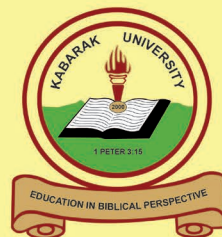


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The Role of Administrative Law and Economics in Tempering Discretion and Balancing Conflicting Objectives in Public Procurement Decision Making

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Abstract

The mandate of government is characterised by significant interdependence, complementarity and overlap between economic and social policy objectives. The pursuit of both economic and social objectives, therefore, is often necessary and inevitable in any system of public procurement regulation. The coexistence of economic and social objectives in a system of public procurement regulation, however, often results in conflicts and dilemmas. The conflicts and dilemmas occur when government bureaucrats make economically efficient but socially undesirable decisions or socially desirable but economically inefficient decisions. Moreover, public procurement laws often give government bureaucrats discretion to decide whether, the extent and the ends for which they can use procurement as a tool of economic or social policy. Although discretion is inevitable in any system of public procurement regulation, and public administration in general, it is also highly amenable to abuse. The disciplines of administrative law and economics offer useful conceptual tools that could be used to achieve an optimal balance or resolve conflicts between economic and social objectives in public procurement decision making. The disciplines of administrative law and economics offer useful conceptual tools for resolving the problem of discretion and its correlation with the incidence of corruption, favourit-

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ism and other forms of malfeasance in public procurement decision making. The two disciplines espouse a rule-based approach to public procurement regulation and decision making, characterised by circumscribed discretion and commitment to the values of competition, transparency and accountability.

Key Words: Public Procurement; Economic Objectives; Social Objectives; Discretion; Corruption, Favouritism, Malfeasance, Administrative Law; Law and Economics.

1. Introduction

This paper examines the interplay of economic and social objectives of public procurement, the conceptual foundations of those objectives and the resolution of the conflicts and dilemmas that often arise from the coexistence of the two species of objectives in a system of public procurement regulation. The paper also examines the problem of discretion and its correlation to the incidence of corruption, favoritism and other forms of malfeasance in public procurement decision making. It argues that administrative law and economics offer useful tools that could be used to achieve an optimal balance between the two species of objectives whenever they conflict. The paper proposes a rule-based approach (as opposed to a guideline or merely directory approach) to public procurement regulation. Specifically, this paper proposes an approach to public procurement that is characterised by circumscribed discretion (as opposed to broad discretion) and commitment to the values of competition, transparency and accountability. Such a system, the paper argues, would mitigate the agency and public choice problems that are naturally inherent in public procurement decisions, correct market and institutional failures and provide a means for the optimal pursuit of both economic and social objectives.

The paper is organised as follows. Part 1 sets out the introduction. Part 2 examines the core tenets of administrative law and economic analysis of law. Part 3 examines the nature of public procurement, the factors that make it a subject of regulatory and academic interest and why it differs from other forms of regulation. Part 4 examines the problem of discretion and its implications for public procurement regulation. Part 5 examines the economic and social objectives of public procurement regulation and the challenges that often arise from the concurrent pursuit of both sets of objectives. Part 6 makes a case for the use of administrative law and economics to resolve the problems relating to conflictual coexistence of economic and social objectives and discretion in public procurement decision making. Part 7 is the conclusion.

2. Core Tenets of Administrative Law and Economics

Scholars have not devoted much effort to examining the theoretical foundations of public procurement regulation. According to a recent audit, only 29% of articles published in the Journal of Public Procurement between 2001

and 2013 had a discernible theoretical grounding.¹ The audit revealed multiple theoretical and disciplinary influences among the authors, broadly categorised as economic, sociological, psychological and managerial.

The dearth of theoretical analysis and rigour in public procurement research is attributable to many factors. First among them is the recent entry of public procurement into academic ranks.² Secondly, most writers tend to focus on practitioner concerns.³ The dearth of theoretical analysis and rigour in public procurement research is also attributable to definitional ambiguity of the subject⁴ and its porous disciplinary boundaries.⁵ As Basheka observes:

Public procurement is now a subject claimed by many disciplines...In public procurement, political scientists will be interested in the internal and external political forces that may influence a procurement decision to award a contract to a particular bidder...Economists are generally concerned with production, consumption and distribution of wealth...Their concern will be on the costs and benefits of a particular procurement decision and their pre-occupation is not the process...Lawyers will be concerned with the laws, rules and procedures for public procurement...public administration experts will most probably be concerned with how a procurement decision will be used to promote efficiency and effectiveness in the running of governmental activities. Sociologists need to concern themselves on the social forces that influence a procurement decision...⁶

The imprecise nature of social sciences, which often makes it difficult to meaningfully research or explain phenomena by reference to a single theory or concepts resident within a single theory or discipline,⁷ may also have contributed to the dearth of theoretical analysis and rigour in public procurement research and writing.

¹ Anthony Flynn and Paul Davis, 'Theory in Public Procurement Research' (2014) 14 (21) *Journal of Public Procurement* 139, 154.

² *Ibid*, 141.

³ *Ibid*.

⁴ *Ibid* 142.

⁵ *Ibid*.

⁶ Bennon C Basheka, 'The Science of Public Procurement Management and Administration,' in Albano G, Snider K and Thai K (Eds), *Charting a Course in Public Procurement Innovation and Knowledge Sharing* (PrAcademics Press 2013) 289, 318-319. See also Paul Schapper, Veiga Malta and Diane Gilbert, 'An Analytical Framework for the Management and Reform of Public Procurement' (2002) 6 (1) *Journal of Public Procurement* 1, 15.

⁷ See Sitwala Imenda, 'Is there a Conceptual Difference between Theoretical and Conceptual Frameworks?' (2014) 38 (2) *Journal of Social Science* 185, 189.

The most frequent and intractable challenges associated with public procurement usually revolve around corruption, favouritism, other forms of malfeasance and cost-effectiveness. These challenges naturally point to the disciplines of administrative law and law and economics as possible sources of conceptual tools for resolution of problems relating to conflictual co-existence of economic and social objectives and discretion in public procurement decision making.

2.1 *Administrative Law*

Administrative law is the branch of the law concerned with the control of the exercise of governmental power, including discretion, and the performance of public duties.⁸ Generally, administrative law seeks to prescribe behaviour within public entities, and to delineate relationships between those within an administration and those outside it⁹ (in our case, procurement officers on one hand and suppliers on the other). The primary function of administrative law is to promote the rule of law:¹⁰

The legitimating principles of any Western system of administrative law are found in the twin ideals of democracy and the rule of law...the rule of law is arguably the more significant of these two principles...while an administrative law system can—and may have to—function outside a system of democratic government, a system of democratic government that does not observe the rule of law is simply paradoxical.¹¹

Administrative law, therefore, keeps the powers of government within their legal bounds¹² and, accordingly, protects citizens from the abuse of those powers.¹³ Besides the control function, which most common law commentators tend to emphasise, administrative law also provides an effective framework for public administration,¹⁴ in terms of rules, practices and procedures.¹⁵

⁸ William Wade and Christopher Forsyth, *Administrative Law* (9th Edn, OUP 2004) 4.

⁹ Martin Shapiro, 'Administrative Law Unbounded' (2001) 8 (2) *Indiana Journal of Global Legal Studies* 369.

¹⁰ Carol Harlow, 'Global Administrative Law: The Quest for Principles and Values' (2006) 17 (1) *European Journal of International Law* 187, 190-191.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

There are two main theories of administrative law, namely the ‘red-light’ theory and the ‘green light’ theory.¹⁶ The *red light* theory of administrative law—which underlies most common law legal systems, including Kenya’s—seeks to curb abuse of power (and discretion), promote the rule of law and ensure that public officers and authorities are compelled to perform their duties (lawfully) if they make default.¹⁷ The *green light* theory of administrative law seeks to ensure a realist and functionalist jurisprudence designed to make administration easier and better.¹⁸

Administrative law extensively overlaps with constitutional law,¹⁹ making it difficult to draw sharp conceptual distinctions between the two subjects.²⁰ Both subjects share constitutionalism and the rule of law (read, control of governmental power) as their primary purposes.²¹ There is a subtle but important distinction, however, between the two subjects. Constitutional law is mainly concerned with establishing the institutions of the state and the structural apparatus of governance²² while administrative law provides the detailed rules for the actual control of the myriad micro-level day-to-day interactions between citizens and the state bureaucracy.²³

The rationale for approaching the two issues that form the focus of this paper from a predominantly administrative law perspective (as opposed to a constitutional law perspective) is two-fold. First, public procurement is an important aspect of public administration.²⁴ Secondly, and more importantly, the traditional administrative law concerns of transparency, integrity, rationality, effectiveness, fairness, participation and accountability²⁵—which go to the rule of law²⁶—have

¹⁶ Wade and Forsyth (n 8) 6.

¹⁷ Ibid, 5 and 20.

¹⁸ Ibid, 6.

¹⁹ Tom Ginsburg, ‘Written Constitutions and the Administrative State: on the Constitutional Character of Administrative Law’ (2010) University of Chicago Public Law and Legal Theory Working Paper No. 331, 123-126 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1697222> accessed on 23rd April 2015. See also Migai Akech, *Administrative Law* (Strathmore University Press 2016) 22-23.

²⁰ Ibid.

²¹ Ibid.

²² Ibid.

²³ Ibid. Ginsburg discusses other important differences between the two subjects (hierarchy, localism, endurance and symbolism) which are not relevant to this paper.

²⁴ Alexandru V Roman, ‘Public Procurement Specialists: They are Not Who We Thought They Were’ (2015) 15 (1) *Journal of Public Procurement* 38. For fuller insights on interlinks between public procurement and public administration, see Basheka (n 6). To the extent public procurement is an important aspect of public administration, it is subject to the constitutional requirement of fair administrative action. Article 47 of the Constitution of Kenya, 2010 states that ‘*every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair...*’

²⁵ Harlow (n 10) 193.

²⁶ Ibid.

significantly influenced the evolution of public procurement regulation at both domestic and international levels.²⁷ Indeed, these administrative law concerns are fundamental features of Kenya's public procurement law.²⁸ Kenyan courts have also recognised these administrative law concerns as the core objectives of public procurement regulation in the country.²⁹

The parts of this paper that deal with the problem of discretion and abuse of the use of procurement as a policy tool proceed from the *red-light* theory of administrative law. The rationale for this is that Kenya operates a decentralised procurement system in which procuring entities enjoy broad discretion to determine their own procurement needs and procedures within a highly permissive legal framework.³⁰ Moreover, the Kenyan procurement system is highly susceptible to abuse, patronage, conflicts of interest, corruption and other forms of malfeasance, which form the main concerns of administrative law.³¹ To address these issues, article 227 (1) of the Constitution requires public agencies to procure goods and services 'in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.'³² Put differently, the Constitution requires State organs and public entities to have a sound system of administrative law (in terms of rules, procedures and principles) for the conduct of procurement.

²⁷ Christopher McCrudden and Stuart S Gross 'WTO Government Procurement Rules and the Local Dynamics of Procurement Policies: A Malaysian Case Study' (2006) 17 (1) *European Journal of International Law* 151, 161.

²⁸ Article 227 (1) of the Constitution of Kenya, 2010 and s 3 of the Public Procurement and Asset Disposal Act, 2015. Ironically, public procurement procedures in Kenya have often been associated with various forms of malfeasance, fundamentally at odds with these constitutional and administrative law requirements.

²⁹ *Republic v Public Procurement Administrative Review Board & Another ex parte Selex Sistemi Integrati* [2008] KLR 728. See also *Republic v Public Procurement Administrative Review Board & 3 Others ex-parte Olive Telecommunication PVT Ltd*, High Court (Nairobi Miscellaneous Civil Application No. 106 of 2014).

³⁰ Walter Odhiambo and Paul Kamau, 'Public Procurement: Lessons from Kenya, Tanzania and Uganda' (2003) OECD Working Paper No. 208, 10-11 available at <<http://www.oecd.org/countries/uganda/2503452.pdf>> accessed on 15th January 2015 10, 14 and 39. See also Victor Mosoti, 'The WTO Agreement on Government Procurement: A Necessary Evil in the Legal Strategy for Development in the Poor World?' (2004) 25 (2) *University of Pennsylvania Journal of International Economic Law* 593, 603.

³¹ NA Deb 5-6 July 2005 2114-2219 and Migai Akech, 'Development Partners and Governance of Public Procurement in Kenya: Enhancing Democracy in the Administration of Aid' (2005) 37 (4) *New York University Journal of International Law and Economics* 829, 847-853. Although Migai's focus is the 2001 regulations and the legal regime obtaining prior to those regulations, the issues discussed in the Article largely remain unaddressed. Indeed, five Kenyan Cabinet Secretaries were forced to leave office in 2015 because of allegations of corruption, most of which revolved around public procurement.

³² Again, Article 227 of the Constitution of Kenya, 2010 only confirms that the issues discussed by Migai Akech (n 31) largely remain unaddressed.

2.2 Law and Economics

Generally, the discipline of economics is concerned with the allocation of resources (which are inherently scarce and finite) to meet competing human needs and wants (which tend to be multiple and infinite).³³ The discipline of law and economics, also known as the economic analysis of law, uses the tools of microeconomic theory to analyse the efficiency and effectiveness of legal rules and institutions.³⁴ The economic analysis of law proceeds on the assumption that decision-makers are rational, act in self-interest and interpersonal utility comparisons and tastes are irrelevant when individuals interact with economic forces.³⁵ The mainstream model of the subject centres on wealth maximisation and the promotion of economic efficiency.³⁶ There are two main propositions under this model. The first is that legal rules are efficient or, alternatively, ought to promote economic efficiency.³⁷ The second is that because of humanity's rational character, individuals tend to respond to legal rules economically.³⁸

The logical consequence under the above assumptions is that individual choices largely reflect a rational assessment—in economic terms—of the costs, benefits, incentives and risks involved in the choice. The typical exponent of law and economics, therefore, would see the main objective of a legal system, in our case, the law on public procurement regulation, as the promotion of the efficient allocation of resources and the avoidance of wastage.³⁹ Critics, however, have questioned the philosophical and ideological underpinnings of the discipline of law and economics.⁴⁰ The main shortcoming of the discipline, critics argue, is its

³³ Azuike Ikena, 'Economic Analysis of Law-A Feminist Critique' (2001) 8 UCL Jurisprudence Review 139. See also Ali Moazed, 'Posner in Pursuit of Wealth: Taking Rights Seriously' (1997) 4 UCL Jurisprudence Review 1.

³⁴ *Ibid.*

³⁵ Azuike (n 33) 145.

³⁶ *Ibid.* This model is commonly known as the "neo-classical" model. Neo-classical economics is generally regarded as the mainstream or orthodox economics.

³⁷ There are two main approaches to the assessment of the economic efficiency of a legal rule or transaction, i.e. pareto superiority and pareto optimality. Pareto superiority refers to situations where both parties to a transaction are made better off and no third party is injured (i.e. made worse off, in economic terms). Pareto optimality, on the other hand, refers to situations where no further transactions or exchanges can be made without injuring others or making them worse off than before. See Azuike (n 33) 148.

³⁸ Kornhauser Lewis, 'The Economic Analysis of Law' (Stanford Encyclopaedia of Philosophy, 26 November 2001) <<http://plato.stanford.edu/entries/legal-econanalysis/>>accessed 11th January 2016.

³⁹ Ironically, this is somewhat irreconcilable with the underlying assumptions in law and economics that individuals act in self-interest and that laws tend to promote economic efficiency. In the real world, selfish individual pursuits often lead to inefficiency, impelling governments to respond by way of regulation (including public procurement regulation).

⁴⁰ See Azuike (n 33) 139.

over-emphasis of economic analysis and disregard for important non-economic considerations and values that often influence human behaviour:

The notion of economic efficiency has been elevated to an unprecedented status in our times. It has become a dogma of modern society, often eclipsing pre-existing fundamental values and even overriding the moral conscience of mankind. In this era of economics, theorists have extended the scope of economic analysis beyond the traditional realm of market transactions between individuals and organisations and contend that the governing conceptual apparatus and principles of economics are general in nature and are capable of governing all aspects of human behaviour.⁴¹

Critics further argue that the discipline of law and economics, especially the model propounded by Posner and the Chicago School,⁴² is too brutish to the extent that its focus on efficiency and wealth maximisation tends to blind any concern for inherent human rights and values.⁴³ In particular, critics argue that by accepting rights only to the extent that they promote economic efficiency, the exponents of law and economics fail to recognise the notion of inherent human value, which comes prior to the market:⁴⁴

To many, economics and the economic analysis of law are just the mechanics of a utilitarian state, concerned with maximising wealth whilst disregarding such moral issues as distributive justice and moral entitlements to property. Posner himself, perhaps the most prominent legal economist, concedes that 'there is more to justice than economics' but provides no clues as to what more there may be.⁴⁵

Article 227 of the Constitution envisions a procurement system that is competitive and cost-effective. These requirements (of competition and cost-effectiveness) extol economic considerations in the award of public procurement contracts. Article 227 of the Constitution, however, also espouses non-economic considerations in the award of public procurement contracts, including fairness,

⁴¹ Moazed (n 33) 1 and Azuike (n 33) 145. See also Dani Rodrick, *Economics Rules: Why Economics Works, when it fails, and How to Tell the Difference* (OUP 2015) 17.

⁴² Richard Posner, *The Economics of Justice* (Harvard University Press 1981), *Economic Analysis of Law* (6th Edn, Aspen 2003).

⁴³ Moazed (n 33) 8-9.

⁴⁴ *Ibid.* See also Alfred C Aman Jr, 'An Administrative Law Perspective on Government Social Service Contracts: Outsourcing Prison Health Care in New York City (2007) 14 (2) *Indiana Journal of Global Legal Studies* 301, 305.

⁴⁵ Adam Ohringer, 'Freeing Posner from His Capitalist Chains' (1999) 6 *UCL Jurisprudence Review* 241. The crux of the Article, though, is that economic analysis has a moral content that is acceptable to the secular reader irrespective of political belief. For similar and other criticisms of the economic analysis of law, see Michael Freeman, *Lloyd's Introduction to Jurisprudence* (8th Edn, Sweet & Maxwell 2008) 625-627.

equity and the use of public procurement as a policy tool, the protection and advancement of persons or groups previously disadvantaged by unfair competition or discrimination and the suppression of unfair employment practices.

The parts of this paper that deal with the issue of conflict between the economic and social objectives underlying Kenya's public procurement laws proceed from a law and economics perspective. The rationale for this lies in the intractable issue of the tension that often arises between economic and non-economic objectives in public procurement decision making, which pervades the existing academic literature. The other rationale for examining the two issues that form the focus of the paper from a law and economics perspective is that most legal scholars agree that public procurement is an important economic activity (especially because public procurement constitutes a significant portion of the Gross Domestic Product of many countries).⁴⁶ Many scholars, especially those of a law and economics bend, espouse the view that public agencies, just like the typical private purchaser, should only consider economic considerations when making purchases from the market.⁴⁷ Government choices, however, often turn on both economic and social considerations.⁴⁸ In any one given context, for instance, the social (or even political) exigencies of the day may impel governments to procure goods or services in a particular manner or from a particular source irrespective of the economic logic of the transaction in question.⁴⁹

3. Nature of Public Procurement and the Rationale for Regulation

Public procurement generally refers to the process through which public bodies purchase, usually, through competitive bidding, the goods and services that they need to carry out their functions and responsibilities.⁵⁰ Academic literature

⁴⁶ Peter Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* (OUP 2004) 11.

⁴⁷ Ibid, viii, 5 and 28. See also Arrowsmith S, Linarelli J and Wallace D, *Regulating Public Procurement: National and International Perspectives* (Kluwer Law International 2000) 12.

⁴⁸ Trepte (n 46) 69.

⁴⁹ Ibid.

⁵⁰ Simon Lester and Bryan Mercurio, *World Trade Law, Text, Materials and Commentary* (Hart Publishing 2008) 665. See also Arrowsmith, Linarelli J and Wallace (n 47) 1. For technical or legal definitions, see *inter alia* Article 2 of the UNCITRAL Model Law on Public Procurement and section 2 of Kenya's Public Procurement and Asset Disposal Act.

variously refers to this process as government procurement,⁵¹ government contracting,⁵² public contracting⁵³ and public purchasing.⁵⁴

There are many significant differences between public and private procurement,⁵⁵ usually revolving around the risk of malfeasance and objectives,⁵⁶ which account for the greater scholarly and regulatory interest in the former.⁵⁷ The driving concern of private sector procurement, for instance, is to obtain the relevant goods or services on the best possible economic terms, based mainly on rational cost-benefit analysis. Public procurement, on the other hand, is often driven by broader considerations that go beyond merely obtaining the relevant goods or services on the best possible economic terms.⁵⁸ These broader objectives may include, *inter alia*, the effect of the transaction on the economy or selected demographic groups.⁵⁹ These broader objectives also often conflict, leading to significant challenges and dilemmas for governments, procurement officers, regulators and other stakeholders.⁶⁰

The multiple policy objectives to which public procurement commends itself, the consequent risk of malfeasance and the frequent absence of an incentive to obtain the relevant goods or services on the best possible economic terms often give rise to problems which cannot be resolved without recourse to regulation.⁶¹ Generally, these problems usually revolve around: conflict between the selfish private interests of individual procurement officers and the collective interest of a dispersed citizenry; and various forms of market and institutional failures.⁶² These problems—which often take the form of corruption, favouritism and other forms

⁵¹ Trepte (n 46) 27.

⁵² Arthur S Miller, 'Government Contracts and Social Control: A Preliminary Inquiry' (1955) 41 (1) *Virginia Law Review* 27, 33.

⁵³ Frank Anechiarico and James Jacobs, 'Purging Corruption from Public Contracting' (1995) 40 *New York Law School Law Review* 143.

⁵⁴ Jan Stentoft Arlbjörn, 'Public Procurement vs Private Purchasing' (2012) 25 (3) *International Journal of Public Sector Management* 203, 208.

⁵⁵ Clifford McCue, Eric Pier and David Swanson, 'Five Dilemmas in Public Procurement' (2015) 15 (2) *Journal of Public Procurement* 177, 182 and Pablo T. Spiller, 'An Institutional Theory of Public Contracts: Regulatory Implications' (2008) National Bureau of Economic Research Working Paper No. 14152 available at <<https://www.webssa.net/files/ssrn-id1231682.pdf>> accessed on 3rd June 2017.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ William J. Baumol, 'Notes on the Theory of Government Procurement' (1947) 14 (53) *Economica* 1.

⁵⁹ *Ibid.* See also Stentoft (n 54) 208.

⁶⁰ McCue, Pier and Swanson (n 55) 178-179.

⁶¹ Trepte (n 46) 135-140.

⁶² *Ibid.*

of malfeasance—are exacerbated by the inevitability of delegated discretionary powers in any system of public administration, and the typical public procurement officer’s temptation to abuse discretion.

There are many conceptual approaches to the regulatory challenges that arise from the nature of public procurement,⁶³ and public administration in general. The most frequent approaches, based on current public procurement scholarship, have their foundations in the principal-agent theory, the public choice theory and the new public management.⁶⁴ The principal-agent theory holds that the relationship between citizens (or their democratically elected representatives) and government bureaucrats is analogous to that of principal and agent.⁶⁵ This relationship, the theory further holds, is characterised by informational asymmetry, the inevitable exercise of delegated power and discretion and a natural conflict between the interests of the principal and those of the agent.⁶⁶ Accordingly, a principal-agent approach to public procurement espouses a regulatory framework that controls discretion and aligns the private selfish interests of individual procurement officers to the collective interests of a dispersed citizenry,⁶⁷ through an appropriate and effective scheme of incentives and sanctions.⁶⁸

The public choice theory, on the other hand, holds that government bureaucrats tend to (ab)use public office to increase their individual private welfare to the detriment of the public in the absence of effective regulatory constraints.⁶⁹ New public management, which seeks to combine the conceptual tools of the principal-agent and public choice theories,⁷⁰ espouses the centrality of citizens in public decision making and accountability of public officers for their public decisions.⁷¹

⁶³ Flynn and Davis (n 1) 139. See also Basheka (n 6) 290, Keith F Snider and Rene G Rendon, ‘Public Procurement Policy: Implications for Theory and Practice’ (2008) 8 (3) *Journal of Public Procurement* 310.

⁶⁴ Migai (n 19) 89-92. See also Jo Barraket, Robyn Keast and Craig Furneaux, *Social Procurement and New Public Governance* (Routledge 2016).

⁶⁵ Trepte (n 46) 70-85.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*;

⁶⁹ Migai (n 19) 89-92.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

4. Problem of Discretion and its Implications for Public Procurement

Generally, the term 'discretion' connotes wise conduct and management, cautious discernment, prudence, individual judgment and the power of free decision making.⁷² In legal parlance, discretion refers to the idea of trusting and giving public officers the autonomy, freedom or power to decide what should be done in a particular situation.⁷³ In the particular context of public procurement regulation, discretion connotes the idea of trusting and giving procurement officers the freedom or power to decide what should be done in various contexts without being unduly fettered by the constraints of laws and regulations.

Discretion, or more particularly the risk of its abuse is a major problem not only in public procurement but also in public administration in general.⁷⁴ Generally, discretion tends to increase transaction costs⁷⁵ and create incentives for corruption and other unethical conduct.⁷⁶ Some studies, however, have made compelling arguments in favour of enhanced discretion in public procurement regulation, on the assumption that the flexibility of bargaining associated with broad discretion leads to more optimal economic outcomes.⁷⁷ In particular, these studies argue that enhanced discretion on the part of public procurement officers reduces bureaucratic red tape and increases economic and administrative efficiency. These studies, however, tend to suppress the reality of the agency and public choice problems inherent in public procurement and various forms of market and institutional failures that justify the regulation of public procurement in the first place.

⁷² Bryan A Garner (Ed), *Black's Law Dictionary* (9th Edn, West Publishing 2009) 534.

⁷³ Albert S Hornby (Ed), *Oxford Advanced Learner's Dictionary: International Student's Edition* (8th Edn, OUP 2010) 416.

⁷⁴ McCue, Pier and Swanson (n 55) 187.

⁷⁵ Arrowsmith, Linarelli & Wallace (n 47) 36, 74-77, Sue Arrowsmith, 'Horizontal Policies in Public Procurement: A Taxonomy' (2010) 10 (2) *Journal of Public Procurement* 149, 167-168.

⁷⁶ Susan Rose-Ackerman, 'The Political Economy of Corruption—Causes and Consequences' (1996) World Bank Note 74 available at <<http://siteresources.worldbank.org/EXTFINANCIALSEC-TOR/Resources/282884-1303327122200/074ackerm.pdf>> accessed on 6th June 2017.

⁷⁷ See e.g. Steven Kelman, *Procurement and Public Management: The Fear of Discretion and the Quality of Government Performance* (American Enterprise Institute Studies 1990). See also Isaac Simiyu Kuloba 'Regulation of Discretion in Public Procurement in Kenya' (LLM Dissertation, University of Nairobi 2011) 8 and See also Steven Kelman, 'Remaking Federal Procurement' (2001) John F. Kennedy School of Government Working Paper No. 3 available at <<http://www.innovations.harvard.edu/sites/default/files/7131.pdf>> accessed on 24th September 2018.

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

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

Most public procurement laws, therefore, tend to circumscribe the discretion exercised by procurement officers.⁷⁸ The rationale for this lies in the underlying economic and administrative law theories, and in particular the general tendency of public officers to abuse discretion by pursuing their own private selfish interests at the expense of the public interest.⁷⁹ Abuse of discretion aggravates the agency and public choice problems inherent in public procurement and various forms of market and institutional failures,⁸⁰ which in turn undermines the achievement of both economic and social objectives of public procurement regulation.

Although discretion is amenable to abuse, the incidence of discretion is an inevitable and unavoidable aspect of public administration.⁸¹ A completely prescriptive regulatory approach, in which every minutiae aspect of public decision making is expressly controlled by statute or subsidiary legislation, does not exist and would not work in the real world:

It used to be thought to be classical constitutional doctrine that wide discretionary power was incompatible with the rule of law. But this dogma cannot be taken seriously today, and indeed it never contained much truth. What the rule

⁷⁸ Trepte (n 46) 71, 102, Arrowsmith, Linarelli & Wallace (n 47) 36, 74-77.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Wade and Forsyth (n 8) 286. See also Migai (n 19) 15.

of law demands is not that wide discretionary power should be eliminated, but that the law should control its exercise.⁸²

The inevitability of discretionary powers in every system of public administration, therefore, means the regulatory solution does not lie in eliminating discretion. Instead, the solution lies in designing and implementing a regulatory framework that effectively pre-empts the problems associated with abuse of discretion—especially corruption, favouritism and other forms of malfeasance or maladministration. The design of such a framework should adopt a contextual rather than an abstract or ‘one-size-fits-all’ approach, based on the level of pervasiveness or entrenchment of corruption, favouritism and other forms of malfeasance.⁸³ In other words, the uncritical ‘copying and pasting’ of model laws, or laws of other countries, is unlikely to yield a regulatory framework that appropriately responds to the unique challenges of any one country’s public procurement system.⁸⁴

5. Nature and Objectives of Public Procurement Regulation

Regulation refers to measures or instruments employed by the state to promote its economic and social policies.⁸⁵ A commonly used definition of the term is ‘sustained and focused control exercised by a public agency, on the basis of a legislative mandate, over activities that are socially valued.’⁸⁶ All regulation—including public procurement regulation—therefore, is a means of social control, entailing mechanisms by which individuals are persuaded or compelled to conform to prescribed standards or values.⁸⁷

Public procurement regulation differs from other types of regulation in a fundamental way. Although regulation generally entails governmental control of the activities of private actors, public procurement regulation mainly focuses on

⁸² Ibid.

⁸³ Trepte (n 46) 48.

⁸⁴ Muthomi Thiankolu, ‘Reconciling Incongruous Policy Objectives and Benchmarking Kenya’s Public Procurement Law: A Review of the Selex Case’ (2011) 11 (4) *Journal of Public Procurement* 451, 472.

⁸⁵ Trepte (n 46) 45.

⁸⁶ Ibid, quoting from Selznick ‘Focusing Organisational Research on Regulation’ in Noll (Ed), *Regulatory Policy and the Social Sciences* (University of California Press 1985) 363. See also Eric Windholz and Graeme Hodge, ‘Conceptualising Social and Economic Regulation: Implications for Modern Regulators and Regulatory Activity’ (2012) 38 (2) *Monash University Law Review* 212, 217.

⁸⁷ Miller (n 52) 27. On the use of law as a tool of social control, see Roscoe Pound, ‘The End or Purpose of Law’ in Michael Freeman, *Lloyd’s Introduction to Jurisprudence* (9th Edn, Sweet & Maxwell 2014) 763-765.

controlling the activities of government and government officers.⁸⁸ This unique feature of public procurement regulation is informed by the inherently flawed nature of the government as a purchaser,⁸⁹ and the government's natural inability to benefit from a market economy without some form of control.⁹⁰ The government's inability to benefit from a market economy arises from three main factors. Firstly, public procurement is often characterised by a conflict between the private selfish interests of individual procurement officers and the broader interests of society as represented by the government. This conflict of interests replaces the rational cost-benefit analysis inherent in private economic transactions with perverse incentives for corruption and other forms of unethical conduct on the part of procurement officers. This, in turn, tends to undermine the achievement of the objectives of public procurement regulation—whether social, economic or political—if left unresolved. Secondly, the incentives for corruption and other forms of unethical conduct often lead to abuse of any discretionary powers conferred upon public procurement officers. Thirdly, although market economies are based on the theoretical construct of perfect competition, the real world is characterised by various forms of market and institutional failures.⁹¹

The risk of corruption and other forms of unethical conduct provides the main justification, from both economic and administrative law points of view, for public procurement regulation.⁹² Put differently, the main rationale for public procurement regulation is to correct agency and public choice problems and various forms of market and institutional failures that tend to undermine the achievement of the objectives underlying a country's public procurement system.⁹³ Regulation also provides a structured framework for dealing with the challenges and dilemmas posed by the multiple, often conflicting, policy objectives to which public procurement commends itself.

Regulation, therefore, is the traditional approach to tackling complexities, problems and risks relating to public procurement—especially in situations where the dominant concerns include probity, transparency, accountability, equity or

⁸⁸ Trepte (n 46) 46.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ See Trepte (n 46) ch 2 on the theoretical construct of perfect competition and how the inapplicability of the assumptions that underlie the construct in the real world informs the formulation of public procurement regulation.

⁹² *Ibid.*

⁹³ *Ibid.*

fair dealing.⁹⁴ Policymakers also often adopt other approaches, either alone or in combination with regulation, to address those complexities, problems and risks.⁹⁵ These other approaches include managerialism, decentralisation, devolution, *ex-ante* approvals, ethical codes, administrative guidelines and *ex-post* oversight and monitoring.⁹⁶

Public procurement regulation may be prescriptive or directory in nature.⁹⁷ A prescriptive approach to public procurement regulation is characterised by circumscribed discretion and stringent formal rules and procedures. It is the main or traditional approach to public procurement. It is considered appropriate in situations of real or presumed likelihood of abuse, malfeasance or undue influence.⁹⁸ A directory approach to public procurement regulation, on the other hand, is characterised by informality and flexibility, usually by reliance on administrative guidelines and general principles as opposed to formal binding rules and procedures.

The justifications for using public procurement as a policy tool include: its effectiveness compared to other regulatory tools;⁹⁹ its flexibility in the face of uncertainty as to legality of other regulatory tools;¹⁰⁰ the need to associate government with the highest possible standards and lawful behaviour;¹⁰¹ greater effectiveness of public procurement compared to more direct means of regulation;¹⁰² and creating a level playing field for bidders.¹⁰³

⁹⁴ Paul Schapper, Veiga Malta and Diane Gilbert, 'An Analytical Framework for the Management and Reform of Public Procurement' (2002) 6 (1) *Journal of Public Procurement* 1, 5-6 and 13. See also McCue, Pier and Swanson (n 55) and Ohad Soudry, 'A Principal Agent Analysis of Accountability in Public Procurement' in Gustavo Piga and Thai Khi V (Eds), *Advancing Public Procurement: Practices, Innovation and Knowledge-sharing* (2007 PrAcademics Press) 433.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ On various forms of regulation, see Arrowsmith, Linarelli & Wallace (n 47) 86-87.

⁹⁸ Paul Schapper, Veiga Malta and Diane Gilbert, 'An Analytical Framework for the Management and Reform of Public Procurement' (2002) 6 (1) *Journal of Public Procurement* 1, 5-6. See also Miller (n 52) 27, 53.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ Sue Arrowsmith, 'Horizontal Policies in Public Procurement: A Taxonomy' (2010) 10 (2) *Journal of Public Procurement* 149, 154 and 159. See also P E Morris, 'Legal Regulation of Contract Compliance: An Anglo-American Comparison' (1990) 19 *Anglo-American Law Review* 87, 88.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

Public procurement regulation is a means to diverse, often conflicting, ends. These ends, or objectives, may be economic or social/political.¹⁰⁴ Some objectives of public procurement regulation, however, are ‘cross-cutting’ to the extent that they transcend economic and social policy domains. Further, the conceptual foundations of the objectives of public procurement regulation transcend multiple disciplines, making it inappropriate or difficult to classify them as strictly economic or social.

5.1 Economic Objectives of Public Procurement Regulation

The phrase ‘economic objectives,’ as used in this paper, refers to all such objectives of public procurement regulation as are based on the neoclassical economic idea of reliance on market forces as the appropriate mechanism for allocating society’s scarce resources. The economic approach to public procurement regulation is based on the theoretical construct of an ideal market characterised by perfect competition.¹⁰⁵ In summary, economists posit that this notional market is characterised by:¹⁰⁶ multiple individual buyers motivated by self-interest and acting to maximise utility, multiple individual sellers motivated by self-interest and acting to maximise profits in atomistic industries or contestable markets, the inability of any one individual buyer or seller to exert any control over market prices, price as a guidepost for decision-makers in the market to communicate scarcity, homogeneous products, the absence of barriers to entry or exit from the market, perfect flow of information among buyers and sellers as to the terms of all market transactions, the holding of resources in private property and the full enforcement of prevailing laws through the state.¹⁰⁷

Neoclassical economic theory assumes that markets are self-regulating¹⁰⁸ and that regulation or government intervention in the market should be limited to the correction of market failure.¹⁰⁹ The phrase ‘market failure’ refers to a situation where any one or more of the assumptions that underlie the theoretical construction of

¹⁰⁴ See Trepte (n 46) chs 2, 3 and 4 on the economic, social/political and international models of public procurement regulation.

¹⁰⁵ Ibid, 63-132.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Temidayo Akenroye, ‘An Appraisal of the use of Social Criteria in Public Procurement in Nigeria’ (2013) 13 (3) *Journal of Public Procurement* 364.

¹⁰⁹ See generally Trepte (n 46) ch 2.

perfect competition does not hold.¹¹⁰ It should be noted at the outset that unlike the notional perfectly competitive market, real markets are frequently, almost invariably, characterised by a failure of one or more of the assumptions.

Neoclassical economics also place great emphasis on the relationships among production costs, price and global welfare—a concept generally referred to as efficiency. Simply explained, efficiency is the idea that economic resources should be used prudently, in a manner that maximises wealth and utility while at the same time minimising waste. In the specific context of public procurement regulation, efficiency refers to the idea that the government should procure goods and services at the lowest possible cost.¹¹¹

Neoclassical economic theory assumes that efficient markets naturally result not only in optimal use of scarce resources but also in global wealth maximisation. The discipline of economics assumes that undistorted or perfectly competitive markets result in the optimal use of the society's scarce resources, a concept commonly referred to as allocative efficiency. Allocative efficiency refers to a state of the economy in which production reflects consumer preferences and prices reflect the marginal cost of production.¹¹² In particular, it refers to a state of the economy where every good or service is produced only up to the point where the last unit provides a marginal benefit to consumers equal to the marginal cost of production.¹¹³ Perfect markets, or more realistically, near-perfect markets, tend towards either the Pareto or the Kaldor-Hicks degrees of efficiency¹¹⁴ In sum, perfectly competitive markets do not allow individual sellers to make supernormal profits, or individual buyers to exert unprofitable bargains.

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

¹¹⁰ Ibid.

¹¹¹ Arrowsmith, Linarelli & Wallace (n 47) 31, Trepte (n 46) 128, Steven L. Schooner, 'Desiderata: Objectives for a System of Government Contract Law' (2002) 2 Public Procurement Law Review 103, 107.

¹¹² Trepte (n 46) 64-66.

¹¹³ McCue, Pier and Swanson (n 55) 180.

¹¹⁴ For further insights, see Azuike (n 33) 148 and Trepte (n 46) 64-66.

award to a different bidder, however, is economically justifiable where the lowest price is deceptive when considered in the context of externalities, hidden costs or market failures.¹¹⁵ The efficiency requirements of public procurement regulation, therefore, seek to correct the agency and public choice problems of a tendency to waste.¹¹⁶ In particular, the objective of efficiency seeks to correct the absence of a profit motive and the typical public procurement officer's lack of incentive to engage in the rational cost-benefit analysis that is naturally inherent in private economic transactions.¹¹⁷

The objective of efficiency is not unique to the discipline of economics. It transcends many other disciplines.¹¹⁸ In the administrative law context of public procurement regulation, efficiency connotes a procurement system characterised by expeditious decision making, the absence of bureaucratic red tape and finality of decisions. An undue regard to administrative efficiency, however, can easily undermine the achievement of other important objectives of public procurement regulation:

The intention of [administrative] efficiency is noble and must be appreciated if the development agenda is to be achieved. The Court cannot ignore that objective because it is meant for a wider public good...However, the Court must put all public interest considerations in the scales and not only the finality consideration. The said Act also has other objectives namely to promote the integrity and fairness of the procurement procedures and to increase transparency and accountability. Fairness, transparency and accountability are core values of a modern society like Kenya. They are equally important and may not be sacrificed at the altar of finality.¹¹⁹

Although allocative efficiency is arguably the main or ultimate economic objective of public procurement regulation, many scholars identify competition,

¹¹⁵ Akenroye (n 108) 371-362. See also Trepte (n 46) ch 2 generally.

¹¹⁶ Ibid, 77-82.

¹¹⁷ Erridge, 'UK Public Procurement Policy and the Delivery of Public Value' in Khi V Thai and others (eds), *Challenges in Public Procurement: An International Perspective* (PrAcademics Press 2005) 335, 336.

¹¹⁸ In Kenya, for instance, the objective of efficiency pervades most chapters of the Constitution of Kenya 2010, including those relating to: fair administrative action, national land policy, elections, administration of justice, decentralisation of county government services, fiscal management, and principles of the public service. See *inter alia* articles 47, 60, 81, 172, 176, 226, 227, and 232 of the Constitution of Kenya, 2010.

¹¹⁹ Per Nyamu J (as he then was) in *Republic v Public Procurement Administrative Review Board & Another ex parte Selex Sistemi Integrati* [2008] KLR 728, 743. See also *Republic v Kenya Revenue Authority Ex Parte Webb Fontaine Group FZ-LLC & 3 Others* [2015] eKLR.

transparency, integrity, end-user satisfaction, wealth distribution, risk avoidance and uniformity as other economic objectives of public procurement regulation.¹²⁰ It might be more accurate, however, to describe the relationship between allocative efficiency and these other objectives as one of end and means, with allocative efficiency being the end and these other objectives being the means. Since markets in the real world are seldom perfectly competitive, the disciplines of economics and administrative law counsel the adoption of a regulatory framework characterised by adherence to these other objectives as a means for achieving both allocative and administrative efficiency. Further, the objectives of competition, transparency, integrity, end-user satisfaction, wealth distribution, risk avoidance and uniformity transcend economic and social policy domains.

5.2 Social Objectives of Public Procurement Regulation

The phrase ‘social objectives’, as used in this paper, refers to all such objectives of public procurement regulation as are not based on the neoclassical economic idea of the primacy of markets, or reliance on markets, as the appropriate mechanism for allocating society’s scarce resources. Generally, social objectives of public procurement regulation tend to concentrate on protection or enhancement of employment rights and conditions, human rights, gender or racial equality, minority interest rights, small businesses and environmental quality.¹²¹ There is no exhaustive or authoritative taxonomy or listing, however, of social objectives of public procurement regulation,¹²² due largely to their diverse and overlapping nature.¹²³

The existing taxonomies generally classify social objectives based either on the segment of society or economy targeted by such objectives or the mechanisms through which public procurement regulation enforces them. Trepte, for instance, classifies them into three broad categories, namely: strategic policies, protective policies and proactive policies.¹²⁴ In summary, these categories refer to policies that seek to: stimulate economic activity or create a comparative advantage in an

¹²⁰ See e.g. Schooner (n 111) 103-104, Arrowsmith, Linarelli & Wallace (n 47) 27-88 and Trepte (n 46) ch 2.

¹²¹ Trepte (n 46) 169-170.

¹²² *Ibid.*, 139.

¹²³ *Ibid.*

¹²⁴ *Ibid.*

industry;¹²⁵ shield domestic products and suppliers from foreign competition;¹²⁶ and promote social goals respectively.¹²⁷ Arrowsmith, on the other hand, classifies them into three different but equally broad categories, namely: policies limited to seeking compliance with legal requirements and those that go beyond such requirements, policies applied only to the award of the contract and those that go beyond it, and mechanisms through which policies are implemented in the procurement process.¹²⁸

Scholars variably describe the social objectives of public procurement regulation as secondary,¹²⁹ collateral,¹³⁰ ancillary, horizontal¹³¹ or socioeconomic.¹³² These descriptions tend to emanate from exponents of an economic approach to public procurement regulation who invariably argue that: the pursuit of social policies tends to undermine economic efficiency by increasing transaction costs and the pursuit of social policies through public procurement tends to undermine the objectives of fair competition, integrity, and transparency. The description of social objectives of public procurement regulation as secondary, collateral or ancillary, however, is apt to mislead or misrepresent the true nature and purpose of such objectives. To illustrate, the sole or decisive reason for engaging in procurement may be, and often is, to implement social policy.¹³³ Governments are also often constrained to abandon a procurement that makes perfect economic sense because of social policy concerns, for example, adverse environmental impact.¹³⁴ Further, the promotion of social objectives, as opposed to the achievement of economic efficiency, may be a 'primary' objective of a system of public procurement regulation.¹³⁵

¹²⁵ Ibid, 140.

¹²⁶ Ibid, 152.

¹²⁷ Ibid, 169.

¹²⁸ Sue Arrowsmith, 'Horizontal Policies in Public Procurement: A Taxonomy' (2010) 10 (2) *Journal of Public Procurement* 149, 154 and 159.

¹²⁹ Arrowsmith, Linarelli & Wallace (n 47) 237, Rolf H. Weber, 'Development Promotion as a Secondary Policy in Public Procurement' (2009) 4 *Public Procurement Law Review* 184, Joe Arnould, 'Secondary Policies in Public Procurement: The Innovations of the New Directives' (2004) 4 *Public Procurement Law Review* 187 and Ron Watermeyer 'Facilitating Sustainable Development through Public and Donor Procurement Regimes: Tools and Techniques' (2004) 1 *Public Procurement Law Review* 30.

¹³⁰ Arrowsmith, Linarelli & Wallace (n 47) 237.

¹³¹ Sue Arrowsmith, 'Horizontal Policies in Public Procurement: A Taxonomy' (2010) 10 (2) *Journal of Public Procurement* 149, 154.

¹³² Ibid, 149.

¹³³ Trepte (n 46) 134.

¹³⁴ Ibid.

¹³⁵ Ibid.

The description of social objectives of public procurement as secondary, collateral or ancillary also tends to reinforce the contentious idea that economic efficiency is the universal, ultimate, sole or decisive basis of all public procurement regulation. Further, such descriptions are abstract to the extent that they suppress the broad nature of the mandate of the government and the reality of interdependence and complementarity between economic and social policy.¹³⁶ Moreover, the use of public procurement as a tool for promoting social policies is not necessarily inherently incompatible with sound economics.¹³⁷

The current literature variably describes the pursuit of social objectives through public procurement as social procurement,¹³⁸ socially responsible public procurement,¹³⁹ affirmative procurement,¹⁴⁰ sustainable procurement,¹⁴¹ linkage¹⁴² and contract compliance.¹⁴³ The idea underlying all these descriptions is the leveraging of public procurement as a strategic tool for stimulating society-wide impacts that go beyond the typical economist's narrow concern for optimal or efficient allocation of resources.¹⁴⁴ In other words, the idea behind using public procurement as a policy tool goes beyond the purely commercial concern of value

¹³⁶ Barraket, Keast and Furneaux (n 64) 5.

¹³⁷ Buy Social Canada, 'What is Social Purchasing?' available at <<http://buysocialcanada.ca/about-us/>> accessed on 29th March 2016. See also Social Procurement Australasia, 'What is Social Procurement?' available at <<http://socialprocurementaustralasia.com/>> accessed on 29th March 2016.

¹³⁸ Christopher McCrudden, *Buying Social Justice: Equality, Government Procurement, & Legal Change* (OUP 2007) 14, Christopher McCrudden, 'International Economic Law and the Pursuit of Human Rights: A Framework for Discussion of the Legality of 'Selective Purchasing' Laws under the WTO Government Procurement Agreement' (1999) 2 (1) *Journal of International Economic Law* 3, Christopher McCrudden and Stuart S Gross 'WTO Government Procurement Rules and the Local Dynamics of Procurement Policies: A Malaysian Case Study' (2006) 17 (1) *European Journal of International Law* 151, 154, Christopher McCrudden, 'Using Public Procurement to Achieve Social Outcomes' (2004) 28 (4) *Natural Resources Forum* 257 and Christopher McCrudden, 'Corporate Social Responsibility and Public Procurement' (2010) Oxford Legal Studies Research Paper No. 9/2006 available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=899686> accessed on 5th May 2015. McCrudden invariably uses the term "linkage" to describe the use of procurement as a tool of social policy.

¹³⁹ Barraket, Keast and Furneaux (n 64) 2 and 4. See also Akenroye (n 108) and European Commission, *Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement* (2010) 7 available at <<http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=606&type=2&furtherPubs=yes>> accessed on 31st March 2016.

¹⁴⁰ K Raga and N Nano, 'Legislative and Administrative Directives Governing Procurement Procedures: A Local Government Perspective' (2011) 4 (1) *African Journal of Public Affairs*, 130, 135.

¹⁴¹ Stephen Brammer, 'Sustainable Procurement in the Public Sector: An International Comparative Study' (2011) 31 (4) *International Journal of Operations & Production Management* 452, 454. See also Ama Eyo, 'Corruption and the Challenge to Sustainable Public Procurement (SPP): A perspective on Africa' (2017) 12 (3) *European Public Procurement and Public Private Partnership Law Review* 253.

¹⁴² McCrudden, *Buying Social Justice* (n 138).

¹⁴³ Arrowsmith, Linarelli & Wallace (n 47) 256 and Morris (n 101) 87.

¹⁴⁴ Barraket, Keast and Furneaux (n 64) 2 and 4.

for money to the broader concern of ensuring social and environmental equity,¹⁴⁵ an outcome variously described in academic literature as public value, social value or social justice.¹⁴⁶ There are several possible mechanisms for generating such broader value from public procurement, including:¹⁴⁷ statutory compliance requirements, contract compliance requirements, eligibility requirements, selection and qualification criteria, technical specifications, preferences, reservations and contract award criteria.¹⁴⁸

The main drivers of social procurement include: dwindling tax revenues; the need to address socioeconomic inequalities; and the perverse effects of globalisation and the pursuit of neoliberal market policies and ineffectiveness of more direct solutions to social, economic and political problems.¹⁴⁹ These drivers of social procurement tend to present ‘wicked problems,’¹⁵⁰ that is, problems that do not respond to conventional solutions.¹⁵¹

Social exclusion, commonly defined as ‘processes [by] which individuals or entire groups of people are systematically blocked from rights, opportunities and resources (e.g. housing, employment, healthcare, civic and democratic participation) that are normally available to members of society and are considered to be the foundations of social cohesion,’¹⁵² is a common intractable or wicked problem. Some studies have suggested that uncritical commitment to markets and neoliberal economic theories tends to marginalise entire groups and communities,¹⁵³ thereby leading to general disaffection and political instability.¹⁵⁴

Social exclusion and other wicked problems often make an economic approach to procurement regulation—which is characterised by a staunch

¹⁴⁵ Ibid.

¹⁴⁶ See generally McCrudden, *Buying Social Justice* (n 138). See Akenroye (n 108) 367.

¹⁴⁷ Trepte (n 46) 187-204, Akenroye (n 108) 368, Erridge (n 117) 336-337 and Sue Arrowsmith, ‘Horizontal Policies in Public Procurement: A Taxonomy’ (2010) 10 (2) *Journal of Public Procurement* 149.

¹⁴⁸ Ibid.

¹⁴⁹ Barraket, Keast and Furneaux (n 64) 3, 13-27. See also Christopher McCrudden, ‘Social Policy Choices and the International and National Law of Government Procurement: South Africa as a Case Study’ (2009) *Acta Juridica* 123, 126.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

¹⁵² Ibid.

¹⁵³ See e.g. Amy Chua, ‘Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development’ (1998) 108 (1) *Yale Law Journal* 1. See also Amy Chua, *World on Fire: How Exporting Free Market Democracy Breeds Ethnic Hatred and Global Instability* (Anchor Books 2004).

¹⁵⁴ Ibid. See also See also Michela Wrong, *It’s Our Turn to Eat: The Story of a Kenyan Whistle-Blower* (HarperCollins Publishers 2009) 115, 324-325.

commitment to markets and purely economic considerations—inappropriate or impracticable.¹⁵⁵ The co-existence of economic and social objectives in a system of public procurement regulation, therefore, reflects the economic, social and political reality that prevails in many countries. It is also a testament to the weakness of the idea that economic efficiency is the sole or ‘primary’ justification for all public procurement regulation.

5.3 *Cross-Cutting Objectives of Public Procurement Regulation*

As stated, the objectives of competition, transparency, integrity, end-user satisfaction, wealth distribution, risk avoidance and uniformity transcend economic and social policy domains.¹⁵⁶ This paper espouses the idea of the cross-cutting nature of these objectives, as they are a sine qua non for realising the overarching goals—whether economic or social—of any system of public procurement regulation. It should be noted at the outset, however, that these cross-cutting objectives are often seen as fundamental requirements of not only public procurement regulation but also public administration in general.¹⁵⁷ In other words, this paper argues that the values embodied in these cross-cutting objectives are complementary to both economic and social policy, and that compliance with them is a prerequisite for realising both economic and social objectives of public procurement regulation.

Take the objective of competition, for instance. This objective is based on the assumption that public bodies get the best value from procurement when a wide pool of private contractors, led purely by the rational and selfish desire of making a profit, endeavour to outdo one another in terms of quality, price, terms and conditions, technology and other parameters.¹⁵⁸ It should be noted, however, that competition often comes at a price, in the form of additional (bureaucratic) costs and inefficiency.¹⁵⁹ The benefits of competitive procurement procedures, however, usually outweigh these costs.¹⁶⁰ Most public procurement regulatory systems, therefore, embody elements of competitive supply.¹⁶¹ Indeed, competitive bidding

¹⁵⁵ Barraket, Keast and Furneaux (n 64) 25. On the inappropriateness of an atomistic analysis of public procurement, see Baumol (n 58) 2.

¹⁵⁶ Trepte (n 46) 134, 205-206, and McCrudden, *Buying Social Justice* (n 138) 576-578.

¹⁵⁷ Elia Armstrong, ‘Integrity, Transparency and Accountability in Public Administration: Recent Trends, Regional and International Developments and Emerging Issues’ (2005) United Nations Department of Social and Economic Affairs 1.

¹⁵⁸ Schooner (n 111) 104, Arrowsmith, Linarelli & Wallace (n 47) 27-88 and Erridge (n 117) 336.

¹⁵⁹ Soudry (n 94) 444.

¹⁶⁰ *Ibid.*

¹⁶¹ Trepte (n 46) 118.

is the preferred method of procurement under most modern public procurement regulatory systems.¹⁶²

Although the conceptual foundations of the objective of competition are to be found mainly in economic theory, competition is a fundamental prerequisite for the achievement of all objectives, whether economic or social, of public procurement regulation.¹⁶³ It is difficult, perhaps impossible, to achieve the objectives of public procurement regulation, whether social or economic, without engaging in some form of competitive bidding. Competition, therefore, offers the best chance of getting the most value out of public procurement even where the main concern is the implementation of social policies.

Likewise, the objective of transparency refers to the idea that procurement procedures should be characterised by the following attributes:¹⁶⁴ clear rules which are known by all participants, the means to verify compliance with those rules,¹⁶⁵ significant limits on the discretion of procurement officers¹⁶⁶ and timely availability to all potential bidders of information relating to specific procurement opportunities and the applicable tender evaluation and award criteria.¹⁶⁷ Transparency provides a regulatory tool for correcting informational asymmetry, the agency and public choice problems inherent in public procurement and various forms of market and institutional failures.¹⁶⁸ In particular, transparency reduces the opportunities for corruption, abuse and other forms of unethical conduct.¹⁶⁹ The transparency requirements of public procurement regulation, however, often come with high implementation costs and reduced administrative efficiency.¹⁷⁰ Most public procurement scholars locate the theoretical foundations of transparency in the discipline of economics. Transparency, however, is a core value that transcends many disciplines, and an essential prerequisite for good public administration.¹⁷¹

¹⁶² Ibid. See e.g. the preamble and Article 28 of the UNCITRAL Model Law on Public Procurement 2011, section 2 of the World Bank's Guidelines for Procurement under IBRD Loans and IDA Credits (2015 edition) ("the World Bank Guidelines") and article XIII of the Government Procurement Agreement.

¹⁶³ Trepte (n 46) 146.

¹⁶⁴ Arrowsmith, Linarelli & Wallace (n 47) 73-76 and Trepte (n 46) 84.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

¹⁶⁷ Thiankolu (n 84) 461.

¹⁶⁸ Trepte (n 46) 76, 84 and 93-94.

¹⁶⁹ McCue, Pier and Swanson (n 55) 183.

¹⁷⁰ Ibid.

¹⁷¹ Thus, the objective of transparency pervades most chapters of the Constitution of Kenya 2010, including those relating to national values and principles, land policy, the electoral system, the judiciary and administration of justice, fiscal management, public procurement, salaries and remuneration, public service and the national police service. See *inter alia* Articles 10, 60, 81, 82, 86, 172, 225 to 227, 230 and 232 of the 2010 Constitution.

The objective of accountability can be viewed similarly. This objective refers to the idea that public officers should explain, defend or justify their conduct.¹⁷² More importantly, accountability connotes the imposition of appropriate and effective sanctions or penalties for corruption and other forms of unethical or unlawful conduct.¹⁷³ Accountability provides, from both an economic and administrative law point of view, a powerful tool for fostering integrity and preventing the abuse of power and corruption.¹⁷⁴ It is especially critical in regulatory systems characterised by the exercise of discretionary powers, especially when the exercise of such powers adversely affects the rights or interests of citizens or, in our case, other stakeholders of the public procurement system. Accountability is realised through the transparency of actions taken within a formal network of internal and external controls.¹⁷⁵ In other words, the objectives of transparency and accountability are complementary, with the result that a proper procurement regulatory system requires both.

The theoretical foundations for the objective of accountability lie in the disciplines of economics and administrative law.¹⁷⁶ Its practical basis in the context of public procurement regulation lies in the need to: control the exercise of discretion,¹⁷⁷ correct market and institutional failures and, more particularly, ensure the prudent utilisation of public funds. A sound public procurement regulatory framework should require government officers to explain or defend their actions and decisions either as a matter of course or when challenged by disaffected bidders or other stakeholders.¹⁷⁸

A public procurement regulatory system can only meet the objective of accountability, and indeed, all its economic or social objectives, if it is characterised by enforcement of the rules and imposition of deterrent or effective sanctions against all persons who participate in or are complicit in the breach of those rules.¹⁷⁹ Regulatory frameworks that look good on paper or in theory serve no useful purpose unless faithfully implemented. In other words, impunity (that is, the opposite of accountability), undermines the achievement of all objectives of public

¹⁷² Migai (n 19) 49.

¹⁷³ For an economic approach to corruption, as opposed to a merely moral or social approach, see Pranab Bardhan, 'The Economist's Approach to the Problem of Corruption' (2006) 34 (2) *World Development* 341. On the causes and consequences of corruption, see Susan Rose-Ackerman, (n 27).

¹⁷⁴ Migai (n 19) 50.

¹⁷⁵ McCue, Pier and Swanson (n 55) 190.

¹⁷⁶ Soudry (n 94) 433.

¹⁷⁷ McCue, Pier and Swanson (n 55) 183.

¹⁷⁸ Thiankolu (n 84) 461.

¹⁷⁹ *Ibid.*

procurement regulation, whether economic or social. In short, the enforcement of the procurement rules tends to promote the objective of accountability. This, in turn, tends to promote both economic and administrative efficiency,¹⁸⁰ by reducing additional costs that would otherwise arise from corruption, favouritism and other forms of malfeasance.¹⁸¹

The objective of integrity (or probity) relates to the conduct of procurement officials, bidders and other players in the procurement process.¹⁸² It seeks to correct the agency and public choice problems inherent in public procurement and various forms of market and institutional failures, by reducing the incidence or risk of malfeasance. Integrity is not only an important feature of a sound approach to public procurement regulation but also a fundamental principle of sound public administration in general.¹⁸³

The objective of value for money refers to the idea of obtaining the relevant goods or services on the best possible terms and ensuring that they are fit for the intended purpose.¹⁸⁴ Value for money is often a combination of different variables,¹⁸⁵ both economic and social, and hence not always synonymous with the highest quality or the lowest price.¹⁸⁶ Although value for money is the main objective of public procurement regulation, especially from a financial or economic point of view, countries often trade off financial value with social value,¹⁸⁷ commonly defined as 'non-financial impacts of programmes, organisations and interventions, including the wellbeing of individuals and communities, social capital and the environment.'¹⁸⁸ The concept of value for money, therefore, connotes the idea of striving to obtain the best possible outcome when all relevant economic and social factors of a particular procurement are considered.

¹⁸⁰ Soudry (n 94) 433.

¹⁸¹ Ibid.

¹⁸² Schooner (n 111) 104-105.

¹⁸³ See e.g. Articles 73-80 of the 2010 Constitution, the Ethics and Integrity Act, 2012, the Public Officer Ethics Act, 2003 and section 3 (d) of the Public Procurement and Asset Disposal Act, 2015.

¹⁸⁴ Arrowsmith, Linarelli & Wallace (n 47) 27-31.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid. For an interesting dispute on this, in which the lowest bid was alleged to be the most expensive when considered in the context of whole life cost or total cost of ownership, see *Alliance Technologies Solutions Ltd v Public Procurement Oversight Authority* (2008-2010) PPLR 759. See also *Lindscan Advanced & Tank Services v Kenya Pipeline Company Ltd*, Public Procurement Administrative Review Board Application No. 16 of 2012.

¹⁸⁷ Trepte (n 46) 47.

¹⁸⁸ Akenroye (n 108) 367-368.

6. Solution through Administrative Law and Economic Concepts

Although many scholars extol an exclusionary approach to public procurement regulation, characterised by a staunch commitment to either economic or social objectives, there is significant interdependence, complementarity and overlap between economic and social policy.¹⁸⁹ In particular, economic policy is seldom a neutral activity driven solely by market forces.¹⁹⁰ Instead, economic policy is often a reflection and product of various social and political struggles.¹⁹¹ A procurement to build a health centre or a school in a marginalised rural village, for instance, can hardly be strictly pigeonholed as being driven exclusively by economic or social policy.¹⁹² It might be more accurate to describe the objectives of such procurement as socioeconomic or, depending on the underlying context, even socio-political. Further, as the preceding discussion demonstrates, many of the objectives of public procurement regulation that the current literature classifies as economic or social have their theoretical foundations in multiple disciplines.

Although economic and social objectives of public procurement often conflict, the coexistence of the two species of objectives in a system of public procurement regulation is not inherently bad. On the contrary, the frequent coexistence of the two species of objectives in public procurement laws is merely a reflection of the political nature and broad mandate of governments,¹⁹³ which often demand a regulatory approach that goes beyond commitment to markets and the achievement of economic efficiency.¹⁹⁴ The entrenchment of the two species of objectives in any system of public procurement regulation, including Kenya's, therefore, should be seen in this context.¹⁹⁵

¹⁸⁹ McCrudden, *Buying Social Justice* (n 138) 576-578. See also Eric Windholz and Graeme Hodge, 'Conceptualising Social and Economic Regulation: Implications for Modern Regulators and Regulatory Activity' (2012) 38 (2) *Monash University Law Review* 212, 222-224.

¹⁹⁰ John Justin McMurtry, 'The Political Economy of Public Procurement' (2014) 40 (1) *Canadian Public Policy* S26.

¹⁹¹ *Ibid.*

¹⁹² On the nuanced nature of regulation, and shortcomings of conceptualising regulatory objectives as strictly social or economic, see Eric Windholz and Graeme Hodge, 'Conceptualising Social and Economic Regulation: Implications for Modern Regulators and Regulatory Activity' (2012) 38 (2) *Monash University Law Review* 212.

¹⁹³ Trepte (n 46) 47.

¹⁹⁴ *Ibid.*

¹⁹⁵ On similar legal entrenchment of both economic and non-economic policy objectives in public procurement regulation, see the UK's Public Services (Social Value) Act 2012 and South Africa's Broad-Based Black Economic Empowerment Act.

The conflictual coexistence of economic and social policy objectives in a system of public procurement regulation, which is one of the twin issues that form the focus of this paper, arises from the different practical and theoretical rationales that underlie the two species of objectives. The conflict is usually stark when procurement officers accord undue regard to either species of objectives at the expense of the other. The dilemma created by the uneasy and often conflictual coexistence of economic and social policy objectives in a system of public procurement regulation, however, does not necessarily require a choice between good and bad, or superior and inferior. Instead, the dilemma usually represents a choice between efficiency and equity,¹⁹⁶ the former being economic and the latter political.¹⁹⁷ The choice, which often turns on the prevailing ideology,¹⁹⁸ requires a judicious balance and occasional trade-offs between the two species of objectives, depending on the socioeconomic and political realities of each country.¹⁹⁹

As the preceding discussion demonstrates, many objectives of public procurement regulation have their conceptual foundations in (*inter alia*) the disciplines of administrative law and economics. The disciplines of administrative law and economics share, as the main focus, the prevention of abuse of discretionary powers in public administration. The conceptual tools of the two disciplines can help in designing a public procurement regulatory framework that: establishes an optimal balance between economic and social objectives whenever they conflict; resolves the agency and public choice problems inherent in public procurement; and corrects various forms of market and institutional failures. The disciplines of administrative law and economics also share, as major objectives, the prevention of abuse of public power and the prudent use of public resources. The two disciplines strive to achieve these objectives by requiring public servants to abide by certain values and principles in the discharge of their public duties.²⁰⁰ These values and principles include:²⁰¹ integrity, legality, rationality, procedural fairness, proportionality, transparency and accountability.

The disciplines of administrative law and economics espouse a regulatory approach to public procurement that is characterised by controlled discretion and effective safeguards against the risk of corruption, favouritism and other forms of

¹⁹⁶ Trepte (n 46) 135 and 204.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

¹⁹⁹ Arrowsmith, Linarelli & Wallace (n 47) 28.

²⁰⁰ Migai (n 19) 27-55.

²⁰¹ Ibid.

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

7. Conclusion

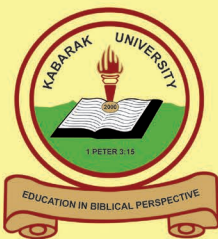
So, how can governments and regulators resolve the problem of discretion and achieve an optimal balance between the economic and social objectives of public procurement? The solution, based on the preceding discussion, lies in designing and implementing a rule-based public procurement regulatory system characterised by circumscribed discretion and commitment to the values of competition, transparency and accountability. The observance of these core values would guarantee the optimal pursuit of all objectives, whether social or economic, of any system of public procurement regulation. A public procurement regulatory system that lacks any of these core values would be prone to agency and public choice problems and various forms of market and institutional failures which, in turn, would undermine the achievement of the underlying economic or social objectives.

This paper espouses a rule-based or prescriptive approach to public procurement regulation, as opposed to a guideline approach, because it entails a narrower margin of discretion on the part of public procurement officers.²⁰² Enforcement of procurement rules, especially in so far as they relate to the ideals of competition, transparency and accountability, would not only circumscribe discretion but also induce 'market-like' behaviour on both the demand and supply sides of public procurement even when the main concern is enforcement of social policies. Put differently, commitment to the ideals of competition, transparency and accountability would guarantee the most feasible and efficient means for

²⁰²Soudry (n 94) 437.

the optimal implementation of both economic and social policies in public procurement.

The proposed regulatory approach promises to resolve the problem that is the subject of this paper in three ways. First, it could mitigate the impact of the agency and public choice problems, and various forms of market and institutional failures, which tend to justify an undue emphasis on economic efficiency and an economic approach to public procurement regulation. Secondly, it could alleviate the problems associated with discretion, especially corruption, favouritism and other forms of malfeasance. Lastly, the proposed regulatory framework could ensure that the pursuit of social policies in public procurement is done in conditions that approximate those prevailing in competitive markets. In other words, the proposed regulatory approach could ensure that the implementation of social policies in public procurement is done as efficiently as possible, even if the quality of such efficiency does not equal the allocative, Pareto or Kaldor-Hicks degrees of efficiency envisioned by economic theory.



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