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Sub-national Public Private Partnerships in Kenya: an appraisal of the legal and institutional framework against the constitutional principles on devolution and public procurement.

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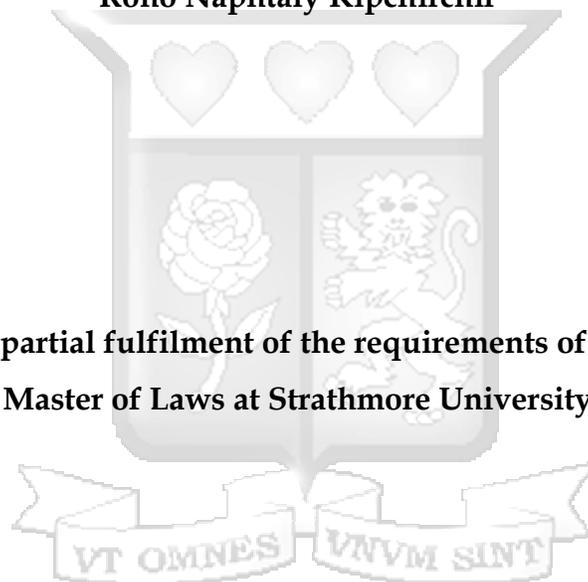
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**Sub-national Public Private Partnerships in Kenya: An Appraisal of the Legal and Institutional Framework against the Constitutional Principles on Devolution and Public Procurement**

**Rono Naphtaly Kipchirchir**



**Submitted in partial fulfilment of the requirements of the degree of  
Master of Laws at Strathmore University**

*Strathmore Law School*

**Strathmore University**

**Nairobi, Kenya**

**OCTOBER, 2021**

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Rono Naphtaly Kipchirchir

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**10<sup>th</sup> October 2021**

## APPROVAL

The thesis of Rono Naphtaly Kipchirchir was reviewed and approved by the following:

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## **ABSTRACT**

The study appraises the legal and institutional framework for sub-national PPPs in Kenya with a view to assessing their conformity with the constitutional principles on devolution and public procurement, and by extension, their impact on the adoption of sub-national PPPs by county governments in Kenya. The conformity with the identified constitutional principles and efficacy of the legal and institutional framework is assessed through the lenses of Economic Analysis of Law Theory as well as the Soufflé Theory.

The study evaluates the legal and institutional framework for sub-national PPPs in Kenya and identifies the gaps and deficits therein. It also evaluates the legal and institutional framework for Sub-national PPPs in comparative jurisdiction.

The above-mentioned legal appraisal, survey and comparative analyses largely confirm the hypotheses of the study, which are, that the procurement regime and institutional framework established under the PPPs Act is not in conformity with the constitutional principles on devolution, and to some extent, with some of the constitutional principles on public procurement; that the existing legal and institutional framework is not efficacious and is partly to blame for the low adoption of sub-national PPPs in Kenya.

Arising from the findings, the study recommends appropriate reforms of the legal and institutional framework for sub-national PPPs in Kenya. It also recommends for enhancement of capacity and credibility of county governments to undertake PPPs. Finally, the recommends for further research on areas not covered by the present study.

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## LIST OF ABBREVIATIONS AND ACRONYMS

COVID	Corona Virus Disease
CSFs	Critical Success Factors
MFMA	Municipal Finance Management Act
MPPPR	Municipal PPP Regulations
MSA	Municipal Systems Act, 2003
PFMA	Public Finance Management Act
PPPs	Public-Private Partnerships
PPPsAB	Public-Private Partnerships Amendment Bill
PPPsB	Public-Private Partnerships Bill
PSPPP	Policy Statement on Public Private Partnerships



## **LIST OF STATUTES AND REGULATIONS**

### **Legislations**

The Constitution of Kenya (2010).

The Constitution of South Africa (1996).

The County Governments Act (No. 17 of 2012).

The Local Governments: Municipal Finance Management Act (South Africa).

The Municipal Public-Private Partnerships Regulations (South Africa).

The Public Finance Management Act (No. 18 of 2012).

The Public Finance Management Act (South Africa).

The Public Private Partnerships Act (No. 15 of 2013).

### **Regulations**

The Public Private Partnerships Regulations (2014).

The Treasury Regulation 16 (South Africa).

### **Bills**

The Public Private Partnerships (Amendment) Bill (No. 52 of 2017).

The Public Private Partnerships Bill (No. 6 of 2021).



## LIST OF AUTHORITIES

Certification of the Constitution of the Republic of South Africa, [1996] ZACC 26.

Independent Electoral Commission of South Africa vs. Langeberg Municipality [Case CCT 49/00] 2001.

Kenya National Highways Authority v PPP Petition Committee & 2 others [2018] eKLR

Republic v Public Private Partnerships Petition Committee (The Petition Committee) & 3 others Ex Parte A P M Terminals [2015] eKLR.

Kenya National Union of Teachers v Attorney General & 4 others [2016] eKLR.

Okiya Omtatah Okioti v Nairobi Metropolitan Service & 3 others; Mohamed Abdala Badi & 9 others (Interested Parties) [2020] eKLR.



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## DEDICATION

This Thesis is dedicated to my wife Judie and my children Jaden, Kayla and Jamin. Your love, encouragement and support gave me the impetus to complete this academic journey.



## CHAPTER ONE: INTRODUCTION

### 1.1. Background

There is no universally agreed definition of Public Private Partnerships (commonly referred to as 'PPPs'). One school of thought views the term as a variety of conceivable relationships between the private and public sector players for the delivery of services which traditionally were in the domain of public sector.<sup>1</sup> The dominant view, however, is that PPPs are contractual arrangements which allow the private sector player to develop an infrastructure facility or provide a public service over time.<sup>2</sup> Under such arrangements, the private sector assumes a substantial financial and technical responsibility as well as risks arising from the provision of such infrastructure or service.<sup>3</sup> This study however adopts the following definition provided under the Kenya Public Private Partnerships Act (PPPs Act):

*“public private partnership means an arrangement between a contracting authority and a private party under which a private party –*

- (a) undertakes to perform a public function or provide a service on behalf of the contracting authority;*
- (b) receives a benefit for performing a public function by way of –*
  - (i) compensation from a public fund;*
  - (ii) charges or fees collected by the private party from users or consumers of a service provided to them; or*

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<sup>1</sup> Li B and Akintoye A, 'An Overview of Public Private Partnerships' in Akintoye A, Beck A and Hardcastle C (eds), 'Public Private Partnerships: Managing Risks and Opportunities', Blackwell Science Lt, UK, pp 3-30.

<sup>2</sup> See for example, Bayliss K and Van Waeyenberge E, 'Unpacking the Public-Private Partnerships Revival' *Journal of Development Studies*, 2017, 1-<<https://bit.ly/2JV3wMW>> on 7 December 2020. See also, Zhang X and Chen S, 'A systematic framework for infrastructure development through public private partnerships' 36 (2) *IATSS Research*, 2013, 1-<<https://bit.ly/3qD7KJE>> on 7 December 2020.

<sup>3</sup> Custos D and Reitz J, 'Public Private Partnerships', 58 (Supplement) *The American Journal of Comparative Law*, 2010, 559.

- (iii) a combination of such compensation and such charges or fees; and
- (c) is generally liable for risks arising from the performance of the function in accordance with the terms of the project agreement".<sup>4</sup>

Notwithstanding the varied definitions, the dominant features of PPPs are risk allocation and sharing, long term nature and the partnership relationship it creates between the public and private sector players.

PPPs have been successfully implemented in several developed countries due to the developed countries' mature legal systems, liberalized markets, stable economies and strong financing capabilities, among other favourable success factors.<sup>5</sup> They are also increasingly becoming common features of infrastructure development in most countries owing to the benefits that accrue from such arrangements. The benefits include reduction of public burden through provision of new sources of investment capital; reduction of sovereign borrowings and associated risks; improvement in quality and affordability of services; reduction in the funding gap particularly for infrastructure developments; expansion of economy and job creation; risk allocation and mitigation; technology transfer; and reduction of wastage and corruption through harnessing of private sector efficiencies.<sup>6</sup> Moreover, PPPs enable governments to outsource the function of providing infrastructure facilities and services and instead focus more on policy, planning, oversight and regulation. They are similarly championed as the antidote to the seeming inefficiency and lack of innovation in the old-style delivery of public services.<sup>7</sup> Notably,

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<sup>4</sup> Section 2, *Public Private Partnerships Act* (No. 15 of 2013).

<sup>5</sup> Jamali D, 'Success and failure mechanisms of public private partnerships (PPPs) in developing countries: insights from Lebanese context' 17 (5) *International Journal of Public Sector Management*, 2004, 428-<https://bit.ly/2JLKPvb> on 7 December 2020.

<sup>6</sup> Jamali D, 'Success and failure mechanisms of public private partnerships in developing countries', 417.

<sup>7</sup> Jamali D, 'Success and failure mechanisms of public private partnerships in developing countries', 421.

PPPs not only benefit public sector players; they also enable private sector players to reap steady and decent returns on their investments in the public sector related projects.<sup>8</sup>

Over time, the application of PPPs has spread from the original infrastructure sectors of roads, railways, bridges, energy, water and sanitation to the emerging infrastructure fields of education, health care and emergency services.<sup>9</sup> The dominant features of risk allocation and sharing and their long-term nature however remain in place.

PPPs are undertaken at national levels of government in jurisdictions with a unitary system of government. They are also undertaken at sub-national levels of government in jurisdictions with decentralised or devolved system of government. Such PPPs are commonly referred to as sub-national PPPs. For the purposes of the study, sub-national PPPs mean PPPs undertaken by county governments in Kenya.

In Kenya, the implementation of PPPs particularly in the road, power and water infrastructure sectors spans more than five decades. However, it was not until 2009 that the Government started taking a more pro-active approach by revamping the legal framework. This was done through development of Public Procurement Disposal (Public Private Partnerships) Regulations of 2009. In 2010, the country adopted a new constitution, which among other things introduced devolution and set out the principles underpinning public procurement. Subsequently, the Government issued a policy statement on PPPs in 2011 reaffirming its intention to collaborate with private sector players in the provision of infrastructure facilities and services and committing to create the necessary environment. The policy, together with the provisions of the then new

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<sup>8</sup> Scharle P, 'Public-Private Partnerships as a social game', 15 (3) *European Journal of Social Science Research*, 2002, 227-52.

<sup>9</sup> Hodge G and Carsten G, 'Public private partnerships: an international performance review', 67 (3) *Public Administration Review*, 2007, 545-558.

constitution informed the subsequent enactment of the PPPs Act in 2013 and the derivative regulations. The main objectives of the legislation are to give effect to the constitutional principles on public procurement and to establish a one-stop-shop legal and institutional framework to facilitate the participation of private sector in the delivery of infrastructure facilities and services, among others.<sup>10</sup> Notably, the Act applies to PPPs at both national and county governments.

With the enactment of the PPPs Act, it was expected that the resultant legal and institutional framework would lead to increased adoption of PPPs including sub-national PPPs. It was also hoped that the new legal and institutional framework would incentivise county governments to develop the capacity and credibility for enhanced adoption of PPPs. However, more than eight years after the enactment of this legislation, the up-take of sub-national PPPs remains low, hence the study.

At the time of writing this thesis, which is eight years after the enactment of the PPPs Act, there were a total of sixty-four PPP projects in the country's PPPs project pipeline.<sup>11</sup> Only five of the sixty-four projects were sub-national PPP projects.<sup>12</sup> In terms of percentage, sub-national PPP projects constituted 7.8% whereas national projects constituted 92.2%. None of the only five sub-national PPP projects had reached financial close. Of the seventeen PPP projects at the procurement stage, only two were sub-national PPP projects, namely, Murang'a Town/Mukuyu Water Supply and Nairobi City Council Car Park Project.<sup>13</sup> Of the forty-one projects at the pre-procurement stage, only three were sub-national projects, namely, Mombasa Solid Waste Management, Nakuru Solid Waste Management, and Solid Waste Treatment in Nairobi City County.<sup>14</sup>

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<sup>10</sup> See, The Long Title, *Public Private Partnerships Act* (No.15 of 2013).

<sup>11</sup> See, Public Private Partnerships Unit of Kenya, *Projects*, published on the PPP Platform as at 28 July 2021, <<http://portal.pppunit.go.ke>.> on 28 July 2021.

<sup>12</sup> See, Public Private Partnerships Unit of Kenya, *Projects*, published on the PPP Platform as at 28 July 2021, <<http://portal.pppunit.go.ke>.> on 28 July 2021.

<sup>13</sup> See, Public Private Partnerships Unit of Kenya, *Projects*, published on the PPP Platform as at 28 July 2021, <<http://portal.pppunit.go.ke>.> on 28 July 2021.

<sup>14</sup> See, Public Private Partnerships Unit of Kenya, *Projects*, published on the PPP Platform as at 28 July 2021, <<http://portal.pppunit.go.ke>.> on 28 July 2021.

Despite the Constitution having devolved multi-sectoral infrastructure development and service delivery mandates to county governments, all but one of the five sub-national PPP projects in the county's PPP projects pipeline related to water and sanitation.<sup>15</sup> It is noteworthy that water and sanitation is a responsibility that rested in the defunct municipalities, prior to the reintroduction of the devolved system of government in 2010. From the above statistics, it is clear that county governments are yet to venture into PPPs for the delivery of their post-2010 resource-intensive constitutional mandates such as agriculture, county health services, county transport, trade and development, and county planning and development.<sup>16</sup>

## 1.2. Research Problem

A review of the last eight years since the enactment of the PPP Act reveals that there has been little or no impact on adoption of PPPs by county governments and institutions within their competence. The legal and institutional framework has failed to incentivize county governments to develop the requisite capacity and credibility for PPPs adoption and implementation. This study, therefore, investigates the reason(s) for the lack of impact, and assesses the degree to which the existing legal and institutional framework for PPPs is aligned with the 2010 constitutional principles on devolution and public procurement.

## 1.3. Research Objectives

As a general objective, the study seeks to ascertain whether the legal framework for sub-national PPPs is consistent with the constitutional principles on public procurement and devolution and how the level of consistency impacts the adoption of sub-national PPPs by county governments. The specific research objectives are as below.

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<sup>15</sup> See, Public Private Partnerships Unit of Kenya, *Projects*, published on the PPP Platform as at 28 July 2021, <<http://portal.pppunit.go.ke>> on 28 July 2021.

<sup>16</sup> See, Part X, *The Local Governments Act* (Cap 265, Laws of Kenya). See also, Part 2 of the Fourth Schedule, *Constitution of Kenya* (2010).

- (a) The study appraises the conformity of the existing legal and institutional framework for sub-national PPPs in Kenya with the constitutional principles on devolution and public procurement.
- (b) The study assesses the relationship between the constitutional principles on devolution and public procurement and adoption of sub-national PPPs by county governments.
- (c) The study explores the manner in which comparative jurisdictions such as South Africa designed her legal and institutional framework in order to enhance the adoption of sub-national PPPs.
- (d) The study provides recommendations as to how the procurement processes and institutional framework under the Act may be reformed to accord with the constitutional principles on devolution and public procurement and thereby enhance the adoption of sub-national PPPs by county governments.

#### **1.4. Hypotheses**

The study proceeds on the following hypotheses:

- (a) The legal and institutional framework established under the PPPs Act is not in conformity with the constitutional principles on devolution and public procurement;
- (b) The existing legal and institutional framework is not efficacious and is partly to blame for the low adoption of sub-national PPPs in Kenya; and

#### **1.5. Research Questions**

This study answers the question whether the existing legal and institutional framework for sub-national PPPs is in conformity with the constitutional principles on devolution and public procurement and adequately supports the adoption of sub-national PPPs. To answer this question, the study considers the following:

- (a) To what extent does the procurement process and institutional framework established under the Act comply with and promote the constitutional principles on devolution and public procurement?
- (b) What is the relationship between the constitutional principles on devolution and public procurement and adoption of sub-national PPPs?
- (c) How has South Africa designed her legal and institutional framework in order to enhance the adoption of sub-national PPPs?
- (d) How can the procurement process and institutional framework under the Act be reformed to accord with the constitutional principles on devolution and public procurement and thereby enhance the adoption of sub-national PPPs?

### **1.6. Approach and Methodology**

The study adopts both qualitative and quantitative methodologies. Qualitative methodology is deemed necessary as the study, underpinned by the economic analysis of law theory, seeks to understand specifically the operation of the Kenyan legal system as regards the existing legal and institutional framework for sub-national PPPs and how it complies with the constitutional principles as well as how the extent of compliance has impacted the adoption of sub-national PPPs in Kenya. In this regard, the study undertakes a comprehensive examination of the obtaining legal and institutional framework for sub-national PPPs in Kenya. In addition, analysis of pertinent pieces of literature from various primary, secondary and tertiary sources was undertaken in order to examine the impact of the legal and institutional framework on the adoption and implementation of PPPs by county governments in Kenya. Furthermore, the study analyses qualitative responses elicited by the questionnaire used in the survey. Moreover, the study undertakes a comparative analysis of sub-national PPPs in South Africa with a view to gaining more insights on international best practice as well as enriching the study and its recommendations. The choice of South Africa is informed by the comparable constitutional model and level of economic development with Kenya.

Similarly, the study uses quantitative approach in order to establish the actual status on adoption and implementation of sub-national PPPs in Kenya by the various counties. Quantitative approach was deemed relevant as it would afford a wide array of responses on the several issues within the study subject. Towards this end, the study analyses quantitative responses elicited from respective county secretaries and a PPP practitioner by tailored questionnaires.

The data collection exercise was undertaken during the height of COVID-19 pandemic. Whilst in-person surveys were virtually impossible, online surveys were apposite. Google Forms provided a suitable platform for the virtual collection and processing of data.<sup>17</sup> To that end, the relevant questionnaires were used to develop respective survey forms on Google Forms. Subsequently, the target respondents were invited via email to respond to the relevant forms.

As pertains to county governments, county secretaries from the forty-seven (47) governments were invited to respond to the relevant form. Ultimately, seventeen county secretaries participated yielding a thirty 36 per cent response rate. The resultant response rate is explained by the inherent limitation of online surveys whereby target respondents are invariably nudged remotely by way of email reminders which may be ignored easily.

### **1.7. Limitations of the Study**

The study is limited to an appraisal of the legal and institutional framework as it applies to sub-national PPPs in Kenya. It does not therefore delve into other forms of PPPs, such as the ones undertaken at the national level. Similarly, and due to the inevitably broad and varied nature of the issues examined, it was impossible to ascertain, with reasonable measure of exactitude, the extent to which each of the identified shortfalls of the legal framework contributes to low adoption of sub-national PPPs in Kenya. Accordingly, the utility of the findings and recommendations in prompting precise responses is

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<sup>17</sup> Google Forms is a survey administration software that allows virtual collection and processing of information from users through surveys.

necessarily limited. In addition, the study focuses on the efficacy of the legal and institutional framework from the perspective of sub-national public-sector partners. The resultant findings and recommendations do not therefore benefit from the perspective of prospective private-sector partners. Whereas significant effort and expense was expended towards data collection from the PPP Unit and PPP practitioners, pertinent data was ultimately collected from one PPP practitioner. Consequently, the study may not have benefited from the perspectives of other practitioners. This limitation was however mitigated by subjecting the responses to rigorous analysis and reviewing pertinent pieces of literature on the subject matter.

### **1.8. Assumptions**

The study proceeded on the assumption that no fundamental changes in the policy, legal and institutional framework for sub-national PPPs in Kenya and comparative jurisdiction would occur during the period of study. It also assumes that the county secretaries and the PPP practitioner interviewed gave honest responses.

### **1.9. Chapter Breakdown**

The objectives of the study are realized within five chapters.

Chapter one is introductory. It provides the background to the problem, the research problem, hypothesis, research questions, research objectives, approach and methodology, limitations, assumptions, chapter breakdown and definition of key terms used in the thesis.

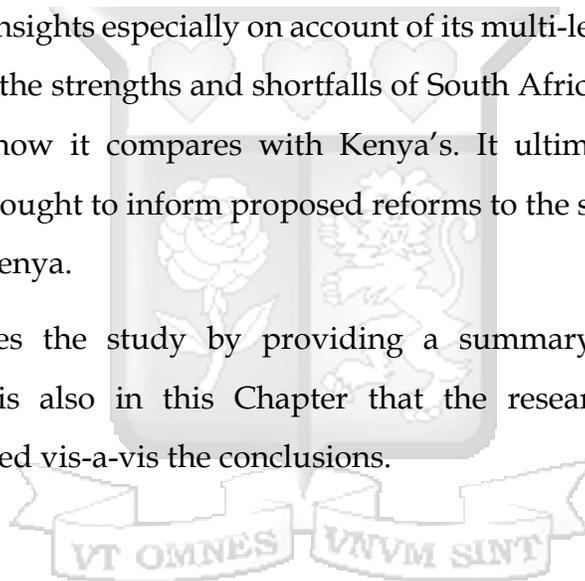
Chapter two contains the theoretical framework and the literature review. It discusses the Economic Analysis of Law theory and the Soufflé Theory, being two carefully selected theories that guided the study. It is also in this chapter that the relevant literature is discussed, and the justification for the present study made.

Chapter three is the main plank of the thesis. It examines the legal and institutional framework for sub-national PPPs in Kenya. It examines each of the two facets of the framework and sets out the shortfalls of the statutory framework in so far as conformity

with the constitutional principles on devolution and public procurement is concerned. It also evaluates the Bills currently pending in Parliament with a view to establishing whether the provisions therein will cure the identified shortfalls. This chapter also presents and discusses the salient findings made from the desktop analysis of the legal framework and the data evidence obtained from county governments and PPP practitioners. It further discusses the evidence of the utility of Kenya's legal and institutional framework in terms of governance and regulation of sub-national PPPs.

Chapter four contains an examination of the legal frameworks for sub-national PPPs in comparative jurisdictions with particular reference to South Africa. South Africa offers valuable comparative insights especially on account of its multi-level governance system. The Chapter identifies the strengths and shortfalls of South Africa's legal framework for municipal PPPs and how it compares with Kenya's. It ultimately recommends the positive attributes that ought to inform proposed reforms to the statutory framework for sub-national PPPs in Kenya.

Chapter five concludes the study by providing a summary of the findings and recommendations. It is also in this Chapter that the research questions and the hypotheses are evaluated vis-a-vis the conclusions.



## CHAPTER TWO: THEORETICAL FRAMEWORK AND LITERATURE REVIEW

### 2.0. Introduction

This chapter discusses two pertinent theories that guided the study. Several pieces of pertinent literature are also reviewed in this chapter.

### 2.1. Theoretical Framework

There are various theories that can be used to explain the concept of PPPs. However, the study enters the debate through the lenses of Economic Analysis of Law Theory and Soufflé Theory.

#### 2.1.1. Economic Analysis of Law Theory

The theory provides guidance for assessment of the efficiency of legal rules using two basic indices, namely: the effects of rules on the behaviour of the relevant actors and whether the effects are socially desirable.<sup>18</sup>

The origin of the economic analysis of law theory is traceable to Jeremy Bentham who “.... systematically examined how actors would behave in the face of legal incentives and who evaluated outcomes with respect to clearly stated measure of social welfare (utilitarianism) objectives.”<sup>19</sup> Over time, the theory has had several practical applications such as understanding the effect of laws on human incentives.<sup>20</sup> As a matter of fact, scholars such as Posner have found economic analysis of law to be a powerful tool for understanding as well as for criticising law.<sup>21</sup>

The theory is based on the understanding that, functionally, legal rules distribute rights and duties based on pertinent characteristics of a situation.<sup>22</sup> Depending on the propriety

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<sup>18</sup> Kornhauser L, "The Economic Analysis of Law", *The Stanford Encyclopedia of Philosophy* (Fall 2017), Edward N. Zalta (ed.), <<https://plato.stanford.edu/archives/fall2017/entries/legal-econanalysis/>> on 21 May 2021.

<sup>19</sup> Bentham J, *An Introduction to the Principles of Morals and Legislation*, (London, 1970) 1.

<sup>20</sup> Baker, E 'The Ideology of the Economic Analysis of Law' 5(1), *Philosophy & Public Affairs*, 1975, 3-<<https://sci-hub.do/https://www.jstor.org/stable/2265019>> on 21 May 2021.

<sup>21</sup> Baker, E 'The Ideology of the Economic Analysis of Law', 4.

<sup>22</sup> Baker, E 'The Ideology of the Economic Analysis of Law', 7.

of distribution, legal rules may result in efficient or inefficient outcomes.<sup>23</sup> On the one hand, legal rules may foster efficiency by defining and allocating rights to the party for whom the rights are most valuable and by defining and placing liabilities on the party who is best situated to minimise costs.<sup>24</sup> On the other hand, legal rules may foster inefficiency by recognizing a right in a party who would be better off if the right was given to the counterparty whom without it would not be incentivised to adopt a socially desired behaviour.<sup>25</sup>

In the context of PPPs, a legal framework distributes rights and obligations between public and private sector partners who have inherent divergent interests. On the one hand, public-sector partners, acting through incumbent elected officials, seek to maximise political benefits by providing current users and voters with the benefit of infrastructure projects whilst deferring the attendant costs to future elected officials, users and voters.<sup>26</sup> On the other hand, the private-sector partners, acting through their boards, seek to maximise profits and shareholder value to their shareholders.<sup>27</sup>

An efficient legal framework in the foregoing circumstances would be the one that maximises the present value of private-sector partners' future risk-adjusted cash flows throughout the life cycle of the contract whilst allowing public-sector partners to earn political credit for delivering project benefits instantly whilst transferring costs of those projects to future governments without jeopardising the ability of the voters and users of the infrastructure projects and services to access those services at socially acceptable costs.<sup>28</sup> An ideal legal framework would, for instance, ensure that a private-sector partner

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<sup>23</sup> Baker, E 'The Ideology of the Economic Analysis of Law', 7.

<sup>24</sup> Baker, E 'The Ideology of the Economic Analysis of Law', 7.

<sup>25</sup> Baker, E 'The Ideology of the Economic Analysis of Law', 8.

<sup>26</sup> Vining A R and Boardman A E, *Self-interest Springs Eternal: Political Economy Reasons why Public-Private Partnerships do not Work as well as Expected*, September, 2014, 18 - <https://www.ifo.de/DocDL/dicereport314-forum4.pdf> on 21 September 2021.

<sup>27</sup> Vining A R and Boardman A E, *Self-interest Springs Eternal: Political Economy Reasons why Public-Private Partnerships do not Work as well as Expected* 18.

<sup>28</sup> Vining A R and Boardman A E, *Self-interest Springs Eternal: Political Economy Reasons why Public-Private Partnerships do not Work as well as Expected*, 18 - 19.

is adequately compensated and incentivised through a raft of measures such as insurance from political risks in order to abandon its narrow profit seeking motive and act in the best interest of the public-sector partner. As regards the public-sector partner, an ideal legal framework would be the one that ensures that public-sector partners are accorded adequate credibility to attract and retain private-sector partners and appropriately capacitated to be able to transfer appropriate risks to the private-sector partner.

The theory acknowledges that rights have more utility in some hands or in some uses than in others.<sup>29</sup> Since law defines and distributes rights, law can be analyzed by assessing whether it encourages or frustrates recognition and distribution of rights to more valued uses.<sup>30</sup> Posner demonstrated that law may be analyzed against the standard of encouraging movement to more valued uses.<sup>31</sup> Baker argues that “any given set of rules can be criticized by viewing its effect on some kind of value.”<sup>32</sup> In terms of the study, the relevant value would be compliance with the constitution and enhancement of efficiency, autonomy, capacity and credibility of county governments to undertake sub-national PPPs. The import of the foregoing would be that any policy, institutional, statutory, procedural or regulatory provision that does not promote constitutional principles or does not enhance the autonomy, capacity and credibility of county governments to undertake sub-national PPPs would be an inefficient provision.

Despite Kenya having a fairly stable legal system and a relatively new legislation on PPPs, the adoption of sub-national PPPs remains low. This was hypothetically attributed to non-compliance with the constitutional principles on devolution and public procurement and an overly complex and inefficient procurement process established under the PPPs Act. The economic analysis of law theory therefore offers an appropriate mechanism for evaluating the efficacy of the legal framework for sub-national PPPs in Kenya with a view to identifying the deficiencies in the legal and institutional framework.

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<sup>29</sup> Baker, E ‘The Ideology of the Economic Analysis of Law’, 8.

<sup>30</sup> Baker, E ‘The Ideology of the Economic Analysis of Law’, 8.

<sup>31</sup> Baker, E ‘The Ideology of the Economic Analysis of Law’, 8.

<sup>32</sup> Baker, E ‘The Ideology of the Economic Analysis of Law’, 8.

### 2.1.2. Soufflé Theory

Soufflé theory was developed and advanced by Parker and Kirsten who argued that “like a soufflé in the hands of a master chef who uses just the right combination of milk, eggs and sugar, and bakes it just long enough to rise, so a successful programme of decentralisation will need a skilful central government to include just the right combination of political, fiscal and institutional elements appropriately sequenced to ensure success.”<sup>33</sup> They cautioned that “half-baked decentralisation efforts, like half-baked soufflés will collapse!”<sup>34</sup>

Parker and Kirsten argued that essential elements of the political, fiscal and institutional dimensions of decentralization must be combined to realize desired outcomes. As regards political dimension, they argued that appropriate policy and legislative powers ought to be decentralised.<sup>35</sup> As regards fiscal dimension, they argued for the appropriate decentralisation of fiscal resources, fiscal autonomy, fiscal decision-making and sub-national borrowing.<sup>36</sup> As regards institutional dimension, they argued in favour of appropriate decentralisation of institutional structures and participation and which elements encompass institutional capacity, institutional accountability and institutional transparency.<sup>37</sup>

Soufflé theory of decentralisation has been instrumental in explaining various aspects of decentralisation. For instance, it has been used to how a country’s resource base, human

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<sup>33</sup> Parker AN and Kirsten J, ‘Decentralization: Toward a Revitalized Strategy for Rural Development’ 34(4), *Agrekon*, 1995, 246-<<https://bit.ly/2SxVloz>> on 5 May 2021.

<sup>34</sup> Parker AN and Kirsten J, ‘Decentralization: Toward a Revitalized Strategy for Rural Development’ 246.

<sup>35</sup> Parker AN and Kirsten J, ‘Decentralization: Toward a Revitalized Strategy for Rural Development’ 247.

<sup>36</sup> Parker AN and Kirsten J, ‘Decentralization: Toward a Revitalized Strategy for Rural Development’ 247.

<sup>37</sup> Parker AN and Kirsten J, ‘Decentralization: Toward a Revitalized Strategy for Rural Development’ 247.

capacity and governance style determines its scale of devolution.<sup>38</sup> Another example of its application is found in the assessment of the impacts of governance aspect of political decentralization on service delivery.<sup>39</sup>

Soufflé theory of decentralisation undoubtedly underpinned the decentralisation of political, fiscal and institutional dimensions to county governments in respect of functions that were devolved to county governments upon the promulgation of the Constitution in the year 2010. It was, therefore, deemed that soufflé theory of decentralisation would complement the economic analysis of law theory in explaining why some of the desired outcomes have not been achieved particularly as regards the adoption of sub-national PPPs by county governments. In that regard, the theory guides the identification of essential elements of political, fiscal and institutional dimensions of decentralisation which may not have been decentralised through legal framework for sub-national PPPs in appropriate proportions.

## 2.2. Literature Review

PPP is an area of much scholarly discourse. Chan *et al* have undertaken extensive studies in this area and in one of the studies they identify the main factors that determine success or failure in the adoption of PPPs.<sup>40</sup> These factors include stable political and social environment and transparent and efficient procurement process. Similarly, in their study of factors contributing to successful PPP projects in Hong Kong as compared to Australia and the United Kingdom, Cheung *et al* identify several factors including favourable legal framework, commitment and responsibility of private and public sectors, strong and

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<sup>38</sup> Farook MK, Shamail S and Awais MM, 'Devolution in a Virtual Enterprise' in Camarinha-Matos LM and Picard W (eds) *Pervasive Collaborative Networks*, Springer, 2008, 436 - <<https://bit.ly/3FovIjm>> on 7 October 2021.

<sup>39</sup> Wagana DM, Iravo M and Nzulwa, 'Analysis of the Relationship between Devolved Governance, Political Decentralization, and Service Delivery: A Critical Review of Literature' *European Scientific Journal*, 2015, 460-461 - <<https://bit.ly/2YpNKkN>> on 7 October 2021.

<sup>40</sup> Chan A, Lam P, Chan D, ASCE M, Cheung E, and Ke Y, 'Potential obstacles to successful implementation of public private partnerships in Beijing and the Hong Kong Special Administrative Region' 26 (1) *Journal of Management in Engineering*, 2010, 30 and 31- <<https://bit.ly/3qN7hVE>> on 8 December 2020.

good private consortium, stable macro-economic environment and appropriate risk allocation and risk sharing as key to success of PPPs.<sup>41</sup>

Yang *et al* have also undertaken studies on factors that determine the success or failure of PPPs. In one of their studies, they focused on PPPs implementation environment in transitional economies with a view to developing an analytical framework for assessing the success factors.<sup>42</sup> They identified the main pillars of such framework as comprising the market, the operating environment and the government. Yang *et al* proceed to argue that deepening and consolidating market liberalization and reforms, establishing strong and supportive legal and institutional environment and enhancing government capacity are key to successful operation of PPPs.<sup>43</sup>

Bazzoli *et al* in their paper on public private collaborations identify the market environment, structure of the PPP and type of projects to be undertaken as the main factors underpinning the adoption of PPPs.<sup>44</sup> Similarly, Field and Peck in their study of factors supporting or impeding the adoption of PPPs have sought to distinguish between internal drivers from external enablers that are associated with successful adoption of PPPs.<sup>45</sup> In his paper, Xueqing Zhang identifies five Critical Success Factors (CSFs) for PPPs in infrastructure developments.<sup>46</sup> These are: conducive investment environment;

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<sup>41</sup> Cheung E, Chan, Albert P C and Kajewski S, 'Factors Contributing to Successful Public Private Partnership Projects: Comparing Hong Kong with Australia and the United Kingdom', 10 (1) *Journal of Facilities Management*, 2012, 45-58-<<https://bit.ly/2IwbbAY>> on 8 December 2020.

<sup>42</sup> Yang Y, Hou Y and Wang Y, 'On the development of public-private partnerships in transitional economies: an explanatory framework', 73 (2) *Public Administration Review*, American Society for Public Administration, 2013, 301-<<https://bit.ly/36S0tOy>> on 8 December 2020.

<sup>43</sup> Yang *et al*, 'On the development of public private partnerships', 303.

<sup>44</sup> Bazzoli G, Stein R, Alexander J, Conrad D, Sofaer S and Shortell S, 'Public private collaboration in health and human service delivery: evidence from community partnerships' 75 (4) *Milbank Quarterly*, 1997, 533-61-<<https://bit.ly/3lXofNj>> on 8 December 2020.

<sup>45</sup> Field J and Peck E, 'Concordat or contract: factors facilitating or impeding the development of public private partnerships in healthcare in England' 6 (3) *Public Management Review*, 2004, 253-272-<<https://bit.ly/3grZ3xs>> on 8 December 2020.

<sup>46</sup> Zhang X, 'Critical success factors for public private partnerships in infrastructure development' 131 (1) *Journal of Construction Engineering and Management*, 2005, 3-14-<<https://bit.ly/37GSAe4>> on 8 December 2020.

appropriate risk allocation; economic viability; reliable concessionaire consortium and sound financial package.<sup>47</sup>

In order to deepen the appreciation of best means of managing and delivering PPP projects, Osei-Kyei and Albert Chan have undertaken a review and analysis of existing literature on CSFs for PPP projects. They conclude that the most important CSFs are, appropriate risk allocation and sharing, strong private consortium, political support, public support, transparent procurement process and favourable legal framework.<sup>48</sup> The findings of their study provide a useful framework for analysing the reasons for success or failure of PPP projects.

Jamali Dima has also written extensively on PPPs particularly in developing countries and underscores the significance of a strong legal and institutional landscape in providing a conducive environment for PPP adoption and implementation.<sup>49</sup> Other studies on the impediments and facilitators of PPPs advance the view that PPPs tend to experience challenges where factors such as transparency, accountability and public participation are lacking or inadequate.<sup>50</sup>

Sub-national PPPs have equally stoked scholarly curiosity. For instance, Purbo *et al* have done an exploratory study on how various tiers of governments can share competencies to develop a more successful sub-national PPP programme.<sup>51</sup> Based on their pertinent findings, they conclude that development of regulatory framework for PPPs by national

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<sup>47</sup> Zhang X, 'Critical success factors for public private partnerships in infrastructure development', 5.

<sup>48</sup> Osei-Kyei R and Chan A, 'Review of studies on the critical success factors for public-private partnership (PPP)', 9-10.

<sup>49</sup> Jamali D, 'Success and failure mechanisms of public private partnerships in developing countries', 426.

<sup>50</sup> Hofmeister A and Heiko B, 'Public private partnerships in Switzerland: crossing the bridge with the aid of a new governance approach' 70 (2) *International Review of Administrative Science*, 2004, 217-232-<<https://bit.ly/39NCLVv>> on 8 December 2020.

<sup>51</sup> Purbo R K, Smith C and Bianchi R J, 'Local governments and public-private partnerships: experiencing multilevel governance issues in Indonesian water supply provision' 36 (1) *International Journal of Water Resources Development*, 2019, 1-<<https://bit.ly/3lKyIFk>> on 4 December 2020.

governments without involvement of respective sub-national governments adversely affects adoption and implementation of PPPs, especially, the ones implementation of which is impacted by interdependencies between multiple levels of governments, in terms of bankability and marketability.<sup>52</sup> Their findings aforesaid offer instructive contribution to the literature on implementation of PPP initiatives within a multi-level governance structure.

Kaur *et al*, having done an empirical study on the determinants of sub-national PPPs in India, identify the key drivers of sub-national PPP investments in terms of both the number and value of projects as being fiscal constraints, existing level of infrastructure, institutional quality and financial development.<sup>53</sup> Pertinently, they conclude that deficiencies in legal framework have a negative effect on the value of sub-national PPPs and a positive effect on the number of sub-national PPPs.<sup>54</sup> Further, they conclude that per capita income has a positive and a negative impact on the value and number, respectively, of sub-national PPPs with the result that poorer states attract numerous PPP projects but of lower values whereas wealthier ones attract fewer PPP projects but of higher values.<sup>55</sup>

Mizell has written about sub-national PPPs in the UK where he asserts that, municipal “PFI has played an integral role in delivering a great deal of social infrastructure at the local level in England” and that municipal “PFIs tend to outperform traditional procurement in terms of costs and schedule overruns”.<sup>56</sup> He concludes that the experience of decades of implementation of sub-national PPPs in the UK demonstrates that a well-structured governance framework which eliminates obstacles to successful

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<sup>52</sup> Purbo R K, Smith C and Bianchi R J, ‘Local governments and public-private partnerships’ 19.

<sup>53</sup> Kaur S and Malik S, ‘Determinants of public-private partnerships: a state-level empirical analysis of India’ 38(4) *Property Management* 2020, 606-<https://bit.ly/3gl36eP> on 7 December 2020.

<sup>54</sup> Kaur S and Malik S, ‘Determinants of public-private partnerships’, 606 and 607.

<sup>55</sup> Kaur S and Malik S, ‘Determinants of public-private partnerships’, 607.

<sup>56</sup> Mizell L, ‘Public-private partnerships at the subnational level of government: The case of PFI in the United Kingdom’ in OECD (ed), *Sub-national Public-Private Partnerships: Meeting Infrastructure Challenges* 2018, <https://bit.ly/3qyaU1q> on 7 December 2020.

project design and delivery, ranging from legal impediments to administrative capacity constraints, increases the viability of PPPs as an alternative mode of procurement.<sup>57</sup> He concludes, further, that whereas both the national and local spheres of governments have capacity challenges, the problem is acute in the local level of government.<sup>58</sup> However, he underscores that the administrative capacity constraints which disadvantage local governments in relation to the private sector are addressed through cogent efforts in reinforcement of expertise of local authorities.<sup>59</sup>

Mazzola *et al* examined the determinants of the realisation of sub-national PPP initiatives whilst focusing, in particular, on the potential role of local management and territorial characteristics in promoting the adoption of PPPs.<sup>60</sup> Based on their findings, they reason that infrastructure endowment in itself cannot explain the adoption of sub-national PPPs.<sup>61</sup> Interestingly, they established, empirically, that greater management ability appears to be a negative determinant for the adoption of sub-national PPPs meaning that municipalities with an efficient administration tend to be involved in fewer PPP initiatives since they are likely to provide services in other ways that they perceive as cheaper.<sup>62</sup>

Hannington Odame and Elsie Kangai have also written on PPPs and argue in one of their papers that a robust legal and institutional framework is essential for successful implementation of PPPs.<sup>63</sup> Their study was however undertaken before the enactment of

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<sup>57</sup> Mizell L, 'Public-private partnerships at the subnational level of government'.

<sup>58</sup> Mizell L, 'Public-private partnerships at the subnational level of government'.

<sup>59</sup> Mizell L, 'Public-private partnerships at the subnational level of government'.

<sup>60</sup> Mazzola F, Cusimano A, Giacomo G and Epifanio R, 'Local and territorial determinants in the realization of public-private-partnerships: an empirical analysis for Italian provinces' 27 (11) *European Planning Studies*, 2019, 2281 and 2282-<<https://bit.ly/2Lfi0I4>> on 7 December, 2020.

<sup>61</sup> Mazzola F *et al*, 'Local and territorial determinants in the realization of public-private-partnerships' 2281.

<sup>62</sup> Mazzola F *et al*, 'Local and territorial determinants in the realization of public-private-partnerships' 2281.

<sup>63</sup> Odame H and Kangai E, 'Agribusiness Public Private Partnerships: County Report of Kenya' Food and Agriculture Organization of the United Nations, Rome, 2013, 8-<<https://bit.ly/3qBjcpp>> on 8 December 2020.

the PPPs Act and does not, therefore, comprehensively address the issues which the present study does. In one of his books, Migai Akech has looked at the subject of PPP but as a variant of privatization.<sup>64</sup> The present study however looks at PPPs, not as a means of privatization, but as collaborative arrangements between private and public sector players.

Ng'ang'a and Kisimbii conducted a survey of PPP projects based in Mombasa County with a view to establishing determinants of private sector participation in the implementation of PPP projects in Kenya.<sup>65</sup> They conclude that funding, ease of doing business, government policies, technological and project periods influence, greatly and significantly, private sector participation in the implementation of PPP projects in Mombasa county.<sup>66</sup> Whilst their study offers useful insights on critical success factors for PPPs generally, the deduced conclusions do not address compliance of the legal and institutional framework with the constitution. Their study also does not address issues of capacity and credibility of county governments as potential determinants of private sector participation in the implementation of PPP projects.

Closer home, Okwaro *et al* have conducted a study on the factors affecting adoption of PPPs in the county government of Uasin Gishu.<sup>67</sup> They established that despite being critical to the county's infrastructure development, the adoption of PPPs in the county was affected by absence of requisite policy direction, inadequate financial resources and lack of confidence among county employees in their ability to make critical decisions

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<sup>64</sup> Akech M, *Privatization and Democracy in East Africa: The Promise of Administrative Law*, East Africa Educational Publishers, Nairobi, 2009, 2-5.

<sup>65</sup> Ng'ang'a N W and Kisimbii J B, 'Determinants of Private Sector Participation in the Implementation of Public Private Partnerships Projects in Kenya: A survey of Public-Private Partnerships based in Mombasa County' 3 (2) *International Academic Journal of Information Sciences and Project Management* 2018, 138-<https://bit.ly/3og142b> on 2 December, 2020.

<sup>66</sup> Ng'ang'a N W and Kisimbii J B, 'Determinants of Private Sector Participation in the Implementation of Public Private Partnerships Projects in Kenya' 153 and 154.

<sup>67</sup> Okwaro K, Chepkwony J and Boit R, 'Factors Affecting Adoption of Public-Private Partnership in County Government of Uasin Gishu, Kenya' 2 (1) *International Academic Journal of Procurement and Supply Chain Management* 2017, 33-<https://bit.ly/3qmnO2D> on 2 December 2020.

relating to the management of PPP procurement.<sup>68</sup> As relates to investors' perception, they found that fear of corruption as well as ignorance of PPPs affected adoption of PPPs in the county.<sup>69</sup> Although they addressed critical success factors for sub-national PPPs, their study was limited to only one county which had no PPP project in the country's PPP pipeline. Consequently, their study did not benefit from insights of a sufficient sample of county governments, more so, the ones that have practical experience in PPP procurement. Hence, their findings may not be generalizable to all the counties across the country.

Most of the studies reviewed above are mainly about advanced or newly industrialised economies and primarily focus on important CSFs for PPPs from the perspective of both national and sub-national levels of government. Indeed, most of them are on Australia, China, Hong Kong, Italy, Canada, India and the United Kingdom. Save for the study by Okwaro *et al*, the few studies that have been undertaken about Kenya relate to broader issues such as privatization, general procurement and PPPs by the national government. There's therefore a dearth of literature on studies undertaken in Kenya, particularly, on sub-national level PPPs in Kenya.

As mentioned above, public infrastructure developments and service delivery through PPPs are not confined to the national level, but are also undertaken by sub-national bodies. The study, therefore, contributes to existing literature by demonstrating the non-conformity of the existing legal and institutional framework with the relevant constitutional principles and its impact on the adoption and implementation of PPPs by county governments in Kenya. It also contributes to the existing literature by proposing the remedial measures that need to be undertaken in order to enhance the adoption of sub-national PPPs in Kenya.

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<sup>68</sup> Okwaro K *et al*, 'Factors Affecting Adoption of Public-Private Partnership in County Government of Uasin Gishu, Kenya', 49.

<sup>69</sup> Okwaro K *et al*, 'Factors Affecting Adoption of Public-Private Partnership in County Government of Uasin Gishu, Kenya', 49.

### 2.3. Conclusion

The economic analysis of law theory is a useful tool in analyzing Kenya's legal and institutional framework for sub-national PPPs against the objects of the constitutional principles on devolution and public procurement, on the one hand, and the implications of the compliance or lack thereof on the efficacy of Kenya's legal and institutional framework for sub-national PPPs, on the other hand.

The soufflé theory of decentralization complements the economic analysis of law theory in explaining why some of the desired outcomes have not been achieved particularly as regards the adoption of sub-national PPPs by county governments. In that regard, the theory is useful in assessing the extent of decentralisation of the essential elements of political, fiscal and institutional dimensions of decentralisation through legal framework for sub-national PPPs in Kenya and how the resultant decentralisation has impacted on the adoption of sub-national PPPs by county governments in Kenya.

Review of pertinent literature revealed a dearth of literature on the extent of compliance of legal and institutional framework for sub-national PPPs with the constitutional principles on devolution and on public procurement, on the one hand, and the implications of the compliance or lack thereof on the efficacy of sub-national PPP project cycle in Kenya, on the other hand. The study will therefore no doubt make significant contribution to the literature on the subject.

## CHAPTER THREE: THE LEGAL AND INSTITUTIONAL FRAMEWORK FOR SUB-NATIONAL PUBLIC PRIVATE PARTNERSHIPS IN KENYA

### 3.0. Introduction

This chapter critiques the legal, institutional and procedural framework for sub-national PPPs in Kenya. It problematizes legal, institutional and procedural shortfalls associated with the County Governments Act and the PPPs Act as relates to procurement of goods and services by way of PPPs by county governments or institutions under them against the constitutional principles on devolution and public procurement. It also evaluates the pending Bills on PPPs with a view to establishing the extent to which they conform to the salient constitutional principles on devolution and public procurement, and hence, cure the identified shortfalls. It also contains findings and analysis of data collected from the survey that was conducted with county secretaries and PPP practitioners. Shortfalls of the legal and institutional framework are identified, analysed and discussed in this Chapter as well.

### 3.1. Legal Framework of Sub-national PPPs

The legal framework for sub-national PPPs in Kenya is, generally, provided for under the Constitution and the County Governments Act, and particularly, under the PPPs Act. The relevant provisions of the said instruments and their import are discussed sequentially below.

#### 3.1.1. The Constitution of Kenya 2010

##### *(a) Principles on Devolution*

The Constitution makes it a fundamental duty of the State to fulfil, amongst other rights, the economic and social rights to which every person is entitled.<sup>70</sup> The constitutional duty of the State is discharged at the national level, by the National Government, and at the county level, by forty-seven county governments.<sup>71</sup> In that regard, the Constitution

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<sup>70</sup> Articles 21(1) and 43(1), *Constitution of Kenya* (2010).

<sup>71</sup> Articles 1(4), 6(1), 176(1) and First Schedule, *Constitution of Kenya* (2010).

distributes functions between the National Government and county governments.<sup>72</sup> It, for instance, requires county governments to provide essential and basic infrastructure services within their respective territories. Such services may be broadly categorised into, amongst other critical mandates, county health, county transport, agriculture, county public works and planning.<sup>73</sup> To ensure seamless delivery of respective services, the Constitution entrenches key principles on devolution. It for instance expressly stipulates at Article 6(2) that "... the governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and cooperation."<sup>74</sup>

Therefore, distinctiveness and interdependence are the two main constitutional principles that underpin devolution in Kenya. Kenyan Courts have defined distinctiveness to mean "...the autonomy of the two levels of Government which connotes that each of them ought to perform its powers and functions without interference from the other."<sup>75</sup> Reasoning that each of the two levels of Government exercises sovereign power on behalf of the people pursuant to Article 1(4) of the Constitution, the Courts have held that none of the said levels of Government "... is an agent of the other but is an equal partner in the governance structure in Kenya."<sup>76</sup> As regards inter-dependence, the Courts have held that the governments at either levels of Government cannot operate in isolation in discharging their constitutional mandates and must, therefore, rely on each other in order to optimally fulfil their respective mandates.<sup>77</sup>

The principles of distinctiveness and interdependence as provided for under Article 6(2) of the Constitution accord with *soufflé* theory of decentralisation in the sense that county governments are afforded relative autonomy to discharge their respective mandates whilst having ready access to the requisite assistance from the National Government.

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<sup>72</sup> Article 186 and Fourth Schedule, *Constitution of Kenya* (2010).

<sup>73</sup> Fourth Schedule, *Constitution of Kenya* (2010).

<sup>74</sup> Article 6(1), *Constitution of Kenya* (2010).

<sup>75</sup> *Kenya National Union of Teachers v Attorney General & 4 others* [2016] eKLR.

<sup>76</sup> *Kenya National Union of Teachers v Attorney General & 4 others* [2016] eKLR.

<sup>77</sup> *Kenya National Union of Teachers v Attorney General & 4 others* [2016] eKLR.

Guided by the economic analysis of law and the soufflé theories, the requirements for distinctiveness and interdependence shall, in this regard, form the value upon which the PPPs Act and regulations made thereunder will be evaluated for compliance with the Constitution. It will be assessed whether the compliance or lack thereof has incentivised efficacy in the sub-national PPPs project cycle.

### ***(b) Principles on Procurement***

In discharging the foregoing constitutional duty, county governments would inevitably procure goods and services. However, the Constitution does not prescribe a particular mode of procurement of the contemplated goods and services. Suffice to say, it obligates governments at both levels to procure public goods and services in accordance with a system that meets five basic principles, namely, fairness, equity, transparency, competitiveness and cost-effectiveness.<sup>78</sup>

The fairness principle entails according equal opportunity and treatment to bidders and consultants.<sup>79</sup> It demands unbiased decision-making and elimination of preferential treatment in all public procurement activities. It also involves equitable distribution of rights and obligations between procuring entities and contractors.<sup>80</sup> Most importantly, a fair procurement system allows every concerned party an opportunity to challenge any pertinent decision or process whenever they feel that they have been unfairly treated.

The equity principle is interrelated with the fairness principle.<sup>81</sup> It is necessitated by patent inequality amongst members of contracting community in terms of actual social and economic disparities which are attributable to past discriminatory policies and

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<sup>78</sup> Article 227(1), *Constitution of Kenya* (2010).

<sup>79</sup> Khan N, *Public Procurement Fundamentals: Lessons from and for the Field*, Emerald Publishing Limited, Bingley, 2018, 6 - <<https://bit.ly/3qogrbj>> on 25 June 2021.

<sup>80</sup> Khan N, *Public Procurement Fundamentals: Lessons from and for the Field*, 6.

<sup>81</sup> Thai KV, *International Handbook of Public Procurement*, Auerbach Publications, Boca Raton, 2009, 362 - <<https://bit.ly/2U7Y7XF>> on 26 June, 2021.

practices.<sup>82</sup> Hence, the principle allows procuring entities in certain defined circumstances to treat contractors differently.<sup>83</sup>

The transparency principle is based on the fact that corruption thrives in secrecy.<sup>84</sup> The principle, therefore, purposes to eliminate secrecy in the entire public procurement cycle regardless of procurement method by ensuring that the public, generally, and the bidder community, particularly, are given easy access to information on the actual procedures and processes by which procurement decisions are made.<sup>85</sup> In that regard, it seeks to ensure that key decisions on procurement are well-documented and that the resultant documentation is made easily accessible to the public, the bidder community and the regulatory authorities, in sufficient detail to facilitate the ascertainment of whether the specifications are unbiased and whether the award decisions are based on fair grounds.<sup>86</sup>

Competition fosters attainment of value for money and legitimizes procurement decisions.<sup>87</sup> It serves as a means of deterring favouritism and other corrupt practices in public procurement.<sup>88</sup> It arises from the belief that absence of competition generates rents that can be easily appropriated and that increasing competition reduces rents resulting in reduced corruption.<sup>89</sup> It is believed that ultimately, a competitive procurement system ensures acquisition of "... the best product at the best price through the most cost-effective process."<sup>90</sup>

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<sup>82</sup> Thai KV, *International Handbook of Public Procurement*, 362.

<sup>83</sup> Thai KV, *International Handbook of Public Procurement*, 362.

<sup>84</sup> OECD, *OECD Principles for Integrity in Public Procurement*, OECD, Paris, 2009, 10 - <<https://bit.ly/3w4ZB2x>> on 25 June, 2021.

<sup>85</sup> Komakech RA, 'Public Procurement in Developing Countries: Objectives, Principles and Required Professional Skills' 6(8) *Public Policy and Administration Research*, 2016, 22 - <<https://core.ac.uk/download/pdf/234669954.pdf>> on 20 June 2021.

<sup>86</sup> OECD, *OECD Principles for Integrity in Public Procurement*, 11.

<sup>87</sup> Sanchez A, 'More Competition-Oriented Public Procurement to foster Social Welfare' *International Public Procurement Conference Seoul*, August 26-28, 2010, 2 - <<https://bit.ly/3wYYZN6>> on 27 June 2021.

<sup>88</sup> Sanchez A, 'More Competition-Oriented Public Procurement to foster Social Welfare' 2.

<sup>89</sup> Darabad BG, 'The Principle of Competition - The Key to Public Procurement Regulation' 2(6) *European Journal of Social Sciences Studies*, 2017, 97 - <<https://bit.ly/2Te0hF7>> on 27 June, 2021.

<sup>90</sup> Darabad BG, 'The Principle of Competition - The Key to Public Procurement Regulation' 97.

The cost-effectiveness principle is premised on the understanding that every public procurement transaction has attendant costs and outcomes.<sup>91</sup> Within the context of public procurement, costs entail all life cycle costs of procurement whereas outcomes entail fulfilment of the relevant procurement needs.<sup>92</sup> A cost-effective system, therefore, would be a system that ensures that in a set of alternatives, only procurement options that offer the best optimality of allocation of resources are adopted.<sup>93</sup>

### **3.1.2. Statutes**

The Constitution enjoins the Parliament to enact legislation that prescribes a framework within which the foregoing principles shall be implemented.<sup>94</sup> The Parliament, accordingly, has enacted the PPPs Act and the Public Procurement and Asset Disposal Act, 2015. Being the primary focus of the study, the PPPs Act is reviewed later in this part against the foregoing constitutional principles. Separately, the Parliament has also enacted the County Governments Act to give effect to the principles on devolution. The same is addressed here if only to the extent to which it affects the power of county governments to procure goods and services by means of PPPs.

#### ***(a) The County Governments Act, 2012***

The County Governments Act, 2012 enshrines a general overarching provision of law that empowers county governments to enter into partnerships with any public or private organisation.<sup>95</sup> It requires the envisaged PPPs arrangements to be undertaken under the provisions of any law relating to public or private partnerships and for any work or function which a county government is responsible within its area of jurisdiction.<sup>96</sup> To

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<sup>91</sup> Wickens DJ, 'The meaning and application of cost-effectiveness as a constitutional requirement for the South African public procurement system', North-West University, 2017, 102 - <<https://bit.ly/3hdK01a>> on 27 June 2021.

<sup>92</sup> Wickens DJ, 'The meaning and application of cost-effectiveness as a constitutional requirement for the South African public procurement system', 105.

<sup>93</sup> Wickens DJ, 'The meaning and application of cost-effectiveness as a constitutional requirement for the South African public procurement system', 102.

<sup>94</sup> Article 227(2), *Constitution of Kenya* (2010).

<sup>95</sup> Section 6(3), *County Governments Act, 2012* (No. 17 of 2012).

<sup>96</sup> Section 6(3), *County Governments Act, 2012* (No. 17 of 2012).

that effect, a county government is empowered to enter into contracts and where such contracts are lawfully entered, they are valid and binding on the county government, its successors and assigns.<sup>97</sup> Additionally, county governments are permitted to raise loans to finance their programmes and infrastructure projects, PPPs included, but subject to the conditions set out in the County Governments Act and Article 212 of the Constitution.<sup>98</sup>

The foregoing notwithstanding, there is no sector-specific law that particularly governs PPPs within the sphere of county governments. Accordingly, the legal framework at the national level applies to the PPPs that are within the competencies of county governments. Resultantly, county governments and institutions within their respective control are bound by legislations designed for PPPs within the context of National Government. Therefore, whilst county governments have the authority to contract PPPs, the PPPs Act and regulations made thereunder dictate how they may do so.

#### ***(b) The PPPs Act***

The PPPs Act provides a regulatory framework for “.... the participation of the private sector in the financing, construction, development, operation, or maintenance of infrastructure or development projects of the Government through concession or other contractual arrangements...”<sup>99</sup> It also provides for the establishment and operationalisation of institutional bodies responsible for the regulation, monitoring, and supervision of the implementation of “project agreements on infrastructure or development projects and for connected purposes.”

The PPPs Act provides for two processes by which a contracting authority, county governments included, may procure a PPP project in Kenya, namely, (a) solicited proposals; and (b) privately initiated investment proposals. Each of the process entails complete PPP project cycle encompassing several stages, as discussed below:

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<sup>97</sup> Sections 6(2)(a) and 6(4), *County Governments Act, 2012* (No. 17 of 2012).

<sup>98</sup> Sections 140, 141 and 142, *County Governments Act, 2012* (No.17 of 2012)

<sup>99</sup> Preamble, *Public Private Partnerships Act* (No. 15 of 2013).

### *(a) Solicited Proposals*

The project cycle as regards solicited proposals may be categorised into three interrelated phases, namely, initiation and planning phase, procurement phase and implementation phase.

#### *(i) Project Initiation and Planning Phase*

The project initiation and planning phase covers a series of tasks including sector diagnostic study and assessment, feasibility study and risk assessment and engagement of transaction advisor.

As a general rule, the PPPs Act mandates every contracting county government intending to undertake a PPP project to conduct a sector diagnostic study and assessment.<sup>100</sup> In that regard, the PPPs Act mandates the contracting county government to consider the strategic and operational benefits expected to be accrued in undertaking the project as a PPP vis-à-vis the conventional practice where the contracting county government undertakes the project, itself.<sup>101</sup> The mandatory pre-assessment of a potential PPP project before cogent steps are taken to initiate the project is ostensibly meant to obviate allocation of resources to the full progression of a project in respect of which PPP implementation may ultimately turn out to be unviable. It may, however, be argued that given the predominant scale of sub-national PPP projects, it may not be economical to subject sub-national PPP projects to extensive and costly sector diagnostic studies, particularly, when the next immediate process is the project feasibility study.

Sector diagnostic study and pre-assessment is impliedly succeeded by the feasibility study. The feasibility study is undertaken by a node on behalf of the respective contracting county government.<sup>102</sup> The primary purpose of the feasibility study is to determine whether the project sought to be implemented as a PPP makes sense ostensibly

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<sup>100</sup> Section 20, *Public Private Partnerships Act* (No. 15 of 2013).

<sup>101</sup> Section 31(2), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>102</sup> Section 32(1), *Public Private Partnerships Act* (No. 15 of 2013) and Regulation 14(1), *Public Private Partnerships Regulations* (2014).

with a view to mitigating the risk of the project failure during the subsequent phases of the project. The feasibility study involves the assessment of the requisite technical and legal requirements of the project.<sup>103</sup> It also entails the evaluation of the social, economic and environmental impacts of the project as well as consideration of the value of the project.<sup>104</sup> The value assessment entails three mandatory components, namely, affordability, value for money and public sector comparator.<sup>105</sup>

Upon approval of the project feasibility study report by the Committee, the Unit is enjoined to assess the technical expertise of the contracting county government to procure the project as a PPP.<sup>106</sup> If the Unit finds that the contracting county government has the requisite expertise, the contracting county government will dispense with the appointment of a transaction advisor and proceed to the procurement phase. Otherwise, the contracting county government will be required to engage a transaction advisor to assist the authority during the procurement phase of the project.<sup>107</sup> The anticipated tasks for which a transaction advisor may be engaged include the preparation of bid documents, due diligence, structuring procurement process, amongst other related matters.<sup>108</sup>

In engaging the services of a transaction advisor, the contracting county government may invite expression of interest from pre-qualified transaction advisors or from the general public.<sup>109</sup> An evaluation team constituted by the contracting county government is required to evaluate the submitted expressions of interest and short-list between three and seven persons.<sup>110</sup> The shortlisted persons would then submit their respective

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<sup>103</sup> Section 33(2)(a) and (b), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>104</sup> Section 33(2)(c) and (d), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>105</sup> Section 32(2)(d), *Public Private Partnerships Act* (No. 15 of 2013) and Regulation 14(1), *Public Private Partnerships Regulations* (2014).

<sup>106</sup> Section 36(1), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>107</sup> Section 36(2), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>108</sup> Regulation 17(2), *Public Private Partnerships Regulations* (2014).

<sup>109</sup> Regulations 21 and 22, *Public Private Partnerships Regulations* (2014).

<sup>110</sup> Regulation 23(2) and (3), *Public Private Partnerships Regulations* (2014).

technical and financial proposals in separate envelopes.<sup>111</sup> The evaluation team is required to open the technical proposals and evaluate them before opening the financial proposals.<sup>112</sup> The evaluation team would then evaluate the financial proposals of persons whose technical proposals are successfully evaluated and recommend the winning proposal to the accounting officer of the contracting county government.<sup>113</sup> An unsuccessful person aggrieved by the decision of the evaluation committee or the accounting officer may prefer an appeal to the Petitions Committee.<sup>114</sup> Eventually, the accounting officer of the contracting authority will invite the successful person to sign a contract for the provision of transaction advisory services to the contracting authority.<sup>115</sup>

### *(ii) Procurement Phase*

The procurement phase, whose primary objective is the identification of the private-sector party to the project, entails stages each of which comprises a set of detailed tasks.<sup>116</sup> The PPPs Act adopts a public tendering process that is customised for PPPs but incorporates virtually all of the tasks associated with a competitive tendering process.

The procurement phase begins with the prequalification process whose general purpose is to sift out bidders without the requisite technical and financial capacity in order to allow the contracting county government to focus solely on the prospective bidders.<sup>117</sup> To that extent, it may be argued that the prequalification process under the PPPs Act promotes the constitutional principle of cost-effectiveness in public procurement. On the flip side, it may be argued that prequalification process is unjustified in view of the

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<sup>111</sup> Regulation 24(1) and (2), *Public Private Partnerships Regulations* (2014).

<sup>112</sup> Regulation 24(3), *Public Private Partnerships Regulations* (2014).

<sup>113</sup> Regulation 25(1), *Public Private Partnerships Regulations* (2014).

<sup>114</sup> Regulation 26, *Public Private Partnerships Regulations* (2014).

<sup>115</sup> Regulation 27, *Public Private Partnerships Regulations* (2014).

<sup>116</sup> See, The World Bank, *Procuring Infrastructure Public-Private Partnerships Report*, 2018, 44 - <<https://bit.ly/2yQYpaQ>> on 11 April, 2020. See also, Liu HJ and Davis P, 'Life-Cycle Critical Success Factors for Public-Private Partnership Infrastructure Projects' *Journal of Management in Engineering*, 2014, 7 - <<https://bit.ly/3enILp5>> on 11 April 2020.

<sup>117</sup> The World Bank, *Attracting Investors to African Public-Partnerships: A Project Guide*, 69.

accompanying time and financial costs and especially when the project sought to be implemented is small in scale.

Pre-qualification is commenced by invitation of applications for pre-qualification.<sup>118</sup> The invitation is intended to elicit comparable offers from potential private-sector partners.<sup>119</sup> In that respect, it may be argued that the pre-qualification process as provided for under the PPPs Act enhances the constitutional procurement principles of fairness and transparency, particularly, through the requirements for prior specification of bidders' eligibility criteria.<sup>120</sup> The invitation of requests for pre-qualification is followed by the constitution of a pre-qualification committee which is, in itself, a time-consuming and costly process.<sup>121</sup> The ensuing applications for pre-qualification are submitted to the pre-qualification committee for receipt, registration and preview.<sup>122</sup> Upon considering the requests for pre-qualification, the pre-qualification committee lists pre-qualified bidders and submits the list to the contracting authority which is then required to publish it in the Gazette, in at least two newspapers of national circulation as well as in the electronic media.<sup>123</sup> Notably, the requirement for publication enhances compliance with the fairness and transparency principles.<sup>124</sup>

The contracting county government may, thereafter, conduct a preliminary meeting with the pre-qualified bidders.<sup>125</sup> The purpose of the meeting is to deliberate on issues relating to the project specifications and initial requirements as well as to respond to attendant enquiries.<sup>126</sup> Based on the deliberations, the contracting county government may vary the

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<sup>118</sup> Section 37(1), *Public Private Partnerships Act* (No. 15 of 2013). Regulation 29(1), *Public Private Partnerships Regulations* (2014) requires the publication of the notice in the Gazette.

<sup>119</sup> The World Bank, *Attracting Investors to African Public-Partnerships: A Project Guide*, The World Bank, Washington DC, 2009, 65.

<sup>120</sup> Regulation 29(2), *Public Private Partnerships Regulations* (2014).

<sup>121</sup> Section 38(1), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>122</sup> Regulation 30(2)(b), *Public Private Partnerships Regulations* (2014).

<sup>123</sup> Regulation 33, *Public Private Partnerships Regulations* (2014).

<sup>124</sup> Regulation 33, *Public Private Partnerships Regulations* (2014).

<sup>125</sup> Section 41(1), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>126</sup> Section 41(2), *Public Private Partnerships Act* (No. 15 of 2013).

requirements of the project.<sup>127</sup> The variations that may eliminate a pre-qualified bidder are, however, not allowable thus enhancing compliance with the fairness principle of public procurement. To further foster the said principle, all the variations must be communicated to all pre-qualified bidders within seven days of the alteration and prior to the issuance of the invitation to bid.<sup>128</sup>

The project then proceeds to bidding stage initiated by the invitation to bid which typically seeks to elicit bids of sufficient quality and comparability from the pre-qualified bidders.<sup>129</sup> The invitation is by notice issued by the accounting officer of the contracting authority in the Gazette and in at least two newspapers of national circulation as well as in the website of the contracting authority, where it has one.<sup>130</sup> The notice together with the tender documents must contain, amongst other pertinent information, general information that is sufficiently necessary for the preparation and submission of a bid.<sup>131</sup> The notice and the tender documents are prepared by the contracting county government, in consultation with the Unit.<sup>132</sup> The contracting authority may, however, delegate the preparation of tender documents to the project appraisal team.<sup>133</sup> Notably, this requirement for consultation is consistent with the constitutional principle of interdependence.<sup>134</sup>

Pending the submission of bids, the contracting county government is required to convene a pre-bid conference for purposes of clarifying any pertinent issues relating to the tender.<sup>135</sup> The conference may be attended by any person participating in the tender.<sup>136</sup> Based on the outcome of the pre-bid conference, the contracting authority may

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<sup>127</sup> Section 42(1), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>128</sup> Section 42(2), *Public Private Partnerships Act* (No. 15 of 2013). Regulation 34(2), *Public Private Partnerships Regulations* (2014).

<sup>129</sup> The World Bank, *Attracting Investors to African Public-Partnerships: A Project Guide*, 71.

<sup>130</sup> Regulation 36, *Public Private Partnerships Regulations* (2014).

<sup>131</sup> Section 43(2)(a), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>132</sup> Section 43(1), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>133</sup> Regulation 35(1), *Public Private Partnerships Regulations* (2014).

<sup>134</sup> Article 6(2), *Constitution of Kenya*, (2010).

<sup>135</sup> Regulation 37(1), *Public Private Partnerships Regulations* (2014).

<sup>136</sup> Regulation 37(2), *Public Private Partnerships Regulations* (2014).

alter the tender documents at this point.<sup>137</sup> Where the alteration significantly varies the original project conceptualization, the contracting authority may extend the period for the submission of bids.<sup>138</sup> Ultimately, a bidder intending to bid for the project would be required to complete and submit a technical and financial bid, each of which must be enclosed in a sealed and separate envelope.<sup>139</sup> Where a bidder is a consortium, the bidder would be required to submit its bid in the name of the consortium.<sup>140</sup>

Evaluation of bids is done by a proposal evaluation team constituted by the accounting officer of the contracting county government.<sup>141</sup> The proposal evaluation team is mandated to open and evaluate the technical bids first and prior to opening the financial bids.<sup>142</sup> Whilst evaluating the technical bids, the proposal evaluation team must apply the evaluation criteria specified in the tender documents against each technical bid without comparing a technical bid against each other, thus fostering the constitutional procurement principle of fairness.<sup>143</sup> The technical bids assessed below the threshold specified in the tender documents are rejected and the related financial bids returned to the respective bidders, unopened.<sup>144</sup> Similarly, bid security must be returned promptly, upon rejection of technical offers as well.<sup>145</sup> In addition, the contracting county government must notify the bidders whose bids are rejected and give reasons for the rejection in writing, thus fostering the constitutional procurement principles of fairness and transparency.<sup>146</sup> In the event of rejection of all bids, the tendering process must be terminated and re-initiated at the invitation of requests for pre-qualification phase.<sup>147</sup>

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<sup>137</sup> Regulation 38(1), *Public Private Partnerships Regulations* (2014).

<sup>138</sup> Regulation 38(2), *Public Private Partnerships Regulations* (2014).

<sup>139</sup> Section 44(1), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>140</sup> Section 46(1), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>141</sup> Section 47(1), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>142</sup> Section 47(3), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>143</sup> Regulations 47(1) and (2), *Public Private Partnerships Regulations* (2014).

<sup>144</sup> Regulation 47(3), *Public Private Partnerships Regulations* (2014).

<sup>145</sup> Regulation 44, *Public Private Partnerships Regulations* (2014).

<sup>146</sup> Regulations 42(1) and (2), *Public Private Partnerships Regulations* (2014).

<sup>147</sup> Regulation 42(3) and (4), *Public Private Partnerships Regulations* (2014).

The proposal evaluation team is, subsequently, required to invite bidders whose technical bids were assessed above the requisite thresholds to a meeting for the purpose of opening the bids on financial offers.<sup>148</sup> The chairperson of the proposal evaluation team must announce the value of each financial offer during the envisaged meeting.<sup>149</sup> Notably, this requirement accords with the constitutional procurement principle of transparency. The proposal evaluation team would then assess the financial bids with a view to determining whether they meet the specifications outlined in the tender documents.<sup>150</sup> To that end, the proposal evaluation team is enjoined to consider the economic advantage that would accrue to the contracting county government as well as the comparative balance for the technical and financial elements of the bid.<sup>151</sup>

A bidder aggrieved by the decision of the proposal evaluation committee rejecting its bid may file a written objection with the Petitions Committee.<sup>152</sup> The Petitions Committee would then be enjoined to hear and determine filed objections within ten working days of their filing.<sup>153</sup> The filing of an objection automatically stays the opening of and evaluation of the financial bids or awarding of the tender, pending determination by the Petitions Committee.<sup>154</sup> The exigencies of an adversarial dispute resolution process compounded with the complexity of project specifications, impugns and puts to question the ability of the Petitions Committee to afford the disputing parties reasonable opportunity to present their respective cases and to determine the same within ten working days. It is doubtful whether such a dispute resolution would pass the constitutional muster when subjected to the requirements for fair hearing and fair administrative action.<sup>155</sup>

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<sup>148</sup> Section 48(1), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>149</sup> Regulation 46(5), *Public Private Partnerships Regulations* (2014).

<sup>150</sup> Section 48(2), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>151</sup> Section 48(3), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>152</sup> Regulation 45(1), *Public Private Partnerships Regulations* (2014).

<sup>153</sup> Regulation 45(2), *Public Private Partnerships Regulations* (2014).

<sup>154</sup> Regulations 48(5), *Public Private Partnerships Regulations* (2014).

<sup>155</sup> See, Articles 47(1) and 50(2), *Constitution of Kenya*, (2010).

The contracting county government may with the approval of the Committee enter into negotiations with the successful bidder.<sup>156</sup> In that regard, it may request the second-ranked bidder to extend the validity of its bid pending the outcome of the envisaged negotiations.<sup>157</sup> The negotiations cover the technical and financial terms of the project provided that they may not result in increase in pricing and variation of the non-negotiable terms stipulated as such in the invitation to tender as well as the financial structure of the project.<sup>158</sup> The negotiating parties may not also alter the terms upon which the bids were evaluated.<sup>159</sup> Should the negotiations be unsuccessful; the negotiating committee is required to initiate negotiations with the second-ranked bidder.<sup>160</sup>

Upon conclusion of the negotiations, the negotiating committee is required to prepare and submit, to the accounting officer of the contracting county government, a project report outlining the agreed terms together with its recommendations.<sup>161</sup> The accounting officer of the contracting county government would then review the project report and, if satisfied, submit it to the Unit.<sup>162</sup> In the event that the Unit is unsatisfied with the project report, the contracting county government would refer the project report back to the negotiating committee for appropriate review of the project report.<sup>163</sup> Ultimately, the Unit would submit the project report to the Debt Management Office for confirmation of its initial approval at the feasibility phase based on the final contract and the preferred bidder submission.<sup>164</sup>

The Unit would, thereafter, submit the project report and the risk assessment report to the Committee for consideration after which the Committee would prepare a report

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<sup>156</sup> Section 52(1)(a), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>157</sup> Section 51(1)(b), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>158</sup> Sections 52(3) and (4), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>159</sup> Section 52(5), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>160</sup> Section 52(6), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>161</sup> Section 53(1), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>162</sup> Section 53(2), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>163</sup> Section 53(3), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>164</sup> Section 53(4), *Public Private Partnerships Act* (No. 15 of 2013).

regarding its recommendations as to whether the project may be undertaken as a PPP.<sup>165</sup> The Committee must then submit its recommendations to the line Cabinet Secretary and the Cabinet Secretary responsible for matters relating finance.

Based on the recommendations of the Committee, the Cabinet Secretary for matters relating to finance and the line Cabinet Secretary would prepare a joint cabinet memorandum and submit it to the Cabinet for approval.<sup>166</sup> In the event that the project entails the exploitation of natural resources, the relevant project agreement must be ratified by the Parliament.<sup>167</sup> Notably, the law allows a county government to solely approve a PPP project within its jurisdiction if the project does not pose contingent liabilities to the national or county government.<sup>168</sup> This is to be done in accordance with regulations made by the Cabinet Secretary under the PPP Act. However, at the time of the study, the existing regulations did not provide for approval of PPP projects by a county government.

The Committee is required to inform the contracting authority of the decision of the Parliament or the Cabinet within thirty days of the decision.<sup>169</sup> The contracting authority must then communicate the decision to all the bidders who took part in the bidding for the project.<sup>170</sup> In the event that the undertaking of the project is approved by the Cabinet or the project agreement is ratified by the Parliament, the contracting authority must finalise the project agreement for execution by the parties.<sup>171</sup>

The PPPs Acts provides that the contracting authority reserves the right to terminate the tendering process at any point prior to the execution of the contract. To obviate potential abuse of the termination right, the law limits the ground for termination to fundamentally

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<sup>165</sup> Sections 54(1) and (2), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>166</sup> Section 54(3), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>167</sup> Section 54(5), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>168</sup> Section 54(4), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>169</sup> Section 56(1), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>170</sup> Section 56(3), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>171</sup> Section 56(2), *Public Private Partnerships Act* (No. 15 of 2013).

serious adverse consequences posed by the continuation of the tendering process.<sup>172</sup> More so, the cancellation right may only be invoked on the basis of the recommendations of the project proposal evaluation team and with the approval of the Committee.<sup>173</sup> To that end, the contracting authority must issue a notice of cancellation comprising the reasons for cancellation to all the bidders.<sup>174</sup> Notably, the bidders are not entitled to any compensation in the event of cancellation of the tender.<sup>175</sup>

The execution of the contract by the contracting authority is only done after the approval of the project by the Cabinet and where necessary, after ratification of the project agreement by the Parliament.<sup>176</sup> Upon the execution of the project agreement by all the parties, the contracting authority is required to publish the results of the tender in at least two newspapers of national circulation. The publication must include the nature, scope, duration, cost and the value of the project as well as the successful bidder.<sup>177</sup> Manifestly, the requirement for the publication is consistent with the constitutional requirements for transparency, in particular, and fairness, generally.

### *(iii) Implementation Phase*

The PPPs Act would then require the successful bidder to establish a project company for purposes of undertaking the project.<sup>178</sup> The contracting county government may be a minority shareholder in the project company. The project company must provide a performance security before the signing of the project agreement between the project company and the contracting county government.<sup>179</sup> The performance security must be

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<sup>172</sup> Section 58(1), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>173</sup> Section 58(2), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>174</sup> Sections 58(3) and (4), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>175</sup> Section 58(5), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>176</sup> Section 57, *Public Private Partnerships Act* (No. 15 of 2013).

<sup>177</sup> Section 60(1), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>178</sup> Section 59(1), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>179</sup> Regulations 50(1), *Public Private Partnerships Regulations* (2014).

in the form of a conditional and irrevocable bank guarantee issued by a Kenyan-licensed bank in favour of the contracting county government.<sup>180</sup>

The implementation phase covers the period between financial close and the end of the contractual term.<sup>181</sup> The PPPs Act places the primary responsibility of ensuring proper project management on the contracting county government.<sup>182</sup> This accords with the devolution constitutional principle of distinctiveness and industry best practice which has shown that value for money is enhanced when the public party monitors the implementation performance.<sup>183</sup> However, the PPPs Act departs from the best practice by requiring the contracting authority to outsource the management of the implementation of the project agreement from an independent expert.<sup>184</sup> Whereas the overall responsibility rests with the contracting county government, the actual supervisory responsibility rests with a third-party. Arguably, this requirement not only complicates the process but also increases the project life cycle costs, albeit unduly.

Further, the PPPs Act mandates the Committee to oversee the implementation of every project.<sup>185</sup> By giving the Committee such an indiscriminate oversight mandate over the implementation of every PPP project including sub-national PPP projects, the PPPs Act is, in that respect, clearly inconsistent with the constitutional principles of distinctiveness and interdependence which enjoin the governments at both levels of government to conduct their mutual affairs on the basis of consultation and cooperation.<sup>186</sup> Therefore, whereas the Constitution provided the recipe for the preparation of a perfect soufflé, the PPPs Act deviated from the recipe by omitting some of the requisite ingredients.

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<sup>180</sup> Regulations 50(2), *Public Private Partnerships Regulations* (2014).

<sup>181</sup> Bao F, Darko A, Chen C and Chan A, 'Review of Public-Private Partnerships Literature: A Project Life Cycle Perspective' *Journal of Infrastructure Systems*, 2018, 12 - <<https://bit.ly/3aYg66B>> on 12 April 2020.

<sup>182</sup> Section 65(1), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>183</sup> Bao F, Darko A, Chen C and Chan A, 'Review of Public-Private Partnerships Literature: A Project Life Cycle Perspective' 13.

<sup>184</sup> Section 65(2), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>185</sup> Section 65(5), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>186</sup> See, Article 6, *Constitution of Kenya*, (2010).

It also enjoins the sector regulators to “play an active role in the implementation phase through monitoring the performance of the contracting authority and the private party ....”.<sup>187</sup> Ideally, these additional supervisory layers are meant to foster checks and balances in the implementation phase and to ensure that the privatisation of service and infrastructure provision does not jeopardise public interest.<sup>188</sup> In that respect, the layers of supervision is consistent with the constitutional principles of cooperation and interdependence. However, these additional regulatory processes may also increase project cycle costs besides creating opportunities for rent seeking, thus making sub-national PPPs unattractive to the private investors. On a balance of the competing interests, the layers of supervisions are not justifiable in view of the constitutional principles of cost-effectiveness particularly if their existence serve to deter county governments from adopting sub-national PPPs.

#### ***(b) Privately Initiated Investment Proposals***

Besides competitive procurement process, the PPPs Act allows a contracting county government to consider a privately initiated investment proposal for a PPP project and procure the project by negotiation without subjecting the proposal to a competitive procurement process in certain specified instances.<sup>189</sup> Nonetheless, a contracting county government is prohibited from considering a privately initiated investment proposal unless it is satisfied that the project shall provide value for money and be affordable and that the appropriate risks are transferred to the private party.<sup>190</sup>

The process is invariably initiated by a private party submitting a project proposal to the contracting party. Both technical and financial bids must be submitted alongside the project proposal.<sup>191</sup> The contracting authority must, before commencing negotiations, (a) prescribe the criteria against which the outcome of the negotiations shall be evaluated,

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<sup>187</sup> Section 65(6), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>188</sup> See, sections 65(3) and (4), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>189</sup> Section 61(1), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>190</sup> Section 61(3), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>191</sup> Regulations 53(4), *Public Private Partnerships Regulations* (2014).

(b) submit the proposal to the Unit for consideration, and (c) upon obtaining recommendation from the Unit, apply for and procure authorisation to negotiate the contract from the Committee.<sup>192</sup> The contracting county government may engage transaction advisory services for the development of the negotiation criteria and for the augmentation of the capacity of the project appraisal team as may be established by the contracting county government.<sup>193</sup>

Upon conclusion of the ensuing negotiations, the contracting authority is required to prepare a project risk assessment report outlining the agreed terms and submit it to the Unit for review.<sup>194</sup> The Unit would then submit a copy of the report to the Debt Management Office for review and ascertainment of the proposal's contingent liabilities and risk matrix.<sup>195</sup> The contracting county government would ultimately award the tender upon approval of the award by the Committee.<sup>196</sup>

### **3.1.3. Bills**

#### ***(a) The Public Private Partnerships (Amendment) Bill, 2017***

The PPPs Amendment Bill (PPPsAB), 2017 sought to amend several provisions of the PPPs Act<sup>197</sup> with a view to, amongst other objectives, appreciating the peculiarity of county governments as contracting authorities within the context of PPP procurement.<sup>198</sup>

To begin with, the PPPsAB sought to distinguish contracting authorities and to categorise them, into two clusters, based on governmental levels. If it had been enacted, county governments would have been responsible for the management and administration of

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<sup>192</sup> Section 61(2), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>193</sup> Regulations 52(2), *Public Private Partnerships Regulations* (2014).

<sup>194</sup> Regulations 53(5), *Public Private Partnerships Regulations* (2014).

<sup>195</sup> Regulations 53(6), *Public Private Partnerships Regulations* (2014).

<sup>196</sup> Regulations 53(7), *Public Private Partnerships Regulations* (2014).

<sup>197</sup> The Public Private Partnerships Amendment Bill (PPPAB), 2017 was passed by the National Assembly and forwarded to the Senate for consideration on 29<sup>th</sup> August 2018.

<sup>198</sup> Statement of the Objects and Reasons for the Bill, *Public Private Partnerships (Amendment) Bill* (No. 52 of 2017).

overall project development cycle of their respective PPPs.<sup>199</sup> To that end, a county government intending to undertake a PPP would have been required to cause its user departments or its county corporations to prepare and submit a project proposal to the PPPs Unit, a national centre for PPP excellence established under the PPPs Act, for consideration and recommendation.<sup>200</sup> Where the Unit recommended that a project may be developed as a PPP, the county government could then approve the project, in which case, it would have subject the project to a detailed feasibility study.<sup>201</sup> Thereafter, the project would be subjected to general PPP project cycle provided under the Act.

Although the PPPsAB had been approved by the National Assembly and forwarded to the Senate for consideration, it appears to have lapsed and given way to the Public Private Partnerships Bill of 2021, discussed below.

***(b) The Public Private Partnerships Bill No. 6 of 2021***

The Public Private Partnerships Bill No. 6 of 2021 (PPPsB) was published on 26<sup>th</sup> February, 2021. Although, it remains to be seen whether the PPPsB will ultimately be enacted or will suffer the same fate as PPPsAB, it bears analysing as it proposes significant changes to the legal and institutional framework. To begin with, the PPPsB is a significant improvement of the PPPsAB. It, however, seeks to repeal the Act in its entirety and to supplant it with a new legislative framework. The new framework is touted as proposing to enhance efficiency in the regulatory process of PPPs and to address deficiencies and gaps in the existing legal framework. To that end, the PPPsB seeks to overhaul the institutional and procedural framework for PPPs in the country. However, this section focuses on proposals touching on sub-national PPPs.

Part VI of the PPPsB is dedicated to PPPs by county governments.<sup>202</sup> County governments which enter into PPPs will be responsible for the administration of the respective overall

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<sup>199</sup> Clause 13, *Public Private Partnerships (Amendment) Bill* (No. 52 of 2017).

<sup>200</sup> Clause 13, *Public Private Partnerships (Amendment) Bill* (No. 52 of 2017).

<sup>201</sup> Clause 13, *Public Private Partnerships (Amendment) Bill* (No. 52 of 2017).

<sup>202</sup> Clause 63(1), *Public Private Partnerships Bill* (No. 6 of 2021).

project development cycle.<sup>203</sup> Specifically, county governments intending to undertake PPPs will be required to undertake respective feasibility studies as applicable to national PPPs and obtain the necessary approvals from the Directorate of Public Private Partnerships and the Public Private Partnerships Committee.<sup>204</sup> They will also be required to liaise with the Directorate at each step of the project cycle.<sup>205</sup> Like all other contracting authorities, county governments will similarly be required to implement the directions of the Directorate.<sup>206</sup> Besides, they will be required to obtain prior approval of their respective county assemblies before undertaking any PPP project.<sup>207</sup> Prior approval of the feasibility studies by the Directorate and the Committee will be necessary before a county government can commence a PPP project.<sup>208</sup> Similarly, approval of the Committee and the Cabinet Secretary responsible for matters relating to finance will be mandatory where the project will require a government support measure or the project exceeds the county government's fiscal ability to implement the project.<sup>209</sup> Needless to add, the provisions applicable to the general PPPs will be applicable to the PPPs by county governments albeit with necessary modifications.<sup>210</sup> The Bill does not, however, outline what those modifications will be and thus it shrouds sub-national PPP project cycle with uncertainty. Suffice to say, the PPPsB seeks to introduce more reforms on the legal framework for sub-national PPPs relative to PPPsAB. However, the perfect opportunity to introduce meaningful and pragmatic reforms appropriate to the peculiar circumstances of county governments was missed.

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<sup>203</sup> Clause 63(2), *Public Private Partnerships Bill* (No. 6 of 2021).

<sup>204</sup> Clause 63(3), *Public Private Partnerships Bill* (No. 6 of 2021).

<sup>205</sup> Clause 63(4), *Public Private Partnerships Bill* (No. 6 of 2021).

<sup>206</sup> Clause 20(4), *Public Private Partnerships Bill* (No. 6 of 2021).

<sup>207</sup> Clause 64(1), *Public Private Partnerships Bill* (No. 6 of 2021).

<sup>208</sup> Clauses 32 and 33, *Public Private Partnerships Bill* (No. 6 of 2021).

<sup>209</sup> Clause 63(5), *Public Private Partnerships Bill* (No. 6 of 2021).

<sup>210</sup> Clause 66, *Public Private Partnerships Bill* (No. 6 of 2021).

### 3.2. Shortfalls of the Legal and Institutional Framework

Generally speaking, the architectural design of the PPPs Act disregards the peculiarity of county governments in terms of structure of county governments as well as the scale of projects undertaken by county governments. As regards the structure, county governments have their own system of checks and balances and mechanisms for accountability which is primarily exercised by the relevant county assembly and the Senate. Therefore, rigorous approval processes at the National Government level in addition to the inherent checks and balances at the county government level implies that ultimately, sub-national PPPs are subjected to lengthier PPP procurement process than are the national PPPs.

As regards scale of projects, the architectural design of PPPs Act does not take into account the fact that PPP projects undertaken by individual county governments are smaller in scale compared to national PPPs. It, therefore, subjects sub-national PPPs to a procurement process that is tailor-made for national PPPs which are larger in scale and in respect of which pertinent project cycle costs are justifiable. Comparatively, county governments are constrained to incur higher transaction costs to deliver less in view of the small scale of projects undertaken at the sub-national level of Government. The resultant situation is invariably economically unjustifiable.

Interestingly, the PPPs Act provides for the enactment of delegated legislation relating to the approval, by county governments, of certain PPP projects within their respective competencies and jurisdiction, ostensibly as opposed to approval at the national level, by the Cabinet.<sup>211</sup> The anticipated delegated legislation is yet to be enacted eight long years after the commencement of the PPPs Act. Whereas it is the role of the Cabinet Secretary responsible for matters relating to finance to originate the envisaged delegated legislation, the National Assembly has failed in its oversight role generally and particularly through its Committee on Delegated Legislations. As a result, all sub-

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<sup>211</sup> Sections 24(3) and 54(4), *Public Private Partnerships Act* (No. 15 of 2013).

national PPP projects, irrespective of subject matter as it relates to competence, have to be validated and structured at the national level. Undoubtedly, mandating institutions at the national level of government to dictate whether or not a county government may procure goods and services by way of PPPs notwithstanding that the procuring of the concerned goods and services lies squarely within the competencies of the county governments militates against the principle of distinctiveness of governments as envisioned by the Constitution. It also negates the requirement for cost-effectiveness, a fundamental requirement imposed by the Constitution.<sup>212</sup> Whereas as the functions have been decentralised to the sub-national level of Government, a key ingredient in the form of legal and administrative toolbox that would clothe county governments with the necessary authority and autonomy to carry out the decentralised functions is still missing. Consequently, the architectural design of the PPPs Act fails the tests of soufflé theory. Specific shortfalls of the legal and institutional framework are as discussed below.

### **3.2.1 Non-representation of County Governments in Key PPPs Institutions**

This section critiques the institutional framework on the basis of composition of key PPPs institutions, whilst having due regard to the constitutional principles on devolution. Emphasis is had on the Committee and the Petitions Committee in view of their crucial roles.

The Committee is a titular statutory institution in the regulation of PPPs in Kenya. It is primarily responsible for the development and the implementation of PPPs policy initiatives. In this regard, it is responsible for, amongst other functions: formulation of policy guidelines on PPPs; alignment of PPP projects with national priorities as well as appraisal and approval or disapproval of PPP projects.<sup>213</sup> It is also responsible for the review of the legal, institutional and regulatory framework on PPPs.

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<sup>212</sup> Article 227(1), *Constitution of Kenya* (2010).

<sup>213</sup> Section 7, *Public Private Partnerships Act* (No. 15 of 2013).

The foregoing notwithstanding, the membership of the Committee does not have representation from the county governments. The inclusion of the Principal Secretary responsible for matters relating to county governments is not enough as he or she ideally represents the interests of the National Government as it relates to county governments. One would expect that the interests of county governments would be best articulated in the Committee by an individual or individuals who have a direct mandate from county governments and at the very least nominated by the Council of Governors. The proposal in clause 6(1) of the PPPsB for nomination of one person by the Council of Governors, though a step in the right direction, is woefully inadequate. Having the forty-seven county governments appoint one member when the National Government appoints nine members is not only manifestly unfair but is also an affront to the constitutional principles of distinctiveness and interdependence. Such an arrangement cannot be countenanced by soufflé theory as the soufflé will surely collapse.

The PPPs Act also establishes the Petitions Committee as a specialized tribunal established for purposes of considering all petitions and complaints by private parties relating to the process of tendering and entering into PPP project agreements.<sup>214</sup> It is composed of a chairperson being a person qualified to be appointed as a judge of the High Court of Kenya, the Unit Director and four other persons with such knowledge and experience as the Cabinet Secretary, in consultation with the PPP Unit considers appropriate.<sup>215</sup>

Based on its composition and mandate, the Petitions Committee has implied powers to adjudicate questions of law.<sup>216</sup> However, the executive leaning appointments and the inclusion of the Unit Director in the composition of the Petitions Committee raises weighty issues of independence and separation of powers. This is compounded by the fact that the recommendations by the Unit are binding on all the processes of the

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<sup>214</sup> Section 67(1), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>215</sup> Section 67(2), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>216</sup> *Kenya National Highways Authority v PPP Petition Committee & 2 others* [2018] eKLR

contracting authority whilst undertaking a PPP project.<sup>217</sup> There is, therefore, a possibility that a member of the Petitions Committee may sit in judgment over a decision that he or she previously participated in, as a member of the Unit. Such an occurrence would undoubtedly jeopardise the administration of justice.

It is also noteworthy that the decisions of the Petitions Committee are final and binding on all parties.<sup>218</sup> The absence of an appeal mechanism against the decisions of the Petitions Committee may therefore result in long-lasting and devastating repercussions on public procurement in the event that the Petitions Committee reaches an unjust decision.<sup>219</sup> This is compounded by the limited time frame of ten days within which the Petitions Committee must dispose of any matter brought before it.<sup>220</sup>

Whereas the PPPsB attempts to address these concerns, by for instance excluding the Unit Director from the membership of the Petitions Committee, the overall composition and packing of the Committee with executive appointees leaves a lot to be desired and does not inspire the necessary credibility, especially amongst private parties.<sup>221</sup> It also remains to be seen whether the PPPsB will be enacted into law or will suffer the same fate as the PPPsAB.

### **3.2.2. Over-institutionalization of PPP Project Cycle**

The PPPs Act assigns institutional responsibilities for PPPs to various constitutional and statutory bodies. In that regard, it establishes and provides for the establishment of various statutory bodies. Some of the statutory bodies are standing entities whilst others are phase-specific. While it is conceded that some statutory bodies are indispensable, there is hardly a justifiable reason for spreading functions across phase-specific entities.

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<sup>217</sup> Section 31(4), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>218</sup> Section 67(5), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>219</sup> Republic v Public Private Partnerships Petition Committee (The Petition Committee) & 3 others Ex Parte A P M Terminals [2015] eKLR.

<sup>220</sup> Section 67(6), *Public Private Partnerships Act* (No. 15 of 2013) as read with Regulation 45(2), *Public Private Partnership Regulations* (2014).

<sup>221</sup> Clause 74, *Public Private Partnerships Bill* (No. 6 of 2021).

Over-institutionalisation is exemplified by, for instance, the requirement for the establishment of a project appraisal team to oversee projects during the preparation phase until the signing of the project agreement.<sup>222</sup> It is composed of a representative of the Unit and a member of the node of the contracting authority as well as technical, financial and legal experts appointed by the accounting officer of the contracting authority.<sup>223</sup> A transaction advisor may be appointed to support the project appraisal team.<sup>224</sup> It is noteworthy that the PPPs Act and the PPPs Regulations do not prescribe the framework upon which project appraisal teams oversee their respective projects. In addition, the law does not mandate a contracting authority to submit returns to the project appraisal team. In the premises, the absence of oversight tools such as mandatory approvals effectually renders a project appraisal team redundant.

The Act also requires the contracting county government to constitute an evaluation team for purposes of evaluation of submitted expressions of interest when engaging the services of a transaction advisor.<sup>225</sup> The evaluation team is phase-specific and its mandate is just to evaluate the expression of interests thereby unnecessarily compounding project cycle costs. Worse, the accounting officer of the contracting county government has veto power over the decisions of the evaluation team. He or she has the option of rejecting the recommendation of the evaluation team in which case, the evaluation team would be required to review its decision whilst considering the objections of the accounting officer and recommend a different winning proposal.<sup>226</sup>

The PPPs Act also requires county governments to constitute bidders' pre-qualification committees.<sup>227</sup> The constitution is done by the contracting authority and must comprise separate representatives of the Unit and the node as well as such legal and technical

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<sup>222</sup> Section 32, *Public Private Partnerships Act* (No. 15 of 2013) and Regulation 13(1), *Public Private Partnerships Regulations* (2014).

<sup>223</sup> Regulations 13(2) and (3), *Public Private Partnerships Regulations* (2014).

<sup>224</sup> Regulations 13(2) and (3), *Public Private Partnerships Regulations* (2014).

<sup>225</sup> Regulation 23(2) and (3), *Public Private Partnerships Regulations* (2014).

<sup>226</sup> Regulation 25(2), *Public Private Partnerships Regulations* (2014).

<sup>227</sup> Section 38(1), *Public Private Partnerships Act* (No. 15 of 2013).

experts deemed necessary by the contracting authority.<sup>228</sup> The requirement for the establishment of a pre-qualification committee is entirely unjustifiable because the pre-qualification tasks can be done by the node itself. In fact, the PPPs Act recognizes as much by giving contracting authorities the option of empowering the project appraisal team to pre-qualify bidders instead of constituting an entirely new prequalification team.<sup>229</sup> Disputably, allowing for the constitution of a separate pre-qualification team incentivises rent-seeking through establishment of legally permissible but unnecessary institutions.

Interestingly, pre-qualification committees make decisions by a simple majority vote after which every decision must be submitted to the respective contracting authority for approval.<sup>230</sup> The mandatory approval of every decision that is made by the pre-qualification committee deprives the committee of the necessary decisional and functional autonomy. Technically, it renders the pre-qualification committee redundant hence making its constitution unnecessary. In the result, the PPPs Act runs afoul of the constitutionally ordained cost-effectiveness principle of public procurement.

Further, the PPPs Act mandates the constitution of proposal evaluation teams.<sup>231</sup> The proposal evaluation team must consist of at least one representative of the contracting authority, appointed transaction advisor and separate sole representatives of the node, the Unit, the Attorney General and relevant regulatory body.<sup>232</sup> The respective representatives of the Unit, the Attorney General and the relevant regulatory body play an advisory role and do not have voting rights during decision-making process.<sup>233</sup>

The PPPs Act also obligates county governments to constitute a negotiating committee.<sup>234</sup> The negotiating committee comprises two persons, each nominated by the Unit and the

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<sup>228</sup> Section 38(2), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>229</sup> Section 38(3), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>230</sup> Regulation 31(2), *Public Private Partnerships Regulations* (2014).

<sup>231</sup> Section 47(1), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>232</sup> Section 47(2), *Public Private Partnerships Act* (No. 15 of 2013). Regulation 40(3), *Public Private Partnerships Regulations* (2014).

<sup>233</sup> Regulation 40(1), *Public Private Partnerships Regulations* (2014).

<sup>234</sup> Section 52(2), *Public Private Partnerships Act* (No. 15 of 2013).

node of the contracting authority from amongst their respective members, such other persons representing the relevant State departments and where applicable, the transaction advisor.<sup>235</sup>

The foregoing allocation of specific functions to phase-specific institutions engenders over-institutionalisation and compounds PPP project cycle costs. Notably, constitution of a phase-specific institution is in itself a form of procurement which must comply with constitutional requirements for transparency, fairness, equity, competitiveness and cost-effectiveness.<sup>236</sup> The compliance comes at entirely avoidable costs to county governments. The said financial and time costs could be avoided if the said functions were assigned to appropriately staffed nodes or the procurement unit of a contracting authority.

Whereas the PPPsB attempts to provide a distinct process for sub-national PPPs and proposes to do away with some of the institutions such as the nodes, it is worth noting that the Bill retains most of the provisions of PPPs Act on constitution of phase-specific bodies, thus perpetuating over-institutionalisation. In particular, and by dint of Part V of the Bill, county governments will, depending on the choice of procurement method, still be required to establish a pre-qualification committees,<sup>237</sup> proposal evaluation teams,<sup>238</sup> negotiating committees,<sup>239</sup> amongst other institutions.

### **3.2.3. Complexity of PPP Project Cycle**

Compared to the conventional procurement processes, PPP procurement process under the current framework is undoubtedly complex. The complexity is somewhat justified by the risks associated with PPPs especially having due regard to the need to design projects with a package of risks and incentives that make them attractive to private sector whilst ensuring that the costs to the taxpayers is minimised despite the long-term nature of PPP

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<sup>235</sup> Section 52(2), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>236</sup> Article 227, *Constitution of Kenya* (2010).

<sup>237</sup> Clause 47, *Public Private Partnerships Bill* (No. 6 of 2021).

<sup>238</sup> Clause 53, *Public Private Partnerships Bill* (No. 6 of 2021).

<sup>239</sup> Clause 56, *Public Private Partnerships Bill* (No. 6 of 2021).

contracts .<sup>240</sup> It is, however, unjustifiable in the context of sub-national PPPs where relevant projects may not have the requisite scale to not only attract prospective private-sector partners but to also warrant the costs associated with complexity.<sup>241</sup>

The framework provided for under the PPPs Act as well as the one proposed by the PPPsB do not take into account the peculiarities of sub-national PPPs. As it is, the PPPs Act subjects sub-national PPPs to the same project cycle as it does the national PPPs.

In view of competencies of county governments, a county government project will seldom have the scale to justify the costs associated with a complex procurement system let alone remain attractive to prospective private-sector partners.<sup>242</sup> By subjecting sub-national PPPs to the same or almost similar procurement process as national PPPs despite the apparent peculiarities of sub-national PPPs such as small scale, the framework effectively renders sub-national PPPs uncompetitive and cost-ineffective. The framework cannot also be said to be fair and equitable. In the result, the framework potentially negates the constitutional principles of fairness, equity, cost-effectiveness and competitiveness.

While it is conceded that some of the procedural tasks discussed above are indispensable, some procedural requirements are manifestly overly burdensome. As a matter of fact, 70.6% of the county secretaries who participated in the survey perceived the existing procurement processes and procedures as being unnecessarily burdensome, inefficient and at best, serving the interests of the National Government. Sector-diagnostic studies and constitution of phase-specific institutions are examples of procedural requirements whose marginal benefits are potentially outweighed by attendant costs and delays.

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<sup>240</sup> Carter BC and Peci F, 'The Institutional challenges of public-private partnerships (PPPs) in transition economies: lessons from Kosovo' *Economic Research*, 24 December 2020, 5 - <<https://www.tandfonline.com/doi/pdf/10.1080/1331677X.2020.1860791?needAccess=true>> on 21 June, 2021.

<sup>241</sup> Delmon J, '4 steps to improving public private partnerships' World Economic Forum', 8 June 2015, -< <https://www.weforum.org/agenda/2015/06/4-steps-to-improving-public-private-partnerships/>> on 21 June, 2021.

<sup>242</sup> Delmon J, '4 steps to improving public private partnerships'.

Without a doubt, emphasis on such procedural requirements militate against the principle of cost-effectiveness.

Whilst the PPPsB will, if enacted, go a long way in simplifying the sub-national PPP project cycle, it still inherits some of the complexities and bottlenecks contained in the PPPs Act. County governments will still be required to carry out detailed feasibility studies before commencing a PPP project. They are also expected to comply with all the conditions for use of each of the procurement methods permitted under the Act, some of which, are complex. For instance, the procedure and conditions for use of Privately-Initiated Proposals are onerous and it is doubtful that the county governments will find it any simpler than the previous regime.

### **3.2.4. Multiple Mandatory Approvals by National Government**

The framework provided under the PPPs Act as well as the one proposed under the PPPsB require county governments and county institutions undertaking PPPs to obtain multiple mandatory approvals from institutions within the National Government at various stages of PPPs cycle.

Firstly, the PPPs Act mandates every contracting county government to submit its list of prioritised projects to the Unit.<sup>243</sup> The Unit would then assess all the lists variously received from contracting county governments and submit the same together with its recommendations, regarding the prospects of implementing the projects as PPPs, to the Committee.<sup>244</sup> The Committee would, thereafter, consider the submitted lists together with the respective recommendations and compile a single national priority list which is submitted to the Cabinet for approval.<sup>245</sup> The approved national priority list is then published by the Unit.<sup>246</sup> Notably, the PPPs Act envisages a situation where certain PPP

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<sup>243</sup> Section 23(1), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>244</sup> Section 24(1), *Public Private Partnerships Act* (No. 15 of 2013) and Regulation 11(4), *Public Private Partnerships Regulations* (2014).

<sup>245</sup> Section 24(2), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>246</sup> Section 25, *Public Private Partnerships Act* (No. 15 of 2013).

projects may be approved by contracting county governments instead of the Cabinet.<sup>247</sup> However, the provision is yet to be operationalised as the delegated legislation in that respect has not been enacted. It is noteworthy that the said empowering provision is not self-executory in the sense that it does not stipulate the time within which the envisaged regulations must be enacted. Neither does it provide for sanctions against failure to enact the same. In the circumstances, county governments are constrained to subject all projects to Cabinet approval. This deprives the contracting county governments of the necessary decisional and functional independence in conducting their affairs as relates to the initiation, approval and implementation of PPP projects.

Secondly, contracting county governments must submit sector diagnostic study and pre-assessment report to the Committee for approval.<sup>248</sup> To that end, the PPPs Act stipulates that if after the envisaged pre-assessment, a contracting county government considers it appropriate to implement a project option by way of a PPP, it must then submit a report of the consideration and analysis together with a project proposal regarding the project to the Committee.<sup>249</sup> Sequentially, the Committee would be expected to review the submitted report and project proposal after which it may either grant or deny its approval.

Thirdly, contracting county governments are required to prepare a feasibility study report within two months after conclusion of the feasibility study and submit the same to the Unit.<sup>250</sup> The Unit is then required to review and evaluate the feasibility study report and make its own recommendations.<sup>251</sup> Besides, the Unit must submit the feasibility study report to the Debt Management Office for evaluation and approval of the fiscal risk and contingent liabilities of the project.<sup>252</sup> Ultimately, the Unit submits the feasibility

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<sup>247</sup> Section 24(3), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>248</sup> Section 31(3), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>249</sup> Section 31(3), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>250</sup> Section 34, *Public Private Partnerships Act* (No. 15 of 2013) and Regulation 15(2)(b), *Public Private Partnerships Regulations* (2014).

<sup>251</sup> Section 35(1), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>252</sup> Section 35(2), *Public Private Partnerships Act* (No. 15 of 2013).

study report together with its recommendations as well as the approval of the Debt Management Office to the Committee.<sup>253</sup> The Committee is then enjoined to determine whether the contracting authority should tender the project as a PPP. To that end, the Committee is mandated to "... consider the report, the recommendations of the Unit and the approval of the Cabinet".<sup>254</sup> Clearly, the approval of the Cabinet at this point is misplaced. It would seem that the legislature meant the approval of the Debt Management Office, instead.<sup>255</sup> Upon completion of the envisaged consideration, the Committee is required to issue its written decision to the contracting authority.<sup>256</sup> The decision is basically whether the contracting authority should proceed to procure the project as a PPP. In the event that the Committee declines to approve the tendering of the project, it must give written reasons for its declination and where necessary, outline the steps that the contracting authority should take for the project to be approved.<sup>257</sup> The furnishing of written reasons impliedly provides a basis upon which the Committee may be held accountable for its decisions.

Fourthly, contracting county governments are required to obtain approval of the Unit in order to use direct procedure of appointment when appointing a transaction advisor. As a general rule, the appointment of a transaction advisor is done competitively except where there are exceptional circumstances necessitating the direct appointment procedure, in which case, the direct appointment must have been recommended by the node of the contracting county government and approved by the Unit.<sup>258</sup>

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<sup>253</sup> Section 35(3), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>254</sup> Section 34(4), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>255</sup> See Regulation 16(3), *Public Private Partnerships Regulations* (2014) which mandates the PPP Committee to "... take into account the written recommendations of the Unit and the approval of the Debt Management Office in relation to the project."

<sup>256</sup> Regulation 16(1), *Public Private Partnerships Regulations* (2014).

<sup>257</sup> Regulation 16(2), *Public Private Partnerships Regulations* (2014).

<sup>258</sup> Regulations 18(3) and 19, *Public Private Partnerships Regulations* (2014).

Fifthly contracting county governments are required to send bidders' evaluation reports to the Committee for approval.<sup>259</sup> Upon evaluation of the financial bids and before the declaration of the first-ranked bidder, the proposal evaluation team must prepare an evaluation report.<sup>260</sup> The report must outline the manner in which the winning bidder satisfied the requisite criteria in comparison to the other bidders.<sup>261</sup> The proposal evaluation team is required to submit the evaluation report together with its recommendations to the contracting county government within five days of this completion.<sup>262</sup> The contracting county government would then send the evaluation report to the Committee for approval, within seven days of its receipt.<sup>263</sup> Thereafter, the Committee would have twenty-one days to either approve or reject the evaluation report.<sup>264</sup> Should it approve the evaluation report, it must notify the contracting county government in writing within two days of the approval.<sup>265</sup> The requirement for approval of the evaluation reports by the Committee, although time-limited, may, arguably, result in unnecessary bottlenecks and costs especially where the sub-national PPP projects portend no liability to the National Government.

Sixthly, the contracting county governments are required to submit project reports regarding agreed negotiated terms to the Unit for approval prior to submission to the Debt Management Office for recommendation and onward transmission to the Committee for assessment and eventual transmission to the line Cabinet Secretary and Cabinet Secretary responsible for matters relating to finance who are enjoined to present the same to the Cabinet for approval and possible transmission to the Parliament for

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<sup>259</sup> See Regulation 48(3), *Public Private Partnerships Regulations* (2014). See also, Sections 53 and 54, *Public Private Partnerships Act* (No. 15 of 2013).

<sup>260</sup> Section 49(1), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>261</sup> Section 49(1), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>262</sup> Regulation 48(2), *Public Private Partnerships Regulations* (2014).

<sup>263</sup> Regulation 48(3), *Public Private Partnerships Regulations* (2014).

<sup>264</sup> Regulation 48(4), *Public Private Partnerships Regulations* (2014).

<sup>265</sup> Regulation 48(4), *Public Private Partnerships Regulations* (2014).

ratification.<sup>266</sup> Seventhly, contracting county governments must obtain prior approval of the Committee if they wish to cancel a tender at any point of the tendering process.<sup>267</sup>

Mandatory multiple approvals from institutions domiciled at the National government are not only limited to solicited proposals. Contracting county governments must similarly, and in all appropriate circumstances, obtain such approvals when procuring projects by way of privately initiated investment proposals. Additionally, the PPPs Act requires contracting county governments to submit privately initiated investment proposals to the Unit for consideration, and upon obtaining recommendation/s from the Unit, apply for and procure authorisation to negotiate the contract from the Committee.<sup>268</sup>

Instructively, the PPPs Act envisages a situation where certain PPP projects may be approved by county governments instead of the Cabinet.<sup>269</sup> Such PPP projects include the ones that do not pose contingent liabilities to the national or county government.<sup>270</sup> The said provisions are problematic in two respects. Firstly, there is hardly a PPP project without contingent liabilities, more so, implicit ones.<sup>271</sup> Secondly, the provision is yet to be operationalised as the delegated legislation in that respect has not been enacted. The situation obtains particularly because the PPPs Act does not prescribe the timelines within which the envisaged regulations must be enacted. Neither does it provide for incentives for the enactment of the regulations either by way of sanctions or rewards. In the circumstances, county governments are constrained to subject all projects to Cabinet approval.

County secretaries who participated in the survey decried the absence of political goodwill on the part of the National Government to entrench PPPs structures at the

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<sup>266</sup> See Section 53(1), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>267</sup> Section 58(2), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>268</sup> Section 61(2), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>269</sup> Sections 24(3) and 54(4), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>270</sup> Section 54(4), *Public Private Partnerships Act* (No. 15 of 2013).

<sup>271</sup> Nwangwu G, 'Managing Contingent Liabilities arising from Public Private Partnership Projects' 9(2) *Journal of Sustainable Development Law and Policy* (2018) 74 & 75 - <<https://bit.ly/3nUKwg9>> on 25 November 2020.

county governments' level. They asserted that National Government fears that strong devolved units can pool resources and easily render the National Government irrelevant. They reasoned that with things remaining as they are, county governments are forced to take a beggar's position as they await the National Government systems to allocate scarce resources. In that regard, they emphasised the need for provision of legal and structural mechanisms for county governments to engage in PPPs without being unduly patronized by the National Government.

While it is conceded that the PPPsB proposes to address some of the above concerns, by among other things recognising the role of county assemblies and reducing the number of mandatory approvals, the reality is that the Bill has only transferred most of the approval functions from the Committee to the proposed Directorate Public Private Partnerships, an institution within the national level of government.<sup>272</sup> Consequently, feasibility studies and other critical phases of procurement such as holding of competitive dialogues, evaluation reports, negotiation reports, cancellation of tenders, are still subject to approval by institutions at the national level of government. Use of Privately-Initiated Proposals mode of procurement is also subject to prior approval of the Directorate.<sup>273</sup>

The requirement for multiple approvals from institutions within the National Government deprives county governments of the necessary decisional and functional autonomy to independently approve their respective PPP projects. It is also inimical to the constitutional principles on devolution and negates the distinctiveness of county governments. The upside to it is that county governments are able to leverage the credibility of the National Government. Approval of a county project by the Cabinet potentially enhances the perceived credibility of the county government and incentivises potential private-sector partners to invest in the project. It however remains to be seen whether the potential credibility benefits justify the capacity deficit and attendant costs.

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<sup>272</sup> Clauses 15 and 19, *Public Private Partnerships Bill* (No. 6 of 2021).

<sup>273</sup> Clause 40(4), *Public Private Partnerships Bill* (No. 6 of 2021).

It is noteworthy that comparatively, conventional forms of procurement are subjected to less stringent level of scrutiny than are PPPs. This is owing to the fact that county governments have the decisional independence in so far as procurement under the PPADA is concerned. For instance, county governments are not required to obtain multiple approvals from institutions within the National Government in respect of every project procured within the procurement framework under the PPADA. Consequently, projects procured under the PPADA do not suffer significant bottlenecks as compared to those procured under the PPPs Act.

### **3.3. Conclusion**

The Constitution provides a general requirement for distinctiveness and interdependence of governments at the national and county levels of government, as regards devolution. It also provides general principles for public procurement including fairness, equity, transparency, competitiveness and cost-effectiveness.

The architectural design of the PPPs Act, when evaluated against the constitutional principles on devolution and public procurement, falls short in a number of ways. For instance, the PPPs Act establishes an institutional framework in respect of which key PPPs institutions domiciled at the National Government lack representation of county governments yet the said institutions have the mandate of making far-reaching decisions and policies that directly affect the manner in which county governments undertake PPPs. The solutions proposed by the PPPsB in this regard would not satisfactorily cure the mischief.

Furthermore, the PPPs Act over-institutionalizes PPP project cycle. Virtually every phase involves the constitution of a body that is responsible for performing phase-specific functions. The over-institutionalisation increases the project cycle costs and protracts the project cycle duration unnecessarily. Whereas the PPPsB attempts to address this concern, the proposals are not adequate as it subjects sub-national PPPs to the same procurement process for PPPs undertaken at the national level of government.

The PPPs Act also establishes a procedural framework with a complex project cycle and multiple mandatory approvals of sub-national PPPs by institutions domiciled at the National Government hence disregarding the peculiarities of sub-national PPPs such as small scale and inherent checks and balances. The multiple mandatory approvals also deprive the county governments of the relative autonomy to conduct its affairs thus running afoul of the constitutional requirement for distinctiveness.

Most importantly, the PPPs Act relegates the regulation of sub-national PPPs to delegated legislations to be enacted by the Cabinet Secretary without providing for timelines within which the said delegated legislations must be enacted and consequences for their non-enactment. It is unsurprising that the envisaged legislation is yet to be enacted eight years after the PPPs Act came into force.

Therefore, it is virtually impossible to undertake sub-national PPPs under the obtaining legal and institutional framework whilst complying fully with the constitutional requirements for distinctiveness and interdependence of governments at the national and county levels of government, on the one hand, and constitutional principles on public procurements such as competitiveness and cost-effectiveness on the other hand. The foregoing potentially explains the low up-take of sub-national PPPs as well as why county governments rely on traditional methods of procurements as opposed to PPPs Act.

From the research findings, the legal framework provided for under the Act has failed to incentivise the realisation of constitutional principles on devolution and public procurement. The failure of compliance with the requisite constitutional requirements and principles has rendered the legal and institutional framework for sub-national PPPs inefficacious. Resultantly, county government are bound to use conventional procurement methods even in circumstances where PPPs would have been the most appropriate form of procurement. This potentially explains the reasons for the low adoption of sub-national PPPs by county governments.

## CHAPTER FOUR: COMPARATIVE ANALYSIS OF LEGAL FRAMEWORK FOR SUB-NATIONAL PUBLIC PRIVATE PARTNERSHIPS IN SOUTH AFRICA

### 4.0. Introduction

This Chapter contains a comparative analysis of legal framework for sub-national PPPs in South Africa. South Africa offers valuable comparative insights especially on account of its constitutional model and multi-level governance system. Furthermore, its experience with sub-national PPPs provides valuable lessons. As at August 2020, there were 34 municipal PPPs in South Africa's PPPs pipeline meaning that there is increased adoption of sub-national PPPs by municipalities in South Africa.<sup>274</sup> There is, therefore, sufficient reason to study the legal framework of sub-national PPPs in South Africa with a view to drawing useful insights.

South Africa has a quasi-federal system of government which is three-tiered and comprises national, provincial and local spheres of government.<sup>275</sup> The provincial sphere consists of nine provincial governments whereas the local sphere is made up of several municipal governments.<sup>276</sup> Each of the three spheres has distinctive legislative and executive competencies as well as constitutionally recognised mandates which include provision of sphere-specific infrastructure and services.<sup>277</sup> In that regard, the spheres have, since 1999, used PPPs to deliver on their respective mandates with the result that

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<sup>274</sup> South African Local Government Association, *The Review of the Public-Private Partnership Uptake by South African Municipalities*, August 2020, 17 - <<https://bit.ly/3lqac5L>> on 9 October 2021.

<sup>275</sup> Tepeciklioglu E, 'South Africa Federalism: Constitutional-Making Process and the Decline of the Federalism Debate' 13(50) *Journal of Yasar University* 2018, 164.

<sup>276</sup> Kaburu FN, 'Fiscal Decentralisation in Kenya and South Africa: A Comparative Analysis' 1(1) *Africa Nazarene University Law Journal*, 2013, 76 - 106, 85- <<https://bit.ly/3kzeSnr>> on 12 August 2020.

<sup>277</sup> Fourth and Fifth Schedules, *Constitution of South Africa* (1996).

South Africa has become one of the leading jurisdictions in terms of the level of development of its PPP legal frameworks.<sup>278</sup>

Comparative insights are drawn with due regard being had to slight difference in the systems of government between Kenya and South Africa. Whereas South Africa is, constitutionally, a quasi-federal, Kenya is a unitary state, with provision for devolution, albeit with incomplete attention to the legislative framework needed to make devolution succeed. South Africa, on the other hand has had to demonstrate rigour in the legal design of the federal structure. As a matter of fact, the very first judgment of the Constitutional Court of South Africa and in which the Court was called upon to certify whether all the provisions of the then proposed Constitution of South Africa complied with the principles that were enshrined in the Constitution of South Africa in force at the time.<sup>279</sup> The Constitutional Court had to send back the proposed constitution for re-drafting of the provisions on provincial and municipal governments because they were not robust enough.<sup>280</sup> In that regard, the Court reasoned that the various provisions of the then proposed constitution did not provide a framework for the structures of local governments, appropriate fiscal powers and functions of local governments, and formal legislative procedures to be adhered to by legislatures at the local government level.<sup>281</sup> It is only after redrafting of the then proposed constitution in compliance with the directions of the Constitutional Court the adoption of the constitution took place in 1996.

#### **4.1. Constitutional Principles on Devolution in South Africa**

Adopted on 8 May 1996 and amended on 11 October 1996, the Constitution of South Africa stipulates that the government of the republic "... is constituted at national, provincial, and local spheres of government which are distinctive, interdependent and

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<sup>278</sup> Mfunwa M, Taylor A and Kreiter Z, 'Public-Private Partnerships for Social and Economic Transformation in Southern Africa: Progress and Emerging Issues' 2(2), *Southern African Journal of Policy and Development*, 2016, 11 - <<https://cutt.ly/fd3PxTF>> on 14 August, 2020.

<sup>279</sup> Certification of the Constitution of the Republic of South Africa, [1996] ZACC 26, para 1.

<sup>280</sup> Certification of the Constitution of the Republic of South Africa, [1996] ZACC 26, paras 483 - 484.

<sup>281</sup> Certification of the Constitution of the Republic of South Africa, [1996] ZACC 26, para 482.

interrelated.”<sup>282</sup> Whereas each of the spheres of government has relative autonomy, it is intertwined with the other spheres and must, in the performance of its functions and exercise of its powers, operate harmoniously with the other spheres.<sup>283</sup> Therefore, to ensure that the three spheres of government function as a single, unified system, collaborating rather than competing, the Constitution envisaged an intergovernmental relationship that is governed by three principles, namely, distinctiveness, interdependence and interrelatedness.<sup>284</sup>

The principle of distinctiveness denotes distribution of sphere-specific competencies among the spheres. It also entails ring-fencing of those competencies with a view to obviating their encroachment by other spheres. The principle is based on the assumption that specific functions are best performed by particular spheres on account of their peculiarities.<sup>285</sup> In that regard, the Constitution of South Africa embeds the doctrine of deference by stipulating as follows:

*“41. (1) All spheres of government and all organs of state within each sphere must*

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*...*

*(e) respect the constitutional status, institutions, powers and functions of government in other spheres;*

*(f) not assume any power or function except those conferred on them in terms of the Constitution;*

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<sup>282</sup> Section 40(1), *Constitution of South Africa* (1996).

<sup>283</sup> Ile IU, ‘Strengthening intergovernmental relations for improved service delivery in South Africa: Issues for Consideration’ 7(1) *Journal of US-China Public Administration*, 2010, 53 - <<https://bit.ly/3wPikze>> on 19 July 2021.

<sup>284</sup> Simeon R and Murray C, ‘Multi-Sphere Governance in South Africa: An Interim Assessment’ 31(4) *Publius: The Journal of Federalism*, (2001) 72 - <<https://sci-hub.se/10.2307/3331062>> on 19 July 2021.

<sup>285</sup> Ile IU, ‘Strengthening intergovernmental relations for improved service delivery in South Africa: Issues for Consideration’, 54.

*(g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere.”<sup>286</sup>*

The principle of interdependence denotes the extent to which a sphere of government relies on other spheres for proper fulfilment of its constitutional mandates.<sup>287</sup> The principle is based on the assumption that no sphere of government can functionally operate in isolation. Thus, the principle requires the spheres to be inter-reliant, mutually dependent and supportive of each other for the government to function within the constitutionally acceptable levels of performance.<sup>288</sup> To that end, the Constitution of South Africa embeds the doctrine of deference by stipulating as follows:

*“40. (1) All spheres of government and all organs of state within each sphere must*

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*(f) co-operate with one another in mutual trust and good faith by -*

*(i) fostering friendly relations;*

*(ii) assisting and supporting one another;*

*(iii) informing one another of, and consulting one another on, matters of common interest;*

*(iv) coordinating their actions and legislation with one another;*

*(v) adhering to agreed procedures; and*

*(vi) avoiding legal proceedings against one another.”<sup>289</sup>*

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<sup>286</sup> Section 41(1)(e) - (g), *Constitution of South Africa* (1996).

<sup>287</sup> Ile IU, ‘Strengthening intergovernmental relations for improved service delivery in South Africa: Issues for Consideration’, 54.

<sup>288</sup> Ile IU, ‘Strengthening intergovernmental relations for improved service delivery in South Africa: Issues for Consideration’, 54.

<sup>289</sup> Section 40(1)(f), *Constitution of South Africa* (1996).

The principle of interrelatedness obtains from the assumption that the spheres are integral parts of the holistic system of government of the republic.<sup>290</sup> Hence, the spheres must relate amicably for the republic to function effectively.<sup>291</sup> In that regard, the Constitution of South Africa mandates all spheres of government and all organs of state within each sphere to “preserve the peace, national unity, and the indivisibility of the Republic ...”<sup>292</sup>

The Constitutional Court of South Africa has had occasion to interpret the principles of distinctiveness, interdependence, and interrelatedness. In one such occasion, it held as follows:

*“All the spheres are interdependent and interrelated in the sense that the functional areas allocated to each sphere cannot be seen in isolation of each other. They are all interrelated. None of these spheres of government nor any of the governments within each sphere have any independence from each other. Their interrelatedness and interdependence is such that they must ensure that while they do not tread on each other’s toes, they understand that all of them perform governmental functions for the benefit of the people of the country as a whole. Sections 40 and 41 are designed in an effort to achieve this result.”<sup>293</sup>*

It is worth noting that in drafting the 2010 Constitution, Kenya borrowed heavily from the Constitution of South Africa with the result that the South African cooperative model of intergovernmental relations is espoused in the Constitution of Kenya. For this reason, it stipulates that “the governments at the national and county levels are distinct and

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<sup>290</sup> Ile IU, ‘Strengthening intergovernmental relations for improved service delivery in South Africa: Issues for Consideration’, 54.

<sup>291</sup> Ile IU, ‘Strengthening intergovernmental relations for improved service delivery in South Africa: Issues for Consideration’, 54.

<sup>292</sup> Section 40(1)(a), *Constitution of South Africa* (1996).

<sup>293</sup> *Independent Electoral Commission of South Africa vs. Langeberg Municipality* [Case CCT 49/00] 2001.

interdependent and shall conduct their mutual relations on the basis of consultation and cooperation.”<sup>294</sup>

## 4.2. Constitutional Principles on Public Procurement in South Africa

Section 217 of the Constitution of South Africa enshrines five foundational principles for public procurement.<sup>295</sup> It provides as follows:

*“217. (1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective.”<sup>296</sup>*

The five principles form the basis for the entire legislative and regulatory framework for public procurement in South Africa.<sup>297</sup>

As discussed in detail in the previous chapter, fairness principle demands unbiased decision-making, equitable distribution of rights and duties and ready availability of credible mechanisms for resolving procurement-related complaints and disputes.<sup>298</sup> Equity principle requires adoption of affirmative action measures and policies, in all appropriate cases of public procurement, for purposes of redressing any disadvantage suffered by individuals or groups on account of historical discrimination or injustices.<sup>299</sup> Transparency is a universal principle of public procurement which requires that, in all appropriate cases, procurement information be made publicly accessible to all concerned organisations and individuals consistently and timeously.<sup>300</sup> Competition principle

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<sup>294</sup> Article 6(2), *Constitution of Kenya* (2010).

<sup>295</sup> Fourie D and Malan C, ‘Public Procurement in the South African Economy: Addressing the Systemic Issues’, 8962, *Sustainability*, 2020, 6 - <<https://cutt.ly/1m1xEIm>> on 20 July 2021.

<sup>296</sup> Section 217(1), *Constitution of South Africa* (1996).

<sup>297</sup> Fourie D and Malan C, ‘Public Procurement in the South African Economy: Addressing the Systemic Issues’, 6.

<sup>298</sup> Khan N, *Public Procurement Fundamentals: Lessons from and for the Field*, (Emerald Publishing, Bingley, 2018) 6 - <<https://cutt.ly/Gm2HCs6>> on 21 July, 2021.

<sup>299</sup> Fourie D and Malan C, ‘Public Procurement in the South African Economy: Addressing the Systemic Issues’, 7.

<sup>300</sup> Khan N, *Public Procurement Fundamentals: Lessons from and for the Field*, 6.

demands that public procurement contracts be awarded through a procedure that involves multiple prospective suppliers contesting for the contract.<sup>301</sup> Cost-effectiveness principle requires a system of public procurement to encompass policies and procedures that enable a procuring entity to make procurement decisions that offer the best available outcome when all applicable costs and benefits over the procurement cycle have been taken into consideration.<sup>302</sup>

It is noteworthy that the South African Constitutional principles on public procurement are replicated in the Constitution of Kenya. Specifically, Article 227(1) of the Constitution of Kenya mirrors Section 217(1) of the Constitution of South Africa. They both stipulate that whenever a public body conducts procurement activities, "... it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective."<sup>303</sup>

#### **4.3. Statutory Framework for PPPs in South Africa**

South Africa has not enacted a sector-specific substantive legislation for PPPs since her adoption of PPPs in 1999.<sup>304</sup> Resultantly, the legal framework for PPPs is gleaned from the various legislative instruments at both national and provincial spheres of government, some of which have overarching implications on the management of PPPs. These include the Constitution, the Public Finance Management Act, 1999, the Local

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<sup>301</sup> Quinot G and Arrowsmith S, *Public Procurement Regulation in Africa*, Cambridge University Press: New York, 2013, 19 - <<https://cutt.ly/Qm2LmH4>> on 21 July 2021.

<sup>302</sup> Fourie D and Malan C, 'Public Procurement in the South African Economy: Addressing the Systemic Issues', 6.

<sup>303</sup> Section 217(1), *Constitution of South Africa* (1996). See also, Article 227(1), *Constitution of Kenya* (2010).

<sup>304</sup> Fombad MC, 'Accountability Challenges in Public-Private Partnerships from a South African Perspective' 7(1), *African Journal of Business Ethics*, 2013, 11-26, 11 - <<https://cutt.ly/ld0SjDz>> on 12 August 2020.

Governments: Municipal Finance Management Act, 2003 and the Local Governments: Municipal Systems Act, 2003.<sup>305</sup> The said sources of PPPs law are discussed briefly below.

The South African Constitution does not have a specific provision that explicitly speaks to PPPs.<sup>306</sup> However, it contains provisions relating to the management and regulation of public contracts generally. As alluded to elsewhere in this chapter, the Constitution of South Africa requires organs of state in the national, provincial or local spheres of government, whilst contracting for goods and services, "... to do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective".<sup>307</sup> Accordingly, it may be legitimately argued that organs of government undertaking PPPs are similarly bound because PPP is a form of public procurement.

Furthermore, the Constitution of South Africa variously empowers the legislative arms of government at national and provincial levels to make laws for the management of functions within the respective or the concurrent competencies of their spheres of government.<sup>308</sup> In the absence of express prohibition, provincial governments are, impliedly, free to legislate on the management of PPPs within their provinces.

The Public Finance Management Act, 1999 (PFMA) is one of the primary legislations governing PPPs in South Africa. In itself, it is not a PPP law but it establishes the National Treasury to which it delegates the mandate of regulating and administering fiscal matters including PPPs.<sup>309</sup> In terms of the said delegated powers, the National Treasury promulgated the Treasury Regulation 16 which stipulates the procedure, approval and management processes of PPPs generally.

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<sup>305</sup> Arimoro AE, 'Legal Framework for Public Private Partnership: South Africa and Nigeria in Focus' *University of Maiduguri Law Journal* 2018, 10 - <<https://cutt.ly/fd0SRH3>> on 12 August 2020.

<sup>306</sup> Arimoro AE, 'Legal Framework for Public Private Partnership: South Africa and Nigeria in Focus', 10.

<sup>307</sup> Section 217(1), *Constitution of South Africa* (1994).

<sup>308</sup> Sections 44 and 104, *Constitution of South Africa* (1994).

<sup>309</sup> Section 5 and 6(2)(a), *Public Finance Management Act* (South Africa).

At the local sphere, Chapter 8 of the Local Governments: Municipal Systems Act, 2003 (MSA) applies to PPPs within the context of the provision of municipal services.<sup>310</sup> It requires a municipality, whilst deciding on a mechanism for the provision of a municipal service, to first evaluate the possibility of the provision of the service through internal mechanisms before exploring the possibility of providing the same service through external mechanisms.<sup>311</sup> Although this provision implicitly sanctions internal mechanisms as the default mode of infrastructure development and service delivery, it envisages circumstances where municipalities may use external mechanism, which are not limited to particular mode of procurement.

The Local Governments: Municipal Finance Management Act, 2003 (MFMA) provides for sound and sustainable management of fiscal affairs of municipalities. As regards PPPs, the MFMA explicitly empowers municipalities to enter into PPP agreements on demonstrable condition that the agreement will: (a) yield value for money; (b) be affordable; and (c) transfer the appropriate risks to the private party.<sup>312</sup> The said empowerment and requirements augur well with the principle of cost-effectiveness as provided for in the South African Constitution.

Section 168 of the MFMA empowers the Cabinet Minister responsible for Treasury, acting in concurrence with the Cabinet Minister responsible for matters relating to local government, to make regulations relating to, amongst other matters, regulation of financial commitments and municipal entities in terms of PPP agreements.<sup>313</sup> It is in accordance with the said enabling provision that the Municipal PPP Regulations (MPPPR) were made. MPPPR provides for the regulation of Municipal PPP project cycle in South Africa.

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<sup>310</sup> Section 120(3), Chapter 11, *Local Governments: Municipal Finance Management Act* (South Africa).

<sup>311</sup> Section 78, Chapter 8, *Local Governments: Municipal Systems Act* (South Africa).

<sup>312</sup> Section 120(1), Chapter 11, *Local Governments: Municipal Finance Management Act* (South Africa).

<sup>313</sup> Section 168(d), *Municipal Finance Management Act* (South Africa).

#### 4.4. Municipal PPPs Project Cycle in South Africa

Municipal PPPs project cycle in South Africa begins with the identification of the project. In that regard, projects primarily originate from an integrated development plan which every municipality is required to have.<sup>314</sup> During the project identification phase, the municipality intending to undertake a PPP project is required to ascertain the nature and size of the project, the current municipal budget, projected development costs and initial list of risks.<sup>315</sup>

Upon identification of a potential PPP project, the contracting municipality is required to make prior written notification, to the national treasury and to the relevant provincial treasury, of its intention as well as of its internal expertise, to undertake the project.<sup>316</sup> It is noteworthy that all the contracting municipality needs to do is to submit a notification to institutions within the national and provincial spheres of government as opposed to seeking their approval. Thus, the notification requirement complies with the constitutional requirement for interrelatedness and interdependence. The notification procedure allows contracting municipalities and their entities to benefit from the wisdom, expertise and capacity of institutions within the national and provincial spheres while eliminating the possibility of municipal spheres feeling patronised by the national and provincial spheres.

The foregoing marks a stark departure from Kenya's sub-national PPP project cycle in the sense that county governments must seek prior approvals from institutions at the National Government. Impliedly, Kenya's statutory framework for sub-national PPPs, in so far as it exists, is inconsistent with the constitutional dictates of distinctiveness as provided for under Article 6(2) of the Constitution of Kenya. Arguably, the drafters of the Constitution of Kenya could not have certainly contemplated mandatory approvals

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<sup>314</sup> National Treasury and Department of Local government of South Africa, *Municipal Service Delivery and PPP Guidelines: Module 3: Project Inception*, 1.

<sup>315</sup> National Treasury and Department of Local government of South Africa, *Municipal Service Delivery and PPP Guidelines: Module 3: Project Inception*, 1.

<sup>316</sup> Regulation 2(1)(a), *Municipal Public-Private Partnerships Regulations* (South Africa).

when they required governments at national and county levels to “conduct their mutual relations on the basis of consultation and mutual cooperation.”<sup>317</sup>

Upon receipt of the notification, the South African National Treasury PPP Unit will then assign an internal project advisor to the municipal PPP project who will provide technical assistance from the date of the registration of the project to the date of completion of the project.<sup>318</sup> The technical assistance encompasses the establishment of the project team, procuring the services of a transaction advisor, supporting the contracting municipality through every step of the feasibility study, ensuring that all the requisite Treasury Views and Recommendations are provided timeously and liaising with the municipality and the PPP Unit.<sup>319</sup> The contracting municipality will then appoint a project team comprising a project officer and a project secretariat. The project officer, with the assistance of the project secretariat will handle all the aspects of preparation and procurement of the project on behalf of the municipality.<sup>320</sup>

Thereafter, the contracting municipality must procure the assistance of a transaction advisor, if so requested by any of the notified treasuries.<sup>321</sup> Such a transaction advisor must be a person with appropriate skills and experience either within or outside the contracting municipality and is intended to assist the municipality on the preparation and procurement of the PPP agreement.<sup>322</sup> The operative phrase used by the Regulations, that is, “if requested” must have been intentional and informed by the constitutional tenets of distinctiveness, interdependence and interrelatedness. Notably, the obligation to procure the assistance of a transaction advisor is the only obligatory recommendation in the entirety of the municipal PPPs project cycle.

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<sup>317</sup> Article 6(2), *Constitution of Kenya* (2010).

<sup>318</sup> National Treasury and Department of Local government of South Africa, *Municipal Service Delivery and PPP Guidelines: Module 3: Project Inception*, 6.

<sup>319</sup> National Treasury and Department of Local government of South Africa, *Municipal Service Delivery and PPP Guidelines: Module 3: Project Inception*, 6.

<sup>320</sup> National Treasury and Department of Local government of South Africa, *Municipal Service Delivery and PPP Guidelines: Module 3: Project Inception*, 7.

<sup>321</sup> Regulation 2(1)(b), *Municipal Public-Private Partnerships Regulations* (South Africa).

<sup>322</sup> Regulation 2(1)(b), *Municipal Public-Private Partnerships Regulations* (South Africa).

The contracting municipality will then conduct a feasibility study and may, to that end, obtain assistance from the national government.<sup>323</sup> It can be argued that the provision of assistance by national sphere of government is consistent with the constitutional requirement for interrelatedness and interdependence as provided for under Section 40(1) as read with Section 41(1) of the Constitution of South Africa.

The principal purpose of feasibility study is to determine whether the proposed PPP serves the best interests of the contracting municipality.<sup>324</sup> In that regard, the feasibility study must detail the strategic and operational benefits of the proposed PPP.<sup>325</sup> It must also describe the nature of the private-sector party's role and the extent to which the performance of the said role by a private party is legally and naturally permissible.<sup>326</sup> It must also state how the PPP will provide value for money, be affordable and transfer appropriate technical and financial risks to the private-sector party.<sup>327</sup> It must outline the implications of the PPP on the contracting municipalities' current and future budgets.<sup>328</sup> Lastly, it must describe the capacity of the contracting municipality to effectively monitor, manage and enforce the expected PPP agreement.<sup>329</sup>

Upon completion of the feasibility study, the contracting municipality is required to submit the resultant report to the relevant municipal council which shall decide whether or not the PPP should be undertaken.<sup>330</sup> It is noteworthy that the relevant municipal

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<sup>323</sup> Section 120(4) and (5), Chapter 11, *Local Governments: Municipal Finance Management Act* (South Africa).

<sup>324</sup> Regulation 3, *Municipal Public-Private Partnerships Regulations* (South Africa).

<sup>325</sup> National Treasury and Department of Local government of South Africa, *Municipal Service Delivery and PPP Guidelines*, 9.

<sup>326</sup> National Treasury and Department of Local government of South Africa, *Municipal Service Delivery and PPP Guidelines*, 9.

<sup>327</sup> National Treasury and Department of Local government of South Africa, *Municipal Service Delivery and PPP Guidelines*, 9.

<sup>328</sup> National Treasury and Department of Local government of South Africa, *Municipal Service Delivery and PPP Guidelines*, 9.

<sup>329</sup> National Treasury and Department of Local government of South Africa, *Municipal Service Delivery and PPP Guidelines*, 9.

<sup>330</sup> Section 120(6)(a), Chapter 11, *Local Governments: Municipal Finance Management Act* (South Africa).

councils are the only institutions which are empowered to approve or disapprove the undertaking of a municipal PPP project. Institutions at the national and the provincial spheres do not play any role at all in so far as approval of municipal PPP projects is concerned. Therefore, it can be argued that the South African statutory framework for sub-national PPPs distributes competencies in a manner that respects the constitutional status, institutions, powers and functions of government in the municipal spheres. For example, in according the government in the municipal sphere the requisite relative autonomy, MPPPR conforms to the constitutional requirements for distinctiveness as provided for under Section 40(1) as read with Section 41(1) of the Constitution of South Africa.

In compliance with the constitutional requirements for interrelatedness and interdependence, the MPPPR requires the contracting municipality to solicit the views and recommendations of the national treasury, the national department responsible for local governments and the relevant line national departments regarding the feasibility study report.<sup>331</sup> Impliedly, the sought views and recommendations are not binding on the municipalities. Thus, the MPPPR upholds the constitutional requirements for distinctiveness as provided for under Section 40(1) as read with Section 41(1) of the Constitution of South Africa without running afoul of the constitutional principles on interdependence and interrelatedness.

Where the feasibility study report is approved by the relevant municipal council the contracting municipality will then proceed to the procurement phase. To that end, it is required to prepare bid documents and to solicit the views of the national and relevant provincial treasuries regarding the proposed bid documentation, at least 30 days prior to the invitation of bids.<sup>332</sup> The contracting municipality will then invite bids, evaluate the submitted bids, prepare an evaluation report and subsequently solicit the views of the

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<sup>331</sup> Section 120(6)(c), Chapter 11, *Local Governments: Municipal Finance Management Act* (South Africa).

<sup>332</sup> Regulation 2(1)(b), *Municipal Public-Private Partnerships Regulations* (South Africa).

national treasury and the relevant provincial treasury regarding the evaluation report, at least 30 days before the award is made.<sup>333</sup> The views of the national and the relevant provincial treasury variously solicited will guide the municipal council in granting or declining its approval. Additionally, the municipal council is required to consider other factors including the contracting municipality's projected financial obligations and the implications of the said obligations on the contracting municipality's future tariffs and revenue and any comments received from the public.<sup>334</sup>

The resultant PPP agreement, if approved by the municipal council, is ultimately executed on behalf of the contracting municipality by its accounting officer who is solely vested with the authority to sign a PPP agreement on behalf of the contracting municipality.<sup>335</sup> Thereafter, the accounting officer of the contracting municipality is mandated with the responsibility of ensuring that the PPP project is implemented effectively and efficiently in accordance with the terms of the PPP agreement.<sup>336</sup> This marks the end of the municipal PPP project cycle.

It is noteworthy that the South African municipal PPPs framework does not provide for a specialized dispute resolution procedure.<sup>337</sup> Persons aggrieved with the decisions of the contracting municipality or its organs are constrained to escalate their grievances to the courts. In such an eventuality, the courts are empowered to provide appropriate interim reliefs such as injunctions restraining the contracting municipality from awarding the disputed contract or from implementing a procurement decision pending judicial review of the decisions complained of.<sup>338</sup> Where the courts ultimately find that the concerned municipality did not comply with the relevant constitutional and statutory provisions,

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<sup>333</sup> Regulation 2(1)(b), *Municipal Public-Private Partnerships Regulations* (South Africa).

<sup>334</sup> Section 33(1)(b), Chapter 4, *Local Governments: Municipal Finance Management Act* (South Africa).

<sup>335</sup> Regulation 6(1), *Municipal Public-Private Partnerships Regulations* (South Africa). Section 33(1)(a) and (c), Chapter 4, *Local Governments: Municipal Finance Management Act* (South Africa).

<sup>336</sup> Regulation 8, *Municipal Public-Private Partnerships Regulations* (South Africa).

<sup>337</sup> Tucker C, 'Public Procurement in South Africa: Overview', *Practical Law*, 1 February 2014, <<https://tmsnrt.rs/3fgvrnd>> on 28 July 2021.

<sup>338</sup> Tucker C, 'Public Procurement in South Africa: Overview'.

the impugned procurement decisions are liable to be set aside and referred back to the relevant municipality which is then required to reopen the procurement procedure.<sup>339</sup>

The South African municipal PPP project cycle presents valuable lessons that may inform reforms to Kenyan sub-national PPP framework. For instance, Kenyan framework could be redesigned to ensure that county governments are able to undertake their PPP projects without seeking most of the multiple approvals from institutions domiciled at the National Government. Such a framework would conform to the constitutional requirement for distinctiveness as provided for under Article 6(2) of the Constitution of Kenya. Moreover, it would shorten the sub-national PPP life cycle and drastically decrease associated life cycle costs.

In addition, the existing statutory provisions that mandate Kenya county governments to obtain prior approvals from institutions within the National government ought to be appropriately amended to, instead, require county governments to obtain the views, recommendations and assistance from those institutions. Such requirements would be consistent with the provisions of Article 6(2) of the Constitution of Kenya which require governments at national and county levels to "... conduct their mutual relations on the basis of consultation and cooperation."<sup>340</sup>

Furthermore, the South African municipal PPPs procurement cycle is simple. It just entails four steps, namely, project identification, feasibility study, procurement and contract management. The obligation to seek Treasury Views and Recommendations are limited to only four instances in the entire municipal PPPs project cycle. Similarly, one institution, namely, a project team comprising a project officer and secretariat is responsible for all the four phases of the municipal PPPs project cycle.

On the other hand, Kenya's sub-national PPPs project cycle is complex. It is characterised by many complicated phases such as sector diagnostic studies, project appraisal, feasibility study, pre-qualification procedure, bidding procedure, amongst other

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<sup>339</sup> Tucker C, 'Public Procurement in South Africa: Overview'.

<sup>340</sup> Article 6(2), *Constitution of Kenya* (2010).

processes. The county governments are obligated to seek approval from institutions within the National Government in virtually each of the said phases before the project can be progressed to the next phase. The county governments are also obligated to establish several institutions some of which are phase-specific. The said institutions include nodes, project appraisal team, bidders' pre-qualification committee, proposal evaluation teams, negotiating committee amongst others. Arguably, the complexity, multiple mandatory approvals and over-institutionalisation breed inefficiency and do not promote the constitutional principles on devolution and public procurement.

#### **4.5. Conclusion**

This Chapter established that South African Constitution provides for a cooperative model of government. The intergovernmental relationships in the national, provincial and municipal spheres are governed by three principles, namely, distinctiveness, interrelatedness and interdependence. The said principles are similarly espoused in the Constitution of Kenya.

Furthermore, the Constitution of South Africa stipulates five procurement principles that bind all organs of state at all spheres of government. The said principles are fairness, equity, transparency, competitiveness and cost-effectiveness. Similarly, the said principles on public procurement are mirrored in the Constitution of Kenya.

The statutory framework for municipal PPPs in South Africa is consistent with the constitutional principles on devolution and public procurement. Governments at the municipal sphere are not mandated to obtain approvals from institutions that are domiciled either at the national or respective provincial spheres thereby complying with the principle of distinctiveness. Municipal PPP projects are solely approved at the municipal level by municipal councils. At appropriate stages of the municipal PPP project cycle, contracting municipalities are only required to obtain views, recommendations and assistance from institutions in the national and the relevant provincial spheres, hence, fostering the principles of interdependence and interrelatedness.

Arguably, compliance with the principles of distinctiveness, interdependence and interrelatedness promotes the constitutional procurement principle of cost-effectiveness. The resultant compliance with the constitutional principle of cost-effectiveness, in particular, breeds efficiency within the municipal PPP project cycle. Moreover, the elimination of mandatory approvals by institutions domiciled at the other spheres of government eliminates bottlenecks. In the result, pertinent PPP project life cycle costs are drastically reduced.



## CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

### 5.0. Introduction

This chapter contains the conclusions of the study and the recommendations arising from the findings of the study. The recommendations are underpinned by the economic analysis of law and the soufflé theories. They are also informed by the research findings on the shortfalls in the excising legal and institutional framework and what obtains in a comparative jurisdiction.

### 5.1. Conclusions

I set out to evaluate the extent to which the legal and institutional framework for sub-national PPPs in Kenya conforms to the constitutional principles on devolution and public procurement. I sought to assess the impact of the extent of compliance with the requisite constitutional principles on the adoption of sub-national PPPs by county governments. In my said quest, I was ably guided by the economic analysis of law and soufflé theories.

I analysed various literature on PPPs generally and sub-national PPPs in particular. For case study purposes, I analysed the legal and institutional framework for sub-national PPPs as provided for under the Constitution of Kenya, the relevant statutes and the relevant regulations as well as the pending Bills.

I also conducted a survey. To that end, I adopted the use of questionnaires for purposes of collecting relevant data from county governments, and PPP practitioners. I elicited both qualitative and quantitative responses which were critical to the assessment of the efficacy of the current legal and institutional framework for sub-national PPPs. I invited County Secretaries from the forty-seven (47) governments to respond to the relevant questionnaire. Ultimately, seventeen county secretaries participated, yielding a thirty-six (36) per cent response rate.

Additionally, I examined the legal frameworks for sub-national PPPs in South Africa. I chose South Africa on account of its multi-sphere governance system, constitutional

similarities with Kenya. Another reason was its long-standing experience with municipal PPPs.

Having carried out the legal analysis, data analysis and comparative analysis, I largely confirmed the hypotheses of the study, namely, that the procurement regime and institutional framework established under the PPPs Act as well as the regulations made thereunder is not in conformity with the constitutional principles on devolution and public procurement. I also confirmed that the existing legal and institutional framework is inefficacious and is partly to blame for the low adoption of sub-national PPPs in Kenya.

I aptly demonstrated that the existing legal and institutional framework as provided for under the PPPs Act is not in conformity with the relevant constitutional principles. In particular, the requirement for multiple mandatory approval of sub-national PPP projects by institutions domiciled at the National Government militates against the principle of distinctiveness of county governments from the National Government as ordained by the Constitution. It is also at odds with the soufflé theory which posits that the Constitution having decentralised competencies to county governments in so far as delivery of infrastructure and services is concerned, the implementing statutory provisions ought to decentralise commensurate functional and decisional autonomy to the county governments to approve and undertake PPP projects.

Undoubtedly, multiple mandatory approvals, over-institutionalisation of PPP project cycle and the complexity of the PPP project cycle increase bottlenecks and pertinent project cycle costs. Without a doubt, the resultant increase in project cycle costs renders the objects of the constitutional procurement principle of cost-effectiveness virtually unrealisable. The foregoing is aggravated by the fact that PPP projects within the competencies of county governments are of relatively lesser scale. In the circumstances, and on the strength of the economic analysis of law theory, it may be argued that the legal and institutional framework as provided for under the PPPs Act run afoul of the relevant constitutional principles and has thus failed to incentivise appropriate efficacy in Kenya's sub-national PPP project cycle. Consequently, the low adoption of sub-national PPPs in

Kenya by county governments is partly attributable to the resultant inefficacy and inefficiency in the existing institutional and statutory framework.

Arising from the findings of the study, there is no doubt that reforming and aligning the existing legal and institutional framework with the constitutional principles on devolution and public procurement will infuse efficacy and lead to increased adoption of sub-national-PPPs in Kenya. Drawing lessons from the South African framework for municipal PPPs, it is possible to align Kenya's framework for sub-national PPPs with the constitutional principle of distinctiveness without running afoul of the corresponding constitutional principle of interdependence.

## **5.2. Recommendations**

In view of the foregoing, the recommendations that best commend themselves in the circumstances and flowing from the research findings as well as comparative studies conducted are as follows: -

### **5.2.1. Reforms on Legal and Institutional Framework for Sub-national PPPs**

There is need to overhaul the legal and institutional framework for sub-national PPPs in Kenyan as well as other incidental laws in order to ensure conformity with the constitutional principles on devolution and public procurement; increase efficacy of the legal framework and hence, enhance the up-take of sub-national PPPs by county governments. Specifically, there is need to:-

#### ***(a) Simplify Sub-national PPP Project Cycle***

Sub-national PPP project cycle ought to be simplified. Towards this end, and borrowing from the South African experience, I recommend that the PPPs Act be amended with a view to not only recognizing county governments as distinct contracting authorities but to also providing a distinct project cycle that is tailored to the specific needs of county governments. The foregoing simplification may be achieved through elimination of stages and procedures whose compliance occasion undue burden to county governments, relative to the envisaged benefits; simplification of procedural elements in

all the stages of PPP procurement cycle; and reduction of institutions, particularly phase-specific institutions. The proposal by the PPPsB to do away with sector diagnostic studies and generally simplify the sub-national PPP project cycle is a step in the direction but is manifestly not enough in the particular circumstances of sub-national PPPs.

***(b) Ensure Meaningful Representation of County Governments in Key National PPPs Institutions***

I strongly recommend appropriate amendments to the PPPs Act to ensure that the membership of institutions at the national level of government that are responsible for the regulation of sub-national PPPs, either through regulatory approvals or policy formulation, are partly constituted by representatives of county governments. One way of achieving it would be amending Section 4 of the PPPs Act by including in the composition of the PPP Committee, at least two persons to be nominated by the Council of Governors. To avoid cluttering of the Committee, Section 4(1)(g) of the PPPs Act may be amended by reducing the number of persons appointed by the Cabinet Secretary to two and having the other two nominated by the Council of Governors. The recommended mode of constitution of the Committee should also be replicated in the constitution of other institutions such as the Petitions Committee.

***(c) Entrench the Independence of the Petitions Committee***

I also recommend the amendment of the PPPs Act in section 67(2)(c) for purposes of ensuring that the Unit Director does not form part of the membership of the Petitions Committee. I also recommend that the composition of the Petitions Committee be reviewed to include, at least two members nominated by the Council of Governors. The number of persons appointed by the Cabinet Secretary should also be reduced and relevant professional bodies involved in the appointment of some members to the Petitions Committee. This recommendation appreciates the quasi-judicial role of the Petitions Committee and will cure the mischief of having an appropriate composition and foster the realisation of the constitutional procurement principle of fairness.

***(d) Allocate Sufficient Time for Resolution of PPPs Disputes***

Furthermore, I recommend appropriate amendment to Regulation 45(2) of the PPPs Regulations with a view to extending the period within which the Petitions Committee must hear and determine complaints made by aggrieved bidders to at least forty-five days. The ten working days' period is insufficient especially having due regard to the complexity of PPP projects and the exigencies of adversarial dispute resolution system. The proposal in PPPsB for extension of this period to twenty-eight days is a step in the right direction but is inadequate and does not take into account the nature of PPPs disputes and the constitutional dictates of fair hearing in every administrative action.

***(e) Provide for Right of Appeal to the High Court against the Decision of the Petition Committee***

I recommend that the PPPs Act be amended to allow a party aggrieved by the decision of the Petitions Committee to escalate the dispute to the High Court. The envisaged appeal should be allowed on both points of law and factual issues. However, to foster the finality of procurement disputes, decisions of the High Court on such matters ought to be final and binding on the parties. To prevent the filing of frivolous appeals, I recommend that appropriate conditions such as the furnishing of sufficient security for costs be required of an intending appellant before the intended appeal is lodged with the High Court. It is noteworthy that this recommendation accords with what obtains in South Africa, to the extent that aggrieved parties are allowed to seek redress in courts of law. However, this recommendation asks that such recourse be at the second instance after the parties have exhausted the internal and alternative remedies.

***(f) Limit Approval Authority in respect of Appropriate Sub-national PPPs to County Assemblies***

There is urgent need to overhaul the legal framework for sub-national PPPs with a view to aligning it with the constitutional requirement for distinctiveness and interdependence of governments at either level. In that regard, and borrowing from the South African approach, an ideal framework would be the one by which county governments

are accorded near full autonomy to undertake sub-national PPPs without seeking approvals of institutions within the National Government. Therefore, approvals should be a preserve of the relevant county assembly, unless the proposed sub-national PPP entails sovereign borrowing or requires sovereign guarantees. In addition, any reference to institutions at the National Government ought to be based on mutual consultation and cooperation. To achieve the said objective, a statutory framework for sub-national PPPs must do away with the multiple mandatory approvals by institutions at the National Government. In the place of multiple mandatory approvals, the envisaged statutory framework should provide for obligatory request for views, recommendations and assistance.

***(g) Enact a Framework for Sub-national PPPs in a Substantive Statute as opposed to a Delegated Legislation***

I strongly recommend the enactment of a framework for the regulation of sub-national PPPs through a substantive statute as opposed to a subsidiary or delegated legislation. However, if it must be provided for in a delegated legislation, then the PPPs Act should also be amended with a view to imposing statutory timelines for the enactment of the requisite delegated legislations. The timelines will compel the relevant Cabinet Secretary and other concerned institutions to fast-track the enactment of delegated legislations meant to operationalize provisions of the PPPs Act that empower county governments to administer and regulate PPPs within their spheres of competence. This recommendation will cure the mischief occasioned by the failure by the Cabinet Secretary to enact crucial regulations almost eight long years after the enactment of the Act. Whilst the PPPsB has addressed this issue in sufficient detail, it remains to be seen if the same will be enacted into law.

***(h) Devolve PPPs Institutional Framework to Counties***

There is need to devolve PPPs institutional framework to the counties. This recommendation may be achieved through appropriate amendments to the PPPs Act and implemented through secondment of officers of the Unit to the nodes or procurement

departments of county governments on permanent terms. The seconded officers would act as liaison contacts between the respective county governments and the Unit. The resultant benefits would include seamless institutional coordination and consultation as well as enhanced visibility of the Unit at the counties.

*(i) Foster Synergies in County Integrated Development Plans*

I strongly recommend the review of the legal framework governing the development of County Integrated Development Plans with a view to fostering synergies, as appropriate, across counties and at the very least, within the emerging regional economic blocs established by county governments for purposes of leveraging economies of scale. In this regard, regional economic blocs ought to be encouraged to identify common infrastructure and service delivery needs which can be bundled and procured together. This will facilitate bundling of PPP projects across counties, and in the result, increase financial viability and scale of the bundled projects by, for example, lowering the project cycle costs. In the result, sub-national PPPs will not only enjoy economies of scale but will also be more attractive to PPPs investors. Synergizing of integrated development plans would allow for the realisation of the constitutional principles of interdependence and cost-effectiveness.

**5.2.2. Reforms on Emergent Issues**

Being an exploratory research, the study only sought to examine the extent to which Kenya's legal and institutional framework for sub-national PPPs accords with the constitutional principles on devolution and public procurement as well as the extent to which the status of compliance under review impacts on the adoption of sub-national PPPs. However, in the course of the study, it emerged that county governments face credibility and capacity challenges.

Similarly, corruption and rent-seeking and as obstacle to successful implementation sub-national PPPs featured prominently in the responses given by the respondents who participated in the survey. Indeed some of the county secretaries who participated in the

survey expressed the view that most officials of county governments view projects as opportunity for rent seeking. Accordingly, where such is not possible (in view of the nature of PPPs), officials will easily sabotage the process.

These emergent issues by be resolved by the following interventions: -

***(a) Enhance Institutional Capacity of County Governments***

I established that there is an urgent need for the enhancement of institutional capacity of county governments to enable them discharge their respective mandates at socially acceptable levels of performance. Such enhancements take various forms including human resource capacity, financial capacity, debt accrual capacity, amongst others. To that end, I recommend appropriate reforms to the recruitment laws and policies of county governments with a view to ensuring that during recruitment of staff, due regard is had to individuals with exposure to or experience with PPPs. Such considerations should be obligatory especially when recruiting individuals whose job responsibilities would involve making of procurement decisions. In the meantime, the current relevant staff of county governments should be appropriately trained on sub-national PPPs.

But more fundamentally, appropriate amendments ought to be made to the PPPs Act to make it mandatory for county governments to establish standing nodes or procurement departments that have basic dedicated staff. However, the composition of the technical staff should vary with the projects. The variation would ensure the necessary flexibility that allows a county authority to tailor the technical expertise of its node to the peculiar needs of a project. More importantly, the capacity enhancement should transcend that which is due to county governments from the PPP institutions within the national level of government. While such institutions are domiciled at the national level of government, they variously play crucial and often mandatory roles in the project cycles of sub-national PPP projects undertaken by county governments. In that regard, and as proposed in the PPPsB, the PPPs Act ought to be amended to ensure institutional strengthening and effectiveness of the Unit. This will not only ensure that it delivers on its statutory mandate of building the capacities of contracting authorities, county governments

included, but will also go a long way in lessening the bottlenecks attributable to regulatory approvals. Similarly, appropriate reforms ought to be made on the Act and the derivative regulations to ensure that institutional, financial, human and technical capacity of other crucial institutions such as the Committee, the Petitions Committee and the Debt Management Office are equally enhanced.

***(b) Ease Restrictions on Borrowing by County Governments***

Article 212 of the Constitution and Sections 58, 140 and 141 of the Public Finance Management Act ought to be amended to ensure that borrowing restrictions imposed on county governments do not unduly constrain the capacity of county governments to undertake PPPs. Therefore, the conditions upon which county governments access loan guarantees and other support measures from the national government ought to be well thought out with a view to ensuring that whilst they achieve the intended objective, they should not impose onerous obligations on the county governments.

Whereas the regulatory framework for county governments' access to sovereign guarantees is still evolving, an appropriate legal framework needs to be designed and put in place to ensure that county governments have ready access to sovereign guarantees from the national government. This will, for instance, make economically viable but commercially unviable infrastructure projects attractive to PPP investors.

***(c) Mandate County Governments to Obtain and Maintain Credit Ratings from Credible Credit-Rating Agencies***

It is imperative that county governments are either obligated or sufficiently incentivised to obtain and maintain credible credit ratings from reputable credit rating agencies. Credit ratings will go a long way in availing a means by which county governments may demonstrate their credibility to prospective PPP investors, thus alleviating the need for sovereign guarantees and other government support measures, and hence potentially enhancing the attractiveness of sub-national PPPs to prospective PPP investors.

***(d) Incentivise County Governments to Honour their Contractual Obligations Timeously***

Appropriate legal and policy reforms ought to be effected to ensure that county governments are incentivised to do everything possible to ensure that they timeously satisfy their contractual and debt obligations. With the resultant history of timeous satisfaction of contractual and debt obligations, prospective PPP investors will be able to trust that county governments are credible counterparties who will respect their contractual obligations. This will potentially obviate the need for additional support measures from the national government and sovereign guarantees together with costs attendant thereto.

***(e) Impose Statutory Time Limitations on the Process of PPP Project Cycle***

Additionally, the risk of contract repudiation by successive county governments after election cycles ought to be mitigated.<sup>341</sup> An example of how such risk may be mitigated is by use of statutory time limitations on various phases of PPP project cycle. In this regard, time allocations for important phases such as project preparation and procurement phases ought to be limited with due regard being had to the need to ensure the said phases do not straddle election cycles. As a consequence, PPP projects initiated by a county government administration will reach financial close before subsequent administrations take over. The subsequent administrations will have no option but to respect the contracts lawfully entered by their predecessors.

***(f) Effect Measures Against Corruption and Rent-Seeking***

I recommend that cogent measures aimed at curbing corruption and rent-seeking obstacles to sub-national PPPs be put in place. To begin with, the Committee and the Unit as well as other relevant institutions ought to be obligated to urgently issue standardised

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<sup>341</sup> Inter-American Development Bank, 'Evaluation of the IDB's non-sovereign operations with sub-national Entities: 2007-2010' 5.

contracts and other relevant documents for sub-national PPPs. Additionally, the Committee ought to see to it that statutory procedures meant to ensure transparency of PPP decision-making processes, accountability of public officials involved in PPP processes, access to contractual information by the public as well as limited use of revenue guarantees and monetary compensations are fully implemented. Such measures will limit the scope of manipulation of sub-national PPP processes by corrupt officials and firms.<sup>342</sup> Moreover, and in order to obviate the sabotage referred to above, county governments should be mandated to first consider the use of PPPs for certain long-term infrastructure projects before resorting to the use of other external mechanisms. To that end, appropriate policies and legislative interventions should be put in place.

### **5.2.3. Recommendations on Further Research**

The study only sought to investigate the efficacy of Kenya's legal framework for sub-national PPPs and the extent to which it promotes the constitutional principles on devolution and public procurement. It, however, did not examine the extent to which each element of non-compliance with the constitutional principles or inefficacy of the legal framework contributes to the low adoption of sub-national PPPs in Kenya. Therefore, one aspect of the hypothesis is that regard and to that extent was not proven. Accordingly, there is need for further research with a view to establishing the extent to which each of the said elements contributes to the low adoption of sub-national PPPs in Kenya. Such further research would offer useful guidance to the allocation of scarce resources towards the proposed interventions. Moreover, the identified inefficiencies were largely informed by the desktop research and the perspectives of county secretaries of county governments that participated in the study. There is, therefore, need for further research focusing on the perspectives of other crucial players in the industry such as PPPs practitioners and PPP investors.

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<sup>342</sup> Lossa E and Martimort D, 'Corruption in public-private partnerships' in De Vries and Etienne B Y (eds) *The Routledge Companion to Public-Private Partnerships* Routledge, 2013, 18 - <<https://bit.ly/2N24pof>> on 15 January, 2021.

I also recommend future research on areas which are pertinent to this study but could not be undertaken due to time and resource constraints. Such areas would include assessment of specific PPPs projects carried out in both Kenya and comparative jurisdictions such as South Africa.



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## APPENDICES

### APPENDIX A: Ethical Review Report



23<sup>rd</sup> September 2021

Mr Rono Naphtaly,  
naphtaly.rono@strathmore.edu

Dear Mr Rono,

**RE: Sub-National Public Private Partnerships: An Appraisal of the Legal And Institutional Framework Against the Constitutional Principles on Devolution and Public Procurement**

This is to inform you that the Research Services Office has received your above research proposal along with a request for exemption from Ethical Approval.

The office notes that: On the grounds of not having submitted your research proposal for ethical approval, with reason of having already collected data for your study thus negating the need for ethical approval for your research study in the University. This is a letter for you to proceed with the next steps of your academic requirements.

Please be advised, that in future, all research proposals should be submitted to the SU-IERC for ethical approval before receiving a NACOSTI permit to collect data.

*Disclaimer: This is not in any way an ethical approval letter*

Yours sincerely,

A handwritten signature in blue ink, appearing to read "R. Mbogo".

Prof Rachel Mbogo  
**Dean Research and Innovation**

## APPENDIX B: Turn-it-in Originality Report



### Document Information

<b>Analyzed document</b>	Sub-National Public Private Partnerships An Appraisal of the Legal and Institutional Framework against the Constitutional Principles on Devolution and Public Procurement.docx (D113863326)
<b>Submitted</b>	9/30/2021 12:47:00 PM
<b>Submitted by</b>	
<b>Submitter email</b>	naphtaly.rono@strathmore.edu
<b>Similarity</b>	13%
<b>Analysis address</b>	library.strath@analysis.orkund.com

### Sources included in the report

<b>SA</b>	<b>Agnes Msc Dissertation - 28-09-2016.docx</b> Document Agnes Msc Dissertation - 28-09-2016.doc (D22046332)		2
<b>W</b>	URL: <a href="https://mmsadvocates.co.ke/review-of-the-public-private-partnership-amendment-bill-2021/">https://mmsadvocates.co.ke/review-of-the-public-private-partnership-amendment-bill-2021/</a> Fetched: 9/30/2021 12:52:00 PM		9
<b>W</b>	URL: <a href="https://bit.ly/3qmnO2D">https://bit.ly/3qmnO2D</a> Fetched: 9/30/2021 12:52:00 PM		9
<b>SA</b>	<b>Strathmore University / 124370.docx</b> Document 124370.docx (D111642785) Submitted by: Grace.Chepkemboi@strathmore.edu Receiver: jkeru.strath@analysis.orkund.com		5
<b>W</b>	URL: <a href="https://bit.ly/2SxVloz">https://bit.ly/2SxVloz</a> Fetched: 9/30/2021 12:52:00 PM		6
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<b>W</b>	URL: <a href="https://bit.ly/3og142b">https://bit.ly/3og142b</a> Fetched: 9/30/2021 12:52:00 PM		4
<b>W</b>	URL: <a href="https://bit.ly/3kzeSnr">https://bit.ly/3kzeSnr</a> Fetched: 9/30/2021 12:52:00 PM		7
<b>W</b>	URL: <a href="https://stralexgroup.blogspot.com/2013/09/a-review-of-public-private-partnerships.html">https://stralexgroup.blogspot.com/2013/09/a-review-of-public-private-partnerships.html</a> Fetched: 9/30/2021 12:52:00 PM		2
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## APPENDIX C: Google Forms containing Questionnaire and Responses

<https://bit.ly/3ozlgMI>

<https://bit.ly/3aa4yOq>

