

MAKERERE



UNIVERSITY

SCHOOL OF LAW

**EVALUATING THE EFFICACY OF THE LEGAL FRAMEWORK FOR
TRANSPARENCY IN PUBLIC-PRIVATE PARTNERSHIPS (PPPS) IN UGANDA: A
CASE STUDY OF LUBOWA HOSPITAL CONSTRUCTION PROJECT**

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**A DISSERTATION SUBMITTED TO THE SCHOOL OF LAW IN PARTIAL
FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF A MASTERS
DEGREE IN LAW OF MAKERERE UNIVERSITY, UGANDA**

OCTOBER 2023

DECLARATION

I, **Jude Byamukama**, declare that this dissertation is my original work and that it has never been presented and will never be presented to any other University or Tertiary Institution of higher learning for an academic award.

.....

Jude Byamukama

Date:

CERTIFICATION AND APPROVAL

This dissertation has been submitted for examination with the approval of the Supervisor, Dr. Dan Ngabirano of the School of Law, Makerere University. The undersigned therefore declare that he has read and hereby recommends for acceptance by Makerere University School of Graduate Studies a dissertation entitled, “**Evaluating the Efficacy of the Legal Framework for Transparency in Public-Private Partnerships (PPPs) in Uganda: A Case Study of Lubowa Hospital Construction Project**”, in partial fulfilment of the requirements for the award of the degree of Master of Laws of Makerere University.

.....

Dr. Dan Ngabirano

(Supervisor)

Date.....

DEDICATION

This work is dedicated to all Ugandan patriots in public service, private sector and civil society who strive to serve the common good and promote transparent use of tax payer funds.

ACKNOWLEDGEMENT

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ABSTRACT

Public Private Partnerships (PPPs) have emerged as a popular model of delivering public infrastructure using private finance. However, a number of PPP infrastructure projects have failed to deliver their set objectives and proved costly for the public sector. This has been partly attributed to secretive nature in which these PPP projects are executed. The secrecy in negotiation and execution of PPP Agreements tends to limit public scrutiny and participation in conduct of public affairs. In particular, the prevalence of confidentiality clauses in PPP Project Agreements is considered a threat to full disclosure and the public's right to access information about conduct of public affairs.

Against this background, this thesis examines the efficacy of the existing legal framework for transparency in the use and delivery of public infrastructure through PPPs. A case study of the project for the construction of an international specialized hospital at Lubowa is evaluated. A comparison is made between Uganda's legal framework for ensuring transparency in PPP projects on one hand and World Bank model legal provisions on the other. Additional comparison is made between Uganda's legal framework with South Africa and Kenya.

The findings reveal that there is limited transparency in PPP projects in Uganda partly because of the numerous exemptions limiting disclosure and access to information in the Public Private Partnerships Act, 2015 and the Access to Information Act 2005. As a result, access and disclosure of information about PPP projects is very inadequate as manifested in the project for the construction of an international specialized hospital at Lubowa. Recommendations are made to reform the legal framework to provide for mandatory disclosure of project information, limit exemptions and introduce a sanctions-based regime so as to enhance transparency in PPP projects in Uganda.

LIST OF ABBREVIATIONS

AG	Attorney General
BEL	Bujagali Energy Limited
CEFROHT	Center for Food and Adequate Living Rights
EBDR	European Bank for Reconstruction and Development
ECJ	European Court of Justice
FOI	Freedom of Information
IDB	Islamic Development Bank
IMF	International Monetary Fund
ISER	Initiative for Social Economic Rights
ISHU	International Specialised Hospital of Uganda
KCCA	Kampala Capital City Authority

MOFPED	Ministry of Finance, Planning and Economic Development
MOH	Ministry of Health
OECD	Organization for Economic Co-operation and Development
PFI	Private Finance Initiative
PPA	Power Purchase Agreements
PPPs	Public Private Partnerships
SEATINI	Southern and Eastern African Trade Information & Negotiations Institute
USD	United States Dollars
UETCL	Uganda Electricity Transmission Company Limited
WB	World Bank

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8. The Public Finance Management Regulations, 2016
9. The Public Private Regulations, 2019, Statutory Instrument No. 18

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South Africa

1. The Constitution of the Republic of South Africa, 1996
2. The Promotion of Access to Information Act 2000

LIST OF CASES

C

1. Charles Mwanguhya Mpagi and Angelo Izama versus Attorney General, Miscellaneous Cause No. 751 of 2009

D

2. Dr. Eng. John Tumwesigye vs Attorney General and Diana Atwine, Civil Suit No.190 of 2017

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3. Finasi/Roko Construction SPV Limited and Anor versus Roko Construction Limited Court of Appeal Civil Application No. 220 of 2019

G

4. Greenwatch (U) Ltd versus Attorney General and Uganda Electricity Transmission Company Ltd, Miscellaneous Cause No 139 of 2001
5. Green Watch versus Attorney General, Miscellaneous Cause No 232 of 2009

I

6. Initiative for Social Economic Rights versus Attorney General, Constitutional Petition No. 007 of 2019
7. Issa Kikungwe & 4 Others versus Standard Bank Investment Corporation Ltd & 3 Others, Miscellaneous Application No.394 of 2004

K

8. Katiba Institute vs Presidents Delivery Unit & 3 Others, Constitutional Petition 468 of 2017, High Court of Kenya at Nairobi

M

9. Maj.Gen.David Tinyefuza vs Attorney General, Supreme Court Constitutional Appeal No.1 of 1997

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13. Southern and Eastern African Trade Information Negotiations Institute (SEATINI) & Center for Food and Adequate Living Rights (CEFROHT) versus Attorney General, Constitutional Petition No. 17 of 2019

14. Sulaiman Kakaire & David Lumu vs Parliamentary Commission & Clerk to Parliament, Miscellaneous Cause No.232 of 2013

GLOSSARY OF TERMS

Contracting Authority	A Ministry, department of Government or any other body established by Government and mandated to carry out a public function.
Private Party	A special purpose company incorporated under the laws of Uganda, to implement a specific public private partnership.
Privatization	The World Bank defines privatization as the process of transferring the production of goods and services from the public sector to the private sector
Public Private Partnership	The Public Private Partnerships (PPP) Act 2015 defines a public private partnership as a commercial transaction between a contracting authority and a private party where the private party performs a function of the contracting authority on behalf of the contracting authority, for a specified period. In return, it acquires the use of property, equipment or other resource of the contracting authority, assumes substantial financial, technical and operational risks in connection with the performance of the function or use of the property and it receives a benefit for performing the function through a payment by the contracting authority of charges or fees collected from the users of the service or infrastructure.
PPP Committee	A committee established under the PPP Act 2015 which is charged with the overall oversight and supervision of all PPP projects in Uganda.
PPP Unit	A unit established under the PPP Act 2015 to serve as the secretariat and technical arm of the PPP Committee.
Transparency	The extent to which an entity reveals to external stakeholders relevant information about its own decision processes,

procedures, functioning, and performance

CHAPTER ONE

1.0 INTRODUCTION

It is no secret that many countries across the globe face financing gaps in their desire to provide public infrastructure especially in areas such as transport, water, healthcare and energy inter alia.¹ The global infrastructure financing gap, which is most felt in low-income economies, is estimated to reach over USD 15 Trillion by 2040.² This is partly because investment in infrastructure development requires very significant financing that cannot be adequately mobilized within the framework of national budgets at the expense of other pressing needs within the economy.

In a bid to address this infrastructure financing gap, the public sector in many countries has over the past three decades turned to partnerships with the private sector with a view to mobilizing private finance for public infrastructure development. Additionally, it is sometimes argued that it is advantageous for the public sector to partner with private sector players who are allegedly more efficient.³

There is a presumption, in favour of the private sector players, that their well-known profit motive incentivizes them to be more efficient and economical thus leading to completion of important infrastructure projects in a timely manner and within the set budget.⁴ Since the 1990s, these partnerships between the public sector and private sector players have been predominantly described as Public Private Partnerships (PPPs) in most of the world whereas they are referred to as Private Finance Initiatives (PFIs) in the United Kingdom. The latter description, PFIs, confirms the fact that these partnerships are widely viewed as arrangements for mobilizing private capital to bridge the gap in public sector financing.

The use of PPPs or PFIs as a financing model to deliver public infrastructure projects has got its fair share of critics across the globe. In particular, concerns have been consistently raised by both scholars and policy makers that infrastructure projects delivered using PPPs are more vulnerable

¹ Mohseni- Cheraghlou Amin and Aladekoba Naomi, (2022), “*The global infrastructure financing gap: Where sovereign wealth funds and pension funds can play a role.*” *Econographics*, October 31, 2022, at www.atlanticcouncil.org. Accessed 20th October 2023.

² Ibid.

³ Shaoul Jean 2005 “*The Private Finance Initiative or the public funding of private profit?*” in *The Challenge of Public-Private Partnerships, Learning from International Experience*, ed. Graeme Hodge and Carsten Greve, 2005, Edward Elgar Publishing Inc

⁴ Moszoro Marian, (2010), “*Efficient Public-Private Partnerships.*” Working Paper WP – 884 October, 2010 IESE Business School, University of Navarra.

to corruption, have limited public participation and exhibit a general lack of transparency.⁵ It is therefore contended that the PPP model of delivery of public infrastructure threatens transparency, public participation and fiscal accountability. It has been argued that the complexity of PPP contracts implies that they are prone to abuse by unscrupulous firms unless controlled by transparent procedures.⁶

There is widespread concern and evidence that transparency, a necessary feature of public sector projects, is threatened by PPPs. Firstly, they utilize complex contractual models whose documentation and commercial information is mostly confidential. Secondly, they conceal the extent of public debt through long term contractual obligations imposed on the state but which crystallize several years or even decades after contract signature.

Yet, even the avid critics of PPP projects do not desire to do away with them completely as they concede to the fact that well designed PPPs may be beneficial to the public sector. Instead, it is proposed that PPP projects must be required to be more transparent, limit their recourse to confidentiality clauses in project agreements and open to public participation. Numerous attempts have been made in law and policy of various jurisdictions to mandate or encourage proactive disclosure of important contractual information in PPP projects.

Additionally, one of the most important and influential promoters of the use of PPPs as a financing model, the World Bank, has gradually recognized the importance of transparency in the delivery of infrastructure projects and even recommended model disclosure frameworks that it encourages countries to adopt.⁷ It has now been widely acknowledged that issues of data disclosure and public engagement, which are at the heart of transparency, are significant in the usage of PPPs to deliver public infrastructure.⁸ Disclosure of critical commercial information about PPPs, whether ongoing or in the pipeline, is at the heart of transparency in such infrastructure projects.

⁵ Demuijnck Geert and Ngnodjom Hubert, (2011), “*Public-Private Partnerships and Corruption in Developing Countries: A Case Study.*” Business & Professional Ethics Journal, Vol.30, No.3/4 (2011), pp.253-268.

⁶ Farlam Peter, (2005), “*Assessing Public Private Partnerships in Africa.*” South African Institute of International Affairs, Nepad Policy Focus Report No. 2. Available at: https://www.researchgate.net/publication/239601344_Working_Together_Assessing_Public-Private_Partnerships_in_Africa [Accessed on 9th August, 2023].

⁷ World Bank, (2020) “*Improving Transparency and Accountability in Public-Private Partnerships: Disclosure Diagnostic Report- Uganda.*” At <http://hdl.handle.net/10986/34086>.

⁸ Siemiatycki Matti, (2007) “*What’s the Secret? Confidentiality in Planning Infrastructure Using Public/Private Partnerships*” Journal of the American Planning Association, 73, 388-403, DOI: 10.1080/01944360708978520.

Against this background, a number of countries in Africa, Europe, Asia, Australia, North America and Latin America have embraced PPPs enthusiastically as a mechanism to utilize private finance for large public infrastructure projects.⁹ African countries have been consistently encouraged to adopt PPPs as an avenue for remedying some of the challenges they have faced in the development of large public infrastructure projects. These challenges include; inadequate financing, corruption, nepotism, poor planning as well as poor project formulation.¹⁰

In Uganda, the move towards adoption of PPP model of delivery or management of public infrastructure projects started in the 1990s. It commenced with the execution of contracts in which private sector entities assumed contractual obligations to operate, expand and modernize public facilities like local markets, bus parks, abattoirs, recreation centers and roads inter alia.¹¹ Over the years, a number of infrastructure projects have been delivered by the Ugandan Government using the PPP model across a wide variety of sectors.¹² The PPP knowledge lab indicates that 31 PPP projects with a total investment commitment of USD 2.2 billion reached financial closure between 1990 and 2017 in Uganda.¹³

1.1 BACKGROUND

PPPs have varying definitions in scholarly literature since they take different forms. A Public Private Partnership has been defined, on one hand, as an arrangement between two or more public and private sectors of a long-term nature.¹⁴ PPPs have also been defined as "long term contractual arrangements between the government and a private partner whereby the latter delivers and funds public services using a capital asset, sharing the associated risks".¹⁵

⁹ Akintola Akintoye, (2009). "*Public Private Partnerships for Physical Infrastructure in Developing Countries.*" In Akintoye, A. & Beck, M. (Eds.), *Policy Finance & Management for Public-Private Partnerships*, Willey-Blackwell (pp. 123-141).

¹⁰ United Nations Economic Commission for Africa, (2005), "*African Governance Report.*" United Nations, Addis Ababa, Ethiopia, pp. 98-99.

¹¹ Nsasira Rachael et al, (2013), "*Public Private Partnerships (PPPs) and Enhanced Service Delivery in Uganda: Implications from the Energy Sector.*" *International Journal of Business Administration*, Vol.4/3. Available at: <http://dx.doi.org/10.5430/ijba.v4n3p48> [Accessed on 17th March, 2023].

¹² Ibid.

¹³ PPP Knowledge Lab, Uganda. Available at: <https://pppknowledgelab.org/countries/uganda> [Accessed on 6th April, 2023].

¹⁴ Hodge G. and Greve C., (2007), "*Public Private Partnership: An International Performance Review.*" *Public Administration Review*, pp. 545-558.

¹⁵ OECD, (2012), "*Recommendation of the Council on Principles for Public Governance of Public-Private Partnerships.*" Available at: <https://www.oecd.org/governance/budgeting/PPP-Recommendation.pdf> [Accessed 15th March, 2023].

In 2015, the Ugandan Parliament passed the Public Private Partnerships Act 2015 which provided a clear legal framework governing the procurement, execution, and implementation of PPP projects in Uganda. At the point of its enactment, there were already several PPP projects in progress such as the electricity PPP projects cited above. It was hoped that the enactment of this legislation would alleviate the concerns of critics about disclosure of information in PPP projects while also providing an enabling framework for the promotion of this financing model.

One of the key infrastructure projects that should have been governed by the provisions of the Public Private Partnerships Act 2015 is the project for construction of an international specialized hospital at Lubowa although it has been mired in controversy and debate. It is this contentious project that has been selected for a case study to interrogate the efficacy of the existing legal framework for transparency in PPP projects in Uganda.

Transparency, in this context, has been defined as having to do with the extent to which an entity reveals to external stakeholders' relevant information about its own decision processes, procedures, functioning and performance.¹⁶ It has also been defined as the availability of information about an actor that allows other actors to monitor the workings or performance of the first actor hence it is intended to enable the public to view what is happening within government.¹⁷

It is argued that transparency is important because its introduction into a process reduces corruption in a number of ways.¹⁸ Firstly, transparency increases costs of concealment and fraud associated with corrupt activities while facilitating monitoring, supervision and control of the contracting process.¹⁹ Furthermore, it creates the possibility of being monitored outside the foreseen control channels if information is publicly accessible.²⁰ Additionally, it is contended that transparency lays the foundation of accountability of all relevant participating partners and

¹⁶ Reynaers Anne-Marie and Grimmelikhuijsen Stephan, (2015) “*Transparency in Public- Private Partnerships: Not so bad after all?*” Public Administration Vol.93, NO.3, 2015 (609-626).

¹⁷ Reig, M; Esteve, M. (2021) “*Internal and External Transparency in Public-Private Partnerships – The Case of Barcelona’s Water Provision.*” Sustainability 2021, 13, 1777. <https://doi.org/10.3390/su13041777> (accessed on 15th October 2023).

¹⁸ Boehm F., and Olaya J., (2006), “*Corruption in Public Contracting Auctions: The Role of Transparency in Bidding Processes.*” Annals of Public and Cooperative Economics, 77(4), pp.431-452.

¹⁹ Ibid.

²⁰ Ibid.

increases the likelihood of detection and the risk of punishment for any would-be instances of fraud or corruption, hence making it a possibility for curbing corruption.²¹

World over, the absence of transparency in the design and implementation, is a common characteristic of many failed PPP projects which either collapsed prematurely or cost the tax payers colossal sums of money while yielding little to no value.²² Similarly, in the Ugandan context, there have been numerous concerns regarding the absence of transparency in a number of failed or costly PPP projects.

Numerous studies have established that the PPP projects in the electricity sector in Uganda were characterized by a lack of transparency evidenced by secretive contractual negotiations and conclusion of Agreements whose contents were never disclosed in the public domain and ultimately constituted a raw deal for the public sector as they did not succeed in delivering lower power tariffs for consumers.²³ There were also concerns from the office of the Auditor General, prior to the enactment of the Public Private Partnerships Act 2015, that numerous PPP projects were implemented across a multiplicity of sectors in the economy without any proper policy guidance or legal framework.

Consequently, the enactment of the Public Private Partnerships Act 2015 was supposed to be a watershed moment insofar as the establishment of a legal framework governing PPP projects in Uganda is concerned. It was anticipated that the Act would lead to an orderly and transparent procurement of subsequent PPP projects after its enactment.

On 12th March 2019, the Parliament of Uganda adopted a report of its Committee on the National Economy. The Committee approved the proposal by Government of Uganda, to issue promissory notes not exceeding US D 379.71 Million to FINASI/ROKO Construction Limited, a private contractor. The promissory notes were intended to guarantee the financing of the construction of an International Specialised Hospital of Uganda (ISHU) at Lubowa, Wakiso district. This project is a partnership between the Ministry of Health and that of Finance, Planning and Economic

²¹ Ibid.

²² Dlamini Z. H, and Botes L., (2022), “Challenges to Effective and Efficient Infrastructure of Public Private Partnerships in South Africa.” Available at: https://hdl.handle.net/10520/ejc-adminpub_v30_n1_a5. Last accessed 10th October 2023

²³ Nsasira R et al 2013 “Public Private Partnerships (PPPs) and Enhanced Service Delivery in Uganda: Implications from the Energy Sector” International Journal of Business Administration, Vol.4, No.3; 2013

Development on behalf of Government and a private contractor, FINASI/ROKO Construction Limited, to undertake the construction of an international specialized hospital. This private contractor is a Special Purpose Vehicle that was set up by a shadowy Italian firm FINASI Internazionale alongside a Ugandan local contractor, Roko Construction Limited.

The existence of this project only came into the public domain following the advice of the Attorney General that the promissory notes supporting it could not be issued by the Government without approval of Parliament. At the time of concluding this research, the promised international specialized hospital has never been delivered by the private contractor.²⁴

Against this background, this study seeks to evaluate the efficacy of the existing legal framework for transparency in PPP projects in Uganda using the case study of this project for the construction of an International Specialized Hospital at Lubowa, Wakiso district.

1.2 STATEMENT OF THE PROBLEM

Beginning in the late 1990s, Uganda adopted the use of the PPP model to deliver public infrastructure especially in the energy and transportation sectors. Despite the promise that such PPP projects would be more economical and efficient, contrary results issued. A number of PPP projects have turned out to be quite costly to the public sector and the majority of such projects have been characterized by a consistent lack of transparency evidenced by limited disclosure of project details and contract information to the public or even to Parliament. The Auditor General's office has noted that the prevalence of lack of transparency in rolling out of PPP projects.,

As a result of this consistent lack of transparency both at the conception level and during execution of PPP projects, a number of partnerships with private sector players in delivery of public infrastructure are routinely mismanaged by corrupt officials, private institutions and a lot of tax payers' funds lost in incomplete or poorly executed projects. In other cases, a serious risk remains that government has committed substantial sums of tax payers' funds to speculative PPP projects whose completion and actual execution remain mysterious. The lack of transparency has also resulted into some PPPs producing substandard work, contrary to what is expected. A study on PPP projects in local governments established that there has been limited value for money realized

²⁴ Ssemakula Micheal and Bukenya Denis, (2019), "*The Italian Investor Proposed USD 379.7 Million Lubowa Hospital Construction Project in Uganda: Disconnections and Disruptions in the Health Sector Expenditure Priorities.*" Human Rights Research Documentation Center (HURIC), and PHM-Network, Uganda. Available at: <http://www.peah.it/2019/04/6596/> [Accessed on 26th August, 2023].

in the projects.²⁵ The projects are typically characterized by poor quality services and corruption leading to numerous failed contracts, non-compliance, incompetence of providers, among others.

If this situation is not addressed, significant tax payer funds will continue to be misappropriated and lost in very expensive infrastructure PPP projects that do not offer value for money. This concern is evident in the public outcry and concerns raised by the Parliament of Uganda in regard to the controversial and secretive project for the construction of an International Specialized Hospital at Lubowa, Wakiso district.

This project was procured, by the Ministry of Health alongside that of Finance, Economic Planning and Development. It is therefore imperative that the legal framework governing PPP projects in Uganda ensures transparent procurement and implementation of such projects. It remains debatable whether the existing legal framework on PPPs is fit for such purpose of enabling transparency in PPP projects. This study therefore sets out to interrogate, through the use of the case study of the controversial Lubowa hospital project, the extent and adequacy of the existing legal framework for transparency in PPP projects in Uganda.

1.3 OBJECTIVES OF THE STUDY

1.3.1 General Objective

The main objective of this research is to examine the efficacy of the existing legal framework for transparency in PPP projects in Uganda.

1.3.2 Specific Objectives

1. To establish the extent to which the current PPP legal framework provides for transparency in the procurement and execution of PPP projects.
2. To analyze the extent to which Uganda's legal framework on transparency in PPP projects is consistent with regional and global standards promoted by the World Bank.

²⁵ Ndandiko Charles, (2010), "*Private Provision of Public Services in Developing Countries: The Case of Uganda's Local Governments.*" University of Twente, Enschede, Netherlands. Available at: <https://research.utwente.nl/en/publications/private-provision-of-public-services-in-developing-countries> [Accessed on 12th August, 2023].

3. To investigate the extent of transparency in the procurement and ongoing implementation of the project for the construction of an international specialized hospital at Lubowa in Uganda.
4. To establish the possible changes that need to be made to the legal regime in order to improve transparency of PPP projects in Uganda

1.4 RESEARCH QUESTIONS

1. To what extent does the current legal framework in Uganda enable transparency in PPP projects?
2. To what extent has the ongoing project for the construction of an international specialized hospital at Lubowa been transparent in light of the Public Private Partnerships Act 2015 and any relevant legislation?
3. What lessons can be drawn from the legal frameworks in Kenya and South Africa to ensure better transparency in public private partnership projects?
4. What changes should be made to the legal framework to ensure that there is better transparency in Uganda's PPP projects?

1.5 SCOPE OF THE STUDY

The study analyses the extent to which the legal framework governing Public Private Partnership arrangements, especially the PPP Act of 2015 and the Access to Information Act 2005, provides for transparency in execution of PPP projects. This is done through the prism of one case study. The case study selected is the project for the construction of an international specialized hospital at Lubowa, Wakiso district.

This study investigates the extent to which there was disclosure of details concerning the entire project, as it currently stands, for the construction of an International Specialised Hospital at Lubowa - a major infrastructure project contracted by the Government of Uganda. The

Government has so far sunk significant sums of taxpayers' money in excess of half a trillion Uganda Shillings, through promissory notes, for this particular project. The study also reviews the current state of this project.

In this quest, the study makes comparisons between Uganda's legal framework and that of other jurisdictions, specifically Kenya and South Africa, that also widely use PPP arrangements. The model disclosure framework on PPPs which is promoted by the World Bank is also considered. The two jurisdictions selected have comprehensive provisions on transparency in PPP projects. This will enable interested policy makers in Uganda to benchmark the country's legal framework with these jurisdictions.

Kenya is a neighbouring state, a fellow member of the East African Community and it supports Uganda's trade with access to the sea. South Africa, on the other hand, boasts of a number of critical multinational businesses operating within Uganda and participating in PPP projects especially in the electricity sub sector. Additionally, Uganda's banking sector is dominated by two major South African owned banks, Stanbic Bank and Absa Bank.

1.6 THEORETICAL FRAMEWORK: The Democracy Theory

In a representative democracy, legitimacy is based upon the citizens' trust that elected representatives and government administrators are implementing the will of the people and such trust is built and sustained by a complex of relations between information, transparency, accountability and participation.²⁶ Information transparency, which describes a condition in which citizens have access to the data and documents that bear upon actions and decisions taken by government actors, is therefore vital to democracy.²⁷

According to this democracy theory, unrestricted access to information by citizens enables them to gainfully participate in the democratic processes around them and keep government officials in check. Consequently, there must not be unreasonable restrictions on disclosure of information and those who hold information should not be allowed to unreasonably withhold information since it is important for the people to have access to varied but correct information.²⁸

²⁶ Harrison M. Teresa and Djoko Sigit Sayogo, 2014 "Transparency, participation, and accountability practices in open government: A comparative study" *Government Information Quarterly* 31 (2014) 513 – 525.

²⁷ Ibid.

²⁸ Article 19, (2007) "Access to information: An instrumental right for empowerment".

Meaningful participation in public affairs can only be achieved where the public is knowledgeable and has access to accurate and timely information.²⁹ Besides, representative democracy necessitates access to information to enable citizens hold their representatives accountable since the latter are not involved in decision making. It is therefore argued, in this theory, that Government should be open. Openness, it is contended, strengthens democracy and promotes efficiency and effectiveness in Government. Derivatively, Government should be transparent since transparency promotes accountability and provides information for citizens about what their government is doing. It is also argued by some theorists that information held by public officials is a national asset that should not be kept away from the public unjustifiably.

In a democracy, the government is held accountable by voters for its activities but this accountability can be weakened by PPPs as negotiations between government and private sector partners are typically conducted in private under the mantra of “commercial in confidence” with the result that the public has no input.³⁰ A PPP may involve a major long-term relationship stretching over decades and limiting the future choices of future voters. Yet, a democratic polity must be able to change policy direction and priorities hence PPPs may in fact undermine democracy. The democracy theory underpins this study that evaluates the extent to which the existing legal framework provides for disclosure, to citizens, of project information in PPP projects in Uganda.

1.7 SIGNIFICANCE OF THE STUDY

The major contribution of this study is two-fold. It enhances the available literature on transparency of PPPs projects in Uganda while bringing a contextual angle to existing global literature on the subject. In the circumstances, the study contributes to the limited scholarly works on the role of a legal framework that mandates disclosure of information as an enabler of effective implementation and use of Public Private Partnerships in Uganda. Secondly, it may be the only study of its kind that specifically considers the extent to which existing Ugandan legislation consider disclosure of project information in implementation of PPPs. It also makes suggestions and recommendations on how to realize Ugandan citizens’ constitutional right to access information in the context of PPP projects. It examines the provisions intended to operationalize

²⁹ Ibid.

³⁰ Coghill Ken and Woodward Dennis, 2005 “*Political issues of public-private partnerships*” in *The Challenge of Public-Private Partnerships*, ed. Graeme Hodge and Carsten Greve.

the right to access information stipulated in the Constitution, the Public Private Partnerships Act 2015 and the Access to Information Act 2005.

In particular, this study provides a thorough review of the legal and regulatory framework for PPP projects in regard to requirements for disclosure of information. It interrogates the existing legal restrictions and benchmarks them against best practices in other jurisdictions. The study also assists the policy makers to improve the authorities' ability to support disclosure through improvement of the current laws, regulations, and guidelines. The study will be helpful to the relevant policy makers especially in the Ministry of Finance, Planning and Economic Development, the PPP Unit, Office of the President, Office of the Auditor General and the Parliament of Uganda, inter alia.

At another level, the study is also designed to inform interested policy makers in other developing countries especially within the Sub-Saharan Africa. This is to be achieved by ensuring that it is published and available online. Extracts of the study will also be published through journals. It stands to equip policy makers from other countries with model mechanisms for enhancing transparency in PPP projects. Upon the dissemination of the study's findings, it is envisaged that the stakeholders will be able to utilize the study recommendations to improve transparency in PPP projects so as to realize value for money especially on the part of the public sector.

In particular, this study provides a thorough review of the legal and regulatory framework for PPP projects in regard to requirements for access to information. The study also assists the policy makers to improve the authorities' ability to implement the Public Private Partnerships Act 2015 and the Access to Information Act 2005.

1.8 METHODOLOGY

This study is qualitative research that involves an analysis of the extent to which transparency is provided for and respected in the legal framework governing implementation of PPP projects in Uganda. The study interrogates the legal framework governing transparency in PPP projects through the prism of the case study of the project for the construction of an international specialized hospital at Lubowa, Wakiso district (Lubowa Hospital Construction project). Qualitative methods were used to generate views, perceptions and opinions on this subject matter.

This study also relies on primary data obtained in form of interviews from selected respondents and documents accessed from the High Court, Court of Appeal and Constitutional Court of Uganda in relevant legal disputes concerning the PPP Act 2015 as well as the case study. Court records are, in law, public records even though there exist formalities to be able to access them. The researcher took advantage of his networks as a legal practitioner before the courts in question to obtain access to the same.

In this case, affidavits, Project Agreements, pleadings and witness statements concerning the disputes and contestations over the constitutional validity of the Public Partnerships Act 2015 and the Lubowa hospital project were accessed from the respective court records. The documents, pleadings and affidavits in the dispute at the High Court in *Roko Construction Limited vs Finasi/Roko Construction SPV Ltd & Finasi International FZC, Miscellaneous Application No.370 of 2019, Company Cause No.10 of 2019* and subsequently Court of Appeal over the rights of Roko Construction Limited in the special purpose company contracted to build Lubowa Hospital were also of immense value to this study.

Additionally, the pleadings and witness statements in *Dr Eng. John Tumwesigye vs Attorney General & Diana Atwine, Civil Suit No.190 of 2017* were valuable in reinforcing some of the positions in this study. The suit, which was filed in the Civil Division of the High Court, concerned the alleged unlawful termination of the contract for the Project Coordinator (Owner's Engineer) for the Lubowa Hospital construction project.

The case files, all pending judgment, that were accessed from the constitutional court are petitions of interest to this study. The first one, *Initiative for Social Economic Rights v Attorney General, Constitutional Petition No. 007 of 2019*, was filed by a civil society organization for declarations that the entire procurement and financing of the Lubowa hospital project offends the constitution. The materials obtained by the researcher on the court record offered a good insight into what the actual players in this project were claiming. Additionally, some Agreements and documents hitherto concealed from the public domain were accessible from the court record.

The second case, Constitutional Petition No.17 of 2019 *Southern and Eastern African Trade Information and Negotiations Institute (SEATINI) Uganda & anor vs Attorney General*, was filed by two civil society organizations. It is a constitutional petition seeking to have several provisions of the Public Private Partnerships Act declared unconstitutional and nullified for inter alia not

providing for public participation in PPP processes and offending constitutional provisions on the right to access information.

In respect of the key informant interviews, respondents were selected from the Ministry of Finance Planning and Economic Development, Ministry of Health, the Office of the Auditor General, Inspectorate of Government, one civil society organization that promotes infrastructure transparency and some private players on the Lubowa hospital construction project. Owing to the controversial nature of the selected case study, the respondents requested for anonymity and hence their actual names are not used in the study.

Additionally, the study heavily relies on secondary data, that is, data that has been collected by other sources prior to this study and that has been made publicly available. It also relies on various laws within Uganda's legal regime, comparing them with those from other jurisdictions that can be said to have more advanced systems. This is intended to draw informed conclusions as to the extent to which the country's legal and policy framework enables or hinders transparency in execution of PPP projects.

A comparative approach was also employed in this study. A comparison was made with the legal framework for transparency in PPPs in South Africa and Kenya. Comparison was also made with model frameworks proposed by international finance institutions, especially the World Bank.

1.8.1. Desktop Review

The study uses desktop review as the primary method of data collection. Desktop review refers to secondary data collected without fieldwork. In the context of this study, this includes searching libraries, the internet, online databases, reports from important organizations or independent sources and government departments. The data that is subject to this method largely comprises of laws, policies and texts.

1.8.2 Interviews

Primary data was also obtained through unstructured key informant interviews that the researcher carried out with eleven (11) Respondents who were carefully selected from various institutions considered relevant to this study and implementation of PPPs in Uganda. These included the PPP Unit under the Ministry of Finance, Planning and Economic Development, some players in the Lubowa Hospital construction project, the office of the Auditor General and the Ministry of

Health. The researcher also conducted an interview with one resource person affiliated with Infrastructure Transparency Initiatives. This is a civil society organization that promotes transparency in public infrastructure projects. These enabled the researcher to gather important insights on transparency in the infrastructure space.

Some of the respondents in the interviews were selected because of the vast pool of knowledge they possess about the subject of this research. They were asked about the operation of public private partnerships in Uganda, the amount of information about PPPs that is publicly available, the sufficiency of the existing legal framework for enabling transparency in PPPs in Uganda. By virtue of their exceptional knowledge, they were best placed to provide in-depth and comprehensive insight into the topic of research. Another category of respondents were selected on account of the positions they hold that are relevant to enforcing transparency through disclosures.

1.8.3 Data Collection Instruments

The data from the respondents was collected using an interview guide which guided the researcher on the necessary questions to be brought to the attention of the interviewee. The interview guide is contained in the appendix.

1.9 LITERATURE REVIEW

There is a dearth of literature on transparency in form of disclosure in PPP projects in Uganda and Sub-Saharan Africa as a whole. Although a wealth of global literature on the subject of disclosure of commercial information in infrastructure projects exists, for the most part it does not account for contextual differences.

1.9.1 Transparency in Public Private Partnerships across the globe

Leading authors on PPPs, Greve and Hodge, discuss the manner in which transparency and PPPs are related, and conclude that while less transparency is not a direct purpose of PPPs, it is a significant consequence of more PPPs.³¹ They point out that a key effect of establishing PPPs is often that there is less transparency in the economic deals and contractual realities in comparison

³¹ Greve Carsten and Hodge Graeme, (2011), “*Transparency in Public- Private Partnerships: Some Lessons from Scandinavia and Australia*” Paper for the 1st Global Conference on Transparency Research, Rutgers University, Newark, 19 -20 May 2011. Available at <https://research.cbs.dk/en/transparency-in-public-private-partnerships-some-lessons-from-sca>. [Accessed on 13th April, 2023]

to public projects. They identify the key elements of transparency as; degree of disclosure of information, accessibility of information, timeliness of information and recourse and influence. They advocate a stronger degree of disclosure, accessibility and timeliness of information while thinking about how to influence PPP decisions in the future.

While the study by Greve and Hodge uses Scandinavian countries and Australia as case studies, it explicitly concludes that its findings affect PPPs almost everywhere in the world. It is therefore imperative in this study to consider their framework, proposals on the best way to improve disclosure and accessibility of information about PPPs. This study adopts their recommendations and framework while taking into account the contextual differences between Uganda, Scandinavian countries and Australia. Their study did not consider Uganda or even any country in Sub Saharan Africa whose economy and private sector have a direct relationship with Uganda. There are numerous differences in country comparison. The present study therefore adopts some recommendations and proposals from Greve and Hodge but mindful of the context. This study has therefore benefited from the earlier cited paper though its scope is Uganda.

Hodge and Greve's discussion on transparency, in another important publication, emphasizes three forms of transparency.³² Firstly, transparency through freedom of information in view of the fact that freedom of information is a central element of modern public administration. Secondly, transparency through budgets and financial statements and thirdly, transparency through data availability. This study similarly approaches the topic of transparency from the prism of the citizens' rights to access information about PPP projects. This study therefore adopts the standards of transparency advanced by Hodge and Greve. The researcher seeks to test their applicability and relevance in Uganda.

Reynaers and Grimmelikhuijsen, in a study on transparency in PPPs using a case study of four PPPs in the Netherlands, conclude that while the scholarship on transparency in PPPs has largely focused on external transparency, internal transparency is equally important.³³ They define external transparency as the extent to which internal information is visible to the outside world

³² Hodge G. and Greve C., (2012), "*Public Private Partnerships: Observations on Changing Forms of Transparency.*" The 2nd Global Conference on Transparency Research, Utrecht, Holland. Available at: <http://www.transparencyconference.nl/wp-content/uploads/2012/05/Hodge-Greve.pdf> [Accessed on 11th August, 2023].

³³ Reynaers, A.M., and Grimmelikhuijsen, S.G. (2015) "*Transparency in Public-Private Partnerships. Not so bad after all?*" Public Administration Vol. 93, No.3, 2015 (609-626).

whereas internal transparency is the availability and inferability of information for the public procurer. In particular, they emphasize that a crucial component in the definition of transparency is the availability of information and that availability does not simply mean that information is visible or accessible to a person or stakeholder but rather that it can also be understood correctly. Lastly, they caution that transparency in PPPs may become problematic because of the strong emphasis on external transparency without due regard to internal transparency.

This study provides valuable insights that enrich the discussion on the prevailing legal framework for transparency in PPPs in Uganda as well as recommendations and proposals. While the paper is based on a sample space of four PPP projects in the Netherlands, the overall framework on the mode of disclosure as well as the distinction between internal and external transparency supports the present study's case for proactive and mandatory disclosure. While there are clear differences in scope and territory the policy proposals made enrich this study as well.

McGrath et al, in a discussion on PPP projects in Central and Eastern Europe, point out that the lack of transparency has become a universal PPP trend as it has been shown that information regarding PPPs is very difficult to obtain, even in countries that have the reputation of having a very developed freedom of expression and information tradition and culture.³⁴ Although this is a study limited to the experience of PPP projects in Central and Eastern Europe, the assumption about restricted information flow about PPPs is adopted in this study which reviews the practice in Uganda.

The study on Central and Eastern Europe therefore enriches the present study with assumptions about secrecy in PPP projects though contextual differences remain. The present study benefits from knowledge about the occurrence of secrecy being one of the common features of PPPs in Central and Eastern Europe. This facilitates a better appreciation of the causes of this reputation and informs the recommendations made. This research study, however, goes far beyond evaluating the information culture about PPPs and makes proposals for combatting limited information flow. In that regard, it has a much wider reach in scope than the cited study on PPPs in Central and Eastern Europe.

³⁴ McGrath, F.B, Cisarova, E., Eger, A., Gallop, P., Kalmar, Z. & Vera, P. (2008), "*Never mind the balance sheet: The dangers posed by public-private partnerships in Central and Eastern Europe*" CEE Bankwatch Network, Accessed 20 October 2023 from http://www.bankwatch.org/documents/never_mind_the_balance_sheet.pdf.

Reeves argues that transparency is an important issue in the PPP debate seeing as various institutions exercise public powers using public funds to provide public goods and services.³⁵ It is against this background that he argues that the institutions should be held accountable to satisfactory standards as required by those on whose behalf they act. It is his take that in the context of PPPs, the client (contracting authority) is responsible for making the contractor accountable for performance in accordance with a written contract. However, the client is ultimately accountable (to some degree) to Parliament and the wider citizenry for service delivery and its management of the PPP.

He also takes the view that transparency serves to improve accountability because the more accessible and assessable PPPs are, the higher the degree of vertical accountability within the policy process and horizontal accountability among interested parties and stakeholders. He continues to point out that accountability and transparency are core principles when prioritizing the realization of value for money in PPP projects. This is because not only does transparency lead to better management of programmes and projects in future undertakings, but it also increases openness of the projects.

Reeves' paper is in the context of Ireland while this study focuses on Ugandan PPPs in particular. However, this study adopts the same theoretical premise on the importance of transparency. This study proceeds to apply it to the Ugandan context and it evaluates the extent to which the existing legal framework guarantees transparency by way of disclosure and permitting access to information in PPP projects. In this way, this study complements the work done by Reeves in regard to PPPs in Ireland.

Regarding transparency through the right to access/disclose information, the World Bank in a research report reviewed the practices on disclosure of information on PPP projects and contracts across 11 jurisdictions. It established that although there is not yet a body of evidence linking the transparency of information on PPPs to program/project performance, there are reasons to believe that significant disclosure helps PPP projects to achieve better value for money.³⁶ Furthermore, the research established that a substantial number of jurisdictions require online disclosure of PPP

³⁵ Eoin Reeves, (2013), "*Mind the Gap: Accountability and Value for Money in Public Private Partnerships in Ireland.*" C. Greve and G. Hodge (ed(s).), (2016), "Rethinking Public Private Partnerships: Strategies for Turbulent Times." Routledge Taylor and Francis Group.

³⁶ World Bank Institute, (2013), op. cit.

contracts implying that disclosure of information about PPP contracts, without prejudice to commercially confidential information, is a popular practice. Out of the eleven (11) jurisdictions surveyed in the report, nine (9) have proactive disclosure regimes.

The report also provides vital information that focuses on the need for transparency in PPP projects. The transparency in question includes public disclosure of PPP contracts and information. However, of the eleven (11) jurisdictions reviewed by the World Bank, only one is from Africa and it is therefore not representative of the situation in Sub-Saharan countries such as Uganda which is the focus of this study. It should be noted that PPPs contracts are of a complex nature and operate through the private law domain which raises transparency issues. The study affirms that critics of PPPs are concerned that governments make use of these contracts to conceal project information that should be provided to the general public against a backdrop of protecting commercial information in PPP arrangements. This study adopts some of the standards advanced by the World Bank in its report on disclosure in PPP projects. However, the study takes into account the local context in Uganda which is lacking in this World Bank report.

Hodge summarizes the opinions of various authors on PPPs in developing countries when he describes the process in “transition countries” as having lack of regulatory capacity and a lack of market mechanisms.³⁷ Hodge argues that regulatory capacity and market mechanisms are needed to maximize citizen benefits in the arena of PPPs especially with regard to transparency.³⁸ The researcher interrogates the importance of a clear regulatory framework for PPPs in Uganda to achieve strategic benefits to the nation. In this study, the importance of a clear regulatory framework on disclosure of project information in PPPs is considered. The study applies the argument made by Hodge in relation to PPPs in transition economies with a particular bias on Uganda which does not feature sufficiently in the global literature.

Hodge and Greve discuss various concerns over fundamental accountability at the levels of policy, project governance and financial transparency in PPPs.³⁹ They state that in both Canada and the

³⁷ Graeme Hodge, (Ed.), (2006), *Privatization and Market Development: Global Movements in Public Policy Ideas.* Edward Edgar Publishing Ltd.

³⁸ The potential use of any mega-credit arrangement by government should send waves of concern to citizens worried about the misalignment of political incentives in the short term compared with long-term implications and financial outcomes.

³⁹ Hodge G. and Greve C. (ed(s).), (2005) *The Challenge of Public Private Partnerships: Learning from International Experience.* Edward Elgar Publishing.

United Kingdom, there are various concerns that PPPs are a form of ripping off the taxpayer. They are of the view that PPPs seem to provide only limited opportunity for meaningful levels of transparency or public participation thereby fomenting a culture of secrecy. Additionally, they argue that less information in such instances amounts to guilt in the eyes of citizens regardless of whether the case is proven or not. However, the text does not address the peculiar situation of PPPs in Uganda or even sub-Saharan Africa unlike what this study intends to do. In agreement with this analysis, this study makes the case for improved citizens' access to information about PPP projects in Uganda.

Osborne⁴⁰ points out that the legislation on procurement highlights characteristics of the market orientation that was prevalent in European policies.⁴¹ It is visible that the rules mainly focus on transparency and the openness of that characterizes contracting-out procedures.⁴² He argues that the essential values at stake are the principles of non-discrimination, equality of treatment, transparency, mutual recognition and proportionality. He also makes reference to the European Court of Justice (ECJ) which opined that the principle of equality of treatment is a fundamental aspect of community law and forbids all forms of discrimination. According to him, the implication herein is that in public-private relations, the procurement processes ought to be conducted objectively and transparently; they also ought to comply with the procedural rules and basic requirements originally agreed upon.

However, his book focuses on the European Union and how its legal and policy framework for transparency was set up with the intention of fighting corruption in PPPs. This study focuses on the disclosure of PPP project information under Ugandan law but equally adopts the assumption that improved transparency is also an anti-corruption measure. Similarly, Osborne's argument that improved disclosure also restricts corrupt tendencies is assumed in this study. Uganda and the incentives that pushed the government to come up with the PPP Act 2015 and all the subsidiary regulations and guidelines that have been passed thus far with the aim of facilitating the running of PPPs in Uganda. This study also discusses the effectiveness, if any, of the laws, regulations and

⁴⁰ Osborne P. Stephen, (2005), *Public Private Partnerships: Theory and Practice in International Perspective.* Routledge Taylor & Francis Group.

⁴¹ Geert T.R and Klijn E., (2000), *Public-Private Partnerships in the European Union: Officially Suspect, Embraced in Daily Practice.* Routledge Taylor and Francis Group.

⁴² For example, Directives 93/36/EEG, 93/37/EEG and 92/50/EEG concerning public orders for deliveries, works and services, the so-called classical guidelines

guidelines in ensuring that there is transparency in PPPs in Uganda as a way of fighting wastage and achieving value for money.

Gramberg et al note that the use of ‘commercial-in-confidence’ principles in PPP arrangements between the government and its private partners are constantly challenged as raising issues of transparency.⁴³ They argue that in all places where there is a long-established tradition of media scrutiny and formal avenues for access to government information, there nonetheless remain deficits in transparency. They warn that PPPs often impose unexplained, even unforeseen costs on the taxpayers and that there is still insufficient information as to whether these projects indeed deliver on their promises. The case study on the construction project of Lubowa Hospital investigates this warning about the transparency deficit of PPP projects. The study also addresses the mystery surrounding this project especially given that little to no information ever reaches the public about it. The author’s contention that PPPs hinder transparency is tested and acknowledged in this study even though its context was largely Europe and Australia. The context of the present study is Uganda.

On a more technical note, Vining et al affirm that profit making private sector entities are adept at ensuring that they are fully compensated for risk taking, and as a result, the public sector have ended up largely or completely financing the PPPs and bearing the risks. At the extreme, some private sectors tend to establish “stand alone” operating firms when carrying out PPP contracts that entail large risks from technological or demand uncertainty.⁴⁴ Additionally, Vining et al note that case studies conducted in European countries like UK, Netherlands and Denmark, Australia reveal similar findings that governments have not been particularly successful at shifting risk to private sector partners.

The scholars thus emphasized that “there are no free lunches” and recommend that governments learn, individually or collectively, to adequately specify contract conditions and institutional conflict resolution mechanisms. Where the conditions of the contract are properly laid down and are made known to all parties, it becomes easier for all parties to be held accountable and for

⁴³ Gramberg B. V., Keddie J. and Neesham C., (2013), “*Australia: Evaluating Performance in Public Private Partnership Projects.*” In, J, Teicher et al (ed(s).), (2013),” *Sharing Concerns: Country Case Studies in Public Private Partnerships.*” Cambridge Scholars Publishing.

⁴⁴ Vining A. R., Boardman A. E. and Poschmann F., (2005), “*Public Private Partnerships in the US and Canada: There are no free lunches.*” *Journal of Comparative Policy Analysis Research and Practice*, 7/3, pp. 199-22.

mechanisms ensuring that there is transparency in all transactions to be enforced. While Vining's study is restricted to North America, this study also demonstrates that indeed even in Uganda, the public sector has learnt the hard way that while contracting with the private sector in PPP projects, "there are no free lunches". Several PPP projects concluded in Uganda such as in the energy sector have gained a reputation for being very expensive and ripping off the taxpayer. This study provides a detailed case study of the controversial Lubowa hospital construction project that appears to have significantly ripped off the Ugandan taxpayer.

On the other hand, Nolwazi analyzes a PPP housing project in Durban, South Africa, and concludes that PPPs have proven to be an effective delivery method in infrastructure and services.⁴⁵ However, she points out that a number of projects failed because while there is clear benefit from risk distribution and participation of the private sector, there is a gap in both delivery and uptake of the final product. She is of the view that there are many long-term effects that PPPs are likely to have, some of which can be averted by ensuring that there is sufficient transparency at all stages of the PPP project. This study considers the concerns made within PPPs in housing in Durban and evaluates the extent to which they hold true in Ugandan PPPs as well. Additionally, this study scrutinizes existing practices in South Africa on access to information about PPP projects for comparison. The learned author therefore contributes to enriching the present study in contextualizing South Africa which is relied on for comparison.

By contrast, Dhiram reviews Kenya's public private partnerships in the road's subsector and argues that a clear legal and regulatory framework has the effect of increasing, inter alia, the transparency of the projects.⁴⁶ He then reviews existing legislation in Kenya. This study's comparison of Uganda's legal framework with Kenya's is partly enriched by this assessment and since Kenya's PPP Act 2021 is also considered. However, the study does not address transparency in Kenyan PPP projects in terms of access to information about projects. The present study does so and even goes further to review Kenya's legal framework on disclosure of information about PPP projects.

⁴⁵ Nolwazi Blose, (2015), "An Assessment of the Role of Public-Private Partnership Models in the Delivery of Affordable Housing in South Africa: A Case Study of SOHCO Property Investments, Durban." University of Kwazulu-Natal, South Africa.

⁴⁶ Dhiram Hadija Rahama, (2012), "Critical Success Factors for Public Private Partnership Projects in the Kenyan Road Sub-Sector." University of Nairobi, Kenya.

Oxfam, in a wide-ranging brief, criticizes the Queen Mamohato Memorial hospital PPP that was built by Lesotho's Ministry of Health with support from the World Bank.⁴⁷ It is argued that this hospital PPP project threatens to bankrupt Lesotho as it costs USD 67 million per annum and consumes more than half of the total government health budget annually. It is argued that this PPP project confirms international evidence that health PPPs are high risk, costly and fail to advance the goal of universal and equitable health coverage. These observations about Lesotho's costly PPP hospital have also been noted by Mukherjee Joia et al.⁴⁸ This study provides an important juxtaposition for the case study of Lubowa Hospital.

There are numerous similarities between the proposed construction of an international specialized hospital at Lubowa and the Queen Mamohato Memorial hospital PPP project in Lesotho. Oxfam's concerns over the cost of this hospital PPP resonate with some of the concerns raised about the present case study. The recommendations made in the present study take into account the circumstances and ending of the Queen Mamohato Memorial hospital PPP which was terminated in 2021 by the government of Lesotho.

1.9.2 Transparency in Public Private Partnerships in Uganda

In terms of the available Ugandan literature on transparency in PPPs, Mugurura and Ndevu in a study on the legal and policy framework for PPPs in Uganda conclude that the lack of integrity in both the public and private sector has serious negative effects on the delivery of infrastructure initiatives particularly within the roads sector.⁴⁹ They further point out that the state's insistence on leaving key PPP processes in the hands of the private sector exacerbates the problem especially in view of the fact that the private sector is not well organized, mature, knowledgeable and coordinated.

They also point out that private sector respondents in their study on the state of PPPs in the roads sector complained that public servants were very secretive when it comes to information on forthcoming PPP projects. It is found in their study that the standard response from public servants

⁴⁷ Oxfam Briefing Note, 7 April 2014 "*A Dangerous Diversion. Will the IFC's flagship health PPP bankrupt Lesotho's Ministry of Health?*".

⁴⁸ Mukherjee Joia et al, 2020 "*Global Cash Flows for Sustainable Development: A Case Study of Accountability and Health Systems Strengthening in Lesotho.*" *Journal of Health Care for the Poor and Underserved*, Volume 31, Number 1, February 2020, pp. 56-74

⁴⁹ Mugurura, J. & Ndevu, Z., 2020 "*The legal public-private partnership framework and policy implementation in Uganda*", *Africa's Public Service Delivery and Performance Review* 8(1), a346. <https://doi.org/10.4102/apsdpr.v8i1.346>.

was that information sought about potential PPP projects was confidential. They emphasize that the secrecy with regard to PPP contracts, which are in fact public documents, is so systemic that even the country's parliamentarians beg to have access to contracts signed between the government and private sector partners.

This study confirms the existence of a systemic lack of disclosure of information about PPP projects by the Ugandan government and the culture of secrecy pervading the entire PPP space even though it was confined in scope to PPPs in the roads sector. However, it does not review the extending legal framework designed to combat this culture of secrecy. Neither does the study make any suggestions or recommendations to combat this systemic lack of transparency in PPPs. By contrast, the present study not only reviews the extent to which the legal framework is designed to mandate disclosure of information in PPP projects, but it analyses the same and makes appropriate recommendations to improve disclosure and combat the culture of secrecy in the PPP space.

Bagenda and Ndevu argue that PPP projects are generally prone to several risks and that in the Ugandan context, the top risks identified in respect of PPP projects in the country include government corruption, construction cost overrun, inadequate tender competition and inability to service debt.⁵⁰ Although this study does not directly address the question of disclosure of PPP contracts to the public, it implicitly recognizes that corruption and inadequate tender competition pose a big risk to conduct of a successful PPP project. Similarly, their research does not consider the prevailing legal framework on PPP projects in Uganda unlike what this study intends to do. The present study argues that one of the ways of curbing corruption in PPP projects is enhancing disclosure of information. Similarly, inadequate tender competition is a direct consequence of poor information disclosure practices that can be combatted in the ways proposed and advanced in the present study. This research paper on the principal risks in PPP projects in Uganda.

Ndandiko points out that the implementation of PPPs in developing countries in Sub-Saharan Africa does not seem to reflect the perceived benefits of PPP projects especially in the context of local governments.⁵¹ He contends that in the absence of strong public and or private sector

⁵⁰ Bagenda Bonny and Zwelinzima Ndevu, 2023 "*Principal Risks Associated with Public-Private Partnership Projects in Uganda.*" *Public Works Management & Policy* 2023, Vol. 0(0) 1 – 48 Available at <https://journals.sagepub.com>

⁵¹ Ndandiko Charles, (2010), op. cit.

institutions and an adequate framework, an unsystematic introduction of PPPs in local governments could worsen infrastructure and service delivery.

Additionally, Ndandiko reveals in his findings on the performance of PPPs in selected municipalities in Uganda, that all seven municipalities complained of political interference, poor quality services and corruption while pointing out that the key barriers to proper implementation of private participation were lack of an appropriate legal and regulatory framework, poor revenue base and incompetence of providers among others. Ndandiko's study is detailed on the flaws associated with PPPs in local governments in Uganda. However, it does not address the transparency problems pointed out seeing as its main focus is the effectiveness of PPPs in local governments. Further, it does not review the legal framework for disclosure of PPP information even within the context of local governments in Uganda. The present study does so and makes appropriate recommendations for improving information disclosure.

Nsasira et al, having reviewed two case studies of PPP projects in Uganda's energy sector, conclude that successful implementation of a PPP project depends largely on the development of capacity, sound legal procedures, agreements and contracts that clearly define the relationship between government agencies and private firms.⁵² The authors point out that there is a need for government to regulate and monitor PPPs to ensure compliance with agreed performance targets. In particular, they recommend that government, as the principal stakeholder in PPPs, needs to develop its capacity to plan, negotiate, implement and monitor successful PPP projects. This is necessary in view of the fact that the two case studies reviewed by the authors highlighted the lack of capacity on the part of government to conduct successful PPPs in electricity generation.

Nsasira et al's other study was restricted to PPPs in the energy sector. It does not interrogate the extent that information about the PPPs in their case study was publicly accessible. This study comprehensively addresses that. The present study focuses on one PPP in the healthcare sector. Furthermore, Basheka et al do not review the legal framework governing PPPs in Uganda. In my study, I do so and focus on the extent to which this framework assures transparency.

⁵² Nsasira R., Basheka B. C. and Oluka P. N., (2013), "*Public Private Partnerships (PPPs) and Enhanced Service Delivery in Uganda: Implications from the Energy Sector.*" International Journal of Business Administration, Vol. 4, No.3. Available at: <https://doi.org/10.5430/ijba.v4n3p48> [Accessed on 12th August, 2023].

Furthermore, Akampurira et al review the factors influencing performance of PPPs in the electricity sector in Uganda.⁵³ They maintain that that the private sector players regarded the existing regulatory and legal frameworks as being attractive for private sector participation and this was enhanced by government's commitment to honor its contractual obligations. Additionally, they point out that difficulties in structuring and obtaining finance in addition to the cumbersome approval processes and resistance from environmental groups were significant constraints to the development and implementation of PPPs in Uganda's electricity sector.

Their findings indicate that the most significant constraints in their order of importance are the inability of local institutions to provide equity financing, multiple requirements to obtain project approvals, lengthy project approval process, delays as a result of lengthy bureaucratic procedures, resistance from environmental groups and poor coordination between government departments. They restricted their focus on the electricity sector PPPs and did not address the legal framework on disclosure of project information and the citizens' right to access such information. We do so in the present study. Further, the present study also addresses questions relating to transparency which the captioned study did not address.

Last but not least, Kayaga affirms that several studies have shown evidence of positive performance trends of urban water utilities under PPPs but most econometric analyses of the effects of water privatization in lower income economies show little evidence that PPPs resulted in marked improvement in performance.⁵⁴ In particular, the study points out that other studies have found that levels of corruption and governance are far more important in explaining the difference in efficiency than PPPs. Case studies from Guinea, Gabon, Senegal and Cote d'Ivoire show that on the whole, performance of water utilities under PPPs had not changed dramatically.

In the Ugandan context, Kayaga further points out that the National Water and Sewerage Corporation (NWSC) did not improve when it was under public private partnership but it made significant efficiency gains under public management. In light of this, the author concludes that there is no link between PPPs and performance improvement in regard to the provision of water and sanitation services in many Sub-Saharan countries including Uganda. Kayaga's study presents

⁵³ Akampurira E. et al, (2009), op. cit.

⁵⁴ Kayaga Sam, (2009), "*Have Public Private Partnerships (PPPs) Improved Performance of Urban Water Utilities in Sub-Saharan Africa? The Case of Uganda.*" Annual Conference of the US Allied Social Sciences Association, San Francisco, USA.

a skeptical attitude towards PPPs. However, it should be pointed out that his research findings are restricted to provision of water and sanitation services. It is also worth pointing out that corruption or lack of transparency is a serious impediment to effective provision of public services or goods - whether utilizing the PPP framework or not. This study did not address the issue of transparency in terms of disclosure of information and whether citizens are able to access material information about the provision of water irrespective of the model used. By contrast, this study exhaustively discusses the rights of citizens to access contract information about ongoing PPP projects or even from State agencies.

Conclusion on literature review

There is diverse global literature on the subject of transparency in PPP projects as highlighted though most of it tends to be country specific save for the targeted publications by the World Bank which has vested interests in promoting PPPs as a funder. However, the review of the literature demonstrates that although a number of studies have been conducted on PPP projects in the Ugandan context, there is still a knowledge gap between what is documented and what is yet to be documented. In particular, there is very limited literature on the disclosure and access to information in PPP projects in Uganda. There is also hardly any discussion on the role of the legal framework in fostering disclosure and access to information on PPP projects in Uganda.

The present study sets out to fill that knowledge gap and provides a systematic review of the extent to which the legal framework governing PPPs in Uganda provides for the citizen's right to access information and compels disclosure by public bodies as a way of fostering transparency in these projects.

1.10 CHAPTERISATION

Chapter One of the study introduces the subject of research. and provides the necessary background information regarding the area of study in addition to presenting the topic of research, the statement of the problem, the objectives, research questions, theoretical framework, methodology that was adopted, and the literature review.

Chapter Two of the study reviews the legal and institutional framework for transparency in PPP projects in Uganda. This is necessary for purposes of understanding the body of legislation that is

in place to ensure transparency in PPPs especially through disclosure of material project information to the public and other stakeholders.

Chapter Three provides an in-depth analysis of the case study of the project for the construction of an international specialized hospital at Lubowa. It discusses the background and current status of this project whose design is fundamentally that of a PPP project despite rhetoric to the contrary from some technocrats.

Chapter Four contains a comparative review of the legal framework for transparency in PPPs. It covers model practices and recommended legal provisions on disclosure of PPP project information especially through the prism of the World Bank which is a key promoter and financier of PPP projects all over the world. The comparative review then trickles down to a regional perspective of transparency by comparing Uganda with Kenya and South Africa.

Chapter Five contains the conclusions, findings and recommendations made from the study. These build on the analysis and discussion in chapters two, three and four respectively. The findings are pointed out and then recommendations flowing from them are presented and explained.

CHAPTER TWO: THE LEGAL FRAMEWORK FOR TRANSPARENCY IN PPP PROJECTS IN UGANDA

2.0 INTRODUCTION

This chapter analyzes the provisions intended to aid or require transparency in the legal framework that governs the operation of PPPs in Uganda. The provisions of interest to this study are those which require disclosure of information about PPPs or those which require the public sector to release information in its custody to requesting members of the public. The aim of this analysis is to investigate the extent to these legal provisions enabling disclosure of project information in PPPs are satisfactory.

The importance of a sound legal framework for the incorporation of private sector participation in PPPs is not debatable.⁵⁵ Regulation provides assurance to the private partner and guarantees protection from expropriation, arbitration of commercial disputes and legitimate recovery of costs and profits that are proportional to the risk undertaken.⁵⁶ The argument here is that a sound framework that enhances transparency is not only good for the public sector but also the private players in the PPP space. This study reviews the legal framework from that premise.

2.1 ANALYSIS OF THE LEGAL AND INSTITUTIONAL FRAMEWORK FOR TRANSPARENCY IN PUBLIC-PRIVATE PARTNERSHIP PROJECTS IN UGANDA

On 1st July 2015, Uganda joined the list of African countries that have enacted specific Public Private Partnership legislation when Parliament passed the highly anticipated Public Private Partnerships (PPPs) Bill. It was assented to by the President expeditiously on 12th August 2015. The new law sought to fill the lacuna, introducing a legal framework for the regulation of the development and implementation of PPPs in the country.

The objective of the legislation, from its preamble, is to guide and regulate the procurement, implementation, maintenance, operation, management, and monitoring of PPPs from the point of the project's conception to the point of its conclusion. It captures the core infrastructural areas for which PPP arrangements may be made, including but not limited to, transportation, water management, oil and gas pipelines, tourist infrastructure, sports and recreational facilities, mining, energy related facilities, social infrastructure inter alia.

⁵⁵ Nutavoot Pongsiri, (2002), "*Regulation and Public Private Partnerships.*" International Journal of Public Sector Management, Vol. 15 No. 6, pp. 487-495.

⁵⁶ Ibid.

While the PPP Act 2015 is the most important legislation governing PPP projects, there are important provisions in the Constitution and other Acts of Parliament as the discussion below demonstrates. In particular, the Access to Information Act 2005, is the most critical legislation that provides for disclosure to citizens of information held by Government bodies. Freedom of information laws are generally considered the enablers of disclosure of information about PPP projects. It goes without saying that freedom of information laws are therefore the primary enablers of transparency in public private partnership projects.

2.1.1 The Constitution of the Republic of Uganda, 1995 (as Amended.): Transparency and Access to Information

Access to information held by Government agencies, which is at the heart of disclosure of information to citizens, is a constitutional right provided for under Article 41 of the Constitution as amended. The Article provides that:

Every citizen has a right to access information in the possession of the State except where the release of the information is likely to prejudice the security or sovereignty of the state or interfere with the right to privacy of any other person.

Article 41 has been interpreted by the Supreme Court to include the right of citizens to access and use official government records in court proceedings without any legal hindrance. For this reason, the Supreme Court found that Section 15 of the National Assembly (Powers & Privileges) Act Cap.258, which restricted use in evidence of contents of parliamentary proceedings, violates Article 41(1) of the Constitution.⁵⁷ Similarly, it was held that Section 121 of the Evidence Act Cap.6 which restricted use in evidence of contents of unpublished official records violated Article 41 of the Constitution.⁵⁸ The import of these decisions is that spirited citizens who obtain access to Agreements concerning PPP projects may use them to initiate legal action to challenge any illegalities surrounding such projects.

It has been argued that Article 41 of the Constitution is crucial for enhanced government openness and increased accountability.⁵⁹ In a review of the decision of the high court in *Sulaiman Kakaire*

⁵⁷ *Paul Ssemogerere and Zachary Olum v Attorney General, Constitutional Appeal No.1 of 2000*

⁵⁸ *Maj.Gen.David Tinyefuza vs Attorney General, Supreme Court Constitutional Appeal No.1 of 1997*

⁵⁹ Oloka-Onyango, Joe, (2015) “*Free at Last? Kakaire’s Case and the Quest for a Right to Truth in Uganda*” (September 28, 2015). Available at SSRN: <https://ssrn.com/abstract=3617261> or <http://dx.doi.org/10.2139/ssrn.3617261> (Accessed 24th November 2023)

and David Lumu vs Parliamentary Commission and Clerk to Parliament, Miscellaneous Cause No.232 of 2013, it is contended that though the Trial Judge determined the matter in the context of the right to a fair hearing under Article 28 of the constitution, the application also presented an opportunity to advance the scope of Article 41 to include the right of journalists to access premises of state agencies from where they derive information.⁶⁰ Unfortunately, the high court missed the opportunity presented by that application to expand the scope of the application of Article 41 as highlighted in the literature.

There is no doubt that citizens' access to information is core to transparency. As a result, it has often been argued that the use of PPP projects may not be the best public policy approach if the community would be disenfranchised because of lack of public access to information about these projects.⁶¹ Lack of public access to information undermines transparency of government affairs and it is against that background that Article 41 must have been enacted.

The constitutional right to access information in the possession of the Government of Uganda or a parastatal under the Government was examined in *Greenwatch (U) Ltd versus Attorney General and Uganda Electricity Transmission Company Limited*. The Applicant Company, a civil society organization, sought to obtain copies of two Agreements providing for purchase of power by the Government of Uganda from a private company AES Nile Power Ltd.⁶² The Respondents argued that they were not bound to disclose information about the Implementation Agreement and Power Purchase Agreement (PPA) entered into by Uganda Electricity Transmission Company Ltd (UETCL), a limited liability company. The Respondents argued that the second Respondent, is a company of its own and was therefore different from an agency of the Government of Uganda not bound by the provision under Article 41 (1) of the Constitution.

Justice FMS Egonda - Ntende dismissed this line of argument on grounds that UETCL was a company wholly owned by the Government of Uganda which qualified it to be a government agency for purposes of Article 41 (1) and held that the PPA in the custody of the respondents were public documents which were subject to Article 41 (1) of the Constitution. However, the Court

⁶⁰ Ibid

⁶¹ Sands, V (2006) "*The Right to Know and Obligation to Provide: Public Private Partnerships, Public Knowledge, Public Accountability, Public Disenfranchisement and Prison Cases*" UNSW Law Journal 2006 Vol.29(3) pp.334 at 341

⁶² HCT-00-CV-MC-0139 OF 2001.

declined to order production of the agreements to the Applicant on grounds that the Applicant had not proved that it was a Ugandan corporate citizen yet only a citizen could access such information.

The Court, though holding that a company could qualify to be a citizen for purposes of Article 41(1), held that the Applicant did not prove its membership to enable a determination as to whether it was indeed a corporate citizen. Consequently, the Court declined to order production of the Agreements in issue to the Applicant. While the outcome was disappointing on the facts, the legal principles surrounding the application of Article 41 of the Constitution were ably canvassed by the court in the researcher's view and they remain valid. The fact that Agreements entered into by any government agency with a private party qualify to be public documents was particularly important and may have influenced subsequent litigation over this question. Considering that PPP Agreements are entered into by government agencies partnering with private parties, these agreements qualify to be public documents in light of the reasoning of the court.

This position was applied, in *Green Watch vs Attorney General*,⁶³ by Lady Justice Lydia Mugambe. The Learned Judge ordered the disclosure to the Applicant of copies of agreements concluded between the Government of Uganda and oil companies in respect of oil exploration, oil exploitation, oil production and revenue sharing agreements.

The learned Judge held that the Attorney General failed to demonstrate how allowing the Applicant to access the said oil agreements would prejudice the sovereignty or security of Uganda or interfere with the privacy of any other person. In particular, she held that confidentiality clauses between contracting parties could not, on their own, vitiate a constitutional right or qualify for the exception clause prescribed within Article 41(1) and Section 5(1) of the Access to Information Act.

The reasoning of the Court suggests that PPP Project Agreements are by implication public documents whose disclosure can and should be permitted notwithstanding any confidentiality clauses. In fact, there are a number of PPP arrangements within the oil and gas sector such as the oil refinery construction.⁶⁴ The only permissible grounds for not disclosing contents of PPP Project Agreements are if such disclosure would prejudice the sovereignty or security of Uganda or interfere with the privacy of any person. Clearly, these exceptions are unlikely to exist in the bulk

⁶³ Miscellaneous Cause No.232 of 2009.

⁶⁴ Uganda Refinery Project, at www.petroleum.go.ug.

of PPP Project Agreements except perhaps those to do with security matters such as construction and installation of military infrastructure.

It should also be noted that under the Constitution, all citizens have the duty to combat corruption and the misuse or wastage of public resources. Additionally, citizens have a constitutional duty to protect and preserve public property. These constitutional duties give all Ugandans reasonable ground to demand for disclosure of information relating to PPP projects for scrutiny since PPP projects involve the usage of public resources or assets. In some PPP projects, public property is turned over to management by private parties. Citizens therefore have a right to know the details of such arrangements between the public sector and private partners concerning usage of public property to enable them discharge their constitutional duties to combat corruption, misuse of public resources and protect public property.

In *Issa Kikungwe & 4 Others vs Standard Bank Investment Corporation & 3 Others*⁶⁵, the question of whether the citizens' constitutional duty to protect public property extended to petitioning courts of law to stop privatization of a public asset was considered favourably by the High court and answered in the affirmative. The Applicants, who were Members of Parliament, petitioned the commercial division of the high court protesting the impending sale of a high rise building that had initially belonged to a publicly owned Uganda Commercial Bank. They complained that the Agreements touching the sale of the flagship building were mired in secrecy and had not been disclosed even to Members of Parliament.

They contended that this building had not been part of the assets transferred to the first Respondent South African bank during the privatization process and that the Purchase Agreement touching this process had not been disclosed. The Respondents, who had concluded a privatization process of a public entity, Uganda Commercial Bank, contended that the terms and Agreements touching the process were confidential and could not be disclosed.

Justice Geoffrey Kiryabwire (as he then was) disagreed with the Respondents' stance in declining to divulge whether this building was part of the assets whose ownership they had taken over. He held that transparency and full disclosure were critical in privatization and could not be curtailed by Agreements with confidentiality clauses:

⁶⁵ HCT-00-CC-MA 394 of 2004

I think that it is this sense of confidentiality that has led to this dispute. It is a matter of full disclosure. I wonder how the privatization of a once public institution can be viewed as confidential in this era of transparency and public accountability. It is for this reason that I considered it fit for the actual Agreement of Sale of 2001 to be brought to Court for inspection. I find on basis of the authorities I have reviewed that the Applicants being Public-spirited Citizens have locus standi under Article 17 (1) (d) of the Constitution, our public law to bring this action.

However, the learned Judge ruled that the granting of locus standi to institute such an action was a matter of discretion which required an applicant to prove citizenship in Uganda, sufficient interest in the matter and not a mere busybody, issues raised for decision should be sufficiently grave and of sufficient public importance. Lastly, he held that they must involve a high constitutional principle. The import of this ruling is that the details of commercial undertakings between the public sector and private players could not be concealed as citizens have a right to know about them and ensure that public property is protected.

Logically, in light of this ruling on the question of locus standi, it follows that the State has a constitutional obligation to ensure that information is disclosed about undertakings involving leasing or sale of public property to private partners. Leasing of public property to private partners is a common attribute of PPP Agreements and citizens have a right to access information about the details of such arrangements. This enables citizens to fulfill their obligations to preserve public property and to combat possible corruption and misuse of public resources in such transactions. Disclosure of information about matters such as ongoing PPP infrastructure projects is therefore an important constitutional obligation as it equips citizens with knowledge that enables them to make sound judgment about the manner in which their leaders are using public resources. This knowledge enables citizens to discharge their constitutional duties under Article 17 of the Constitution.

Further, the Constitution establishes institutions that are charged with the realization of transparency in projects involving public resources. For instance, the Office of the Auditor General is created under Article 163 with the role of auditing all public accounts of Uganda and conducting financial and value for money audits in respect of any projects involving public funds.⁶⁶ The Constitution mandates the Auditor General to disclose the findings of such audits to Parliament⁶⁷

⁶⁶ Article 163 (3), *ibid.*

⁶⁷ Article 163 (4), *ibid.*

which is then required to take appropriate action upon deliberation on the reports presented to it.⁶⁸ This institution is critical for transparency in infrastructure financing in the sense that it discloses results of its audits of PPP projects to the people's representatives in Parliament and this disclosure helps in exposing any corruption or fraud in PPP projects.

To ensure that Government borrowing is done with careful consideration, the Constitution prescribes the precise manner that the Government ought to take before it makes any financial commitment.⁶⁹ The Government is required to seek parliamentary approval for any loan, and then present the terms and conditions of the loan before Parliament before paying the money procured into a public fund created for the purposes of the loan. This is important for PPP projects since a number of them involve debt financing of public infrastructure. The requirement for the people's representatives to approve all debt financing involving the Government enables disclosure of details. It is this requirement which compelled the Attorney General to advise the Ministry of Finance, Planning and Economic Development that the issuance of promissory notes to the private contractor on Lubowa Hospital required parliamentary approval. This compelled disclosure of material information about this project to Parliament and derivatively, the general public.

Clause 5 of Article 159 provides that Parliament has the discretion to authorize the Government to enter into arrangements for the giving of a loan or a grant of any public fund or public account. This is relevant for PPPs in the sense that there can arise a situation where the Government makes certain concessions in respect to revenue collected from the users of the complete project (for example, a toll road) and this can only be done with the approval of Parliament. As already highlighted, this requirement enables disclosure of certain agreements about intended PPP projects to parliament as a prerequisite for obtaining parliamentary approval.

There is no doubt therefore that the Ugandan Constitution heavily favors disclosure of project information about PPPs to the public especially through creation of a constitutional right of citizens to access information in the hands of the State. However, this disclosure of commercial information about PPP projects has not been adequately tested in the Courts of Law to establish firm and conclusive precedents on its content and scope.

⁶⁸ Article 163 (5), *ibid.*

⁶⁹Article 159, *ibid.*

2.1.2 The Access to Information Act, 2005

In a bid to define the boundaries within which the constitutional right to access information under Article 41(1) may be exercised, the Access to Information Act, 2005 was enacted. Essentially, the Act re-enacts the provisions of Article 41(1) of the Constitution as one of its key provisions regulating access to information.⁷⁰ The Access to Information Act 2005 was operationalized by the Access to Information Regulations, 2011. The Act and the Regulations specify the information that is accessible to the public and the procedure that ought to be followed in seeking to access information in possession of the State. Additionally, the Act also defines the restricted classes of information.

It is important to note that the expressed purpose of the Act, as stated in its preamble, is to promote an efficient, transparent and accountable government, give effect to article 41 of the Constitution, promote transparency in all organs of the State through provision of timely, accessible and accurate information. The Act also seeks to empower the public to effectively scrutinize and participate in government decisions.⁷¹ Freedom of information laws, such as the Access to Information Act 2005, are generally the most efficient tool of enforcing transparency within PPPs since they provide a mechanism through which important project information may be accessible to the public.

In light of its purpose, Section 5 of the Act expressly recognizes the right of every citizen to access information and records in possession of the State or any public body and further provides that such information and records shall be accurate and up to date as far as is practicable. In particular, the Act emphasizes that a person's right of access should not be affected by any reasons given for requesting access or the information officer's belief as to what the person's reasons are for requesting access.⁷² The Act requires that persons seeking to access information must be reasonably aided and assisted without defeating their requests.⁷³ These are good and progressive provisions in the Act which could, on the face of it, aid the pursuit of disclosure in PPP projects by spirited citizens.

It is noteworthy that Uganda was among the first African countries to enact a freedom of information law but despite the existence of this law, it is documented that access to vital

⁷⁰ Section 5(1).

⁷¹ Section 3, Access to Information Act, 2005.

⁷² Section 6(a) and (b) of the Access to Information Act, 2005.

⁷³ Sections 12 and 13, Ibid.

information by citizens is still a big challenge.⁷⁴ The reasons given for the failure of these progressive provisions in the Act to result into better disclosure of information range from bureaucracy, tedious complaint mechanisms to wide exemptions to accessible information.⁷⁵ These criticisms are well founded in the researcher's view. The procedure for accessing such information is unreasonably bureaucratic in light of the provisions of Section 20 of the Act.

Perhaps the most problematic provisions of the Act are those which expressly exempt certain categories of information from disclosure. The exemptions are quite wide. Information that is exempt from disclosure under the Act includes health records that would constitute invasion of personal privacy,⁷⁶ Cabinet Minutes and those of its Committees.⁷⁷ Any information whose disclosure would involve unreasonable disclosure of personal information about a person including a deceased individual is also protected from disclosure.⁷⁸ Further, proprietary information, scientific or technical information whose disclosure could cause harm to interests or proper functioning of a public body is also protected from disclosure. Lastly, information supplied in confidence by a third party whose disclosure could prejudice such party in contractual or commercial negotiations or commercial competition is equally protected.⁷⁹

Rather surprisingly, Section 28 of the Act also protects certain confidential information from disclosure in very broad terms. It permits denial of access to information if disclosure would constitute breach of duty of confidence owed to a third party in terms of an agreement or if the information was supplied in confidence by a third party whose assistance to avail information may still be required. This is very broad and blanket protection against disclosure for virtually all information that is subject to a confidentiality clause in an agreement. However, the High Court ruled that the right to access to information under Article 41 of the Constitution takes precedence over confidentiality clauses in Agreements.⁸⁰ Therefore, the provisions of Section 28 of the Act appear to be in violation of Article 41 of the Constitution.

⁷⁴ Collaboration on International ICT Policy for East and Southern Africa (CIPESA), April 2017, Position Paper, "*The State of Access to Information in Uganda.*"

⁷⁵ Ibid.

⁷⁶ Sections 21 and 26.

⁷⁷ Section 25.

⁷⁸ Section 26.

⁷⁹ Section 27.

⁸⁰ *Green Watch vs AG, Miscellaneous Cause No.232 of 2009.*

Similarly, the provisions of Section 33 of the Act which prohibit disclosure of records containing opinions, advice, reports or recommendations or an account of consultation in the course of deliberations within a public body also raise concern. It is doubtful whether this provision would pass the constitutional muster under Article 41. Numerous civil society players have complained that the Access to Information Act contains very broad and wide exemptions from disclosure.⁸¹ The provisions of Sections 28 and 33 of the Act confirm the validity of this criticism. It is possible to protect all contractual information from disclosure through recourse to the provisions of Section 28 of the Act which emphasizes confidentiality.

On the other hand, it is justifiable to prevent disclosure of information for purposes of protection of the safety of persons and property,⁸² protecting law enforcement and integrity of ongoing legal proceedings⁸³ as well as where defence, security and international relations are concerned.⁸⁴ These provisions exist in many jurisdictions. However, in the context of PPP projects, section 28 provides a convenient escape route for the public sector to evade disclosing PPP projects information through recourse to confidentiality clauses which are common in most PPP agreements.

The public sector on its own cannot provide all the required information and has to be aided and assisted by the private sector.⁸⁵ Besides, PPP Project agreements generally include a confidentiality clause and the entire PPP procurement model requires confidentiality at various stages of the planning process.⁸⁶ This poses significant challenges in realizing the right to access information about PPP projects.

It has been observed to be a global trend that numerous PPP projects tend to go hand in hand with changes in freedom of information laws to prevent access to certain information about them through the use of commercial confidentiality clauses.⁸⁷ In the Ugandan context, this has not been

⁸¹ Coalition for Freedom of Information in Uganda (COFI-U) 2016, “*Emerging Concerns on Access to Information in Uganda 2011 – 2015*” A Shadow Report Submitted to the Office of the High Commissioner for Human Rights On the occasion of Uganda’s 2nd Cycle Universal Peer Review Due October 2016.

⁸² Section 29.

⁸³ Sections 30 and 31.

⁸⁴ Section 32.

⁸⁵ World Bank Group, 2015 “*A Framework for Disclosure in Public- Private Partnerships*”.

⁸⁶ Siemiatycki Matti (2007) “*What’s the Secret?*” *Journal of the American Planning Association*, 73: 4, 388 -403, DOI: 10.1080/01944360708978520 , <https://doi.org/10.1080/01944360708978520>.

⁸⁷ Sands Valarie, 2006 “*The Right to Know and Obligation to Provide: Public Private Partnerships, Public Knowledge, Public Accountability, Public Disenfranchisement and Prison Cases.*” *UNSW Law Journal*, 2006 Vol. 29(3), 334.

necessary as promoters of PPP projects can conveniently shield these projects from disclosure through recourse to the wide exemptions under section 28 of the Access to Information Act. This significantly undermines transparency in PPP projects.

Besides, where a third party has an interest in the information that is required by a person making a request, as may be the case in a PPPs, there is a requirement under Section 35 of the Act and Regulation 19 of the Access to Information Regulations that such an interested third party be given notice informing them of the intention to grant access. The interested third party must then give their consent to the disclosure of the information in writing.⁸⁸ The use of confidentiality clauses in PPP related Agreements is sufficient to evade disclosure and defeat transparency without violating provisions of the Access to Information Act 2005.

Further, although Section 34 of the Act provides for mandatory disclosure in public interest, it sets a very stringent standard before all the exemptions provided under the Act can be overridden. The desired disclosure should be able to reveal evidence of substantial contravention or failure to comply with the law or an imminent or serious public safety, public health or environmental risk. Additionally, the public interest in the disclosure of the record should be greater than the harm contemplated in the provision in question.⁸⁹

The procedure under the Act has been tested unsuccessfully by two journalists who sought to obtain certain oil and gas related agreements involving the Government of Uganda and oil companies. The Agreements were predictably protected against disclosure to the public by confidentiality clauses. In *Charles Mwanguhya Mpagi and Angelo Izama v Attorney General*,⁹⁰ the applicants sought disclosure of the contents of confidential oil and gas related Agreements between the Government of Uganda and various oil companies.

The brief facts were as follows; the Ugandan Government entered into Production Sharing Agreements with various Oil Companies. In May 2007, the Applicants requested for certified copies of these Agreements from the Attorney General and the Permanent Secretary, Ministry of Energy and Mineral Resources. The Solicitor General refused to disclose the Agreements citing a confidentiality clause requiring consent of the Oil prospecting companies. The Applicants

⁸⁸ Regulation 20, *ibid*.

⁸⁹ Section 34 (a) and (b).

⁹⁰ Miscellaneous Cause No 751 of 2009, Chief Magistrate's Court of Uganda at Nakawa.

therefore moved to court pursuant to provisions of Section 37 of the Access to Information Act which provides inter alia that a person may lodge a complaint with the Chief Magistrate against the decision of an information officer.

The Applicants, being journalists by profession, argued that there was public interest in the disclosure which outweighed any third-party harm and that considering that oil is a national resource, the people had a right to know how it is being exploited for purposes of transparent management. The Attorney General, on the other hand, argued that such disclosure would violate the confidentiality clauses and amount to a breach of contract on the part of Government.

The court found that the applicants failed to meet the legal standard of the Access to Information Act because they did not show that the public benefit in disclosure outweighed the harm to the third parties. However, the Court overruled the Attorney General's argument over breach of contract holding that an order of court would supersede the terms of the Agreements. That notwithstanding, it was held that the applicants failed to show how they would use the information which they sought to make the government more transparent, accountable and efficient and that their submissions were insufficient to prove the public interest. It should be noted though that this approach by the Chief Magistrate's Court was roundly rejected by the High Court in enforcing the constitutional right to access to information in *Green Watch vs UETCL and Attorney General*,⁹¹ as well as *Green Watch vs Attorney General*.⁹² In the researcher's view, any attempts at seeking to obtain disclosure of PPP related project information would suffer the same fate as the failed attempt to obtain the Oil and Gas Agreements between the Government of Uganda and Oil companies because of the strong sensitivity of PPP Agreements which are analogous to agreements in the Oil and Gas sector.

However, in *Edward Ronald Sekyewa t/a Hub for Investigative Media vs National Forestry Authority*,⁹³ the Chief Magistrate's Court at Mengo upheld a request for information under the Access to Information Act 2005 which had been made by the Applicant regarding information pertaining to procurement of equipment for prohibiting, control and management of fires in 506

⁹¹ Miscellaneous Cause No 139 of 2001, High Court.

⁹² Miscellaneous Cause No 232 of 2009, High Court.

⁹³ Miscellaneous Cause No73 of 2014, Chief Magistrate's Court at Mengo.

Forest reserves in the country. The request had been declined on grounds that the Applicant did not specify the purpose of his information request.

The presiding Chief Magistrate (as he then was) Boniface Wamala, in allowing the application with costs, ruled that the provisions of Section 6 of the Access to Information Act 2005 were clear and unequivocal in providing that the reason for which information is required and the belief of the officer supposed to provide the information are irrelevant considerations. He additionally disagreed that release of the information requested would be prejudicial to security, sovereignty of the state or privacy of any person.

However, it should be noted that the information requested in this application was not particularly controversial or even likely to generate very topical discussion in the country in the manner in which the Oil Agreements did. It is therefore safe to conclude that the grant of this application could also have been influenced by the fact that the information which the Applicant sought was relatively harmless. In respect of controversial information which would be of strong public interest, the applications for information under the Act have not been granted.

It is therefore important to point out as highlighted above, that the Access to Information Act 2005 contains numerous “clawback” provisions that have effectively neutered its effectiveness and rendered its use in ensuring disclosure of contracts and related information held by public agencies illusory. Disclosure of documents and Agreements involving commercial partnerships between the State and private companies has generally not improved since the enactment of this Act. Government agencies have sufficient cover under the Act to decline to disclose information and the courts have obliged in deferring to the refusal to disclose contracts and commercial partnerships. The use of commercial confidentiality clauses in PPPs to evade disclosure of information to the public undermines transparency and has been recommended by some scholars that PPPs should not be used as a model if the community would be disenfranchised through lack of public access to public information.⁹⁴

Further, although freedom of information laws such as the Access to Information Act 2005 are generally regarded as important enablers of transparency in PPP projects, the Ugandan experience suggests otherwise. The Access to Information Act 2005 does not achieve any such designs and

⁹⁴ Ibid.

cannot be relied upon as a tool to mandate disclosure in PPP projects in Uganda. The numerous criticisms of the Act over its failure to improve mandatory disclosure of information from the public sector are justified and in its present form, it does not offer any significant support for improving transparency within the PPPs space.

2.1.3 Transparency Framework in the Public Private Partnerships Act, 2015

The PPP Act was enacted in 2015 to establish the much-needed legal framework for public private partnerships and to provide guidelines on how public private partnerships should be implemented in Uganda. In terms of ensuring transparency, *Section 47(1) of the Act* is the provision that mandates disclosure of information. It provides that, “A contracting authority shall, upon written request by any person, disclose information regarding a public private partnership.” This provision, on the face of it, appears mandatory and unequivocal.

A person who wishes to obtain information related to a PPP project is required to make a written request to the relevant contracting Authority. However, a detailed procedure to request information (for example, the format, recipient, etc.) has not been specified in the Act. This would imply that the provisions of the Access to Information Act 2005 came into play with their attendant weaknesses.

Further, Section 47(3) requires the publication of PPP Agreements on the website of the Ministry. It provides that, “Subject to subsection (2), all public private partnerships agreements shall be published on the website of the Ministry.” The Ministry is defined to mean the Ministry responsible for finance.⁹⁵ The requirement to publish PPP agreements on a Ministry website would certainly satisfy significant benchmarks in disclosure frameworks both in PPP legislation and freedom of information laws generally. However, these two critical provisions on disclosure are undercut by the provisions of Section 47 (2) as highlighted below.

Unfortunately, Section 47 (2) of the Act restricts these proactive disclosure provisions with numerous exceptions; it provides as follows;

Notwithstanding subsection (1) information shall not be disclosed where –

(a) the disclosure is likely to prejudice the security or sovereignty of the State;

⁹⁵ Section 4 of the Public Private Partnerships Act.

- (b) the disclosure interferes with the right to privacy of any person;*
- (c) the disclosure would amount to a breach of the law, impede law enforcement or would not be in public interest; or*
- (d) the information contains –*
 - (i) proprietary information including information relating to any manufacturing process, trade secret, trade mark, copyright, patent or formula protected by law or by international treaty to which Uganda is a party*
 - (ii) scientific or technical information, the disclosure of which is likely to cause harm to the interests of the proper functioning of the contracting authority; and*
 - (iii) information supplied in confidence by a bidder, the disclosure of which could reasonably be expected to put that bidder at a disadvantage in contractual commercial negotiations or to prejudice the bidder in commercial competition.*

From the very onset, Section 47 is problematic even from its naming. Based on the provisions of the section, it appears to be one that is intended to promote disclosure of information and ensure transparency. However, the draftsman’s choice of the title heading of the section ‘Confidentiality’ gives the impression that the section intends to limit the amount of information shared. The provisions restricting disclosure of information are generally similar to those in the Access to Information Act 2005 and it is safe to say they were imported from that legislation with its attendant weaknesses. The weaknesses of these provisions and the criticisms directed at them are similar as elucidated below.

The restrictions to disclosure of information clearly render the import of Section 47(1) and (2) on disclosure of information and publication of PPP Agreements on the Ministry website futile. These restrictions render the right to access information on request nugatory. The exceptions provided are so wide and vague that they leave little room for any person to access meaningful information. For instance, information that is likely to prejudice the security or sovereignty of the State is excluded from that which can be disclosed.⁹⁶ While there is merit in the argument of security, one cannot help but wonder what aspects of national security would be threatened by disclosure of contractual information on PPPs involving most public infrastructure such as public roads and health facilities. The said provision may be used to undermine disclosure of contract information.

⁹⁶ Section 47 (2) (a), *ibid.*

Besides, why would a PPP model be used to deliver any project if there is a risk of undermining national security or sovereignty?

Another exception that is made by the provision is where disclosure of information interferes with the right to privacy of any person.⁹⁷ This provision is as problematic as the one that precludes disclosure of information where such disclosure reveals proprietary information, trade secrets, manufacturing processes and patents or formulas among others.⁹⁸ Whereas the arguments hold water, it is equally probable that these provisions can be relied upon in bad faith by the relevant parties to hide substandard work or corruption and this is a limitation on transparency that should not be overlooked.

The Act also prohibits disclosure of information where such disclosure may amount to a breach of the law, impede law enforcement or would not be in the public interest.⁹⁹ Similarly, information of a proprietary nature, scientific or technical information as well as a bidder's confidential information are all protected from disclosure.¹⁰⁰ As argued, these provisions render the primary provision on disclosure meaningless.

Section 47(1) and (3) constitute disclosure provisions that exist in many freedom of information statutes all over the world. The difference is that the Ugandan provisions are stringent and also introduce a penal aspect for irregular disclosure. This does not appear to exist in any jurisdiction. Similarly, the exemptions created under Section 47(2) exist in some form in various nations although their wording is critical. It has been argued that the question of exemptions is generally the most debated aspect of Freedom of Information laws as a badly written set of exemptions can gut the law by allowing the authorities to withhold information at their discretion.¹⁰¹

It is further pointed out that while typical exemptions include the protection of national security, personal privacy, public security, commercial secrets and internal deliberations, the central issue is how these exemptions are defined, who gets to decide whether a particular piece of information

⁹⁷ Section 47 (2) (b), *ibid.*

⁹⁸ Section 47 (2) (d), *ibid.*

⁹⁹ Section 47 (2) c, *Ibid.*

¹⁰⁰ Section 47 (2)d, *Ibid.*

¹⁰¹ Ackerman M. John and Sandoval-Ballestros E. Irma, "The Global Explosion of Freedom of Information Laws" *Administrative Law Review*, Winter 2006, Vol.58 No. 1 (Winter 2006) pp. 85- 130, Published by American Bar Association, <https://www.jstor.org/stable/40712005>.

is covered by an exemption and whether there is public interest to override any exemptions.¹⁰² It has therefore been proposed that the test for exemptions proposed by Article 19, an Organization dedicated to promoting freedom of expression inclusive of freedom to information, should be given some consideration; It is to the effect that the restricted information must relate to a legitimate aim listed in the law; disclosure of the information must threaten to cause substantial harm to that aim; and the harm to the aim must be greater than the public interest in having the information.¹⁰³ In the researcher's view this test is highly recommended for evaluating the wide exemptions contained in Section 47(2) of the PPP Act 2015. It would be more practical to replace the wide exemptions with this test instead or even better, align this provision with the Access to Information Act 2005.

The most perplexing aspect about the PPP Act 2015 is that it criminalizes any disclosure of information that contravenes the exclusions under Section 47 (2) of the Act but does not criminalize any non-disclosure by contracting authorities. Section 47(4) of the Act provides that:

An official of a contracting authority or of the Unit or a member of the project team or the evaluation committee who contravenes the provisions of subsection (2) commits an offence and is liable on conviction, to a fine not exceeding two hundred currency points or imprisonment not exceeding two years or both.

The criminalization of unauthorized disclosure is an extreme measure that should not exist in a statute intended to promote transparency through appropriate disclosure. This limits disclosure in PPP projects because contracting authorities are aware that there is no direct legal consequence prescribed for their failure to comply with the law through withholding material information yet there are legal consequences for unauthorized disclosure.

It is worth noting that under Section 13(2) of the Act, the Government is expressly prohibited from borrowing, guaranteeing, or raising a loan for a PPP project in the absence of prior approval from Parliament.¹⁰⁴ This ensures that there is prior disclosure of an intended PPP project to Parliament where the people's representatives sit. This ensures that they have opportunity to review and assess the public benefits of any project which will impose a cost on the public purse. This is a positive

¹⁰² Ibid.

¹⁰³ Article 19, "The Public's Right to Know: Principles on Freedom of Information Legislation." (London: 2001). Available at <http://www.article19.org/pdfs/standards/modelfoiaw.pdf>. [Accessed on 23rd October, 2023]

¹⁰⁴ Section 13 (2) prohibits the Accounting Officer from entering into any agreement that has future financial liabilities for the Government without prior approval from Parliament.

measure in the quest for transparency because it gives the people's duly elected leaders a chance to scrutinize any prospective PPP project before taxpayers' money is committed to the venture. However, such scrutiny presumes existence of an independent and proactive legislature that is ready to hold the executive to account instead of rubberstamping its policies and proposals.

Section 23(3) of the PPP Act specifically provides that the procurement of a private party of a PPP shall be fair, equitable, transparent, competitive and cost-effective. The import of this provision is that procurement of private parties under the PPP arrangement are required to be transparent. The requirement to advertise bids is an important safeguard of transparency in the implementation of PPP arrangements in Uganda.¹⁰⁵ Advertisement of bids constitutes important disclosure to the entire public of an intended PPP project. This is the bedrock of transparency.

Unfortunately, the PPP Act does not provide a clear mechanism of ensuring procurement of a private party is disclosed to the public as part of transparency. However, the PPP Act is silent about any specific consequences in the event Section 23 (3) of the PPP Act is flouted. There ought to have been specific sanctions for noncompliance with this provision. Further, there is no tribunal where parties may have recourse in case they are dissatisfied with the manner in which procurement of the private party has been carried out.

Under Section 31 of the Act, contracting parties are required to proactively publish invitations to tender bids for PPP projects in more than one newspaper of wide circulation.¹⁰⁶ This is a form of proactive disclosure at the onset of a PPP procurement process. Unfortunately, the Act is silent about the consequences of failure to comply.

Section 10 of the Act establishes a PPP Unit. One of the major functions of the PPP Unit is to disseminate PPP related information by virtue of its mandate to serve as a resource center on all matters related to PPPs.¹⁰⁷ The Act also provides that the PPP Unit has the duty to collect and disseminate information on PPP projects in Uganda.¹⁰⁸ The PPP Unit is therefore supposed to act as a repository of information about PPP projects with a view to providing this information to the general public. The PPP Unit is therefore supposed to be at the heart of disclosure of PPP information. However, it must be noted that the provisions of Section 47(2) which create numerous

¹⁰⁵ Section 3.

¹⁰⁶ Section 31 (1).

¹⁰⁷ Section 11 (2).

¹⁰⁸ Section 11 (2) (g).

exemptions and Section 47(4) which criminalizes unauthorized disclosure make it difficult for the PPP Unit to engage in proactive disclosure.

The requirement under Section 30 of the Act for the Auditor General to audit PPP projects and disclose results of each PPP audit to Parliament within nine months of its completion also facilitates disclosure of some PPP information. The provision empowers the Auditor General or a person appointed by the Auditor General to audit all PPPs every financial year.¹⁰⁹ It is important to note that the provision applies to all the stages that a PPP project goes through, from conception to completion.¹¹⁰ The findings from these audits are supposed to be shared with Parliament within nine months of the audit.¹¹¹ These provisions are very important for transparency because they make room for disclosure of audit reports to the people's representatives in Parliament. Besides, the Auditor General is free to publicly release details of some audit reports and occasionally does so.¹¹²

Additionally, the Act requires any official of a contracting authority or PPP Unit involved in a PPP project to disclose any pecuniary interest that they may have in a project.¹¹³ The Act forbids such an official from taking part in any decision-making process for the PPP project where such a decision has been taken.¹¹⁴ The Act goes on to give a definition of what amounts to a pecuniary interest and stipulates that where such an official is a member of the private party or is a holder of a debenture in the private party¹¹⁵ or where such an official is a partner in the private party or is employed by the private party, he or she shall be deemed to have a pecuniary interest.¹¹⁶

Interestingly, the Act also goes further to include the pecuniary interest of a spouse, child or business associate of the official that he or she has knowledge about or would have knowledge about if they exercised due diligence.¹¹⁷ However, since public officials are no longer required to disclose the wealth of their spouses and children, this provision has been rendered ineffective following the amendment to the Leadership Code Act to exempt spouses and children from declarations¹¹⁸. The

¹⁰⁹ Section 30 (1), Public Private Partnership Act, 2015.

¹¹⁰ Section 30 (2), *ibid.*

¹¹¹ Section 30 (3), *ibid.*

¹¹² See Reports available on Auditor General's official website www.oag.go.ug.

¹¹³ Section 48, *ibid.*

¹¹⁴ Section 48 (1), *ibid.*

¹¹⁵ Section 48 (2) (a), *ibid.*

¹¹⁶ Section 48 (2) (b), *ibid.*

¹¹⁷ Section 48 (3), *ibid.*

¹¹⁸ Section 4A of the Leadership Code (Amendment) Act 2021

Act criminalizes the concealment of pecuniary information under Section 48. It is intended to limit corrupt behaviour in PPP projects on the part of public sector players. However, the concealment of information, which is encouraged by the Section 47 (2) of the Act limits its usefulness since the public is unable to access material information and raise alarm about opportunistic behavior by public officials in PPPs.

The PPP Act 2015 authorized the Minister for Finance to make regulations by way of statutory instrument to give full effect to the Act.¹¹⁹ The regulations were intended to, inter alia, give full effect to the PPP Act's provisions in regard to the procurement process as well as monitoring of PPPs.¹²⁰ Surprisingly, the Regulations subsequently passed by the Minister responsible for Finance only focus on the procurement cycle of a PPP and do not contain any provisions clarifying disclosure of PPP information despite certain omissions such as the mode of applying for disclosure under Section 47(1).¹²¹ It is safe to conclude that facilitating proactive disclosure of project information does not appear to have been a key preoccupation of the framers of the PPP Act 2015 and the subsequent Regulations.

Given the inherent challenges in the interpretation and implementation of the Act, it is no wonder that the PPP Act 2015 is presently subject of a constitutional challenge in *Southern and Eastern African Trade Information Negotiations Institute (SEATINI) & Center for Food and Adequate Living Rights (CEFROHT) vs Attorney General* on grounds that it allegedly infringes the constitutional provisions on public participation and access to information among others.¹²² The outcome of this petition would not affect this study's assessment of the provisions of the Act which are considered wanting and in need of reform. Besides, the provisions of the Access to Information Act 2005, which largely provide a similar restrictive framework on disclosure and access to information, are not subject of any constitutional challenge. Even if the captioned petition succeeded, it would not affect the existing restrictive environment on disclosure and access to information about PPP projects.

¹¹⁹ Section 51(1), *ibid.*

¹²⁰ Section 51(2), *ibid.*

¹²¹ The Public Private Partnerships Regulations, SI 18 of 2019.

¹²² Constitutional Petition No. 17 of 2019.

2.2 OTHER RELEVANT LEGISLATION ON TRANSPARENCY IN PPP PROJECTS

2.2.1 The Public Finance Management Act, 2015

The Public Finance Management Act 2015 is the enabling law of the provisions under Article 159 of the Constitution that allows the Government to acquire loans or give guarantees for the acquisition of the same by private entities. Section 36 of the Act provides that the authority to raise money by borrowing vests solely in the Minister and no other person or public corporation is allowed, without the approval of the Minister, to raise any loan or issue any guarantee which may result directly or indirectly in a liability being incurred by the Government.

The section also provides that the terms and conditions of the loan should be laid before Parliament and the loan should not be enforceable except when it is approved by parliament. This is also the crux of Section 39 of the Public Finance Management Act and it is aimed at improving transparency by allowing Parliament to review the information relating to any contractual obligation that the country might be bound by. The Act forces disclosure to Parliament, the people's representatives, of debt financing arrangements used to deliver public infrastructure or social services. This is particularly relevant for PPP projects which primarily utilize debt financing.

The Public Finance Management Act creates a disclosure framework where government expenditures are involved. The Act establishes Parliamentary oversight of government expenditure to enhance transparency. Section 12 (2) of the Act provides that the Parliament shall ensure that public resources are held and utilized in a transparent, accountable, efficient, effective, and sustainable manner and in accordance with the Charter for Fiscal Responsibility and the Budget Framework Paper. To this end, the Parliament is charged with the duty to review and approve all government expenditures. Multi-year financial commitments in the context of PPP contracts are also under an obligation to obtain parliamentary approval. In the context of PPPs, accounting officers of contracting authorities are obliged to furnish Parliament with details of all activities and expenditures related to a PPP project.¹²³ This is yet another form of mandated disclosure to parliament of information about PPP projects.

¹²³ Section 16 and Section 45, Public Finance Management Act, 2015.

It is important to involve the Parliament in the approval of PPP arrangements because the Parliament represents the will of the people. It is also important to seek Parliament's approval because it gives room for the agreement to be scrutinized by persons other than those involved in the conceptual stages of the PPP and this improves the level of transparency in the entire process.

As this study demonstrates in the discussion of the case study on Lubowa hospital, parliamentary oversight also provides an opportunity for representatives of the people to evaluate the use of taxpayer funding for such projects. Unfortunately, the extent to which Parliament is involved in the approval processes before commitment of taxpayer funding is made is rather limited. The case study of Lubowa hospital will be considered as an example. In the researcher's view, the law should have specifically outlawed any agreements that commit public finance without the prior approval of parliament. In absence of such a provision, the executive has taken liberty to conclude numerous agreements committing tax payer funding without parliamentary oversight.

2.2.2 The Budget Act, 2001

Under the Budget Act 2001, the President is under an obligation to disclose to Parliament all information relating to the total indebtedness of the country for that financial year.¹²⁴ As part of this obligation, information relating to guarantees of loans and grants to individual companies or statutory corporations is supposed to be disclosed to Parliament.¹²⁵ These provisions ensure disclosure of financial exposure that the country faces as a result of PPP projects concluded with debt financing.

The disclosure to parliament required by this law enables a careful review of the fiscal impact of PPP projects on the national budget. This provision requiring disclosure of indebtedness therefore goes a long way in supporting transparency in PPP projects which typically involve contracting public debt.

2.2.3 The Official Secrets Act, Cap.302: An Obstacle to Transparency

This law poses serious obstacles in the way of transparency through its wide prohibitions of disclosure of information by current and former public officials. It specifically criminalizes disclosure of information, inter alia, about contracts or performance of the same. This does not

¹²⁴ Section 13 (1), Budget Act, 2001.

¹²⁵ Section 13 (3), *ibid.*

appear to fit within the general scheme of the Act which is to prevent espionage and collusion with foreign powers.

Section 4(1) of the Official Secrets Act *inter alia* makes it an offence for persons holding office or those formerly holding office to disclose information received confidentially or to disclose information about contracts or their performance. This prohibition fosters a culture of secrecy surrounding disclosure of government records especially contracts since disclosure of the same to unauthorized persons constitutes a criminal offence under this Act. It is therefore not surprising that, historically, there has been a consistent pattern to conceal documents in government archives or in the alternative, to neglect the archiving of important historical information in Uganda.¹²⁶ This is the effect of a legal regime that proscribes any disclosure of information about government records.

The Official Secrets Act is therefore an obstacle to realization of transparency concerning government records generally. This affects the disclosure of information about public private partnerships in Uganda since there are legal consequences for any inadvertent or erroneous disclosure of information to unauthorized persons.

2.3 INSTITUTIONAL FRAMEWORK FOR ENSURING TRANSPARENCY IN PUBLIC PRIVATE PARTNERSHIPS IN UGANDA

2.3.1 The Public Private Partnership Unit

The most important institution which is required to aid transparency in PPPs by facilitating disclosure of PPP information is the PPP Unit created under Section 10 of the PPP Act. The Unit is the secretariat and technical arm of the PPP Committee. It is mandated to provide technical, financial and legal expertise to the Committee and project team.¹²⁷ In theory, it can be looked at as the engine for the implementation of all PPP projects in Uganda. As earlier pointed out, it is also vested with power to disclose PPP related information subject to the restrictions in Section 47 (2) of the Act.

Despite not disclosing to the public who the individuals that constitute the Unit are, the Unit is operational and functional in Uganda. The researcher was able to visit the Unit and interview some

¹²⁶ Peterson Derek R, (2021) “*The Politics of Archives in Uganda*.” Available at <https://doi.org/10.1093/acrefore/9780190277734.013.982> (Accessed on 24th November 2023)

¹²⁷ Section 11, Public Private Partnerships Act, 2015.

of its staff. It has been reported that Uganda's PPP Unit is understaffed and lacks adequate ownership and capacity within the line ministries and contracting authorities to develop and implement PPPs.¹²⁸ This is what prompted the Unit to advertise vacancies for various positions.¹²⁹

Efforts have been made by the Unit to ensure that bare minimum information about PPP projects in Uganda is availed to the public. To this effect, the Unit has established a website where members of the public can view the different projects that are being considered, developed, or implemented within the country. In addition, the website also avails the estimated value of each project as well as information relating to the contracting authority for the projects.

It is important to take note of the fact that the website provides very basic information about a handful of projects. Besides, there are no records of audit and feasibility reports for the projects included and neither are the private parties identified. The information disclosed by the PPP Unit on its website is therefore grossly inadequate and does not satisfy the test of timely and accurate information.

2.3.2 The Office of the Auditor General

The National Audit Act, 2008 establishes the Office of the Auditor General with powers to audit and report on public accounts. It also gives the Auditor General powers to inquire into, examine, investigate and report, as he or she considers necessary, on the expenditure of public monies disbursed, advanced or guaranteed to a private organization or body in which Government has no controlling interest.¹³⁰ At the same time, the PPP Act 2015 requires the Auditor General to audit each PPP project¹³¹ and present an audit report of the same to the Parliament within nine months of the end of the audit.¹³²

This therefore enables disclosure of PPP information to Parliament where the peoples' representatives sit. However, the PPP Act recognizes that audits must be carried out in accordance

¹²⁸ In a letter dated 18th May, 2020, the PPP Unit, through the Ministry of Finance, Planning and Economic Development, advertised for the procurement of extra services owing to the fact that it was understaffed and lacked adequate capacity to fulfill some of its functions. Available at: http://pppunit.go.ug/sites/files/EOI_LEGAL_ADVISOR.pdf [Accessed on 20th September, 2023].

¹²⁹ The World Bank Group, (2016), "*Country Readiness Diagnostic for Public Private Partnerships*." Available at: <https://www.gihub.org/resources/publications/country-readiness-diagnostic-for-public-private-partnerships/> [Accessed on 14th March, 2023].

¹³⁰ Section 18, National Audit Act, 2008.

¹³¹ Section 30 (1), Public Private Partnerships Act, 2015.

¹³² Section 30 (3), *ibid*.

with the provisions of the National Audit Act. These audits provide some form of disclosure to the people's representatives but do not go far enough to enable the public obtain access.

2.4 CONCLUSION

The legal and institutional framework for transparency in PPPs in Uganda is quite restrictive and does not succeed in supporting proactive disclosure of PPP project information. On the contrary, it defeats the entire concept of transparency through a number of provisions intended to defeat freedom of access to information about PPP projects.

Furthermore, these institutions, especially the PPP Unit lack the capacity to strictly enforce their mandate and this is clear from their enabling laws. The current legal framework, though capable of being utilized to ensure disclosure of information about PPPs is rather inadequate. The disclosure framework therefore requires recourse to other legislation especially the Access to Information Act which unfortunately has limitations in regards to commercial information.

CHAPTER THREE: A CASE STUDY EVALUATING THE STATE OF TRANSPARENCY IN PPP PROJECTS IN UGANDA: THE CONSTRUCTION OF THE INTERNATIONAL SPECIALIZED HOSPITAL OF UGANDA AT LUBOWA

3.1 INTRODUCTION

This chapter evaluates a case study in form of a controversial proposed construction of an international specialized hospital of Uganda at Lubowa. Some of the players in this project, especially the bureaucrats in the Ministry of Finance, maintain that the project in question is not a typical PPP project despite bearing all the hallmarks of one. There is also confirmation, on the court record, from the Permanent Secretary of the Ministry of Health that this project is indeed a Public Private Partnership. This confirmation was made in the pleadings and evidence of the court dispute involving a former technical coordinator for this project.

Besides, the question of whether the said project for the construction of an international specialized hospital at Lubowa fits within the ambit of the PPP Act 2015 is ultimately a matter of law. There has been a consistent concern that there is lack of capacity on part of the public sector to transparently conduct successful PPPs.¹³³ Many PPPs, such as those in the electricity sector, are mired in secrecy and confusion with accusations that private players took advantage of the naïve or dishonest negotiators on part of the public sector.

It is against this background that the researcher set out to investigate and review in detail this contentious project that continues to raise concerns from all sections of the public regarding its cost, financing structure, mode of execution and manner of procurement. Additionally, the project has occasioned litigation in the courts of law. This project has generated considerable debate in the mass media and on the floor of parliament because of its reported cost to the tune of USD 379.71 Million (Three hundred seventy-nine million United States dollars) that has already been partially met by the Government.

The researcher obtained primary data in form of the filed pleadings, witness testimonies, copies of the Project Agreements and related documentation from court records in respect of the litigation concerning this project. The Report of the Parliamentary Committee on the National Economy was also obtained from Parliament. This data, from court proceedings and the Committee Reports of

¹³³ Nsasira R., Basheka B. C. and Oluka P. N., (2013), op. cit.

Parliament, provided considerable information that is not in the public domain. The information and documents obtained are largely concealed from the public.

3.1.1 Background of the Project

This study finds that there is a dearth of information about the manner in which the proposal for the project was originated and presented to the Ministry of Health, then to the Head of State, President Yoweri Museveni, who recommended it to the Ministry of Finance, Planning and Economic Development. The official promoter of the project, one Mrs Enrica Pinetti, has neither a background in healthcare nor previous investment in this sector based on public records.

Strangely, there was absolutely no input sought from the country's professional body of doctors, the Uganda Medical Association. The Uganda Medical Association publicly opposed the viability of the project and also pointed at its astronomical cost.¹³⁴ The design and procurement of the project were equally lacking in transparency and it is not surprising that over USD 100 million has already been pumped into the construction with no tangible results on site.¹³⁵ The construction site is largely abandoned. The entire project bears the hallmarks of a “scam” and a colossal waste of taxpayers' money.

It is possible that with better disclosure of the details of the proposal and Project Agreements prior to execution by the government, considerable concerns could have been addressed and the funding as well as structure of the entire project designed differently. The Ugandan Parliament would also have been involved much earlier and the public debate that ensued when funds were already committed would have been more fruitful.

Instead, scanty details about the project only surfaced after Government of Uganda had already entered into contractually binding Agreements for financing of the project. These details came to light when a parliamentary resolution was required by the Ministry of Finance, Planning and Economic Development to authorize issuance of promissory notes to guarantee financing for the project's contractors. The promissory notes were necessary to enable the project sponsors obtain financing. The sponsors of the project, in coordination with the line ministries of Health and

¹³⁴ The Observer, 19th March 2019 “*Doctors opposed to Lubowa hospital project*” Available at <https://observer.ug/news/headlines/60144-doctors-scold-government-over-lubowa-project> Accessed 20th August 2023

¹³⁵ Report of the Parliamentary Committee on the National Economy concerning the Financing of the International Specialized Hospital of Uganda, March 2019.

Finance, consistently evaded both the letter and spirit of the PPP Act 2015 hence their false claims that the project is not a PPP.

This study finds that the project for construction of Lubowa Hospital is really a PPP in disguise. The design of the project and the Project Agreements conform to a design, finance, build and operate PPP Agreement envisaged under Section 43 of the PPP Act 2015. There is also considerable similarity between this project and the contentious hospital PPP in Lesotho which was subsequently terminated over its astronomical cost to the country. The project is mired in secrecy, has a questionable contractual structure, and has occasioned significant wastage of taxpayer funds in a speculative project. It is doubtful whether this project will ever be successfully concluded owing to a secretive procurement, contract negotiation process as well as financing mechanism that denied important stakeholders the opportunity to weigh in. The absence of transparency in the proposal stage, procurement, and financing, as well as blatant disregard for provisions of the PPP Act 2015 have occasioned significant loss to the public sector.

It is probable that a more transparent structure and bidding process would have attracted more serious and competent investors in healthcare. It would have been unnecessary for the public sector to commit irrevocable funding through promissory notes to a speculative project with a shadowy investor.

3.1.2 Description of the intended Project

There is no official documentation describing the Project. Consequently, the researcher obtained a Committee Report from the Parliament of Uganda that addressed this project in detail. The findings about the nature of project are partly drawn from the said report and the Project Agreements which were tendered in court proceedings touching the project.

In summary, the project as envisaged by the Ministry of Finance, Planning and Economic Development as well as the Ministry of Health is construction of a specialized hospital for the treatment of ailments for which Ugandans routinely seek medical treatment abroad. These include cancers, kidney transplant, heart diseases, brain diseases and other Non-Communicable Diseases. The construction is supposed to be carried out by a private contractor using a Special Purpose

Vehicle which was incorporated for this purpose, Finasi/Roko Construction SPV Ltd.¹³⁶ The original shareholders of this entity were Finasi International FZC and Roko Construction Limited.

The original concept submitted to the Ministry of Health was for the design, finance, construction, equipping and operation of a specialized hospital at Entebbe and a new Cancer Centre at Mulago Hospital. The justifications for the project were to reduce the mortality related to non-communicable diseases and to reduce resource hemorrhage that was attributed to medical tourism.¹³⁷ The entire project was intended to be completed within a period of 24 months with effect from December 2018 but the project remains substantially incomplete as of October 2023. Its completion date is uncertain and there is a real likelihood that the project will never be completed.

3.1.3 An overview of the Procurement Process of the Project

On 28th February 2013, the Ministry of Health wrote to the Ministry of Finance, Planning and Economic Development about a proposal to upgrade Entebbe hospital into a specialized hospital alongside a new Cancer Centre at Mulago Hospital. It appears that the Ministry of Health did not receive a formal response from the Ministry of Finance according to available documentation.¹³⁸ There was also no formal bidding process for this project. It appears that the proposal was an unsolicited bid.

Ms. Enrica Pinetti, the individual behind Finasi International FZC, then approached the President of the Republic of Uganda with the same proposal to develop a specialized hospital for the treatment of ailments for which Ugandans routinely seek medical treatment abroad in 2013.¹³⁹ It appears this was because of the failure or refusal by the Ministry of Finance, Planning and Economic Development to respond to her proposal that had been channeled through the Ministry of Health.

The President then wrote to the Ministry of Finance, Planning and Economic Development forwarding and supporting the same proposal with specific directives in a letter dated 23rd April

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ Supplementary Affidavit of Charles Victor Byaruhanga filed on 6th November 2019 in *Initiative for Social Economic Rights v Attorney General, Constitutional Petition No. 07 of 2019* at the Constitutional Court.

2014.¹⁴⁰ The highlight of this letter was the claim that the proposed project was aimed at reducing medical expenses that the Government of Uganda incurred abroad. The said letter specifically pointed out that the proposal was to deliver the construction of the said specialized international hospital using a PPP model and that financing would be entirely sourced by the developer.

Thereafter, on 28th August 2014, the Contracts Committee under the Ministry of Health made a decision approving the execution of a Project Framework Agreement between Government and Finasi International FZC in favor of the proposal for the construction of an International Specialized Hospital.¹⁴¹ There was never any bidding process to identify the right contractor. Subsequently, a Project Investment Proposal for the hospital was presented by Finasi International FZC.

On 29th October, 2014 a concept plan to finance, design, construct, equip and operate a specialized hospital at Entebbe and a new Cancer Centre at Mulago was submitted to the Government of Uganda by Finasi International FZC. The proposed locations were subsequently merged after the Government of Uganda identified a single location at Lubowa for the specialized hospital.¹⁴²

On 17th November, 2014, the Project Framework Agreement between the Government of Uganda represented by the two ministries on one hand and Finasi International FZC on the other was signed to guide the negotiations for the final Project Agreements.¹⁴³ The Project Framework Agreement covered details about the design, construction, financing and operation of two top quality hospital facilities in Uganda.

On 27th May, 2015, a Project Works Investment Agreement (PWIA) was signed for the design, finance, and construction and equipping of a 240-bed hospital along with staff training. The agreement covered the project works remuneration wherein it was agreed that construction would cost USD 249.9 million as well as a financing cost of USD 99.5 million bringing the total cost of the project to USD 345.2 million.¹⁴⁴

¹⁴⁰ Parliament of Uganda, (2019), “*Report of the Committee on National Economy on the Proposal to Issue Promissory Notes Not Exceeding USD 379.1 Million to Finasi/Roko SPV Limited for the Financing of the International Specialized Hospital of Uganda at Lubowa, Wakiso.*”

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ Supplementary Affidavit of Charles Victor Byaruhanga filed on 6th November 2019 in *Initiative for Social Economic Rights v Attorney General, Constitutional Petition No. 07 of 2019* at the Constitutional Court.

¹⁴⁴ Ibid.

Subsequently, the private contractor, Finasi International FZC, set up a special purpose vehicle with Roko Construction Limited to implement the project as is generally the norm with PPP projects. This special purpose vehicle was incorporated as a private limited liability company named Finasi/Roko Construction SPV Limited.

In October 2015, the Government of Uganda entered into an agreement with the Special Purpose Vehicle, Finasi/Roko SPV Ltd for the construction, operation, and maintenance of a specialized hospital for a period of eight years. The project required the construction of a 264-bed specialized health facility under Phase 1 and which was to be expanded into a medical city of up to 500 beds total capacity under Phase 2.¹⁴⁵

The Ministry of Health is provided for as the owner of the hospital under the agreement. It was required to pay the SPV out of its annual budget during the 8 years of operations. The agreement also highlighted the corporate structure of the Special Purpose Vehicle. The SPV was constituted by Finasi International FZC, as the lender and the Ugandan construction company Roko Construction Limited as the contractor. It was to be incorporated in accordance with Ugandan law.

Subsequently, a Project Services Agreement for the management, operation and maintenance of the hospital was entered into between the Government of Uganda and Finasi/Roko SPV Limited on 27th January, 2016.¹⁴⁶ In the agreement, the project was provided for in the Public Investment Plan (FY2018/19– 2020/21) as Project Code 1393 and as one of the health sector’s planned multi-year projects and the start date of the project was provided as July 2016 with a date of completion as June 2020.¹⁴⁷

It was agreed that Ministry of Health would, among others, pay the hospital’s operations remunerations (management services remunerations) of USD 5 million per quarter during the first year and USD 6 million per quarter in the following years. In addition, the Ministry would pay annual operations services remuneration that were to be agreed upon between the Ministry of Health and the hospital.¹⁴⁸

¹⁴⁵ Ministry of Health, (2019), op. cit.

¹⁴⁶ Parliament of Uganda, (2019), op. cit.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

Some of the notable clauses in this agreement were,¹⁴⁹

- a) Management Service Remuneration under which the Ministry of Health was to pay the International Specialized Hospital of Uganda Limited an amount covering the company's income for general management of the hospital.
- b) Operation Service Remuneration under which the Ministry of Health was to pay to the company the operational costs to be borne by the hospital other than those related to general management of the hospital.
- c) Hospital Revenue Account operated by the Ministry of Finance, Planning and Economic Development into which patient revenue generated by the hospital was to be paid, the proceeds of which were to be paid into the Consolidated Fund.

In a letter dated 17th May, 2018, the Minister of Health wrote to the Permanent Secretary, Ministry of Health for the identification and appointment of the Owner's Engineer by the Ministry. This was complied with and in a letter dated 9th July, 2018, Finasi/Roko SPV Limited wrote to the Permanent Secretary, Ministry of Health concerning the appointment of the Owner's Engineer.

Curiously, the President also wrote to the Minister of Health on 4th September, 2018 about the employment of Francis Wakabi as the Owner's Engineer for the project. In response to this, the Permanent Secretary, Ministry of Health wrote to the Permanent Secretary Ministry of Public Service on 28th November, 2018 about the employment of Francis Wakabi as the Owner's Engineer for the project. In reply, the Permanent Secretary, Ministry of Public Service wrote to the Permanent Secretary, Ministry of Health approving the employment of Francis Wakabi on 3rd December, 2018.¹⁵⁰ It does appear that there was some resistance over the employment of the said individual as owner's engineer though the reasons are not disclosed.¹⁵¹

A respondent from the Ministry of Health reported that the entire project is subject to serious influence peddling from powerful individuals in government and key technocrats within the ministry were all forced to shun any involvement with it for their own safety and professional reputations.¹⁵² Evidently, the personal intervention of the President in matters such as appointment of the owner's engineer support that concern from the respondent.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

¹⁵² Interview with Ministry of Health official

On 4th December, 2018, the Direct Agreement was signed between the Government of Uganda and Finasi/Roko SPV Limited and African Export-Import Bank and Barclays Bank of Uganda Limited.¹⁵³ This Agreement was the enabler of financing of the project.

On the same date, a Promissory Note Purchase Agreement was signed between the Finasi/Roko SPV Ltd as the Seller and African Export-Import Bank, ABSA Bank Limited, Barclays Bank of Uganda Limited and the Eastern and Southern African Trade and Development Bank as the Arrangers; and African Export-Import Bank (as the Note Purchaser, Administrative Agent and Security Agent) and Barclays Bank of Uganda (as the Local Administrative Agent); and the Original Note Funders.¹⁵⁴

On 12th February 2019, the state minister for Finance, David Bahati presented the proposal to issue promissory notes not exceeding USD 379.71 million to Finasi/ Roko Construction Special Purpose Vehicle (SPV) Limited to Parliament which then referred it to the Committee of National Economy for consideration. The proposal was reinforced by a letter from H.E the President to the Rt. Hon. Speaker of Parliament dated 25th February 2019, expressing his support for the proposal.¹⁵⁵

The money was intended to finance the design, construction and equipping of the International Specialized Hospital of Uganda in Lubowa, Wakiso District. The proposal was accordingly referred to the Committee on National Economy for consideration. It was premised on Sections 23 and 36 of the Public Finance and Management Act, 2015 (as amended), which provide for multi-year expenditure commitments and authority to raise loans.

The Committee on National Economy is provided for under the Rules of Procedure of Parliament and it has the mandate to, among others;¹⁵⁶

- a) Review, consider, and scrutinize all matters relating to national economy generally, finance and any other matter referred to it by the House.

¹⁵³ Ibid.

¹⁵⁴ Supplementary Affidavit of Charles Victor Byaruhanga in *Initiative for Social Economic Rights v Attorney General, Constitutional Petition No. 07 of 2019*.

¹⁵⁵ Parliament of Uganda, (2019), op. cit.

¹⁵⁶ Rule 175(1) & (2). Rules of Procedure of Parliament

- b) Examine and make recommendations to the House on all loan agreements required to be authorized or approved by the House under Article 159 of the Constitution of the Republic of Uganda 1995 as amended.

Subsequently, the Parliament of Uganda approved the proposal to issue the promissory notes to Finasi/ Roko SPV Limited on 12th March, 2019, having adopted the report by the Committee on National Economy.¹⁵⁷ As of March 2023, the Ministry of Finance, Planning and Economic Development tabled before Parliament's Budget Committee a proposal for UGX 228 billion intended for promissory notes for the works at the hospital.¹⁵⁸ This proposal was met with heavy resistance as the legislators continue to question what the parties have to show for the money that the Government of Uganda has disbursed thus far.¹⁵⁹ It remains to be seen if Parliament's Budget Committee will approve the proposal.

In terms of cost, the project model was based on a project financing plan wherein the selected private bank (African Export-Import Bank) was meant to finance the total amount that was needed for the project over a grace period of 2 years. The money owed was to be repaid over the course of the subsequent 6 years. The interest on the principal amount was supposed to be paid with effect from the second year.

As a precondition to the achievement of the construction effective date, the Ministries of Health and Finance, upon request by Finasi/Roko Construction SPV Limited, entered into a Lenders Direct Agreement with the financing parties, that is, African Export-Import Bank and Barclays Bank of Uganda. The project financing plan included;

- i) a payment period of 6 years,
- ii) a grace period of 2 years,
- iii) an effective interest rate of 6.49 percent; and,
- iv) the borrower was the SPV (Finasi/ Roko).

¹⁵⁷ Parliament of Uganda, (2019), op. cit.

¹⁵⁸ Sekanjako Henry, (2023), "Government, Pinetti Sign New Agreement for Lubowa Hospital." The New Vision

¹⁵⁹ Ibid.

This was reported by the Macroeconomic Policy Department Ministry of Finance, Planning and Economic Development.¹⁶⁰

According to the Project Works Investment Agreement (PWIA), the initial cost of the project was estimated at USD 345.2 million of which USD 249.9 million (72.4 percent) was ringfenced for construction works (comprising of design, construction, equipping the hospital and drugs for the first year) while USD 95.3 million was allocated for the cost of financing.¹⁶¹

However, a close look at the Direct Agreement shows that the cost of financing was incrementally revised from USD 95.3 million to approximately USD 116.986 million. This was attributed to the changes in agreement conditions that saw the interest rate condition change from a floating LIBOR under the PWIA to a fixed rate under the direct agreement.

As a result, the effective interest rate increased from 4.76 percent under PWIA to 6.49 percent under the direct agreement. Consequently, the total project cost as per the Direct Agreement was placed at USD 366.436 million. This adjustment resulted into changes in the shares of construction works costs and cost of financing to the current levels of 68 percent and 32 percent respectively.

The total cost estimates of the project therefore were in excess of one trillion (approx. USD 366 million). This cost was highlighted in the Report of the Committee on National Economy in the course of considering the proposal to issue promissory notes not exceeding USD 379.71 million to Finasi/Roko Construction SPV Limited for the purpose of financing of the international specialized hospital of Uganda (ISHU) at Lubowa.¹⁶²

Overall estimated costs of the project were noted to be to the tune of approximately USD 557.9 million (inclusive of cost of financing and operational management) during the first eight years. This money was required starting from the third year of project's implementation (2020) – by way of redemption of promissory notes. The overall amount submitted to Parliament to authorize issue of promissory notes currently stands at USD 379.71 million.

¹⁶⁰ Macroeconomic Policy Department, (2020), “*Performance of the Economy Report – Feb 2019.*” Ministry of Finance, Planning and Economic Development. Available at: <https://www.finance.go.ug/publication/performance-economy-report-feb-2019> [Accessed 8th March, 2023].

¹⁶¹ Supplementary Affidavit of Charles Victor Byaruhanga in *Initiative for Social Economic Rights v Attorney General, Constitutional Petition No. 07 of 2019.*

¹⁶² Office of the Clerk to Parliament, (2019). Available at: <https://www.parliament.go.ug/cmisis/views/5ab4df7f-a946-4ebf-80cc-adc7636bdd0c%253B1> [Accessed on 16th August 2023].

However, it is worth noting that this cost excludes the cost of land, operational costs of the hospital during the eight years other than hospital management costs and taxes owed. Of this, USD 366.9 million (64 percent) was earmarked for construction costs and it included the cost of financing and a balance of USD 191 million (34 percent) which was earmarked for management operation costs of the project during the eight years after construction.

It follows therefore that the patient revenues generated by the hospital were meant to be paid into a revenue collection account opened by the hospital under the instruction of the Ministry of Finance, Planning and Economic Development (MoFPED). The hospital revenues account was meant to be operated by MoFPED and the proceeds from the account paid into the Uganda Consolidated Fund.

To date, the Government has issued a promissory note for USD 86 million for works that were certified as allegedly completed by the Ministry of Health Engineer in December 2018. Perhaps, this is the reason why there was contention regarding appointment of the engineer in question. It appears the contractor influenced this appointment. Seven years later from conception of the project, the specialized hospital does not exist on the ground and the level and extent of the actual construction works carried out remains mysterious despite the significant financial exposure and commitments by the Government of Uganda.

3.1.4 The Current State of the Construction Project of the international specialized hospital at Lubowa

In 2019, the Minister of Health issued a ministerial statement to Parliament on the project.¹⁶³ She revealed that the Ministry had fulfilled all its obligations under the initial agreement and since Parliament had approved the issuance of promissory notes to the Finasi/Roko SPV Ltd through the Ministry of Finance, Planning and Economic Development, the project had been declared effective.¹⁶⁴ In effect, this is the only official disclosure to the public about the shadowy project. However, a Respondent interviewed from the Ministry revealed that the technocrats in the Ministry were equally clueless about the status of this project. They referred all queries concerning the project to the Ministry of Finance, Planning and Economic development despite the fact that the construction is of a specialized hospital.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

However, the Minister pointed out that it had been brought to the attention of the Government that despite fulfilling all its obligations, there had arisen a legal dispute between the shareholders of the private partner and that an injunction had been granted in respect of the said dispute which froze operations at the project site.¹⁶⁵ In actual fact, this was not accurate. It lends credence to the information from the interviewee from the Ministry of Health that indeed the ministry is clueless about the status of the project.

The injunction issued in by the High Court did not prevent the construction on the project site, if any, from proceeding. It merely stopped Finasi International from seeking to eject Roko Construction Limited from being the contractor on site yet they were part of the Special Purpose Vehicle (Finasi/Roko Construction SPV Ltd) which had undertakings with the Government of Uganda.¹⁶⁶ It is also worth noting that the dispute between the two parties had nothing to do with failure to fulfill obligations.

It is reported that project completion stands at 25 percent as intimated by the project owner engineer, Ministry of Health and the projected date of completion has since been amended to September, 2024. This completion estimate of 25 percent is highly questionable and appears exaggerated as there is nothing tangible on site save for incomplete excavation works according to an official from the Ministry of Health who visited the site.¹⁶⁷

More recently, the Daily Monitor, a widely respected daily newspaper in the country, published an article highlighting the status of the controversial project as of March 2022.¹⁶⁸ The article comes in the wake of the demise of the Governor of the Bank of Uganda, Emmanuel Tumusiime-Mutebile and the Speaker of Parliament, Jacob Oulanyah, both of whom died in hospitals abroad where they were seeking specialized healthcare.¹⁶⁹ These unfortunate events relate to the project in the sense that its objective was to provide ultra-specialized treatment within the country to prevent instances where VIPs, such as the deceased Governor Bank of Uganda and Speaker of Parliament, have to

¹⁶⁵ *Roko Construction Limited vs Finasi/Roko Construction SPV Ltd and Finasi International FZC, HCMA No. 370 of 2019.*

¹⁶⁶ *Ibid.*

¹⁶⁷ Interview with MOH official

¹⁶⁸ Available at: <https://www.monitor.co.ug/uganda/special-reports/oulanyah-s-death-renews-debate-on-lubowa-hospital-3762540> [Accessed on 29th March, 2023]

¹⁶⁹ *Ibid*

be flown out of the country using public resources. If the project had been completed in 2020 as was agreed, a case can be made that the individuals would have been treated domestically.

The article also quotes the Permanent Secretary to the Treasury, Ramathan Ggoobi who concedes that the entire project was poorly handled in its early stages.¹⁷⁰ Ggoobi points out that a steering committee spearheaded by the Prime Minister has been constituted to oversee the completion of the project but the Prime Minister, just like other officials before her, was blocked from accessing the site until she put her intention to visit the site in writing.¹⁷¹ The contractor on site continues to resist any attempts by Government representatives to carry out spot checks on progress of works. In effect, the contractor appears too powerful to be subjected to any oversight from government officials and blocks access to the construction site. This blockade of government officials could be attributed to the fact that there are no ongoing works on site beyond the incomplete foundation works.

Additionally, the contractor's close relationships with the head of state appear to offer a powerful disincentive against oversight by the relevant officials from the Ministries of Finance and Health. It should be noted that the head of state, President Museveni, has personally intervened in writing on three known occasions. First, in introducing the project to the Ministry of Finance. Secondly, he seconded the appointment of the owner's engineer, an individual whose role on the project was to supervise the works on behalf of the Ministry of Health. The individual in issue was apparently recommended by the contractors on site in a clear conflict of interest that should have been obvious to the president.¹⁷²

Respondents from the two Ministries of Health and Finance were categorical in pointing out that the key promoter of the project, Ms Enrica Pinetti, enjoys protection from the head of state and she has employed this political cover to have her way on all aspects of the project. It explains why government committed to issuance of promissory notes for the first phase of the project even when nothing tangible exists on the ground. Additionally, the said promoter, emboldened by high level state protection, had the audacity to cause the deployment of military guards on the project to

¹⁷⁰ Ibid

¹⁷¹ Ibid

¹⁷² Ibid.

prevent access of the construction site by Members of Parliament, civil servants from the Ministry of Health and others.¹⁷³

3.1.5 An overview of the litigation affecting the project

This project has been the subject of three suits. The first suit was between the parties in the special purpose vehicle Finasi/Roko SPV Limited, namely Roko Construction Limited and Finasi International.¹⁷⁴ The background of the suit is as follows. According to Roko Construction Limited's Managing Director, Mark Koehler, the company signed a Memorandum of Understanding with Finasi International FZC to be the 'sole contractor' for the construction works of the hospital and this agreement was cleared by the Solicitor General.¹⁷⁵

Thereafter, the company allegedly begun preliminary works on site in December 2018. These works, it is claimed, included grading, soil examination, connection, and payment of utility services inter alia. However, in June 2019, the chairperson of Finasi International FZC, Erica Pinetti, showed up at the construction site accompanied by military personnel and several staff employed by a Chinese construction firm demanding that Roko Construction Limited's staff hand over the site to them and vacate the premises.¹⁷⁶

Roko Construction Limited refused to comply and instead filed an application for an injunction restraining Finasi International FZC from hiring another contractor. In the application, the company claimed it risked suffering irreparable financial losses and damages seeing as it had, over a period of four years, spent colossal sums of money and man hours to design and plan for construction, and to mobilize resources, machinery, materials, specialist recruitment, among others.¹⁷⁷ It also claimed that it had concluded contracts with several financial institutions and if the actions of Finasi International FZC were not stopped, it would be in breach and liable for damages in millions of dollars.

For their part, Finasi/Roko SPV Limited and Finasi International FZC argued that there was no contract or undertaking with Roko Construction Limited granting it the exclusive mandate to carry

¹⁷³ Ibid.

¹⁷⁴ *Roko Construction Limited V Finasi/Roko Construction SPV Ltd and Finasi International FZC, HCMA 370/2019.*

¹⁷⁵ Ibid.

¹⁷⁶ Broughton Tania, (2019), "Infrastructure Project in Peril." Africa Legal. Available at: <https://www.africa-legal.com/news-detail/infrastructure-project-in-peril/> [Accessed on 26th September, 2023].

¹⁷⁷ HCMA 370/2019.

out the construction works on the project. They also cited non-cooperation on the part of the company as the justification for contracting a different Chinese Company, Power China Guizhou Engineering Company, as a civil works contractor.¹⁷⁸

The court took the view that the matter before it was purely a question of fact. Having examined and interpreted the documents attached to the affidavits in support and reply, the court was under the impression that Roko Construction Limited was recognized as the contractor of the works from the intentions of the parties in all the agreements. The court ordered an interim injunction prohibiting Finasi/Roko SPV Ltd from evicting Roko Construction Limited staff from the site.

However, the parties continued to have wrangles which prompted Roko Construction Limited to return to court seeking to have Finasi/Roko SPV cited for contempt of court over alleged disobedience of the order of injunction. This matter was never resolved by the court since the parties eventually settled out of court and the contractor was changed to Power China Guizhou Engineering Co. Ltd.¹⁷⁹

The second suit relating to this Lubowa project is a constitutional petition that was filed by a Civil Society Group, the Initiative for Social and Economic Rights (ISER), against the Attorney General.¹⁸⁰ ISER petitioned the Constitutional Court of Uganda for declarations, inter alia, that the Agreements entered into on behalf of the Government of Uganda for the construction of the International Specialized Hospital of Uganda at Lubowa are void. The Petition also seeks to have the relevant authorities compelled to take the necessary steps to implement the project in line with the Public Private Partnerships Act.¹⁸¹

The issues pending determination in the petition before the Constitutional Court are as follows;

- i) Whether the petition raises questions for constitutional interpretation
- ii) Whether the acts of the Minister of Health and the Minister of Finance, Planning and Economic Development in entering into the contracts on behalf of the Government of

¹⁷⁸ Mwenda Andrew, (2022), “*The Power, Influence and Dubious Deals of Enrica Pinetti.*”

¹⁷⁹ Uganda Radio Network, (2019), “*Lubowa hospital: Finasi, Roko to Settle Case Out of Court.*” The Observer, dated 29th August, 2019. Available at: <https://observer.ug/news/headlines/61810-lubowa-hospital-finasi-Roko-to-settle-case-out-of-court> [Accessed on 20th August, 2023].

¹⁸⁰ *Initiative for Social Economic Rights v Attorney General, Constitutional Petition No. 007 of 2019.*

¹⁸¹ Ibid.

and the private parties are inconsistent with and or in contravention of Article 2(1), 159(2), (5) and (6) of the Constitution of the Republic of Uganda.

- iii) Whether the resolution passed by Parliament on 12th March 2019 approving a proposal to issue promissory notes to Finasi/Roko Construction SPV Limited contravenes Article 159(2), (5) and (6) and 79 of the Constitution.

Whereas the petition has been heard and final submissions have been made, it is still pending judgment from the Constitutional Court. The critical questions in my view are addressed in the second and third issues that await determination by the court. Suffice to note that there are indeed serious questions meriting investigation by the court.

Lastly, *Dr Eng. John Tumwesigye vs the Attorney General and Diana Atwine, Civil Suit No.190 of 2017* is a suit filed over the termination by government of the services of the Project Coordinator whose role was to oversee, on behalf of the Ministry of Health, the construction and equipping of the International Specialized Hospital of Uganda. The Plaintiff was appointed on 15th June 2016 to oversee and supervise the design and construction of the project works in accordance with the agreed standards. The Plaintiff claimed that he had retired as a civil servant from the Ministry of Health where he had been pivotal in preparation of the concept for the project in issue and that he had been contracted as overseer of the same following his retirement.

The Plaintiff claimed the termination of his contract as Project Coordinator on 24th February 2017 was illegal and done outside the mandate of the 2nd Defendant, Dr Diana Atwine, the Permanent Secretary of the Ministry of Health. In a claim which the court found to be frivolous and vexatious, the Plaintiff charged that the latter was unfit to hold public office of Permanent Secretary.

Of particular interest to this study, Dr Diana Atwine, the Permanent Secretary of the Ministry of Health described the Agreement between the Government of Uganda and Finasi/Roko Construction Limited as a Public Private Partnership. It should be noted that the Ministries of Health and Finance represented Government of Uganda in these Agreements. This description of the Lubowa Hospital Construction Project as a PPP is contained both in her statement of defence as well as testimony as a witness and party in this suit. This is a significant admission from a major player that the case study, the project for the construction of an international specialized hospital at Lubowa is indeed a Public Private Partnership.

The High Court dismissed the suit and ruled that the termination of the Plaintiff's contract was lawful and did not breach any internal processes as claimed. In particular, the High Court ruled that the Plaintiff did not dispute evidence that five months after execution of the agreement appointing him, the work he was appointed to manage had not yet commenced and yet he was being paid a salary. It was therefore found that the 2nd Defendant, Dr Diana Atwine, had acted well within her mandate, authority and power in terminating the plaintiff's contract.

3.1.6 An Overview of the Report by the Parliamentary Committee on National Economy concerning the financing of the International Specialized Hospital of Uganda.

Parliament of Uganda has the mandate, under the Constitution, of approving Government's expenditure. While there are proposals for appropriation of funds that pass without the need for serious scrutiny, some proposals are referred to the Committee on National Economy for review to enable Members of Parliament make appropriate decision.

The proposal brought by the Ministry of Finance, Planning and Economic Development for the issuance of promissory notes not exceeding USD 391.4 million for the financing of the International Specialized Hospital of Uganda at Lubowa was very controversial. This prompted the Speaker of Parliament to refer the matter to the Committee on National Economy to review the same and guide the house. This compelled the Ministry of Finance to disclose material information about the project which had hitherto been concealed from the people's representatives.

The report of the Committee on the National Economy was issued in March 2019 and a number of observations and recommendations were made. The committee noted that the project had the potential of contributing to the NDP II Health Sector Objective of enhancing health sector competitiveness in the region. The committee also noted that the implementation of the project had the potential of increasing the availability of specialized medical services in the country and promoting medical tourism by way of referrals from neighboring countries.

However, the Committee raised concerns about the mode of implementation of the project altogether especially in light of the fact that it was in violation of the Presidential Directive which clearly stipulated that the project was to be designed as a PPP. In essence, the only guarantee of the Ugandan Government was supposed to be that the hospital would have patients. This was not the case as the burden of financing of the construction of the project has also been shifted to the Government.

The committee also took note of the fact that the government had already defaulted on the requirement to issue promissory notes to Finasi/Roko Construction SPV Limited for the first approved certificate of completed milestone of 5th December, 2018. It also took note of the fact that this commitment was made without prior approval of Parliament which was against the provisions of the law and that the proposal for the issue of promissory notes was Government's way of seeking the mandatory approval.

Further, the committee noted that the Ministry of Health, which was supposed to be the owner of the hospital, was supposed to pay the SPV through its annual budget for 8 years of operation, together with an annual fee to cover the provided service and to repay the initial investment. The committee also noted that the engineer appointed as the Owner's Engineer on site had resigned from Public Service and was under investigation despite the President insisting that he should continue working.

The committee further faulted the project implementer for recommending who the owner's supervisor should be. This glaring conflict of interest pointed to outright corruption on part of the contractor.¹⁸² Finally, the committee pointed out that the preparation and appraisal of the project had taken longer than it should have and warned about the risk of delays in implementation which could further put the project at risk of failure altogether.

The committee also cautioned the Attorney General's office to exercise a higher degree of caution and due diligence when advising Government to avoid or minimize losses arising out of inconsistencies.¹⁸³ Furthermore, the committee advised that in the future, the Government ought to strictly adhere to the provisions of the law that require the prior authorization of Government financial commitment for more than one financial year instead of seeking the approval of Parliament after the fact. This was an implicit admission that the project had not been initiated transparently and in accordance with the law.

On the issue of Government supervision of the project, the committee recommended that the contract of the "Owner's engineer", Eng. Francis Wakabi, be terminated with immediate effect and that the Ministry of Health request the Ministry of Works and Transport to assign two

¹⁸² Report of the Parliamentary Committee on the National Economy concerning the Financing of the International Specialized Hospital of Uganda, March 2019.

¹⁸³ Ibid.

internationally accredited senior engineers at the rank of principal to the project.¹⁸⁴ The committee also advised that the Ministry of Health should appoint an accredited engineer of its own. Collectively, this team of engineers ought to form a team of Owner's Engineers to represent the Government. This recommendation has never been implemented to date.

Lastly, two Members of Parliament made a minority report that recommended that the Government should source funds to rehabilitate existing facilities instead of guaranteeing profits for a private company.¹⁸⁵ The minority report also recommended that there was need to rethink the promissory note financing modality which gave the private investor 100% funding and guarantees to safeguard them from any losses.¹⁸⁶ The minority report also recommended that the Attorney General be held responsible for failing to properly and legally advise the Government on the project. In my view there was merit in the concerns of the minority report even though the majority Members of Parliament approved the majority report.

Overall, the members of the Committee on the National Economy were in agreement about the lack of transparency in all the stages of the Lubowa project. Both the majority and minority reports called for transparency and avoidance of conflict of interest. They equally agreed that the law had been flouted in the conception and contractual negotiation of the project without the prior approval of parliament. The minority strongly maintained the position that the project is largely of no value to the tax payer and flouted the law but is riddled with corruption.

3.1.7 A Critical Assessment of the Extent of Transparency in the Said Project

The construction of the International Specialized Hospital of Uganda presented a project idea which had outstanding prospects. Some of these included; the prospect of reducing government's expenditure on sending people abroad for treatment as well as the projects potential to promote medical tourism. However, there was never any disclosure of the concept of this hospital in the public domain.

An article run by the Daily Monitor newspaper quotes the Permanent Secretary to the Treasury, Ramathan Ggoobi, conceding that the entire project was poorly handled in its early stages as noted above with particular emphasis on the lack of transparency during the bidding and procurement

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

process.¹⁸⁷ Ggoobi also reveals that the Government has so far released promissory notes worth USD 120 million (UGX 431 billion) out of the USD 379 million (UGX 1.2 trillion) project cost which he says is equivalent to the current civil works.¹⁸⁸ This value of the civil works completed is disputed by Members of Parliament and it is safe to say the funds disbursed are not commensurate with the actual work done.¹⁸⁹

However, the most troubling aspect relating to the project was the fact that the PPPs Unit in Uganda denied any association with the project in the interviews conducted with members of the Unit.¹⁹⁰ It claimed that the project did not fit within the definition of PPPs. This is odd seeing as the project was conceived as a PPP from the very beginning. All the documents and agreements are in support of the assertion that the project is intended as a PPP.¹⁹¹ The denial by the PPP Unit can therefore be looked at as an attempt by the Unit to protect itself from the disapproval of the public as well as the fact that the project appears to have been forced through by the President. He wrote letters influencing the Ministries of Finance and that of Health to accept the wishes of the contractor ranging from the design of the project and the appointment of the engineer to certify works. Curiously, the President himself described the project as a PPP while introducing the same to the Ministry of Finance.

The manner in which the project received approvals from the Ministry of Health and that of Finance was mired in secrecy. The Parliamentary Committee on the National Economy which evaluated the project criticized the design of the project and specifically called for removal of the engineer appointed by the Ministry of Health to certify works completed. The said engineer was eventually removed from the project.

That notwithstanding, the fact that the Government entered into a binding contract to guarantee foreign loans and signed lenders' agreements with Finasi/Roko Construction SPV Limited before getting approval from Parliament leaves a lot to be desired. This is in light of the fact that the

¹⁸⁷ Available at: <https://www.monitor.co.ug/uganda/special-reports/oulanyah-s-death-renews-debate-on-lubowa-hospital-3762540> [Accessed on 29th March, 2023].

¹⁸⁸ Ibid.

¹⁸⁹ Report of the Parliamentary Committee on the National Economy concerning the Financing of the International Specialized Hospital of Uganda, March 2019.

¹⁹⁰ Interview conducted with PPP Unit staff

¹⁹¹ Canavet Josselin, (2019), "*Lubowa Hospital: A Case Study in Corruption Risk – And How Open Contracting Could Have Helped.*" Transparency International Health Initiative. Available at: <https://ti-health.org/content/lubowa-hospital-news-uganda-open-contracting/> [Accessed on 21st September, 2023].

agreement was negotiated and entered in 2018 before Hon. Bahati tabled the motion for the promissory notes guaranteeing the financing of the project in 2019. This represents a deviation from the principle of transparency in consideration of the fact that the PPP Act 2015 and Public Finance Management Act 2015 do not allow Government to guarantee a loan for a private party without the approval of Parliament.¹⁹² It is critical that people's representatives are in the knowledge of any projects with such serious fiscal consequences. In this case, they were belatedly brought on board.

Interestingly, there was no feasibility report that was furnished to any authority as is required under Section 22 of the PPP Act 2015. The public record does not have any report that shows how this project would have been more beneficial if it was carried out by a private party at the expense of the normal procurement methods and procedures used by the Government. It is equally impossible for the Government to claim that the normal direct procurement methods were used as this cannot be proved.

By all indications, we have a 'Public Private Partnership Project' that was created without consideration of the Law or any of the procedures put in place to protect taxpayers' money from being wasted. It is very likely that such a project could have been taken on at a cheaper price if only due diligence was exercised and the projects were done by the responsible Ministries through normal procurement procedures.

It can be argued that the general lack of transparency in the procurement process undermined the level of competitiveness at the point of the project's inception. It also defeats the value for money principle owing to the fact that the Government of Uganda could have identified a cheaper and more effective alternative contractor for the project.

The Lubowa project can be juxtaposed with a similar project that was completed by the Ministry of Health which is the Specialized Women and Neonatal Hospital in Mulago that was built at a cost of about USD 34 million (about UGX. 92 billion) which is considerably lower than the amount

¹⁹² For contextual purposes, sub-clause 26.12 of the Project Works Investment Agreement was to the effect that as a pre-condition to achievement of the construction effective date, the Ministry of Health and the Ministry of Finance, Planning and Economic Development ought to, upon request by Finasi, enter into a Lenders Direct Agreement with the finance parties, that is, African Export-import Bank and Barclays Bank of Uganda. This was done without the requisite approval of Parliament.

of money that is needed by the investors to construct the International Specialized hospital.¹⁹³ The majority of the funding for the Women's Hospital was through a loan from the Islamic Development Bank on comparatively more favorable terms.¹⁹⁴ Considering the fact that the cost of the land was not factored into the summation of the cost of the Lubowa project and the contractor, Finasi/Roko Construction SPV Limited, was not subjected to a competitive bidding and evaluation process, it can be concluded that this project is very detrimental to the taxpayers.

Needless to say, the Specialized Women and Neonatal Hospital in Mulago has been in operation for slightly over three years and it is yet to achieve optimum output.¹⁹⁵ How, then, will a heavily overpriced facility in Lubowa, meant to stem the influx of Ugandans seeking specialized medical care abroad, compete with similar facilities elsewhere, that do not have an eight-year timeline to pay off an enormous debt?

In relation to procurement process of the contract, no record of a bidding process is available; it was simply awarded to Roko Construction Limited and Finasi International FZC. Despite this shortcoming, another company, Power Guizhou Engineering Co. Ltd, was admitted to the project to conduct construction works, essentially sidelining Roko Construction Limited from the project. This was also done without any procurement procedures being followed which prompted Roko Construction Limited to take Finasi/Roko Construction SPV Limited, Finasi International FZC, the Ugandan Government and Power Guizhou Engineering to court on the grounds of anomalies. This raises questions as to whether the proper procedure was followed in the expulsion and introduction of one of the parties to the initial arrangement as there is no official record to that effect. It also raises concerns as to whether or not the Government of Uganda was notified prior to the admission of Power Guizhou Engineering to the contract or whether the Government consented to this.

Emphasis has been placed on the procedural deficits of the procurement process adopted for the project. A proper procurement process is typically a five-step process that involves planning, planning initiation, award, contracting and implementation. If indeed the Lubowa project had gone

¹⁹³ Ministerial Policy Statement FY 2022/23; Vote 420 – Mulago Specialized Women and Neonatal Hospital.

Available at:

https://budget.finance.go.ug/sites/default/files/Sector%20Spending%20Agency%20Budgets%20and%20Performance/Mulago%20Specilaised%20Women%20and%20Neonatal%20Hospital_0.pdf [Accessed on 21st September, 2023].

¹⁹⁴ Ibid.

¹⁹⁵ Ibid.

through an open contracting process, the relevant persons at the planning stage ought to have raised the issue of whether or not the hospital was needed, or the question on whether the project guaranteed that value for taxpayers' money would be realized.

Additionally, if there had been a transparent contracting process, other firms, both international and local, would have been given a chance to submit better bids, thereby providing price competition and more value for money. As has been pointed out earlier, the agreement was concluded with Finasi International FZC and Roko Construction Limited without any competition – no other companies had the opportunity to submit a bid. In a transparent procurement process, there would have been an opportunity for an open evaluation of all the received bids.

As far as implementation goes, the hospital was expected to cost USD 397 million, making it the most expensive hospital built in Uganda and almost anywhere in the world. Regardless, Members of Parliament were unsure of the purpose of financing the hospital even after it was endorsed by the Committee on National Economy. To contextualize their concerns, a local hospital built on similar terms costs an average of USD 25 million hence the Lubowa hospital was slated to cost approximately 16 times more than other hospital construction projects.¹⁹⁶ And with the volatility of the times, factoring in the adverse effects of the COVID-19 pandemic, it is highly probable that the project cost, if still pursued, will be significantly higher.

In terms of monitoring, the project is shrouded in a cloak of secrecy that makes it impossible even for oversight bodies to make sense of it. It is evident from the absence of readily available information relating to the terms of the project agreements as well as the actual resistance of the contractors to visits on site by government officials. On 6th August, 2019, the Minister of Health, Dr. Jane Ruth Aceng, the Permanent Secretary, Dr. Diana Atwine together with several Members of Parliament (MPs) from the National Economy Committee were denied access to the site of the ongoing construction of the International Specialized Hospital of Uganda, located in Lubowa.¹⁹⁷

The reason as to why the officials, who were trying to exercise Parliament's oversight function, were denied access to the site despite having planned the visit several weeks prior is unclear though the political connections of the promoters clearly aid their impunity and disregard for oversight

¹⁹⁶ Ibid.

¹⁹⁷ Canevet Josselin, (2020), "*Lubowa Hospital: A Case Study in Corruption Risk and How Open Contracting Could Have Helped.*" Available at: <https://ti-health.org/content/lubowa-hospital-news-uganda-open-contracting/> [Accessed on 16th August, 2023].

from government officials. Finasi/Roko Special Purpose Vehicle (SPV), the contractor, explained that security turned away the Minister and the MPs for their own safety. A statement from Finasi/Roko SPV also pointed out that was standard procedure at all construction sites that health and safety measures are sufficiently adhered to at all times, for all persons, including visitors, as there was always heavy moving equipment and machinery on site, open trenches, among others, that were potentially harmful to humans if not well managed.¹⁹⁸ This appears to be a vague half-baked excuse that was calculated to avoid inspection. Critically, there in fact is no ongoing construction on the site.

It is important to note that under Clause 3.4 of the Project Services Agreement, the Ministry of Health is at all times at liberty to carry out unannounced visits to observe, inspect and satisfy itself as to the adequacy of the works being conducted. However, this provision was blatantly disregarded when the Ministry of Health officials were turned away from the site. This controversial project points to the importance of open contracting especially with regard to the health sector.

The purpose of using open contracting is to make the process more transparent and to ensure that the taxpayers get value for money. Unfortunately for taxpayers in countries around the world, situations like this continue to reinforce the narrative against PPP projects as vehicles for promoting undeserved private profit at the expense of the public sector. In this project, open contracting would certainly have attracted more credible and competent health care contractors instead of the shadowy entity, FINASI International, which has no track record in the sector.

3.2 FINDINGS

At all times, the International Specialized Hospital of Uganda has been riddled with inconsistencies and shrouded in secrecy. In my view, the manner in which the project was conceived violated the Constitution, PPP Act, Procurement laws and procedures by which Government is bound.

The consistent claim from some promoters of the Project that the same is not a PPP Project are clearly erroneous. Firstly, the creation of a Special Purpose Vehicle Finasi/Roko Construction Company Limited was clearly an attempt to comply with Section 20(1) of the PPP Act 2015 which

¹⁹⁸ Ibid.

requires a private party in a public private partnership to be a special purpose company incorporated under the laws of Uganda to implement a specific PPP. There cannot be any other explanation as to why two separate corporate entities, Roko Construction Company Limited and FINASI International incorporated a separate legal entity whose sole objective was to implement the contract to construct the international specialized hospital.

Secondly, the contractual terms to design, finance, construct, equip and operate the hospital in question fall under the ambit of PPP Agreements envisaged under Section 43 of the Public Private Partnerships Act 2015. Section 43 provides as follows, “A design, build, finance and operate agreement shall be used where a private party is to design, build, finance and operate an infrastructure for a specified period and to transfer the infrastructure to the contracting authority at the end of that period.” Clearly, this is the gist of the Agreements entered into between the private contractors and the Ministries of Health and Finance. Finasi/Roko Construction Company Limited is supposed to design, build, finance and operate the hospital in question. The Project Framework Agreement, although avoiding mention of the phrase PPP, is also clearly a design, build, finance and operate PPP Agreement. Section 37 of the PPP Act permits a contracting authority to use any of the PPP agreements specified in sections 38 to 45.

Thirdly, the entire design and model of this hospital project has all the hallmarks of Lesotho’s controversial PPP hospital project, the Queen Mamohato Memorial Hospital in Maseru, Lesotho which was built at a cost of US D 100 million to be operated under an 18 year contract between Lesotho Ministry of Health and a private consortium.¹⁹⁹ It was initially hailed by the World Bank as a model for PPP financing for health care facilities and services in low income countries.²⁰⁰ However, the hospital became a political mess as it absorbed over half of the entire budget for the health system. Public disclosure of the exact financial arrangements brokered with the guidance of the World Bank’s IFC only succeeded after a change in Lesotho’s Government otherwise the same had been concealed.²⁰¹ The refusal or failure to disclose the exaggerated financials of this hospital PPP in Lesotho are similar to the manner in which the financial arrangements in respect of the

¹⁹⁹ Webster C. Paul, (2015) “*Lesotho’s controversial public- private partnership project*” *The Lancet Vol.386, Issue 10007, p1929-1931*, November 14, 2015.

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*

Lubowa Hospital project were concealed from the public and parliament till there was need to obtain parliamentary approval.

Lastly, one of the key players in the project, the Permanent Secretary of the Ministry of Health, Dr Diana Atwine expressly described the entire project as a Public Private Partnership on court record in her defence and witness testimony in *Dr Eng John Tumwesigye vs Attorney General and Diana Atwine, Civil Suit No.190 of 2017*. This was in the context of the court dispute following termination of the Project Coordinator. This is conclusive confirmation that the project is indeed a PPP. In her witness statement in the said suit, she stated as follows;

The Government of Uganda represented by both the Ministry of Health and the Ministry of Finance Planning and Economic Development on the one hand and Finansi/Roko Construction SPV Limited on the other hand executed a Public Private Partnership Agreement (“the PPP”) for the financing, design, construction and equipment of an international specialized hospital (“the Project”).

In the researcher’s view, the original concept for the construction of an international specialized hospital appears to have been inspired by the Lesotho PPP for the upgrade of the Queen Mamohato hospital. As of 2014 when the contentious Lubowa Hospital project was initiated, the Queen Mamohato hospital upgrade PPP had been hailed by the World Bank and scholars as a model PPP for demonstration of how public-private partnerships could increase access and quality of care in the healthcare sector.²⁰²

It is worth noting that in 2021, the Queen Mamohato hospital PPP was terminated by the Lesotho government over its cost.²⁰³ Unfortunately, there cannot be said to be any positive impact realized from the Lubowa project to date. If anything, it has been nothing short of detrimental to the taxpayers. Significant taxpayer funds have been spent on what appears to be a speculative and non-existent project whose promoters clearly lack the capacity to deliver on their undertakings with the Government.

²⁰² Taryn Vian et al, (2015) “Hospital Public- Private Partnerships in Low Resource Settings: Perceptions of How the Lesotho PPP Transformed Management Systems and Performance” Journal of Health Systems & Reform, Volume 1, 2015 - Issue 2, Last Accessed on 10th November 2023 at <https://doi.org/10.1080/23288604.2015.1029060>

²⁰³ Gernetzky Karl, 14th July 2021 “Netcare cuts Lesotho operations on termination of deal” Business Live at www.businesslive.co.za/bd/companies/industrials/2021-07-14-netcare-begins-early-handover-of-lesotho-operations-citing-repeated-nonpayment/. Accessed on 20th October 2023,

The evident lack of transparency in this project is equally manifested in the unavailability of reliable information on the negotiation, design, implementation, and contract documents. This has been found to be unconvincing. It is equally alarming that yearly audit reports have never been presented to the public for the previous two financial years in respect of the project. If it were the case that the reports were presented, the findings would serve to ensure that the public has an eye on the project, and it would have been easy to see if the project was following its plans.

It was also surprising that public officials were denied access to the site which showed that there was a possibility that project implementation was never up to speed. This was a manifestation of incompetence considering the fact that the project was supposed to have been completed in June 2020. Given the trajectory that this project took, the impression upon the public is an underwhelming one in light of the fact that there was no transparency throughout the project and it has not yielded any results hence, no value for money.

It is safe to assert therefore, that the project failed to deliver on its promises as can be evidenced by the fact that by the conclusion of this study in May 2023, the project is far from completion despite the projected date of completion being July 2020. This project also offers lessons on the consequences of failure to transparently procure and execute PPP projects; the tax payer stands to lose significantly due to machinations and opportunistic behavior of the profit oriented private sector players such as Finasi International FZC and Roko Construction Limited.

The most perplexing aspect of the project is the cavalier attitude with which disclosure of information about it has been handled. To date, the financial details of the project have never been formally announced to the public. Similarly, there is absolutely no formal communication to the public about the status of the works on the project. Essentially, there is absolutely no disclosure permitted to the point that a journalist who tried to visit the site to interview individuals was instead detained.²⁰⁴ The entire project is a case study in failure of disclosure and the dangers that follow in terms of cost overruns and financial loss to the public sector.

²⁰⁴ Daily Monitor, Friday September 22, 2023 “*Monitor Journalist arrested over Lubowa hospital story*”. Accessed on 24th September 2023 at www.monitor.co.ug/uganda/news/national/monitor-journalist-arrested-over-lubowa-hospital-story-4377342

CHAPTER FOUR

COMPARATIVE REVIEW OF MODEL LEGAL FRAMEWORKS ON TRANSPARENCY IN PPP PROJECTS: A GLOBAL AND REGIONAL PERSPECTIVE

4.0 INTRODUCTION

In this chapter, legal frameworks from South Africa and Kenya are analyzed insofar as they promote the principle of transparency in PPPs through mandated disclosure of project information. The choice of these jurisdictions is not arbitrary. It was influenced by the need to take into account a jurisdiction with a mature economy and several PPP projects (South Africa) and one whose adoption of PPP projects is also recent. The PPP disclosure framework developed by the World Bank is also widely used in several jurisdictions including the United Kingdom, the States of New South Wales and Victoria in Australia hence it is highly relevant for comparison and benchmarking.

4.1 MODEL FRAMEWORKS FOR TRANSPARENCY IN PUBLIC PRIVATE PARTNERSHIPS ON THE GLOBAL STAGE: RECOMMENDATIONS FROM THE WORLD BANK

The World Bank has been very instrumental, rightly or wrongly, in promoting the usage of PPPs in financing infrastructure projects in developing countries. It has provided technical and funding support to various PPP projects globally and in Uganda as well. It is a well-known promoter and supporter of PPP projects. It has also received some criticism for its promotion of PPPs. It is therefore pertinent to review its own position on transparency in the form of disclosure of information in PPP projects.

To its credit, it gives pride of place to the importance of transparency in PPP projects and has developed numerous standards, in form of disclosure of information frameworks, to guide its stakeholders especially the beneficiaries of its financing mechanisms. The World Bank justifies its disclosure framework with direct reference to several economies which have robust disclosure frameworks such as the United Kingdom, New South Wales, British Columbia among others. It therefore extensively reviews the practice in “model proactive disclosure jurisdictions” and urges other countries to benchmark the same.

In 2015, the World Bank laid down the disclosure framework for ensuring that there is disclosure in public private partnerships.²⁰⁵ The framework is designed to provide technical guidance for systematic, proactive pre and post procurement disclosure of information in PPP programs. This information generally includes the details of:

- i) Pre-Procurement: Pre-tender, tender, evaluation and reporting.
- ii) Post-Procurement: Basic project information, risk, justification for PPP method, financial information, government support, tariffs and performance.

The publication states that the key challenges facing disclosure appear to be the reluctance of public bodies to share information in the absence of a clear mandate, a dearth of practical internal guidance, non-availability, inaccuracy of data, time and costs of disclosure and the lack of oversight mechanisms. It goes on to state that even disclosed information sometimes becomes inaccessible, especially where it consists of placing complex, difficult to comprehend, full contract documents in the public domain.²⁰⁶

According to the World Bank, more information is likely to be disclosed where clear mandates supported by legislation are provided through a Freedom of Information Act alone or by public private partnership laws, and/or public finance management laws and/or specific guidance laws.²⁰⁷ As such, the legislation, policy and guidance read together ought to provide as much clarity as possible on what is to be disclosed when, or by whom and how.²⁰⁸

The World Bank is alive to the fact that gaps in specific cases are always going to rise but that notwithstanding, broader issues can be taken care of through sound and practical legislation and guidance. The World Bank reports that detailed guidance underlying general freedom of information legislation works fairly well, as in the cases of Victoria, New South Wales, the United Kingdom and British Columbia. Some of the elements that are present in these jurisdictions include;

²⁰⁵ The World Bank, (2015), “*A Framework for Disclosure in Public Private Partnerships.*” Available at: <https://thedocs.worldbank.org/en/doc/773541448296707678-0100022015/original/DisclosureinPPPsFramework.pdf> [Accessed on 13th May, 2023].

²⁰⁶ Ibid.

²⁰⁷ Ibid.

²⁰⁸ Ibid.

- i) Request for Qualifications Document. The World Bank recommends a project website or through link to the bid website. In addition, addenda to the Request for Qualifications Document ought to be available to proponents registering through the bid website.
- ii) Name and number of parties who respond to the Request for Qualifications Document.
- iii) Name and number of parties shortlisted at Request for Qualifications Document Stage
- iv) Request for Proposals
- v) Disclosure of the draft project agreement when evaluation is at an advanced level.

In the United Kingdom, the key pieces of mandatory disclosure include:

- i) Infrastructure and construction pipeline information
- ii) Accessible information on the current public private partnerships
- iii) Full contract disclosure with the exception of exempt information
- iv) Full project and financial information where the government has equity
- v) Actual and forecast equity return information

In a nutshell, the World Bank, based on review of best practices in many countries with a widespread use of PPPs, recommends that to improve transparency in public private partnerships, legislation should attempt to include two key requirements in particular which are proactive disclosure and specific coverage and this is supposed to be done through direct mention of PPPs. Additionally, there ought to be mention of contracts or contract information and procurement information as part of the definition of information.

One of the specific advantages of providing detailed coverage when dealing with disclosure in PPPs is that it provides clarity on what to disclose and it becomes inevitable that public bodies disclose the necessary information. In the United Kingdom, disclosure in PPPs has evolved over time and this has been made possible by the Freedom of Information Act, 2000 which is generously interpreted and through intense audit scrutiny and public pressure.²⁰⁹

The UK Freedom of Information Act is supplemented by the 2010 Policy on Disclosure which has strong disclosure requirements. For example, it provides for general coverage of all contracts, deals with the specific information that is supposed to be covered under disclosure and provides the

²⁰⁹ Ibid.

definition of such information. Ideally, contracts entered into by any public authority fall within the information that ought to be disclosed.²¹⁰

Furthermore, the 2010 Policy on Disclosure encourages proactive disclosure of contracts with a broad listing of elements to be disclosed.²¹¹ Lastly, it specifies the broad areas of redactions relevant in the context of PPP contracts, such as commercially sensitive information and trade secrets as well as strategic/public interest related confidential information.

At the pre-procurement stage, different jurisdictions have different disclosure requirements. For instance, in British Columbia, major capital project plans made by the responsible minister, requests for qualifications and proposals, successful bidders and project value-for-money reports have to be disclosed.

In New South Wales, the responsible agency is supposed to publish the details of any procurement arrangements for PPPs on the e-Tendering website available or the Infrastructure Australia website;²¹² the procuring agency is required to avail tender documents and summaries of bid evaluation of public interest are supposed to be publicly disclosed.²¹³

In the United Kingdom, information on procurement is supposed to be disclosed by the procuring agency on the contract finder website as “tentative” notice. Furthermore, information on the tender documents is supposed to be made available by the procuring agency on the contract finder website as “tender” notice. Finally, bid evaluation is supposed to be availed by the procuring agency on the contract finder website as “award” notice.²¹⁴

Another way of ensuring reasonable disclosure of project information is the inclusion of standard disclosure clauses within the legislation governing public private partnerships. In the United Kingdom for example, the Private Finance 2 Standard Contract sets out a full chapter on transparency and information (Chapter 31). It includes required and recommended drafting on confidentiality and freedom of information wherein contractors must;

- i) Provide a contract summary within 20 days of the signature of the contract

²¹⁰ Part 9, Freedom of Information Code of Practice, 2017.

²¹¹ HM Treasury (2012), Clause 6.1, Standardization of PF2 Contracts.

²¹² Clause 35 of Volume 7, Commercial Principles for Economic Infrastructure of the National PPP Guidelines.

²¹³ Clause 6, Government Information (Public Access) Act, 2009.

²¹⁴ Chapter 31, Private Finance 2 Standard Contract.

- ii) Provide access to all requested project data
- iii) Provide quarterly summaries of the information provided by the senior lenders
- iv) Provide the authority and Her Majesty's Treasury a calculation of the equity internal rate of return and other financial information bi-annually.²¹⁵

The chapter also specifically states that the provision of information is part of the service required and it imposes consequences for the failure to comply.

In British Columbia, the standard drafting guidelines developed by Partnerships BC put the contractor on notice that following the financial clause, the authority expects to publicly disclose:

- i) The Fairness Advisor's report
- ii) A project report
- iii) Financial project agreement, excluding those portions that may be redacted pursuant to the application of the freedom of information laws.

Finally, in New South Wales, the law provides that the government will be entitled to publish the project agreement and other project contracts, but disclosure by the private party is generally prohibited without prior consent of the government.²¹⁶ This legal provision implies in effect that the public party is entitled to full disclosure of the entire PPP contract documentation.

It is therefore quite clear that the World Bank standards for PPPs require active and timely disclosure of PPP information and as indicated above, it specifically points out and recommends jurisdictions with best practices in this regard. The World Bank urges economies to adopt the disclosure regime championed by jurisdictions such as United Kingdom, New South Wales and British Columbia among others.

Surprisingly, Uganda's legal frame disregards the World Bank recommendations for proactive disclosure of project information. The PPP Act 2015 in particular prohibits disclosure of information using a very wide provision that provides numerous justifications for restricting access to information. This contradicts the World Bank's model framework on disclosure of information about PPP projects.

²¹⁵ Chapter 31, PF2 Standard Contract.

²¹⁶ Clause 35 of the Volume 7: Commercial Principles for Economic Infrastructure of the National PPP Guidelines.

4.2 REGIONAL PERSPECTIVE: LEGAL AND REGULATORY FRAMEWORK FOR TRANSPARENCY IN PUBLIC PRIVATE PARTNERSHIPS: THE CASES OF KENYA AND SOUTH AFRICA

Despite being larger economies, Kenya and South Africa are jurisdictions whose approach to transparency in PPP projects has significant lessons for Uganda. In respect of Kenya, in addition to sharing membership within the economic bloc of the East African Community (EAC), the economy is invariably linked to Uganda's in a number of ways on account of Uganda's landlocked status while sharing common borders with Kenya. As a matter of fact, one famous PPP project was designed to provide the Standard Gauge Railway and it required joint execution in respect of both countries.²¹⁷ However, due to a number of funding constraints, the project is nowhere near completion.

On the other hand, South African multinational companies dominate the Ugandan economy in banking, telecommunications and energy sectors. South African companies, including State Corporations such as Eskom, have been heavily involved in PPP projects in Uganda's electricity sector. It is therefore quite useful to benchmark on the regulatory framework of PPP projects in these two countries and how they compare with Uganda.

4.2.1 Legal and Regulatory Framework for Transparency in Public Private Partnerships in Kenya

Kenya's 2010 Constitution recognizes transparency as being essential to good governance.²¹⁸ Further, Article 35(3) of the same Constitution places a requirement on the state to publish and publicize any important information that affects the country as a whole. Article 232 of the same constitution reinforces this requirement by stating that the principles of accountability and transparency ought to be adhered to through the provision of timely and accurate information to the public so as to guide public service.

Furthermore, Kenya enacted an Access to Information Act in 2016 so as to lay down the perimeters within which provision of access to information held by public entities and private bodies may be done. For purposes of comparison, it is important to note that Kenya is globally ranked as 23rd best

²¹⁷ Kinyua R. W. and Mwenda M. N., (2020), "*Optimizing Public Private Partnership in Implementation of Railway Transport Projects in Kenya: A Case of the National Standard Gauge Railway*". EJBMR, European Journal of Business and Management Research Vol. 5, No. 6. Available at: <https://www.ejbmr.org/index.php/ejbmr/article/view/619> [Accessed on 26th August, 2023].

²¹⁸ Article 10, Constitution of the Republic of Kenya, 2010.

Freedom of Information country while Uganda is ranked as 47th best.²¹⁹ Kenya's Access to Information Act 2016 provides the framework giving the right to information. It specifically provides that there is a duty of disclosure of information unless a public officer is specifically exempted.²²⁰ The Act only restricts disclosure of information on three grounds of national interest, invasion of privacy and professional confidentiality.²²¹ These three grounds of exemptions to disclosure of information exist in virtually all Freedom of Information Laws.²²² They are not in any way unique to Kenya. Typically it is the manner in which these exemptions are interpreted and applied that matters significantly. In *Katiba Institute vs Presidents Delivery Unit*,²²³ the High Court in Nairobi ruled that the constitutional right to access information was open to both natural and juristic persons and the court's ruling paved way for numerous organizations to initiate successful access to information requests.²²⁴

In December 2021, Kenya's President signed into law a new PPP Act. This Act repealed Kenya's formerly operational legislation governing PPPs which was the PPP Act of 2013. It has been reported that prior to the enactment of the new Act, the delivery of PPP projects in Kenya was characterized by false statistics and conspicuous red tape which explains the low uptake, reduced investor interest and delivery of projects.²²⁵

Section 69 of the PPP Act, 2021 defines the perimeters of the minimum disclosure requirements needed from contracting authorities in relation to the PPP projects that are undertaken in Kenya. Section 69(1) of Kenya's Public Private Partnerships Act 2021 is the most important provision on disclosure of PPP project information in Kenya. It provides as follows;

A contracting authority shall, on the execution of a project agreement, publish in at least two newspapers of national circulation and electronic media the results of the tender and the following information---

²¹⁹ Continuous ranking is done by the Centre for Law and Development. Available at: <http://www.rti-rating.org/country-data/> [Accessed on 9th May, 2023].

²²⁰ Section 4(4) Access to Information Act 2016, Kenya.

²²¹ Section 6, Ibid.

²²² Ackerman M. John and Sandoval-Ballestros E. Irma, (2006) "*The Global Explosion of Freedom of Information Laws.*" *Administrative Law Review*, Winter 2006, Vol. 58, No.1 (Winter 2006), pp. 85 – 130 <https://www.jstor.org/stable/40712005>.

²²³ Petition 468 of 2017, 2017 Eklr.

²²⁴ Information online at www.katibainstitute.org.

²²⁵ Kitoo Ibrahim, (2021), "*Kenya New PPP Law A Shot in the Arm for Infrastructure.*" *Business Daily*. Available at: <https://www.businessdailyafrica.com/bd/opinion-analysis/letters/kenya-new-ppp-law-a-shot-arm-infrastructure-3653046> [Accessed on 5th September, 2023].

- a) *The nature of the project and key terms of the project agreement;*
- b) *The works to be developed or public services to be performed under the project;*
- c) *The successful bidder*
- d) *The amount of any public funds committed to the project;*
- e) *The project tariff, if applicable;*
- f) *Any government support measures provided to the project*
- g) *The social and economic benefits of the project;*
- h) *The duration of the project*
- i) *The expected asset quality when the project is handed back to the contracting authority; and*
- j) *The manner in which the project will be monitored and reported on during the duration of the project*

This provision is a positive step towards maintaining satisfactory levels of transparency because the principle goes hand in hand with disclosure of PPP information. Section 69 of Kenya's PPP Act also identifies salient features of PPP projects which ought to be brought into the public domain. These features help in describing and providing adequate information about the contract that should be made public. Some of the aspects with a bearing on transparency include; the works to be developed or the public service to be provided, the amount of public funds committed or the extent of government's commitment to the project and to whom as well as any project tariffs if any.

In line with this requirement on disclosure, the Cabinet Secretary is granted the discretion to prescribe regulations for better implementation of Section 69 of the Act. These Regulations have not yet been passed. This is of particular importance because it gives room for the legal framework on transparency in PPPs to adapt to any scenarios that may not have been foreseen when the law was being enacted by Parliament.

Clearly, Kenya's new PPP law is highly progressive and ambitious in promoting a robust disclosure framework designed to ensure that all material information touching a public private partnership project is disclosed to the public. The law specifically requires publication of PPP project information in two newspapers of national circulation besides electronic media. This is a very high and lofty standard in terms of disclosure of project information about PPPs.

It would be beneficial for Uganda's legal regime on PPPs to incorporate an equivalent of Section 69 of Kenya's PPP law. It is critical for disclosure and access to information if the law specifically provides for the kind of information that must be disclosed without fail about each PPP project. Uganda's PPP Act 2015 lacks such a provision and instead contains stringent provisions for protection of commercial confidentiality. These provisions are used to undermine proactive disclosure and access to information. They need to be modified by inclusion of a specific provision that mandates disclosure of certain information such as particulars of parties in PPPs, an overview of the financial terms, projected benefits to the community as well as a cost benefit analysis of the project.

4.2.2 Legal and Regulatory Framework for Transparency in Public Private Partnerships in South Africa

The legal foundation for the requirement of transparency in public private partnerships in South Africa is provided for under Article 217(1) of the Constitution of the Republic of South Africa 1996 which provides that when an organ of the state in the national, provincial or local sphere of government or other institution identified in the national legislation contracts for goods or services, it must do so in accordance with a system that is fair, equitable, transparent and cost-effective.²²⁶ Within South Africa, transparency is therefore a constitutional imperative.

Furthermore, Article 152 of the Constitution lays the foundation for the involvement of the public in every step of the PPP process through consultations and legislative debates. This is further buttressed by the Department of Public Service and Administration Batho Pele Principles that require the enforcement of transparency and openness mechanisms such as the presentation of annual performance plans, department annual reports open days, workshops, training programmes or public meetings so as to always keep the public informed about what is going on with all PPP projects.

There are different laws and policies governing PPPs in South Africa which emphasize the principle of transparency. Some of these legislations include the Treasury Regulation 16 (2004)²²⁷, the Municipal Systems Act,²²⁸ the Municipal Finance Management Act²²⁹ and the Promotion of

²²⁶ Arimoro Augustine, (2018) "An Appraisal of the Framework for Public Private Partnerships in South Africa" *European Procurement & Public Private Partnership Law Review*, 2018, Vol. 13, No.3 (2018), pp. 214 – 228.

²²⁷ No. 16 of 2004.

²²⁸ No. 32 of 2000.

²²⁹ No. 56 of 2003.

Administrative Justice Act.²³⁰ There are two major policy documents that guide the implementation of PPPs at the national level in South Africa and these are the PPP Manual²³¹ and the Standardized Public Private Market Provisions²³² developed by the PPP Unit of the National Treasury. Treasury Regulation 16 (2004) is the central legislation governing PPPs in South Africa for both national and provincial government.²³³

The South African PPP legal framework does not explicitly require disclosure of project information in PPP projects though the importance of transparency is emphasized. Without a robust disclosure framework that enables dissemination of project information to the public, the effectiveness of South Africa's PPP project information disclosure framework is highly debatable. However, recourse may be heard to South Africa's Promotion of Access to Information Act in order to obtain limited information about contracts since proactive disclosure of information is generally limited as contract information and audit reports are only disclosed reactively.²³⁴ It is rather surprising that proactive disclosure of PPP related information to the public is limited in South Africa. It is therefore critical to note that South Africa does not offer a good example to Uganda in term of disclosure of PPP information. Additionally, there has been limited uptake of PPP projects in South Africa. The Kenyan standard is clearer and more proactive.

A study also indicated that politicization of infrastructure through party politics, political risk and dominance of the state in delivery of strategic infrastructure and assets has played a key role in the limited uptake of PPPs in South Africa.²³⁵ Perhaps, the limited proactive disclosure is also due to this politicization of infrastructure delivery. The key lesson to learn for Uganda from South Africa is that existence of a freedom of information law and guidelines for disclosure is not sufficient to ensure transparency in PPP projects.

²³⁰ No. 3 of 2000.

²³¹ National Treasury 2004a.

²³² National Treasury 2004b.

²³³ Supra, Note 210.

²³⁴ Ofentse K. Sebitlo, Tatenda Mbara & Rose Luke, (2022) "The State of South Africa's Public-Private Partnership Practices in Transport Projects: Problems and Potential." *Journal of Transport and Supply Chain Management Vol. 16 of 2022.*

²³⁵ Ibid.

4.3 FINDINGS FROM THE COMPARISON OF THE LEGAL AND INSTITUTIONAL FRAMEWORKS IN SELECTED JURISDICTIONS

From the very onset, it is quite clear that whereas there are some similarities between the framework in Uganda and those discussed in this chapter, there are also pronounced differences.

The PPP model framework recommended by the World Bank, specifically requires that parties to a PPPS be compelled under the law to disclose key PPP information in the spirit of transparency. In Uganda, both the Access to Information Act 2005 and the PPP Act 2015 use the cover of commercial confidentiality to undermine disclosure of PPP information even though they contain provisions that appear to provide for disclosure of information.

Most model frameworks have a provision requiring publication of certain details about PPPs. For instance, the legal framework of New South Wales which the World Bank recommends, requires the responsible agency to publish the details of procurement arrangements for PPPs on the e-Tendering website available or the Infrastructure Australia website. Some of the information which is required for disclosure includes tender documents and summaries of bid evaluation in respect of all PPPs. This is not the case in Uganda as there is nothing similar to a repository where useful PPP information from the relevant parties can be accessed. The PPP Act 2015 is also silent on the obligation to publish PPP project information as a way of disclosing ongoing PPPs to the public.

Kenya's new PPP Act from 2021, in contrast with Ugandan law, expressly provides that PPP contracts are subject to disclosure so as to buttress the principle of transparency. In particular, Section 69 of Kenya's PPP Act has absolutely no equivalent in Uganda's PPP Act 2015. While Kenya's PPP Act 2021 specifically lists the information that must be disclosed to the public, Uganda's PPP Act is generally silent and only provides for a vague clause on disclosure that is subject to numerous exemptions.

In regard to South Africa, it is clear that the country has very limited proactive disclosure which has generally resulted into poor PPPs uptake. It may therefore not offer good comparison with Uganda which has several PPP projects in implementation and in the pipeline. However, South Africa offers the lesson that having a constitutional provision on transparency in contracting and a freedom of information legislation is not sufficient to encourage and stimulate proactive disclosure in PPPs.

4.4 CONCLUSION

This chapter analyzed the framework on disclosure in PPP projects in advanced jurisdictions recommended by the World Bank in comparison to the framework in Uganda. Additional comparison has been made with the framework in Kenya and South Africa. The findings from this analysis highlight gaps in the legal framework to facilitate disclosure of PPP project information in Uganda. The gaps in Uganda's framework cut across a wide range of areas right from the scope of information disclosure.

CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

5.0 INTRODUCTION

This study has reviewed the legal framework for transparency in public private partnerships in Uganda. It establishes that there is a clear lack of transparency in infrastructure projects delivered in Uganda using the PPP model based on the case study of the controversial project for construction of an international specialized hospital at Lubowa. The study has analyzed the legal framework currently in place to enhance transparency in form of disclosure of project information. It demonstrates from the case study that the existing legal framework has not deterred systemic lack of information as well as outright denial of information about pending PPP projects.

This has facilitated a culture of contentious, questionable, secretive and expensive PPP projects such as the controversial project for the construction of Lubowa Hospital. The legal framework does not penalize non-disclosure of project information. Neither does it mandate proactive disclosure of information about PPP projects. On the contrary, the legal framework seeks to penalize unauthorized disclosure of project information. Further, the existing provisions in the Access to Information Act 2005 violate Article 41 of the Constitution. The limitations to disclosure of information contained in the Act go beyond those permitted in the Constitution.

It is established from the case study of Lubowa Hospital that significant taxpayer funds in excess of half a trillion Uganda Shillings have been sunk into this controversial project without any tangible result to show. The procurement, design and launch of the project were all concluded in a secretive manner. No information was formally disclosed to the public over the existence of this project.

This study also establishes the existence of serious cost overruns as well as non-competitive procurement of infrastructure projects. This is consistent with studies tending to suggest that PPP projects with higher levels of disclosure tend to have limited cost overruns whereas the reverse is also true.²³⁶ It is my conclusion that the cost overruns on this Lubowa project could have been averted by better disclosure during conception, procurement, and implementation of the projects

²³⁶ Mojahedul Islam Nayyer et al, 2022 IOP Conf.Ser.Earth Environ. Sci 1101052019 “*Effect of transparency on the development phase of public- private partnership: Analysis of highway projects.*” IOP Conference Series: Earth and Environmental Science, Volume 1101, Issue 5, id.052019, 11pp. Available at <https://ui.adsabs.harvard.edu/abs/2022E%26ES.1101e2019N/abstract> Last accessed 10th October 2023

in issue. It is also probable that the cost overruns partly occur because of limited disclosure which restricts public scrutiny of the project.

In particular, a scrutiny of the project for the construction of Lubowa Hospital demonstrates a blatant disregard for disclosure of information, at all levels, to the public and derivatively, the taxpayer, who is footing the bill for the project. The lack of transparency has thus far led to what appears to be a colossal loss of very significant taxpayer funds. This was partly occasioned by the non-disclosure of material information that could have been red flagged by experts and informed members of the public. A review of the Project Agreement also indicates that the contractor committed breaches of the same in denying government of Uganda officials' impromptu access to the construction site.

Government funding to this project in excess of five hundred billion shillings is not commensurate with the construction works on site. There is no contractor on site for the past six (6) or so months. This project, confirms the critical importance of transparency in conception, procurement and implementation of PPP projects in order to avoid wastage and theft of public funds through opaque structures.

5.1 CONCLUSIONS

5.1.1 Shortcomings in the Legal and Institutional Framework

Within the legal framework, there are some provisions for transparency in PPP projects. However, these provisions are rather mild and ambiguous. As a consequence, they have consistently been disregarded and there is very limited disclosure in the PPP space.

The PPP legal framework has been found to have a number of shortcomings. These cut across a broad spectrum of areas ranging from fundamental aspects such as a very narrow definition of PPPs to more complex aspects especially inadequate disclosure guidelines for contract information on the various PPP projects in the country. Additionally, the numerous exemptions to disclosure of information under the PPP Act 2015 as well as the Access to Information Act 2005 restrict the disclosure of contract information. The exemptions of security and sovereignty of the State, right of privacy of any person, public interest inter alia are too broad and capable of covering all PPP related information about a project.

To compound the situation, Section 47 (4) of the PPP Act 2015 surprisingly criminalizes unauthorized disclosure of information thereby creating a chilling effect in the minds of officials of contracting authorities who may be inclined to engage in proactive disclosure of information. This provision does not exist in most freedom of information laws or PPP legislation.

At a policy level, the lack of specific prescriptions for enforcing transparency in PPP projects could also be blamed for the resulting inadequate legal framework. The policy framework urges transparency but does not specifically provide for mandatory public disclosure of certain project information about PPPs. If this had been the case, it would have provided better guidance for legislative action.

The failure of the legal framework contained in the Public Private Partnerships Act 2015, to provide a broad definition of PPPs has influenced some public sector players to circumvent the law while borrowing its premise and concepts. For instance, there is widespread confusion on whether or not the construction project in respect of the International Specialized Hospital of Uganda was indeed a public private partnership primarily because of the mode of delivery of the project. Some of its promoters consistently claim that it is not a PPP project yet its design, funding arrangements and Project Agreements are basic features of a PPP. For all intents and purposes, the project is a PPP even though its promoters argue the contrary.

World over, different modes of PPPs have been adopted and some of these are not expressly provided for in the definition of PPPs in Uganda. Some jurisdictions reviewed for comparison, such as South Africa, have adopted a broad and generous definition of PPPs in their law to cover most contractual relationships between the public sector and private sector for delivery of any good or service.

The practice of information disclosure has been emphasized as being integral to the enforcement of the principle of transparency in PPPs. Within the principal legislation, the PPP Act 2015, one would expect a well-defined path that relevant parties are required to follow so as to make sure that there is adequate disclosure of project information to the public. Unfortunately, this is lacking in the Act. The provisions on disclosure of information in the PPP Act 2015 and the Access to Information Act 2005 are unduly restrictive and offer wide exemptions that enable reliance on confidentiality clauses in PPP Agreements to oust all attempts at disclosure.

As a consequence, throughout this study, it proved difficult to find any substantial information on PPP projects disclosed by the relevant authorities. It comes as no surprise that the level of disclosure in Ugandan infrastructure projects, as evidenced by the dearth of official information about Lubowa Hospital, is very low and largely unsatisfactory.

5.1.2 A Disconnect Between the Policy prescriptions on transparency and Resulting Legal Framework

The PPP Policy Framework specifically calls for principle of transparency but the resulting legal framework under the PPP Act 2015 does not comprehensively address the requirement to uphold and respect the principle of transparency. To a greater extent, the legal framework is vague about the methods in which transparency in PPPs is to be attained. It merely gives an inference that the two principles of transparency are to be respected and upheld but does not give satisfactory details for the enforcement of the provisions. The law does not adequately put in effect the policy proposals calling for increased transparency in PPP projects. In effect, the PPP Act 2015 pays lip service to the Policy.

The legal provisions creating institutions such as the PPP Unit do not provide them with adequate legal backing to enforce transparency by compelling disclosure in PPP projects. This also applies to the PPP Committee which is supposed to enforce compliance with the law. The institutions created under the PPP legal regime do not have powers to ensure that they discharge the mandate to ensure transparent dealings in PPP projects. There is no equivalent of Section 69 of Kenya's PPP Law.

5.1.3 Systemic Lack of Disclosure of Basic Information in PPP Projects

Using the case study as the yardstick, this study finds that there is an overwhelming lack of transparency in PPP projects in Uganda. There is very limited public disclosure about the nature of ongoing PPP projects. This was a common problem seen in the case study of the construction of an international specialized hospital at Lubowa. The gaps in transparency are present at all stages of the process right from the conception of the project idea, throughout the planning and implementation stages, and even after completion.

There is no known record of feasibility studies carried out and the accompanying reports if any. The project appears to have been speculative from its inception. Additionally, the manner in which PPP projects are identified and funding structured is opaque as exemplified by this project. There

is no particular office or even official website where basic information touching this project can be readily accessed.

5.1.4 An Entrenched Culture of Secrecy Aggravated by Little Knowledge about PPPs

One of the most recurring traits that is common among PPPs in Uganda is the culture of secrecy that surrounds the entirety of the process. This trend is present at all stages of the project. Generally, this culture of secrecy is enabled by the systemic lack of transparency within the PPP infrastructure space in the country. The project for the construction of Lubowa Hospital was initiated and commenced in this climate of secrecy. Scanty details about it made it into the public domain only when Parliament was requested to approve issuance of Promissory Notes supporting the project.

While the law provides for the manner in which a PPP decision ought to be arrived at, what happens in practice is an entirely different thing altogether. The regulations provide for the manner in which bids for PPPs ought to be considered but there has not been any public record that provides evidence of bidding and selection processes of the players in PPP projects conducted in Uganda. This secrecy is not only limited to the bidding and pre-bidding stages, but also extends to the lifetime of the projects.

A clear manifestation of the culture of secrecy is the state of affairs surrounding the International Specialized Hospital of Uganda at Lubowa where even the country's Prime Minister in the company of other Members of Parliament were blocked from accessing the project site to evaluate the progress of the project in which the Government of Uganda has sunk over five hundred billion shillings with parliamentary authorization. This state of affairs is aggravated by the fact that there is hardly any information about PPPs that is disseminated to the general public.

5.1.5 Limited Publicly Available Information About PPP Projects

Information relating to feasibility studies conducted on PPPs, reports from community engagement as well as other project reports, if any were ever done, cannot be found anywhere. There is no known repository, online or otherwise, where PPP information can be found and accessed by the public. There is no official government website which provides any information on the controversial Lubowa hospital project.

Furthermore, seeing as the PPP Unit is required to ensure that the principle of transparency is adhered to, it is expected that it ought to be at the forefront of the campaign to avail information about PPP projects. However, the information relating to PPPs made available on the PPP Unit website is very vague and does not give any insight into the PPP projects listed. When compared to more comprehensive websites like that of Honduras, the PPP Unit's website does not meet satisfactory standards of disclosing information on PPPs to the public.

It is also clear that the mode of disclosure and communication in relation to availability of contract information is still lacking in Uganda. The PPP Unit website does not contain sufficient information to inform the public.

5.1.6 Lack of Publicly available Audits of Major PPP Projects

Under Section 18 of the National Audit Act, 2008, audits of projects in which public funds have been spent are supposed to be carried out by the office of the Auditor General. Similarly, Section 30 of the PPP Act 2015 requires an annual audit of each PPP project. This is one of the various roles conferred on the Office of the Auditor General. However, there is no publicly available record of any audit reports from any of the major PPP projects that have been executed in Uganda.

The lack of documented audits has been found to be a hinderance to transparency in the sense that these reports would provide a firm foundation for evaluating whether or not a PPP project has been done properly by providing a detailed breakdown of the processes and money flows during the project's lifetime.

A respondent from the office of the Auditor General revealed that the Lubowa hospital project is supposed to be audited in the coming financial year of 2023/2024. It remains to be seen whether this audit will even be successfully conducted in light of the intransigence of the promoters of the project.

5.1.7 Weak PPP Unit Limited Capacity to Oversee PPPs and enable disclosure through its platforms

In addition to the fact that both the PPP Unit and PPP Committee have been found to be in default of their mandate, they are ill-equipped for the execution of the roles bestowed upon them. The two bodies do not have any means of employing a carrot-and-stick approach which would be very instrumental in enforcing their mandate and obtaining information about PPP projects so as to disclose it to the public. This is aggravated by the fact that the PPP Unit has distanced itself from

some of the projects that are clearly PPPs. This has been the case with the Lubowa Hospital project which the unit erroneously claims is not a public private partnership yet it fits within the ambit of the definition of a PPP under the Public Private Partnerships Act 2015.

It appears that the PPP Unit is equally unable to obtain information about ongoing PPP projects so as to publish the same on its website or even inform interested stakeholders. This makes proactive disclosure of project information about PPP projects difficult if not outrightly impossible. This justifies their inability to exercise any oversight over projects such as the Lubowa Hospital construction project. As a result, the public is deprived of accurate information about such projects.

5.2 RECOMMENDATIONS

5.2.1 Changes to the Legal Framework

There is a clear need to introduce amendments to both the PPP Act 2015 and the Access to Information Act 2005 to provide for a more proactive legal regime on disclosure of information about PPPs in particular. PPPs pose unique challenges, and it is critical for the public to know as much information about them as possible to enable sound decision making and discharge of constitutional duties.

There is a clear need to amend Section 47 of the PPP Act as well as Sections 26 to 28 of the Access to Information Act 2005 to provide for mandatory disclosure of PPP Project documentation subject only to a few redactions that may prejudice a bidder or contractor against its competitors. The provisions of Section 47(4) which criminalize unauthorized disclosure of PPP information need to be repealed. It is wholly unnecessary, has a chilling effect and discourages a proactive approach on the part of PPP players who desire to exhibit transparency. The threat of prosecution for disclosing information to the public should not be in the law. In the researcher's view, this provision does not pass constitutional validity especially in light of Article 41 of the constitution.

Further, it is recommended that the exemptions to disclosure in Section 47(2) of the PPP Act and in Sections 26 to 28 of the Access to Information Act should be repealed and replaced with the simple test for exemption that weights possible harm resulting from disclosure against the possible greater good or public interest. The provision for several exemptions watered down the utility of Section 47(1) and (3) that provide for disclosure of information about PPP projects. This needs to be revisited. In view of this, it may also be useful for members of the civil society to consider a

constitutional challenge in the Constitutional Court against the validity of Section 47 (2) of the PPP Act for being overly broad and restrictive contrary to the provisions of Article 41.

The PPP Act does not adequately provide for mechanisms to prevent circumvention of its provisions by bureaucrats as transpired with this project where the top officials in the Ministries of Health and Finance ignored the Act in regard to the Lubowa Hospital Project. The PPP Unit has also repeatedly distanced itself from the project on the assertion that the project is not a public private partnership and that as such, it does not fall within its scope of responsibility. This is obviously not correct but the Act does not authorize any one to deal with such neglect of duty.

Further, the PPP Act 2015 as well as Access to Information Act 2005 need to be revised to provide a sanctions-based regime for deliberate non-disclosure that is deemed to be malicious and in violation of the law. While there may be some border line cases of non-disclosure that may require legal interpretation, majority of cases do not require that. It is therefore pertinent that public officials refusing to disclose information arbitrarily should be checked with a sanctions-based regime. The sanctions may include warnings, suspension from office or even dismissal from office.

Lastly, there is a clear need for a separate body to adjudicate disputes over access to alleged confidential information held by government agencies about PPP projects in particular and other related commercial information in general. In the researcher's view, courts of law should only come in as an institution of last resort. There is need for a separate administrative Tribunal constituted of competent and independent citizens whose role would be to summarily determine whether denial of certain requests for information was reasonable or not.

5.2.2 Provision of Detailed PPP Information on the PPP Website

Apart from having a scanty list of PPP projects on its website, the PPP Unit does not disclose sufficient information about both complete and ongoing PPP projects. Lessons ought to be drawn from other jurisdictions that have taken great strides and made initiatives to have comprehensive information on their websites. The PPP Unit should be required, by law, to publish on its website details on all existing PPP projects only subject to protections for commercially sensitive information.

Not only do good websites avail fundamental project information, but they also avail an overview of the project contract information, feasibility studies, cost reports and partners. It is important to

note that the government entity in charge of a PPP project ought to be held to a similar standard and be expected to avail some information if not all of the aforementioned information on their electronic platforms so that any interested party can simply go to their platform so as to access the information relating to the project.

Furthermore, the private partners cannot and should not be exempted from the obligation to disclose key project information on the PPP project in which they are involved so that they too can be seen to be transparent and so that they too can be held accountable. The only exception should be protection of confidential proprietary information of a private party.

5.2.3 Empowerment of the PPP Unit to Promote Transparency in PPP Projects

It has been pointed out in the findings that the PPP Unit barely has any meaningful legal authority with which to enforce their mandate as far as ensuring that the principle of transparency through proactive disclosure of PPP projects information is concerned. It has also been argued that the PPP Unit should be equipped with the means and authority to compel the relevant parties to adhere to the principle of transparency. This could result into higher levels of transparency in PPPs in the country. Increased disclosure would result into better public scrutiny that should result into a general improvement in the quality of PPPs. It is therefore necessary that the law should vest the PPP Committee and Unit with additional powers to enable them exercise effective oversight and clothe them with an ability to proactively disclose project information to the public.

For instance, under Section 86 of the PPP Act No. 14 of 2021 of Kenya, mandatory inspection of PPP project premises is provided upon request from the contracting authority. The contracting authority has an obligation to disclose to the public details about progress of works on a PPP project. This is a glaring omission in Uganda's PPP law. A similar provision under Uganda's PPP Act 2015 would have preemptively averted a scenario such as that which transpired at the International Specialized Hospital of Uganda at Lubowa where Members of Parliament and the Prime Minister were blocked from accessing the project site. Empowering the PPP Committee and its Unit with a robust regulatory role will go a long way in ensuring that the stages of the project are transparently done.

5.2.4 Timely Audits of PPPs and Publication of Such Audit Reports

It is desirable that a clear timeline for the auditing of PPP projects by the Auditor General be specified in the law and guidance be availed for making the reports from the audits publicly

available. This will have the impact of improving transparency in the sense that any interested party has access to a full account of the cost-benefit analysis and other related issues arising out of PPP projects in Uganda.

While it is a legal requirement for the office of the Auditor General to present its reports to Parliament under the National Audit Act, this ought to be expanded to include widespread dissemination to the public of its audit reports. This is important for audit reports about PPP projects.

5.2.5 Provision of Resources for the Realization of Transparency in PPPs

There is a need to increase the resources that are available to the entities charged with enabling a transparent environment for PPPs. These include the PPP Committee and the PPP Unit. There is need to ensure that these entities are provided with adequate funding and any other resources that may be necessary for them to fulfil their roles.

For instance, there appears to be no specific individual employed by the PPP Unit under the Ministry of Finance, Planning and Economic Development to provide regular and timely updates about ongoing PPPs on the PPP website. There is no proper central depository of documentation about all PPP projects in Uganda. This can only be created with support of some financial resources to employ competent personnel to manage such a depository. Clearly, robust disclosure of project information about ongoing projects can be provided through a well updated web site. The maintenance of such a website requires reasonable resources.

5.2.6 Improvement of Institutional and Policy Framework for Transparency

Despite the existence of a policy framework and a number of institutional measures to ensure that transparency is adhered to in PPPs, there still remains some gap in the framework. It is important for the policy and institutional framework to be revised to categorically call for proactive disclosure of project information.

In particular, the policy framework should call for entities to be sanctioned for failure to disclose information. Furthermore, a case can be made for the establishment of more institutions that are assigned a specific role and are adequately staffed to execute such roles. For instance, the establishment of a PPP Transparency Committee charged with safeguarding the principle of

transparency would take the burden off those institutions that have other roles and give more guided attention to transparency in PPPs.

Furthermore, vesting these institutions and entities with corporate personality would allow them to sue and be sued in their own capacity which has the potential to act as a twofold mechanism for ensuring transparency. On one hand, they would be able to institute suits against errant parties to PPPs or compel them to comply with measures for ensuring that there is transparency. On the other hand, aggrieved members of society would be able to sue or seek court orders compelling these institutions to carry out their functions so as to improve the state of transparency in PPPs in Uganda.

5.2.7 Inclusion of Transparency and Information Disclosure as A Standard Provision in All PPP Agreements

It might not be possible to compel private partners in PPPs to disclose key information relating to PPPs during and after the project without specific contractual provisions as well as legal provisions in the Act. It is therefore critical for the law to require public sector players to incorporate a requirement of information disclosure into all PPP agreements. The law should impose a model disclosure clause that PPP Agreements should incorporate. By way of operation, this would work as a manifestation of a principle similar to that which requires the buyer to beware when entering into any agreement. A private party seeking out a PPP Agreement should know in advance that various material details of the same will be disclosed to the public.

This is the case in the United Kingdom where the Private Finance 2 Standard Contract sets out a full chapter on transparency and information (Chapter 31). It includes a required and recommended clause on confidentiality and freedom of information that must be adopted. The clause is designed to compel contractors to disclose to the public a contract summary, access to all project data together with quarterly summaries of the information provided by the lenders, a calculation of the equity internal rate of return and other financial information bi-annually.

By opting to enter into a PPP arrangement, all parties would, by default, consent to adhering to the standard requirement to disclose key information to the public as a way of promoting the principle of transparency. This would apply to the government, the relevant government institution and the private partner involved in the PPP. There is no doubt that this level of disclosure would increase transparency in PPP projects significantly. Increased transparency generally results into better

implementation of projects and fewer cost overruns since the players do not conceal from the public material information that could be questioned such as contractual clauses that are a result of poor negotiation from the public sector.

It is no secret that world over, a number of PPP projects particularly in infrastructure have failed to achieve their laid down objectives despite their good intentions. At the heart of this failure is the recurring lack of transparency before, during and after the implementation of a PPP project. This has happened not just in Uganda, but also globally. Lessons learnt globally, particularly the need for a robust proactive disclosure legal regime, ought to act as a guide in changing the manner in which PPP projects are conceived and delivered in Uganda.

It is critical that important project information about prospective and ongoing PPP projects is placed in the public domain to enable appropriate input from the public and other stakeholders. If this had been done with the contentious project for the construction of an international specialized hospital at Lubowa, it is probable that the Government would have been spared from indulging in a speculative undertaking with inexperienced private contractors.

Uganda's experience shows that while PPPs provide an avenue through which developing countries can mobilize private capital to implement large scale infrastructure projects, there is need to ensure that these flagship projects are delivered in a transparent manner to avoid wastage or even outright misuse of public funds. Transparent delivery of PPP projects is one where material project information is available to the citizenry. An informed citizenry is able to hold the leaders to account for any oversights in such projects. This discourages opportunistic behavior and outright corruption in PPP projects leading to improved delivery of infrastructure projects that will benefit the common good.

5.2.8 Areas of further research about PPPs and the overall theme of transparency

This study primarily focused on the efficacy of the existing legal framework for ensuring transparency in PPPs and a case study of the controversial Lubowa Hospital construction project was utilized. However, there have been numerous other PPP projects that have not been subject the level of controversy generated by the present case study. The researcher therefore recommends other studies to consider the extent to which different PPP projects are transparent.

Additionally, the extent to which World Bank funded PPP projects in the country are transparent in light of the Bank's disclosure framework has not been interrogated. This is an important area for future research since the World Bank has been promoting disclosure frameworks for PPP projects. It would be important for a study to specifically interrogate World Bank funded PPP projects.

Lastly, the whole concept of PPP projects is still under researched within Sub-Saharan Africa. Questions of accountability, transparency and value for money of PPP projects have been not adequately researched within the region. The researcher therefore recommends these questions to future researchers on this topic.

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APPENDICES

Appendix A: Consent Form

Introduction: My name is Byamukama Jude from Makerere University School of Law. I am carrying out a study assessing transparency in PPPs in Uganda.

Purpose of the study is to: To examine the existing legal framework and its effectiveness in ensuring transparency in PPP projects in Uganda so as to generate information that will be used by various stakeholders to plan appropriate interventions that would improve access to information about PPPs.

Study procedure: This study requires you to answer the questions posed to you in the Key informant guide. The questions concern your attitudes, knowledge and experience concerning transparency in PPP implementation in Uganda.

Benefits: No direct benefits in form of money will be given to you for your participation in this study, but after your participation, you will benefit by acquiring more knowledge on PPPs that you are provided with, identify the gaps that are existing between what you are receiving and what should be given to you to advocate for better PPP implementation.

Risks: You will not be exposed to any risk while participating in this study. You have the right to withdraw from the study at any time and your participation is voluntary. You can also request for anonymity.

Confidentiality: The information obtained will be kept strictly confidential and used only for purposes of research. Your identity will be kept confidential.

Queries and problems: In case you have any questions regarding this study, you may ask them now or contact the principal investigator Byamukama Jude on 0774 153035.

Statement of consent: I have understood the purpose of this study and participation is voluntary and I can withdraw from the study at any time I wish without explaining the reason for my withdrawal. I also understand that the information I give in this study will be kept confidential and that I will not be required to identify myself by name.

Signature of the participant..... Date..... Respondents'
No.....

Appendix B: MoFPED, PPP Unit and MOH Interview Guide

KI guide for the staff in the ministries of MoFPED and MOH, Office of the Auditor General

1. Are there any PPP projects being managed under this department? If yes, which ones? Are there any that have been subject to audits? If so, are the audit reports in the public domain?

.....
.....

2. How do members of the public obtain information about ongoing PPPs under supervision of your department? Is it mandatory for players in PPP projects to disclose certain information? How can I access this information? Is it available on any website?

.....
.....

3. May you outline your roles and your level of participation in the PPP projects?

.....
.....

4. Which key factors do you consider, if at all, in determining what information to communicate to the public about on going PPP projects? Are these factors known to the general public? Are there any audit reports about PPP projects that have been disseminated to the public

.....

5. Do you have any specific mechanisms in place to ensure disclosure to the public of information about on going PPP projects? If yes, which ones.

.....
.....

6. Have you played any role in the project for the construction of an international specialized hospital at Lubowa? If yes, what role?

.....
.....

7. Who is responsible for monitoring contractual compliance of this Lubowa hospital project and what is the status of the project? Where do members of the public obtain information about this project?

.....

8. Who keeps custody of the Project Agreements concerning the Lubowa Hospital project and how many other people have access to them and why?

.....

.....

9. Where do I access information about the PPP projects that were/are still being implemented?

.....

.....

10. What challenges exist in regard to disclosure of information about the Lubowa Hospital construction project? Has any access to information request about this project been presented to the Ministry or the PPP Unit?

.....

.....

11. What do you think can be done to improve disclosure of information of PPP projects in Uganda?

.....

Thank you for your participation.