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BILATERALLY FINANCED PROCUREMENTS IN KENYA: A CRITIQUE OF THE KENYA STANDARD GAUGE RAILWAY PROCUREMENT

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ABSTRACT

Many emerging economies receive significant parts of their financial support to deliver on strategic projects through bilateral or multilateral arrangements. To facilitate this, most of these countries, such as Kenya, have created exceptions in their domestic public procurement laws. By using the Kenya Standard Gauge Railway infrastructure procurement as a case study and adopting a doctrinal legal research approach, this article offers insights on bilaterally financed procurement, in Kenya specifically, but also generally. The research posits that such procurements ought to be regulated and used as catalytic agents in advancing competition, accountability and transparency to realise value for money and bolster legitimacy in the procurement of strategic infrastructure projects.

BILATERALLY FINANCED PROCUREMENTS IN KENYA: A CRITIQUE OF THE KENYA STANDARD GAUGE RAILWAY PROCUREMENT

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1 Introduction

1.1 The underlying objective of bilaterally financed procurements

Typically, developing countries approve five-year plans that set out their development strategies. These plans identify goals, priority sectors and projects. However, to implement these plans, governments must identify and decide the source of financing for these projects. One source is the state budget, which primarily depends on the capacity to raise taxes and issue sovereign bonds. In addition, many African countries require substantial investment to achieve their development objectives in line with what is envisaged by the United Nations 2030 Sustainable Development Goals (SDGs), especially when it comes to infrastructure development. According to the African Development Bank, the African continent is facing an infrastructure financing gap of USD 68 – 108 billion per year.[1] External financing obtained from bilateral and multilateral lenders and donors is therefore a major source of capital for these projects. The incentive for choosing external financing obtained from bilateral or multilateral finance institutions primarily lies in the comparative advantage they can offer by way of a combination of foreign currency, countercyclical financing, access to cheaper financing, longer maturities and support with project preparation and capacity building.[2] The main objective of "development" funding, however, is to finance projects that

[1] AfDB 2018.
[2] Martínez-Galán 2023:2.

otherwise would not receive commercial finance in emerging economies.[3]

1.2 The practice and usage of bilaterally financed procurement

Development finance is typically provided through a loan – on concessionary or non-concessionary terms – or by means of a grant. Loans are usually provided by way of a loan agreement between a development financing bank or agency and the recipient government or its agency.[4] Typically, the loan agreement contains information on the amount and the tenor of the loan, the applicable fees, the interest rate, the terms of repayment, including the place of payment and the currency, and the purpose for which the funds may be utilized. The terms of the loan agreement can also determine the procurement process to be followed for executing the project that it finances.

Typically, bilaterally or multilaterally financed procurements[5] are backstopped by bilateral or multilateral financing agreements. These projects often have downstream on-lend agreements in place between the borrowing government and the implementing agencies or end-user. As a matter of practice, the procurement outcome of the project is often subject to the financing entity's concurrence or no objection. Although the procurement process is subject to the rules of the lending institution, the procurement contracting processes are often led by the borrower countries' executing and implementing agencies (line ministries or thematic agencies) and the role of the lending institution is merely to monitor whether the procurement process has followed the bank's or other agreed upon procurement regulations and to validate the process. Typically, the legal agreement governs the legal relationship between the borrower and the development financier. The legal agreement determines the procurement regulations or guidelines that will apply to the procurement of goods, works or services.

The preferred procurement modality is open competitive bidding. The rights and obligations of the borrower and the providers of the goods, works or services are then governed by the relevant request

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[3] Larsen, Voituriez & Nedopil 2023:4.
[4] Olmsted 1960:424. Also refer to Regulation No.189(a) of the Kenya Public Finance Management (National Government) Regulations, 2015.
[5] Commonly referred to as Government–to-Government procurement.

for bids document and by the contract signed by the borrower and the supplier.

1.3 The legal character of development finance procurement

As regards the legal character of bilateral or multilateral development (MDB) loans, it is useful to look at what is generally regarded as the traditional World Bank view on these loans. This view was put forward in 1959 when Aron Broches, the then General Counsel of the World Bank, posited that: -

> "(1) Every loan agreement between the World Bank and a member state, and every guarantee agreement (which is by definition with a member state), is an international agreement 'governed by international law', as both parties to such agreements have international legal personality. These agreements are treaties in the broad sense of the term, as a matter of international law, and are registered with the United Nations as such.
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> (2) A loan agreement between the World Bank and a non-state borrower (for example, a state-owned enterprise) 'is certainly not an international agreement governed by international law', since the non-state party does not have an international legal personality. Such an agreement does, however, 'partake of the international character' of the dealings between the World Bank and the member state, which justifies 'insulating it from the effect of municipal law'. Considering these attributes, such agreements are not registered separately with the United Nations but are provided instead 'as annex to the related guarantee agreement'."[6]

At the borrower's request, and in cases of World Bank-financed procurements, the Bank may (subject to its policies and rules, and applicable fiduciary and operational requirements), agree to rely on and apply the procurement rules and procedures of the borrowing country, another multilateral or bilateral agency or organisation. The borrower must however be able to justify the desire to use the exemption "based on market analysis, risk and operating context and the project's particular circumstances".[7] It must further

[6] Broches 1959:214.
[7] Procurement Regulations for Borrowers, Annex V, section 2.3.

demonstrate that it has the necessary capacity, experience and an acceptable remedial system.[8]

Because the World Bank's actions in the procurement space are often followed by other development banks it is important to take note of how they view the legal character of these loan agreements.[9]

1.4 China's role in bilateral financed procurement

In the last three decades, the People's Republic of China has risen from a reclusive economic backwater to a premier global power. Accompanying this rise is China's emergence as a leader in international development finance.[10] In Africa, Government – to - Government financing is often provided by China. Based on their "reform and opening up" policy of 1978, the "going out" policy of 1999 and the "Belt and Road Initiative" (BRI) of 2013, China's capital flows towards the rest of the world have increased exponentially over the last four decades. Chinese overseas engagement through investment and financing through state-owned enterprises, state-owned financial institutions, policy banks and an increasing number of development funds averaged US$70 billion over the last five years.[11] Through this, China has become the major financing partner for many emerging countries,[12] also those in Africa - Kenya included.

There are six different types of Chinese loans to Africa: interest-free loans, concessional loans, preferential export buyer's credits, export buyer's credits, supplier's credits and commercial loans. Given their concessional interest rates, interest-free loans and concession loans, fit in the OECD Development Assistance Committee (DAC's) definition of foreign aid. Preferential export buyer's credits, export buyer's credit and any supplier's credits or commercial loans insured by China Export and Credit Insurance Corporation (*Sinosure*)[13] fit in the OECD definition of other official flows, which includes official bilateral financial instruments that are export-facilitating in purpose.

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[8] Quinot & Williams-Elegbe 2018:6.
[9] See Quinot & Williams-Elegbe 2018:6-7.
[10] Singh 2021.
[11] Scissors 2021.
[12] Martínez-Galán 2023:2.
[13] *Sinosure* is China's export credit insurance agency.

Several types of Chinese institutions provide loans to African borrowers. Based on the China Loans to Africa (CLA) Database, which tracks public and publicly-guaranteed loans, the two biggest Chinese development finance institutions (DFIs), Exim Bank of China (CHEXIM) and the China Development Bank (CDB), respectively committed USD 87 billion and 39 billion respectively for the period 2000–2020.[14] Together the two DFIs contributed about 79% of the total Chinese loan commitment to Africa.[15] The majority of Chinese loans to Africa are concentrated in the transportation, power, mining, information and communication technologies sectors, with the transport and power sector alone contributing 29% and 25% respectively to the total amount of Chinese loan commitments between 2000–2020.[16]

Chinese contractors play an important role in China-financed infrastructure projects in Africa, but also in projects financed by financial institutions from OECD countries as well as multilateral financial institutions. Based on the China Investment Tracker,[17] the volume of China's construction contracts in Africa is about USD 20–35 billion per year. These construction contracts are often implemented by Chinese state-owned enterprises, and often directly or indirectly (for example, through sovereign-to-sovereign loans) funded through Chinese financing mechanisms.[18]

Kenya is one of the African countries that have made use of development finance offered by China to finance infrastructure projects. One example of a bilateral financed procurement provided by China to Kenya, which will form the subject of discussion in this article, is the Standard Gauge Railway (the SGR project). In 2023, Kenya spent Kenya Shillings 152 billion to repay debt due to China, which underlines the burden on taxpayers in servicing loans raised to build the Standard Gauge Railway and other infrastructure projects undertaken in the past. According to disclosures by the Kenya National Treasury, the debt comprised

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[14] The Boston University Global Development Policy Center uses the DFI definition from Finance in Commons, a global network of global development banks. DFIs are stand-alone entities that primarily issue financial instruments, such as loans, for project-specific purposes with a public policy mandate, under a government-led strategy (Xu, Marodon & Ru 2021). This definition is also substantiated with China's self-identification of CHEXIM and CDB as DFIs.
[15] Hwang *et al* 2022.
[16] Hwang *et al* 2022.
[17] American Enterprise Institute 2022.
[18] Springer *et al* 2023:15.

nearly Kenya Shillings 100.47 billion in principal sums and Kenya Shillings 52.22 billion in interest. The total amount owed represents a 42.14% rise in comparison to Kenya Shillings 107.42 billion of China debt owed in the previous year ended June 2023.[19]

However, China's growing footprint in international development financing has attracted fierce criticism. For instance, former US Secretary of State Rex Tillerson made this damning remark on China's dealings with African nations:

> ''China's approach encourages dependency using opaque contracts, predatory loan practices, and corrupt deals that mire nations in debt and undercut their sovereignty, denying them their long-term, self-sustaining growth [...] its approach has led to mounting debt and a few if any jobs in most countries. When coupled with the political pressure, this endangers Africa's natural resources and its long-term economic and political stability''.[20]

According to a dataset compiled by Aid Data – a United States research lab at the College of William & Mary - the terms of Beijing's loan deals with developing countries are usually secret and require borrowing countries, such as Kenya, to prioritise repayments to Chinese state-owned banks ahead of other creditors. The dataset, based on an analysis of loan agreements undertaken between 2000 and 2019, suggests that Chinese funding agreements contain clauses with ''more elaborate repayment safeguards'' than its ''peers in the official credit market'', and that China tends to give loans to African countries with few or no conditions and usually does not want to interfere in the domestic affairs of countries it engages with. This has led critics of China to accuse Beijing of engaging in debt diplomacy, resulting in African countries being saddled with enormous debt Beijing knows they cannot possibly pay. China then extracts concessions from the indebted countries through pressure to sell off national assets or barter national resources for debt clemency.[21]

Much scholarly debate exists on whether Chinese-African relationships are mutually rewarding. One school of thought,

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[19] Munda, 2024.

[20] US Department of State, 2018. This narrative has in a good measure been supported and also discounted. See also Aidi 2018; Tao 2023.

[21] Munda, 2024.

otherwise known as the "*Optimistic* or *Balanced Development School*", views the relationship as a "win-win engagement" where China is only pursuing its own economic interests in the contemporary economic world order by fostering a sound development partnership with Africa. Conversely, the second school of thought, the "*Pessimistic or Neo-Colonial School*", characterizes it as an unequal relationship resulting to a "zero-sum engagement" of Chinese imperialism whereby China is perceived as a power bloc in severe competition with Africa's traditional cooperation partners (the Global North) to gain access to Africa's vast natural resources.[22]

This contribution analyses the legal position of bilaterally financed procurement in Kenya with reference to a case study of the Standard Gauge Railway procurement financed by China, and litigation that resulted from this project in an effort to provide guidelines for these forms of procurement.

2. Kenyan law on public procurement

2.1 General legal position on public procurement

In Kenya, public procurement by state organs and public entities is highly regulated. The constitutional linchpin is Article 227(1) which provides that when a state organ or other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

To give effect to this Article of the Constitution, Parliament enacted the Public Procurement and Assets Disposal Act (PPADA, 2015).[23] In Kenya, sections 4(2)(f) and 6(1) of the PPADA, 2015, are the cornerstones of bilaterally and multilaterally financed procurements. To avoid any doubt, section 4(2)(f) provides that procurement and disposal of assets under bilateral or multilateral agreements between the Government of Kenya and any other foreign government, agency, entity or multilateral agency *shall not be subject to the application of the Act unless as otherwise prescribed in the Regulations*.[24] Section 6(1) provides that subject to the

[22] Nyiayaana & Jack 2024:10-29.
[23] No.33 of 2015, Laws of Kenya. The PPADA, 2015 was preceded by the Public Procurement and Disposal Act, No.3 of 2005 – now repealed.
[24] Regulation 5(1) provides that where any bilateral or multilateral agreements are financed through negotiated loans for the procurement of goods, works or

Constitution, where any provision of the PPADA, 2015, conflicts with any obligations of the Republic of Kenya arising from a treaty, agreement or other convention ratified by Kenya, and to which Kenya is party, *the terms of the treaty or agreement shall prevail*. The above provision mirrors the provisions of Article 3 of the UNCITRAL Model Law on Public Procurement, as adopted by the United Nations Commission on 1st July 2011.

Section 6(1) of the repealed Public Procurement Disposal Act, 2005, (PPDA, 2005), which applied at the time the SGR project was procured, provided that where any provision of the Act conflicts with any obligations of the Republic of Kenya arising from a treaty or other agreement to which Kenya is a party, *the Act shall prevail except in instances of negotiated grants or loans*. Relatedly, Section 7(1) provided that if there is a conflict between the Act, the regulations or any directions of the Public Procurement Oversight Authority and a condition imposed by the donor of funds, *the condition shall prevail* with respect to a procurement that uses those funds and no others.

The above position in law is further supported by the provisions of Article 2(5) and (6) of the Constitution which provide for the application of the general rules of international law in Kenya and that any treaty or convention ratified by Kenya shall form part of the law under this Constitution. The *raison d'être* behind the foregoing provisions of law which, in essence, exempt bilaterally and multilaterally financed procurement from the application of the municipal public procurement law is that economic relations between the Government and Development Finance Institutions (DFIs), foreign sovereign states, agencies of foreign sovereign states and international organisations are governed by international law as opposed to municipal law. As a matter of fact, DFIs, foreign sovereign states, agencies of foreign sovereign states and international organisations do not usually lend money or otherwise support a country's development projects under agreements that are governed by the municipal laws of the borrowing state. This exemption enables a country to utilise external financing and collaboration in delivering complex and high-value development projects through bilateral and multilateral agreements.

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services, the Act shall not apply where the agreement specifies the procurement and asset disposal procedures to be followed.

Section 6(1) of the PPADA, 2015, embodies an important rule of international law, commonly expressed in the maxim *pacta sunt servanda.* The rule, which is set out in Article 27 of the Vienna Convention on the Law of Treaties, forbids a state from using its municipal laws as a justification for derogating from obligations imposed under bilateral or multilateral agreements. Section 6(1) of the PPADA, 2015, therefore, is a corollary to section 4(2)(f) of the PPADA, 2015. Relatedly, Regulation 5(1) of the Public Procurement and Asset Disposal Regulations, 2020, provides for an ouster from the application of PPADA, 2015, in procurements where bilateral or multilateral agreements specify procurement procedures to be followed where the financing of the procurement is through negotiated loans.

Closely related to the foregoing is the principle of international comity. The Supreme Court in *Hilton v Guyot*[25] famously defined international comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation".

Kenyan courts and *quasi*-judicial bodies have decided many cases on the applicability of the Kenya public procurement law to projects financed by donors under bilateral or multilateral agreements. For example: *Kenya Medical Supplies Authority v Revital Health (EPZ) Limited & 2 Others*,[26] *Republic v Public Procurement Administrative Review Board & 2 Others ex-parte Kenya Power & Lighting Company*,[27] *Republic v Public Procurement Administrative Review Board & Another ex-parte Geothermal Development Company Ltd & Another*[28] and *Republic v Public Procurement Administrative Review Board & 2 Others ex-parte Coast Water Services Board & Another.*[29] The *KEMSA* and *Kenya Power cases* upheld the exemption of bilaterally and multilaterally financed procurements from PPADA and declared them constitutional. In essence, this gives way to the financiers' guidelines and procurement regime, as provided for under the

[25] 159 US 113 (1895)).
[26] Civil Appeal (Mombasa) No 65 of 2016 [hereinafter the "*KEMSA* case"].
[27] High Court (Nairobi) Judicial Review Application No.181 of 2018 [hereinafter the "*Kenya Power* case"].
[28] High Court (Nairobi) Miscellaneous Civil Applications No.71 of 2017 [hereinafter the "*GDC* case"].
[29] High Court (Nairobi) Miscellaneous Civil Application No.116 of 2016, [hereinafter the "*Coast Water Services Board* case"].

public procurement law and regulations of Kenya.[30] The *GDC* and *Coast Water Services Board* cases, however, have caused significant confusion on the import of section 4(2)(f) and section 6 of the PPADA, 2015. Contrary to the dominant view of the High Court, and contrary to binding precedent from the Court of Appeal, the decisions have held that: -

(a) donor-funded public procurement projects should not be exempted from the Act since the public invariably repays the monies lent by the donors;

(b) donor-funded public procurement projects can only be exempted from the Act under exceptional and very narrow circumstances, for example, where the relevant bilateral or multilateral agreement expressly ousts the application of PPADA, 2015;

(c) statutory provisions that exempt donor-funded public procurement projects from PPADA, 2015, are incompatible with the values of transparency, competition, fairness, equity and cost-effectiveness embodied in *inter alia* Article 227 of the Constitution; and

(d) a bilateral and multilateral agreement would not exempt a donor-funded project from PPADA, 2015, where the procuring entity is a state corporation or other public entity as opposed to the Government of Kenya (Government) in strict sense.

The distinction between the Government and public entities as embodied in the *GDC* and *Coast Water Services cases* is artificial and unreal. The reason for this is that the Government engages in public procurement not by itself but through state corporations, ministries, departments and other public entities. In other words, the Government is a multi-entity body (as opposed to a single entity) comprising several state corporations, ministries, departments and other agencies of the state. Indeed, it is near impossible to find a public procurement project or contract in which, strictly speaking, the Government as such is the procuring entity.

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[30] In essence holding the position that the enforcement of international agreements is governed by international law in the case of treaties and not municipal law. This is currently the dominant view.

2.2 Controversy and Challenges

It has been posited that in most cases, Kenyan public procurement laws do not regulate Government–to-Government procurement in Kenya, which raises questions in relation to its compliance with the minimum requirements of a public procurement system set out in the Constitution of Kenya.[31] Lack of transparency, competition and accountability undermines legitimacy of any project or decision. Suchman defines legitimacy as "a generalised perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed systems of norms, values, beliefs and definitions''.[32] Because it is not uncommon for bilaterally or multilaterally financed procurements to be tied to the procurement of goods and services from the donor country,[33] many commentators have questioned whether developing countries are the real beneficiaries of development assistance.[34] Practices which tie the provision of aid to procurement aimed at protecting markets in donor countries, and bad governance in the recipient countries, reduce aid effectiveness, and development assistance often fail to achieve its primary goal of alleviating poverty.[35] Often such procurements are criticized for lack of competition, transparency and for undermining the value-for-money principle.[36] The increased use of tied aid and the practice to insist on using the development agency's procurement rules rather than those of the recipient country (referred to as the "use of country" systems) continue to be a significant challenge to public procurement in Africa.[37] The biggest controversy, however, relating to the SGR project procurement concerns the transparency of the project and the closed-door negotiations between the two governments. [38]

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[31] See Onyango 2018.

[32] Suchman 1995:574.

[33] United Kingdom 2000: para 284.

[34] Hancock 1989:156 notes that in virtually every aid-giving country, a substantial proportion of development assistance funds is typically spent on the purchase of goods and services from that country and highlighting a practice among bilateral donors of using funds allocated for development assistance to help their exporters to secure contracts in the recipient countries.

[35] Migai Akech 2006:3.

[36] For further insights on this see Enrique Martínez-Galán & Proenca 2023. Also see Onyango 2018.

[37] La Chima 2013:219; Williams-Elegbe 2013:95.

[38] Something commendable moving forward is that the Public Procurement and Asset Disposal Regulations, 2020, regulation 5(2), now provides that all bilateral and multilateral agreements whose implementation is through procurement in part or in whole shall involve procurement professionals from the respective

The SGR loan has raised concerns about Kenya's external debt challenge and sustainability. The opacity of the loan agreement has fed into narratives about so-called "debt-trap diplomacy"[39] and led to rumours that China was "taking over" Kenya's national assets. Other rumours regarding the SGR loan agreement have accompanied concerns about debt sustainability. In 2018, a leaked report attributed to the Auditor-General's office indicated that Mombasa Port, a strategic national asset, was used as collateral to secure the SGR loan. However, after careful reviews of related documents and reports, Bräutigam *et al*[40] debunked this rumour, arguing that the misleading claim resulted from misinterpretations of highly technical documents. The project has raised several issues regarding employment (labour relations, local employment, skills and knowledge transfer) and its impact on the environment.[41]

While Chinese-financed projects abroad have demonstrated contributions to economic growth and the improvement of local livelihoods, some infrastructure projects, including those financed and developed by Chinese entities, also pose significant risks to the local environment, including social and governance risks.

Regulation 5(3) of the PPADA Regulations, 2020, provides that an accounting officer shall, *subject to the provisions of the bilateral and multilateral agreements* between the Government of Kenya and any other foreign government, agency, entity or multilateral agency, ensure that tender documents contain requirements that the tenderer shall— (a) include a plan of technology and knowledge transfer by training and mentoring of Kenyan citizens; (b) reserve at least 50% employment opportunities for Kenyan citizens; and (c) include a plan for building linkages with local industries which ensures at least 40% inputs are sourced from local markets. Regulation 5(4) provides that for greater certainty, where the

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procuring entity at the initial stages of project preparation and negotiations for the purposes of ensuring that the public procurement and asset disposal interests of Kenya are considered.

[39] "Debt-trap diplomacy" is a term used to define a creditor nation or establishment extending loans to a borrowing nation in order to expand the lender's political leverage. This form of diplomacy entails providing projects or loans with too challenging terms for borrowing states to pay back, ultimately forcing them to accept economic or political concessions. The borrowing state thus relinquishes some of its strategic assets to decrease its debt burden towards the lending nation. See Ajnoti 2022.

[40] Bräutigam *et al* 2022.

[41] For detailed analysis of the Chinese projects in Africa and how they affect environmental, social and governance, see Springer *et al* 2023.

requirements of paragraph (3) cannot be met, an accounting officer must have a report prepared detailing evidence of the inability to meet this provision and measures to be undertaken to ensure compliance with this regulation and submit the report to the National Treasury to grant a waiver of the requirement.

When analysing this provision, it appears that what would be an ideal way of protecting local interests in bilaterally or multilaterally financed procurements is watered down by the use of the words "subject to the provisions of the bilateral and multilateral agreements" as well as the rider proviso under Regulation 5(4).

Whether or not the SGR is affordable and meets the value for money proposition has been a subject of debate in many fora. Only time will tell whether the investment in the project was worthwhile.[42]

3 The Making of the SGR Project

Stern[43] has demonstrated how adequate infrastructure is essential for productivity and growth. Transport, particularly, is a driver of development. On 28th October 2008 the then President of Kenya, His Excellency Mwai Kibaki, and the President of Uganda, His Excellency Yoweri Museveni, issued a joint communique stating a commitment by both countries to replace the Mombasa - Kampala metre gauge (''the lunatic express'') – a railway line constructed in 1901 under the British colonial period – with a high-capacity railway system known as the Standard Gauge Railway (the SGR). The SGR is one of the flagship projects of Kenya's national development programme "Vision 2030", which aims to transform Kenya into an industrialised and middle-income country by the end of this decade. The 700-kilometre Kenya SGR links the port city of Mombasa to the country's hinterland. This was necessitated by various technical and capacity challenges the "lunatic express" was facing at the time.[44] This commitment was based on the understanding that each country would develop the portion of the SGR line falling within its border in accordance with uniform

[42] Olotch 2017.

[43] Stern 1991:122-133.

[44] See para 4 of the Supreme Court Judgment, Petition No. 13 & 18 (E019) of 2020 [hereinafter the SC Judgment].

technical standards and that each country was to identify financing for the construction of its own portion.[45]

On 12th August 2009, the Kenyan Ministry of Transport executed a Memorandum of Understanding (MoU) with the China Road and Bridge Corporation (CRBC), a state-owned corporation of the People's Republic of China. Under the MoU, CRBC was to undertake, at its own cost, a feasibility study of the construction of phase 1 covering 500 kilometres and come up with a preliminary design for the project. This also included consideration of the technical details, the financing required and the legal requirements for the implementation of the project. In the event the results of the study were to be approved, CRBC were to be the sole agent to design, construct and supervise all works of the project. Further, upon agreement of the design, the parties were to negotiate a commercial contract with CRBC to source funding for the project.[46] CRBC submitted the feasibility study report in February 2011, which Kenya Railways Corporation (KRC), the statutory body mandated with responsibility of the railway network in Kenya, was tasked to review. KRC subsequently approved the feasibility and design report and the scope of works.[47]

In terms of financing, the agreement was that China Exim bank, through a mix of concessional and commercial loans, was to finance 85% of the project costs being 11.5 billion US Dollars for the Nairobi - Naivasha section (Phase IIA)[48], while the Kenyan Government would provide the 15% remainder of the project costs.[49] In a bid to meet its portion of the funding of the project, the

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[45] See para 5 of the SC Judgment.
[46] See para 6 of the SC Judgment.
[47] See para 7 of the SC Judgment.
[48] The Export-Import Bank of China is a state-funded and state-owned policy bank with the status of an independent legal entity. It is a bank directly under the leadership of the China State Council and dedicated to supporting China's foreign trade, investment and international economic cooperation. With the Chinese government's credit support, the bank plays a crucial role in promoting steady economic growth and structural adjustment, supporting foreign trade, and implementing the "going global" strategy. The Chinese Government Concessional Loan refers to the medium and long term, low interest rate loan facility with the feature of government aid and grant. The recipient covers all developing countries that have diplomatic relations with China. The Chinese Government Concessional Loan is denominated in Renminbi Yuan and could finance up to 100% of the total cost under the commercial contract signed with a Chinese contractor. See http://www.chinacelacforum.org/eng/ltdt_1/201506/t20150602_6550967.htm.
[49] See para 8 of the SC Judgment.

Government of Kenya introduced a railway development levy at the rate of 1.5% of the customs value of imported goods to be charged on all imports. The levy was introduced by the Finance Bill of 18th June 2013, and it is currently provided for under section 117A of the Customs and Excise Act.[50] The SGR project arguably was Kenya's most expensive infrastructure project at the time.

On 11th August 2012, and 4th October 2012, the KRC and CRBC executed the commercial contracts for the construction of the SGR line (civil works) and the supply and installation of facilities, locomotives and rolling stock respectively for the Mombasa-Nairobi SGR project with the result that CRBC was engaged as an engineering, construction and design contractor for the project.[51] To facilitate and finance the executed commercial contracts between KRC (end-user and implementing agency) and CRBC (as the end-producer or EPC contractor) for the Mombasa - Nairobi SGR project, the Government of Kenya represented by the National Treasury (as the borrower) and the Export - Import Bank of China (as the lender) executed a Preferential Buyer Credit Loan Agreement dated 11th May 2014.[52] On 3rd December 2015, the Government of Kenya represented by the National Treasury (as the borrower) and the Export-Import Bank of China (as the lender) executed a Buyer Credit Loan Agreement to further facilitate the 19th September 2015 Nairobi-Naivasha SGR EPC Turnkey Contract between China Communications Construction Company (CCCC) and KRC.

The loan proceeds of the principal loan agreements were to be on-lent by the Government of Kenya through the National Treasury to the Kenya Railways Corporation, the implementing agency for the SGR project. The first phase of the SGR connected Mombasa to Nairobi with a passenger train, the Madaraka Express, now regularly running between the two terminuses. The SGR was extended to Naivasha in 2019.[53]

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[50] See para 10 of the SC Judgment.
[51] See para 9 of the SC Judgment.
[52] Preferential buyer's credit refers to the loan facility with concessional terms provided for the purpose of promoting trade and economic cooperation. The recipient covers all developing countries that have diplomatic relations with China. See http://www.chinacelacforum.org/eng/ltdt_1/201506/t20150602_6550967.htm.
[53] Huang 2022.

This article analyses litigation that addressed the legitimacy of the SGR Project, my findings being that the SGR project procurement process violated the Kenyan Constitution, the country's procurement legislation as well as other laws.

4 The SGR Case Overview

4.1 The High Court Petitions

On the 5th of February 2014, Okiya Omtatah and Gisebe presented to the High Court a petition[54] to intervene and stop the KRC contract with the CRBC to implement the Mombasa-Nairobi - Malaba/Kisumu Standard Gauge Railway on grounds that the project was in flagrant violation of both the Public Procurement and Disposal Act, 2005, and the Constitution of Kenya, 2010. The petition was filed prior to the construction of the railway. In the same petition they were seeking to suspend the contracts between KRC and CRBC for the supply and installation of facilities, locomotive and rolling stock for the railway. The petitioners stated that they understood the importance of the railway and that it was part of Kenya's development agenda but that the manner the project was procured and implemented violated both the Constitution and statutory procurement law. They argued that several procedures were not undertaken including due diligence, an independent feasibility study and design of the project, and that there was a conflict of interest in the government contracting with CRBC to implement the project; furthermore, that CRBC should not have received the award for the contract considering it had been black-listed by the World Bank for corruption on a project in the Philippines. They further argued that awarding the SGR project to CRBC contravened Articles 10,[55] 46,[56] 47,[57] 201[58] and 227[59] of the Constitution, the Public Procurement and Disposal Act,[60] the Public Officer Ethics Act[61] and the Ethics and Anti-Corruption Commission Act.[62]

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[54] Nairobi High Court Petition No.58 of 2014.
[55] Article 10 - National Values and Principles of Governance.
[56] Article 46 - Consumer Rights.
[57] Article 47- Fair Administrative Action.
[58] Article 201- Principles of Public Finance.
[59] Article 227- Procurement of Public Goods and Services.
[60] No. 3 of 2005 (Kenya).
[61] Chapter 183 (Kenya).
[62] No. 22 of 2011 (Kenya).

The Petitioners sought from the court the following declarations that: -

a) there was no valid contract between GOK and CRBC;

b) the Attorney-General (AG), KRC and the Public Procurement Oversight Authority (1st-3rd respondents) failed to safeguard public interest and common good in not ensuring that the procurement accorded with the law;

c) the GOK should not conduct business with CRBC;

d) the railway should be procured through competitive bidding;

e) orders for injunction to restrain 1st-3rd respondents from transacting with or continuing with the contract with CRBC;

f) mandatory orders do issue to compel the AG to direct the police to criminally investigate public officers including officials of 1st-3rd respondents involved in the fraudulent procurement process as officers of the 4th respondent.

In the LSK petition,[63] KRC and the AG were the respondents. The Petitioner (LSK) sought declarations that: -

a) KRC was subject to Articles 10,[64] 42,[65] 69,[66] 70,[67] 201 and 227 of the Constitution;

b) the award of the contract to CRBC for the supply and Installation of facilities and diesel-powered engines which were outdated be annulled; and

c) polluting the environment violates the provisions of the Constitution and an order of Certiorari do issue to nullify the award of the contract.

LSK argued that, under Article 227 of the Constitution, KRC is obligated to contract for goods and services in accordance with a

[63] Nairobi High Court Petition No. 209 of 2014.
[64] National Values and Principles of Governance.
[65] Article 42 – Environment.
[66] Article 69 - Obligations in respect of the Environment.
[67] Article 70 - Enforcement of Environmental Rights.

system that is fair, equitable, transparent, competitive and cost effective, and that it was required to comply with the provisions of the PPDA, 2005, which under Section 29 requires that a procuring entity must use open tendering or an alternative procurement procedure. They also argued that under Article 42 of the Constitution every person is entitled to a clean and healthy environment and that the use of the procured engines would contribute to pollution of the environment with the emissions of dangerous fumes and lastly, that the construction was overpriced.

The respondents argued that the project was beneficial to the country and that a master plan had been developed by KRC for this project in 2009 and that the procurement process for consultants to undertake the feasibility study for the project had been halted in August 2009. Furthermore, the GOK had signed a memorandum with CRBC for the feasibility study and the initial design of phase 1 of the project and it stated that CRBC would perform the study at their own cost and if it was found to be viable would source the funding for the project.

The respondents revealed that the feasibility study was submitted to GOK in February 2011 and was approved by KRC in June 2012 after which negotiations took place to get the project started. GOK then entered into a financing agreement with Exim Bank of China for a concessional and commercial loan to support the project under which CRBC was the Engineering Procurement and Construction contractor. That the negotiated loan was in line with section 6(1) of the PPDA, 2005. They also stated that an environment and social impact assessment study was done in 2012 and all environmental concerns had been addressed.

The respondents argued that there was a Memorandum of Understanding between CRBC and the Ministry of Transport (MoT) that should the feasibility study be approved then the project would continue under an internationally recognised "EPC Contract" (Engineering, Procurement and Construction contract) and that KRC would be in charge of supervising the project. Furthermore, the respondents argued that the petition could not be founded on public documents allegedly obtained in breach of the Constitution and the Evidence Act.[68] The source and origin of the documents had not been disclosed and therefore the authenticity of the said

[68] Chapter 80, Laws of Kenya.

documents was unknown, and this violated KRC's right to a fair hearing under Article 50 of the Constitution.

In the High Court Lenaola, J (as he then was), in a judgment dated 21st November 2014, dismissed the consolidated petitions and allowed the cross petition to expunge the documents finding them to be inadmissible. Because the petitioners invoked Article 165(3) of the Constitution, the court further held that it had jurisdiction to interpret and determine whether the acts of the respondents violated the Constitution and that the argument that the complaints ought to have been lodged before the Public Procurement Administrative Review Board was therefore irrelevant.[69] On whether the consolidated petitions were supported by valid documentary evidence, the court noted that while Article 35 of the Constitution grants every citizen the right to information held by the State, the right is not absolute and there is a procedure for obtaining such information. The court found that the manner in which the petitioners obtained the documents they relied on violated KRC's right to privacy and privacy of communication between KRC and Exim Bank.

The court found that because the project was funded by a loan from China through Exim Bank, the procurement in question was not subject to the PPDA, 2005, by dint of Section 6(1) but was governed by the terms of the negotiated loan. The court held that the Public Finance Management Act, No. 18 of 2012 had not been violated since Parliament was involved in budgeting for the funds to be utilised in the SGR project as envisioned by the introduction of the railway development levy in section 117A of the Customs and Excise Act. As to whether the appellants had put in place mechanisms to ensure value for money, the court found that this was an argument related to policy and not a clear issue of law, hence, being outside the court's mandate. The courts further opined that the SGR was not a World Bank-funded project and therefore CRBC's blacklisting was not an automatic bar to participation in any other projects. If anything, CRBC had not in line with Sections 115 and 116 of the then PPDA, 2005 been debarred by the Director General of the PPOA.[70]

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[69] Para 28 of the SC Judgment.
[70] Para 32 of the SC Judgment.

4.2 The Court of Appeal Decision – Nairobi Civil Appeal No.s 10 & 13 of 2015

Subsequently, aggrieved LSK filed Civil Appeal No. 10 of 2015 at the Court of Appeal raising five grounds of appeal. Likewise, Okiya Omtatah and Wyclife Gisebe lodged Civil Appeal No. 13 of 2015, raising a total of fifty-one grounds of appeal. Both appeals were consolidated with Civil Appeal No. 13 of 2015 designated as the lead file. The Court of Appeal condensed the issues for determination to four: (i) whether the appeal was moot; (ii) whether the learned judge erred in expunging documents in support of the petitions; (iii) whether the learned judge erred in concluding that the procurement did not contravene the Constitution; and (iv) whether the learned judge erred in holding that the PPDA, 2005, did not apply to the procurement.[71]

4.2.1 Whether the appeal was moot

The court made a finding that the relief to restrain the implementation of the impugned contract and to nullify the award of the contract were no longer relevant as the construction of the SGR was already complete and the railway line operating; however, the issues relating to the constitutionality of the procurement, the interpretation and applicability of section 6 of the PPDA, 2005, and expungement of annexures to the petition remained for consideration by the court.[72]

4.2.2 Expungement of documents in support of the petition

The respondents argued that the documents used by the petitioners were obtained illegally and that the legitimacy and authenticity of the disclosed documents violated their constitutional rights to fair administrative action and a fair hearing.

The Court of Appeal concluded that the petitioners should have requested the concerned government departments to supply them with the information they required and which they were entitled to receive in accordance with Article 35 of the Constitution. It agreed with the High Court it would be detrimental and inimical to the administration of justice and against the principle underlying

[71] Para 33 of the SC Judgment.
[72] Para 34 of the SC Judgment.

Article 50(4) of the Constitution to allow irregularly obtained evidence.[73]

4.2.3 Constitutionality of the SGR procurement

The court stated that based on the evidence presented by the respondents, the allegation that the engagement of CRBC as the contractor was dictated by the financing agreement was inaccurate. The court found that the engagement of CRBC was not an obligation arising from a "negotiated grant or loan" agreement as envisaged under section 6 of the PPD Act, because CRBC as the contractor had been procured before the financing agreement was entered into.

The court stated thus: -

> "it is the procurement that dictated the terms of the loan that ousted the procurement procedures under the Act as opposed to the terms of the loan agreement dictating the procurement procedure or who the supplier of the goods and services would be. The situation is not at all ameliorated by the fact that the entity that undertook the feasibility study and spelt out the manner in which the project would be implemented dictated that it would be the implementor or executor of the project."

Consequently, unlike the High Court, the Court of Appeal made a finding that section 6(1) of the PPDA, 2005, did not oust the application of the Act from the procurement in issue.[74]

The Court of Appeal made a declaration that KRC, as the procuring entity, failed to comply with and violated the provisions of Article 227(1) of the Constitution and sections 6(1) and 29 of the PPDA, 2005, in the procurement of the SGR project.[75]

My analysis is that the effect of the SGR Court of Appeal decision is that the procurement of the SGR project was not exempt from the application of the PPDA, 2005, which means that the project should have been procured within the regulatory framework of the said Act. This also means that the procurement ought to have been competitive and if undertaken by any other method, then such

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[73] Para 35 of the SC Judgment.
[74] Para 36 of the SC Judgment.
[75] Para 37 of the SC Judgment.

procurement should have met the conditions laid down in the procurement law and nothing short of that.

Secondly, the Court of Appeal decision left unanswered the effect and efficacy of a judgment which declares a procurement process irregular and illegal but leaves the resultant contracts unaffected and makes no declaration on their fate. This is especially so in light of the provisions of section 27 of the then PPDA, 2005, and section 72 of the now PPADA, 2015.[76] In my view this rendered the Court of Appeal decision nothing but a pyrrhic victory to the petitioners. In the *Royal Media Services v Independent Electoral & Boundaries Commission & 3 Others*,[77] the court was categorical that contractors cannot expect the court to aid them in the violation of procedures to regulate the use of public funds in Kenya. Similar decisions have been reached on public policy, public interest and other reasons in the cases of *Multi-line Motors (K) Limited v Migori County Government.*[78] It is a general principle of law that from an illegal action no rights will accrue or will be enforceable. In its Latin rendition, this principle is reflected in the maxim *ex turpi causa non oritur actio.* Similar pronouncements were made by the Kenyan court in the case of *Kenya Pipeline Company Limited v Glencore Energy (U.K) Limited.*[79]

4.3 The Supreme Court decision – Nairobi, Petition No. 13 of 2020 as consolidated with Petition No. 18 (E019) of 2020

The Supreme Court (SC) identified the following issues, among others, for the purpose of disposing the appeal: -

i. whether the appeal before the Court of Appeal was moot;

ii. whether the learned judges erred in expunging documents in support of the petitions filed by the petitioners at the High Court;

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[76] These sections provide for compliance with the procurement law by not only the public entities and staff but also contractors, consultants and suppliers.
[77] Milimani HCCC No. 352 of 2014, [2019] eKLR.
[78] Migori HCCC No. 9 of 2016.
[79] In the Court of Appeal, Nairobi, Civil Appeal No. 67 of 2014, [2015] eKLR. Also see *Ederman Property Limited v Lordship Africa Limited, Public Procurement Administrative Review Board & Nairobi City County* (Nairobi Civil Appeal No. 35 of 2018).

iii. whether the procurement of the SGR was in accordance with Articles 227 of the Constitution and the provisions of the PPDA, 2005.

On the first issue, the SC held that the SGR project, though completed, continues to raise questions especially in relation to the constitutionality of the project and the surrounding procurement process. The court made a finding that the matters the Court of Appeal had to deal with were not moot.[80]

On the second issue, the SC held that pursuant to sections 80 and 81 of the Evidence Act, public documents can only be produced in court as evidence by way of producing original copy or a duly certified copy to ensure authenticity and integrity of public documents and that the documents having been adduced in evidence without adhering to these provisions rendered them inadmissible. The SC made a finding that the 1st, 2nd and 3rd respondents did not request for the information relied upon under the procedure set out in the Access to Information Act No. 31 of 2016, enacted to give effect to Article 35 of the Constitution. The court held that admission of illegally obtained information, including information from other agencies, is detrimental to the administration of justice and in violation of the provisions of Article 50(4) and 31 of Constitution which guarantees every person the right to privacy including privacy of communication, among others.

The SC further stated as hereunder: -

> ''As noted by the Supreme Court of India in *Sachidananda Pandey v State of West Bengal & Ors* [1987 AIR 1109, 1987 SCR (2) 223, per Khalid J.]. (Concurring) today public-spirited litigants rush to courts to file cases in profusion under the attractive name of public interest litigation. They however must inspire confidence in courts and amongst the public, and most importantly, be above suspicions. *Easy access to courts under Articles 258 should therefore not be misused as a license to file frivolous claims disguised as public interest. Articles 22 and 258 of the Constitution are not open-ended panacea or bogey provisions to be resorted to as panacea to any person under the guise of public interest. Like any other well intended provision of the Constitution, it is bound to be abused and when that happens,*

[80] Para 67 of the SC Judgment.

> *the courts should not hesitate to reign in such abuses. We think that the litigation herein in the guise of Public Interest Litigation fits in the above description. How else would one explain the blatant non-compliance with the clear procedures of obtaining information in the possession of the State or State organs*"[81] [emphasis added].

In my opinion, the SC was right, just like the High Court and Court of Appeal, in making a finding against the admission of the illegally procured evidence by the petitioners. The statement by the SC on public interested litigation is however unfortunate and redundant as it seriously discourages public interest litigation and constitutional petitions even when well-intended, the probity and admissibility of the evidence notwithstanding.

Important developments to mention in regard to access to information relating to the SGR procurement is the High Court decision of 13th May, 2022, in a separately filed matter *Khalif & Another v Permanent Secretary Ministry of Transport & 4 others; Katiba Institute & Another (Interested Parties)*.[82] In this case, the petitioners claimed that the construction of the SGR project was undertaken with controversy and secrecy. They thus filed the instant petition seeking among others a declaration that the failure by the respondents to provide and publicise the information sought was a violation of the right to access to information and an order compelling the respondents to provide the information sought. The court's view was that the petitioners directed a proper request to the respondents and they were supposed to decide whether to grant or refuse the request within a reasonable time but within twenty-one (21) days after receiving the request. The fact that the respondents failed to reply within the stipulated period influenced the court to hold that it would be against the letter and spirit of the Constitution if it were to decide that the petitioners failed to exhaust the statutory dispute resolution mechanism prior to filing the current petition.

The court stated that entrenchment of the right to access information as a constitutional principle, expands rather than limits the scope of the right. Therefore, to discharge its burden under section 6 of the Access to Information Act, the State must provide

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[81] Para 100 of the SC Judgment.
[82] Constitutional Petition E032 of 2019 [2022] KEHC 368 (KLR).

evidence that the record in question falls within the description of the statutory exemption it seeks to claim.

On the third issue, (a) whether Article 227 of the Constitution was applicable; and (b) whether procurement of the SGR complied with Article 227 of the Constitution as read together with the provisions of the PPDA, 2005, the SC made a finding that Article 227 was applicable regardless of when the procurement of SGR was initiated and the project implemented.[83] Disagreeing with the Court of Appeal, the SC further made a finding that the procurement of the SGR project met the requirements of Article 227 of the Constitution as read with the provisions of the PPDA, 2005.[84]

5 Conclusion and reform recommendations

5.1 SGR decision brought clarity on bilaterally financed projects procurements approach and process governance

In light of the divided jurisprudence on bilaterally and multilaterally financed procurements, the SC decision in the SGR case has set the hitherto sought yet elusive precedent, and offered much-needed guidance in this type of procurement. One such point of clarity is that the financing agreement must *not necessarily* precede the project implementation or commercial contract. Although the case was decided under the PPADA, 2005, it effectively breathed life into and gave a full interpretation of the exceptions of bilaterally and multilaterally financed procurements from the application of the PPADA, 2015, as provided for under sections 4(2)(f) and 6 of the PPADA, 2015, read with Articles 2(5) and (6) of the Constitution of Kenya. The court held that where the procurement and contractual agreements are executed between entities who are both state corporations, as was the case with KRC and CRBC, in furtherance of Government – to - Government undertakings consummated in the form of a bilateral or multilateral agreement for and on behalf of those two governments, it squarely brings the arrangement within the realm of a Government – to - Government transaction that is not subject to the provisions of the PPADA, 2015. [85]

[83] Para 121 of the SC Judgment.
[84] Para 140 of the SC Judgment.
[85] Paras 127-138 of the SC Judgment.

In essence, the SC decision aligned itself to the views of the General Counsel of the World Bank, Aron Broches,[86] on the sanctity of treaty-based procurements and the non-applicability of municipal laws in the said contracts. The decision further followed and validated the dominant view and jurisprudence in the *KEMSA*[87] and *Kenya Power* cases.[88] The Supreme Court decision is a welcome departure from that of the *GDC*[89] and *Coast Water Services Board*[90]*cases* which *restrictively* and *unrealistically* interpreted sections 4 and 6 of the PPADA, 2015.

5.2 Importance of constitutional petitions as a public procurement governance enhancement and accountability tool.

Constitutional petitions in regard to public procurement remain a very critical and important tool in upholding and enforcing constitutional values and principles of governance and addressing public procurement infractions. This is especially so in challenging procurement methods, raising constitutional interpretation issues, or when dealing with contracts already executed but with questions arising on their legality. They even remain important when it comes to procurements undertaken under bilateral or multilateral arrangements as envisaged under sections 4 and 6 of the PPADA, 2015, where the Public Procurement Administrative Review Board (PPARB) may not have jurisdiction to determine, and even if the PPARB had, public interest litigants may stand to be locked out for lack of necessary *locus standi*, among others.[91]

Despite the SC's unfortunate sentiments on public interest litigation, the SGR case also brought to the fore the important role of constitutional petitions as a governance tool in checking public procurement processes and provide stakeholders the opportunity to voice their concerns regarding government projects. This is to ensure that the government is held accountable for its actions and that public interest is taken into account in accordance with the Constitution and relevant statutory laws.

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[86] Broches 1959.
[87] Civil Appeal (Mombasa) No. 65 of 2016.
[88] High Court (Nairobi) Judicial Review Application No. 181 of 2018.
[89] High Court (Nairobi) Miscellaneous Civil Applications No. 71 of 2017.
[90] High Court (Nairobi) Miscellaneous Civil Application No. 116 of 2016.
[91] See the limitations and conditions for access to the PPARB as provided under, among others, Sections 167(1), (2) & (4), 169(1) and 170 of the PPADA, 2015.

That said, constitutional petitions remain fraught with a real danger of abuse especially when used for the realisation of ulterior and oblique motives in lieu of genuine public interests. As such, constitutional petitions – especially in public procurement matters – should only be admitted when they genuinely seek constitutional interpretation as opposed to litigating what has already been litigated or ought to have been litigated through review before the PPARB, judicial review before the High Court or an appeal before the Court of Appeal or Supreme Court in appropriate cases where judicial deference should be applied as a bar against abuse of the court process.[92]

5.3 Is it time to legislate on timelines for filing and determination of constitutional petitions bearing on public procurement?

Unlike disputes resolution mechanisms as provided under Sections 167, 170, 171, 173, 175(1), (3) and (5) and 175(4) and (5) of the PPADA, 2015, constitutional petitions are generally not time-bound in terms of filing and determination. They, therefore, if entertained without priority, stand to compromise and undermine timely and efficient determination of procurement disputes and unfortunately erode the objectives and values of faster and expeditious filing and processing of procurement disputes as guaranteed under Article 159(2) (b) of the Constitution.[93]

With the SGR constitutional petition being decided way after the signing of the procurement contracts and delivery of the SGR project, this case no doubt demonstrates the need for having in place a provision in law and possibly the Constitution calling for time-bound filing and determination of constitutional petitions or any other avenue for relief as provided for under Section 174 of the PPADA, 2015, regarding public procurement matters[94], otherwise

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[92] For further insights on the importance, requisite check and balances in respect of public interest litigation see para 98 of the SC judgment, which in essence adopted the Indian Supreme Court statement in *Ashok Kumar Pandey v State of West Bengal* (2004) 3 SCC 349. In brief it stated that public interest litigation has now come to occupy an important field in the administration of law and should not be ''publicity interested litigation'' or ''private interest litigation'' or ''politics interest litigation'' or the latest trend ''paise income litigation''. If not properly regulated this form of litigation can be abused and can be used as a tool for vengeance

[93] This article provides that in exercising judicial authority, the courts and tribunals shall be guided by, among others, the principle that justice shall not be delayed.

[94] This section provides that the request for a review is in addition to any other legal remedy a person may have.

late filing and determination of constitutional petitions may result in academic and pyrrhic outcomes and also delayed delivery of strategic government projects.

5.4 Conflict of interest and lack of competition question

The SGR case unfortunately fell short of clarifying the need for avoiding a conflict of interest in public procurement, bilateral or otherwise. Indeed, most development banks, just like the Kenyan public procurement and related laws, require that firms or individuals involved in procurement should not have a conflict of interest.[95] This may be explained by the provisions of section 87 of the repealed PPDA, 2005, and now retained in similar wording as section 130 of the PPADA, 2015, which provides that a person who enters into a contract resulting from procurement through a request for proposals shall not enter into any other subsequent contract for the procurement of goods, services or works related to that original contract. Having CRBC undertake the feasibility study – notwithstanding that it did so at its own cost – and at the same time doubling up as the implementer of the resultant contract for the SGR project unfortunately created an incentive for a possible conflict of interest and for undue competition. This was to the chagrin of other possible bidders and inimically to well-established principles, practice and law on conflict of interest, competition and arguably value for money.

5.5 Addressing the public policy issues on the fate of illegally procured contracts

The Supreme Court's finding that, contrary to the Court of Appeal's decision, the SGR procurement was legal, gave a literal and, in my view, a correct and *practical* interpretation to sections 4 and 6 of the PPADA, 2015, while in effect giving essence to and upholding the provisions of Articles 2(5) and (6) of the Constitution. In so finding, the Supreme Court helped to address the difficult and

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[95] For example, clauses 3.14-3.18 of the World Bank Procurement Regulations for Investment Project Financing Borrowers, 4th ed, November 2020, make provision against conflict of interest and unfair competitive advantage. Similar provisions are found in the Guide to Procurement for Projects financed by EIB (2024), Clauses 1.2 (Eligibility of contractors and suppliers), 1.5 (Conflict of Interest), and 3.2 (Eligibility of providers of works, goods and services). Section 130 of the PPADA, 2015, places a restriction on entering into related contracts by providing that a person who enters into a contract resulting from procurement by a request for proposals shall not enter into any other subsequent contract for the procurement of goods, services or works related to that original contract.

troubling question from an economic and international relations perspective of what would have become of the already executed loan agreements and implemented commercial contracts between the Republic of Kenya and the Exim Bank of China, the KRC and the EPC contractors respectively. In essence, the court ensured that it did not reach a conclusion that will expose Kenya to breach of its international obligations and possibly stranded assets.

The absurdity however is that the Supreme Court, despite appreciating[96] that procurement – bilateral or otherwise – must still conform to the provisions of Article 227 even when done pursuant to the obligations of a treaty or agreement or any other procedure, reached a totally different conclusion by making a finding that the procurement was constitutional and failed to address the issue of lack of competition and transparency in the procurement of the SGR Project. This is especially so when the procurement directed at the EPC contract was implemented by the same entity which undertook the feasibility study and without any empirical evidence that no other entity, Chinese or otherwise, was capable and eligible to deliver the SGR project. At the very least, restricted tendering to Chinese firms should have been adopted. This has been the case before in respect of the tender for the Kenya Rural Telecommunication Development Phase II 2007 and 2011/2012 concession loan for supply, installation, testing and commissioning of the national surveillance communication, command and control system in the National Police.

The Supreme Court's view, which I respectfully disagree with, that because the government was involved through Government – to - Government procurement, transparent, competitive and cost-effective procurement as contemplated under Article 227(1) of the Constitution is not a must.[97] As a justification, the Supreme Court stated that this is not the first time that the government of Kenya has intervened and undertaken direct Government – to - Government procurement. In 2013, with an impeding general election, and due to constitutional timelines, Independent Electoral and Boundaries Commission (IEBC) was embroiled in legal battles over the procurement of voting materials.[98]

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[96] See para 135 of the SC judgment.
[97] See para 135 of the SC judgment.
[98] For a detailed reading on the Government–to-Government procurement of the voting materials in Kenya in 2013, see Onyango 2018.

The Supreme Court's adoption of the word "state organ" as defined under Article 260 of the Constitution did not further but rather render the hallowed constitutional and public procurement principles merely homiletic and hortatory. The interpretation did not promote the rule of law, the development of the law and good governance.[99] It is my contention that under the principle of effectiveness, Articles 227(1) and 260 of the Constitution (defining "state organ") should be construed to yield a proper – if not the maximum – degree of effectiveness. If anything, there should be a higher calling on the government, in comparison with other public entities, to uphold these principles.

5.6 Call for further reforms

The 2010 Constitution demands mandatory compliance with the values and principles set out therein.[100] The courts, however, have been equivocal leaving the law in a state of flux on the application of constitutional values and principles to procurements characterised by foreign financing or urgency. Dr Thiankolu Muthomi offers three possible explanations to this state of affairs: Firstly, strict enforcement of constitutional values and principles, especially those relating to transparency and competitive bidding, might be impracticable in such contexts. For example, foreign donors often insist that contracts for projects they finance must be awarded to specified contractors or contractors from specified countries. This offends the constitutional principle of competitive procurement. Secondly, the reluctance of the courts to strictly enforce constitutional values and principles in these contexts might reflect Kenya's apparently entrenched culture of impunity and reluctance to strictly enforce the regulatory framework for public procurement. Lastly, the reluctance may be evidence of practical difficulties that may arise from poor or ill-thought-out constitutional design, especially regarding public procurements characterised by foreign financing and urgency.[101]

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[99] See Arts 10, 35, 201, 227, 232 and 259(1) & (3) of the Constitution.
[100] The Constitution of Kenya, Arts 3 and 10 (1).
[101] For a detailed analysis on the application of constitutional principles to bilaterally and multilaterally financed procurements and direct procurements and implementation challenges, see Muthomi 2020, citing various cases in Kenya. See, also Breyer 2024, trying to cement his belief in former Chief Justice John Marshall's philosophy that the Constitution must be a workable set of principles to be interpreted by subsequent generations.

The current state of law on Government – to - Government procurement in Kenya and elsewhere in the world is in flux by virtue of being largely unregulated and therefore attracts, and will continue to attract, a lot of controversy. This has often led to unjustified direct procurement of goods and services without regulation or proper oversight, which raises issues related to their transparency, accountability, competitiveness and cost - effectiveness which are key requirements of a public procurement system as envisaged under Article 227(1) of the Constitution of Kenya.

The linkage between development and public procurement seems to have come of age in recent years.[102] There are some important opportunities emerging internationally that may strengthen the link between development and procurement in Africa and create further opportunities for procurement law reform in this respect. A case in point is the adoption of the Sustainable Development Goals by the United Nations as part of its 2030 *Agenda for Sustainable Development*. The explicit recognition of the potential role of public procurement within this agenda offers an opportunity for African states to strengthen their approach to procurement with an overt development agenda.[103] The emergence of growing international acceptance of an overt developmental agenda in public procurement is also evident in the 2011 revised UNCITRAL Model Law on Public Procurement.[104] As argued by Joshua Schwartz. "a system of government procurement law … should be regarded in perpetuity as a work in progress, rather than a finished product".[105] It is perhaps the right time that Kenya introduce clear robust provisions in law, and possibly a specific law, to clarify and offer the much needed policy direction and guidance on the modalities of undertaking Government – to - Government procurement and to rationalise the interests of the borrowers with those of the financiers in such funded projects.[106] There are already positive signs in the coming into effect of the Public Procurement and Asset Disposal

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[102] For an in-depth understanding of public procurement law and how it significantly bears on development, see Quinot 2018:15-30.
[103] Quinot & Williams-Elegbe 2018:4.
[104] It explicitly recognises the potential incorporation of "socio-economic policies" in a state's public procurement regime. It is important to note that the Model Law requires the use of such socio-economic policies in public procurement to be authorised in law.
[105] Schwartz 2002:115.
[106] Such a precedent has been set with the enactment of the Public Private Partnerships Act, No. 14 of 2021 (Kenya).

Regulations, 2020. Regulation 5(2), for instance now provides that all bilateral and multilateral agreements of which their implementation is through procurement, partly or in whole, shall involve procurement professionals from the respective procuring entity at the initial stages of project preparation and negotiations to ensure that the public procurement and asset disposal interests of Kenya are considered.

In the meantime, and as a general rule, Government – to - Government procurement ought to be used sparingly, with clear justifications, value for money propositions, with utmost fidelity to the constitutional and public procurement principles. This is especially so if it is to achieve the much needed and sought public legitimacy and good will.

Moreover, lack of or low transparency leads to distrust and miscommunication and devalues the anticipation of China being "a better partner" to developing countries than the West.[107] It would thus be in China's interest to radically upgrade its development financing transparency.[108]

In the words of Patrick Rothfuss,[109]: -

> ''it's the questions we can't answer that teach us the most. They teach us how to think. If you give a man an [all] answer[s], all he gains is a little fact. But give him a question and he'll look for his own answers.''

Whereas there is no silver bullet to issues of bilaterally and multilaterally financed procurements, it is my hope that this article will serve as an incentive for others to seek to address any questions I may have not addressed or satisfactorily answered on the Kenya SGR procurement and bilaterally financed procurements, a subject quite wide and complex in Kenya as well as worldwide.

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[107] Li 2020.
[108] Larsen, Voituriez & Nedopil 2023:28.
[109] In his poem, *The Wise man's fear*.

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