

UNIVERSITY OF NAIROBI

SCHOOL OF LAW

**CORPORATE GOVERNANCE: THE CHALLENGES FACING IMPLEMENTATION
OF GENDER DIVERSITY IN THE COMPOSITION OF BOARDS OF STATE
CORPORATIONS IN KENYA**

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DECLARATION

I, **OMENTA VERONA KEMUNTO**, do hereby declare that ‘*Corporate Governance: The Challenges Facing Implementation of Gender Diversity in the Composition of Boards of State Corporations in Kenya*’ is my own work and has not been submitted and is not currently being submitted for the award of a degree in any other University.

Signature..... **Date**.....

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This project has been submitted with my approval as the University of Nairobi Supervisor.

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ACKNOWLEDGMENT

I am grateful to my Supervisor, Ms. Yvonne Oyieke for her effort and guidance throughout the process.

My gratitude goes to my family, friends and colleagues for the encouragement they gave me that made this research possible.

Finally, I thank the Sovereign God for His provision, health and strength to keep going.

DEDICATION

To my family who has been very supportive throughout my studies and has given me the motivation to achieve my goals.

ABSTRACT

The board of directors is an integral element of corporate governance. Its role is to guide, plan, manage, oversee and steer the strategic thinking of the corporation. The composition of the board influences the effective governance, decision making, reputation and performance of a corporation. The board is required to have a diversity of gender, skills, age, education and experience as a good corporate governance practice. More specifically, however, lack of gender diversity has plagued the boards of State Corporations in Kenya. The genesis of this is the persistence of gender inequality over many years. Although Kenya has put in place enabling legislation such as the Constitution, State Corporations Act and *Mwongozo*, the Code of Governance for State Corporations which provides for guidelines for good corporate governance and best practices, nevertheless women are still underrepresented in the boards of SCs. Full implementation of gender diversity in the board room will only pan out if measures are taken to overhaul and streamline the board appointment exercise. Further, government commitment, a review of laws such as the State Corporations Act to be in line with the Constitution and *Mwongozo* promulgated as a statute.

LIST OF ABBREVIATIONS

BoD	Board of Directors
CoK	Constitution of Kenya
CEO	Chief Executive Officer
IoD	Institute of Directors
MDGs	Millennium Development Goals
OECD	Organization for Economic Cooperation and Development
PS	Permanent Secretary
SADC	Southern African Development Community
SC	State Corporation
SCA	State Corporations Act
SCAC	State Corporations Advisory Committee
SDGs	Sustainable Development Goals
UK	United Kingdom
USA	United States of America

TABLE OF STATUTES AND OTHER LEGISLATIVE INSTRUMENTS

Constitution of Kenya, 2010

State Corporations Act (Cap 446)

The Companies Act 2008

Public Finance Management Act, No. 1 of 1999

Government-Owned Entities Bill, 2014

Two-Third Gender Rule Laws (Amendment) Bill, 2015

GUIDELINES

Executive Office of the President, Implementation of Mwongozo; The Code of Governance for State Corporations (Executive Order No.7)

Organization for Economic Cooperation and Development, Principles of Corporate Governance (Organization for Economic Co-operation and Development, 2004)

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TABLE OF CASES

Advisory Opinion No.2 of 2012 In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR

Centre for Rights Education & Awareness (CREAW) v Attorney General and Commission on the Implementation of the Constitution [2015] eKLR, Petition 182 of 2015

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Flagship Carriers Ltd v Imperial Bank Ltd High Court Civil Case No. 1643 of 1999 (unreported)

Katiba Institute v Independent Electoral and Boundaries Commission [2017] eKLR, Petition 19 of 2017

TABLE OF CONTENTS

DECLARATION.....	ii
ACKNOWLEDGMENT	iii
DEDICATION.....	iv
ABSTRACT.....	v
LIST OF ABBREVIATIONS	vi
TABLE OF STATUTES AND OTHER LEGISLATIVE INSTRUMENTS	vii
TABLE OF CASES.....	viii
CHAPTER ONE	1
1.0 Background of the Study.....	1
1.1 Statement of the Problem	5
1.2 Justification of the Study.....	5
1.3 Research Objectives	6
1.4 Hypothesis.....	6
1.5Research Questions	7
1.6 Theoretical Framework	7
1.6.1 Liberal Feminist Theory.....	8
1.7Research Methodology.....	9
1.8 Literature Review	10

1.9 Limitations	13
1.10 Chapter Breakdown.....	13
CHAPTER TWO	15
CORPORATE GOVERNANCE AND GENDER DIVERSITY-THEORETICAL PERSPECTIVE.....	15
2.1 Introduction	15
2.2 The Concept of Corporate Governance.....	15
2.3 Corporate Governance in State Corporations.....	19
2.4 The Board of Directors: Role and Responsibilities.....	19
2.4.1 Agency Theory	21
2.5 The Composition of the Board	22
2.6 The Issue of Gender Inequality	23
2.6.1 Intersectionality of Gender with other Inequalities	25
2.7 Gender Diversity in the Boardroom	26
2.8 The Business Case of Gender Diversity in Corporate Governance	28
2.9 Conclusion.....	29
CHAPTER THREE	31
KENYA’S LEGAL FRAMEWORK FOR GENDER DIVERSITY IN THE APPOINTMENT OF BOD OF STATE CORPORATIONS.....	31
3.1 Introduction	31

3.2 Corporate Governance in Kenya’s State Corporations	31
3.3 Board Appointments	33
3.4 Legal Framework of Board Appointments in Kenya’s State Corporations	36
3.4.1 State Corporations Act.....	36
3.4.2 The Constitution of Kenya	37
3.4.2.1 The Gender Bill and Affirmative Action.....	40
3.4.3 Government Owned Entities (GOE) Bill, 2014.....	42
3.4.4 The Code of Governance for State Corporations (<i>Mwongozo</i>)	43
3.4.4.1 Comply or Explain Model.....	44
3.4.4.2 Soft Law.....	45
3.5 The Role of the State Corporations Advisory Committee	46
3.6 Conclusion.....	47
CHAPTER FOUR.....	49
THE LEGAL FRAMEWORK FOR GENDER DIVERSITY OF CORPORATE	
GOVERNANCE IN SOUTH AFRICA.....	49
4.1 Introduction	49
4.2 South Africa	49
4.2.1 The Legal and Regulatory framework.....	50
4.2.1.1 The Companies Act 2008	50
4.2.1.2 Public Finance Management Act.....	51

4.2.1.3 Marvin King Report on Corporate Governance	51
4.2.1.4 Protocol on Corporate Governance in the Public Sector	54
4.2.1.5 Measures Adopted to Increase Board Gender Diversity	55
4.3 Appraisal of South Africa and Lessons Kenya Can Learn.....	57
4.4 Conclusion.....	61
CHAPTER FIVE	63
CONCLUSION AND RECOMMENDATIONS.....	63
5.1 Summary of Findings	63
5.1.1 The Nexus between Corporate Governance and Gender Diversity.....	63
5.1.2 Kenya’s Legal Framework for Gender Diversity in Corporate Governance of SCs....	63
5.1.3 Lessons and best practices for Kenya from South Africa	65
5.2 Conclusions	66
5.2.1 Specific obligations	66
5.2.2 Law Reforms	66
5.2.3 Binding nature of Mwongozo.....	67
5.2.4 Training	68
5.3 Recommendations	68
BIBLIOGRAPHY.....	70

CHAPTER ONE

1.0 Background of the Study

For a long time now, conflict of interest and independence have been distinguished as the main issues affecting corporate boards¹. One of the areas in corporate governance which require more attention is board diversity². Board diversity is the varying of board composition based on gender, age, nationality, education and experience³.

Gender diversity has slowly emerged against the backdrop of deliberations and practices underpinning corporate governance in the world. Men have dominated the boards of many corporations with very few women representation⁴. As a result, this has necessitated the enactment of laws to remedy the situation. To begin with, in 2003, the world saw Norway bring in a new law that required corporations in the public sector to attain a balanced gender representation on their boards⁵. France and Spain followed suit in 2006 and 2007 respectively in introducing similar regulations⁶.

In 2012, the results of a study conducted by Kenya Institute of Management titled '*Bringing the other half to the Board Room: Case Study of State Corporations and Listed Companies in Kenya*' revealed that women constituted 20% in boardrooms of State Corporations (SCs)⁷. In

2014, the Institute of Directors (Kenya) carried out a comparative study which indicated a slight

¹ Marco Bondellini, 'Corporate Governance of Banks and Financial Sustainability: Critical Issues and Challenges Ahead' (2018) Business Law Review 1-18 <<https://qmro.qmul.ac.uk>> accessed 2 October 2017.

² Glynis Morris, 'Gender Diversity in the Boardroom' (2011) 35(3) Company Secretary's Review 24.

³ David Harrison and Katherine Klein, 'Diversity Constructs' (2007) Academy of Management Review 32.

⁴ Julie Suk, 'Gender Parity and State Legitimacy: From Public Office to Corporate Boards' (2012) 10 (2) International Journal of Constitutional Law 449-450.

⁵ Norway became the first nation in Europe to place gender quotas on corporations in this respect. See Breaking the Glass Ceiling? The Effect of Board Quotas on Female Labour Market Outcomes in Norway <<https://academic.oup.com>> accessed 19 October 2017.

⁶ *ibid* (n 4).

⁷ Samuel Njihia, 'Bringing the other half to the Board Room: Case Study of State Corporations and Listed Companies in Kenya' (Kenya Institute of Management 2012) <<https://www.iodkenya.co.ke>> accessed 17 October 2019.

increase in women representation at 26%⁸. Nonetheless, this falls short of guaranteeing women one-third representation in the boards as set forth for in the Constitution of Kenya (CoK), 2010⁹

There have been mixed findings on whether gender diversity leads to better corporate governance, productivity, competitiveness and increased output pertaining to profits¹⁰. Mutua, for instance, conducted a study on the correlation between the Board of Directors (BoD) diversity and Kenya's insurance firms' financial performance¹¹ in which he concluded that gender positively affected the overall financial operations of a company and recommended the appointment of women in directorships be made in line with the one third gender principle as put across by the Constitution¹². Mbugua, on the other hand, carried out research about the impact of board diversity on Kenya's commercial banks' financial performance¹³. He established that gender diversity did not influence a bank's productivity but rather it was an important corporate governance tool¹⁴.

Before the promulgation of the CoK 2010, most corporate boards in Kenya were male-dominated¹⁵. This is because Kenya is a patriarchal society where men have power over women and the men are seen as the final decision-makers in their roles as husbands and heads in most

⁸Institute of Directors(Kenya), 'Report of the Taskforce on Women Representation on Boards' (July 2015) <<http://www.iodkenya.co.ke/assets/resource/9017f7ddac66712e7d2d9d33c3c75259.pdf>>accessed 8 November 2017.

⁹Article 27(8) "the state shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of similar gender".

¹⁰Julie Suk. 'Gender Parity and State Legitimacy': From Public Office to Corporate Boards (2012) 10 (2) International Journal of Constitutional Law 449-450<<https://ojs.deakin.edu.au/>> accessed 19 October 2017.

¹¹Patrick Mutua, 'The Relationship between Board Diversity and Financial Performance of Insurance Underwriters in Kenya' (MSc Thesis, University of Nairobi 2013) <<http://erepository.uonbi.ac.ke/>> accessed 19 October 2017.

¹² *ibid* 33-36.

¹³Mbugua Douglas Ngugi, 'The Effects of Board Diversity on the Financial Performance of Commercial Banks in Kenya'. (MSc Thesis, University of Nairobi 2012) <www.chss.uonbi.ac.ke> accessed 19 October 2017.

¹⁴ *ibid* 35.

¹⁵ *ibid* (n 8).

governance institutions. Patriarchy has and still continues to be one of the greatest impediments to the actualization of the gender equality principle¹⁶.

The CoK2010 strives to tackle the issue of equal and non-discriminatory rights of women and men¹⁷. Article 27(8) of the CoK 2010 requires the members of appointive or elective posts are not to go beyond two-thirds of a similar sex¹⁸. Appointive bodies refer to offices or positions that are filled by appointments which include the board of SCs. The gender makeup of the BoD should meet the stipulations of Article 27(8) of the CoK. This stipulation ensures that one gender, mostly male gender, does not dominate the opposite gender (mainly female). The rule gave women the opportunity to be considered for appointments in areas where they would have not been considered as they are the gender that is most disadvantaged¹⁹. Although the gender rule exists, there is still hostility from those who have in the past enjoyed the rights and women will not automatically possess these rights²⁰. A Kenya Commission on National Gender and Equality²¹ report reveals that women still have a low representation in the composition boards even after the enactment of CoK 2010²².

The State Corporations Act (SCA)²³ which is the basis of appointment of board members to SCs does not provide for gender diversity as criteria for selection of the individuals. This leads to the

¹⁶Japhet Biegon, *Gender Equality and Political Processes in Kenya: Challenges and Prospects* (Strathmore University Press 2016).

¹⁷ Article 27.

¹⁸Constitution of Kenya 2010.

¹⁹Kathy Davis et al., *Handbook of Gender and Women's Studies* (1stedn, SAGE Publications 2006).

²⁰ *ibid* 9.

²¹ Established by the CoK and NGECA Act (Cap 15) See <<http://kenyalaw.org/>>.

²² National Gender and Equality Commission Kenya, 'Gender Equality in Kenya Post 2010 Constitution' (2017)<<https://www.ngeckenya.org>> accessed 4 December 2017.

²³ Cap 446 Laws of Kenya.

composition of boards in some SCs not meeting the constitutional requirement²⁴. This inadequacy is a breeding ground of claims for discrimination. To address this problem, a Code of Governance for SCs known as ‘*Mwongozo*’ was enacted in January 2015 requiring appointments of persons to the board of management of SCs to conform to Article 27(8) of the CoK²⁵.

The President through Executive Order No.7 called on all SCs boards to put into practice the stipulations of *Mwongozo*²⁶. *Mwongozo* seeks to entrench the corporate governance concepts as far as the administration and running of SCs in Kenya. In particular, it covers appointment, the liability of BoD; transparency and reporting, duties, risk and internal control; organizational and ethical management; rights, obligations of shareholders; interactions of stakeholders; and conformity to applicable rules and regulations²⁷.

In December 2015, the National Gender and Equality Commission (NGEC)²⁸ conducted an assessment of gender representation in 153 SCs. The findings revealed that out of 1,428 board members assessed, 384 were women consisting of 26.8% while 1,044 were men consisting of 73.2%. This is an indication of inequality and disparity in the appointment and composition of boards of SCs in Kenya.

²⁴Samuel K Gitaka, and Clifford G Machogu, ‘A Study on Compliance with the Two-Thirds Gender Rule in Appointments and Promotions of Staff in Public Universities Elevated in 2012 and 2013’ (2016) 6(6) International Journal of Scientific Research Publications 507.

²⁵ARTICLE 19, ‘Kenya: Concern over Appointment of Directors of State Corporations’ (*Article 19*, 14 October 2015) <<https://www.article19.org>> accessed 24 November 2017.

²⁶ Executive Office of the President, *Implementation of Mwongozo; The Code of Governance for State Corporations* (Executive Order No.7)<<http://www.cohesionandvalues.go.ke/>>accessed 24 November 2017.

²⁷Public Service Commission and State Corporation Advisory Committee, *Mwongozo: The Code of Governance for State Corporations* 2015.

²⁸NGEC, ‘Equality and Inclusion in State Corporations Leadership in Kenya. The Case of 153 State Corporations’ (2015) <<https://www.ijsrp.org>>accessed 12 January 2018.

Further, in the Hansard report of 13th June 2017, the government was called upon to ensure SCs function within the law and where a lacuna in the law exists, *Mwongozo* rules be strictly interpreted²⁹.

In light of the foregoing, the research will scrutinize why diversity in terms of gender is not being implemented in boards of SCs in Kenya. The study will examine the legal framework of boards of SCs, the root of gender diversity infringement and the initiatives that are capable of dealing with this issue so as to ensure good corporate governance.

1.1 Statement of the Problem

Although the CoK 2010 and *Mwongozo* call for gender diversity to be considered in board appointments, nevertheless, the legislations do not guarantee the existence of a diversity of gender in corporate boards. This oversight has led to the number of females present on the board falling short of the two-thirds principle on gender stipulated in the Constitution. The omission excludes women from participating in a course of decision-making which is on behalf of the stakeholders and for the benefit of the organization.

1.2 Justification of the Study

Law is a tool used to alter an unjust social system³⁰. Having looked at the existing literature on the diversity of gender in the BoD and notwithstanding the enactment of CoK 2010 and *Mwongozo*, the study recognizes that women are and remain underrepresented in the boardroom. The study seeks to inform policymakers and legislators on reform concerns on board appointments of SCs in Kenya. Specifically, the process, procedure and criteria when selecting

²⁹Parliament of Kenya, Parliamentary Debates: National Assembly Official Report (*Hansard*, 13th June 2017, 2.30pm) 15<www.parliament.go.ke>accessed 4 December 2017.

³⁰ Leslie Curzon, *Jurisprudence: Lecture Notes* (2ndedn, Cavendish Publishing Limited 1995) <<https://www.manchester.edu>> accessed 15 April 2018.

the board of management. Previously it has been held women add no value when considered for board appointments as they lack experience. The study, however, attempts to counter this idea. The study is warranted by the fact that while many scholars have deliberated over diversity, scarce literature is available about gender diversity on SC boards.

1.3 Research Objectives

The objectives of the research are:

- a. To examine the nexus between gender diversity and corporate governance.
- b. To analyze whether the legal framework for gender diversity in corporate governance of SCs in Kenya is adequate and effective.
- c. To identify lessons and best practices that Kenya can learn from the legal framework for gender diversity in corporate governance of SCs in South Africa.
- d. To make recommendations on the measures that can be taken to improve compliance with gender diversity to ensure better corporate governance practice of SCs in Kenya.

1.4 Hypothesis

This study is grounded on the assumption that:

- a. Patriarchy continues to play a fundamental role in the culture of Kenya.
- b. Kenya has maintained the traditional political criteria of appointing board members.
- c. The current legal framework for board appointments does not guarantee the greater existence of women in the BoD of SCs.

1.5 Research Questions

The study aims to respond to the following:

- a. What is the nexus between gender diversity and corporate governance?
- b. Is the legal framework for gender diversity in corporate governance of SCs in Kenya adequate and effective?
- c. What lessons and best practices can Kenya learn from the legal framework for gender diversity in corporate governance of SCs in South Africa?
- d. What measures are can be taken to improve compliance with gender diversity so as to ensure better corporate governance practice of SCs in Kenya?

1.6 Theoretical Framework

This research will draw on feminist jurisprudence and liberal feminist theory. Bix³¹ defines feminism as a theory of gender that interprets women's experiences. He opines that there is no one universal cause of inequality between women and men. The reasons change from one society to another for example arising from educational, economic, work-related causes, religion, sexual objectification and many other reasons. Women in society were viewed as subordinate in all spheres of life³².

Feminist jurisprudence rejects patriarchy³³. Patriarchy is analyzed through the lens of feminist theory so as to understand what women contend with³⁴. It is apparent where society is biased against women and regards women as inferior to men³⁵.

³¹Brian Bix, *Jurisprudence: Theory and Context* (5thedn, Sweet and Maxwell 2009).

³²Peter Halstead, *Key Facts: Jurisprudence* (Hodder Arnold 2005).

³³*ibid.*

According to feminist jurisprudence, women are subjugated and overlooked by law while men are perceived as being supreme in society. Feminist scholars fought to be regarded as equal to men and pushed for reforms³⁶.

1.6.1 Liberal Feminist Theory

The main proponents of this theory are Mary Wollstonecraft, Wendy Williams, Elizabeth Cady Stanton, John Stuart Mill and Ruth Bader Ginsburg³⁷. This theory advocates for the same treatment of both genders by allowing men and women the right to decide not to participate in something rather than to utterly exclude or discriminate against them because of their sex particularly their constitutional rights³⁸.

The key argument of the theorists is, in order to alleviate the oppression of women, the law should be changed to allow women the chance to choose what they want to do instead of curtailing their enjoyment of choices by the simple virtue of them being female. A good law will increase or equal the freedom of choice for women with that of men and a bad law subtracts from this freedom³⁹.

Catherine MacKinnon criticizes the reception of gender-neutrality in the law by liberal feminists. Other critics of this theory argue that by taking up individual rights, liberal feminists treat the dissemination of such rights in society as unproblematic. However, rights become an issue when

³⁴Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' Volume 1989 1(8) University of Chicago Legal Forum 139-167<<https://www.csusb.edu>> accessed 20 June 2018.

³⁵Preeti S Rawat, 'Patriarchal Beliefs, 'Women Empowerment and General Well-being' (2014) 39(2) Vikalpa 43-56 <<https://www.ed.ac.uk/>> 20 June 2018.

³⁶Hilaire Barnett, *Introduction to Feminist Jurisprudence* (1stedn, Cavendish Publishing Limited 1998) <<https://www.unsw.edu.au>> accessed 18 June 2019.

³⁷Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory*(3rdedn, Oxford University Press 2012) 298.

³⁸ibid 302.

³⁹Robin West, 'The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory' (2011) 3(81) Georgetown Law Faculty Publications and Other Works.

they cause harm to others⁴⁰. Further, liberal feminism is seen to favour middle-class, heterosexual, white women while ignoring women of a different class, culture and race⁴¹.

Liberal feminism justifies equality as a criterion for determining the sharing of opportunities among diverse members of society. It is necessary for the exercise of distribution to be fair for people to consider they have been given an equitable outcome⁴². Liberal feminism favours gender diversity as it is concerned with gender and argues for equality for all⁴³. Under this perspective, the seats on corporate boards are to be distributed fairly equally among men and women and this is the premise of the gender principle of two-thirds which dictates that one gender cannot surpass a two-thirds seat. Although legislation on equality of men and women exists in the CoK 2010, there is a lack of gender diversity in boards of SCs due to non-compliance with the law. This research will advocate coming into being of more law to promote adherence to the constitutional gender principle within the boards.

1.7 Research Methodology

This is a qualitative study that will rely on doctrinal and feminist research methodologies. The feminist methodology involves conducting research from a gender point of view where the experience of women is considered⁴⁴. The research will also benchmark with other jurisdictions.

The topic of gender diversity in corporate governance is multi-disciplinary in nature⁴⁵. The researcher will examine the diversity of gender as a matter of law and policy that should be considered in the board composition. The study will analyze the legal framework of gender

⁴⁰Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory*(3rdedn, Oxford University Press 2012) 309.

⁴¹ Jackson Stevi, *Contemporary Feminist Theories* (Edinburg University Press 1998) 98-112.

⁴² Michelle Maiese, 'Distributive Justice: Beyond Intractability' (1stpublished June 2003, updated by Heidi Burgess 2013) < <https://www.usp.ac.fj>> accessed 29 November 2017.

⁴³ Ibid 19.

⁴⁴ Gwendolyn Beetham and Justina Demetriades, 'Gender and Development' (2007) 2(15) JSTOR 199.

⁴⁵ It takes into account the discipline of law, economics and sociology.

diversity in the composition of boards of SCs in Kenya as well as benchmark against South Africa's legal and regulatory framework.

The researcher will carry out a desk-based review of the literature regarding the process of appointing new board members and the issue of gender in board appointments. Various statutory laws, reports, policy documents and writings from scholars will be employed.

The study will place reliance on primary and secondary sources in the collection of data. Primary sources will comprise the CoK, SCA, *Mwongozo*, guidelines and other codes of best practice. Secondary sources will include electronic books, online journals, seminar presentations and law reports. Information from books and other reference materials will be accessed through the use of the library.

1.8 Literature Review

Writings about diversifying corporate boards have focused more on professional qualifications, experience and age however, studies have not given much attention to gender diversity in boards of SCs in Kenya. There has been no attempt to critically look into the reasons for non-compliance despite there being a constitutional requirement for the past nine (9) years. This study thus intends to fill this gap.

*Mwaura*⁴⁶ in his work argues that poor and unsuccessful running of SCs can be ascribed to the requirements of selection based not on appropriate but on technical expertise political interests. This has impaired the managerial capacity of the boards and the integrity of the skilled personnel. He points out that the appointment of individuals with the right qualifications would intensify the board's output by escalating the standards of care required of directors in the same

⁴⁶Kiarie Mwaura, 'The Failure of Corporate Governance in State Owned Enterprises and the Need for Restructured Governance in Fully and Partially Privatized Enterprises: The Case of Kenya', (2007) 31 (1) Fordham International Law Journal<<https://core.ac.uk/>>accessed 20 May 2018.

capacity. The author has failed to discuss the need to have diversity to boost productivity. Diversity in the form of gender diversity is significant in the recruitment of individuals to the board of management because of the impact it has on work relations. This is the essence of stakeholder theory. For example, gender diversity would proffer a broader outlook on business issues, innovations and opportunities as women and men have different ideas and different approaches in handling issues, diverse leadership styles and additionally offer a wider range of mixed solutions⁴⁷.

Later in 2011, following the introduction of the new Constitution, *Mwaura*⁴⁸ in his work tackles the issue of board appointments which is affected by overlapping regulations including the SCA, the CoK 2010 and Acts of Parliament establishing the State Corporation. He points out that under the SCA, the make - up of the board is shaped by the President and not the chairperson or directors thus the appointment process is political in nature. He states that the board nomination process should not discriminate but cater to equal treatment to all as stipulated in Article 232 1(i) of the CoK which addresses equality of appointment opportunities in public service for both women and men and Article 27 which bears the two-thirds gender rule principle. The research shall offer legal forms to the SCA and Acts of Parliament establishing SCs on the sections stipulating board appointments to be aligned to the Constitution.

Francoeur et al.,⁴⁹ in addressing a diversity of gender in corporate governance and top management extend their discussion to the positive results by having more women on corporate

⁴⁷ Elijah Ileri, 'Kenya's Legal and Regulatory Framework on the Appointment of Board of Directors for State-Owned Enterprises (SOE) and Its Effectiveness' (2016) 6(12) International Journal of Humanities and Social Science<https://www.ijhssnet.com/journals/Vol_6_No_12_December_2016/6.pdf> accessed 1 May 2018.

⁴⁸Kiarie Mwaura, Constitutional Restructuring of Corporate Governance in State Owned Enterprises: Dynamism or Distraction? (2011) 1 Journal of Mount Kenya University Law School<<https://chss.uonbi.ac.ke/>>accessed 1 May 2018.

⁴⁹ Claude Francoeur *et al*, 'Gender Diversity in Corporate Governance and Top Management' (2008) 81(1) Journal of Business Ethics 83-95<<https://www.core.ac.uk>>accessed 4 July 2018.

boards on a company's performance⁵⁰. They highlight the agency theory and stakeholder theory. Both theories have been applied in this study. Despite the relevant arguments to this study, their work does not offer solutions on how to increase gender diversity. This study shall recommend ways of increasing gender diversity on corporate boards.

Musikali⁵¹ points out that board appointments should consider gender diversity as many boards of SCs in Kenya are male-dominated. She suggests the need for diversity of age as it adds a range of skills and views that bring about improved performance without focusing on the necessity of a gender-diverse BoD.

*Ouko*⁵² observes that the membership of a board has an effect on the operations of a corporation. According to Ouko, the experience, skills and qualifications of board members determine board performance and ultimately the corporation. He notes that board appointments are bedeviled with directors who are not competent to execute their duties. This has led to the political interests that afflict the appointment process. On the issue of performance, he has paid no mind to gender diversity. The study establishes the need for gender diversity in the board composition.

Alvarez et al.,⁵³ note no connection exists concerning board gender diversity and better output of an organization as the disadvantages are more than the advantages. They argue that gender diversity brings less co-operation, more battles and opinions leading to slow decision making. In their findings, they rightfully assert that diversity of gender has no effect on performance.

⁵⁰ *ibid* 83-95.

⁵¹ Lois Musikali, 'The Law Affecting Corporate Governance in Kenya: A Need for Review' (2008) *International Company and Commercial Law Review* 213-227.

⁵² Austin Ouko, 'The Presidential Taskforce Report on Parastatal Reforms: The Case for a Review' (2016) 2 (12) *The Law Society of Kenya Journal* 103-138.

⁵³ Isabel Alvarez, 'The Influence of Gender Diversity on Corporate Governance' (2010) 1(13) *Spanish Accounting Review* 53-88.

Nevertheless, it will be incorrect not to acknowledge the additional value women bring in boardroom deliberations due to the variety of perspectives.

1.9 Limitations

Kenya has a limited number of corporations that have published data that one can access for this study which is basically desktop research and more so among SCs which is the area of focus of the research.

1.10 Chapter Breakdown

Chapter one introduces the study by pointing out the emerging issue of gender diversity in corporate governance. The chapter outlines the background of the study which reveals that even though there is legislation in place, it does not guarantee the existence of gender diversity in corporate boards. There is clear evidence of a lack of compliance.

Further, the chapter lays down the problem statement, statement of objectives, hypothesis and research questions which the research intends to answer. The study will apply critical legal studies on the theoretical framework. The chapter also highlights the research methodology to be used and a review of the existing literature. The chapter concludes by setting out the limitations of the study and a chapter breakdown.

Chapter two will establish the link between corporate governance and gender diversity. It will address the gender inequality question and conclude with the need for diversity of gender in corporate governance.

Chapter three will review the laws and codes of best practice regarding the appointment of the BoD of SCs in Kenya. The CoK 2010 and *Mwongozo* following the coming into force the

Constitution makes it a requirement to have the board diversified by gender. The chapter will assess whether the practice in Kenya meets the legal and regulatory provisions and concludes by identifying the gaps in the law if any along with actions needed for compliance.

Chapter four will evaluate the corporate governance codes and other legal instruments in South Africa and lessons Kenya can learn from South Africa.

Chapter five provides a summary and conclusion of the research. The chapter will set out recommendations for legislative reforms on board appointments and propose ways of implementing gender diversity in the board membership of SCs.

CHAPTER TWO

CORPORATE GOVERNANCE AND GENDER DIVERSITY-THEORETICAL PERSPECTIVE

2.1 Introduction

This chapter examines the correlation between corporate governance and gender diversity. The assessment will be in the context of the principles and theories of corporate governance, the examination of the role and responsibilities of the board, requirements for appointment and composition of the board of directors. The issue of gender inequality will be addressed before establishing the rationale for gender diversity in corporate governance.

Diversity of gender in the board is a marker of good corporate governance. The reason is that the composition of the board is critical for a company's effective leadership and realization of its long term goals⁵⁴. Nonetheless, the study recognizes that gender diversity is not the only requirement for effective leadership and attainment of a company's long term goals.

2.2 The Concept of Corporate Governance

Corporate governance has been within the realm of the private sector and it relates to the management and governance of organizations that are mainly engaged in activities geared towards making a profit. The owners of corporate entities saw the idea of corporate governance necessary as they were not the ones managing the day to day operations. It was thus important to

⁵⁴Public Service Commission and State Corporation Advisory Committee, *Mwongozo: The Code of Governance for State Corporations* 2015, ch 1.

put in place structures for effective management. Increasingly, the public sector has welcomed the idea of corporate governance⁵⁵.

Interest in corporate governance began the beginning of the 1990s after the transgressions of American firms such as Enron Corporation (Enron), Nicor Gas, Global Crossing, Sprint and Merck and several public companies in the United Kingdom⁵⁶. Specifically, this study emphasizes the case study of Enron.

Enron was one of the largest well-known energy and transport services companies before it was declared bankrupt in 2001. Before filing for bankruptcy, Enron's earnings had quadrupled in one year as a result of the deregulation of oil and gas that promoted competition by allowing people to buy gas or electricity from various producers. However, Enron's success was short-lived after it emerged the company misrepresented its gains by posting fraudulent earnings to investors to boost its portfolio while the company's officials embezzled money. This practice led to its collapse and at the same time, employees and investors incurred huge losses from investing in the company's stock. It later emerged that the board of directors of Enron lacked independence as some of the board members had financial affiliations with the company which made them act in their own self-interests⁵⁷. Further, the board failed in its oversight role over management. The directors engaged the firm's auditor to administer both internal audit and consulting services; allowed high-risk accounting with weak financial reporting; signed off on excessive executive remuneration and failed to meet its fiduciary duties⁵⁸. Moreover, Enron lacked diversity on its

⁵⁵Anona Armstrong *et al.*, 'A Comparative Study of Governance in the Public Sector versus the Private Sector in Australia' (2005) Centre for International Corporate Governance Research < <https://www.uow.edu.au> > accessed 17 February 2019.

⁵⁶Bob Tricker, *Corporate Governance: Principles, Policies and Practices* (2nd edn, Oxford University Press 2011).

⁵⁷Nguyen HuuCuong, 'Factors causing Enron's Collapse: Investigation into Corporate Governance and Company Culture' (2011) 8(3) *Corporate Ownership and Control* 585-593.

⁵⁸Steven Ramirez, 'A Flaw in the Sarbanes –Oxley Reform: Can Diversity in the Boardroom Quell Corporate Corruption?' (2012) 77(4) *7 St. John's Law Review* 858 <<https://www.tandfonline.com>> accessed 25 June 2019.

board. Out of the 15 directors, it only had one woman and one black person. The directors were from the same background with similar experiences which fostered a groupthink mentality that made them conform and go with the flow rather than question and review the decisions made⁵⁹. Overall, Enron's failure was a consequence of weak corporate governance structures, unethical behaviour and severe conflict of interest.

The numerous corporate failures brought forth various legislations and reports promoting sound practice in corporate governance. These were to reinforce the existence of independent non-executive members in the BoD, oversight of management and board diversity. In addition, the Chairperson and CEO obligations are to be split up, they called for accountability, disclosure of conflict of interest, governing executive remuneration, the autonomy of the audit committee, developing and conformance with the organization's code of ethics and conduct among others⁶⁰. These are the Cadbury Report (1992)⁶¹, Greenbury Report (1995)⁶², Hampel Report (1998)⁶³ which gave rise to the Combined Code on Corporate Governance (2003)⁶⁴, USA Sarbanes-Oxley Act(2002)⁶⁵, Turnbull (1997)⁶⁶, Higgs Report (2003)⁶⁷ and Organization for Economic Cooperation and Development (OECD) Principles (2004)⁶⁸.

⁵⁹ *ibid.*

⁶⁰ *ibid* (n 57).

⁶¹ Adrian Cadbury, 'The Final Report of the Committee on the Financial Aspects of Corporate Governance' (Gee & Co. 1992)<<https://hydra.hull.ac.uk/>. The report addressed the dominance of a company by one person that is the CEO and conflict of interest among others.

⁶² Richard Greenbury, 'Directors' Remuneration. Report of the Study' (Group Gee Publishing 1995)<<http://cdn.law.ucla.edu/>>. The report tackled the problem of the director's excessive remuneration.

⁶³ Ronnie Hampel, 'Committee on Corporate Governance: Final Report' (Gee Publishing 1998). The report called for board evaluation after a few years' experiences.

⁶⁴ Set forth the ideal practice on board composition, directors' pay, reporting and audit in the context of shareholders.

⁶⁵ The Act enforces the independence of the audit committee.

⁶⁶ Nigel Turnbull, Internal Control: Guidance for Directors on the Combined Code (The Rank Group plc 1999)<<https://scholarbank.nus.edu.sg/>>. The report recommended maintaining and reviewing an internal system of control to manage risks.

⁶⁷ Derek Higgs, 'Review of the Role and Effectiveness of Non-Executive Directors' (Department of Trade and Industry 2003)...recommended increase of non-executive directors on the board from one third to one half.

⁶⁸ Stephen Girvin et al., *Charlesworth's Company Law* (18thedn, Sweet & Maxwell 2010).

Sir Cadbury Authur in his report (Cadbury Report) characterizes corporate governance as the structure that guides and controls corporations⁶⁹. Turnbull views corporate governances as the systems which have an impact on the institutional processes of an entity⁷⁰. In addition, the OECD Principles of Corporate Governance states that corporate governance encompasses the relationship amongst the management of the firm, its BoD, its investors and other stakeholders⁷¹.

The OECD Principles of Corporate Governance sets out six (6) principles of good governance which are now integrated worldwide as corporate governance principles. These are⁷²:

- a) Checking that there is an effective organizational management structure
- b) Protecting the rights of shareholders and essential ownership functions
- c) The equitable treatment of shareholders
- d) The role of stakeholders
- e) Disclosure and transparent management of finance and organizational issues
- f) Board responsibility

These principles are to be used to guide and strengthen a country's regulatory framework for corporate governance. Governments influence corporate governance by putting in place laws, rules and regulations that govern and control the running of their corporations⁷³.

⁶⁹ Adrian Cadbury, 'The Final Report of the Committee on the Financial Aspects of Corporate Governance' (Gee & Co. 1992) <<https://lra.le.ac.uk/>>accessed 12 January 2019.

⁷⁰Naimh Brennan, 'Turnbull puts Risk Management to the Top of Corporate Agendas' (2000) 3 Irish Business Law 57-61.

⁷¹ OECD Principles of Corporate Governance, 2004.

<<http://www.oecd.org/corporate/ca/corporategovernanceprinciples/31557724.pdf>>accessed 5 January 2019.

⁷² *ibid.*

⁷³Bob Tricker, *Corporate Governance: Principles, Policies and Practices* (2ndedn, Oxford University Press 2011).

2.3 Corporate Governance in State Corporations

A State Corporation is an entity where the government has vast controlling interests over it. This can either be in the finance, manufacturing, transport, mining, electricity, health and other sectors⁷⁴.

Countries have relied on the OECD Principles of Corporate Governance to develop their corporate governance laws and codes. In 2005, the OECD Guidelines on Corporate Governance of State-Owned Enterprises were adopted to provide for the governance of SCs and improve performance. The guidelines call for SCs to keep greater levels of transparency and disclosure in line with OECD Principles of Corporate Governance. Further, the guidelines provide that BoD of SCs must possess the requisite skills, experience, professionalism, independence and know-how to execute their oversight role over management and long term strategic planning. Besides, the guidelines mandate the board members to exercise integrity, take accountability for their actions and encourage greater board diversity including gender diversity in the recruitment procedure of board members by appointing authorities having a database of qualified individuals developed through an open competitive process⁷⁵.

2.4 The Board of Directors: Role and Responsibilities

An integral component of corporate governance is the board of management⁷⁶. SCs operate with a BoD. The board is charged with the task of making decisions for an organization. It is primarily responsible for the performance, strategic direction, policy setting, accountability, risk

⁷⁴Kiarie Mwaura, 'Constitutional Restructuring of Corporate Governance in State Owned Enterprises: Dynamism or Distraction?' (2011) 1 Journal of Mount Kenya University Law School 2<<https://chss.uonbi.ac.ke/>>accessed 1 May 2018.

⁷⁵OECD Guidelines on Corporate Governance of State-Owned Enterprises, 2005<<https://core.ac.uk/>> accessed 4 May 2019.

⁷⁶ Barry Baysinger, 'The Composition of Boards of Directors and Strategic Control: Effects on Corporate Strategy' (1990) 15(1) Academy of Management Review 70.

management and internal control including protecting the rights of shareholders and managing stakeholder relationships⁷⁷.

Board directors comprise of executive, non-executive, independent non-executive directors or connected independent non-executive directors. An executive director is one who is a member of the board and at the same time is engaged in a corporation's executive management while a non-executive director is one who does not play an executive, managerial role in the corporation. An independent non-executive director is a member who has no other relationship with the corporation other than the directorship. The connected non-executive director is one who has some affiliation with the corporation but is not part of its management such as a retired corporation's executive⁷⁸. Where a board member is not able to attend meetings, an alternate director is appointed to take his place⁷⁹.

Some of the key characteristics that an efficacious board is required to have as a matter of good corporate governance practice are⁸⁰:

- a) Defined roles-the duty of care (to discharge reasonable care, skill and diligence), fiduciary duty, accountability and oversight of the company's management;
- b) Board independence- differentiate the functions of the Chairperson and the CEO, diversity in the boardroom, a register for declaring a conflict of interests;
- c) Compliance to laws and regulations-compliance includes monitoring adherence to applicable laws, regulations and codes;
- d) Exercise corporate social responsibility; and

⁷⁷Bob Tricker, *Corporate Governance. Principles, Policies and Practices* (2ndedn, Oxford University Press 2011) 5.

⁷⁸ *ibid* 97-99.

⁷⁹ *ibid*.

⁸⁰Public Service Commission and State Corporation Advisory Committee, *Mwongozo: The Code of Governance for State Corporations* 2015.

- e) Transparency and disclosure in the midst of recruiting and selecting new directors, board evaluation and timely disclosure of interests.

Directors are collectively in charge of the internal governance and monitoring the management of the corporation. As such, the directors appointed must have the requisite knowledge, qualification and skill required to perform their tasks to avoid negatively impacting the company's business⁸¹. Directors have a responsibility to act with skill, care and diligence in the exercise of their duties and with the standard expected of a director⁸². This duty was expressed in *Flagship Carriers Ltd v Imperial Bank Ltd*⁸³ but initially stated in *Re City Equitable Fire Insurance Co*⁸⁴ where the judge held that a director must observe the level of skill reasonably expected from an individual possessing their knowledge and experience but will not be responsible for misjudgment. Because of the various ongoing corporate governance issues, directors are increasingly being held accountable for the firm's performance, legal compliance and social responsibility.

It is stated that the board's governance practice affects the firm's performance however Cutting and Kouzmin find no relationship between the two⁸⁵.

2.4.1 Agency Theory

The agency theory further explains the role of the board. This theory suggests that managers as agents are responsible for running a company in the best interest of the principal, who is the shareholders. Companies need to safeguard the interests of the shareholders by making sure that

⁸¹ Stephen Girvin et al., *Charlesworth's Company Law* (18th edn, Sweet & Maxwell 2010).

⁸² Companies Act 2015, s 145.

⁸³ High Court Civil Case No. 1643 of 1999 (unreported).

⁸⁴ [1925] ch.407.

⁸⁵ Bruce Cutting & Alexander Kouzmin, 'The Emerging Patterns of Power in Corporate Governance-Back to the Future in Improving Corporate Decision Making' (2000) 15(5) *Journal of Managerial Psychology* 477-507 <<https://tandfonline.com/>> accessed 12 March 2019.

those who manage companies are not doing so for their self-interest but the benefit of the shareholders⁸⁶. It acknowledges the conflict of interest that exists between managers' interests and maximizing shareholder value. This variance creates the need for the board of directors as a governance control mechanism to monitor the company's management by overseeing their decision making and performance to protect the shareholders⁸⁷. In the context of SCs, the principal is the government and its agencies while the board of directors is the agent.

In conclusion, the achievement of good corporate governance requires accountability and fulfilment of the board's responsibilities. Moreover, the effectiveness of a board is dependent on its composition⁸⁸.

2.5 The Composition of the Board

For a corporation to run effectively and efficiently, the board should comprise individuals who are diverse, skilled, qualified and capable of independent decision making⁸⁹.

Features of a diverse board include gender diversity, varied professional experience (human resource, finance, marketing, etc.) and distinctive race, ethnicity and cultural background. Freeman argues that boards that have diversity perform better in comparison to those without and is a strategy for managing risk⁹⁰. These kinds of boards are able to have wide-ranging resources of knowledge, perspective and talent which is key to effective corporate governance as it

⁸⁶Susan McLaughlin, *Unlocking Company Law* (1stedn, Hodder Education 2009).

⁸⁷Geoffrey Kiel and Gavin Nicholson, *Boards that Work: A New Guide for Directors*(Mcgraw Hill 2003)<<https://www.canberra.edu.au/>>accessed 2 May 2019.

⁸⁸ Adrian Cadbury, *Corporate Governance and Chairmanship: A Personal View* (Oxford University Press 2002)<<https://www.canberra.edu.au/>>accessed 2 May 2019.

⁸⁹Public Service Commission and State Corporation Advisory Committee, *Mwongozo: The Code of Governance for State Corporations* 2015, ch1.

⁹⁰Douglas Freeman, 'Board Diversification Strategy.RealizingCompetitive Advantage and Shareholder Value' (A Whitepaper by Virtcom Consulting, Virtcom Consulting) <https://www.calstrs.com/sites/main/files/file-attachments/board_diversification_strategy.pdf> accessed 29 June 2019.

improves board dynamics and decision making⁹¹. In America, reports indicate that boards are unable to discharge their duties due to directors having similar backgrounds which have as a result impaired the boards' critical evaluative judgment and performance⁹².

The Higgs Report (UK) (2003) in its reforms, recommended board gender diversity in the composition of directors. Diversity enables the board to be independent and play its monitoring role. Erhardt et al., point out that a BoD that is diverse enhances its supervisory function and is more independent thereby decreasing instances that may create conflict with the shareholders' interests⁹³.

2.6 The Issue of Gender Inequality

In order to appreciate the need for gender diversity in the composition of boards, it is vital to first and foremost be familiar with what gender inequality is about.

Gender inequality refers to the unjust treatment of people on the basis of their sex (used interchangeably with gender). This may take different forms where women are more disadvantaged in the social, economic and political spheres although any gender may be prejudiced⁹⁴. Gender inequality stems from the continued acts of discrimination against a particular gender over a long period of time⁹⁵.

Patriarchy is recognized as the root cause of gender inequality. The stereotype has been that men and women are conditioned to believe men are more competent, independent and authoritative

⁹¹James McRitchie, 'Groupthink in the Boardroom Context' (Corporate Governance 2015) <<https://www.corpgov.net/2015/02/groupthink-boardroom-context>> accessed 26 June 2019.

⁹²Adrian Cadbury, *Corporate Governance and Chairmanship: A Personal View* (Oxford University Press 2002).

⁹³Niclas Erhardt *et al.*, 'Board of Director Diversity and Firm Financial Performance' (2003) 11(2) *Corporate Governance: An International Review* 102-111.

⁹⁴ UNDP, 'Humanity Dividend: Confronting Inequality in Developing Countries' (United Nations Development Programme Bureau for Development Policy 2013) <<https://www.undp.org/>> accessed 4 April 2019.

⁹⁵ Amy Parziale, *Gender Inequality and Discrimination* (SAGE Publications 2007).

while women are viewed as compliant, dependent and falling short on skills⁹⁶. This outlook influences society's culture, preference, attitudes, systems, practices, and ascension to leadership⁹⁷. It is argued that through patriarchy, women's access to power and resources is curtailed⁹⁸.

The struggle to eliminate gender inequality started between the 18th-20th century where there was a push to end discrimination of women from taking part in public life for instance, in education and several professions. In Europe, women above 30 years obtained their voting rights in the year 1918 and in the year 1928 all women achieved the same rights as men⁹⁹.

In the year 1979, the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) concerned with eliminating discrimination against women came into force¹⁰⁰. The Convention stipulates that the measures utilized in bringing equality between men and women shall be discontinued when the objectives of equality of opportunity and treatment have been met¹⁰¹.

Further, in the year 2000, the promotion of gender equality and women empowerment was included as the Millennium Development Goal 3 set to achieve sustainable development by the year 2015¹⁰². Later in September 2015, the 17 Sustainable Development Goals (SDGs) were

⁹⁶Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' Volume 1989 1(8) University of Chicago Legal Forum 139-167.

⁹⁷Leslie Curzon, *Jurisprudence: Lecture Notes* (2ndedn, Cavendish Publishing Limited 1995).

⁹⁸Lanoi Maloiy, 'Patriarchy and the Control of Resources: Contributing Factors to the Feminization of Poverty in Kenya' <<https://www.afdb.org>> accessed 8 May 2018.

⁹⁹Hilaire Barnett, *Introduction to Feminist Jurisprudence* (Cavendish Publishing 1998).

¹⁰⁰Selin Delli, 'A Historical Perspective on Gender Inequality and Development in the World Economy, C.1850-2000'(DPhil thesis, University of Utrecht 2015)<<https://www.stic.ac.th>>accessed 4 May 2019.

¹⁰¹ See Article 4 of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women<<https://www.coe.int>>accessed 3 May 2019.

¹⁰²United Nations, 'Millennium Development Goals'(2000) <http://www.un.org/millenniumgoals/2015_MDG_Report/pdf>accessed 15 April 2019.

launched wherein the fifth goal targets to achieve gender equality and the empowerment of all women and girls by 2030¹⁰³.

Kameri-Mbote opines that though laws make provision for fair treatment of everyone, persons who faced marginalization will continue to be somewhat disadvantaged owing to the historical injustices¹⁰⁴. The aim should be to reduce barriers to the allocation of opportunities.

Considering the measures taken to achieve gender equality, inequalities still persist between men and women. The reason being, implementation is left to those who excluded women. These inequalities are also seen in the board room setting where there is a lack of gender diversity.

2.6.1 Intersectionality of Gender with other Inequalities

Women are not subject to similar treatment. Race added to women's subordination from the colonial era of the USA through the middle of the 20th century¹⁰⁵. The concept of intersectionality recognizes that an individual may be excluded in many respects. A black woman, for example, would be prejudiced as a result of sex and race. Gender, ethnicity, age and religion intersect each other leading to a 'matrix of domination'¹⁰⁶. In Kenya, a person might encounter oppression on the basis of both gender and ethnicity. A woman from Samburu or Marsabit undergoes difficulties that may hinder their progress that women from Kiambu or Coast

¹⁰³United Nations, 'The Sustainable Development Goals 2015-2030'(2015)<<http://una-gp.org/the-sustainable-development-goals-2015-2030/>> accessed 15 April 2019.

¹⁰⁴ Prof. Annie Patricia G. Kameri-Mbote, 'Fallacies of Equality and Inequality: Multiple Exclusions in Law and Legal Discourses' (2013) an Inaugural Lecture delivered at the University of Nairobi, School of Law, International Environmental Law Research Centre 2.

¹⁰⁵Jasmine Pierce, 'It's Not Just a "Black Thing:" Black Women in the Law and Issues of Double Identity and Discrimination'(2011) <<https://www.wcl.american.edu>> accessed 17 November 2019.

¹⁰⁶ibid(n 104)12.

counties do not. Gender along with other inequalities, for instance, ethnicity should be taken into account when coming up with gender policies for affirmative action¹⁰⁷.

2.7 Gender Diversity in the Boardroom

Baroness Hogg, Chairman of the UK Financial Reporting Council, stated that:

A relationship exists between board diversity and effectiveness. Diversity widens the perspectives brought on decision-making, avoids too great a similarity of attitude and helps companies understand their customers and workforces. A board with few women on it risks a weakness in at least one of these respects¹⁰⁸.

Further, the Higgs Report (2003) presses for more women representation on boards as gender diversity enhances the effectiveness of the board which is a good corporate governance practice¹⁰⁹.

In both Enron and WorldCom corporate scandals, women emerged as the whistleblowers who went against the tide of groupthink culture and exposed the malpractices¹¹⁰. Findings from research carried out by Conference Board of Canada on corporations with diverse boards and those without revealed that 94% of boards having three or more women directors adhere to the company's guidelines on conflict of interest whereas only 68% of boards that constituted of only men directors complied¹¹¹. Further, 86 %of boards comprising three or more women directors required their companies to have a code of conduct while only 66% of boards that lacked diversity enforced this corporate governance requirement. The study concluded that diversity on

¹⁰⁷ibid 13.

¹⁰⁸ Bob Tricker, *Corporate Governance. Principles, Policies and Practices* (2ndedn, Oxford University Press, 2011) 125.

¹⁰⁹ Antonio Garcia-Izquierdo, 'Gender Diversity on Boards of Directors and Remuneration Committees: The Influence on Listed Companies in Spain' (2018) 9:1351 *Frontiers in Psychology* <<https://www.aeaweb.org>> accessed 27 June 2019.

¹¹⁰Geoffrey Colvin, 'Wonder Women of Whistleblowing' *Fortune* (the USA, 12 August 2002) 56.

¹¹¹David Brown *et al.*, 'Women on Board: Not Just the Right Thing but the Bright Thing' (Conference Board of Canada Report, June 2002) <<https://systematicreviewsjournal.biomedcentral.com>>accessed 2 June 2019.

boards represented by the presence of women on boards changes the functioning of the board and instills a culture of scrutiny¹¹². Researchers conducted a similar study in America on the impact of gender diversity on corporate governance and established that gender-diverse boards held more meetings with fewer instances of non-attendance compared to-diverse boards¹¹³. Both studies reveal that diversity enhances the functioning of the board.

As aforesaid, obstacles to women's representation in the board have been the historical and social-cultural barriers in the society such as patriarchy and prejudices against women which has led to male domination in the boardrooms.

Globally, non-compliance is an obstacle to ensuring board gender diversity. This problem has also been witnessed in many boards in Kenya in this context, boards of SCs, evidenced by statistics presented in the previous chapter. Many European countries are now trying to tackle this problem of under-representation of women in their boards through quota legislation to increase gender diversity. However, some women directors are against quotas as they see it as portraying their inability to thrive on their own¹¹⁴. The essence of appointing women as board directors should not be about meeting a target to have more women representation but to have women directors who are competent and able to add value in the spirit of best practice in corporate governance.

¹¹² *ibid.*

¹¹³ Nadia Loukil and Ouidad Yousfi, 'Does Gender Diversity on Corporate Boards Increase Risk Taking?' (2016) 1(33) *Canadian Journal of Administrative Sciences* 66-73 <<https://onlinelibrary.wiley.com>> accessed 24 June 2019.

¹¹⁴ *ibid.*

2.8 The Business Case of Gender Diversity in Corporate Governance

Gender diversity is not only a legal or social issue but a business imperative¹¹⁵. It is noteworthy from various research studies conducted that having women on boards improves corporate performance and decreases mismanagement issues¹¹⁶.

Corporations whose board composition is diverse having male and female gender are likely to be more innovative and profitable as there is a broad spectrum of ideas, critical assessment and alternative viewpoints leading to improved corporate governance¹¹⁷. For SCs this means better public service delivery, effective use of public resources, sustainability, enhanced compliance with legislation, improved governance and efficiency in the operations¹¹⁸. Nonetheless, as earlier discussed, some authors do not acknowledge that gender diversity improves performance.

According to the agency theory point of view, boards that have a diversity of gender play a better monitoring role in comparison to male-dominated boards¹¹⁹. There are arguments that women are superior at governance, are more attentive to regulating conflicts of interests and nurture stakeholder relationships¹²⁰.

Furthermore, when there is a representation of both genders at the board, it brings about better deliberations and decision-making which aids in policymaking and understanding people's needs as there is a broader representation of people and knowledge resource. Women have different

¹¹⁵Caroline Ndungu, 'Diversity' *Business Daily* (Kenya, 13 March 2019)11.

¹¹⁶Bob Tricker, *Corporate Governance. Principles, Policies and Practices* (2ndedn, Oxford University Press, 2011).

¹¹⁷Sharon Sutherland, 'Why AI Could Correct the Gender Imbalance Right Up To the Boardroom' (Ernst & Young March 2019) <https://www.ey.com/en_gl/women-fast-forward/why-ai-could-correct-the-gender-imbalance-right-up-to-the-boardroom>accessed 8 April 2019.

¹¹⁸Preamble, Public Service Commission and State Corporation Advisory Committee, *Mwongozo: The Code of Governance for State Corporations* 2015.

¹¹⁹Antonio Garcia-Izquierdo, 'Gender Diversity on Boards of Directors and Remuneration Committees: The Influence on Listed Companies in Spain' (2018) 9:1351 *Frontiers in Psychology*<<https://pubs.aeaweb.org>> accessed 27 June 2019.

¹²⁰Victoria Pynchon, Note to Board of Directors: Women Make a Positive Difference<<https://www.ijhssnet.com>> accessed 5 June 2019.

interests and experiences compared to that of men's, which means their thought process will be different.

Having a gender diverse board increases the legitimacy of a corporation. A corporation is a social entity that fosters general welfare for the community¹²¹. Women form half of the population, and as such, it is just that women have a presence on the board¹²².

Pursuance of good corporate governance entails corporate social responsibility. Diversity is a good indicator of corporate social responsibility, which contributes to a company's reputation¹²³. This goes on to say that a company's corporate social responsibility will attract and retain highly qualified employees and board members of both genders who act for the benefit of the stakeholders in decision making and this will further ensure the sustainability of the company¹²⁴.

2.9 Conclusion

The focus of this chapter was on the relationship between corporate governance and gender diversity. Gender diversity in board appointments is a concept that has not existed for a long time and countries are grappling with various ways to increase gender diversity in the board room.

Industrialized countries have put in place a requirement on quotas; however, more action is required to increase the representation of women on the board.

¹²¹Steve Letzaet *al.*, 'Shareholding versus Stakeholding: A Critical Review of Corporate' (2004) 3(12) Corporate Governance: An International Review 242-262<<https://westminsterresearch.westminster.ac.uk>>.

¹²²United Nations, 'Equal Participation of Women and Men in Decision-Making Processes, with Particular Emphasis on Political Participation and Leadership' (Division for the Advancement of Women 2005)<<https://www.iisd.ca>> accessed 12 April 2019.

¹²³Freeman Douglas, 'Board Diversification Strategy. Realizing Competitive Advantage and Shareholder Value' (A Whitepaper by Virtcom Consulting, Virtcom Consulting)<https://www.calstrs.com/sites/main/files/file-attachments/board_diversification_strategy.pdf> accessed 29 June 2019.

¹²⁴Edward Freeman and William Evan, 'Corporate Governance: A Stakeholder Interpretation' (1990) 19 (4) Journal of Behavioral Economics 337-359.

As aforementioned, gender diversity has an influence on corporate governance as it brings about better decision-making, better performance as the board's monitoring and oversight role is enhanced and improves the corporate image and reputation. Therefore, gender diversity is encouraged in the appointment and composition of the board to guarantee good corporate governance.

CHAPTER THREE

KENYA'S LEGAL FRAMEWORK FOR GENDER DIVERSITY IN THE APPOINTMENT OF BOD OF STATE CORPORATIONS

3.1 Introduction

For many years, board appointments to Kenya's SCs have elicited public outcry as the appointments have majorly comprised of politicians and ex-civil servants. The appointment process should ensure that the composition of the board has a balanced mix of skills, gender, knowledge and experience. The legal framework on board appointments in Kenya's SCs is insufficient to guarantee gender diversity in the composition of boards and good corporate governance practices. Sound corporate governance principles call for compliance with relevant laws, regulations, governance practices and other legal requirements¹²⁵. It is within this background that the legal framework for gender diversity in board appointments will be considered.

3.2 Corporate Governance in Kenya's State Corporations

Kenya is among the countries that have adopted the OECD corporate governance principles. It has developed its Code, *Mwongozo*, which incorporates the corporate governance principles and best practices in the governance of SCs.

Previously, corruption, politics, leadership challenges, lack of accountability, misappropriation of public funds and inefficiencies in the provision of goods and services riddled SCs. The problems were due to shortcomings in the governance structure. The governance structure of SCs involved a multifaceted relationship among Parliament, Ministries, boards and CEOs. This

¹²⁵ Public Service Commission and State Corporation Advisory Committee, *Mwongozo: The Code of Governance for State Corporations* 2015.

intricate relationship created misunderstanding and conflict in apportioning responsibilities and accountability¹²⁶. Besides, SCs had no specific process for recruitment, selection and appointment of members of the board. The boards were found to be unprofessional, incompetent, lacking autonomy¹²⁷ and deficient in the right mix of skills. Moreover, board members did not know their roles as directors, and there was no separation of responsibilities between the CEO and Chairperson¹²⁸. According to Mwaura, board inefficiencies occur as a consequence of people appointing board members acting in the interest of those who can support them politically but not in the best interest of the SC¹²⁹.

The weaknesses necessitated the development of *Mwongozo* as a remedy to cure the corporate governance ills experienced in Kenya's SCs. As discussed, good corporate governance warrants accountability, effectiveness and efficient use of resources that incorporates financial stewardship. *Mwongozo* addresses the requirements for the board of directors, transparency and disclosure, accountability and risk management, ethical leadership and corporate citizenship, rights of shareholders, stakeholder relationships, sustainability and compliance with laws and regulations¹³⁰. Nonetheless, the efficiency of the board in SCs cannot be at par with the private sector because of interference by the government¹³¹.

¹²⁶ *ibid.*

¹²⁷ OECD Guidelines on Corporate Governance of State-Owned Enterprises 2005 calls for full autonomy for SC boards and states should not participate in its daily management. See <<http://www.oecd.org/dataoecd/46/51/34803211.pdf>>accessed 24 July 2019.

¹²⁸ Public Service Commission and State Corporation Advisory Committee, *Mwongozo: The Code of Governance for State Corporations* 2015.

¹²⁹ Kiarie Mwaura, 'The Failure of Corporate Governance in State-Owned Enterprises and the Need for Restructured Governance in Fully and Partially Privatized Enterprises: The Case of Kenya' (2007) 31 *Fordham International Law Journal* 34<<https://www.riarauniversity.ac.ke>> accessed 3 June 2019.

¹³⁰ *ibid* (n 128) ch 1-8.

¹³¹ *ibid* (n 129).

3.3 Board Appointments

Directors' appointments will arise at the outset when incorporating a corporation, reappointment following the expiry a director's term, where a vacancy needs to be filled or when an additional position of a director is created¹³².

Board appointments require a formal, rigorous, transparent procedure and should be based on merit¹³³. The hiring of board directors has over the years been politicized since they are made by the President and line Ministries (who derive their authority from the President) and backed by laws that do not have guidelines that outline the criteria, qualifications and requirements of the candidates needed for the position. The President has the authority to appoint persons of his choice which makes room for the appointment of former political cronies such as former Ministers and Assistant Ministers who are mostly of the male gender¹³⁴.

The poor appointment procedure has contributed to SCs low performance in terms of profits, growth and governance¹³⁵ leading to their collapse due to mismanagement as witnessed in corporations such as Kenya National Assurance, KCC, Kenya Bus Services and others, not stated¹³⁶. Musikali recommends that persons recruited should possess leadership skills and have good business knowledge of the specific corporation to execute their various roles. However, research reveals that most directors in Kenya do not know their duties and functions.

¹³²Bob Tricker, *Corporate Governance. Principles, Policies and Practices* (2ndedn, Oxford University Press, 2011) 303.

¹³³ Ibid (n 128) ch1.

¹³⁴Nzau Musau, 'Kieleweke Gets a State Boost as State Jobs Favour Central' *The Standard* (Kenya, 5 May 2019)14.

¹³⁵ Barbara Grosh, 'Public Sector Enterprises in Kenya: What Works, What doesn't Work and Why?'(1994) 32(2) *Journal of Modern African Studies*<www.ijhssnet.com accessed 7 June 2019.

¹³⁶ Lois Musikali, 'The Law Affecting Corporate Governance in Kenya: A Need for Review' (2008) *International Company and Commercial Law Review*.

In May 2019, the President issued several gazette notices¹³⁷ appointing former Members of Parliament (MP) and governors¹³⁸. These appointments are made up of people who have political interests and ex-civil servants who can push a specific political agenda. Appointees of this nature have been regarded as having no knowledge and experience in the sectors or corporations they were assigned to¹³⁹.

A similar trend was observed in 2018, where retirees were appointed to head the boards of SCs such as Rtd. General Julius Karangi as Chair of NSSF board, Francis Muthaura as chair of KRA board¹⁴⁰, and Doyo Godana as Chair of Moi Teaching and Referral Hospital¹⁴¹. Others included former Samburu West MP Jonathan Lelelit Lati as Chair of the Kenya Industrial Research and Development Institute, Ex-Governor of Baringo Benjamin Cheboi as chair of the Agricultural Development Corporation Board and Ex-Migori MP Charles Owino as Chair of South Nyanza Sugar Company Board¹⁴².

As of the year 2012, the composition of boards of ninety-eight (98) SCs was as follows¹⁴³:

¹³⁷ Government Printers, *The Kenya Gazette* (Nairobi, 3 May 2019) Vol. CXXI-No.56.

¹³⁸ They include former Dagoreti MP Dennis Waweru as Chairman of Kenya Investment Authority, former Kigumo MP Jamleck Kamau as Tana and Athi Rivers Development's Chairman, former Taita Taveta Senator Dan Mwanzo as Chairman of Kenya Ferry Services, former Kitui Governor Julius Malombe as Chairman of Kenya Water Towers Agency, former Rarieda MP and Siaya Governor aspirant Nicholas Gumbo as Chairman of Kenyatta National Hospital, former Maragua MP Elias Mbao as Chairman of NEPAD/APRM Kenya Governing Council, Victor Pratt (President's brother-in-law) re-appointed as Chairman of Retirement Benefits Authority and former Marakwet East MP Jebii Kilimo as Chairperson of the Street Families Rehabilitation Trust Fund. See Benjamin Muriuki, 'Full List: Uhuru Appoints Former MPs, Governor to Top Parastatal Jobs' *Citizen Digital* (Kenya, 4 May 2019) <<https://citizentv.co.ke>> accessed 17 July 2019.

¹³⁹ Austin Ouko, 'The Presidential Taskforce Report on Parastatal Reforms: The Case for a Review' (2016) 2 (12) *The Law Society of Kenya Journal* 103-138.

¹⁴⁰ His appointment was however suspended pending a suit filed in court by activist Okiya Omtatah.

¹⁴¹ Published in *The Kenya Gazette* (Nairobi, 6 June 2018) Vol. CXX-No.68.

¹⁴² Wangui Ngechu, 'Political Losers Rewarded in New Parastatal Changes' *Citizen Digital* (Kenya, 7 June 2018) <<https://citizentv.co.ke/news/political-losers-make-comeback-in-new-parastatal-changes-203145/>> accessed 17 July 2019.

¹⁴³ Institute of Directors Kenya, 'Report of the Taskforce on Women Representation on Boards' (2014) <https://www.ifc.org/wps/wcm/connect/12c36f804b5f6654bd05fd08bc54e20b/Kenya_IOD_Report_September_2015.pdf> accessed 19 June 2019.

Measures	State Corporations
Number of state corporations	98
Number of directors	1091
Number of men directors	872
Number of women directors	221
Percentage of men directors	80
Percentage of women directors	20
Number of men chairpersons	85
Number of women chairpersons	13
Percentage of men chairpersons	87
Percentage of women chairpersons	13

Data on Directors of State Corporation in Kenya

*Source: Institute of Directors Kenya, 'Report of the Task Force on Women Representation on Boards' (2014)
<https://www.ifc.org/wps/wcm/connect/.../Kenya_IOD_Report_September_2015.pdf>*

The findings indicate that the number of women representation in the Board was 20 percent while that of men was at 80 percent. This connotes that little thought is accorded to gender diversity when appointing directors of SCs.

From the foregoing, it is evident that equity and fairness of opportunity for women in the appointment process are lacking as women are constrained by the handful of political networks they may have to support them. Also, it has been argued that there are few qualified women who can take up these appointments¹⁴⁴. As a result, women are underrepresented in boards of SCs.

¹⁴⁴Annie Njanja, 'Experts Call for More Women on Boards' *Business Daily* (Kenya, 22 March 2017)<<https://www.businessdailyafrica.com/corporate/539550-3860746-82tcqlz/index.html>> accessed 20 June 2019.

3.4 Legal Framework of Board Appointments in Kenya's State Corporations

3.4.1 State Corporations Act

The appointment of directors to boards of SCs is primarily provided for in the SCA¹⁴⁵ and in the Act of Parliament establishing the SC. Besides the two statutes, reference is made to the CoK¹⁴⁶ *Mwongozo* and Public Officer Ethics Act¹⁴⁷.

The SCA stipulates that the members of the board shall be made up of¹⁴⁸:-

- a) A Chairperson, appointed by the President;
- b) The Chief Executive Officer ;
- c) The Permanent Secretary of the ministry the SC falls or an alternate person by notification in writing;
- d) The Permanent Secretary, National Treasury or an official person by notification writing;
- e) The Attorney-General or his representative;
- f) Eleven other members or less not being the SC's employees, out of those members three or less shall be public officers, designated by the Minister.

Pursuant to the above, the appointment and composition of the board are in the control of the President instead of the board members. This thus renders the appointment process political rather than transparent which leads to a board with former politicians or retired civil servants

¹⁴⁵The State Corporation Act Cap 446, Laws of Kenya is an overarching Act that governs all State Corporations whether established through a Legal Notice or an Act of Parliament.

¹⁴⁶ Constitution of Kenya 2010.

¹⁴⁷ Public Officer Ethics Act No.4 of 2003.

¹⁴⁸ss 6(1) and 4.

who are unqualified and inexperienced¹⁴⁹. The Act has no guidelines or criteria for appointment of chairpersons and board directors in terms of qualifications (knowledge, education, experience) and a requirement on gender diversity. Additionally, the Act does not provide the procedure for appointment, selection and mechanisms to implement gender diversity as the designations are made from external organs as listed above where gender may not be considered. For the non-independent directors, compliance is dependent on which gender is holding office, which may be from one gender that is ordinarily male. These bring about boards that are not competent and male-dominated, which has an impact on performance.

To curb the issue of incompetence, the appointment of directors should be vetted by an independent body or Parliament¹⁵⁰. The Act needs to be revised to provide for qualifications, recruitment and selection procedure and consideration for gender diversity in the nomination and appointment of board members.

3.4.2 The Constitution of Kenya

The CoK2010 specifies the principles of corporate governance, which encapsulates good governance, transparency, accountability and fairness¹⁵¹. Fairness represents the equal treatment of rights of all shareholders, taking into account the minority shareholders. In this respect, equity will apply where both genders receive equitable consideration for board appointments.

¹⁴⁹Kiarie Mwaura, 'Constitutional Restructuring of Corporate Governance in State-Owned Enterprises: Dynamism or Distraction?' (2011) 1 Journal of Mount Kenya University Law School 5-10 <<https://chss.uonbi.ac.ke/>> accessed 1 May 2018.

¹⁵⁰Kiarie Mwaura, 'The Failure of Corporate Governance in State-Owned Enterprises and the Need for Restructured Governance in Fully and Partially Privatized Enterprises: The Case of Kenya' (2007) 31 Fordham International Law Journal 34 <<https://core.ac.uk/>> accessed 20 May 2018.

¹⁵¹ Article 10(b) &(c).

Before the promulgation of the CoK 2010, the old Constitution did not have provisions of gender equality in appointive bodies. It only considered the elective bodies¹⁵². This has contributed to the low number of women in the Boards or lack thereof. However, the Constitution prior to 2010 outlawed discrimination on the grounds of sex¹⁵³.

Article 232 deals with values and principles of public service, which are applicable to all SCs¹⁵⁴ and are essential in corporate governance. It provides for accountability, adequate service provision and economical use of resources. Specifically, in terms of board appointments, Article 232 (1) (i)¹⁵⁵ provides both men and women ought to be granted equal chances in filling vacant positions in all public service positions. Further, board recruitment has to be transparent, uphold high standards of professional ethics and reflect fair competition and merit¹⁵⁶. The selection process should be open to all, in this context, both male and female genders taking into account individual integrity, competence and suitability¹⁵⁷. This means that there should be a board vacancy advertisement to fill positions followed by competitive interviewing.

Board appointments should take into account gender diversity and equity and not engage in tokenism. Tokenism entails recruiting women to make it look like there is fair treatment with the intent of avoiding a backlash. Having one woman on the board is viewed as a token. The limit of avoiding tokenism is to have three or four women in the board out of eleven board members who are seen as a critical mass able to influence decisions and not conform¹⁵⁸. It is inferred that having four women out of eleven would meet the constitutional requirement of women

¹⁵² Constitution of Kenya 1963 revised 2008, s 33(5).

¹⁵³ *ibid* s 82(3).

¹⁵⁴ Article 232 (2) (b).

¹⁵⁵ Constitution of Kenya, 2010.

¹⁵⁶ Article 232 (1) (a) (f) (g).

¹⁵⁷ Article 73 (2) (a).

¹⁵⁸ Mariateresa Torchia *et al.*, 'Women Directors on Corporate Boards: From Tokenism to Critical Mass' (2011) 102(2) *Journal of Business Ethics* 299-317 <<https://opus.lib.uts.edu.au>> accessed 9 July 2019.

representation (1/3:2/3) and that three women out eleven board members would fail to reach the target¹⁵⁹.

Article 27(3) sets out the equality of all males and females in every field that is economic, political, cultural and social¹⁶⁰. This is further reinforced by prohibiting discrimination on the grounds of sex by the State or an individual¹⁶¹. The Constitution under Article 27(8) mandates the State to legislate and put in place affirmative action programmes to implement the two-thirds gender rule in elective or appointive bodies to remedy the injustices suffered by people due to past discrimination¹⁶². Appointive bodies consist of board appointments and this gender proportion requirement is a form of affirmative action.

Despite the provisions on equality and inclusivity of both genders being laid down clearly in the Constitution, this is yet to be realized. It was expected that the Constitution through these provisions would facilitate the increase of women existence in various elective and appointive positions; however, women representation in the boards of SCs is still lagging behind. The challenge has been that there is no framework in place for implementing the two-thirds gender principle. Gender disparities in the appointment and composition of boards go against the spirit of the Constitution. Appointment procedures of boards of SCs need to be brought into compliance with the Constitution.

¹⁵⁹ In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR, Advisory Opinion No. 2 of 2012.

¹⁶⁰ Article 27(3).

¹⁶¹ Article 27(4) and 27(5). The grounds for discrimination under Article 27(5) include but not limited to 'race, sex, pregnancy, marital status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth'.

¹⁶² Article 27(6).

3.4.2.1 The Gender Bill and Affirmative Action

Numerous attempts have been made to realize the two-thirds gender principle. *Advisory Opinion No. 2 of 2012 In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*¹⁶³ illustrates the difficulties in interpreting Article 27(8) on whether it was to be gradually or immediately attained. The Supreme Court's majority view was that the two-thirds gender principle is achieved with time by legislative or other measures such as affirmative action as there was no mention on effective dates in the Constitution¹⁶⁴. Going by Schedule Five of the CoK2010 the law ought to have been put in place by 27 August 2015.

Further in *Centre for Rights Education & Awareness (CREAW) versus Attorney General and Commission on the Implementation of the Constitution*¹⁶⁵ the court held that the Respondents exhibited laxity and did not fulfill their mandate in developing legislation for submission in Parliament to enable the constitutional requirement that the appointive bodies must not consist of not more than two thirds of persons of the same sex be attained within five (5) years after Constitution was in place that is by 27 August 2015. In the ruling, the same had not been actualized and exposed Article 27(8) which sets out the gender rule of two-thirds to the contravention. The Respondents were directed to enact the necessary legislation within 40 days.

Nine years after the adoption of the Constitution, there has been no legislation to realize the gender-equity principle under Article 27(8) of the CoK and close the gender gap. Though, there has been the introduction of the Two-Third Gender Rule Laws (Amendment) Bill, 2015 (Gender Bill).

¹⁶³ [2012] eKLR.

¹⁶⁴ It is worth noting that Chief Justice Mutunga was of the opinion that the two-thirds gender rule should be attained immediately.

¹⁶⁵[2015] eKLR, Petition 182 of 2015.

In the years 2016 and 2017, the Bill which was sponsored by Honourable Samuel Chepkonga¹⁶⁶ and Senator Judith Sijeny respectively, did not proceed to the third reading stage due to lack of quorum. Once again, voting on the Bill sponsored by Majority Leader Aden Duale met the same set back on 27 February 2019¹⁶⁷. Various attempts made to pass the Bill into law demonstrate the lack of political will to include women in elective and appointive positions which is one of the objects of the Bill¹⁶⁸. Implementation of the principle now remains precarious despite the legislation.

Political will and good faith are needed for Parliament to pass the Bill into law. Justice Mwita in *Katiba Institute versus Independent Electoral and Boundaries Commission*¹⁶⁹ recognized that other means may be used to see through the two-thirds gender rule besides legislation.

Affirmative action has been presented as a solution to open up opportunities for women. Proponents of affirmative action argue that it will overcome discrimination for the long haul by providing an avenue for those that have endured injustices to have equal access and opportunities without regard to their sex, ethnicity or race. On the other hand, opponents maintain that affirmative action does not tackle the fundamental reason for the cause of inequality. This may eventually lead to reverse discrimination against men unless it is properly administered until the need is met¹⁷⁰.

The Gender Bill aims to redress past discrimination of women by requiring policies and programmes to implement affirmative measures. This will ultimately enhance women's representation on boards. Even if the Bill is legislated, the choice on who is to be appointed to

¹⁶⁶ National Assembly, 'Bill Tracker - Parliament of Kenya' <<http://www.parliament.go.ke>> 3 May 2019.

¹⁶⁷ National Assembly Deb (The Constitution of Kenya Amendment Bill) 27 February 2019, cols 9-14.

¹⁶⁸ Preamble of the Two-Third Gender Rule Laws (Amendment) Bill, 2015.

¹⁶⁹ [2017] eKLR, Petition 19 of 2017.

¹⁷⁰ Caitlin Myers, 'A Cure for Discrimination? Affirmative Action and the Case of California's Proposition 209' (2007) 60(3) *Industrial and Labour Relations Review* 379-396 <<https://www.ssc.wisc.edu>> accessed 23 July 2019.

the board primarily for those SCs that are established by a legal notice such as Kenyatta National Hospital¹⁷¹ is still dependent on the SCA, which does not have mechanisms to implement gender diversity.

3.4.3 Government Owned Entities (GOE) Bill, 2014

The GOE Bill, 2014 is a legislation that was put together to facilitate governance of all state-owned entities using single legislation so as to ensure a clear one-stop-shop for the law and sought out the issue of overlapping regulations to avoid confusion. The Bill aims to bring about the classification of Government Owned Entities, effective governance and accountability while at the same time, address the compliance challenges caused by having many legislations. The Bill, when passed into law, was to repeal the SCA and Acts of Parliament creating SCs¹⁷².

The Bill has been criticized for generating a multiplicity of laws catering to state agencies, public universities, county agencies and commercial companies. It also has a similar governance framework as the SCA, which is a setback to guaranteeing good corporate governance practice. The Oversight Office¹⁷³ that has been recommended to replace the State Corporations Advisory Committee will still perform the same tasks¹⁷⁴. Some sections in the Bill have been cited as unconstitutional¹⁷⁵.

Section 32 to Section 34 of the Bill specifies the composition and appointment of board members of Government Owned Entities. Under Section 32(3), the board shall comprise:

¹⁷¹ Legal Notice No.109 of 1987.

¹⁷²s 65.

¹⁷³ National and County Agencies Oversight Office.

¹⁷⁴ Kenya Law Reform Commission, 'Government Owned Entities Bill and National Wealth Sovereign Management Bill' (Government Circular, 14 May 2014).

¹⁷⁵ Section 68 calls for termination of existing board members term 12 months after the Bill starts operating as an Act. This is in contravention to Article 41 of the Constitution of Kenya which stipulates that 'the State shall within the limits of its economic capacity and development make effective provision for securing the right to work'.

- a) A Chairperson, appointed by the President;
- b) A minimum of three and less than five members appointed by the related Cabinet Secretary
- c) The Permanent Secretary of the parent Ministry or a representative at a senior level within the said Ministry appointed by the Cabinet Secretary by gazette notice ;
- d) The Permanent Secretary, National Treasury;
- e) The Chief Executive Officer;
- f) The Company Secretary

Section 33(3) states that the recruitment procedure shall be transparent and competitive and Section 34 outlines the qualifications candidates should meet to be considered for appointment. The Bill also stipulates the gender equity principle that not more than two-thirds of the board members shall be a similar gender in the nomination and appointment of the chairperson and board members¹⁷⁶. This is an improvement of the SCA.

3.4.4 The Code of Governance for State Corporations (*Mwongozo*)

In the year 2015, the President issued *Mwongozo* as regulations under the SCA based on Section 30 of the SCA which allows for regulations to be made to supplement the Act.

The Code is a policy instrument that gives principles as a guideline to the practice of corporate governance of SCs. It may be disregarded where it contradicts existing legislations¹⁷⁷.

Chapter 1 paragraph 1 dealing with the composition of the board expressly states that the board should encompass gender diversity in addition to skills and experience to ensure effective management of the corporation. Clause 1.1 states that Article 27 of the CoK which contains the

¹⁷⁶s34 (3).

¹⁷⁷*Mwongozo*, 2015 Introduction at xiii.

gender equity principle shall be taken into account when appointing board members. Moreover, it provides that the appointment procedure should be formal, transparent and grounded on merit. The Chairperson's appointments are to be made by the President while those of the members of the board by the Cabinet Secretary of their parent ministry¹⁷⁸.

3.4.4.1 Comply or Explain Model

The approach adopted by *Mwongozo* is on a 'comply or explain' basis. This approach requires SCs to include in their annual reports their compliance with the guidelines of the Code if not, the explanations for failure to adhere and the steps that are being taken to ensure compliance is given¹⁷⁹. Under the Code, SCs are to comply with the principles provided for the appointment and composition of boards.

The problem occasioned with this approach is that it leaves room for failure to comply with the set governance principles and practice and justification given to explain the non-compliance.

USA¹⁸⁰ and India adopt the 'comply or else' approach which makes it mandatory for corporations to adhere to the corporate governance principles or be sanctioned for non-compliance. Germany and India adopt both mandatory and voluntary compliance standards in their codes¹⁸¹. Perhaps, *Mwongozo* needs to adopt the mandatory compliance approach in some of its provisions especially in regards to board appointments.

¹⁷⁸ Clause 1.1(9) & (10).

¹⁷⁹*Mwongozo* recognizes that at implementation, 'State Corporations will be at different levels of compliance with corporate governance norms. This allows organizations time to fully comply at a pace that is realistic in their circumstances and to learn from other organizations, whilst at the same time taking responsibility and ownership for any non-compliance. While full compliance is expected, the approach positively recognizes that a satisfactory explanation, coupled with a roadmap to full compliance will in certain circumstances be acceptable. This requires that the disclosures for non-compliance will need to be detailed and Boards will be held to account for any explanations given'.

¹⁸⁰ US Sarbanes Oxley Act (2002).

¹⁸¹JayatiSakar and Subrata Sarkar, *Corporate Governance in India* (Sage Publications, 2012).

3.4.4.2 Soft Law

Soft law represents the rules and guidelines that have no legally binding effect while hard law characterizes those instruments that are binding¹⁸². *Mwongozo* may be regarded as a soft law because it is not legally binding and SCs that do not comply with its provisions will only be required to give information regarding the non-compliance and will be issued with recommendations. The Code carries with it the soft gender quota prescribed in Article 27(8) in terms of board appointments. Whereas had *Mwongozo* been a hard law bearing the hard gender quota, there would be sanctions issued as penalties non-compliance for instance fines.

Mwaura states that sanctions are a key characteristic in the private sector for compelling directors to carry out their functions. This makes directors discharge their duties otherwise disgruntled shareholders would sell their shares¹⁸³.

In Norway where the hard gender quota (mandatory gender quota) legislation applies, public and private companies that are not compliant with the gender representation in boards are either fined, not registered or delisted¹⁸⁴. In Italy, Belgium and France, board members may not be remunerated as one of the penalties for non-compliance while in Austria, the board appointments may be quashed if the board does not consist a minimum of 30% women¹⁸⁵. Spain opted for the soft quota legislation with incentives¹⁸⁶ but without sanctions which saw a minimal rise of women in boards thus missing its 40% target. The hard quota law has contributed to an upsurge

¹⁸²Kenneth Abbott and Duncan Snidal, 'Hard law and Soft Law in International Governance' (2000) 54(3) International Organization 421-456 <<https://www.stiftelsesforeningen.no>> accessed 27 July 2019.

¹⁸³Kiarie Mwaura, 'Constitutional Restructuring of Corporate Governance in State Owned Enterprises: Dynamism or Distraction?' (2011) 1 Journal of Mount Kenya University Law School 7-9 <<https://chss.uonbi.ac.ke/>> accessed 1 May 2018.

¹⁸⁴Norway was the first country to put in place gender quotas in the boards where the board composition was to be made up of a minimum of 40% of women and men by 2008.

¹⁸⁵Ruth Mateoas de Cabo *et al.*, 'Do Soft Law Board Gender Quotas Work? Evidence from a Natural Experiment' (2019) European Management Journal <<https://www.ucl.ac.uk>> accessed 2 July 2019.

¹⁸⁶ These incentives include tax rebates and public tender contracts awarded to those companies who had diversified boards however there was lack of government commitment to follow through.

of females present in the boards of countries where it is applied. Various studies have acknowledged that a legally binding guideline or rule that imposes gender quotas is the best measure for raising the number of women representation in the boardroom¹⁸⁷. This is supported by a United Nations report that recommends having either legislated or voluntary quotas to increase women's leadership and participation in decision making positions¹⁸⁸.

Mwongozo lacks incentives and sanctions, which affects the compliance of its provisions and ultimately, the performance of the boards. SCs have not fully adhered to the reforms as stipulated in *Mwongozo*. Board appointments are politically influenced without paying attention to gender diversity. Most board directors in SCs are of the male gender¹⁸⁹.

Stringent measures need to be developed for non-compliance. Although the Code is not legally binding, its governance principles on the diversity of gender in the appointment and composition of the board are well articulated in the Constitution of Kenya where its provisions are enforceable in courts¹⁹⁰.

3.5 The Role of the State Corporations Advisory Committee

Section 26 of the SCA establishes an advisory and oversight institution known as the State Corporations Advisory Committee (SCAC). The President has the authority of appointing the members of the committee.

¹⁸⁷ *ibid* 12.

¹⁸⁸ United Nations, 'Equal Participation of Women and Men in Decision-Making Processes, with Particular Emphasis on Political Participation and Leadership' (Division for the Advancement of Women 2005) <<https://www.iisd.ca>> accessed 12 April 2019.

¹⁸⁹ NGEN, Equality and Inclusion in State Corporations Leadership in Kenya. The Case of 153 State Corporations (NGEN Annual Report 2015-2016). <<https://www.ngekenya.org/Downloads/Equality%20and%20inclusion%20in%20state%20corporations%20in%20Kenya.pdf>> accessed 3 January 2019.

¹⁹⁰ Article 27(8).

Under the Act, SCAC is delegated to review and investigate SCs and issue recommendations to the President. In particular, SCAC advises the President or Minister on the appointment or removal of board members and the terms and conditions on the same¹⁹¹. This creates an opportunity for SCAC to advise on matters of gender diversity in the appointments nevertheless, SCA is the principal statute that governs board appointments including the Acts of Parliament establishing the SCs and *Mwongozo*. SCAC is mandated to actualize the provisions laid down in *Mwongozo* as it took part in its development.

Despite its roles, the appointment of board members is lacking as the composition of boards of SCs is not conforming to gender diversity. Further, there is a lack of independence of the committee¹⁹² to execute its oversight role on the board appointments, which is seen as being political.

3.6 Conclusion

This chapter sheds light on Kenya's legal and regulatory framework on board appointments. We have good laws that promote gender diversity, but the problem of implementation, maintaining the status quo and lack of political will persists. The current legal framework for appointment into boards of SCs is an impediment to gender diversity in the boardroom.

The selection and appointment of the board members of SCs need to be clear, transparent and more gender-responsive to achieve gender diversity in the boardroom. The appointments should adhere to the provisions on equality and non-discrimination stipulated in the Constitution of

¹⁹¹ Section 27 (1) (c), SCA provides that SCAC shall advise on the appointment, removal or transfer of officers and staff of SCs, the secondment of public officers to SCs and the terms and conditions of the same.

¹⁹² The members of the committee are appointed by the President

Kenya 2010. Additionally, all appointees to the board should be vetted by a neutral and independent body to ensure that they are fit for the office.

A better framework for board appointments should be developed. The selection should be far from "business as usual" where we see the same political cronies of the male gender being awarded positions in different corporations one after the other. Board appointments should be on merit and more than ticking a compliance box on gender diversity. For progress to be made, additional measures to achieve equality such as training women on board leadership, putting in place sanctions and incentives should be implemented in addition to legislating the gender-equity principle.

Kenya's laws pertaining to SCs and board appointments should be revised and harmonized to allow for compliance with ease to enhance good corporate governance. The laws and regulations need to be streamlined to spur gender diversity in board appointments and bring consistency within the laws. The existing law on gender diversity in appointments needs to be implemented fully.

CHAPTER FOUR

THE LEGAL FRAMEWORK FOR GENDER DIVERSITY OF CORPORATE GOVERNANCE IN SOUTH AFRICA

4.1 Introduction

This chapter discusses the legal framework of corporate governance in South Africa as a benchmark for Kenya. In particular, the chapter will look at the gender diversity of corporate governance in South Africa and identify lessons for Kenya.

The researcher will rely on South Africa as it is a developing country within the Africa continent with a more developed framework of corporate governance recognized internationally. South Africa and Kenya have a similar corporate culture-politicization, a unitary board structure, are middle-income countries¹⁹³ and follow the common law system. Additionally, the Constitution of South Africa¹⁹⁴ is similar to Kenya in terms of its provisions on equality and discrimination. Furthermore, Kenya infused the King III Code principles in *Mwongozo*.

4.2 South Africa

SCs in South Africa have faced the same challenges as Kenya in their governance and management. Corruption, mismanagement, poor governance structures, inadequate financial performance and inefficient operations have been observed¹⁹⁵. Studies have established a link

¹⁹³ Kenya is classified as a lower-middle income country while South Africa is classified as an upper-middle income country by the World Bank. See <<https://data.worldbank.org>>.

¹⁹⁴Article 9 provides that ‘the state may not unfairly directly or indirectly discriminate against anyone one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.....National legislation must be enacted to prevent or prohibit unfair discrimination’.

¹⁹⁵National Treasury, ‘Financial Position of Public Sector Institutions: 2017 Budget Review’ (South Africa)<<https://spii.org.za>>accessed 31 August 2019.

between corruption and corporate governance. Countries that have high corruption rates were observed to lack good corporate governance and had low compliance to standards¹⁹⁶.

In the year 2000, SCs underwent restructuring as the government was keen on enhancing operations and management. A Presidential SC Review Committee was established with the objective of guaranteeing SCs exercise their mandate. This entailed having governance policies and practices¹⁹⁷. Competent professional boards were put in place in SCs such as South African Airways and Eskom to strengthen their operations and become financially sustainable¹⁹⁸.

4.2.1 The Legal and Regulatory framework

SCs in South Africa are governed by Codes of Corporate Governance, the Public Finance Management Act 1999, the Companies Act 2008, treasury regulations, Acts of Parliament and policies for Affirmative Action. These instruments set out guidelines on governance, transparency, accountability and financial management¹⁹⁹.

4.2.1.1 The Companies Act 2008

The Companies Act 2008 applies to both public and private companies. The Act addresses the overall management of a company by the board of directors²⁰⁰. It provides for the duties of directors which are to act in good faith and in the best interest of the company²⁰¹, to exercise due

¹⁹⁶Michelle Caron *et al.*, 'The Influence of Corruption on Corporate Governance Standards: Shared Characteristics of Rapidly Developing Economies' (2012) 2 University of Pittsburgh.

¹⁹⁷Sara Balbuena, 'State-Owned Enterprises in Southern Africa: A Stocktaking of Reforms and Challenges' (2014) OECD www.oecd.org/corporate/ca/oecdcorporategovernanceworkingpapers.html accessed 28 October 2019.

¹⁹⁸See 2016/2017 Financial Position of Public Sector Institutions Published by the South Africa Treasury <<http://www.treasury.gov.za>> accessed 20 October 2019.

¹⁹⁹NS Matsiliza, Corporate Governance of the State-Owned Enterprises in an Emerging Country: Risk Management and Related Issues (2017) 3(7) Risk Governance & Control: Financial Markets & Institutions 36 <<https://www.virtusinterpress.org>> accessed 5 August 2019.

²⁰⁰Companies Act 71 of 2008.

²⁰¹s 76 (3) (a) & (b).

care, skill and diligence expected of a person in the same seat in discharging their obligations²⁰². Both transparency and accountability are set out in the Act.

The requirements listed above are evident when a director makes efforts to acquaint themselves with the status of the company, declares a conflict of interest where there is a personal benefit and makes reasoned decisions²⁰³.

4.2.1.2 Public Finance Management Act

The Public Finance Management Act²⁰⁴ emphasizes the need for transparency and accountability of boards. The directors are to act with integrity, honesty and in the best interest of the corporation in protecting its financial interests²⁰⁵.

SCs such as the South African Airways have been faced with financial mismanagement which has had implications on the taxpayer. This has seen the State bailout the ailing corporation out of its financial woes²⁰⁶.

4.2.1.3 Marvin King Report on Corporate Governance

The Codes of Corporate Governance developed to enhance the governance and performance of SCs are the Marvin King Reports (King I, King II, King III and King IV) which spell out the applicable corporate governance principles²⁰⁷.

²⁰² S 76 (3) (c).

²⁰³ Victoria Bronstein and Judith Katzew, 'Safeguarding the South African Public Broadcaster: Governance, Civil Society and the SABC' (2018) 2(10) Journal of Media Law 244-272<<https://www.tandfonline.com>>accessed 5 August 2019.

²⁰⁴ No. 1 of 1999.

²⁰⁵ s.49 (a) and s 50 (a) & (b).

²⁰⁶ Ibid (n 207).

²⁰⁷ NS Matsiliza, Corporate Governance of the State-Owned Enterprises in an Emerging Country: Risk Management and Related Issues (2017) 3(7)Risk Governance &Control: Financial Markets & Institutions 36<<https://www.virtusinterpress.org>>accessed 5 August 2019.

The reports are codes of corporate governance that contain international best practices and principles to be used in the governance of SCs and public listed companies. These reports are non-legislative but are used together with laws that are applicable to directors and corporations. They have been used as a benchmark for corporate governance in African countries including Kenya.

King I report was published in 1994 giving recommendations for boards including board composition, the appointment of directors and their terms, the requirement for disclosure, remuneration, annual reporting and programs on affirmative action. This report did not mention gender diversity in the composition of boards.

In 2002, the initial report was revised bringing about the King II Report. This report covered sustainability, risk management, director's functions and roles and internal audit. Diversity in this report is only mentioned as a board function where the board is to ensure the corporation has diversity in the staff population, women's contribution and methods to increase diversity in the corporation²⁰⁸.

King III Report (2009) was based on practical principles and practices. The report centers on sustainability and observes that ethical and effective leadership breeds good corporate governance. It requires accountability and transparency in everything that is done. Further, it provides a requirement for having both genders in the composition of the board. It is based on the 'apply or explain' model where corporations are to justify why they did not take up the principles²⁰⁹. The report 'recommends' as opposed to 'mandates' which is the language of the

²⁰⁸Cliff Dekker Attorneys, 'King Report on Corporate Governance for South Africa 2002: What it Means to You' 22 http://www.mervynking.co.za/downloads/CD_King2.pdf<accessed 22 August 2019>.

²⁰⁹Alexandrea Roman, 'King III Report: How South Africa Revolutionized Corporate Governance' (2019) <<https://www.azeusconvene.com/articles/south-africa-revolutionize-corporate-governance>> accessed 30 August 2019.

‘comply or explain’ model. Here, corporations have ‘the freedom to choose principles and practices that are applicable to their processes’ but will need to give reasons for their choices²¹⁰. This approach has been criticized for the fact that not all corporations will make the right decisions for their processes which will after a while produce errors. Supporters justify the approach stating that those who apply it are fully aware of the corporate governance standards and the practice²¹¹.

Some of the SCs in South Africa have not followed the corporate governance principles put forward by the King III Report. This has led to their collapse and massive losses²¹². On the recommendation of ethical and effective leadership, the boards have come under criticism in their decision-making as they have let political interests meddle in their affairs. The appointments made by the board have been challenged in court for not being in line with the King III requirements. For example, the courts rendered the appointment of a Chief Operations Officer by the South African Broadcasting Corporation void as the person was found to be incompetent and lacked the qualifications to hold office. Other SCs such as South Africa Airways have not observed accountability and transparency which has negatively affected its operations and delivery of services²¹³.

King IV Report came into existence in 2016 replacing the King III report by decreasing the principles from 75 to 15 principles. It is noteworthy that while the King III Report was based on

²¹⁰ *ibid*.

²¹¹ Alexandra Roman, ‘King III Report: How South Africa Revolutionized Corporate Governance’ (2019) <<https://www.azeusconvene.com/articles/south-africa-revolutionize-corporate-governance>> accessed 30 August 2019.

²¹² The SCs are Transnet, Trans-Caldon Tunnel Authority, South African Post Office, Denel, etc.

²¹³ NS Matsiliza, *Corporate Governance of the State-Owned Enterprises in an Emerging Country: Risk Management and Related Issues* (2017) 3(7) *Risk Governance & Control: Financial Markets & Institutions* 39-40 <<https://www.virtusinterpress.org>> accessed 5 August 2019.

‘apply or explain’ model, King IV report takes the ‘apply and explain’ model²¹⁴. Its approach is focused on principles and outcomes where the principles are to attain the particular stated outcomes. It is expected that the principles will be applied and a reason given on the practices carried out and progress made towards achieving the outcomes²¹⁵. The report promotes stakeholder inclusivity, corporate citizenship, performance evaluation and independence.²¹⁶ Transparency in all corporate governance practices is a major concern of the report. According to the report, the composition of the board should have a balanced mix of experience, knowledge, skills and diversity. The report calls on corporations to have gender targets and to disclose the efforts made even though there are no prescribed targets²¹⁷.

4.2.1.4 Protocol on Corporate Governance in the Public Sector

The Protocol on Corporate Governance in the Public Sector is a policy document that lays down principles to inform corporate governance in public institutions²¹⁸. This Protocol is read together with the King Code as it addresses specific issues whereas the King Code is general in its application²¹⁹.

Under the Protocol, the Board is tasked with governing a corporation in an efficient and effective manner²²⁰. It is in charge of making sure the corporation complies with applicable regulations²²¹.

²¹⁴ See King IV Report on Corporate Governance published by Deloitte <<https://ajobe.journals.ac.za>> accessed 2 September 2019.

²¹⁵ KPMG International ‘King IV says Apply & Explain’ (2016) <<http://uir.unisa.ac.za>> accessed 3 September 2019.

²¹⁶ Institute of Directors Southern Africa, ‘King IV Report on Corporate Governance for South Africa 2016’ (Institute of Directors Southern Africa 2016) 20-23.

²¹⁷ See King IV Report on Corporate Governance published by Deloitte <<https://ajobe.journals.ac.za>> accessed 2 September 2019.

²¹⁸ Department of Public Enterprises, *Protocol on Corporate Governance in the Public Sector* Republic of South Africa 2002.

²¹⁹ Department of Public Enterprises, *Protocol on Corporate Governance in the Public Sector* Republic of South Africa 2002 para 2.2.

²²⁰ Para 5.1.

²²¹ Para 5.1.1.3.

The Protocol sets out the parameters for board composition. It states that the board shall have persons with integrity, competence, accountability, requisite experience, expertise and skills²²².

Although the Protocol provides for the composition of the board, it is silent on the aspect of gender diversity.

4.2.1.5 Measures Adopted to Increase Board Gender Diversity

South Africa is ranked as a leading nation having gender-diverse boards by the GMI Ratings 2013 Women on Boards Survey. This could be associated with its internationally recognized King III Code and the country's outlook on gender diversity²²³.

South Africa has aligned King III and King IV Codes to the provisions of OECD Guidelines on Corporate Governance of State-Owned Enterprises 2005. These guidelines observe that it is best practice to have diversity in board composition including gender but not limited to age, professional and educational background. The guidelines provide the State's roles as²²⁴:

1. Putting in place a well-structured and merit-based transparent board appointment procedure;
2. Involvement in the appointment of all SC boards and playing a part in board diversity;
3. Disclosing the qualifications of the directors, method of selection and board diversity policies; and
4. Mandating SCs to come up with proposals that increase gender diversity on boards.

²²² Para 5.1.6.

²²³ Institute of Directors South Africa, South Africa is a Leader in Gender Diversity on Corporate Boards, says New Study <<https://www.iodsa.co.za>> accessed 27 October 2019.

²²⁴ OECD Guidelines on Corporate Governance of State-Owned Enterprises 2005, 39-40, 63-71.

The Constitution of South Africa provides for gender consideration to be made in the appointments of members to appointive bodies. An example is the South African Commission of Human Rights, the Judiciary and the Independent Authority to Regulate Broadcasting²²⁵.

In a quest to increase board gender diversity, South Africa has relied on both voluntary government initiatives and legislated quotas. In 2008, South Africa endorsed and adopted the Southern African Development Community (SADC) Protocol on Gender and Development²²⁶. The Protocol contained 23 targets that were to be met by 31 December 2015 which included a target on fifty (50) percent women representation in decision-making positions at public (the Executive, CEOs as well as boards of SCs) and private corporations²²⁷. As a signatory to the Protocol, South Africa failed to meet the target in the public sector but improvement in the representation was observed standing at 40.5%²²⁸. Due to this set back in realizing the target, South Africa opted to enact laws on board gender diversity which would mean having a legislated gender quota²²⁹.

The National Women Empowerment and Gender Equality Bill was introduced in parliament in the year 2013. The bill proposed a minimum appointment of fifty (50) percent of women in areas of decision-making in the corporate world. The bill was taken out as it was perceived as not being realistic and achievable. Further, the bill was found to be problematic as it would bring about tokenism, bloated boards and would raise the administrative burden on organizations.

²²⁵Constitution of South Africa 1996, Articles 174(2), 186(2) (b) and 193(3).

²²⁶<https://www.sadc.int/issues/gender/women-politics/> accessed 18 August 2019.

²²⁷ Article 12 of the SADC Protocol.

²²⁸ B Mabe, '50% Women & 2% of People with Disabilities Employment by Departments: DPSA Monitoring Report' (Public Service and Administration, Performance Monitoring and Evaluation, 2015) <<https://pmg.org.za>>accessed 18 August 2019.

²²⁹ Suzette Viviers *et al.*, 'Mechanisms to Promote Board Gender Diversity in South Africa' (2017)17(1) Acta Commercii Independent Research Journal in the Management Sciences 6<<https://actacommercii.co.za> accessed 2 October 2019>.

Moreover, unclear objectives and implementation issues were an underlying concern. This left the country with no legislation on gender diversity²³⁰.

It is stated that South Africa has enough legislation that contributes to increasing gender diversity in the boards. What is required is goodwill for implementing what is already in place and legislation ought to be the final option. Research has shown that the preference in South Africa is on gradual voluntary gender targets as opposed to mandatory board gender quotas to enhance women representation owing to the negative effects of the mandatory quotas that prevail over the later²³¹. The limited number of competent female board aspirants has also been a cause of opposition to the mandatory quota. Gender quotas will need to be aligned with the number of qualified women that can be obtained²³². It is noteworthy that currently women are getting into the work environment more qualified and in larger numbers than men which will create a supply of female board candidates²³³.

4.3 Appraisal of South Africa and Lessons Kenya Can Learn

It is argued that developing countries such as Kenya and South Africa encounter a lot of government interference, have a weak rule of law and human resource capacity which makes it difficult to implement the recommended corporate governance practice. Developing countries

²³⁰Suzette Viviers *et al.*, 'Mechanisms to Promote Board Gender Diversity in South Africa' (2017) 17(1) Acta Commercii Independent Research Journal in the Management Sciences 5-9<<https://actacommercii.co.za> accessed 2 October 2019>.

²³¹Suzette Viviers *et al.*, 'Mechanisms to Promote Board Gender Diversity in South Africa' (2017) 17(1) Independent Research Journal in the Management Sciences 7<<https://actacommercii.co.za> accessed 2 October 2019>.

²³²Janine Hills, 'Addressing Gender Quotas in South Africa: Women Empowerment and Gender Equality Legislation' (2015) 20(1) Deakin Law Review 153-184.

²³³Annemarie Durbin, 'Optimizing Board Effectiveness with Gender Diversity: Are Quotas the Answer' (2011) 21 International Finance Corporation<<https://www.ifc.org>> accessed 4 September 2019.

are said to have a weak legal framework that hinders good corporate governance²³⁴. This thus requires these countries to come up with a suitable framework of corporate governance that suits them²³⁵.

Musikali submits that developing nations have adopted a code of corporate governance that has been put together from a mix of codes from developed nations where little attention is paid to the environment the code is going to be applied as there is a difference in the corporate culture²³⁶. She adds that the enforcement of codes taken from developed countries may not be as successful as conditions in a particular country are not considered. This makes it hard for countries to realize good corporate governance. Nonetheless, she notes that corporate governance principles that have been effectual in other countries should be taken up²³⁷.

Mwongozo directly embraced provisions of the King III Report on Corporate Governance (2009) for South Africa and the provisions of the 2005 OECD Guidelines on Corporate Governance of State-Owned Enterprises. Some of these include²³⁸:

1. Effective leadership- the direction of leadership has to be based on values;
2. Board gender diversity-women should comprise the board of management;
3. Accountability and transparency-being responsible in decision making and disclosing interests;

²³⁴ Lois Musikali, 'The Law Affecting Corporate Governance in Kenya: A Need for Review' (2008) *International Company and Commercial Law Review* 1-3.

²³⁵ Benjamin Mwanzia Mulili, 'Corporate Governance Practices in Developing Countries: The Case for Kenya' (2011) 2(1) *International Journal of Business Administration*.

²³⁶ *Ibid* (n 238)6.

²³⁷ *Ibid*.

²³⁸ Alexandria Roman, 'King III Report: How South Africa Revolutionized Corporate Governance' (2019) <<https://www.azeusconvene.com/articles/south-africa-revolutionize-corporate-governance>> accessed 30 August 2019.

4. The board has an independent audit committee- the members are not employed or rendering any service to the organization
5. Sustainability and sustainable development- the growth of the corporation is continuous
6. An approach to a voluntary basis of compliance-‘comply or explain’
7. Stakeholder approach –where the board considers the rights and interests of stakeholders

The concern here as Musikali puts forward is that when applying the recommendations of a specific code, they should be structured to fit a country’s position as circumstances on the ground are different. Kenya is a patriarchal society that is undergoing changes and is yet to accept and pass the gender bill.

While the King Codes are internationally recognized, they do not have the force of a statute. The same is evident in Kenya as the provision of gender diversity is not implemented fully in boards of SCs in Kenya. In this case, Kenya has the option of converting *Mwongozo* into an Act of Parliament as it is applicable to all SCs. This will make it a legally binding instrument that is to be adhered to.

The requirements for board appointments in South Africa are contained in different documents. A gap exists where some regulations have a provision on gender diversity while some do not. Unfortunately, this is the same situation in Kenya. Having one legislation that clearly specifies the board recruitment, selection, qualification and the composition of the board in line with the CoK 2010 will remove uncertainty and difficulties in compliance. It will also remove the confusion created where the SCA and the Act of Parliament creating the SC conflict in matters of board appointments. Steps had been taken when the GOE Bill covering all SCs was formulated but stalled after amendments to the bill were proposed.

South Africa's SCs are grappling with the same issues as Kenya where board directors who have little or no knowledge in the management of SCs are appointment to the boards. Where the criteria for an appointment has not been met, Kenya can take a leaf from South Africa and challenge board appointments in court that do not meet applicable standards in terms of qualifications and competence. The recruitment procedure of board members should take into account the essential skills, expertise and experience needed. Moreover, Kenya's SCs need to provide training for their board members to increase their competence in the delivery of their duties and ultimately the governance of the corporation.

Kenya should benchmark in South Africa and Norway as they are leading countries that are leading in having gender-diverse boards in addition to relevant professional qualifications. This will benefit the organizations and society at large.

Kenya needs to strengthen its legal framework in order for good corporate governance to be achievable. This will entail drafting an effective corporate governance code that is more suited to the country's conditions. The principles need to be provided in the statute to ensure full compliance. Moreover, the Kenya government like South Africa needs to be committed to turning around the governance of SCs and take action for non-compliance. Where required, a new professional diverse board should be appointed.

In the same way that South Africa dealt with the issue of gender diversity, Kenya is currently confronted with the same issue. Kenya needs political goodwill to ensure that the Gender Bill is not completely withdrawn from Parliament like South Africa's. This will ensure there is legislation on gender diversity.

From South Africa's context, mandatory gender quota legislation became a viable option when the voluntary target failed to achieve the fifty (50) percent women representation. Kenya needs to take the mandatory approach on board gender diversity since there has been laxity with the voluntary approach adopted by *Mwongozo*. Penalties should be pegged on non-compliance. In addition, more women are being trained on leadership and management hence there will be a supply of readily available competent women for board appointments.

4.4 Conclusion

Sound corporate governance does not exist in a vacuum. Ethical leadership, integrity, values, a corporate culture free from politics, honesty and an appropriate legal framework are paramount.

Having a clear legal and regulatory framework is essential for SCs to uphold corporate governance standards and best practices. This will entail harmonizing all board requirements to remove the multiplicity of laws that makes compliance problematic.

South Africa and Kenya have state directives for the representation of women in SC boards. The board is required to have competencies that lead to better governance and performance of the SC. Best practice requires the board to be comprised of competent, diverse and qualified individuals. SCs either have none or a limited number of women on their boards. The appointments of the board members need to be transparent, formal and merit-based. A robust appointment system may reduce political interference and at the same time put in place a competent board.

Most countries have applied the voluntary approach to their codes which has led to the slow compliance of gender diversity in their board rooms. The mandatory gender quotas have worked to overturn the under-representation of women on the boards. Going by the increased number of women taking up senior management positions and pursuing leadership training and mentorship,

the pool of qualified candidates will increase. Kenya should move from the traditional political criteria of board appointments. The mandatory approach to the corporate governance principle of gender diversity in board appointment and composition would be effective and should be considered.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Summary of Findings

In general, the research sought to determine the challenges facing the implementation of gender diversity in the composition of boards of SCs in Kenya. Specifically, the study addressed the following three areas: an assessment of the nexus between corporate governance and gender diversity; an investigation of whether the legal framework for gender diversity in corporate governance of SCs in Kenya is adequate and effective; and an examination of the lessons and best practices Kenya can learn from the legal framework for gender diversity in corporate governance of SCs in South Africa

5.1.1 The Nexus between Corporate Governance and Gender Diversity

In answer to research question one, the study establishes that the board is a critical component of corporate governance. Gender diversity is a major concern in corporate governance as it contributes to a high-performance board. Nonetheless, gender inequality impedes women's representation in the BoD. Men have and continuously dominate the boardroom. A majority of researchers agree that gender diversity in corporate governance leads to better productivity as it enhances deliberations and decision making, monitoring, accountability and creative problem solving due to different perspectives. Both genders are important in corporate governance in terms of management and decision making in the board.

5.1.2 Kenya's Legal Framework for Gender Diversity in Corporate Governance of SCs

In answer to research question two, the SCA majorly governs board appointments. The responsibility of board appointments falls squarely on the President's shoulders. The

appointments have been politicized and are made without regard to gender diversity as it is not provided in the statute. The CoK 2010 and *Mwongozo* attempt to address the problem by setting provisions for gender diversity. However, nine years later, there is a lack of implementation of the two-thirds gender principle provided in Article 27(8) of the CoK which also applies to board appointments.

The principle should be retained and implemented fully more so in boards of SCs. Just because the principle has not been fully implemented does not mean we should consider removing it. The principle has enabled women to be appointed on the boards because it is provided in the Constitution. Chapter One of *Mwongozo* makes reference to Article 27 in the Constitution on matters of board composition and appointments. What needs to be pushed for is full compliance.

A review of *Mwongozo* reveals its application is voluntary. This leaves room to disregard the governance principles and practice provided on the composition and appointment of the board to include gender diversity.

What needs to be done is to have clear, formal and transparent recruitment and appointment system of board members taking into account gender diversity. The board candidates should undergo competitive recruitment by an independent body and finally recommended for appointed by the President and Cabinet Secretaries.

Although it is crucial to avoid formulating more law as we already have good laws and regulations in place to achieve board gender diversity, it is necessary to have bills that have been delayed, such as the Gender Bill and the Government Entities Bill 2014 that was to replace the SCA reworked and completed to achieve full compliance. Another option is to amend the SCA. The main issue has been the poor implementation of laws.

5.1.3 Lessons and best practices for Kenya from South Africa

In answer to research question three, a benchmark with South Africa reveals that South Africa has a robust legal framework for corporate governance. South Africa relied heavily on the OECD Guidelines on Corporate Governance of State-Owned Enterprises 2005 to develop the King III and King IV Codes which are recognized internationally. The OECD guidelines make it a requirement to have gender diversity in the boards. Further, the same is stipulated in South Africa's Constitution which is implemented in the board appointments of SCs. However, scholars state that corporate governance principles that are adopted from other jurisdictions need to be modified for the same to be effective before they are applied because of the different cultural, economic and governance systems. *Mwongozo* relied heavily on UK code which lays emphasis on 'comply or explain'²³⁹ model and the recommendations of the King III Report. Both of the codes take a voluntary approach which has barely worked for *Mwongozo* because SC boards do not meet the gender diversity requirement.

South Africa considered moving from the voluntary approach to the mandatory gender quota. Nevertheless, the challenge was that there were not enough qualified women to meet the mandatory quota. The debate of merit should not override quantity. Women are the ones who struggle with the issue of merit; however, merit should apply to both male and female candidates in the board recruitment process. Women are put to task to work twice as hard as men to get the board appointments. Moreover, women in Kenya need to be trained and mentored so that they have the necessary knowledge and skills. Having women who have the requirements for board appointments at hand will result in meeting the gender quotas.

²³⁹ The Combined Code on Corporate Governance (Financial Reporting Council, 2003)
https://ecgi.global/sites/default/files//codes/documents/combined_code_final.pdf.

Just like South Africa, Kenya needs to harmonize its laws on board appointments. Some laws provide for gender diversity and some do not.

5.2 Conclusions

5.2.1 Specific obligations

Office bearers need to be allocated clear and direct obligations for implementation of gender diversity in the boards of SCs. Gender diversity should be a component when recruiting and selecting new board members.

A list of directors or the chairperson submitted for board appointments should ensure that their appointment into a specific board is compliant with the two-thirds gender principle before gazetting their appointments.

Appointing authorities that are the President and Cabinet Secretaries should be committed to having women in the formation of boards to drive the demand for gender diversity. They should select and appoint board members in line with gender diversity.

5.2.2 Law Reforms

For gender diversity to be present in the board, the requirement needs to be written, specific and prescriptive in the sections of statutes providing for board appointments. This will bring about compliance when the obligation is specific.

Section 6 of the SCA should be revised to provide for the qualifications and experience required for appointing the chairperson and board members. This will apply mainly to the SCs which are established by a legal notice as some of those created under an Act of Parliament have this

provision for example under Section 6A of the Kenya Information and Communications (Amendment) Act, 2013.

Further, Section 6 of the SCA should lay out the appointment procedure, which includes inviting people to apply for the vacant board seat. There is a need to have a selection panel that will interview and choose the appointee on merit. This will make the process transparent, formal, and competitive. It will bring the best-qualified candidate to the boards.

Section 6(1) should conclude by stating that in appointing the chairperson and board members, the President and Cabinet Secretary shall ‘ensure that not more than two-thirds of the board members are of one gender’²⁴⁰.

The Acts of Parliament creating various should be revised to include these similar provisions under the sections of the statute providing board appointments.

The CoK 2010 needs to be fully implemented in terms of Article 27(8) otherwise this leaves room for the composition of boards of SCs being disputed in court on the ground of unconstitutionality.

5.2.3 Binding nature of Mwongozo

Mwongozo, as a policy document, was drafted out of good intentions. For there to be full compliance, it needs to be made into a statute so that it is legally binding. In the alternative, the Code should apply a mandatory approach to some of its provisions and in this context gender diversity in board appointment and composition.

Failure to uphold the requirement should lead to sanctions. In the event the board does not comply with the obligation on gender diversity, penalties such as board disqualification and the

²⁴⁰ Constitution of Kenya 2010, Article 27(8).

board not undertaking board meetings or any business until there is compliance should apply. Directors will, as a consequence, not earn any remuneration. This will ultimately push and lead to an increase in compliance.

Further, *Mwongozo* should require mandatory annual reporting on compliance with gender diversity to encourage corporations to have more gender-diverse boards.

5.2.4 Training

It is argued that women have little experience with board leadership and often consider themselves as inadequate as they do not have the relevant management experience essential to carry out their roles in the boardroom²⁴¹. To improve their expertise, they need access to relevant skills development, leadership training and mentoring.

Women should consider board development training to ensure they are upskilled in board leadership and corporate governance developments so that there is a broader pool of prospective qualified women candidates who have the requirements needed to be considered for board appointments thus bringing about gender diversity in the board.

5.3 Recommendations

The CEO of a SC should provide details of how the board is constituted in terms of gender when notifying the Cabinet Secretary of the parent ministry of directors' or chairperson's terms that are about to expire. For example, the CEO of Kenyatta National Hospital informing the Cabinet Secretary-Ministry of Health. This will inform the Cabinet Secretary's choice when considering persons for appointment.

²⁴¹ United Nations, 'Equal Participation of Women and Men in Decision-Making Processes, with Particular Emphasis on Political Participation and Leadership' (Division for the Advancement of Women 2005) <<http://ulspace.ul.ac.za>> accessed 22 April 2019.

The Secretary of SCAC should advise the President and Cabinet Secretaries on gender diversity in the board appointment process.

Kenya Law Reform Commission should formulate proposals for review and reform of the SCA as previously observed to be tabled before the National Assembly for acceptance and signing into law.

Kenya Law Reform Commission should prepare *Mwongozo* as a draft Bill and table it before the National Assembly for consideration to be enacted as a statute.

The Corporation Secretary of SCs should identify board development training for female board members where they can develop skills and networks such as the Women on Boards Network.

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