

**TOWARDS GOOD GOVERNANCE: AN APPRAISAL OF THE ROLE OF ARTICLE 10
OF THE CONSTITUTION IN IMPLEMENTATION OF PUBLIC PROCUREMENT
LAW IN KENYA**

**A RESEARCH PAPER SUBMITTED TO THE UNIVERSITY OF NAIROBI IN
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DECLARATION

Student's Declaration

I declare that this research project is my original work and has not been presented for a degree in this or any other university. Secondary sources have been duly acknowledged and referenced.



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Date: 29/10/2021

Supervisor's Declaration

This research project has been submitted for examination with my approval as University Supervisor.



Dr. Seth Wekesa
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Date: 04/11/2021

DEDICATION

To my parents, my constant source of unconditional love. I am because you are.

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First, I am most thankful to God for always meeting me at my point of need. His enduring love and grace have sustained me through this academic journey.

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LIST OF CASES

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

Avante International Technology Inc v the Independent Electoral and Boundaries Commission, High Court of Kenya (Nairobi) Judicial Review 451 of 2012.

Bevaj Furniture v Kenya School of Monetary Studies, 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 Limited v Kenya Rural Boards Authority, Review Board Application No. 7 of 2016.

Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 Others [2014] eKLR.

Michael Sistu Mwaura Kamau v Ethics & Anti-Corruption Commission & 4 Others, Civil Appeal (Nairobi) No. 102 of 2016.

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

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

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

NHIF v Meridian, Anti-Corruption Court (Nairobi) Anti-Corruption Case No.12 of 2013.

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

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

Republic v County Government of Mombasa Ex-Parte Outdoor Advertising Association of Kenya [2014] eKLR.

Republic v Grace Sarapay Wakhungu, John Koyi Waluke and Erad Supplies & General Contracts Limited, Anti-Corruption Court (Nairobi) Anti-Corruption Criminal Case No 31 of 2018.

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) & 6 Others, High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 378 of 2017.

Republic v Judicial Commission of Inquiry into the Goldenberg Affair & 2 Others Ex Parte George Saitoti [2006] eKLR.

Republic v Public Procurement Administrative Review Board & 2 others Ex Parte MIG International Limited & Another, Miscellaneous Application No. 356 & 362 of 2015(Consolidated).

Republic v Public Procurement Administrative Review Board & another Ex parte SGS Kenya Limited, High Court of Kenya (Nairobi) Judicial Review Miscellaneous Application 496 of 2017.

Roben Aberdare (K) Limited v Kenya Rural Roads Authority, Review Board Application No. 11 of 2017.

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

Simba Pharmaceuticals Limited & another v Public Procurement Administrative Review Board & Another, High Court of Kenya (Nairobi) Miscellaneous Civil Application 185 of 2017.

LIST OF STATUTES

Kenyan Statutes

The Anti-Corruption and Economic Crimes Act, 2003.

The Constitution of Kenya, 2010.

The Ethics and Anti-Corruption Commission Act, 2011.

The Elections Act, 2011.

The Leadership and Integrity Act, 2012.

The Office of the Director of Public Prosecutions Act, 2013.

The Penal Code.

The Public Officer Ethics Act, 2003.

The Public Procurement and Asset Disposal Act, 2015.

The Public Service (Values and Principles) Act, 2015.

South African Statutes

The Broad-Based Black Economic Empowerment Act, 2003.

The Prevention and Combating of Corrupt Activities Act, 2004.

LIST OF STATUTORY INSTRUMENTS

The Anti-Corruption and Economic Crimes (Amendment) Bill, 2019.

The Lifestyle Audit (No.2) Bill, 2019.

The Preferential Procurement Regulations, 2017.

The Public Procurement and Asset Disposal Regulations, 2020.

The Public Procurement and Disposal Regulations, 2006.

The Public Procurement (Preferences & Reservations) Regulations, 2011.

LIST OF POLICY INSTRUMENTS

Government of Kenya, ‘Sessional Paper No.3 of 2013 on National Values and Principles of Governance’ (Government Printer 2013).

LIST OF ABBREVIATIONS

ACECA	Anti-Corruption and Economic Crimes Act, 2003.
COA	Court of Appeal.
CoK	Constitution of Kenya, 2010.
CORD	Coalition for Reforms and Democracy.
DCI	Director of Criminal Investigations.
EACC	Ethics and Anti-Corruption Commission.
ERC	Energy Regulatory Commission.
IEBC	Independent Electoral and Boundaries Commission.
NASA	National Super Alliance.
NVPG	National Values and Principles of Governance.
ODPP	Office of the Director of Public Prosecutions.
PP&ADA	Public Procurement and Asset Disposal Act, 2015.
PPRA	Public Procurement Regulatory Authority.

ABSTRACT

The promulgation of the 2010 Constitution was a major milestone towards realizing good governance in Kenya. Article 10 of the Constitution outlines national values and principles of governance that ought to permeate public processes in Kenya. Specifically, article 10 enjoins state organs, state officers, public officers and every other person to comply with national values whenever any of them is applying or interpreting the Constitution, enacting, applying or interpreting any law or when making or implementing public policy decisions.

To institutionalize good governance in public purchasing, the Public Procurement and Asset Disposal Act, 2015 expressly requires that national values guide public procurement in Kenya. Although the provision in the 2015 Procurement Act is arguably unnecessary, it is an indication of Kenya's aspirations for good governance in public procurement which has been stifled by endemic graft. Although the enactment of article 10 of the 2010 Constitution heralded a new governance order in public administration generally, corruption remains stubbornly entrenched in public procurement in Kenya. The rampant corruption that characterizes public procurement in Kenya demonstrates the dominance of values that are not in harmony with those outlined in article 10.

The central question guiding this study is why the enactment of article 10 has failed to eradicate corruption and other related problems in public tendering in Kenya. The study critically examines the challenges hindering the realization of article 10 in public procurement decision-making in Kenya. The study focuses on the statutory and institutional challenges that have impeded the implementation of article 10 in public procurement in Kenya. The study also recommends mechanisms to entrench and enhance NVPG in public procurement processes in Kenya.

Ten years since the promulgation of the Constitution, little academic effort has been deployed towards interrogating why article 10 has failed to forestall corruption and other types of malfeasance in public procurement. Thus, this study makes a beneficial contribution to the existing body of knowledge. Addressing the challenges facing the entrenchment of article 10 in public procurement processes will be beneficial in tackling corruption and other associated problems in public procurement in Kenya. The study utilizes doctrinal research methodology.

CHAPTER ONE: INTRODUCTION

1.1 Background and Context

Kenya's decision to promulgate the Constitution of Kenya, 2010 (hereinafter, 'CoK') was a turning point in the reform agenda of public procurement. To begin with, public procurement was accorded constitutional status by dint of article 227. Article 227(1) requires state organs and public entities to contract in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.¹

Further and to institutionalize good governance in the public service, article 10 of the CoK espouses the expected behavior in the public service in Kenya. Article 10(1) requires state organs, state officers, public officers and every other person to adhere to the national values and principles of governance (hereinafter, 'NVPG') when applying or interpreting the Constitution, enacting, applying or interpreting any law or when making or implementing public policy decisions.²

The NVPG include patriotism, national unity, sharing and devolution of power, the rule of law, democracy, the participation of the people, human dignity, equity, social justice, inclusiveness,

¹ Article 227(2) instructs the Kenyan parliament to pass legislation to cover categories of preference in a tender award, protection of disadvantaged groups and sanctions against unprofessional contractors, tax defaulters and those guilty of employment law violations.

² CoK.

equality, human rights, non-discrimination, protection of the marginalized, good governance, integrity, transparency and accountability and sustainable development.³

To demonstrate the significance of NVPG, the CoK has referred to the values and principles in a number of its provisions⁴ along with setting up various commissions to champion the attainment of NVPG in public administration.⁵ Moreover, article 132(1) (c) places an obligation on the President of Kenya to report, during his annual national address, measures taken and progress attained to realize the NVPG.

The provisions of article 10 were enacted as a response to Kenya's past and present vices such as corruption, impunity, authoritarianism, appalling poverty, contempt for the rule of law, acquisition of illegitimate wealth by any means and other vices.⁶ The new governance order enshrined in article 10 provides the moral code to guide each person's choices, actions and behavior.⁷ It is anticipated that the assimilation of NVPG in all spheres of Kenya's society will lead to the realization of socio-cultural, economic and political change.⁸

³ *ibid*, Article 10(2).

⁴ They include articles 4(2), 132 (c) (i) and (ii), 234 (2) (c), 249(1) (b). Various provisions in the constitution emphasize at least one NVPG.

⁵ These commissions include the Kenya National Human Rights and Equality Commission, Independent Electoral and Boundaries Commission, Commission on Revenue Allocation and the Public Service Commission.

⁶ Yash Pal Ghai, 'What are National Value and Principles for?' *Standard Digital* (Nairobi, 16 October 2011) < <https://www.standardmedia.co.ke/article/2000044908/what-are-national-value-and-principles-for> > accessed 25 April 2020.

⁷ Njuguna Humphrey Kimani, 'Political Patronage in the Operationalization of Public Procurement Law in Kenya' (DPhil thesis, University of Nairobi 2017).

⁸ Kenya Institute for Public Research and Analysis, 'Report on the Status of National Values and Principles of Governance in Kenya, 2015' (Abridged Version S.P No. 16/2017, April 2017) < <https://www.must.ac.ke/wp-content/uploads/2019/12/Status-of-National-Values-and-Principles-of-Governance-2015-Popular-Version.pdf> > accessed 25 April 2020.

To align the legislative framework for public procurement with the Constitution, the Public Procurement and Asset Disposal Act, 2015 (hereinafter, 'PP&ADA') was passed into law.⁹ In that respect, article 10 was embedded in Section 3 (a) of the PP&ADA as guiding principles in public procurement.¹⁰ Additionally, under the PP&ADA the Public Procurement Regulatory Authority (hereinafter, 'PPRA') is tasked with monitoring, assessing and reviewing the public procurement system to make certain that it respects NVPG, article 227 and other constitutional provisions and to make recommendations for improvement.¹¹ Other enabling laws and policies to foster the realization of NVPG include the Public Officer Ethics Act, 2003¹², the Public Service (Values and Principles) Act, 2015¹³, the Leadership and Integrity Act, 2012¹⁴ and the National Values and Principles of Governance Policy Sessional Paper No. 8 of 2013 among others.

Despite these positive gains in public procurement in Kenya, corruption-related scandals loom large in government contracting occasioning the country loss of billions of shillings in public funds. These scandals include *inter alia* the National Youth Service, National Land Commission, the Irrigation Board, National Cereals and Produce Board, Standard Gauge Railway and more recently the Kenya Medical Supplies Authority scandal.¹⁵ The rampant corruption characterizing public procurement is a manifestation of a failure in the entrenchment of the spirit and letter of article 10 in public procurement decision-making.

⁹ Act No. 33 of 2015.

¹⁰ The essence of the PP&ADA is to operationalize article 227 of the CoK and to lay down procedures that will enhance efficiency in public procurement and assets disposal in Kenya.

¹¹ PP&ADA, Section 9.

¹² Act No. 4 of 2003.

¹³ Act No. 1A of 2015.

¹⁴ Act No.19 of 2012.

¹⁵ *NHIF v Meridian*, Anti-Corruption Court (Nairobi) Anti-Corruption Case No.12 of 2013, *Republic v Judicial Commission of Inquiry into the Goldenberg Affair & 2 Others Ex Parte George Saitoti* [2006] eKLR.

1.2 Statement of the Problem

Although the enactment of article 10 of the CoK heralded a new governance order in the public service, nevertheless corruption remains deeply entrenched in public procurement in Kenya. The rampant cases of corruption and their recurrence in public procurement demonstrate the dominance of values that are in dissonance with those outlined in article 10. What remains unknown is why article 10 does not seem to have an impact on public procurement decision-making in Kenya. This study explores this unknown.

1.3 Objectives

The overall objective of this study is to establish the challenges facing the implementation of NVPG in public procurement in Kenya. The study will explore the following specific objectives:

1. To establish the effect of weaknesses of the public procurement law on the implementation of NVPG in public procurement in Kenya.
2. To examine the effect of institutional failures on the implementation of NVPG in public procurement in Kenya.

1.4 Research Questions

This study answers the following questions:

1. What is the effect of weaknesses of the public procurement law on the implementation of NVPG in public procurement in Kenya?
2. What is the effect of institutional failures on the implementation of NVPG in public procurement in Kenya?

1.5 Hypotheses

The study is based on two key hypotheses. The first is that weaknesses of the public procurement law have worked against the implementation of NVPG in the public procurement system in Kenya. The second is that institutional failures have derailed the implementation of NVPG in the public procurement system in Kenya.

1.6 Theoretical Framework

This study will rely on two theories namely; sociological approaches to the law and utilitarianism.

1.6.1 Sociological Approaches to the law

A wide range of studies has influenced this school of thought. It is for that reason that it is difficult to identify a central proposition of the sociological school of jurisprudence.¹⁶ However, one can identify a number of ideas in the thinking of those who adopt this school of thought.¹⁷

Sociological jurisprudence has roots in the historical school of jurisprudence.¹⁸ Thus, sociological jurists believe that an inquiry about the law ought to examine the sociological origin of the law and legal institutions.¹⁹ However whereas the historical school contends that law originates from the mere human consciousness of the society, sociological jurists believe that law

¹⁶ M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence* (9th edn, Sweet & Maxwell 2014) 701.

¹⁷ The major proponents of this school are Von Jhering, Eugene Ehrlich, Roscoe Pound and Leon Duguit among others

¹⁸ Omony John Paul, *Key Issues in Jurisprudence: An In-depth Discourse on Jurisprudence Problems* (1st edn, Law Africa 2013) 85.

¹⁹ *ibid* 85.

originates from social factors obtaining in society.²⁰ Essentially, the import of sociological origin of the law is that law has social roots and each society must enact laws that align with its goals.²¹

The sociological approach to the law focuses on the workings or operations of the law rather than its abstract content.²² According to sociological jurists, the law must be studied in action and not in textbooks.²³ In this regard, Roscoe Pound contends that a distinction must be made between “law in books” and “law in action”.²⁴ He further contends that often there is tension between the two.²⁵ Eugene Ehrlich, on the other hand, propounds that the actual source of the law is societal activities, not statutes or case law.²⁶ According to him, a “living law” underlies the formal rules of a legal system and the task of a judge or jurist is to assimilate these two laws.²⁷

The sociological school treats the law as a social phenomenon.²⁸ It is concerned with the actual effect of legal doctrine and institutions on society.²⁹ Sociological jurists encourage reliance upon the social sciences in studying the place of law in society and the means to make it more effective in action.³⁰ According to sociological jurisprudence, the law is validated by social criteria.³¹

²⁰ *ibid* 85-86. The idea of the social origin of the law is particularly associated with Von Jhering.

²¹ *ibid*

²² Freeman (n 16) 701.

²³ *ibid*.

²⁴ Raymond Walks, *Understanding Jurisprudence: An Introduction to Legal Theory* (3rd edn, Oxford University Press 2012)164.

²⁵ *ibid*.

²⁶ Freeman(n 16) 713.

²⁷ *ibid*.

²⁸ Paul (n 18) 87.

²⁹ *ibid*.

³⁰ Freeman (n 16) 715.

³¹ Paul (n 18) 89

Sociological jurists contend that the law exists to encourage conduct that furthers social solidarity and to prevent conduct that hinders it.³² They argue that law is invalidated when acts done to validate it cause social disorder in which case a spontaneous action is necessary towards re-adjustment.³³ The main critics of the sociological school of law are legal positivists who claim that the analysis of legal concepts should be distinguished from sociological inquiries.³⁴

In sum, sociological jurisprudence is concerned with the workings and effect of the law in society. The import of the studies on the operation of the law in society is that where the law is not effective in action measures can be taken to make it more effective. This approach to the study of law lends credence to this study. Article 10 was enacted to improve governance in public processes including public procurement. Thus far, it has failed to forestall corruption in public procurement. It is evident that article 10 is not effective in action. It is, therefore, necessary to interrogate the reasons why article 10 has failed to achieve its intended purpose as envisioned by the CoK, to find solutions towards making it more effective.

1.6.2 Utilitarianism

Utilitarianism is a theory in moral philosophy employed as a critical tool for evaluating actions, laws, policies, governments, and institutions.³⁵ The theory developed as a radical ideology for

³² *ibid*

³³ *ibid*

³⁴ *ibid* 210

³⁵ Charles Osifo, 'Evaluating Governance and Management in Africa: A Utilitarian Approach' (2015) Public Management Working Papers 8, 2<https://www.univaasa.fi/materiaali/pdf/isbn_978-952-476-599-2.pdf> accessed 20 April 2020.

advocating and implementing reforms whose consequence was pleasure, happiness and well-being of citizens.³⁶The premise of utilitarianism is two-pronged, welfarism and consequentialism.³⁷ The welfarism proposition places societal well-being above all else and consequentialism is the view that what is morally good or not is judged by its consequences.³⁸

The main proponents of utilitarianism are Jeremy Bentham and John Stuart Mill. Bentham, drawing from Thomas Hobbes' exposition of human nature and David Hume's exposition of social utility, stated that humans were either ruled by pleasure and pain, and as a matter of instinct, man will always seek pleasure and avoid pain.³⁹ According to him, the greatest happiness of the greatest number is the determinant of right and wrong.⁴⁰

John Stuart Mill, an admirer of Bentham, expounded and enriched Bentham's work especially on the concept of happiness. According to Mill, some qualitative pleasures were better than others but to Bentham there were no dissimilarities between qualitative pleasures, only between quantitative ones.⁴¹ Generally, however, utilitarianism approves acts that advance happiness or pleasure and rejects those that tend to cause unhappiness or pain.⁴²

³⁶ *ibid.*

³⁷ William H. Shaw, 'Contemporary Criticisms of Utilitarianism: A Response' in Henry R. West (ed), *The Blackwell Guide to Mill's Utilitarianism* (Blackwell Publishing 2006).

³⁸ *ibid.*

³⁹ Julia Driver, 'The History of Utilitarianism' (*The Stanford Encyclopedia of Philosophy*, 22 September 2014) < <https://plato.stanford.edu/entries/utilitarianism-history/> > accessed 20 April 2020.

⁴⁰ Jeremy Bentham, *A fragment on government* (Cambridge University Press 1776) 1 cited in Eric Kariuki, 'Application of Therapeutic Jurisprudence: A Different Approach to Punishment in Kenya' (2017) 2 *Strathmore Law Review* 39.

⁴¹ Driver (n 39).

⁴² Will Kenton, 'Utilitarianism Defined' (*Investopedia*, 13 March 2018) < <https://www.investopedia.com/terms/u/utilitarianism.asp> > accessed 20 April 2020.

One of the main criticisms of utilitarianism is that justice and fairness are not always achieved in the greatest happiness of the greatest number. John Rawls an ardent defender of justice, states that every person enjoys an inviolability that is rooted in justice that even societal welfare cannot supersede.⁴³ It is on this premise that Kenyan law gives protection to special categories of persons such as women, disabled persons, youth and other special groups.

However, whereas indeed, certain actions or laws intended to generate the greatest happiness of the greatest number may not always translate to justice, this is not the case with article 10. Article 10 was enacted to foster efficiency and efficacy in the utilization of public resources thereby enhancing the well-being of Kenyans. Utilitarianism as a theory, advocates for rules and actions that maximize the happiness and well-being of society. This theory explains why there is a need to interrogate the obstacles to the realization of NVPG in public procurement in Kenya.

Public purchasing is integral to the government's provision of essential goods and services and therefore good governance of government procurement resources is especially necessary. Effective distribution of essential goods and services can improve the well-being of many Kenyans thereby maximizing happiness for a greater number of Kenyans. Effective implementation of article 10 in public purchasing will contribute to the efficient use of public procurement funds. Identifying and addressing the obstacles to the assimilation of article 10 in public procurement is a worthwhile academic effort.

⁴³ John Rawls, *A Theory of Justice* (Revised edn, Harvard University Press 1999) 3.

1.7 Literature Review

The study undertook a review of the accessible literature on the area of the study. The review demonstrated that many scholars have focused their academic efforts on interrogating the challenges hindering the implementation of public procurement law generally. There is still sparse literature depicting the challenges inhibiting the actualization of article 10 in public procurement. The literature review has been presented in two parts. The first part addresses the challenges in the implementation of article 10 in public procurement. The second part explores challenges in the implementation of public procurement law in Kenya.

1.7.1 Challenges in Implementation of Article 10 in public procurement

Njuguna Humphrey Kimani contends that effective implementation of public procurement law is dependent on both the intra-system (laws, policies and institutions) and the outer-system (political environment).⁴⁴ He however argues that the legal, policy and institutional framework for public procurement in Kenya present minor challenges to the operations of the public procurement regulations. According to him, the political environment within which the regulations work is the major culprit in the effective operationalization of public procurement regulations in Kenya.

He submits that even though the Constitution vide article 10 entrenches a moral philosophy in the legal order, nevertheless political patronage remains a serious influence on the operations of the public procurement laws and institutions. He argues that political patronage manifests itself through corruption and is the unseen hand in the major scams in the public purchasing sector in

⁴⁴ Kimani (n 7).

Kenya. He concludes that the public procurement law has failed to deliver its objectives as a result of political patronage.

To manage the problem of political patronage, his study recommends *inter alia* the alignment of the political leadership with the prescriptions of article 10 and Chapter 6 of the CoK. His study also recommends that parliament passes new laws to make political patronage associated corruption more severe including attaching a death to such offences. His study also proposes that since leaders are the product of their environment, the Kenyan society should affirm desirable values and dissuade undesirable influences. This can be done through training programs, a societal code of conduct, ethical committees and a system of rewards and punishment.

This study is in agreement with Kimani's arguments that political patronage has worked against the entrenchment of article 10 and Chapter 6 of the CoK in public procurement. However, the study mainly focuses on the political environment and fails to examine the effect of the shortcomings of the legal and institutional framework on the actualization of article 10 in public tendering in Kenya. This study intends to fill that gap by critically analyzing the shortcomings in the legal and institutional framework for public procurement and their effect on the realization of article 10 in public procurement in Kenya.

Similarly, Solomon Kyalo Mutangili examines the challenges facing the effective implementation of procurement law in Kenya.⁴⁵ He observes that Kenya has enacted adequate laws to guide the public procurement process. According to him, public procurement law in Kenya constitutes primarily of the constitutional prescriptions under articles 10, 227, 232 and

⁴⁵ Solomon Kyalo Mutangili, 'The Influence of the Public Procurement Law on the Market Economy in Kenya' (2021) 5(1) Journal of Procurement & Supply Chain 13.

Chapter 6 of the CoK as well as the PP&ADA. He, therefore, submits that the persistent problems in public procurement are not due to the absence of laws but misconduct by procurement personnel who are the decision-makers in the procurement processes. Accordingly, public procurement problems cannot be cured by further legislation but by providing incentives, both negative and positive, geared towards aligning the conduct of public procurement agents with the public interest.

Mutangili attributes the persistent misconduct by procurement personnel to the failure by the political leadership to assert authority in ensuring that allocations are used effectively and that procurement officers have the incentive to apply public resources well. He concludes that the ineffectiveness of Kenya's public procurement law is a political problem and not a legal problem. He proposes that the solution lies in enhancing enforcement of incentives, both positive and negative, not in enacting new laws.

Mutangili makes good arguments in advocating for incentives, both negative and positive, as a means of curbing procurement malpractices. However, the scholar has attributed the failure in the effective implementation of article 10 and other public procurement laws to political leadership only. He fails to interrogate other broader issues such as the legal and institutional framework for public procurement and how the same has impacted the achievement of article 10 in public procurement decision-making. This failure in Mutangili's study represents a gap in his study that the present study intends to fill.

Muthomi Thiankolu examines the regulatory challenges relating to the interplay of economic and social objectives and abuse of discretion.⁴⁶ He submits that Kenya's regulatory framework for public procurement is imbued with conflictual coexistence of economic and social objectives. Economic objectives place great emphasis on efficiency which connotes prudent use of scarce economic resources. Social objectives on the other hand transcend economic concerns of efficiency and tend to focus on *inter alia* social and environmental equity.

He further submits that Kenya's regulatory framework for public procurement fails to enable the resolution of the conflict between social and economic objectives. It simply prescribes certain safeguards against abuse of social objectives, which safeguards cannot prevent economic inefficiencies. The conflicting policy goals have resulted in public procurement outcomes that are economically efficient but socially undesirable and vice versa. To address the problem of conflictual coexistence of economic and social objectives, he proposes a holistic approach to public procurement decision-making rather than a choice between superior and inferior.

According to Thiankolu, the problem of conflictual coexistence of economic and social objectives is compounded by the poorly circumscribed discretion conferred to procurement officers by the public procurement laws. The wide discretionary powers enable the procurement officers to decide the extent to which procurement can be used as an economic or social tool. He observes that the broad discretion granted to procurement officials creates inducements for corruption and other kinds of malfeasance in government procurement in Kenya. He further

⁴⁶ Muthomi Thiankolu, 'Balancing Economic and Social Objectives in Public Procurement in Kenya: A Review of the Law, the Policy and the Practice' (DPhil thesis, University of Nairobi 2020).

observes that abuse of discretion has undermined the achievement of social and economic objectives and the realization of constitutional precepts such as NVPG. He proposes a rule-based approach to public procurement regulation to control discretion. He also proposes Kenya should also adopt an appropriate and effective regime of sanctions to prevent abuse of discretion.

The study under review was useful in analyzing how broad discretion powers conferred on procurement officers have contributed to the failure in the actualization of article 10 in public procurement in Kenya. The discussions on the interplay between economic and social objectives were also useful in analyzing how the implementation of certain social policies is detrimental to good governance. The author's arguments for a stringent regime of sanctions align with the present study's argument for stronger accountability mechanisms. This study however extended beyond the discussions in Thiankolu's study that contributed to this study. The present study provided a critical analysis of the broader challenges hindering the implementation of article 10 in government procurement in Kenya.

1.7.2 Challenges in the implementation of public procurement law in Kenya

A wide range of literature has focused on the challenges faced in the implementation of public procurement laws generally. Wanyonyi, Makokha and Namusonge are of the view that the enactment of PP&ADA was a positive step in Kenya's development agenda and was intended to streamline the public procurement process. However, the implementation of the Act remains unsatisfactory as the public procurement processes continue to be marred by numerous

problems.⁴⁷ They attributed the failure in the effective implementation of the PP&ADA to a lack of competent personnel.

According to them, Kenya lacks personnel who are skilled and knowledgeable on procurement matters, rules and regulations. They assert that procurement officials' awareness of the PP&ADA, coupled with clear knowledge of procurement rules and regulations enhances the implementation of the PP&ADA. Thus, procurement personnel competence impacts positively on implementation of the PP&ADA in public institutions in Kenya. They propose enhanced training of procurement officers to enhance the success in the implementation of the PP&ADA in public entities in Kenya.

The arguments in the study under review align with the present study's arguments that sufficient knowledge and understanding of procurement regulations enhance the effective implementation of PP&ADA. Article 10 being part of PP&ADA by virtue of Section 3, the arguments in the study under review apply to this study. However, the discussions in the present study are specifically focused on the challenges impeding the realization of article 10 in public purchasing in Kenya. Unlike the study under review, the present study also provides an in-depth analysis of how the inadequacy of legal knowledge and skills among procurement officers affects the implementation of article 10 in public procurement processes in Kenya. Further, the present

⁴⁷ Phanice Lumonya Wanyonyi, Elizabeth Nambuswa Makokha and Gregory S. Namusonge, 'Factors Influencing the Implementation of the Public Procurement and Asset Disposal Act 2015: A Case of Public Institutions in Trans-Nzoia West Sub- County in Kenya' (2018) 5(3) International Journal of Recent Research in Social Sciences and Humanities 68.

study also analyses broader challenges impeding the implementation of article 10 in public procurement in Kenya.

Solomon Kyalo Mutangili examines the challenges affecting compliance with public procurement regulations in Kenya.⁴⁸ He contends that the presence of adequate regulatory and institutional framework for public procurement has not fostered compliance with public procurement laws. He asserts that the public tendering process has been marred by corruption, incompetence of procurement officers and non-compliance with the law. He opines that the outlined sanctions and penalties outlined in the PP&ADA have failed to curb corruption and related problems in public procurement. According to him, low compliance levels affect the effective operationalization of public procurement regulations.

He submits that the factors inhibiting compliance with public procurement laws include poor enforcement by the enforcement bodies and deficient staff training and awareness of procurement procedures. He contends that the procurement personnel in many procuring entities lack adequate knowledge of the public procurement legal framework, principles, and procedures. He further contends that the few who have extensive knowledge of public procurement regulations take advantage of the loopholes in the regulation. Thus, the failure by the relevant enforcement bodies to prosecute unscrupulous suppliers and procurement officers has also contributed to the low levels of compliance with public procurement rules.

⁴⁸ Solomon Kyalo Mutangili, 'Challenges Influencing Compliance to Public Procurement Regulations in Kenya' (2021) 5(1) *Journal of Procurement & Supply Chain* 24.

To improve conformity with public procurement regulations he proposes procurement capacity development through dynamic and continuous training. He further proposes strict enforcement of the law by the relevant enforcement agencies. Although the present study aligns with the arguments of the study under review, the study under review interrogates the challenges hindering adherence to the wider public procurement regulations. The present study critically and specifically interrogates the challenges hindering the realization of article 10 in public procurement in Kenya.

Jackson Njoroge & Edith Ngugi sought to examine the challenges facing the implementation of public procurement regulations in Kenya.⁴⁹ They contend that regulated public procurement is crucial to Kenya's economic growth. They observe, however, that implementation of public procurement laws is poor in Kenya. Their study identifies four main challenges hindering the implementation of Kenya's public procurement regulations as inadequate funding of public procurement institutions, staff incompetence, poor leadership and non-adherence to public procurement law.

The study recommends severe penalties to enhance adherence to public procurement laws, increased funding for public procurement institutions such as PPRA to improve their operations and capacity development through training of procurement officers. This is another study that looks at the challenges facing the wider public procurement regulations. The present study focuses its discussions on the obstacles to the implementation of NVPG in public procurement.

⁴⁹ Jackson Njoroge and Edith Ngugi, 'Challenges Facing Implementation of Public Procurement Regulations in Public Institutions in Kenya: A Case of Nairobi City County Government' (2016) 4(4) International Journal of Business & Law Research 1.

The present study unlike the study is comprehensive in its analysis of the challenges hindering the actualization of article 10 in public procurement in Kenya.

Gathu Charles Njuki examines the challenges facing the implementation of PP&ADA in light of the CoK.⁵⁰ He submits that Kenya has made great strides in reforming her public procurement laws with the PP&ADA finally finding anchorage in the CoK. He observes that despite the milestones of the public procurement legal regime in Kenya, effective implementation of public procurement laws in Kenya still faces challenges in their implementation. According to him, the challenges include the unconstitutionality of certain provisions of the PP&ADA, weak institutions, widespread corruption, lack of political goodwill, a culture of impunity and disrespect for the rule of law. The continued presence of these challenges has played a part in the prevalence of scandals in government procurement in Kenya.

He proposes *inter alia* aligning the PP&ADA with the CoK, strengthening of institutions through adequate funding and enhanced autonomy, sanctioning of public procurement law violators, harmonization of the “law in books” with “the law in action” and vetting of public procurement participants.⁵¹ The present study agrees with the arguments in the study under review. However, like the foregoing studies, Njuki’s study emphasizes the challenges facing the implementation of PP&ADA.

⁵⁰Gathu Charles Njuki, ‘The Challenges Facing Implementation of the Public Procurement Law in Light of the Constitution of Kenya 2010’ (Master’s Thesis, University of Nairobi 2018).

⁵¹ *ibid.*

From the foregoing review, it can be extrapolated that studies conducted on the various aspects of this study were mainly focused on the obstacles to the implementation of the wider public procurement regulations. There is negligible literature on the challenges impeding article 10 implementation in public procurement decision-making in Kenya. This study intends to fill that gap.

1.8 Justification

The widespread corruption and other related problems in public procurement are indicative of the fact that article 10 has failed to achieve its intended purpose of fostering good governance in public administration. However, little academic effort has been deployed towards interrogating the role played by article 10 in the implementation of public procurement law in Kenya. There is scanty research on the challenges impeding the realization of article 10 in public procurement processes in Kenya. This study supplements the existing body of knowledge.

1.9 Research Methodology

This study utilizes doctrinal research methodology. Doctrinal research involves the use of primary and secondary sources of data to answer legal propositions or questions and has a narrow scope not needing fieldwork.⁵² The data collection method is therefore suitable as the study seeks to investigate the challenges impeding the realization of article 10 in public procurement decision-making in Kenya.

⁵² Debashree Chakraborty, 'Empirical (Non-Doctrinal) Research Method and its Role in Legal Research' (2015) 3 (1) Int. J. Ad. Social Sciences 23.

The primary and secondary data relied upon include the Constitution, legislation, case law, policy documents, textbooks, scholarly journals and articles, theses, peer-reviewed papers, web-based publications, government publications, reports and newspapers. Only relevant sources with information relevant to the research were selected and reviewed.

1.10 Scope and Limitations

Various challenges face the implementation of article 10 in public procurement processes in Kenya. This study only focuses on the regulatory and institutional challenges. Time and resource constraints proved difficult to conduct fieldwork. However, there exist adequate resources to enable the author to undertake conclusive desktop research on the topic.

1.11 Chapter Breakdown

This study has four chapters.

Chapter 1: Introduction.

Chapter one introduces the study. It sets forth the background of the study, statement of the research problem, research questions, research objectives, research hypothesis, justification of the research, the theoretical framework that informs the research to be carried out, literature review, research methodology to be adopted, anticipated limitations of the study and chapter outline.

Chapter 2: The Effect of Weaknesses of the Public Procurement Law on Implementation of Article 10 in Public Procurement

Chapter two reviews the shortcomings in the public procurement laws which have hindered the integration of NVPG in public procurement processes in Kenya.

Chapter 3: The Effect of Institutional Failures on Implementation of Article 10 in Public Procurement

Chapter three examines the various institutional failures and how they derail the realization of NVPG in public procurement processes. The discussions in this chapter will focus on the key institutions tasked with the responsibility of implementing and enforcing NVPG in public procurement.

Chapter 4: Conclusion and Recommendations

Chapter four embodies the summary of the study, its conclusion and recommendations on how to entrench and enhance article 10 in the public procurement processes in Kenya.

CHAPTER TWO: THE EFFECT OF WEAKNESSES OF THE PUBLIC PROCUREMENT LAW ON THE IMPLEMENTATION OF ARTICLE 10 IN PUBLIC PROCUREMENT

2.1 Introduction

This chapter investigates how the weaknesses in the public procurement law in Kenya have been instrumental in hindering the actualization of NVPG in public procurement processes in Kenya. The chapter focuses on four main statutory weaknesses namely: broad discretionary authority, conflicts between the PP&ADA and article 10, weak and ineffective accountability mechanisms, and lack of integrity vetting mechanisms.

2.2 Broad discretionary authority

One of the major setbacks to the realization of NVPG in public tendering processes in Kenya is the broad discretionary authority conferred on public procurement officers in Kenya. Discretion is the power to decide between courses of action or where an end has been specified, a choice exists on how to achieve that end.⁵³ In legal contexts, discretion entails according to state officials the authority to determine the course of action in specific circumstances.⁵⁴ With respect to public procurement, procurement officials are given the freedom to decide on the course of action in certain procurement circumstances without legal restrictions.⁵⁵

⁵³ P.P. Craig, *Administrative Law* (2nd edn, Sweet & Maxwell 1989) 280.

⁵⁴ Albert Sidney Hornby, *Oxford Advanced Learner's Dictionary: International Student's Edition* (8th edn, Oxford University Press 2010) 416.

⁵⁵Thiankolu (n 46).

The PP&ADA grants wide discretionary powers to procurement officials with regard to certain major decisions relating to public procurement, without providing mechanisms to circumscribe the exercise of those powers.⁵⁶ The exercise of broad discretionary authority by public procurement officers in Kenya has resulted in procurement processes and outcomes that do not uphold article 10 values as they are characterized by widespread corruption and associated problems.

To illustrate, the PP&ADA confers wide discretionary powers with regard to the method to be employed for public procurement.⁵⁷ Although the Act provides clear rules on the circumstances under which the various methods of tendering may be used, the choice of the procurement methods usually involves some element of discretion on the part of procurement officers. This discretion presents opportunities for abuse.

For instance, in *Republic v Independent Electoral and Boundaries Commission (I.E.B.C) Ex parte National Super Alliance (NASA) & 6 Others*, it was evident that the Independent Electoral and Boundaries Commission (hereinafter, 'IEBC') engaged in dilatory conduct by mismanaging the procurement process for electoral materials.⁵⁸ IEBC's objective was to generate a situation where it would be urgent to procure the said electoral materials for the 2017 general elections.⁵⁹ The urgency situation would then justify the need to resort to direct procurement to award the

⁵⁶ *ibid.*

⁵⁷ PP&ADA, Sections 96-114.

⁵⁸ High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 378 of 2017.

⁵⁹ *ibid.*

tender to Al-Ghurair Printing & Publishing LLC (hereinafter, ‘Al Ghurair LLC’), a pre-determined tenderer.⁶⁰

The High Court held that the IEBC had failed to facilitate sufficient public participation and directed IEBC to commence *de novo* the procurement of election materials for the Presidential elections.⁶¹ This case demonstrates how discretionary powers can be used to undermine the spirit and letter of article 10 by facilitating malfeasance, fraud and partisanship in the public procurement process. Further, apart from violating the national value and principle of public participation, the tender process breached various NVPG.

To explain, although the PP&ADA permits procuring entities to use the direct method of procurement in urgency situations, the circumstances provoking the urgency ought not to have emanated from the procuring entity’s dilatory conduct.⁶² Thus, sabotaging the procurement process to create an urgent situation amounted to disregard for the rule of law. The rule of law, fundamentally, demands that government officers and citizens act according to the law.⁶³

⁶⁰ *ibid.* See also *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, *Al Ghurair Printing and Publishing LLC v Coalition for Reforms and Democracy & 2 Others*, Civil Appeal (Nairobi) No. 63 of 2017, *Cecil James Oyugi v Public Procurement Administrative Review Board & Another*, High Court of Kenya (Nairobi) Constitutional Petition No. 241 of 2017 for more information on the 2017 elections ballot paper printing tender. In the latter case, the petitioner contended that the procurement process instituted by IEBC was flawed and had violated various constitutional provisions including article 10 on NVPG. The Petitioner further argued that IEBC had “set out to frustrate the procurement process in order to justify single sourcing” for the election materials. The Petitioner requested the court to restrain IEBC from awarding the procurement contract by way of the direct tendering method. Although the court agreed that the procurement process carried out by IEBC was flawed as was observed by the Public Procurement Administrative Review Board, the court observed that the Petitioner’s allegations that IEBC intended to single source for the election materials were purely speculative at that stage. The court however cautioned the IEBC against deliberately setting out “to frustrate the will of the Kenyans in an elective process by undertaking its work in a shoddy manner”.

⁶¹ High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 378 of 2017.

⁶² PP&ADA, Section 103(2) (b).

⁶³ Brian Tamanaha, ‘A Concise Guide To The Rule Of Law’ (2007) St. John's Legal Studies Research Paper Series 07-0082, 3 <<https://content.csbs.utah.edu/~dlevin/conlaw/tamanaha-rule-of-law.pdf>> accessed 10 August 2021.

Further, it was evident that the conduct of IEBC in the procurement process was geared towards awarding a preferred candidate to the exclusion of others. The partisanship displayed by IEBC amounted to discriminatory conduct contrary to articles 10 and 27 of the CoK. Ultimately, the conduct of IEBC compromised the integrity of the procurement process as the procurement process was impaired and unsound.

Coincidentally, the choice of procurement method is important in the actualization of national values in public procurement processes. Of all the methods of procurement provided for under the PP&ADA, the most competitive and also preferred method of public tendering is open tendering.⁶⁴ It is also the most transparent method of tendering. This is attributable to the openness and publicity inherent in open tendering.⁶⁵

The transparency in the open tendering process mitigates integrity risks. Integrity issues such as biased technical specifications, inadequate timelines, abnormally high prices, apparent favouritism, collusive bidding and other integrity violations can easily be detected and challenged in an open public procurement process.⁶⁶ Transparency also facilitates accountability as it creates pressure among public procurement officers to explain the irregularities in the tendering process and in so doing enhances accountability by procurement officials.

⁶⁴ PP&ADA, Section 91.

⁶⁵ Section 96 of the PP&ADA requires the accounting officers of procuring entities to take reasonable steps to bring the invitation to tender to the attention of those who may desire to submit bids where open tendering is used. Publicity and openness are not only limited to invitations to tender but extend to tender opening, bids evaluation and tender award.

⁶⁶ Organisation of Economic Co-operation and Development, *Integrity in Public Procurement: Good Practice from A to Z* (OECD 2007) 22-23.

Moreover, open tendering is the method that upholds all the principles espoused in article 227(1) of the CoK. This is because, by its nature, it fosters fairness, equitableness, transparency, competitiveness and cost-effectiveness of public procurement. Further, article 10 violations are easily monitored and detectable in the open tendering processes because of their transparency. Conversely, article 10 violations often occur when non-transparent methods are used. This explains why most of the major corruption in the public tendering process usually revolves around non-competitive procurement methods.

The PP&ADA also grants public procurement officials wide discretionary powers when it comes to the termination of procurement proceedings. The discretion to terminate procurement proceedings has often been exercised in a manner that disregards and undermines article 10 of the CoK. For instance, in *Republic v Public Procurement Administrative Review Board & another Ex parte SGS Kenya Limited*,⁶⁷ the Energy Regulatory Commission (hereinafter, 'ERC') terminated the tender for the provision of marking and monitoring of petroleum products before notification of the award. ERC terminated the tender on grounds that 'the terms of reference did not include emergent technical requirements.'⁶⁸ Section 63(1) (a) of the PP&ADA empowers procuring entities to terminate tender proceedings before notification of the tender award if the procurement in question has been overtaken by a substantial technological change. Prior to the termination of the tender, the tender evaluation committee had recommended that the contract be granted to SGS Kenya Limited (hereinafter, 'SGS').⁶⁹

⁶⁷ High Court of Kenya (Nairobi) Judicial Review Miscellaneous Application 496 of 2017.

⁶⁸ *ibid.*

⁶⁹ *ibid.*

Aggrieved by the decision of ERC, SGS lodged a complaint with the Public Procurement Administrative Review Board (hereinafter, 'Review Board'). The Review Board dismissed the complaint and allowed ERC to re-advertise the tender.⁷⁰ The tender documents in the re-advertised tender introduced substantially new issues that were not in the initial tender documents and which had little bearing on the emergent technological change.⁷¹ For instance, allowable variations were increased which had the potential of increasing the contract sum.⁷² There was also a drastic reduction of the scoring for staffing which provision would allow bidders with less qualified staff to succeed.⁷³

SGS moved to the High Court on grounds that: (i) Although the PP&ADA permits procuring entities to terminate a tender process where the procurement in question has been overtaken by a substantial technological change, ERC had not provided admissible evidence of a substantial technological change such as a technical report, (ii) the Review Board was in breach of constitutional principles such as NVPG and public finance principles, and (iii) the new issues introduced in the re-advertised tender were meant to favour a specific bidder.⁷⁴

The High Court agreed with SGS contentions and quashed the Review Board's decision. In addition, the High Court directed the ERC to proceed with the initial tender process in conformity with the recommendation of its technical committee.⁷⁵ The High Court relied on

⁷⁰ *ibid.*

⁷¹ *ibid.*

⁷² *ibid.*

⁷³ *ibid.*

⁷⁴ *ibid.*

⁷⁵ *ibid.*

*Avante International Technology Inc v the Independent Electoral and Boundaries Commission*⁷⁶

where it was held that termination of a contract by a procuring entity on technological change ground requires proof more particularly a technical report by technical committee or by persons technically competent to demonstrate the occurrence of technological change.⁷⁷ The Court noted that no material had been adduced by ERC to demonstrate technological change.⁷⁸ The court while noting that the Review Board's decision was in breach of the law aptly stated:

It is my view that the power of discretion to terminate a tender prior to the notification of the tender award is restricted by the law to the said conditions and they must be demonstrated to be present for such a termination to be allowed to stand... What must be borne in mind is that public procurement has a constitutional underpinning as clearly stated in Article 227 and disputes arising from procurement processes are concerned with constitutional rights which include the Right to reasonable expectation once a bidder is successful. In addition, the scheme of the act is such that procurement process must strictly conform to the constitutional dictates of transparency, openness, accountability, fairness and generally the rule of law and such rights cannot be narrowly-construed. And what is more, the public body terminating the tender bears the onus of establishing that the termination meets all these constitutional dictates. In my view, had the Review Board considered the constitutional underpinnings of procurement processes as outlined above, it would have in my view arrived at a different conclusion.⁷⁹

⁷⁶ High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 451 of 2012.

⁷⁷ *ibid*

⁷⁸ *ibid.*

⁷⁹ *ibid.*

The foregoing case demonstrates how the public procurement regulatory framework which grants wide discretionary powers impedes the realization of article 10 in public tendering. First, the cancellation of procurement was in disregard of the rule of law which demands evidence of a substantial change in technology. It was not enough for ERC to just recite Section 63(1). The requirement for evidence is meant to protect bidders from illegal cancellations. By supporting the termination of the procurement proceedings, the Review Board was supporting illegality. Illegality entails acting inconsistently with the prescriptions of the law or its principles as well as the failure to observe explicitly laid down laws.⁸⁰

Second, arbitrary cancellation of procurement based on flimsy grounds was contrary to the national principle of good governance. Arbitrary cancellation of tender increases procurement costs. Good governance demands that public funds be managed carefully and diligently.⁸¹ It further requires that sums allocated for public procurement are utilized for their intended purpose without diversion or wastage.⁸² When procurement funds are used properly, it makes public procurement cost-effective, which is one of the goals of procurement according to article 227(2) of the CoK.

Third, the wide discretionary powers granted to procurement officers to terminate procurement proceedings were used to promote partisanship and bad governance. It was obvious that the introduction of new issues in the re-advertised tender was meant to give a new lease of life to a

⁸⁰ *Republic v Public Procurement Administrative Review Board & 2 Others Ex Parte MIG International Limited & Another*, Miscellaneous Application No. 356 & 362 of 2015(Consolidated).

⁸¹ Jorge Lynch, *Public Procurement: Principles, Categories and Methods* (Leanpub Book Publishers 2013) 12.

⁸² Organisation of Economic Co-operation and Development (n 66)10.

preferred candidate and had the effect of increasing the costs of procurement. Further, procurement processes cost money and therefore cancellation and subsequent re-advertisement of tender amounted to imprudent use of the already scarce resources. In sum, the requirements of the re-advertised tender were inconsistent with the national value of non-discrimination and good governance.

Broad discretionary powers provide opportunities for malfeasance, partisanship and fraud.⁸³ This is because public procurement is often characterized by competing interests owing to the principal-agent relationship existing between the government (principal) and the procurement officials (agents).⁸⁴ As such, there is a clash between the private selfish interests of procurement officers and the broader societal interests as represented by the government.⁸⁵ Unlimited discretionary authority induces procurement officials to take advantage of the procurement system due to humanity's individualistic nature of advancing their interest at the cost of public interest.⁸⁶

Thus, when public procurement officers are given wide discretionary powers there is the likelihood that they will exercise discretion in a manner that upholds their selfish interests. Personal gain to be derived from disregarding the requirements of article 10 could induce public procurement officials to disintegrate NVPG in the interpretation and application of the public

⁸³ Susan Rose Ackerman, 'Political Corruption and democratic structure' in Arvind Jain, *The Political Economy of Corruption* (1st edn, Routledge Publishers 2001).

⁸⁴ Clifford McCue, Eric Pier and David Swanson, 'Five Dilemmas in Public Procurement' (2015) 15 (2) *Journal of Public Procurement* 177, 188.

⁸⁵ Muthomi Thiankolu, 'The Role of Administrative Law and Economics in Tempering Discretion and Balancing Conflicting Objectives in Public Procurement Decision-making' (2020) 5 *Kabarak Journal of Law and Ethics* 172.

⁸⁶ Peter Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (Oxford University Press 2004) 71.

procurement regulations especially when they view the prescriptions of article 10 as an obstacle to the attainment of their selfish interests.

In essence, article 10 is intended to improve governance in public administration. Application of NVPG in public procurement ensures that the funds available for public procurement are expended responsibly and in compliance with the intentions of the provider of the funds. Good governance practices in public procurement clash with individualistic selfish interests usually in the form of inflation of contract costs, embezzlement, bribery, fraud, cartelism, collusion between bidders and procurement officers and other corrupt practices. This is because good governance and sound public procurement help to deter graft, mitigate wastage, improve the efficacy of government expenditure, develop infrastructure and improve the people's standard of living.⁸⁷

The problem of discretion is best captured by the agency and public choice theories.⁸⁸ The agency theory views procurement officials as agents of the government (principal).⁸⁹ This fiduciary relationship is characterized by informational asymmetry and discretion.⁹⁰ The theory also holds that oftentimes the agents' goals may not align with the principal's goal of attaining social welfare.⁹¹ Due to the informational asymmetry, discretion and conflict of interest inherent in the agency relationship, there is the likelihood that procurement officials will exploit

⁸⁷ Scott Oziengbe Aigheyisi and Julius Ovuefeyen Edore, 'Public Procurement, Governance And Economic Growth: Some Policy Recommendations For Africa's Growth and Development' (2015) 10 International Journal of Development and Management Review 110, 120.

⁸⁸ Sue Arrowsmith, John Linarelli and Don Wallace, *Regulating Public Procurement: National and International Perspectives* (Kluwer International 2000) 36, 74-77.

⁸⁹ Trepte (n 86) 70-85.

⁹⁰ *ibid.*

⁹¹ *ibid.*

procurement processes for their selfish interests at the cost of public interest.⁹² Thus, the agency relationship provides opportunities for exploitation both deliberate and unconscious, and the greater the discretion in the hands of the agent the greater the opportunities for abuse.⁹³

The public choice theory on the other hand applies similar principles utilized by economists to scrutinize decisions made by people in the market.⁹⁴ Economists assert that decisions made in the marketplace by buyers and sellers are influenced by their self-interest.⁹⁵ Thus, the public choice theory holds that government officers charged with the responsibility of promoting public interests are similarly inclined to promote their selfish interests primarily with public interests being secondary.⁹⁶ The public choice theory, therefore, explains why procurement officials are likely to abuse their discretionary powers to facilitate malfeasance aimed at advancing their private interests at the cost of public interest.⁹⁷

In summary, abuse of discretion increases the costs of procurement due to the corruption and other opportunistic conduct that characterize public procurement systems with unlimited discretionary powers.⁹⁸ Thus, public procurement regulatory frameworks imprinted with broad discretionary authority are inconsistent with the need to promote good governance.⁹⁹ Without effective regulation to circumscribe the exercise of the broad discretionary powers, the law often exacerbates corruption and other forms of malfeasance.

⁹² *ibid* 71.

⁹³ *ibid*.

⁹⁴ Migai Akech, *Administrative Law* (Strathmore University Press, 2016).

⁹⁵ *ibid*.

⁹⁶ *ibid*.

⁹⁷ Thiankolu (n 46).

⁹⁸ Sue Arrowsmith, 'Horizontal Policies In Public Procurement: A Taxonomy' (2010) 10 (2) *Journal Of Public Procurement* 149.

⁹⁹ *ibid*; Thiankolu (n 46).

2.3 Conflicts between the PP&ADA and Article 10

The PP&ADA contains various provisions that conflict with the letter and spirit of article 10 of the CoK and by extension Section 3 of the PP&ADA. The fact that certain provisions of the PP&ADA conflict with its Section 3, makes the provisions of PP&ADA internally contradictory. The disharmony between certain provisions of PP&ADA and article 10 is one of the reasons why article 10 is a good law on paper but it has failed to achieve its intended goal of promoting good governance in public processes.

For example, the PP&ADA requires aggrieved tenderers and candidates seeking an administrative or judicial review to deposit substantial amounts of money as a mandatory requirement for seeking redress. A refundable deposit amounting to at least 10% of the cost of the contract must accompany a request for review.¹⁰⁰ A judicial review application, on the other hand, shall be rejected if the security fee has not been paid by the aggrieved party.¹⁰¹

The foregoing provisions of the law undermine the letter and spirit of article 10 in various respects. First, the provisions are discriminatory and impede equality in access to justice. They place extraneous requirements on public procurement litigants yet the same provisions do not apply to other forms of litigation before the courts and other tribunals. In effect, public procurement litigants are not treated equally before the law as this provision imposes a huge financial burden on public procurement litigants. Procurement contracts usually involve huge

¹⁰⁰ PP&ADA, Section 167(2). Regulation 204(1) of the Public Procurement and Asset Disposal Regulations, 2020 indicates that the refundable deposit amounts to 15% of the contract sum.

¹⁰¹ *ibid*, Section 175(2). Regulation 222 of the 2020 Regulations specifies that the refundable security fee in judicial review applications shall be 3% of the contract sum and shall not exceed Kshs. 10 million.

amounts of money which sometimes run into trillions of Kenya Shillings. Thus, the mandatory requirement to pay a deposit makes access to justice a costly affair and has the effect of preventing genuine litigants from accessing justice.¹⁰²

Second, access to justice is a prerequisite to accountability. Accountability in public procurement entails procurement officials explaining their actions or decisions and suffering sanctions for those actions.¹⁰³ As mentioned earlier, the requirement for a deposit has the capability of locking out genuine litigants thereby hindering answerability by public procurement officials. Therefore, the provisions requiring a mandatory deposit in order to access administrative or judicial review have the effect of hindering accountability by public procurement officers.

Third, the foregoing provisions also contravene other fundamentally constitutional provisions which are interlinked with NVPG. These constitutional provisions are equality and freedom from discrimination,¹⁰⁴ fair administrative action,¹⁰⁵ access to justice,¹⁰⁶ right to fair trial¹⁰⁷ and fairness and transparency in public procurement systems.¹⁰⁸

¹⁰² *ibid* (n 55).

¹⁰³ 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* 451,461.

¹⁰⁴ CoK, Article 27.

¹⁰⁵ *ibid*, Article 47.

¹⁰⁶ *ibid*, Article 48.

¹⁰⁷ *ibid*, Article 50.

¹⁰⁸ *ibid*, Article 227.

The schemes of preferences and reservations prescribed under the PP&ADA are also antagonistic to the national principles of integrity, transparency and good governance. The Act prescribes preferential and reservations schemes to operationalize article 227(2) of the CoK.¹⁰⁹ Pursuant to the PP&ADA, preferential procurement applies to goods wholly or partially manufactured, mined, produced or assembled in Kenya and firms where Kenyans have a shareholding above 50%.¹¹⁰ The Act also reserves a minimum of 30% of all procurement to businesses owned by women, youth, persons with disabilities and other disadvantaged groups.¹¹¹ Although the scheme of preferences and reservations prescribed under the PP&ADA are majorly intended to promote and protect disadvantaged groups and local industry, their strict and technical application has often produced outcomes that run counter to the national value and principle of good governance which demands prudent use of public resources.

Bevaj Furniture v Kenya School of Monetary Studies (hereinafter, ‘Bevaj Furniture case’) is a procurement case that illustrates how strict application of the margin of preferences often leads to procurement outcomes that are contrary to the constitutional principle of good governance.¹¹² In this case, the Review Board’s ruling that the tender for the supply and assembly of furniture for the academic wing and library of Kenya School of Monetary Studies be subjected to an 8% margin of preference resulted in the tender being awarded to Bevaj Furniture, the complainant, at a tender price that exceeded the successful candidate’s bid by almost Kshs.20

¹⁰⁹ Parliament is instructed to legislate on categories of preference in contracts award and the protection of disadvantaged groups.

¹¹⁰ PP&ADA, Section 155.

¹¹¹ *ibid*, Section 53(6).

¹¹² Review Board Application No. 24 of 2013.

million.¹¹³ The successful tenderer, Fursys (K) Ltd, had been awarded the tender by the Kenya School of Monetary Studies at the tender price of Kshs. 249,434,381.24.¹¹⁴ The tender price for the complainant, Bevaj Furniture Limited, was Kshs. 267,074,994.18.¹¹⁵ In the request for review, the complainant submitted, *inter alia*, that the Kenya School of Monetary Studies had failed to apply the margin of preference as required by the law.¹¹⁶

Roben Aberdare (K) Limited v Kenya Rural Roads Authority (hereinafter, ‘Roben Aberdare case’) is another case that demonstrates the perverse consequences of the application of the margin of preferences.¹¹⁷ The case relates to a tender for the improvement to bitumen standards and maintenance of select rural roads in Kenya.¹¹⁸ The application of the scheme of preference saw Roben Aberdare (K) Limited, a local contractor, awarded the contract at the tender price of Kshs. 6,081,865,936.29/=.¹¹⁹ China Far East Construction Limited, a foreign bidder, had the lowest bid offer of Kshs. 5,184,304,783.29/=.¹²⁰ The difference between the contract price and the lowest bid offer was approximately Kshs. 1 billion.¹²¹

Similarly in *China Overseas Engineering Group Company Limited v Kenya Rural Boards Authority* (hereinafter, ‘China Overseas case’), a company with a Kenyan shareholding of above 50% was awarded the tender for improvement to bitumen standards and maintenance of select

¹¹³ *ibid.*

¹¹⁴ *ibid.*

¹¹⁵ *ibid.*

¹¹⁶ *ibid.*

¹¹⁷ Review Board Application No. 11 of 2017.

¹¹⁸ *ibid.*

¹¹⁹ *ibid.*

¹²⁰ *ibid.*

¹²¹ *ibid.*

rural roads in Kenya upon the application of 10% margin of preference.¹²² The complainant, China Overseas Engineering Group Company Limited (hereinafter, ‘China Overseas’), had undertaken to use materials manufactured and mined in Kenya. According to the Public Procurement and Disposal (Preference and Reservations) Regulations, 2011, the complainant qualified for 15% margin of preference.¹²³ The Review Board however ruled that being a foreign company, China Overseas could only benefit from a margin of preference where it had entered into a joint-venture with citizen contractors.¹²⁴ As a result, the tender was awarded at a tender price of about Kshs. 200 million higher than the complainant’s tender bid.¹²⁵

The foregoing cases demonstrate how strict and mechanical application of the margin of preference increases the cost of procurement inconsistent with the national value of good government. Additionally, the extra costs of procurement exceed the benefits derived from the application of the margin of preference.¹²⁶ This is especially because the preference schemes generally benefit a few well-connected individuals.¹²⁷ For example, in the *China Overseas case*, awarding the contract to China Overseas would have saved the taxpayer huge sums of money with the extra benefit of local industry promotion and employment creation for Kenyans even though it is a foreign company. The same cannot be said about the local company that was awarded the tender based on Kenyan shareholding. The preferences schemes also distort

¹²² Review Board Application No. 7 of 2016.

¹²³ Public Procurement and Disposal (Preference and Reservations) Regulations, 2011, Regulation 14.

¹²⁴ *ibid*, Regulation 16.

¹²⁵ Review Board Application No. 7 of 2016; See also *Questa Care Limited v Kenya Medical Supplies Authority & Another*, Review Board Application No. 28 of 2017, *Simba Pharmaceuticals Limited & another v Public Procurement Administrative Review Board & Another*, High Court of Kenya (Nairobi) Miscellaneous Civil Application 185 of 2017.

¹²⁶ Thiankolu (n 46) 162.

¹²⁷ *ibid*.

competition thereby impeding the national principles of integrity and transparency.¹²⁸ Competition, integrity and transparency are complementary concepts and the lack of one affects the others.¹²⁹

In summary, even though preferences and reservations schemes aim to promote and protect national industries and to create employment opportunities, from the Kenyan perspective, their economic worth is disputable and they undermine competition.¹³⁰ Additionally, contracting domestic contractors may have the effect of benefiting a small section of well-connected individuals.¹³¹ For a country like Kenya, the majority of whose citizens are poor, it may be beneficial to award tenders to efficient and cheaper foreign suppliers as opposed to inefficient and uncompetitive local suppliers.¹³²

The PP&ADA also contains provisions that tend to exclude judicial oversight thereby subverting the national values of integrity and accountability.¹³³ For instance, Section 167(4) of the PP&ADA specifies matters that are not subject to administrative review. These matters include the choice of a procurement method and termination of procurement proceedings before award notification.¹³⁴ Section 169 of the PP&ADA empowers the Review Board Secretariat to dismiss a complaint where payment of the appeal fees has not been done within the stipulated time.

¹²⁸ Thiankolu (n 103) 460.

¹²⁹ *ibid.*

¹³⁰ *ibid* 463.

¹³¹ *ibid* 465.

¹³² *ibid* 465.

¹³³ *ibid* 463.

¹³⁴ Also, once a procurement contract has been signed as between the accounting or authorized officer of the procuring entity and the successful candidate, the procurement proceeding is not subject to administrative review.

Pursuant to Section 175(5) where the High Court or the Court of Appeal (hereinafter, 'COA') has failed to decide a matter within 45 days, the Review Board's decision is final and binding to parties.

The above provisions interfere with judicial scrutiny of procurement decisions and this affects the answerability aspect of accountability. Answerability involves public officials informing about and explaining their actions and decisions.¹³⁵ Limiting judicial scrutiny also calls into question the integrity of the public procurement processes.

The foregoing accountability limiting provisions are compounded by the fact that members of the public have no automatic standing in public procurement disputes.¹³⁶ According to the Act, only a disaffected candidate or tenderer can seek administrative review of public procurement decisions of procuring entities.¹³⁷ The parties to an administrative review are the person seeking the review, the accounting officer of a procuring entity, the successful tenderer and such other persons as the Review Board may determine.¹³⁸ Members of the public are stakeholders in the public tendering process. The fact that they have no standing in the procurement disputes limits accountability in the public tendering process.

The provisions of the PP&ADA analyzed in this section of the study represent only a fraction of the provisions which conflict with article 10 values. However, they make a case for an

¹³⁵ *ibid.*

¹³⁶ Thiankolu (n 103) 462.

¹³⁷ PP&ADA, Section 167(1).

¹³⁸ *ibid.*, Section 170.

exhaustive review and amendment of the PP&ADA to resolve the disharmony between the Act and article 10. Proper legal provisions need to be put in place to encourage NVPG in public procurement processes.

2.4 Weak and ineffective accountability mechanisms

The lack of strong and effective accountability mechanisms in the public procurement regulatory framework is a major impediment to the institutionalization of NVPG in public procurement. In public procurement, the notion of accountability carries two basic implications, answerability and enforcement.¹³⁹ Answerability involves public officials informing about and explaining their actions while enforcement entails the accountability agencies imposing sanctions on public officials who have breached their public obligations.¹⁴⁰ It means that public procurement practitioners are open to challenge and sanction for contravening public procurement laws.¹⁴¹

Accountability institutions or mechanisms in a democracy facilitate accountability in public office, prohibit abuse of power and corruption and keep public officials on their toes by continuously reminding them that they will be required to account for their deeds.¹⁴² Although accountability invariably functions *ex-post* (subsequent to accountor's conduct), accountability

¹³⁹ Andreas Schedler, 'Conceptualizing Accountability' in Andreas Schedler, Larry Diamond and Marc F. Plattner (eds), *The Self-Restraining State: Power and Accountability in New Democracies* (Lynne Rienner Publishers 1999).

¹⁴⁰ *ibid.*

¹⁴¹ Sabbath M. Uromi, 'Challenges Facing Public Procurement Information in Some African Countries Namely: South Africa, Uganda, Zimbabwe and Tanzania' (2014) 2(7) *International Journal for Innovation Education and Research* 54, 56.

¹⁴² 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* 341, 346.

mechanisms can have *ex-ante* effects through deterrence.¹⁴³ For accountability to operate effectively *ex-ante* there must be strong accountability mechanisms in the form of effective laws which provide for hefty penalties or sanctions for conduct that offends the law.¹⁴⁴ The public procurement legal regime should contain a scheme of sanctions that ensure that the costs of participating in corruption outweigh the potential benefits.¹⁴⁵ The fear of penalty or sanctions acts as a deterrence tool against fraudulent enrichment and violations of the law by power holders.¹⁴⁶

Kenya's public procurement law has weak accountability mechanisms effectively aiding corruption in public purchasing.¹⁴⁷ The result of the accountability provisions of the PP&ADA is that corruption and other forms of malfeasance in government procurement are perceived as low-risk and high-reward activities. A natural person who is guilty of an offence under the PP&ADA is only liable to a fine of up to Kshs. 4 million or imprisonment for a term not exceeding ten years or to both.¹⁴⁸ A body corporate convicted for an offence under the PP&ADA is subject to a fine of up to Kshs. 10 million.¹⁴⁹

In addition, a state or public officer guilty of an offence under the PP&ADA opens himself/herself to disciplinary action whereas persons who are neither state nor public officers

¹⁴³ *ibid* 346.

¹⁴⁴ *ibid* 343; Rajesh Kumar Shakya, 'Procurement Governance Framework: Success to E-Government Procurement (E-GP) System Implementation' (International Public Procurement conference, Washington, August 2012) <<http://www.ippa.org/images/PROCEEDINGS/IPPC5/Part2/PAPER2-16.pdf>> accessed 5 October 2020.

¹⁴⁵ Thiankolu (n 46).

¹⁴⁶ *ibid*.

¹⁴⁷ JM Migai Akech, 'Development Partners and Governance of Public Procurement in Kenya: Enhancing Democracy in the Administration of Aid' (2007) IILJ Working Paper 2006/3 (Global Administrative Law Series).

¹⁴⁸ PP&ADA, Section 176 (2) and 177.

¹⁴⁹ *ibid*.

shall be debarred.¹⁵⁰ Other penalties include disqualification or voiding of a contract for the procurement as well as the lodging of a complaint by a procuring entity with the appropriate professional body.¹⁵¹ A person can also suffer automatic debarment or disqualification depending on whether he or she is a public or private official.¹⁵²

Considering the huge sums of money lost in corruption and related problems, these penalties amount to a slap on the wrist. The accountability mechanisms in the PP&ADA do not provide a disincentive for corruption and other forms of corruption. Curiously, Kenya's public procurement law was modeled around the public procurement laws of South Africa.¹⁵³ However, compared to Kenya, South Africa has more deterrent and effective accountability mechanisms.¹⁵⁴ The sanctions contained in the South African public procurement regulatory framework make certain that the costs of participating in corruption and other malpractices outweigh the possible benefits.¹⁵⁵ Their sanctions are also wider and severer compared to their Kenyan counterparts.¹⁵⁶

In South Africa, a person convicted of public procurement corruption and malfeasance is liable to a fine or imprisonment for terms varying between five years to life depending on the court imposing the sentence.¹⁵⁷ In addition to a sentence, the court is empowered to require an endorsement of *inter alia* the particulars of the convicted person on the register of tender

¹⁵⁰ *ibid*, Section 176.

¹⁵¹ *ibid*.

¹⁵² *ibid*, Section 41.

¹⁵³ Muthomi Thiankolu, 'Using Public Procurement as a Tool of Economic and Social Development Policy in Kenya: Lessons from the United States and South Africa' (2019) 1(1) *Journal on Financing for Development* 97, 101.

¹⁵⁴ *ibid* 124.

¹⁵⁵ *ibid* 125.

¹⁵⁶ *ibid*.

¹⁵⁷ The Prevention and Combating of Corrupt Activities Act, 2004, Section 26(1).

defaulters.¹⁵⁸ Following an endorsement on the register, a person is debarred for a duration varying between five to ten years.¹⁵⁹ In the case of enterprises, debarment extends to persons involved in their management and enterprises set up by such persons at a later time.¹⁶⁰

Additionally, South African courts are empowered to enforce a fine equivalent to five times the value of gratification involved in the offence.¹⁶¹ A similar provision exists in the Anti-Corruption and Economic Crimes Act, 2003 (ACECA) although it is not as stringent as the provision in South African law. A conviction for an offence under the ACECA attracts a mandatory fine where a quantifiable benefit was received by the convicted person or a quantifiable loss was incurred by another person.¹⁶² The mandatory fine is equivalent to twice the amount of the quantifiable benefit received or loss suffered and where the conduct originating the offence led to quantifiable benefit and loss, the mandatory fine is equivalent to twice the aggregate of the amounts of the benefit and loss.¹⁶³ Some of the offences under the ACECA, 2003 relate to public procurement. The Act explicitly criminalizes payment for sub-standard goods, unsupplied goods, partially supplied goods, services not rendered or for inadequately rendered services.¹⁶⁴ The Act

¹⁵⁸ *ibid*, Section 28.

¹⁵⁹ *ibid*.

¹⁶⁰ *ibid*.

¹⁶¹ *ibid*, Section 26(3).

¹⁶² *ibid*, Section 48(1).

¹⁶³ *ibid*, Section 48(2). The recent prominent case of *Republic v Grace Sarapay Wakhungu, John Koyi Waluke and Erad Supplies & General Contracts Limited*, Anti-Corruption Court (Nairobi) Anti-Corruption Criminal Case No 31 of 2018 is one of the cases that has applied this provision. This case involved the supply of 40,000 metric tonnes of maize to the National Cereals and Produce Board which led to the loss of approximately Kshs. 297 million. The accused persons upon being found guilty of fraud and other offenses were slapped with hefty sentences. Grace Wakhungu was sentenced to 69 years imprisonment or payment of a fine amounting to Kshs. 707,725,562. John Walukhe was sentenced to 67 years imprisonment or a fine totaling Kshs. 727, 725,562.

¹⁶⁴ ACECA, Section 45(2).

also criminalizes willful or careless failure to observe the applicable law on procurement.¹⁶⁵ Engaging in a project without prior planning is also a criminal offence per the Act.¹⁶⁶

In South Africa, tenderers who submit wrong information regarding their preferential status or fail to declare their subcontracting arrangements are liable to stiff penalties including: (i) debarment for a duration of up to ten years, (ii) damages, (iii) disqualification of tenderer, (iv) termination of tender, and (v) penalties of up to 10 % of the tender value.¹⁶⁷ A similar provision exists in the Broad-Based Black Economic Empowerment Act, 2003. Upon conviction, a person who knowingly misrepresents the broad-based black economic empowerment status is subject to a fine or imprisonment for a period up to ten years or both.¹⁶⁸ An enterprise is liable to a fine of up to 10% of its annual turnover.¹⁶⁹ Further, a procurement officer who fails to report misrepresentation of the black empowerment status by a person is liable to a fine or imprisonment for a period up to 12 months or both.¹⁷⁰

In a nutshell, the South African regime of sanctions for public procurement malpractices is far more stringent and deterrent than Kenya's sanctions regime for the same offences. In the absence of effective public procurement regulation, corruption and unethical conduct will continue to thrive in public procurement processes. Prescriptions of law will often be disregarded especially where there is no fear of sanctions.¹⁷¹ Thus, a direct link exists between strong accountability mechanisms and the effective realization of NVPG in public purchasing in Kenya. Fear of

¹⁶⁵ *ibid.*

¹⁶⁶ *ibid.*

¹⁶⁷ The Preferential Procurement Regulations, 2017, Regulation 14.

¹⁶⁸ The Broad-Based Black Economic Empowerment Act, 2003, Section 130.

¹⁶⁹ *ibid.*

¹⁷⁰ *ibid.*

¹⁷¹ *ibid.*

sanctions and penalties will facilitate the strict observance of public procurement law and this will, sequentially, lead to the fulfillment of the mandate of Kenya's public procurement law.

2.5 Lack of integrity vetting mechanisms

The Bulk of corruption cases in Kenya occur in the public purchasing sector.¹⁷² Also, major corruption scandals in Kenya are public procurement-related.¹⁷³ The widespread corruption in public procurement is mainly attributable to the fact that a significant percentage of government revenue is spent on public procurement.¹⁷⁴ The vast sums of money involved in government procurement provide temptation for unethical and opportunistic conduct which hinders the government from purchasing items at the lowest possible price.¹⁷⁵ In Kenya, it is approximated that public procurement makes up 11% of the country's Gross Domestic Product.¹⁷⁶

Indeed the problematic nature of corruption in public procurement became very apparent on the 4th June 2018, the government through a circular instructed all procurement and accounting heads in government to step aside for fresh vetting.¹⁷⁷ This followed President Uhuru Kenyatta's directive during the Madaraka Day celebrations of 1st June 2018, that all procurement and accounting heads in government undergo fresh vetting including polygraph testing to ascertain their integrity and suitability.¹⁷⁸ Before vacating, the procurement and accounting heads were

¹⁷² Akech (n 147).

¹⁷³ Ethics and Anti-Corruption Commission, *An Evaluation of Corruption in Public Procurement: A Kenyan Experience* (EACC 2015) 11.

¹⁷⁴ *ibid.*

¹⁷⁵ G Mazibuko and DJ Fourie, 'Manifestation of Unethical Procurement Practices in the South African Public Sector' (2017) 9 (9) *African Journal of Public Affairs* 106.

¹⁷⁶ Transparency International, 'Contract Monitoring Network of Kenya' (2013) <<https://www.tkenya.org/index.php/contract-monitoring-newtork-of-kenya/>> accessed 21 April 2020.

¹⁷⁷ Titus Waweru, 'State Orders All Government Procurement Heads to Step Aside' *The Standard* (Nairobi, 5 June 2018) <<https://www.standardmedia.co.ke/politics/article/2001282858/uhuru-orders-procurement-bosses-to-step-aside>> accessed 25 September 2020.

¹⁷⁸ *ibid.*

required to hand over to their immediate deputies.¹⁷⁹ Further, they were required to tender their personal information to the Head of Public Service by 8th June 2018.¹⁸⁰ The personal information included assets, liabilities and previous records of service.¹⁸¹ This move by the government was meant to intensify the war on corruption. Following the lifestyle audit, only 400 out of about 1000 procurement and accounting officers passed the lifestyle audit and were cleared to return to work.¹⁸²

The pervasive nature of corruption and the vast opportunities for corrupt practices in public procurement points to the need for robust and continuous integrity vetting mechanisms aimed at detecting illegitimate enrichment such as lifestyle audits. Lifestyle audit of procurement officers will bring to the fore inconsistencies between a procurement official's living standard and their income. Lifestyle audits in their nature are conducted to ascertain whether a person's living standard is proportionate to their income and are intended to promote integrity and accountability among public officials.

Kenya's public procurement law and other enabling laws do not provide an effective legal framework within which to carry out lifestyle audits on public procurement officers. The Public Officer Ethics Act, 2003 enjoins public officers to submit to their responsible Commission their declaration of the income, assets and liabilities and that of his spouse and dependent minor

¹⁷⁹ *ibid.*

¹⁸⁰ *ibid.*

¹⁸¹ Kennedy Kimanthi and Philip Momanyi Maosa, 'Heads of Procurement, Accounting to Step Aside' *Nation* (Nairobi, 4 June 2018) <<https://nation.africa/kenya/news/heads-of-procurement-accounting-to-step-aside-51124> > accessed 25 September 2020.

¹⁸² Cyrus Ombati, 'Less Than Half of 1,000 Procurement and Accounting Officers Now Cleared' *The Standard* (Nairobi, 22 August 2018) <<https://www.standardmedia.co.ke/nairobi/article/2001292887/many-fail-vetting-as-only-400-officers-cleared> > accessed 25 September 2020.

children, once, every two years.¹⁸³ On application to the responsible commission, the contents of the declaration are made available.¹⁸⁴ This requirement applies to public officers involved in public procurement. Whereas this is a commendable initiative, the drawback is that there is no suitable framework for auditing of these declarations which calls into question the integrity of the said declarations.

On 6th September 2019, the Senate of Kenya proposed the Lifestyle Audit Bill, which Bill is intended to anchor lifestyle audits of public and state officers in Kenya on the law. The objective of the proposed legislation is to operationalize article 10 of the CoK to establish the procedure for undertaking lifestyle audits and for connected purposes.¹⁸⁵ The Bill prescribes circumstances under which a lifestyle audit may be carried out, the standards of professional conduct for officers when carrying out the lifestyle audit and the lifestyle audit process.¹⁸⁶ The Bill also proposes that the Kenya Revenue Authority, the Ethics and Anti-Corruption Commission (hereinafter, 'EACC') and the responsible Commissions be the bodies in charge of lifestyle audits of public and state officers.¹⁸⁷ Further, the Bill makes it an offence to provide misleading or false information during the audit process to agencies conducting the audit.¹⁸⁸ A conviction for such an offence attracts imprisonment for a term of two years or a fine of up to Kshs. 5 million or both.¹⁸⁹

¹⁸³ The Public Officer Ethics Act, 2003, Section 26(1).

¹⁸⁴ *ibid*, Section 30

¹⁸⁵ The Lifestyle Audit Bill, 2019.

¹⁸⁶ *ibid*.

¹⁸⁷ *ibid*.

¹⁸⁸ *ibid*.

¹⁸⁹ *ibid*.

The proposed legislation also prescribes provisions on search warrants, search without warrants, unexplained wealth, interim freezing orders, account freezing orders, complaints by members of the public, lifestyle audit of immediate family, referral of matters to the Director of Public Prosecutions, deferred prosecution agreements among other provisions.¹⁹⁰ If passed into law, the bill will reinforce the war on corruption through enhanced integrity and accountability among public and state officers.

Lifestyle audits can be strong accountability and integrity tools. An effective lifestyle audit promotes accountability since a mismatch between an individual's wealth and their purchasing power will warrant an explanation of the extra source of wealth from that individual. Sanctions will act as a deterrence tool against fraudulent and unjust enrichment by procurement officers. The answerability aspect of the lifestyle checks and the resultant sanctions would encourage integrity and probity in the dealings of public procurement officials.

When given legal backing, lifestyle audits of public and state officers will be a crucial stimulus in the fight against graft. This is especially because corruption is inconspicuous in nature and most times the only indication that corrupt activities have occurred is an unexplained change in a person's lifestyle.¹⁹¹ If lifestyle audits are conducted properly, public and state officers will think twice before they engage in pilferage of public funds.

¹⁹⁰ *ibid.*

¹⁹¹ Ngumbi Eric Munyao, 'Viability Of Lifestyle Audits as an Anti-Corruption Strategy in Kenya: A Critical Assessment Of The Policy, Legal And Administrative Framework' (Master's thesis, University of Nairobi 2019).

2.6 Conclusion

This chapter has interrogated the weaknesses in the legal regime for public procurement. The chapter has also examined the correlation between the identified statutory weaknesses and failure in the implementation of NVPG in public procurement processes. There is a need for a review and redesign of the regulatory framework to ensure that the statutory provisions are harmonized with article 10. If the statutory weaknesses are not addressed, article 10 will remain to be a good law but only on paper.

The next chapter examines the institutional failures that have curtailed the realization of NVPG in public procurement decision-making. The chapter will focus on the relevant institutions responsible for implementing and enforcing NVPG in public procurement in Kenya.

CHAPTER THREE: THE EFFECT OF INSTITUTIONAL FAILURES ON THE IMPLEMENTATION OF ARTICLE 10 IN PUBLIC PROCUREMENT

3.1 Introduction

The preceding chapter probed the weaknesses of the public procurement law and how the same have worked against the realization of NVPG in public procurement. This chapter explores the various institutional failures and how they have impeded the realization of NVPG in public procurement. The discussions in this chapter will revolve around the key institutions tasked with the responsibility of implementing and enforcing NVPG in public procurement namely: PPRA, EACC, Review Board, Office of the Director of Public Prosecutions (hereinafter, 'ODPP'), Director of Criminal Investigations (hereinafter, 'DCI') and the judiciary.

3.2 Judicial reluctance to enforce NVPG in public procurement

The success or failure in the actualization of NVPG in public procurement is largely dependent on the judicial attitude towards the enforcement of NVPG. Judicial attitude can be gleaned from the approach by the Review Board and courts in adjudicating procurement cases with article 10 perspectives. As shall be illustrated herein, the courts and Review Board have not demonstrated firmness in enforcing constitutional principles and values such as NVPG. The timidity by the courts and the Review Board in strictly enforcing NVPG in public procurement is arguably one of the biggest assaults in the actualization of article 10 in public procurement decision-making. Reluctance by the Review Board and courts to enforce constitutional principles encourages procurement officers to disregard constitutional principles when making public procurement decisions.

In the case of *Republic v Independent Electoral and Boundaries Commission (I.E.B.C) Ex parte National Super Alliance (NASA) & 6 Others*, the High Court revoked the tender for printing ballot papers awarded to Al Ghurair LLC for failure by the IEBC to adhere to constitutional values and principles specifically public participation.¹⁹² However, the COA overturned the decision of the High Court and upheld IEBC's contentions on appeal.¹⁹³ On appeal, the IEBC argued that the High Court ought to have overlooked its violations of the CoK and PP&ADA on grounds of public interest to hold the forthcoming elections on time.¹⁹⁴ IEBC also faulted the High Court for holding that the application of public participation in direct procurement is mandatory.¹⁹⁵ The COA in overturning the High Court's decision held that on account of the scheduled date for the 2007 general elections, direct procurement was the only realistic method of procuring election materials for the 2017 general elections.¹⁹⁶ The COA also held that the High Court was wrong in necessitating public participation in the direct method of tendering.¹⁹⁷

This decision of the COA was not only flawed in many respects but demonstrated a lack of firmness in enforcing NVPG in public procurement. First, the court's decision that public participation was not applicable to direct tendering offended article 10. Article 10 demands mandatory adherence to NVPG whenever a person is enacting, applying or interpreting any law. Second, despite the Court's observation that constitutional values cannot be "sacrificed at the

¹⁹² High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 378 of 2017.

¹⁹³ *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others*, Civil Appeal (Nairobi) No.224 of 2017.

¹⁹⁴ *ibid.* NASA contended that the time constraints, if any, were precipitated by the Appellant's dilatory conduct, conduct which was calculated to avoid competition so as to award the contract to a pre-decided tenderer.

¹⁹⁵ *ibid.* NASA argued that the Appellant had neither consulted with the pertinent stakeholders nor allowed public participation prior to deciding to grant Al Ghurair LLC the subject contract, thereby contravening the constitutional dictates of transparency and accountability.

¹⁹⁶ *ibid.*

¹⁹⁷ *ibid.*

altar of time constraints”, it arrived at a decision that sacrificed the constitutional principles of public participation, transparency, accountability and the rule of law.¹⁹⁸ Public participation fosters transparency and accountability because of the publicity aspect of public participation. By frustrating avenues for scrutiny such as public participation, the decision of the COA impeded transparency and accountability in the tendering processes. Where scrutiny mechanisms are curtailed a fertile ground is created for procuring entities and their officers to obscure procurement processes in order to advance their selfish interests through malfeasance.¹⁹⁹

Additionally, the decision of the COA not only violated the rule of law but it encouraged violations of the rule of law. Article 10 does not exclude public participation in the direct method of procurement. By holding that public participation is not obligatory in direct tendering, the COA violated the letter and spirit of article 10. The decision also overlooked the fact that previous litigation (discussed extensively in the ensuing section) challenging the award of the contract to Al Ghurair LLC alluded to the fact that IEBC had mismanaged the procurement process to avoid competition. The conduct of IEBC, therefore, amounted to dilatory conduct contrary to Section 103 of the PP&ADA. By upholding the decision of IEBC to grant the subject tender to Al Ghurair LLC, the COA effectively encouraged violation of the law. Thus, the decision sets a dangerous precedent as public entities would mismanage the procurement process to create an artificial shortage of time thereby justifying the use of a non-competitive method of tendering.

¹⁹⁸ *ibid.*

¹⁹⁹ Thiankolu (n 46).

The Review Board has also demonstrated disinclination towards effectuating constitutional values in public procurement. This was the case in *Paarl Media (PTY) Limited v Independent Electoral and Boundaries Commission & 2 Others* (hereinafter, ‘the Paarl Media case’).²⁰⁰ The administrative proceedings formed part of the litigation that challenged the conduct of IEBC in the tender proceedings for the supply of election materials for use in the 2017 general elections. Paarl Media (PTY) Limited (hereinafter, ‘Paarl Limited’), an unsuccessful bidder, lodged a complaint with the Review Board having failed to advance past the preliminary evaluation stage in the tender process.²⁰¹ The main argument by Paarl Limited and the Coalition for Reform and Democracy (hereinafter, ‘CORD’), an interested party, was that the tender process and specifications contravened constitutional principles and the Elections Act, 2011.²⁰² In dismissing the complaint by Paarl Limited, the Review Board held, *inter alia*, that Sections 167 and 169 of the PP&ADA restricted its mandate to public procurement disputes and did not extend to contraventions of the CoK and Elections Act, 2011.²⁰³

The Review Board’s decision is wrong and demonstrates reluctance by the Review Board to enforce constitutional principles thereby hindering the realization of constitutional values and principles such as NVPG in public procurement decision-making. First, the CoK is the supreme law of Kenya and each person is enjoined to respect, uphold and defend it.²⁰⁴ Second, the CoK demands mandatory compliance with NVPG whenever any person enacts, applies or interprets the law.²⁰⁵ In the same vein, the PP&ADA requires that public procurement be guided by

²⁰⁰ Review Board Application No. 93 of 2016.

²⁰¹ *ibid*

²⁰² *ibid*.

²⁰³ *ibid*.

²⁰⁴ CoK, Articles 2 and 3.

²⁰⁵ *ibid*, Article 10; Section 3(a) of PP&ADA.

constitutional values and principles and relevant legislation.²⁰⁶ Third, the 2010 Constitution obliges courts and tribunals to promote and protect its purpose and principles when exercising judicial authority.²⁰⁷ Lastly, the courts have held that the Review Boards are competent to enforce the CoK. In *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others*,²⁰⁸ the Supreme Court of Kenya stated that:

The Public Procurement and Disposal Act, indeed, does not preclude parties from raising constitutional issues touching on their complaint. We note, besides, that administrative bodies, such as the Tribunal in question, are bound by the Constitution.²⁰⁹

Thus, no provision in the CoK and the PP&ADA precludes the Review Board from enforcing the constitutional precepts. Indeed, both laws encourage the Review Board to promote and enforce constitutional precepts such as national values and principles. Courts and Review Board willingness to firmly enforce article 10 will go a long way towards fostering national values in public procurement processes in Kenya.

3.3 Judicial equivocation in the application of constitutional values and principles

The Review Board and courts have demonstrated equivocation in the application of constitutional values and principles in public procurement.²¹⁰ This can be inferred from

²⁰⁶ PP&ADA, Section 3.

²⁰⁷ CoK, Article 159(2) (e).

²⁰⁸ [2014] eKLR; See also *Republic v Public Procurement Administrative Review Board & 2 Others Ex Parte MIG International Limited & Another*, Miscellaneous Application No. 356 & 362 of 2015 (Consolidated) where the High Court declared that the Review Board has wide latitude in administrative review applications including considering the constitutionality of the procurement decisions.

²⁰⁹ *ibid.*

²¹⁰ Thiankolu (n 46).

inconsistent jurisprudence emanating from the Review Board and courts on the application and interpretation of article 10 in public procurement. The inconsistencies can be illustrated using a number of the litigation that ensued following the award of the tender to Al Ghurair LLC for the supply of electoral materials for the 2017 general elections.

In Republic v Independent Electoral and Boundaries Commission & Another Ex Parte Coalition for Reform and Democracy & 2 Others, CORD commenced judicial proceedings disputing IEBC Secretariat's decision to award the tender for the supply of electoral materials for the 2017 general elections to Al Ghurair LLC.²¹¹ CORD argued that the award of the contract to Al Ghurair LLC violated various provisions of the CoK (article 10 included), PP&ADA and electoral laws.²¹² IEBC, on the other hand, justified its violations of the Constitution and statutes on the ground of public interest to hold the approaching general elections on the constitutionally assigned date.²¹³ IEBC argued that failure to hold the 2017 general elections on the constitutionally assigned date would expose the country to a situation similar to the 2008 post-poll violence.²¹⁴ The High Court rejected the arguments by IEBC, reversed IEBC's decision to grant the tender to Al Ghurair LLC and gave IEBC discretion to restart the tender process.²¹⁵

The High Court held that public interest cannot legitimize the breach of the Constitution or a statute "as public interest is best served by enforcing the Constitution and statute".²¹⁶ The court relied upon the proclamation of the court in *Republic v County Government of Mombasa Ex-*

²¹¹ High Court of Kenya (Nairobi) Miscellaneous Application No. 637 of 2016.

²¹² *ibid.*

²¹³ *ibid.*

²¹⁴ *ibid.*

²¹⁵ *ibid.*

²¹⁶ *ibid.*

Parte Outdoor Advertising Association of Kenya that public interest must be consistent with the CoK and the law since the rule of law is one of the NVPG under article 10 of the CoK.²¹⁷ In agreeing with the pronouncements in the aforementioned case, the High Court stated:

Where the alleged public interest is not founded on any legal provision or principle and runs contrary to the Constitution and the law, such perceived public interest will not be upheld by the Court. Under Article 10 of the Constitution, all State organs, State officers and all persons tasked with inter alia the making and implementation of public policy decisions are bound by the national values and principles of governance one of which is the rule of law. Consequently, any alleged public policy or interest that is contrary to the rule of law cannot be upheld.²¹⁸

The High Court's decision upheld article 10 by affirming that the rule of law is supreme and not even public interest can trump it. Thus, public interest is incapable of validating a breach of the law.

Al Ghurair LLC appealed the decision at the COA.²¹⁹ The COA in a majority decision upheld the decision of the High Court and dismissed the appeal.²²⁰ The COA agreed with the High Court

²¹⁷ (2014) eKLR.

²¹⁸ High Court of Kenya (Nairobi) Miscellaneous Application No. 637 of 2016.

²¹⁹ *Al Ghurair Printing and Publishing LLC v Coalition for Reforms and Democracy & 2 Others*, Civil Appeal (Nairobi) No. 63 of 2017.

²²⁰ *ibid.*

that public interest cannot excuse a violation of the CoK and PP&ADA.²²¹ According to the COA, “public interest can never override constitutionalism”.²²²

The COA having upheld the decision of the High Court, IEBC re-advertised a fresh tender on 18th April 2017.²²³ Although the tender advert indicated that it was “open to all tenderers with ISO 9001 and ISO 27001 (ISM) certified or equivalent”, IEBC’s conduct indicated otherwise. IEBC sent out in advance tender invitations and documents to 13 specific firms.²²⁴ According to IEBC, the 13 firms consisted of 9 firms that had submitted tenders and 4 firms which made inquiries in respect of the quashed tender dated 17th August 2016.²²⁵ The tender invitations and documents were thereafter published on IEBC’s website 6 days before the closing date for submission of bids.²²⁶

Aggrieved by the procurement process, Rosecate Promotions and Supplies Limited (hereinafter, ‘Rosecate’) instituted administrative review proceedings.²²⁷ Rosecate claimed that the tender process and documents were flawed *to wit*: (i) PP&ADA demands that the time between tender advertisement and bid submission deadline not be less than 30 days,²²⁸ (ii) where open tendering is utilized, accounting officers of procuring entities are required to take reasonable steps to bring

²²¹ *ibid.*

²²² *ibid.*

²²³ *Rosecate Promotions & Supplies Ltd v Independent Electoral and Boundaries Commission & 3 Others*, Review Board Application No. 44 of 2017.

²²⁴ *ibid.* According to IEBC’s minutes of 4th May 2017, tender invitations and documents had already been sent out to 13 firms on various dates beginning from 18th April 2017.

²²⁵ *ibid.*

²²⁶ The tender was advertised on IEBC’s website on 28th April 2017 and the closing date for submitting bids was 4th of May 2017.

²²⁷ *ibid.*

²²⁸ PP&ADA, Section 89(c); Regulation 36 of the Public Procurement and Disposal Regulations, 2006.

the invitation to tender to the attention of those who may desire to submit tenders,²²⁹ (iii) the procurement process was non-transparent and discriminatory,²³⁰ and (iv) the evaluation criteria were neither objective nor quantifiable.²³¹ Rosecate further claimed that the tender documents had not complied with the directions of the High Court and the COA that IEBC re-tenders in compliance with the CoK, PP&ADA and the election laws.²³²

IEBC, on the other hand, contended that: (i) the Review Board lacked jurisdiction to hear and determine the procurement dispute as the request for review was seeking to challenge the procurement method used,²³³ (ii) it had elected to use the restricted method of tendering and had complied with the law relating to procurement through restricted tendering, (iii) Rosecate lacked *locus standi* to institute the request for review as it was neither a bidder nor an invited participant, (iv) restricted method of tendering was utilized by IEBC as it was behind schedule in securing election materials, (v) the publication of tender documents on IEBC's website on 24th August 2017 was simply for general information to the public for purposes of transparency and was not intended to constitute an invitation to tender, and (vi) urgency and public interest involved in the matter justifies non-cancellation of the procurement process.²³⁴

²²⁹ *ibid*, Section 96.

²³⁰ *ibid*, Section 3(b); Article 27(1) and 227(1) of the CoK.

²³¹ *ibid*, Section 80(3) (a).

²³² *Rosecate Promotions & Supplies Ltd v Independent Electoral and Boundaries Commission & 3 others*, Review Board Application No. 44 of 2017.

²³³ According to Section 167(4) (a) of the PP&ADA , the choice of a procurement method is not subject to a request for review.

²³⁴ *ibid*.

On 19th May 2017, the Review Board allowed the request for review and annulled the entire procurement process.²³⁵ The Board held *inter alia* that the subject procurement process was fundamentally flawed and contravened articles 27 and 227 of the CoK, Section 3(b) of the PP&ADA and other constitutional and statutory provisions.²³⁶ The Review Board declared the entire public procurement process void and terminated the process. It further directed IEBC to commence the tendering process afresh “using such method as it may consider appropriate taking into account the time left” and other necessary factors.²³⁷

The ruling of the Review Board is laudable to the extent that by terminating the public procurement process commenced by IEBC, the Review Board upheld the national values of non-discrimination, transparency and the rule of law among other constitutional values. It was evident that the entire re-tendering process was neither transparent nor fair as IEBC’s conduct had given undue advantage to select bidders. It was further apparent that the process had breached several constitutional and statutory provisions. However, by giving IEBC wide discretion to re-tender using a method it considers appropriate, the Review Board reversed its gains. The Review Board not only encouraged impunity but also gave IEBC further opportunities for abuse. The Review Board also encouraged further violations of the rule of law.

²³⁵ *ibid.*

²³⁶ *ibid.*

²³⁷ *ibid.* The Review Board’s ruling triggered litigation in the High Court. See *Hillary Mulialia Okumu v Independent Electoral and Boundaries Commission & 2 Others*, High Court of Kenya (Nairobi) Constitutional Petition No. 69 of 2017; *Cecil James Oyugi v Public Procurement Administrative Review Board & another*, High Court of Kenya (Nairobi) Constitutional Petition No. 241 of 2017.

The Review Board failed to appreciate that: (i) IEBC had so far mismanaged the procurement process to create an urgency situation giving way to the award of the tender to a preferred tenderer, and (ii) IEBC had so far breached several provisions of the law and could not be expected to steer the process in accordance with the law with the procurement officials still holding office, and (iii) urgency does not constitute one of the circumstances under which restricted method of tendering may be used.²³⁸ The Review Board ought to have held IEBC procurement officials accountable for the breach of the law. Failure to hold public procurement officials accountable for breaches of the rule of law encourages impunity.

Following the ruling of the Review Board, IEBC granted the contract for the supply of election materials to Al Ghurair LLC through the direct tendering.²³⁹ NASA commenced judicial review proceedings seeking to quash IEBC's decision to grant the subject tender to Al Ghurair LLC through direct tendering.²⁴⁰ NASA contended that: (i) IEBC's decision was in total disregard of NVPG set out in article 10 of the CoK, particularly, the principle of public participation, (ii) decision to award Al Ghurair LLC was pre-determined and was in breach of the constitutional tenets of transparency and accountability, (iii) the electoral commission engaged in dilatory conduct by mismanaging the procurement process for ballot papers and other materials to generate a situation where it would be urgent to procure the materials in question, (iv) close associates of Al Ghurair LLC had on several occasions met with the incumbent president of Kenya for unknown reasons, and (v) Al Ghurair LLC has previously printed ballot papers in

²³⁸ PP&ADA, Section 102.

²³⁹ The contract was awarded on 29th May 2017, 10 days following the Review Board's ruling.

²⁴⁰ *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.

various elections tainted by electoral malpractices.²⁴¹ In sum, NASA alleged that the decision by IEBC was in contravention of articles 10 and 227 of the CoK.

On 7th July, 2017 the High Court quashed the decision of IEBC to grant the tender to Al Ghurair LLC.²⁴² The High Court ordered IEBC to commence *de novo* the procurement process in accordance with the CoK, PP&ADA and the relevant election laws.²⁴³ The High Court held that public participation being a national value ought to have been applied to the procurement of election materials by IEBC.²⁴⁴ The High Court reiterated that public interest cannot justify contravention of the CoK or a Statute.²⁴⁵

The IEBC lodged an appeal against the decision of the High Court.²⁴⁶ IEBC argued *inter alia* that public participation is not obligatory in direct tendering under the PP&ADA. IEBC further argued that the High Court had incorrectly applied the principle of public interest.²⁴⁷ On 20th July, 2017, the COA allowed the appeal by IEBC and set aside to the High Court's judgment.²⁴⁸ The COA upheld IEBC's arguments that public participation is not obligatory in direct

²⁴¹ *ibid.*

²⁴² *ibid.*

²⁴³ *ibid.*

²⁴⁴ *ibid.*

²⁴⁵ *ibid.*

²⁴⁶ *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others*, Civil Appeal (Nairobi) No. 224 of 2017.

²⁴⁷ *ibid.*

²⁴⁸ *ibid.*

procurement.²⁴⁹ The COA stated that due consideration should have been given to public interest in holding the elections at the constitutionally prescribed date.²⁵⁰

The COA decision was flawed in substantial respects. First, the decision was inconsistent with the previous decisions of the Review Board, High Court and the COA that public interest and time considerations cannot validate contravention of the rule of law. Second, inconsistent with article 10 and section 3(a) of PP&ADA which require mandatory conformity to NVPG when interpreting, implementing or applying public procurement law, public participation being one of them. No provision, constitutional or statutory, expressly excludes public participation in direct method of tendering.

Third, the COA contradicted itself by undermining and upholding NVPG in the same breath. In that regard, the Court stated:

Notwithstanding the foregoing, we must emphasize that IEBC and all State organs are bound by the values and principles enunciated among others in Articles 10, 201, 227 (1) of the Constitution. The values and principles of accountability, transparency, free and fair elections can never be sacrificed at the altar of time constraints. It is not worth to hold a non-transparent and flawed General Election at whatever cost simply because time is a constraint. Notwithstanding time constraints, IEBC and all procurement entities must at all times remain accountable and transparent in their operations and must adhere to the values in

²⁴⁹ *ibid.*

²⁵⁰ *ibid.*

Articles 10, 201 , 227 and 232 of the Constitution as incorporated in Section 3 of the Public Procurement and Asset Disposal Act.²⁵¹

In essence, the COA stated that public participation is not compulsory in direct tendering and in the same breath stated that national values must be adhered to in public procurement.

Fourth, the COA decision failed to appreciate that the urgent situation had resulted from the procuring entity's dilatory conduct, which conduct was geared towards awarding a preferred candidate.²⁵² Fifth, by upholding the decision of IEBC to grant the tender for supply of electoral materials to Al Ghurair LLC, the COA in effect undermined the rule of law, encouraged discriminatory practices, compromised the integrity of the procurement process and frustrated scrutiny mechanisms such as public participation thereby undermining transparency and accountability.

The contradictory decisions by the courts, as demonstrated by the foregoing jurisprudence, demonstrate indecision by the court regarding the role of NVPG in public procurement decision-making. Whereas other courts have demonstrated that NVPG is a mandatory requirement whose lack of application in the procurement can result in termination of the procurement proceedings, other courts have been reluctant to terminate a procurement process where a breach of NVPG has been proven. The equivocation by the courts encourages disregard for NVPG by procurement officials in the public procurement processes.

²⁵¹ *ibid.*

²⁵² This was contrary to Section 103(2) (b) of the PP&ADA.

3.4 Technical approach to the interpretation of public procurement law

Public procurement regulation usually takes two approaches; prescriptive and directory approaches. A prescriptive approach to regulation places reliance on detailed, strict rules to be adhered to by procurement officials, usually aimed at limiting the discretion in the hands of procurement officials.²⁵³ The directory approach, on the other hand, relies on general guidelines and principles to guide public procurement decision-making.²⁵⁴

Public procurement law in Kenya combines both these approaches as it is both rule-based and principle-based. It contains both formal rules and procedures and overarching principles to guide public procurement. Section 3 of PP&ADA enumerates the guiding values and principles in public procurement. These values and principles include the NVPG enshrined in article 10 of CoK. Although the NVPG are directive in nature they are obligatory. Therefore, the interpretation of prescriptive rules ought to give effect to directory rules such as NVPG.

Nevertheless, the Review Board and courts have on various occasions demonstrated their inclination towards a technical interpretation of public procurement laws which emphasizes the letter of the public procurement law with little or no regard for overarching principles such as NVPG. For instance, in the Paarl Media case, the Review Board dismissed the complainant's request for review as a result of technical interpretation of the public procurement law.²⁵⁵ In

²⁵³ Arrowsmith, Linarelli and Wallace (n 88) 86-87; Jeffrey Gutman, 'Is there Room for Discretion? Reforming Public Procurement in a Compliance Oriented World' (2014) Global Economy and Development Working Paper 74; Julia Black, Martyn Hopper and Bhrista Band, 'Making a Success of Principles Based Regulation' (2007) Law and Financial Markets Review 191.

²⁵⁴ *ibid.*

²⁵⁵ Review Board Application No. 93 of 2016.

dismissing the complaint by Paarl Limited, the Review Board held, *inter alia*, that Sections 167 and 169 of the PP&ADA restricted its mandate to public procurement disputes and did not extend to contraventions of the CoK and Elections Act, 2011.²⁵⁶ The Review Board's interpretation of the PP&ADA was mechanical and wrong in law. A holistic interpretation of the PP&ADA and the CoK would have revealed that the Review Board was empowered to deal with complaints relating to contraventions of the constitutional provisions and principles.

First, the 2010 Constitution requires the courts and tribunals to administer justice without undue regard for procedural technicalities.²⁵⁷ Second, courts and tribunals ought to protect and promote the purpose and principles of the CoK when exercising judicial authority.²⁵⁸ Third, the Review Board failed to appreciate that the objective of the PP&ADA is to give effect to a constitutional provision, article 227 of the CoK.²⁵⁹ Fourth and most relevant to the study, article 10 requires the public procurement law to be interpreted and applied with due regard to NVPG.²⁶⁰ Fifth, the Review Board's decision was contrary to the PP&ADA which requires that public procurement be guided by values and principles of the CoK and relevant legislation.²⁶¹ Sixth, the CoK is the supreme law of Kenya and all persons are enjoined to respect, uphold and defend it.²⁶² Lastly, the Supreme Court in *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others* has held that the Review Board is subject to the CoK and has powers to enforce it.²⁶³ The Review Board's interpretative approach where the letter of the

²⁵⁶ *ibid.*

²⁵⁷ CoK, Article 159(2) (d).

²⁵⁸ *ibid.*, Article 159(2) (e).

²⁵⁹ PP&ADA, The Preamble.

²⁶⁰ CoK, Article 10, Section 3(a) of PP&ADA.

²⁶¹ PP&ADA, Section 3.

²⁶² CoK, Articles 2 and 3.

²⁶³ [2014] eKLR.

PP&ADA is applied to the exclusion of constitutional dictates such as article 10 exacerbates the failure in the institutionalization of NVPG in public procurement processes in Kenya.

In the case of *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others*, the IEBC contended *inter alia* that the High Court had misapprehended the law by holding that public participation is compulsory in direct procurement under the PP&ADA.²⁶⁴ IEBC further contended that the High Court's holding that public procurement is mandatory in direct procurement in effect amended Sections 103 and 104 of the PP&ADA which provide for circumstances and procedure for direct procurement.²⁶⁵ The COA agreed with the appellants and allowed the appeal by IEBC. The COA stated:

Our reading of Sections 103 and 104 of the Public Procurement and Asset Disposal Act, 2015 and Article 227 (1) does not impose a mandatory requirement for public participation prior to using or adopting or making the decision to adopt direct procurement. Section 103 (2) of the Public Procurement and Asset Disposal Act, 2015 does not provide for public participation as one of the conditions to be satisfied prior to adopting direct procurement...the trial court erred when it imposed a requirement for public participation prior to the Appellant making the decision to adopt direct procurement method to procure election material and ballot papers for presidential elections.

²⁶⁴ Civil Appeal (Nairobi) No. 224 of 2017.

²⁶⁵ *ibid.*

The IEBC and Court of Appeal's interpretation of Section 103 and 104 were very technical thereby undermining article 10 values. Although those sections do not expressly require public participation in direct tendering, article 10 of the CoK and section 3 of the PP&ADA set forth NVPG in public procurement. Furthermore, the exemption of public participation in direct procurement has not been provided for in the CoK or the PP&ADA. The IEBC's contention and COA's decision that public participation is not mandatory in direct tendering hinders the achievement of NVPG in public procurement.

The Bevaj Furniture case,²⁶⁶ China Overseas case²⁶⁷ and the Roben Aberedare case²⁶⁸ are also some of the cases that demonstrate how technical interpretation and application of the margin of preference has often led to procurement outcomes that are contrary to article 10 values. There are many cases that illustrate the technical judicial approach to interpreting public procurement law. The study has however outlined a few. However, what can be discerned from the illustrations is that the Review Board and the courts are oblivious of the fact that technical approach to the interpretation and application of public procurement regulations where the law on paper is applied to the letter without reference to NVPG undermines the integration of NVPG in government procurement.

²⁶⁶ Review Board Application No. 24 of 2013.

²⁶⁷ Review Board Application No. 7 of 2016.

²⁶⁸ Review Board Application No. 11 of 2017.

3.5 Weak oversight and enforcement bodies

The Responsibility of providing oversight and ensuring that NVPG are enforced in the public purchasing system has been placed upon a number of institutions: PPRA, the Review Board, EACC, DCI, ODPP and the judiciary. However, these institutions have largely underperformed in their mandate. Weak oversight and enforcement create enormous opportunities for abuse of the government procurement system often with total impunity.²⁶⁹

3.5.1 The PPRA

The PPRA is the body responsible for overseeing the operationalization of national values in Kenya's public purchasing system.²⁷⁰ The PPRA is specifically tasked with monitoring, assessing and reviewing the public procurement system to ensure that it conforms to NVPG and other constitutional provisions and make recommendations for improvements.²⁷¹ The prevalence of corruption in the public procurement sector more than in any other sector in Kenya reveals that the PPRA has largely failed in its envisaged mandate. The failure of PPRA to deliver its mandate may be attributable to the fact that it is an underfunded institution.²⁷² The funding allocated by the Ministry of Finance is insufficient and negatively affects the regulatory authority's operational capacity.²⁷³ The PPRA is carrying out operations on a yearly budget of approximately Kshs. 385 million yet it is expected to perform numerous public procurement

²⁶⁹ Robert R Hunja, 'Obstacles to Public Procurement Reform in Developing Countries,' in Sue Arrowsmith and Martin Trybus (eds), *Public Procurement: the Continuing Revolution* (Kluwer Law International 2003).

²⁷⁰ PP&ADA, Section 9(1).

²⁷¹ *ibid*, Section 9(1).

²⁷² Annika Engelbert, Markus Kaltenborn and Nina-Annette 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 Berlin 2016) 45.

²⁷³ *ibid*.

functions in the 47 counties in Kenya.²⁷⁴ The authority is not adequately financed to perform its responsibilities effectively.²⁷⁵ This interferes with its functions because a lot of manpower and resources are required bearing in mind that the PPRA is tasked with ensuring that NVPG pervades the public procurement system in all forty-seven counties.

3.5.2 The Review Board

The Review Board is a quasi-judicial body and is a tribunal of the first instance for dispute resolution arising from the procurement process. Its mandate is to review, hear and determine public procurement disputes.²⁷⁶ As explained in the preceding sections of the study, the Review Board has demonstrated reluctance in enforcing constitutional values in public procurement. The Board has also been guilty of adopting a technical approach to the interpretation of public procurement law, which approach does not take into consideration the overarching principles such as NVPG.

Being the tribunal of the first instance, many cases are brought before it yet the board has few staff members to handle the cases who work on a part-time basis.²⁷⁷ Due to the many cases that the Review Board is expected to adjudicate on, it may not be able to effectively adjudicate on procurement disputes brought before it. It may be easy to resort to technical interpretation of public procurement law in order to expeditiously dispose of matters.

²⁷⁴ Office of the Auditor-General, 'Report of the Auditor-General on the Financial Statements of Public Procurement Regulatory Authority For the Year Ended 30 June 2018' (Report, 2018).

²⁷⁵ *ibid.*

²⁷⁶ PP&ADA, Section 28(1).

²⁷⁷ Njuki (n 50) 108.

3.5.3 The EACC

The EACC is the public body established to enforce integrity and combat corruption and economic crimes in Kenya.²⁷⁸ Additionally, in the performance of its duties, the Commission also enforces the rule of law, accountability and good governance.²⁷⁹ The Commission is generally responsible for securing compliance with and for enforcement of the provisions of Chapter Six of the CoK on Leadership and Integrity.²⁸⁰ The EACC is also mandated to conduct investigations and to recommend to the ODPP prosecution for violations of *inter alia* the Ethics and Anti-Corruption Commission Act, 2011, ACECA and the Leadership and Integrity Act, 2012.²⁸¹

These violations include payment for sub-standard goods, unsupplied goods, partially supplied goods, services not rendered or inadequately rendered services.²⁸² Other violations include willful or careless failure to observe the applicable law on procurement and engaging in a project without prior planning.²⁸³ Other public procurement-related offences include conflicts of interest, bribery, fraud, abuse of office, bid-rigging, embezzling and misappropriating of public funds and breach of trust.²⁸⁴

²⁷⁸ Ethics and Anti-Corruption Commission Act, 2011, Section 3(1).

²⁷⁹ *ibid*, Section 11.

²⁸⁰ CoK, Article 79.

²⁸¹ Ethics and Anti-Corruption Commission Act, 2011, Section 11. Other functions include *inter alia* enlisting public support in tackling corruption, monitoring public bodies' practices to detect corruption and instituting and conducting proceedings in court to recover or protect public property.

²⁸² ACECA, Section 45 (2).

²⁸³ *ibid*.

²⁸⁴ *ibid*, Section 2.

For most of its existence, the EACC has failed to deliver its envisaged mandate. The EACC is required to investigate corruption cases in the public purchasing sector and liaise with the ODPP for the perpetrators to be charged. This has not been happening. Many cases instituted never end up in convictions. This is especially because of the apparent dysfunction between the EACC, DCI and ODPP which has oftentimes led to blame games between the aforementioned public institutions.²⁸⁵

All these offices are critical in the fight against corruption. Although their mandates are distinct, they are interdependent. The EACC and DCI have a shared mandate of investigating corruption while the ODPP institutes criminal proceedings. The EACC does not have prosecutorial powers. It collects evidence in the course of its investigations and delivers the evidence to the office of the DPP. The collaboration of these offices is therefore critical in tackling corruption and other types of impropriety in public procurement and the dysfunction is one of the weakest links in the fight against corruption contributing to runaway graft.

The frequent change of the Commission has also affected the smooth operation of the Commission in investigating and charging people suspected of having been involved in corrupt dealings.²⁸⁶ For instance, in the case of *Michael Sistu Mwaura Kamau v Ethics & Anti-*

²⁸⁵ Standard Team, 'Haji, EACC Isolate Kinoti as Fight for More Clout Rages' *The Standard* (Nairobi, 13 July 2020) <<https://www.standardmedia.co.ke/the-standard-insider/article/2001378565/haji-eacc-isolate-kinoti-as-fight-for-more-clout-rages>> accessed 30 August 2021; Opiyo Wandayi, 'There is no Choice; DPP and DCI Must Cooperate' *The Standard* (Nairobi, 01 June 2020) <<https://www.standardmedia.co.ke/commentary/article/2001373447/there-is-no-choice-dpp-and-dci-must-cooperate>> accessed 30 August 2021.

²⁸⁶ See Felix O.Okiri, Lynn Waithera Ngugi and James Opiyo Wandayi, 'Strengthening Integrity & Preventing Corruption in the Judiciary in Kenya' (2019) 10 *Beijing Law Review* 131 on the turbulent history of the Commission.

Corruption Commission & 4 Others,²⁸⁷ the Court declared that EACC was improperly constituted at the time it completed the investigations and forwarded its recommendation to the ODPP. The Petitioner was discharged by the court on that account.

The frequent changes in the Commission have mostly been attributable to interference in its functions.²⁸⁸ Political leaders and government functionaries interfere in the work of the EACC especially if there is potential that they will be subject to their investigation.²⁸⁹ EACC chairs have been unceremoniously removed in the past and this has impacted negatively in the fight against corruption and other malpractices in government procurement. Corruption has become more prevalent in the public purchasing sector than in any other sector in Kenya. Major public procurement-related scandals have gone on unpunished, thus stifling economic growth and development in the country.

3.5.4 The ODPP

The failure to enforce NVPG by the EACC has also been compounded by the ODPP's reluctance to prosecute corruption cases in public procurement.²⁹⁰ The ODPP has the power to require an investigation by the Inspector-General of the National Police Service into an allegation of criminal conduct and he/she is required to comply.²⁹¹ In exercising the prosecution powers, the ODPP may institute and undertake criminal proceedings against any person before any court (other than a court martial), take over and continue any criminal proceedings commenced in any

²⁸⁷ Civil Appeal (Nairobi) No. 102 of 2016

²⁸⁸ Njuki (n 50) 109.

²⁸⁹ *ibid.*

²⁹⁰ The ODPP is created under article 157 of the CoK.

²⁹¹ *ibid.*, Article 157; Section 5(1) of the Office of the Director of Public Prosecutions Act, No. 2 of 2013.

court (other than a court martial) with the permission of the instituting party or discontinue at any stage before judgment is delivered any criminal proceedings it had instituted or taken over.²⁹²

Numerous procurement-associated cases involving senior-level government officials have not been fully pursued in courts and are dismissed, withdrawn or not prosecuted at all on grounds such as lack of evidence.²⁹³ Indeed, the EACC has on various occasions claimed that the office of the DPP has trivialized their efforts and failed to prosecute cases brought before them.²⁹⁴ This claim has further prompted dialogues on granting the EACC prosecutorial powers.²⁹⁵ Recently, the ODPP declined to prosecute officials incriminated in the Kenya Medical Supplies Authority scam.²⁹⁶ The EACC had recommended that six senior officials from the authority be prosecuted.

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3.5.5 The Judiciary

The judiciary provides fora for dispute resolution and the development of jurisprudence.²⁹⁸ It is expected to facilitate the attainment of the rule of law, shape public policy through interpretation of the CoK and other laws and to delivers justice in accordance with the CoK and other laws.²⁹⁹

²⁹² *ibid.*

²⁹³ Kimani (n 7).

²⁹⁴ Davis Ayega, 'MP wants EACC given powers to prosecute corruption cases' *Capital News* (Nairobi, 18 February 2019) <<https://www.capitalfm.co.ke/news/2019/02/mp-wants-eacc-given-powers-to-prosecute-corruption-offences/>> accessed 15 June 2021.

²⁹⁵ *ibid.*

²⁹⁶ Stephanie Wangari, 'DPP Haji Declines to Charge KEMSA Scandal Suspects' *Kenyans.co.ke* (Nairobi, 02 October 2020) <<https://www.kenyans.co.ke/news/57864-dpp-declines-charge-kemsa-scandal-suspects>> accessed 15 June 2021.

²⁹⁷ *ibid.*

²⁹⁸ Judiciary of Kenya, 'Our Mandate' <<https://www.judiciary.go.ke/about-us/mandate/>> accessed 25 August 2020.

²⁹⁹ *ibid.*

The judiciary exercises its mandate through the courts and tribunals.³⁰⁰ When exercising judicial authority, the courts and tribunals ought to protect and promote the constitutional purpose and principles.³⁰¹

The judiciary has some weaknesses that have affected the implementation of NVPG in public procurement. From the previous discussion in the preceding part of this chapter, the study has demonstrated that the courts and tribunals have demonstrated: i) reluctance in the enforcement of constitutional principles such as NVPG, ii) inclination towards a technical interpretation of the public procurement law to the disadvantage of NVPG achievement in public procurement, and iii) equivocation in the application of constitutional values and principles such as the NVPG. These failures by the judiciary have negatively impacted the realization of NVPG in public procurement processes in Kenya.

Corruption in the judiciary impedes the realization of NVPG in public procurement. There have been accusations of judicial corruption with some judges and magistrates having been laid off as a result of corruption.³⁰² Corruption in the judiciary could be the unseen hand in the flopping of certain high-profile procurement-related cases.³⁰³ A corrupt judiciary cannot be expected to judiciously adjudicate on cases involving corruption.

³⁰⁰ CoK, Article 159(1).

³⁰¹ *ibid*, Article 159(2).

³⁰² In the past, a Supreme Court judge has been accused of receiving a Kshs. 200 million bribe to influence the outcome of an election petition. Also, following the promulgation of the CoK, judges and magistrates underwent a vetting process that saw a significant number of them declared unfit to serve in the judicial office for corruption and other judicial malpractices. Previously, in the year 2003, Justice Aaron Ringera led committee had linked 23 judges and 82 magistrates in corruption.

³⁰³ Njuki (n 50) 108.

The problems in the judiciary have been further compounded by the fact that Kenya lacks a higher court that specifically adjudicates procurement disputes. A special higher court that solely adjudicates on procurement disputes would contribute to effective adjudication of procurement disputes in a manner that breathes life to NVPG in procurement processes in Kenya. The unsatisfactory performance of the Anti-corruption courts has also not helped matters.³⁰⁴ An independent and effective judiciary is fundamental in fostering NVPG in public administration in Kenya.

Weak oversight and enforcement are further compounded by the lack of will from the political actors to expend the political capital needed to punish breaches of public procurement law due to the potential loss of direct financial and/or political benefits.³⁰⁵ With the poor conviction rate that the country has achieved concerning the corrupt activities involving the actors in the procurement process, it cannot be said that the state has provided an environment that is conducive for development. Indeed, the rampant corruption within the procurement sector has remained the main bottleneck in this country thus stifling efforts to reduce poverty among the citizenry and spur economic growth. Thus, weak oversight and enforcement coupled with the lack of political will have greatly hindered the success in integrating NVPG in public procurement processes.

³⁰⁴ Kimani (n 7).

³⁰⁵ *ibid.*

3.6 Inadequate Legal Knowledge and Skills

Another major drawback to the implementation of article 10 in government procurement is the lack of adequate legal skills and knowledge by procurement practitioners to enable them to effectively and holistically interpret and apply the public procurement regulations in Kenya. Proper, effective and comprehensive implementation of a legal framework for public procurement requires that the guardians of the tendering process a mix of adequate legal skills and extensive knowledge of procurement practices and procedures including those linked to institutional concerns.³⁰⁶ They should also be knowledgeable on the underlying causes of and in dealing with the intrinsic challenges in implementing the laws in Kenya.³⁰⁷

However, most procurement officers only possess some technical procurement skills but lack adequate legal skills and knowledge that are essential to planning, management and implementation of procurement laws.³⁰⁸ Arguably, the shortage of legal skills and knowledge has contributed to an atomistic approach to the interpretation and application of public procurement law, which approach has often resulted in perverse consequences.

Public procurement disputes litigated in courts have demonstrated how procurement entities through, its procurement officers, tend to focus on technical legal interpretations. For instance in *Republic v Independent Electoral and Boundaries Commission (I.E.B.C) Ex parte National Super Alliance (NASA) & 6 Others*, IEBC argued that the incorporation of the national value of

³⁰⁶ Hunja(n 269).

³⁰⁷ *ibid.*

³⁰⁸ *ibid.*

public participation into the tender process was not mandatory since the national value was not explicitly imported into article 227 which is specific to public procurement.³⁰⁹ However, the High Court dismissed IEBC's argument and stated that the NVPG outlined in article 10 formed the foundation of the nation and bind all persons always.³¹⁰

IEBC failed to appreciate that NVPG applies to public procurement regardless of the existence of constitutional principles which are specifically applicable to public procurement. Article 10 of the constitution enjoins all persons to observe NVPG when enacting, applying or interpreting any law. The IEBC's argument that public participation was not mandatory in direct tendering was not only wrong in law but also violated the provisions of CoK. Furthermore, the exemption of public participation in direct procurement has not been provided for in the CoK and the PP&ADA.

The fact that NVPG are obligatory in public procurement was reiterated in *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others*,³¹¹ where the COA stated:

These values are not mere suggestions or aspirations to be attained at some future date, by generations yet unborn. They are directive and obligatory principles that are immediately and presently binding on all State organs, State officers, public officers and all persons whenever any of them apply, or interpret the Constitution; enact, apply or

³⁰⁹ High Court of Kenya (Nairobi) Miscellaneous Civil Application No. 378 of 2017.

³¹⁰ *ibid.*

³¹¹ Civil Appeal (Nairobi) No. 105 of 2017

interpret any law; or make or implement public policy decisions. They are broad and all inclusive in their reach, sweeping in their sway and peremptory in their command.³¹²

Technical interpretation of public procurement laws tends not to take into consideration the overarching principles such as NVPG. Procuring entities gravitate towards technical meanings of public procurement rules and compliance with the same instead of the holistic interpretation of public procurement rules and procedures which gives effect to constitutional provisions.³¹³ The technical approach to interpreting and applying public procurement rules ultimately impedes the realization of NVPG in government procurement.

Legal skills and knowledge deficiency have also contributed to the wrong interpretation and application of the public procurement law. For example, in *Rosecate Promotions & Supplies Ltd v Independent Electoral and Boundaries Commission & 3 Others*, IEBC contended that urgency justified the use of the restricted method of tendering.³¹⁴ This was a wrong interpretation and application of the public procurement regulation as urgency does not constitute one of the circumstances under which a restricted method of tendering may be used.³¹⁵

Proper and holistic interpretation of public procurement law demands that procurement officers be equipped with adequate legal skills and knowledge. Thus, the shortage of legal knowledge and skills among public procurement officials leads to a weak appreciation of all legal issues to

³¹² *ibid.*

³¹³ Thiankolu (n 46).

³¹⁴ Review Board Application No. 44 of 2017.

³¹⁵ PP&ADA, Section 102.

be incorporated in public procurement decision-making such as the NVPG. Lack of decent legal knowledge and skills represents a real risk to good governance.

3.7 Conclusion

Kenya has established a robust institutional framework for the advancement of NVPG in public procurement processes. Although these efforts are laudable, the actualization of the NVPG in public procurement remains elusive. This is perceptible from the fact that corruption has continued to rear its ugly head in government procurement more than in any other sector of government. The study opines that the institutions tasked with promoting NVPG in public procurement are not performing their envisioned mandate effectively or at all. The continued presence of institutional ineffectiveness will remain a hindrance to the implementation of NVPG in public procurement processes. Thus, institutional problems need to be addressed to encourage NVPG in public procurement.

The ensuing chapter summarizes the study. It discusses the main findings of the study and proposes ways to institutionalize and enhance national values in public procurement processes in Kenya.

CHAPTER FOUR: CONCLUSION AND RECOMMENDATIONS

4.1 Introduction

This chapter concludes the study. It provides a summary of the research findings and recommendations on how to effectively operationalize and enhance NVPG in public procurement in Kenya.

4.2 Summary of findings

This study set out to establish the challenges facing the implementation of NVPG in public procurement in Kenya. With that goal, the study proceeded with two hypotheses. The first hypothesis was that weaknesses of the public procurement law have worked against the implementation of NVPG in the public procurement system in Kenya. The second hypothesis was that institutional failures have derailed the implementation of NVPG in the public procurement system in Kenya.

Based upon the two hypotheses, the study mapped out two specific objectives. The first objective was to establish the effect of weaknesses of the public procurement law on the implementation of NVPG in public procurement in Kenya. The second objective was to examine the effect of institutional failures on the implementation of NVPG in public procurement in Kenya.

To realize these objectives, the study formulated two research questions which were consequently answered in chapters two and three of the study. Based on the discussions under the said chapters, the study established some findings. The findings have been organized in terms of the thematic areas analyzed under chapters two and three of the study.

4.2.1 The Effect of Weaknesses of the Public Procurement Law on Implementation of Article 10 in Public Procurement

The study revealed four main weaknesses in the public procurement regulation which have contributed to the failure in the realization of article 10 in public purchasing in Kenya. First, the PP&ADA grants wide discretionary powers to procurement officials with regard to certain major decisions relating to public procurement, without providing mechanisms to circumscribe the exercise of those powers. The wide discretionary powers have often been exercised by public procurement officials in a manner that upholds their selfish interests and disregards the requirements of article 10 of the CoK. Thus, public procurement regulatory frameworks imprinted with broad discretionary authority are detrimental to good governance.

Second, there exist conflicts between certain provisions of the PP&ADA and article 10 of the CoK. These conflicts defeat both the letter and spirit of article 10 of the CoK rendering article 10 ineffective. Third, Kenya's public procurement law has weak and ineffective accountability mechanisms. Its regime of sanctions is lenient and non-deterrent. The result of the accountability provisions of the PP&ADA is that corruption and other forms of malfeasance in government procurement are perceived as low-risk and high-reward activities. Finally, the public procurement law and other related laws do not have a legal framework within which to carry out

integrity vetting such as lifestyle audits to detect illegitimate enrichment. The inconspicuous nature of corruption necessitates a robust and continuous audit of the public procurement officials' lifestyle to detect illegitimate enrichment.

4.2.2 The Effect of Institutional Failures on Implementation of Article 10 in Public Procurement

The responsibility for ensuring that NVPG permeates public procurement processes has been placed on various institutions. These institutions include PPRA, EACC, ODPP, DCI, the Review Board and the judiciary. The study revealed several failures in the aforementioned institutions that have impeded the realization of NVPG in the public procurement processes in Kenya. First, the Review Board and courts have demonstrated reluctance in enforcing constitutional principles and values such as NVPG. Reluctance by the Review Board and courts to enforce constitutional principles encourages procurement officers to disregard constitutional principles in public procurement decision-making.

Second, jurisprudence emanating from the Review Board and courts has revealed judicial equivocation in the application of constitutional values and principles in public procurement. Judicial ambivalence encourages disregard for NVPG in the government procurement process. Third, the Review Board, courts and procurement officers of public entities have on various occasions adopted technical interpretation of public procurement laws which emphasizes the letter of the public procurement law with little or no regard for NVPG. Technical interpretation and application of public procurement regulations weaken the integration of NVPG in public procurement processes in Kenya.

Fourth, the institutions responsible for monitoring and enforcing NVPG in the government procurement system have largely underperformed in their mandate thereby creating vast opportunities for procurement malpractices. Weak oversight and enforcement are further compounded by the lack of will from the political actors to deploy the political capital needed to punish breaches of public procurement law due to the fear of potential loss of financial or political benefits. Weak oversight and enforcement coupled with the lack of political goodwill have greatly hindered the success in integrating NVPG in public procurement processes. Lastly, public procurement practitioners possess inadequate legal knowledge and skills to enable them to effectively and holistically interpret and apply public procurement regulations. The shortage of legal knowledge and skills has contributed to an atomistic approach to the interpretation and application of public procurement law, which approach has often resulted in improper outcomes.

4.3 Recommendations

In light of the foregoing research findings and general conclusions, this study proposes mechanisms to effectively actualize and enhance national values in the public procurement system in Kenya.

4.3.1 Review and Amendment of the PP&ADA

Kenya should review the PP&ADA to circumscribe the broad discretionary powers granted to public procurement officers. The regime of sanctions or penalties should also be redesigned in a way that guarantees that the costs of participating in corruption and other impropriety outweigh the possible gains. The sanctions or penalties should be more stringent than the current regime of

sanctions under the Act. The PP&ADA review and amendment should be exhaustive enough to resolve the conflicts between the PP&ADA and article 10.

4.3.2 Enhanced oversight and monitoring

In Kenya, public sector purchasing is the government function that is most susceptible to article 10 values violations. This can be gleaned from the endemic corruption that is stubbornly entrenched in government procurement. Thus, regular and continuous monitoring of the public procurement system by the PPRA is crucial in detecting and preventing any article 10 infringements. Regular monitoring of the system will enable the PPRA to detect and promptly confront the difficulties encountered in the institutionalization of NVPG in the public procurement system in Kenya. Regular monitoring will also help to ascertain whether previous interventions have been effective in fostering national values in the public procurement system. However, for these enhanced efforts to be possible, the PPRA requires adequate funding.

4.3.3 Enhanced enforcement of NVPG

When adjudicating public procurement disputes with a constitutional perspective, the Review Board and courts ought to rise to their higher calling and demonstrate collective willingness and decisiveness to enforce constitutional values and principles such as NVPG. They should not hesitate to terminate procurement proceedings that violate any of the NVPG outlined in article 10 of the CoK. Further, the Review Board and courts ought to adopt a holistic interpretative approach to interpreting public procurement law as this approach advances NVPG.

To further strengthen the enforcement of NVPG in public procurement processes, the challenges facing enforcement institutions that have contributed to the weak enforcement of NVPG in

public procurement must be addressed to promote effective enforcement of NVPG in public procurement processes. Increased cooperation between enforcement institutions will also go a long way towards reducing corruption and related problems in public procurement processes in Kenya.

4.3.4 Appropriate system of incentives and disincentives

Parliament should consider an incentive model of regulation to complement the disincentive model that has always existed in regulation in the form of criminal sanctions. In this regard, both models exist side by side in a complimentary way. This incentive mechanism rewards fidelity to NVPG and the disincentive model to deter violations of NVPG. This is an economist's approach to the problem of inefficient use of public resources such as corruption.³¹⁶ Since the disincentive models have so far failed to yield sustainable fruit, regulators should consider introducing an incentive model alongside the incentive model to maximize good outcomes in the public tendering function.

Concurrently, those who violate NVPG should face the full force of the law. This will deter future violations and enhance compliance out of fear of sanctions. Weak enforcement of the law coupled with lenient sanctions compromises compliance with NVPG.

³¹⁶ See Pranab Bardhan, 'The Economist's Approach to the Problem of Corruption' (2006) 34 (2) World Development 341.

4.3.5 Training of Procurement Officials

Public procurement officials must be equipped with both technical and legal knowledge and skills. The traditional training of public procurement officials has always focused on equipping procurement officers with technical skills and knowledge and this has led to technical application and interpretation of public procurement law. Training that equips procurement officials with legal skills and knowledge will enable the said officers to interpret and apply public procurement law in a holistic and integrative manner.

Procurement officers should also be trained on how to interpret and apply NVPG in the public procurement processes. Comprehension of the role of the different national values with respect to public procurement will help to accelerate the infusion of these values into public procurement decision-making. It will also enable compliance with the national values by public procurement personnel. This is especially necessary because article 10 of the Constitution as currently formulated is in form of a long list of abstract concepts most of which have not been interpreted in legislation. This may pose challenges to the assimilation of article 10 values into the public processes such as public purchasing. For the benefit of the public procurement practitioner, it would be useful to attempt to elucidate NVPG within public procurement contexts for ease of implementation in public procurement decision-making. Training of public procurement officials should be regular and continuous as new issues emerge in the public procurement process.

4.3.6 Follow-up on President's reports

Once every year, the President in a national address, reports on the measures employed and the progress made to realize NVPG in Kenya. In some of these reports, the President highlights the

bottlenecks in the implementation of article 10 values in the public service. These bottlenecks when identified in a report should be addressed in all spheres of the public service so as to facilitate the thriving of NVPG. Since PPRA is responsible for ensuring that the public procurement system respects national values, it should ensure that challenges in the public procurement system highlighted in the reports are promptly addressed. Addressing challenges that hinder the implementation of national values is especially important in public procurement as it is a sector that is greatly affected by corruption.

4.3.7 *Ex-post* review of decisions on alternative tendering methods

The choice of procurement method is important in the actualization of national values in public procurement processes. Although there are many methods of procurement that are allowed under the PP&ADA the most competitive and also preferred method of public tendering is open tendering. It is also the most transparent method of tendering. Because of the openness of open tendering, article 10 violations are easily monitored and detectable. Conversely, article 10 violations happen where non-transparent methods are used. This explains why most of the major corruption in the public procurement process usually revolves around non-competitive procurement methods.

Although the PP&ADA provides clear rules on the circumstances under which each method of tendering may be used, the choice of the procurement method usually involves some element of discretion on the part of government officials. This discretion presents opportunities for abuse. To ensure that this discretion is used properly, oversight is necessary where government officials

use non-competitive procedures in procurement contracts that involve a significant amount of money. *Ex-post* verification or review should be required by the PP&ADA to reduce opportunities of abuse in the exercise of judgment on the choice of the procurement procedure.

The PP&ADA should require multiple approvals for an alternative method of procurement to be used in a public procurement involving a significant amount of money. The *ex-post* review and approval can be done by an internal (within the procuring entity) or external authority. However, the ultimate approval should come from PPRA as it may be less vulnerable to the problems of discretion and enjoys some perception of being independent. It is no longer prudent to leave this decision to the public entities only. This will reduce the abuse of alternative procurement methods to the detriment of the public.

4.3.8 Enactment of the Lifestyle Audit Bill, 2019

Parliament needs to accelerate the passing of the Lifestyle Audit Bill, 2019 into law. The proposed legislation was published in the Kenya Gazette Supplement dated 6th September, 2019 but over one year down the line the Bill is yet to be passed into law. The proposed law seeks to operationalize article 10 of the CoK by prescribing a legislative framework within which to carry out lifestyle audits on public and state officers. Lifestyle audits in their nature are conducted to ascertain whether a person's living standard is proportionate to their income. Where there is no satisfactory explanation, the person will be criminally liable.

This Bill is crucial in public procurement where violations of national values are pervasive as evidenced by the various procurement scandals in the sector. This is Lifestyle audits will foster NVPG by bringing to light those public officers that have unjustly enriched themselves through corrupt activities. Where there is a clash between an individual's wealth and their purchasing power, that individual will be required to explain their source of wealth.

When given legal backing, lifestyle audits of public and state officers will be a crucial stimulus in the fight against graft. If lifestyle audits are conducted properly, public and state officers will think twice before they engage in pilferage of public funds. Also, since the lifestyle audit extends to family members it will be very difficult for the public and state officers to hide illicitly acquired wealth. Legally backed lifestyle audits will reinforce the already existing mechanism of wealth declarations under the Public Officer Ethics Act, 2003.

4.3.9 Mainstreaming national values through education

The use of the formal education system for value shaping is an essential strategy towards mainstreaming national values in public procurement. Today's children and young adults are the public procurement officials of tomorrow. Thus, education on the meaning, importance and ways to apply national values in day-to-day lives should be made part of the curriculum of primary, secondary and tertiary institutions. This can be done through a common course at all these levels of learning. The instructional material should be appropriate to each educational level, that is, it should take into account the intellectual and comprehension capabilities of the students at the

different levels of learning. Additionally, the content on national values in schools should also be examinable to gauge the student's understanding of the same.

Mainstreaming national values through education is a fundamental step towards modeling a new society in Kenya. It lays a foundation for adherence to national values by Kenyans from a young age and in so doing it inculcates in them a lasting culture of fidelity to these national values. Generally speaking, the best time to impart values to a person is during early growth. It is true that when you train a child in the way he should, there is a better chance that even when he is old he will not depart from it.

Mainstreaming of national values through the educational curriculum should be reinforced by civic education so that national values become entrenched in all facets of society. There should be targeted civic education on national values throughout the country. The government should identify influential persons and institutions that can help in championing NVPG and principles of governance. Effective compliance with national values requires that the public are aware of them and their meaning.

4.4 Areas for further research

Many challenges prevent the realization of NVPG in government procurement in Kenya. The study focused on the legal and institutional challenges. The study suggests that an attempt should be made to explore challenges that have not been discussed in the study but have contributed to

the failure in the implementation of national values in public procurement processes in Kenya. Addressing all the challenges hampering the integration of NVPG in public procurement will enable success in the implementation of NVPG in public procurement in Kenya.

BIBLIOGRAPHY

Books

Akech M, *Administrative Law* (Strathmore University Press, 2016).

Arrowsmith S, Linarelli J and Wallace D, *Regulating Public Procurement: National and International Perspectives* (Kluwer Law International 2000).

Bentham J, *A Fragment on Government* (Cambridge University Press 1776).

Craig PP, *Administrative Law* (2nd edn, Sweet & Maxwell 1989).

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 Berlin 2016).

Ethics and Anti-Corruption Commission, *An Evaluation of Corruption in Public Procurement: A Kenyan Experience* (EACC 2015).

Freeman MDA, *Lloyd's Introduction to Jurisprudence* (9th edn, Sweet & Maxwell 2014).

Hornby AS, *Oxford Advanced Learner's Dictionary: International Student's Edition* (8th edn, Oxford University Press 2010).

Lynch J, *Public Procurement: Principles, Categories and Methods* (Leanpub Book Publishers 2013).

Organisation of Economic Co-operation and Development, *Integrity in Public Procurement: Good Practice from A to Z* (OECD 2007).

Paul OJ, *Key Issues in Jurisprudence: An In-depth Discourse on Jurisprudence Problems* (1st edn, Law Africa 2013).

Rawls J, *A Theory of Justice* (Rev edn, Harvard University Press 1999).

Trepte P, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (Oxford University Press 2004).

Walks R, *Understanding Jurisprudence: An Introduction to Legal Theory* (3rd edn, Oxford University Press 2012).

Book Chapters

Ackerman SR, 'Political Corruption and democratic structure' in Arvind Jain (ed), *The Political Economy of Corruption* (1st edn, Routledge Publishers 2001).

Hunja RR, 'Obstacles to Public Procurement Reform in Developing Countries,' in Sue Arrowsmith and Martin Trybus (eds), *Public Procurement: the Continuing Revolution* (Kluwer Law International 2003).

Schedler A, 'Conceptualizing Accountability' in Andreas Schedler, Larry Diamond and Marc F. Plattner (eds), *The Self-Restraining State: Power and Accountability in New Democracies* (Lynne Rienner Publishers 1999).

Shaw WH, 'Contemporary Criticisms of Utilitarianism: A Response' in Henry R. West(ed), *The Blackwell Guide to Mill's Utilitarianism* (Blackwell Publishing 2006).

Scholarly Journals

Aigheyisi SO and Edore JO, 'Public Procurement, Governance And Economic Growth: Some Policy Recommendations For Africa's Growth and Development' (2015) 10 International Journal of Development and Management Review 110.

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 341.

Black J, Hopper M and Band B, 'Making a Success of Principles Based Regulation' (2007) Law and Financial Markets Review 191.

Bardhan P, 'The Economist's Approach to the Problem of Corruption' (2006) 34 (2) World Development 341.

Chakraborty D, 'Empirical (Non-Doctrinal) Research Method and its Role in Legal Research' (2015) 3 (1) Int. J. Ad. Social Sciences 23.

Kariuki E, 'Application of Therapeutic Jurisprudence: A Different Approach to Punishment in Kenya' (2017) 2 Strathmore Law Review 39.

Mazibuko G and Fourie DJ, 'Manifestation of Unethical Procurement Practices in the South African Public Sector' (2017) 9 (9) African Journal of Public Affairs 106.

McCue C, Pier E and Swanson D, 'Five Dilemmas in Public Procurement' (2015) 15 (2) Journal of Public Procurement 177.

Mutangili SK, 'The Influence of the Public Procurement Law on the Market Economy in Kenya' (2021) 5(1) Journal of Procurement & Supply Chain 13.

Mutangili SK, 'Challenges Influencing Compliance to Public Procurement Regulations in Kenya' (2021) 5(1) Journal of Procurement & Supply Chain 24.

Njoroge J and Ngugi E, 'Challenges Facing Implementation of Public Procurement Regulations in Public Institutions in Kenya: A Case of Nairobi City County Government' (2016) 4(4) International Journal of Business & Law Research 1.

Okiri FO, Ngugi LW and Wandayi JO, 'Strengthening Integrity & Preventing Corruption in the Judiciary in Kenya' (2019) 10 Beijing Law Review 131.

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, 'Using Public Procurement as a Tool of Economic and Social Development Policy in Kenya: Lessons from the United States and South Africa' (2019) 1(1) Journal on Financing for Development 97.

Thiankolu M, 'The Role of Administrative Law and Economics in Tempering Discretion and Balancing Conflicting Objectives in Public Procurement Decision-making' (2020) 5 Kabarak Journal of Law and Ethics 172.

Uromi SM, 'Challenges Facing Public Procurement Information in Some African Countries Namely: South Africa, Uganda, Zimbabwe and Tanzania' (2014) 2(7) International Journal for Innovation Education and Research 54.

Wanyonyi PL, Makokha EN and Namusonge GS, 'Factors Influencing the Implementation of the Public Procurement and Asset Disposal Act 2015: A Case of Public Institutions in Trans- Nzoia West Sub- County in Kenya' (2018) 5(3) International Journal of Recent Research in Social Sciences and Humanities 68.

Papers

Arrowsmith S, 'Horizontal Policies In Public Procurement: A Taxonomy' (2010) 10(2) Journal Of Public Procurement 149.

Akech JMM, 'Development Partners and Governance of Public Procurement in Kenya: Enhancing Democracy in the Administration of Aid' (2007) IILJ Working Paper 2006/3 (Global Administrative Law Series).

Gutman J, 'Is there Room for Discretion? Reforming Public Procurement in a Compliance Oriented World' (2014) Global Economy and Development Working Paper 74.

Osifo C, 'Evaluating Governance and Management in Africa: A Utilitarian Approach' (2015) Public Management Working Papers 8 <https://www.univaasa.fi/materiaali/pdf/isbn_978-952-476-599-2.pdf> accessed 20 April 2020.

Shakya RK, 'Procurement Governance Framework: Success to E-Government Procurement (E-GP) System Implementation' (International Public Procurement conference, Washington, August

2012) <<http://www.ippa.org/images/PROCEEDINGS/IPPC5/Part2/PAPER2-16.pdf>> accessed 5 October 2020.

Tamanaha B, 'A Concise Guide to the Rule of Law' (2007) St. John's Legal Studies Research Paper Series 07-0082 <<https://content.csbs.utah.edu/~dlevin/conlaw/tamanaha-rule-of-law.pdf> > accessed 10 August 2021.

Reports

Kenya Institute for Public Research and Analysis, 'Report on the Status of National Values and Principles of Governance in Kenya, 2015' (Abridged Version S.P No. 16/2017, April 2017) <<https://www.must.ac.ke/wp-content/uploads/2019/12/Status-of-National-Values-and-Principles-of-Governance-2015-Popular-Version.pdf> > accessed 25 April 2020.

Office of the Auditor-General, 'Report of the Auditor-General on the Financial Statements of Public Procurement Regulatory Authority for the Year Ended 30 June 2018' (Report, 2018).

Theses

Njuki GC, 'The Challenges Facing Implementation of the Public Procurement Law in Light of the Constitution of Kenya 2010' (Master's Thesis, University of Nairobi 2018).

Kimani NH, 'Political Patronage in the Operationalization of Public Procurement Law in Kenya' (DPhil thesis, University of Nairobi 2017).

Munyao NE, 'Viability of Lifestyle Audits as an Anti-Corruption Strategy in Kenya: A Critical Assessment of the Policy, Legal And Administrative Framework' (Master's thesis, University of Nairobi 2019).

Thiankolu M, 'Balancing Economic and Social Objectives in Public Procurement in Kenya: A Review of the Law, the Policy and the Practice' (DPhil thesis, University of Nairobi 2020).

Other Secondary Sources

Ayega D, 'MP wants EACC given powers to prosecute corruption cases' *Capital News* (Nairobi, 18 February 2019) < <https://www.capitalfm.co.ke/news/2019/02/mp-wants-eacc-given-powers-to-prosecute-corruption-offences/> > accessed 15 June 2021.

Driver J, 'The History of Utilitarianism' (*The Stanford Encyclopedia of Philosophy*, 22 September 2014) < <https://plato.stanford.edu/entries/utilitarianism-history/> > accessed 20 April 2020.

Ghai YP, 'What are National Value and Principles for?' *Standard Digital* (Nairobi, 16 October 2011) < <https://www.standardmedia.co.ke/article/2000044908/what-are-national-value-and-principles-for> > accessed 25 April 2020.

Judiciary of Kenya, 'Our Mandate' <<https://www.judiciary.go.ke/about-us/mandate/>> accessed 25 August 2020.

Kenton W, 'Utilitarianism Defined' (*Investopedia*, 13 March 2018) <<https://www.investopedia.com/terms/u/utilitarianism.asp>> accessed 20 April 2020.

Kimanthi K and Maosa PM, 'Heads of Procurement, Accounting to Step Aside' *Nation* (Nairobi, 4 June 2018) <<https://nation.africa/kenya/news/heads-of-procurement-accounting-to-step-aside-51124V>> accessed 25 September 2020.

Kimanthi K, 'Heads of Procurement, Accounting to Step Aside' *Daily Nation* (Nairobi, 04 June 2018) <<https://www.nation.co.ke/kenya/news/heads-of-procurement-accounting-to-step-aside-51124>> accessed 30 June 2020.

Ombati C, 'Less Than Half of 1,000 Procurement and Accounting Officers Now Cleared' *The Standard* (Nairobi, 22 August 2018) <<https://www.standardmedia.co.ke/nairobi/article/2001292887/many-fail-vetting-as-only-400-officers-cleared>> accessed 25 September 2020.

Standard Team, 'Haji, EACC Isolate Kinoti as Fight for More Clout Rages' *The Standard* (Nairobi, 13 July 2020) <<https://www.standardmedia.co.ke/the-standard-insider/article/2001378565/haji-eacc-isolate-kinoti-as-fight-for-more-clout-rages>> accessed 30 August 2021.

Transparency International, 'Contract Monitoring Network of Kenya' (2013) <<https://www.tikenya.org/index.php/contract-monitoring-network-of-kenya/> > accessed 21 April 2020.

Wandayi O, 'There is no Choice; DPP and DCI Must Cooperate' *The Standard* (Nairobi, 01 June 2020) <<https://www.standardmedia.co.ke/commentary/article/2001373447/there-is-no-choice-dpp-and-dci-must-cooperate>> accessed 30 August 2021.

Wangari S, 'DPP Haji Declines to Charge KEMSA Scandal Suspects' *Kenyans.co.ke* (Nairobi, 02 October 2020) <<https://www.kenyans.co.ke/news/57864-dpp-declines-charge-kemsa-scandal-suspects>> accessed 15 June 2021.

Waweru T, 'State Orders All Government Procurement Heads to Step Aside' *The Standard* (Nairobi, 5 June 2018) <<https://www.standardmedia.co.ke/politics/article/2001282858/uhuru-orders-procurement-bosses-to-step-aside> > accessed 25 September 2020.