		
Payment or excessive payment for goods or services that have not been supplied or supplied in full		
Payment or excessive payment for substandard or defective goods		
Payment or excessive payment for services that have not been rendered or adequately rendered		
Wilful or careless failure to comply with the law and/or policy on public procurement		
24 Is there any link between the discretion or freedom enjoyed by procurement officers and the incidence of the various types of misfeasance set out in (23) above?		
25 Please explain your answer in (24) above		

Part E: Suggested Reform(s)

26 Based on your answers to the preceding questions, what policy reform(s) would you recommend on	

	the use of public procurement as a policy tool in Kenya?	
27	Based on your answers to the preceding questions, what legal reform(s) would you recommend on the use of public procurement as a policy tool in Kenya?	
Part F: Additional Relevant Information		
28	Please provide any other information you consider relevant to the interplay between the economic and social policy objectives embodied in Kenyan public procurement laws. Kindly explain why you consider this additional information relevant to the study.	

Thank you very much for agreeing to take part in this research, and for taking the time to complete the Questionnaire. Your views will come in very handy in achieving the objectives of the research.

Subject to your agreement, and your convenience, I would be much obliged if you would kindly consider granting me such oral interview(s) as may be necessary to gather further information or get further insights into your answers as set out in this Questionnaire.

Yours faithfully,

MUTHOMI THIANKOLU
(Candidate)
thiankolu@uonbi.ac.ke

Appendix 8: Interview Schedule

MUTHOMI THIANKOLU

LLM (DISTINCTION)WARWICK
Dip., Kenya School of Law
LL.B. (HONS.) NAIROBI

Branton Court, Maisonette A6
Ndemi Lane, Off Ngong Road
P. O. Box 19893-00100
Nairobi Kenya

Telephone: +254 720 781 449

PIN Number: A003987276U

E-Mail: *thiankolu@uonbi.ac.ke*

YOUR REF	MY REF	DATE:
T. B. A.	***MT/PhD***	***14/09/2020***

Dear Madam/Sir,

RE: RESEARCH INTERVIEW

BALANCING ECONOMIC AND SOCIAL POLICY OBJECTIVES IN PUBLIC PROCUREMENT IN KENYA: A REVIEW OF THE LAW, POLICY AND PRACTICE

Part A: Introduction

My name is Muthomi Thiankolu, a research candidate at the University of Nairobi School of Law. The focus of the research is: (i) interplay of the economic and social policy objectives embodied in Kenyan procurement laws, (ii) the discretion enjoyed by public officers in the use of public procurement as a policy tool: and (iii) the link between discretion and the incidence of corruption, favouritism and other forms of malfeasance.

This is to kindly request you to consider granting me an interview, focusing on the broad questions set out in Part B of this letter.

The research is governed by the ethical requirements of the University of Nairobi, and the laws of the Republic of Kenya. The National Commission for Science, Technology and Innovation has authorised the research, through a Research Permit No. NACOSTI/P/17/76777/18199 dated 26th July 2017.

Your participation in the research should be voluntary. This means you have an unqualified right to decline any request to: (i) grant me an interview, or (ii) otherwise participate in the research. In addition, you have the right to have any data that you may supply withdrawn from the study any time before the submission of my thesis. Lastly, you are entitled to anonymity and utmost confidentiality regarding any information that you may supply.

IMPORTANT NOTES: For purposes of the requested interview:

(1) "*public procurement*" refers to the purchase or acquisition by government agencies, from private sector suppliers, of such goods and/or services as government agencies may need to carry out their constitutional or statutory functions,

(2) "*public procurement regulation*" refers to all laws, regulations, legal notices, codes and government circulars relating to public procurement in Kenya,

(3) '*economic objectives*' refers to all such objectives of public procurement regulation as are based on the idea of reliance on market forces as the appropriate means for allocating society's scarce resources and

(4) '*social objectives*' refers to all such objectives of public procurement regulation as are not based on the idea of reliance on market forces as the appropriate means for allocating society's scarce resources. Social

objectives of public procurement regulation may include, among others, protection of the environment, wealth redistribution, promotion of fair employment practices and the protection or advancement of marginalised persons, regions and communities.

Part B: Interview Questions		
	QUESTION	**RESPONSE**
1	What is the main economic objective(s) of Kenyan public procurement laws?	
2	What is the main social objective of Kenyan public procurement laws?	
3	Is there any conflict between the economic and social objectives embodied in Kenyan public procurement laws?	
4	Which of the two species of objectives Should Prevail in the event of Conflict?	
5	Do Kenyan public procurement laws offer sufficient guidelines on the resolution of conflicts between economic and social objectives?	

6	If so, what is the nature of the guidelines?	
7	Do public officers have discretion on whether to integrate social objectives into public procurement?	
8	What is the main strength of our current public procurement regulatory system?	
9	What is the main weakness of our current public procurement regulatory system?	

Please indicate whether any of the following happens when public officers apply the law on the use of public procurement as a policy tool:

ISSUE	YES	NO
1. Reservation of tenders for specified persons or groups, e.g. women, youth, persons with disabilities and marginalized groups		
2. Award of reserved tenders to persons or		

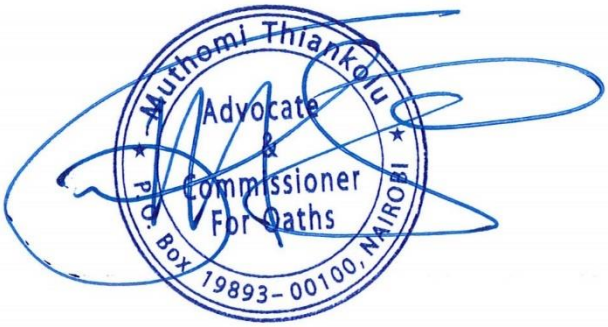
groups not entitled or intended to benefit from the scheme of reservations		
3. Preference for goods sourced, produced or manufactured in Kenya		
4. Preference for goods produced through environmentally friendly technologies		
5. Preference for local or citizen contractors and service providers		
6. Application of preferences to contractors, goods or services not entitled or intended to benefit from the scheme of preferences		
7. Favouring companies owned by or associated with public officers		

8. Favouring companies owned by or associated with the relatives or friends of public officers		
9. Favouring contractors who pay or are willing to pay bribes or kickbacks to public officers		
10. Favouring contractors who finance the political campaigns of the ruling party and/or senior politicians		
11. Award of tenders at inflated prices		
12. Payment or excessive payment for goods or services that have not been supplied or supplied in full		
13. Payment or excessive payment for		

substandard or defective goods		
14. Payment or excessive payment for services that have not been rendered or adequately rendered		
15. Willful or careless failure to comply with the law and/or policy on public procurement.		
16. Is there any link between the discretion or freedom enjoyed by procurement officers and the incidence of the various types of malfeasance described above?		
What legal or policy reforms if any would you recommend on regulation of public procurement in Kenya?		

I hope that my request for an interview shall find favour with you, especially in view of your extensive knowledge and experience on matters relating to public procurement regulation in Kenya.

Yours faithfully,



MUTHOMI THIANKOLU
(Candidate)
thiankolu@uonbi.ac.ke

Appendix 9: Questionnaire on Procurement of Ballot Papers

MUTHOMI THIANKOLU

LLM (DISTINCTION)WARWICK
Dip., Kenya School of Law
LL.B. (HONS.) NAIROBI

Branton Court, Maisonette A6
Ndemi Lane, Off Ngong Road
P. O. Box 19893-00100
Nairobi Kenya

Telephone: +254 720 781 449

PIN Number: A003987276U

E-Mail: *thiankolu@uonbi.ac.ke*

YOUR REF	MY REF	DATE:
T. B. A.	*MT/PhD*	*14/09/2020*

Dear Madam/Sir,

RE: RESEARCH

PROCUREMENT OF BALLOT PAPERS FOR THE 2017 GENERAL ELECTION

Part A: Introduction

My name is Muthomi Thiankolu, a research candidate at the University of Nairobi School of Law. The focus of the research is: (i) interplay of the economic and social policy objectives embodied in Kenyan procurement laws, (ii) the discretion enjoyed by public officers in the use of public procurement as a policy tool: and (iii) the link between discretion and the incidence of corruption, favouritism and other forms of malfeasance.

This is to kindly request you to consider completing the Questionnaire set out below and, subject to your convenience, granting me an interview.

The research is governed by the ethical requirements of the University of Nairobi, and the laws of the Republic of Kenya. The National Commission for Science, Technology

and Innovation has authorised the research, through a Research Permit No. NACOSTI/P/17/76777/18199 dated 26th July 2017.

Your participation in the research should be voluntary. This means you have an unqualified right to decline any request to: (i) complete the whole or any part of the Questionnaire, (ii) grant me an interview, or (iii) otherwise participate in the research. In addition, you have the right to have any data that you may supply withdrawn from the study any time before the submission of my thesis. Lastly, you are entitled to anonymity and utmost confidentiality regarding any information that you may supply.

IMPORTANT NOTES: In this Questionnaire:

(1) "*public procurement*" refers to the purchase or acquisition by government agencies, from private sector suppliers, of such goods and/or services as government agencies may need to carry out their constitutional or statutory functions,

(2) "*public procurement regulation*" refers to all laws, regulations, legal notices, codes and government circulars relating to public procurement in Kenya,

(3) '*economic objectives*' refers to all such objectives of public procurement regulation as are based on the idea of reliance on market forces as the appropriate means for allocating society's scarce resources and

(4) '*social objectives*' refers to all such objectives of public procurement regulation as are not based on the idea of reliance on market forces as the appropriate means for allocating society's scarce resources. Social objectives of public procurement regulation may include, among

others, protection of the environment, wealth redistribution, promotion of fair employment practices and the protection or advancement of marginalised persons, regions and communities.

Part B: General Information

Please tick where appropriate in the space(s) provided in the table below.

<table>
<tr><td>Name (Optional)</td><td colspan="3"></td></tr>
<tr><td>Gender</td><td colspan="3">Male | Female</td></tr>
<tr><td rowspan="9">Occupation</td><td colspan="3">Public/Civil Servant</td></tr>
<tr><td colspan="3">Legal Practitioner</td></tr>
<tr><td colspan="3">Economist</td></tr>
<tr><td colspan="3">Academic</td></tr>
<tr><td colspan="3">Contractor</td></tr>
<tr><td colspan="3">Review Board</td></tr>
<tr><td colspan="3">Supply Chain Management Professional</td></tr>
<tr><td rowspan="2">NGO</td><td colspan="2">Working on Corruption</td></tr>
<tr><td colspan="2">Working with Government</td></tr>
</table>

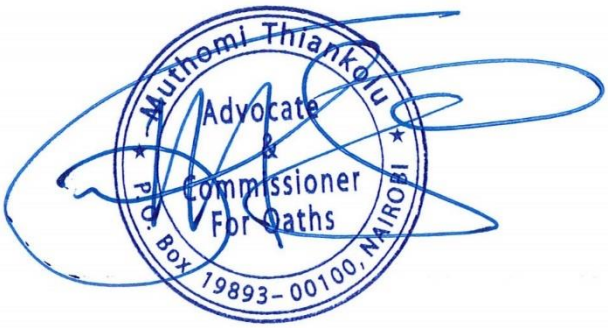
		Civil Servant
		KIPPRA
		Political Scientist
		Judicial Officer
		Other (*Please specify*)
Part C: Objectives of the Tender for the Procurement of Ballot Papers for the 2017 General Election		
1	What, in your opinion, were the economic objectives of the Tender (hereinafter, "***the Tender***") for the procurement of ballot papers for the 2017 general election?	
2	Did the IEBC have discretion on whether to integrate social objectives into the Tender? Alternatively, did the IEBC believe that it had any such discretion?	
3	To the best of your knowledge, did the IEBC integrate any social objectives into the Tender?	
4	If so, what was the nature of the social objectives it integrated?	
5	Were the economic and social objectives compatible, in your view?	
6	If not, what steps did the IEBC take to resolve conflicts between the economic and social objectives?	

7	Were the social objectives compatible, in your view?	
8	If not, what steps did the IEBC take to rationalize or resolve conflicts among the social objectives?	
9	To the best of your knowledge, was the Tender characterised by corruption, favouritism or any other form(s) of malfeasance?	
10	If so, to what would you attribute the incidence of corruption, favouritism and/or other forms of malfeasance?	

Thank you very much for agreeing to take part in the research, and for taking the time to complete the Questionnaire. Your views will come in very handy in achieving the objectives of the research.

Subject to your agreement, and your convenience, I would be much obliged if you would kindly consider granting me an interview to get further insights into your answers as set out in this Questionnaire.

Yours faithfully,



MUTHOMI THIANKOLU
(Candidate)
thiankolu@uonbi.ac.ke

Appendix 10: Questionnaire on Procurement of Laptops

MUTHOMI THIANKOLU

LLM (DISTINCTION)WARWICK
Dip., Kenya School of Law
LL.B. (HONS.) NAIROBI

Branton Court, Maisonette A6
Ndemi Lane, Off Ngong Road
P. O. Box 19893-00100
Nairobi Kenya

Telephone: +254 720 781 449

PIN Number: A003987276U

E-Mail: *thiankolu@uonbi.ac.ke*

YOUR REF	MY REF	DATE:
T. B. A.	*MT/PhD*	*14/09/2020*

Dear Madam/Sir,

RE: RESEARCH

PROCUREMENT OF LAPTOPS FOR PRIMARY SCHOOLS

Part A: Introduction

My name is Muthomi Thiankolu, a research candidate at the University of Nairobi School of Law. The focus of the research is: (i) interplay of the economic and social policy objectives embodied in Kenyan procurement laws, (ii) the discretion enjoyed by public officers in the use of public procurement as a policy tool: and (iii) the link between discretion and the incidence of corruption, favouritism and other forms of malfeasance.

This is to kindly request you to consider completing the Questionnaire set out below and, subject to your convenience, granting me an interview.

The research is governed by the ethical requirements of the University of Nairobi, and the laws of the Republic of Kenya. The National Commission for Science, Technology

and Innovation has authorised the research, through a Research Permit No. NACOSTI/P/17/76777/18199 dated 26th July 2017.

Your participation in the research should be voluntary. This means you have an unqualified right to decline any request to: (i) complete the whole or any part of the Questionnaire, (ii) grant me an interview, or (iii) otherwise participate in the research. In addition, you have the right to have any data that you may supply withdrawn from the study any time before the submission of my thesis. Lastly, you are entitled to anonymity and utmost confidentiality regarding any information that you may supply.

IMPORTANT NOTES: In this Questionnaire:

(1) "*public procurement*" refers to the purchase or acquisition by government agencies, from private sector suppliers, of such goods and/or services as government agencies may need to carry out their constitutional or statutory functions,

(2) "*public procurement regulation*" refers to all laws, regulations, legal notices, codes and government circulars relating to public procurement in Kenya,

(3) '*economic objectives*' refers to all such objectives of public procurement regulation as are based on the idea of reliance on market forces as the appropriate means for allocating society's scarce resources and

(4) '*social objectives*' refers to all such objectives of public procurement regulation as are not based on the idea of reliance on market forces as the appropriate means for allocating society's scarce resources. Social objectives of public procurement regulation may include, among

others, protection of the environment, wealth redistribution, promotion of fair employment practices and the protection or advancement of marginalised persons, regions and communities.

Part B: General Information

Please tick where appropriate in the space(s) provided in the table below.

<table>
<tr><td>Name (Optional)</td><td colspan="3"></td></tr>
<tr><td>Gender</td><td>Male</td><td>Female</td><td></td></tr>
<tr><td rowspan="9">Occupation</td><td colspan="3">Public/Civil Servant</td></tr>
<tr><td colspan="3">Legal Practitioner</td></tr>
<tr><td colspan="3">Economist</td></tr>
<tr><td colspan="3">Academic</td></tr>
<tr><td colspan="3">Contractor</td></tr>
<tr><td colspan="3">Review Board</td></tr>
<tr><td colspan="3">Supply Chain Management Professional</td></tr>
<tr><td rowspan="2">NGO</td><td colspan="2">Working on Corruption</td></tr>
<tr><td colspan="2">Working with Government</td></tr>
<tr><td colspan="3">Civil Servant</td></tr>
</table>

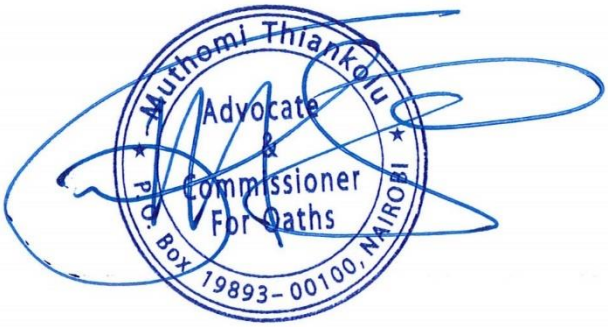
	KIPPRA
	Political Scientist
	Judicial Officer
	Other (*Please specify*)
Part C: Objectives of the Tender for the Procurement of Laptops for Primary Schools	
1 What, in your opinion, were the economic objectives of the Tender (hereinafter, "***the Tender***") for the procurement of Laptops for Primary Schools?	
2 Did the Ministry of Education have discretion on whether to integrate social objectives into the Tender? Alternatively, did the Ministry of Education believe that it had any such discretion?	
3 To the best of your knowledge, did the Ministry of Education integrate any social objectives into the Tender? 4 If so, what was the nature of the social objectives it integrated?	
5 Were the economic and social objectives compatible, in your view? 6 If not, what steps did the Ministry of Education take to resolve conflicts between the economic and social objectives?	

7 Were the social objectives compatible, in your view? 8 If not, what steps did the Ministry of Education take to rationalize or resolve conflicts among the social objectives?	
9 To the best of your knowledge, was the Tender characterised by corruption, favouritism or any other form(s) of malfeasance? 10 If so, to what would you attribute the incidence of corruption, favouritism and/or other forms of malfeasance?	

Thank you very much for agreeing to take part in the research, and for taking the time to complete the Questionnaire. Your views will come in very handy in achieving the objectives of the research.

Subject to your agreement, and your convenience, I would be much obliged if you would kindly consider granting me an interview to get further insights into your answers as set out in this Questionnaire.

Yours faithfully,



MUTHOMI THIANKOLU
(Candidate)
thiankolu@uonbi.ac.ke

Appendix 11: Questionnaire on the United States Public Procurement System

MUTHOMI THIANKOLU

LLM (DISTINCTION)WARWICK
Dip., Kenya School of Law
LL.B. (HONS.) NAIROBI

Branton Court, Maisonette A6
Ndemi Lane, Off Ngong Road
P. O. Box 19893-00100
Nairobi Kenya

Telephone: +254 720 781 449

PIN Number: A003987276U

E-Mail: *thiankolu@uonbi.ac.ke*

YOUR REF	MY REF	DATE:
T. B. A.	*MT/PhD*	*14 September 2020*

Dear Madam/Sir,

RE: RESEARCH QUESTIONNAIRE

BALANCING ECONOMIC AND SOCIAL POLICY OBJECTIVES IN PUBLIC PROCUREMENT

Part A: Introduction

My name is Muthomi Thiankolu, a research candidate at the University of Nairobi School of Law. The focus of the research is: (i) interplay of the economic and social policy objectives embodied in Kenyan procurement laws; (ii) the discretion enjoyed by public officers in the use of public procurement as a policy tool: and (iii) the link between discretion and the incidence of corruption, favouritism and other forms of malfeasance. Part of my research entails a comparative study of the public procurement law and practice of the United States.

This is to kindly request you to consider completing the Questionnaire set out below and, subject to your convenience, granting me an interview.

The research is governed by the ethical requirements of the University of Nairobi, and the laws of the Republic of Kenya. The National Commission for Science, Technology and Innovation has authorised the research, through a Research Permit No. NACOSTI/P/17/76777/18199 dated 26th July 2017.

Your participation in the research should be voluntary. This means you have an unqualified right to decline any request to: (i) complete the whole or any part of the Questionnaire; (ii) grant me an interview; or (iii) otherwise participate in the research. In addition, you have the right to have any data that you may supply withdrawn from the study any time before the submission of my thesis. Lastly, you are entitled to anonymity and utmost confidentiality regarding any information that you may supply.

IMPORTANT NOTES: In this Questionnaire:

"*public procurement*" refers to the purchase or acquisition by government agencies, from private sector suppliers, of such goods and/or services as government agencies may need to carry out their constitutional or statutory functions;

"*public procurement regulation*" refers to all laws, regulations, legal notices, codes and government circulars relating to federal public procurement in the United States;

'*economic objectives*' refers to all such objectives of public procurement regulation as are based on the idea of reliance on market forces as the appropriate means for allocating society's scarce resources; and

'*social objectives*' refers all such objectives of public procurement regulation as are not based on the idea of reliance on market forces as the appropriate means for allocating society's scarce resources. Social objectives of public procurement regulation may include, among others, protection of the environment, wealth redistribution, promotion of fair employment practices and the protection or advancement of marginalised persons, regions and communities.

<table>
<tr><td colspan="3">Part B: General Information

Please insert a tick (✓) where appropriate in the space(s) provided in the table below</td></tr>
<tr><td>Name (Optional)</td><td colspan="2"></td></tr>
<tr><td>Gender</td><td>Male</td><td>Female</td></tr>
<tr><td>Occupation</td><td colspan="2">Procurement Regulator</td></tr>
<tr><td></td><td colspan="2">Legal Practitioner</td></tr>
<tr><td></td><td colspan="2">Academic</td></tr>
<tr><td></td><td colspan="2">Supply Chain Management Professional</td></tr>
<tr><td></td><td></td><td>Working on Corruption</td></tr>
</table>

	NGO	Working with Government
	Civil Servant	
	Judicial Officer	
	Other (*Please specify*)	

Part C: American Policy and Legal Frameworks for Public Procurement

QUESTION	**RESPONSE**
What is the main economic objective(s) of American public procurement laws?	
What is the main social objective(s) of American public procurement laws?	
Is there any conflict between the economic and social objectives embodied in American public procurement laws?	
Which of the two species of objectives should prevail in the event of conflict?	
Do American public procurement laws offer sufficient guidelines on resolution of potential conflicts between economic and social objectives? If so, what is the nature of the guidelines?	

Do American public officers have a discretion on whether to integrate social objectives into public procurement?		
What is the main strength of the current American public procurement regulatory system?		
What is the main weakness of the current American public procurement regulatory system?		
Please indicate, by placing a tick (✓) on the appropriate box, whether any of the following happens in United States:		
ISSUE	**YES**	**NO**
1. Reservation of tenders for specified persons or groups, e.g. women, youth, persons with disabilities and marginalized groups		
2. Award of reserved tenders to persons or groups not entitled or intended to benefit from the scheme of reservations		
3. Preference for goods sourced, produced or manufactured in United States		
4. Preference for goods produced through environmentally friendly technologies		
5. Preference for local or citizen contractors and service providers		

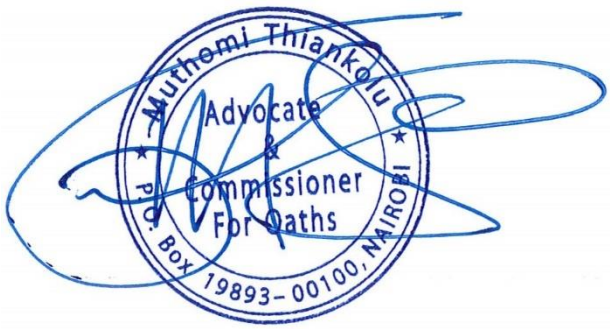
6. Application of preferences to contractors, goods or services not entitled or intended to benefit from the scheme of preferences		
7. Favouring companies owned by or associated with public officers		
8. Favouring companies owned by or associated with the relatives or friends of public officers		
9. Favouring contractors who pay or are willing to pay bribes or kickbacks to public officers		
10. Favouring contractors who finance the political campaigns of the ruling party and/or senior politicians		
11. Award of tenders at inflated prices		
12. Payment or excessive payment for goods or services that have not been supplied or supplied in full		
13. Payment or excessive payment for substandard or defective goods		
14. Payment or excessive payment for services that have not been rendered or adequately rendered		

15. Willful or careless failure to comply with the law and/or policy on public procurement.		
16. Is there any link between the discretion or freedom enjoyed by procurement officers and the incidence of the various types of malfeasance described above?		
Part D: Suggested Readings		
Please indicate any reading materials that you would recommend to a foreigner researching on the interplay of economic and social objectives of the American public procurement regulatory system.		
Please indicate any reading materials that you would recommend to a foreigner researching on the discretion enjoyed by American public officers in the use of public procurement as a policy tool and the link between such discretion and the incidence of corruption, favouritism and other forms of malfeasance.		

Thank you very much for agreeing to take part in this research, and for taking the time to complete the Questionnaire. Your views will come in very handy in achieving the objectives of the research.

Subject to your agreement, and your convenience, I would be much obliged if you would kindly consider granting me such oral interview(s) as may be necessary to gather further information or get further insights into your answers as set out in this Questionnaire.

Yours faithfully,



MUTHOMI THIANKOLU
(Candidate)
thiankolu@uonbi.ac.ke

Appendix 12: Questionnaire on the South African Public Procurement System

MUTHOMI THIANKOLU

LLM (DISTINCTION)WARWICK
Dip., Kenya School of Law
LL.B. (HONS.) NAIROBI

Branton Court, Maisonette A6
Ndemi Lane, Off Ngong Road
P. O. Box 19893-00100
Nairobi Kenya

Telephone: +254 720 781 449

PIN Number: A003987276U

E-Mail: *thiankolu@uonbi.ac.ke*

YOUR REF	MY REF	DATE:
T. B. A.	*MT/PhD*	*14 September 2020*

Dear Madam/Sir,

RE: RESEARCH QUESTIONNAIRE

BALANCING ECONOMIC AND SOCIAL POLICY OBJECTIVES IN PUBLIC PROCUREMENT

Part A: Introduction

My name is Muthomi Thiankolu, a research candidate at the University of Nairobi School of Law. The focus of the research is: (i) interplay of the economic and social policy objectives embodied in Kenyan procurement laws; (ii) the discretion enjoyed by public officers in the use of public procurement as a policy tool: and (iii) the link between discretion and the incidence of corruption, favouritism and other forms of malfeasance. Part of my research entails a comparative study of South African public procurement law and practice.

This is to kindly request you to consider completing the Questionnaire set out below and, subject to your convenience, granting me an interview.

The research is governed by the ethical requirements of the University of Nairobi, and the laws of the Republic of Kenya. The National Commission for Science, Technology and Innovation has authorised the research, through a Research Permit No. NACOSTI/P/17/76777/18199 dated 26th July 2017.

Your participation in the research should be voluntary. This means you have an unqualified right to decline any request to: (i) complete the whole or any part of the Questionnaire; (ii) grant me an interview; or (iii) otherwise participate in the research. In addition, you have the right to have any data that you may supply withdrawn from the study any time before the submission of my thesis. Lastly, you are entitled to anonymity and utmost confidentiality regarding any information that you may supply.

IMPORTANT NOTES: In this Questionnaire:

"*public procurement*" refers to the purchase or acquisition by government agencies, from private sector suppliers, of such goods and/or services as government agencies may need to carry out their constitutional or statutory functions;

"*public procurement regulation*" refers to all laws, regulations, legal notices, codes and government circulars relating to public procurement in South Africa;

'*economic objectives*' refers to all such objectives of public procurement regulation as are based on the idea of reliance on market forces as the appropriate means for allocating society's scarce resources; and

'*social objectives*' refers all such objectives of public procurement regulation as are not based on the idea of reliance on market forces as the appropriate means for allocating society's scarce resources. Social objectives of public procurement regulation may include, among others, protection of the environment, wealth redistribution, promotion of fair employment practices and the protection or advancement of marginalised persons, regions and communities.

<table>
<tr><td colspan="3">Part B: Participant's Information

Please insert a tick (✓) where appropriate in the space(s) provided in the table below</td></tr>
<tr><td>Name (Optional)</td><td colspan="2"></td></tr>
<tr><td>Gender</td><td>Male</td><td>Female</td></tr>
<tr><td>Occupation</td><td colspan="2">Procurement Regulator</td></tr>
<tr><td></td><td colspan="2">Legal Practitioner</td></tr>
<tr><td></td><td colspan="2">Academic</td></tr>
<tr><td></td><td colspan="2">Supply Chain Management Professional</td></tr>
<tr><td></td><td></td><td>Working on Corruption</td></tr>
</table>

	NGO	Working with Government
	Civil Servant	
	Judicial Officer	
	Other (*Please specify*)	

Part C: South African Policy and Legal Frameworks for Public Procurement	
QUESTION	**RESPONSE**
What is the main economic objective(s) of South African public procurement laws?	
What is the main social objective(s) of South African public procurement laws?	
Is there any conflict between the economic and social objectives embodied in South African public procurement laws?	
Which of the two species of objectives should prevail in the event of Conflict?	
Do South African public procurement laws offer sufficient guidelines on resolution of potential conflicts between economic and social objectives? If so, what is the nature of the guidelines?	

Do South African public officers have a discretion on whether to integrate social objectives into public procurement?		
What is the main strength of the current South African public procurement regulatory system?		
What is the main weakness of the current south African public procurement regulatory system?		
Please indicate, by placing a tick (✓) on the appropriate box, whether any of the following happens in South Africa:		
ISSUE	**YES**	**NO**
1. Reservation of tenders for specified persons or groups, e.g. women, youth, persons with disabilities and marginalized groups		
2. Award of reserved tenders to persons or groups not entitled or intended to benefit from the scheme of reservations		
3. Preference for goods sourced, produced or manufactured in South Africa		
4. Preference for goods produced through environmentally friendly technologies		
5. Preference for local or citizen contractors and service providers		

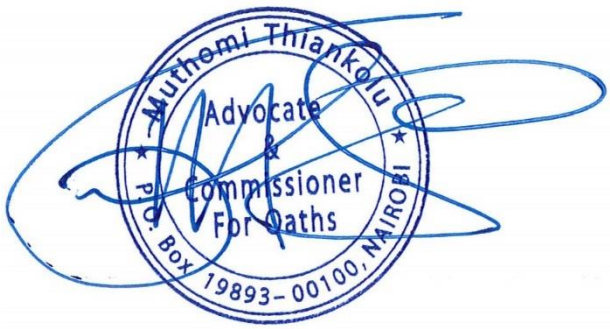
6. Application of preferences to contractors, goods or services not entitled or intended to benefit from the scheme of preferences		
7. Favouring companies owned by or associated with public officers		
8. Favouring companies owned by or associated with the relatives or friends of public officers		
9. Favouring contractors who pay or are willing to pay bribes or kickbacks to public officers		
10. Favouring contractors who finance the political campaigns of the ruling party and/or senior politicians		
11. Award of tenders at inflated prices		
12. Payment or excessive payment for goods or services that have not been supplied or supplied in full		
13. Payment or excessive payment for substandard or defective goods		
14. Payment or excessive payment for services that have not been rendered or adequately rendered		

15. Willful or careless failure to comply with the law and/or policy on public procurement.		
16. Is there any link between the discretion or freedom enjoyed by procurement officers and the incidence of the various types of malfeasance described above?		
Part D: Suggested Readings		
Please indicate any reading materials that you would recommend to a foreigner researching on the interplay of economic and social objectives of the South African public procurement regulatory system.		
Please indicate any reading materials that you would recommend to a foreigner researching on the discretion (if any) enjoyed by South African public officers in the use of public procurement as a policy tool and the link between such discretion and the incidence of corruption, favouritism and other forms of malfeasance.		

Thank you very much for agreeing to take part in this research, and for taking the time to complete the Questionnaire. Your views will come in very handy in achieving the objectives of the research.

Subject to your agreement, and your convenience, I would be much obliged if you would kindly consider granting me such oral interview(s) as may be necessary to gather further information or get further insights into your answers as set out in this Questionnaire.

Yours faithfully,



MUTHOMI THIANKOLU
(Candidate)
thiankolu@uonbi.ac.ke