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CORPORATE GOVERNANCE IN KENYA: THE DILEMMA OF ACHIEVING EQUALITY IN BOARD MANAGEMENT

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DECLARATION

I, **VIOLET GRACE MARANGA**, do hereby declare that this Research Paper is my original work and has not been submitted, and it is not currently being submitted in any other university.

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VIOLET GRACE MARANGA

G62/37789/2020

This Research Paper has been submitted for examination with my approval as University Supervisor.

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DR. KENNETH MUTUMA

Date …**10th December 2021**……

LIST OF ABBREVIATIONS

1. AfDB: African Development Bank
2. FTSE: Financial Times Stock Exchange Group
3. NGEC: National Gender and Equality Commission
4. OECD: Organisation for Economic Co-operation and Development
5. CEDAW: International Convention on the Elimination of all Forms of Discrimination Against Women
6. UDHR: Universal Declaration on Human Rights
7. SA: South Africa

TABLE OF STATUTES, OTHER LAWS AND CODES

1. Constitution of Kenya, 2010
2. Companies Act, 2015
3. State Corporations Act, Cap 446
4. Two-Third Gender Rule Laws (Amendment) Bill, 2015
5. Public Finance Management Act, 2012
6. Basic Education Act, 2013
7. Children's Act, 2001
8. National Gender and Equality Commission Act, 2011

GUIDELINES

1. Capital Market Authority's Code of Corporate Governance for Issuers of Securities to the Public, 2015
2. Executive Office of the President, Implementation of Mwongozo; The Code of Governance for State Corporations (Executive Order No.7)
3. Public Service Commission and State Corporation Advisory Committee, *Mwongozo*: The Code of Governance for State Corporations, 2015

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I pray the Almighty God to bless you all abundantly

ABSTRACT

The study examines the factors that hinder attainment of gender parity on public corporate boards in Kenya. The period under review is from 2010, following the promulgation of the 2010 Constitution of Kenya, to the present day 2021. Although there exists extensive provisions of laws on gender equality and there has also been a remarkable increment of women representation on corporate boards, that stride and the achievement of the bare minimum requirement is not enough to entirely address the gender imbalance that women have faced in a predominantly patriarchal society. Nevertheless, the current study analyzes in depth the correlation between corporate governance and gender parity while exploring the factors that have contributed to the gender disparities on the corporate boards.

The study examines these specific factors, amongst others because it is guided by the assumption that Kenya is still a patriarchal society thus contributing to the gender disparities on the corporate boards. The study examines these specific factors, amongst others because it is guided by the assumption that Kenya is still a patriarchal society thus contributing to the gender disparities on the corporate boards. The study employs doctrinal research methodology and a review of legal provisions on equality in both national and international laws has been conducted as well as review of studies and reports that identify the societal factors that are an impediment to gender parity on the corporate boards.

The review in general has demonstrated that despite having provisions of the laws that are all inclusive, societal factors such as misconceptions, stereotypes and ignorance are majorly the

hindrance to attainment of equality and this is all premised to the patriarchal nature of the society. The study is thus an important piece of literature as it adds on to existing literature on corporate governance and gender parity, specifically the value propositions of having women on the corporate boards and institutional alignment measures that corporations can adopt to eradicate some of the identified factors that impede attainment of parity.

CHAPTER ONE

1.1 Background

Corporate governance is a cornerstone of any successful going concern and it entails the way in which a corporate organization is governed. The meaning of corporate governance is not yet precise as different scholars have provided varying but closely related definitions. The definitions by scholars tend to be molded around the field of each scholar's interest.[1] For instance, Friedman[2] taking the economic approach, has defined corporate governance as "the conduct of business in accordance with the desires of owners or shareholders of the business." In terms of management, Demb and Neubauer have defined it as the manner in which corporations react to the welfare of stakeholders inclusive of their rights.[3]

Blair has offered the definition and viewpoint that is most appropriate to the context of this study. According to Blair, corporate governance is the totality of the set of legal, cultural and institutional arrangements that determine what public going concerns can do; who exercises control over them; how that control is to be exercised; and how the risks and returns from the activities undertaken during operations are allocated.[4]

Evidently, corporate governance does not have a narrowed definition and it is defined in different ways. However, the common denominator of all definitions is that corporate governance entails a

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[1] Jill Solomon, *Corporate Governance and Accountability*, (5th edn, John Wiley & Sons 2020) 5.
[2] Milton Friedman, 'The social responsibility of business is to enhance its profits' (1970) 32 New York Times, 122–126.
[3] Ada Demb and Neubauer Friedrich, 'The Corporate Board: Confronting the Paradoxes' (1992) 25 Long Range Planning, 9.
[4] Margaret Blair, 'Ownership and Control: Rethinking Corporate Governance for the Twenty- First Century' (1995) The Brookings Institution.

combination of, laws, policies, regulations, practices, norms and organs that influence the manner in which a corporate organization is administered, its activities directed and controlled.

Corporate governance within a corporate organization is the duty of management and the board of directors. As much as the board is an essential and crucial entity within a corporate organization, its gender composition in Kenya has raised questions as to the presence and role of women on the corporate boards, given their low numbers. Article 27(3) of the Constitution of Kenya provides that every person, including a man and a woman, has the right to equal treatment and access of opportunities in "political, economic, cultural and social spheres." Importantly, Article 27(5) prohibits discrimination of any person on any ground including their sex.

The foregoing provisions have been captured and highlighted in the Public Service Commission and State Corporation Advisory Committee, *Mwongozo*: The Code of Governance for State Corporations, 2015 which focuses on corporate governance of state corporations. *Mwongozo* provides that board appointments are to be guided by the provisions of Article 27 of the Constitution.[5] It further states that gender equality and merit is the overriding principle when constituting a board, which means that gender equality and merit should be a significant consideration in the process of constituting a board.[6] The same has been emphasized in the Capital Market Authority's Code of Corporate Governance for Issuers of Securities to the public, 2015. The code states that each board should have a policy on gender diversity[7] and in this regard, the

[5] Public Service Commission and State Corporation Advisory Committee, *Mwongozo*: The Code of Governance for State Corporations, 2015, cap 1.
[6] Ibid.
[7] Capital Markets Authority's Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015, Recommendation, 2.1.5.

code defines diversity to include gender. Gender sensitivity and a fair process ought to also guide the appointment procedure.[8]

Studies and reports revealed in the past that there was a significant under-representation of women on corporate boards in Kenya. In 2017, Kenya Institute of Management (KIM) reported that only 21% of women were board members in listed companies as compared to 18% in 2015.[9] In an earlier report of 2012, KIM observed publicly listed companies' boards that had only 12% women board members.[10] The representation of women has been increasing with the Equileap 2019 report indicating Kenya's representation of females on the boards at 23%.[11] In a much recent report, a 2021 report by KIM, there has been a noted increase in the number of women on the corporate boards, standing at 36% compared to 26% of 27.[12] The increase is further significant as globally the percentage of women holding board positions is only at a dismal 23.3%.[13] The statistics show Kenya's commitment in ensuring gender parity on the corporate boards.

Further, the importance of having a gender diverse board has been emphasized as having positive effects to the overall performance of a corporation.[14] There are other studies as well from different jurisdictions that have arrived at similar conclusions stressing a noticeable positive upward trajectory on the overall performance of corporations that have women sitting on the corporate

[8] Ibid.
[9] Kenya Institute of Management, 'Board Diversity and Inclusion Research Report' (2017).
[10] Kenya Institute of Management, 'Bringing the other half to the boardroom: Case Study of State Corporations and Listed Companies in Kenya' (2012).
[11] Equileap, 'Gender Equality in Kenya: Assessing 60 Leading Companies on Workplace Equality' (2019) 4.
[12] Kenya Institute of Management, 'Board Diversity and Inclusion Report' (2021) 10.
[13] Ibid, 14.
[14] See: Hassan Ibrahim et al, 'Effect of Gender Diversity on the Financial Performance of Insurance Firms in Kenya' (2019) 8 International Journal of Research in Business and Social Science, 274-285; KIM (n 9) 19-22.

boards.[15] There is established a linkage between the performance of corporations and the diversity in the composition of members on the corporate boards. Women are important in the composition of these boards and the most dominant conversation in corporate governance revolves around the number of women represented in the boards.

Kenya has significantly improved in its gender inclusivity on the corporate boards and that is commendable. However, that slight increase is still not yet significant enough to address the general gender imbalance debate and the patriarchal nature of the society that has constantly favoured men over women. The focus of the current study is thus on the possibility of achieving gender parity on the corporate boards of management through the elimination of factors that have historically contributed to the gender imbalance on the boards.

1.2 Problem Statement

Despite the strides being made to increase the number of women on boards, Kenya is still predominantly a patriarchal society and much more needs to be done to ensure that there is an upward trajectory in the number of women on the corporate boards, thus addressing the dilemma of gender disparity in its entirety.

Further, various studies indicate that board diversity increases a corporation's performance, qualifying the need to have more women as members of the corporate boards. The current study therefore critically analyzes the correlation between corporate governance and gender parity; analyzes the laws as against the current status of women's representation; explores factors

[15] See: Sara De Masi et al, 'Women Do the Job: The Reasons to Set Quota for Women on Boards' (2018) 13 International Journal of Business and Management, 167-179; Shiv Kumar and Baroda Satyavan, 'Why Should Women On Corporate Boards: One Question Many Aspects' (2018) 8 Pramana Research Journal, 137-146.

attributed to gender disparities on the boards and advances recommendations on achieving gender parity on the corporate boards.

1.3 Research Questions

1. What are the legal provisions on gender parity in public corporate boards of management in Kenya?
2. What is the current status of women representation in the public boards and factors that contribute to gender disparity?
3. What best lessons can be drawn from Norway and South Africa in order to attain gender parity on public boards?
4. What measures and recommendations can be advanced to achieve gender parity in the public boards?

1.4 Objectives

1.4.1 General Objective

The general objective is to examine the factors that hinder attainment of gender parity on public corporate boards in Kenya.

1.4.2 Specific Objectives

The specific objectives of the study are:

1 To outline the legal framework on gender equality in Kenya;

2 To examine the current status of women representation on Kenyan public boards and the factors that contribute to gender disparity on the boards;

3 To draw lessons from Norway and South Africa on how to attain gender parity on the boards;

4 To advance recommendations on how to attain gender parity in the public boards.

1.5 Hypothesis

The study proceeded with the assumption that Kenya is still a patriarchal society thus contributing to the gender disparities on the corporate boards.

1.6 Theoretical Framework

A number of theories have been coined to explain the subject of diversity in corporate boards and the overall performance of those boards. The current study will dwell on two theories- the **agency theory** and the **liberal feminism theory**.

The first theory is the **agency theory,**[16] one of the oldest theories on corporate governance, premised on the understanding that the owners of a business and its management are separate. As with a typical principal-agent relationship, the owner of a business is the principal and the manager of that business is the agent, who needs to act on the interests of the owner. However, an agency problem arises when the agents (managers) deviate and start acting on their own interest rather than that of the principals (owners). To circumvent that possibility, the theory suggests that the principals (owners) should have a monitoring mechanism that would oversee the workings of the agents (managers) and ensure that it is the interest of the principals that is being acted upon. A board of directors is one way of monitoring management (agents) helping in curbing any possibility of an agency problem. The monitoring role of the board includes evaluation of the performance of management and being involved in strategic and major decision making.[17]

[16] Michael Jensen and William Meckling, 'Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure' (1976) 3 Journal of Financial Economics, 305-360.
[17] Neema Mori and Evelyn Richard, 'Board Gender Diversity: Challenges and Implications for Corporations in the East African Community' (2019) Journal of African Business, 5.

Scholars have linked the agency theory to diversity on boards and state that a more diverse board improves the monitoring performance.[18] Some have suggested that diversity breeds board independence and there is a minimum chance for the management (agent) to manipulate heterogeneous boards and this improves the boards' transparency and frankness.[19] While acknowledging the benefits of diverse boards, the agency theory has also been criticized in relation to the value addition that a diverse board is purported to bring forth. Francoeur et al[20] have questioned whether promoting women presence on boards improves corporate governance as a direct consequence or whether it impairs the same. The authors' state:

> "From an agency-theoretic standpoint, when one considers the overall impact of gender diversity on the various duties being assumed by a corporate board, it is thus impossible to tell whether promoting greater female participation will improve or impair corporate governance and, as a direct consequence, corporate financial performance."

Regardless of the criticism, agency theory remains relevant to the current study as it highlights the monitoring role of the boards and also various studies have backed up the assertion that gender diverse boards breed better results. Agency theory therefore posits that diversity can lead to an increase in effectiveness that directly leads to better organization performance.

The second theory is the **Liberal feminism**, also referred to as mainstream feminism. The theory relies on the concept of liberal democracy to advance the freedom of women. It advocates for gender equality through fighting for the initiation of legal reforms. It focuses on the removal of

[18] Isabel Alvarez et al, 'The Influence of Gender Diversity On Corporate Performance' (2009) 13 Revista de Contabilidad-Spanish Accounting Review, 59.
[19] Trond Randoy et al, 'A Nordic perspective on corporate board diversity' (2006) 4-11.
[20] Francoeur Claude et al, 'Gender diversity in corporate governance and top management' (2008) Journal of Business Ethics, 85.

any form of barrier such as cultural, economic, political and social, that prevent women from achieving equality with men.[21] Cultural barriers are a great impediment in women presence on Kenya's corporate boards, while other studies would have relied heavily on cultural feminism to address cultural barriers, they are not the only barriers that contribute to gender disparity. Liberal feminism is the thus the most accurate as it seeks to wholesomely eradicate any kind of barrier that deters women from achieving equality.

Cohen writes that feminist theory offers a new perspective on roles that corporations play as the theory seeks to enhance and change corporation laws that have been developed majorly from the point of view of men, as corporations are male dominated.[22] The theory seeks to achieve gender equality rather than dismantle the existing system at the expense of that equality.

This theory is significant for the study as it justifies the argument of having equal number of representation for both men and women in the public corporate boards. Being able to occupy the same number of seats works towards the provisions of the Constitution which requires that one gender should at least occupy a third of positions in elective and appointive seats. Gender diversity is increasingly improving in Kenya but effort still needs to be put in further increasing that number.

The liberal feminism theory is criticized for reliance on the State in efforts of achieving the goal of gender equality. Liberal feminists rely on the State to facilitate the process through legislative reforms.[23] However, this criticism does not water down the importance that legal reforms have on

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[21] Ronnie Cohen, 'Feminist Thought and Corporate Law: It's Time to Find Our Way Up From the Bottom (Line) (1993) 2 The American University Journal of Gender, Social Policy & The Law, 1-36.
[22] Ibid, 1.
[23] Ryan Musgrave, 'Liberal Feminism, from Law to Art: The Impact of Feminist Jurisprudence on Feminist Aesthetics' (2003) 18 Hypatia, 214-235.

gender equality. Legal provisions on equality if implemented definitely underscores the increased number of women on the corporate boards.

1.7 Literature Review

Literature has been written on gender diverse boards and the barriers that women face in getting representation on the boards. Local literature on these exists but they are not adequate in addressing women representation on the boards, as such other literature from foreign jurisdictions will be borrowed as supplementary.

Barnes et al[24] write that the United Kingdom (UK) has seen an increase of women in the work spaces but their inclusion in executive roles in public boards has unfortunately been sluggish. The author states that between 2015-2017, for Financial Times Stock Exchange (FTSE) 100 in the UK, the percentage of executive directors who were women was capped at a dismal less than two percent (2%); while for women non-executive directors it was twenty nine percent (29%). The authors differentiate between executive and non-executive directors by stating that executive directors are the full time employees who oversee the overall running of the business and who have discretion to make decisions that are integral to the business. For non-executive directors, they are only employed on the public boards for a few days in a year, thus not full-time.

The authors' list factors that can be attributed to the sluggish growth of women in the public boards and these include structural problems; stereotypes and difficulties in disrupting the status quo of having majorly men in the boards. First, structural problems are associated with factors such as women having less technical skills to qualify for the positions; maternity and child care as

[24] Claire Barnes et al, 'Women directors on FTSE company boards: An exploration of the factors influencing their appointment' (2019) 6, 1-25.

hindrances and generally the bias role that companies play in the selection of directors. Secondly, stereotypes and bias over the possible performance of women has led to them being constantly sidelined thus contributing to their dismal numbers in the public boards. Lastly, difficulties in disrupting the status quo of having men in the boards is tied to the top leadership, majorly composed of men, who would rather maintain the current status as it is given that their comfortability with it is confirmed.

The authors' work is instructive to the current study as it highlights some of the reasons as to why a majority of women are yet to be represented in public boards, thus acting as a guide. It further differentiates between executive and non-executive directors giving a glimpse as to the minimal role that women are unfortunately geared towards. However, the authors' work focuses on the UK, while the current study is focused on Kenya and it will not make a distinction between women directors' executive or non-executive roles.

Omukaga[25] In her PhD dissertation on women on corporate boards in Kenya lists several challenges and factors that prevent women in Kenya from getting on the boards. The author lists several factors but only three will be examined herein. First, juggling family life and professional advancement was a concern as in most cases women have opted to raise families and equal balance of the two becomes blurry. This then creates and cements the practice that men are better than women as women may always bow out leaving their professional careers. A pathway for men to dominate the boards is thus easily created. Secondly, organizational policies and practices have

[25] Millicent Omukaga, 'Women on Corporate Boards: Navigating Gender Hurdles to access Corporate Boards in Kenya' (2019) Erasmus University Rotterdam- International Institute of Social Studies, 87-128.

been tailored to favor men as compared to women. The author states that promotional practices ignore women primarily based on beliefs such as women often being destructed by family life.

Lastly, career ambitions and aspirations from women are much lower. The author writes that based on research, qualified women to join the boards were afraid to make their intentions known and some opined that they were waiting to be approached. This is unlike their counterparts who are aggressive and apply for available spots even in instances where they lack the basic qualifications. Most women are thus associated with lower self-esteem which can be attributed to societal norms. For other women, they were simply not interested at all in joining the boards even in instances where they met the minimum qualifications and the relevant required number of work experience. They are comfortable with the status quo as they know it. The author's work is very informative on factors that explain the lack of women on Kenyan boards and that is a necessary guide for the current study. While being a positive guide, the author does not focus on external factors that are a hindrance but it deviates and also faults the women for lack of numbers in the boards, an approach that the current study does not necessarily follow.

Muriungi[26] writes on women board directors in Africa focusing on Kenya and South Africa, as they are considered the two countries in Africa with the most gender diverse boards and with the most women directors in Africa. Kenya stands at 19.8% and South Africa at 17.4% using 2015 data collated by the African Development Bank. Despite being considered as advanced, the author highlights the challenges that the two countries still face in ensuring that women have an access to board representation. The author first faults the non-implementation of legal provisions; both Kenya and South Africa have expansive provisions on gender equality in their constitutions but

[26] Rosemary Muriungi, 'Women Board Directors: Africa on the Rise' in Lynne Devnew et al (eds) *More Women on Boards: An International Perspective* (Information Age Publishing Inc. 2018), 115-132.

the same is not reflective in practice. Lack of gender equality guidelines in corporate governance rules is also another challenge. Most boards are male dominated as no rules dictate that a certain number should be a preserve for qualified women.

Societal factors are yet another challenge. These include doubts in women leaderships; family life demands; stereotypes and deep-rooted sexism. Further, the author notes that lack of professional experience is a barrier for most women as a majority have not attained the level of leadership and experience that is required for the board positions. Women's underestimation of their abilities is also a barrier and the majority do not aspire to hold leadership positions. The author's work is instructive for the current study as it dives into barriers that prevent the representation of women on boards and she focuses on Kenya as well. The current study will thus be guided by her work in highlighting and explaining the minimal presence of women on Kenyan boards.

Mori and Richard[27] write that gender equality is amongst the guiding principles of the East African Community and the importance of women on boards' leadership should be emphasized in the member states- Kenya being one. The authors note that corporate boards have majorly two roles, monitoring and resource provision roles. On the monitoring role, they argue that women are better monitors than men as they input more effort into ensuring that corporate strategies are implemented as expected; new strategies are adopted and performance reviews of the board are constantly done. Still on the monitoring role, the authors opine that independent women on boards are better decision makers as they constantly ask questions thus eliminating possible mistakes in decision making and they prepare adequately for meetings thus contributing consciously and better. On the resource provision role, the authors equate it to networking and external legitimacy.

[27] Mori (n 17) 1-19.

Women are better in communication and they are effective in communicating with stakeholders and also with other board members. Customer and employee satisfaction is also fulfilled more with women than men.

With these benefits, the authors opine that there is a need to have a balance in the number of members on a board bearing in mind a relative proportion of women, giving an example of an eight member board to have at least three women. The authors' work guides the current work in advocating for the increase of women on boards and in highlighting the roles unique to women that they possess that would be beneficial in capturing the unique skills that women possess and are beneficial in enhancing the performance of corporations. While the authors' work focuses on EAC as a regional bloc with a proposition of gender diversity in private and public corporate boards in the member states, the current study focuses on Kenya and particularly on public corporate boards.

Dworkin and Schipani[28] write on the interlinkage of gender diversity and corporate governance in the United States of America (USA). The authors opine that women's presence on corporate boards have been attributed to better performance of the businesses in terms of the financial outcome; corporate social responsibility and human capital. For financial outcomes and women, the authors' rely on studies that illustrate that a gender diverse board of a Fortune 500 company is reflective of the high returns on sales and the invested capital as compared to a board's company with a lower percentage of women. Additionally, in comparing between diverse boards and single

[28] Terry Morehead and Cindy Schipani, 'The Role of Gender Diversity in Corporate Governance' (2018) 21 University of Pennsylvania Journal of Business Law, 106- 115.

sex boards, the authors indicate that diverse boards report better performance financially and in overall productivity as compared to the single sex boards.

For corporate social responsibility and women, women are more morally principled than men as they have better values instilled by society's roles. These values translate to ensuring that a company's corporate social responsibilities are fulfilled. For women and human capital, the authors state that women are usually composed for board meetings and their attendance is frequent as compared to men portraying them as the most competent directors. Skills wise, the authors opine that based on several studies, female directors tend to have better skills and qualifications than their male counterparts and this is not merely on academic qualifications but also on other values such as the moral values indicated under corporate social responsibility above. The authors' work is thus useful to the current study as it stresses on the benefits that women have on boards thus being an able guide to the study, albeit its focus is the USA with examples from other Northern States.

Kumar and Baroda[29] opine that diversity on boards leads to better decision making and improvement in creativity and innovation. As to why women should be on the boards, the authors state that unlike men who view leadership as authoritative, women view it as interactive, transformational and participative and this becomes attractive to employees who will definitely align their personal goals and interest to the goals of the organization improving the performance of the organization. Other than the leadership style which yields better results, the authors state that benefits associated with women on boards include raising social issues that are majorly ignored by men; bringing different outlook and perspectives on issues under discussions; always

[29] Kumar (n 15).

being present in major decision making arenas; ensuring etiquette in boardrooms and networking better with external forces.

The authors additionally note that having women on boards should not be viewed as merely being a representative symbol of one gender but it should be viewed as against the positive outcomes on the performance of an organization that is associated with them on boards.

While the authors' work is definitely a useful guide to the current study, their focus was on various countries across Asia, Africa, Europe and the United States, the current study is a focus on Kenya with good practices and lessons drawn from Norway.

Masi et al[30] stress on the need to have women on boards. The authors state that when mandatory quotas were introduced in Italy, the number of women increased on boards and this yielded better performances in the organizations and corporate governance in general. They write that a study of Italian FTSE MIB companies from 2008 to 2015 demonstrated that an increase of women on the boards had a positive impact on financial and social performance; better decision making and improved attendance of board meetings as well which had a resulting effect on the overall board monitoring function. The authors thus note that the importance of women on boards is both on the financial and non-financial aspects that are fundamental for a corporation.

However, the authors' note that based on their study the presence of women did not influence policy formulation or the implementation of the same. Absence or presence of women did not have an effect on the corporations' policies. The current study does not necessarily support that particular finding as it is a deviation from several literature, discussed above, that emphasizes and finds that women influence better implementation of policies or strategies of a corporation. The

[30] De Masi (n 15).

current study thus borrows the positive effects that the author associates with women on boards but it deviates from the finding that they have no effect on policy or strategy implementation.

Each literature discussed above addresses diverse aspects that have been specifically pointed out under each discussion. Previous local literature that exists on corporate governance and diversity have majorly been critiquing the non-implementation of the provisions of the laws while also advocating for changes in the laws to perhaps make them effective. Understandably so, data available always pointed out the gross under-representation of women on the corporate boards. However, with the current study, recent data has indicated that implementation of the laws are currently effective making this study unique as it does not critique the laws nor suggest for their change, but rather seeks to address better mechanisms of implementation of the laws through goodwill. The study will also add onto literature on factors that impede achievement of gender parity on the corporate boards as very local few scholarly works address the same in depth.

1.8 Justification of the Study

The bare minimum provisions of the current laws on equality are being implemented thus explaining the current 36% of women on corporate boards in Kenya. However, this stride is not enough to bridge the gap on gender imbalance in the corporate boards nor to address the factors that have impeded women from being considered for board positions. This study strives to explore the factors that contribute to gender disparities on the boards and advance necessary recommendations to relevant law and policy makers who are instrumental in shaping laws and policies of the country.

Additionally, very few studies in the country have addressed the value propositions of having women on the corporate boards. This study will thus add to the limited literature available while also recommending to relevant stakeholders such as the corporations on internal measures that can be adopted to achieve gender parity on the boards.

1.9 Methodology

The study is essentially a doctrinal research which adopts qualitative elements of legal research. The study analyzes literature, materials and data obtained from secondary sources of data such as books, articles, reports, journals, international instruments, regional instruments and national laws, and other online websites.

The study also benchmarks with other jurisdictions, Norway and South Africa. Norway was the trendsetter in adopting a strong legislature that increased women's presence on corporate boards. The country provides the best benchmark to evaluate and recommend various value propositions for achieving gender diversity on the corporate boards in Kenya. On the other hand, South Africa's reality is similar to Kenya's and there has been a noted increase of women representation on the corporate boards, it is thus a good benchmark as well.

1.10 Limitations

The study relies solely on secondary sources of data and an associated problem with this kind of data is that it may be unreliable in light of new and continuous updates of data, more so because few public companies publish their diversity status online.

1.11 Chapter Breakdown

The study is divided into five chapters as follows:

Chapter One: Introduction

This chapter has provided the background of the study with respect to what corporate governance entails and the spotlight on the representation of women on boards of public corporations in Kenya.

Specifically, the chapter has outlined the statement of the problem of the study, which provides an insight of the reason why undertaking the study is essential. Importantly, the chapter has provided the justification of the study, which directly relates to the statement of the problem. Under this chapter, the objectives have also been outlined. Emanating from the objectives are the research questions that the research shall seek to answer, the theoretical framework that shall inform the study, and the research methodology that shall guide the study process. The chapter also provides a literature review, which looks at the previous studies in the area of the present study and helps in identifying the existing gaps with respect to the study objectives. Finally, the chapter identifies the research hypothesis, which provides a tentative response to the research questions, and it identifies the inherent limitations of the study.

Chapter Two: Legal framework on Gender Equality

This chapter outlines the laws that advocate for gender equality both international and national laws. The chapter critically examines in detail provisions on gender equality as enshrined in different instruments that Kenya is a signatory to, it further examines the provisions of the national laws thus enhancing a better understanding as to the position of laws applicable to Kenya on gender equality on public corporate boards.

Chapter Three: Current Status of the Representation of Women on Public Corporate boards and factors that result to gender disparity in the Public Corporate boards

This chapter highlights the present day depiction of women board members in public corporations in Kenya. The focus is on the factors that result in gender disparities in public corporate management boards. Some of the factors looked at include misconceptions and stereotypes, bias hiring and promotion practices, amongst others. The outcome of this chapter is important in terms of providing appropriate recommendations on how to enhance gender equality in the public corporate management boards.

Chapter Four: Drawing Lessons from Norway and South Africa on Gender Equality

This chapter evaluates Norway and South Africa, different jurisdictions that have been successful in increasing the number of women on corporate boards. The study relies on Norway's strong enacted legislation that improved gender equality in the corporate boards of management within its territory. For South Africa, the goodwill of the corporations to implement equality provisions is relied on. The countries provide the best benchmark to evaluate and recommend various value propositions for achieving gender equality on the boards in Kenya.

Chapter Five: Findings, Conclusion and Recommendations

This chapter presents the outcome with respect to the objective and the research questions that guided the study. It draws various conclusions from the study process, particularly from the above chapters. On the strength of the conclusion and the findings, the chapter issues appropriate recommendations as to the achievement of gender equality in public corporate boards of management.

CHAPTER TWO

LEGAL FRAMEWORK ON GENDER EQUALITY IN BOARD MANAGEMENT IN KENYA

2.0 Introduction

This chapter focuses on outlining existing instruments and laws on gender equality. International and regional instruments to which Kenya is a signatory to have been outlined. National laws and policies are also outlined in so far as gender equality is advocated for. The objective is to lay a foundation for understanding the position of the laws thus contributing to a better measure of the laws as against current representation in public boards as captured in the subsequent chapter.

2.1 Legal Instruments

2.1.1 International Instruments

Kenya is a signatory to several international instruments that advocate for equality and non-discrimination. However, the current study will be limited to a few of the instruments that are most relevant in their application to women composition in public boards.

a. **Convention on the Elimination of All forms of Discrimination Against Women, 1979 (CEDAW)**

Article 2 defines discrimination against women as:

> "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

From the definition, it can easily be deduced that public corporate existence falls within the economic sphere and the exclusion of women from these boards breeds discrimination against women which should not be encouraged. State Parties are further urged to ensure that policies of non-discrimination are embodied in their constitutions and to take appropriate steps to ensure that there is equality in organizations.[31] The appropriate steps that would ensure equality is achieved have been listed to include the elimination of customary and social practices that are pegged on the idea of superiority of men over women.[32] Based on literature, as discussed in the preceding chapter, stereotypes and cultural factors are a major contributor in the lack of diversity on corporate boards with women often viewed as inferior, their leadership abilities questioned and their abilities undermined. Equality as envisioned by CEDAW entails the eradication of such beliefs. As relates to public and political office and life, CEDAW calls upon its State Parties to ensure that there is equality in eligibility for election into public offices and bodies and associations that are inclined to the public life of the country.[33]

b. Universal Declaration on Human Rights, 1945 (UDHR)

Article 2 provides that persons are entitled to equal rights and freedoms and discrimination of any kind on grounds such as sex are frowned upon. Further, the UDHR states that everyone is equal before the law and entitled to equal protection from any form of discrimination.[34] Application of the law is considered as equal to everyone however the dismal number of women board members

[31] Convention on the Elimination of All forms of Discrimination Against Women 1979, art 2.
[32] Ibid, art 5.
[33] Ibid, art 7.
[34] Universal Declaration on Human Rights 1945, art 7.

on public corporation in the country is illustrative of the presence of discrimination of women a clear violation of the persuasive provisions of the UDHR.

c. International Covenant on Economic, Social and Cultural Rights, 1966

Every person has equal rights for the enjoyment of the guaranteed rights.[35] For instance, the right of education[36] and work[37] advocates for equal opportunities for all and this ensures that women acquire the same educational qualifications and work opportunities and experience as men that would enable them to qualify for the board positions.

d. Convention on the Rights of the Child, 1989

Article 28 stipulates that compulsory education for every child and equal opportunity for every child is a guaranteed right. State Parties are mandated to ensure that the right to primary education is free for all children while for higher educational learning institutions to make them accessible at appropriate costs for all.[38] Education is key for girls who have been historically disadvantaged and acquisition of education broadens their chances of qualifying to join corporate boards as is the case with men. Education and equality of access to the same is thus integral in increasing women representation on corporate boards.

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

The principles by Organization for Economic Cooperation and Development (OECD) are persuasive and they are applicable in both OECD members and nonmembers as well. On board responsibilities, principle 6 indicates functions of an effective board and this includes ensuring that

[35] International Covenant on Economic, Social and Cultural Rights 1966, art 3.
[36] Ibid, art 13.
[37] Ibid, art 6.
[38] Convention on the Rights of the Child 1989, art 28 (1).

there is a formal and transparent nomination and election process.[39] A fair nomination and election process would in the long run ensure that women with similar expertise as men are given a chance in a largely male dominated arena.

2.1.2 Regional Instruments

a) Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa, 2003

State parties ought to ensure that "elimination of discrimination against women is done through legislative, institutional and other appropriate measures." These measures include ensuring that equality provisions are enshrined in constitutions, legislative instruments, including gender policies in policy documents and ensuring that they are effectively implemented.[40] In a view of eliminating harmful cultural and other stereotypical practices, there should be public education, information and communication strategies that would help in such elimination.[41] As regards the right of education and training, there should be appropriate measures and equal opportunities for women to access educational and training facilities.[42] In work and career advancement, state parties should ensure that there is transparency in women recruitment and promotion and ensure equality in access to employment opportunities.[43]

b) African Charter on Human and Peoples Rights, 1982

Everyone has equal rights of enjoyment of their rights and freedoms without distinction on grounds which include sex.[44] Before the law every person is equal and subjected to the same protection as

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[39] Organization for Economic Cooperation and Development, Principles of Corporate Governance (Organization for Economic Co-operation and Development, 2004), 24.
[40] Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa 2003, art 2.
[41] Ibid, art 2(2).
[42] Ibid, art 12.
[43] Ibid, art 13.
[44] African Charter on Human and Peoples Rights 1982, art 2.

well.[45] State parties are mandated to ensure that there is elimination of any kind of discrimination against women and to ensure that the rights of women are protected as enshrined in diverse international instruments.[46] As a State Party, Kenya should advocate for equality and eradication of harmful beliefs and practices against women in the public sphere and ensure that there is an equal representation of the sexes, especially women, in the public corporate boards.

c) Africa Charter on the Rights and Welfare of the Child, 1990

The Charter stipulates that every child has the right to an education and governments must take special measures to ensure equal access to education by everyone in the society including special groups such as females.[47]

2.1.3 National Laws and Policies

a) Constitution of Kenya, 2010

Article 27 of the Constitution has expansive provisions on non-discrimination and equality. A reflection of similar provisions in the international and regional instruments. The Constitution guarantees that before the law everyone is equal and this extends to persons' enjoyment of all rights and freedoms without any differential treatment on a number of grounds inclusive of sex.[48] To ensure equality of every person, the State is mandated to take measures such as affirmative actions to address historical discrimination and injustices that certain individuals suffer.[49] On the

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[45] Ibid, art 3.
[46] Ibid, art 18.
[47] Africa Charter on the Rights and Welfare of the Child 1990, art 11.
[48] Constitution of Kenya 2010, art 27 (1) (2).
[49] Ibid, art 27 (6).

same affirmative vein, the Constitution stipulates that “not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.”[50]

The two-thirds gender rule has been developed as an important principle of human rights and gender equality. *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate,*[51] the Supreme Court stated that implementing the two-thirds gender rule is progressive and not immediate and it only remains as an abstract principle until the parliament enacts a legislation that enables the provision.

The Kenya National Human Rights and Equality Commission is established under Article 59 of the Constitution and its functions include the promotion of gender equality and equity; the promotion of respect of human rights and monitoring and investigation of human rights complaints amongst other functions. Every person has a right to lodge a complaint with the commission citing any violation or infringement of the provisions of the Bill of Rights[52] to which the rights to equality and freedom from discrimination squarely fall.

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

The Bill was introduced in parliament to promote the representation of women in elective and appointive positions. The Bill sought to mandate the National Gender and Equality Commission to collaborate with all public and non-public bodies in developing measures that would ensure the progressive realization of women, amongst other special groups, in the public and non-public bodies.[53] The monitoring measures were to include capacity building programmes that would

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[50] Ibid, art 27(8).
[51] Advisory Opinion No 2 of 2012, eKLR.
[52] Constitution (n 48) art 59(3).
[53] Two-Third Gender Rule Laws (Amendment) Bill 2015, sec 3.

enable women to increase their participation in the elective and appointive positions and also adopt measures that would change the attitude and perception of the society as related to the capability of women in the said positions.[54] The Bill has unfortunately not been enacted into law indicating that there is lack of good will from the legislators, who are predominantly men, to enact more equality laws specific to special groups such as women.

c) National Gender and Equality Commission Act, 2011

The National Gender and Equality Commission is established by the Act as a "successor in title of the Kenya National Human Rights and Equality Commission that was envisaged by Article 59 of the Constitution." [55] The Commission's functions include promotion of gender equality; investigating and receiving complaints of violation of equality principles; receiving annual reports from public institutions on the progress of compliance with provisions and principles of equality and to facilitate and advise both public and private institutions on the integration of gender equality principles in their policies.[56]

d) Basic Education Act, 2013 and the Children's Act, 2001

The Basic Education Act at section 28 guarantees the right to education for each child. Section 7 of the Children's Act on the other hand stipulates that "every child has the right to access basic education." Education discrimination has been an obstacle to girls' access to education in the African society and for a long time the girl child has been confined to house chores, early marriages and early child rearing with the belief that it was only the boy child who was deserving of

[54] Ibid.
[55] National Gender and Equality Commission Act 2011, sec 3.
[56] Ibid, sec 8.

education.[57] The right to basic compulsory education as stipulated in the laws has a resultant effect of increasing the number of girls who attain education. With acquisition of education from primary level to tertiary level, women are elevated to a somewhat similar level ground with men and similar qualifications would make it easier for women to apply for the same corporate board positions as men.

e) State Corporations Act, Cap 446

The Act primarily provides for the establishment of state corporations by the president.[58] For the composition of the board members, the chairperson is appointed by the president while the other members are appointed as provided for in the corporations' articles of association or the written law that establishes the corporation.[59] The Act is silent on board diversity and also on principles that govern the appointment of board members. The Act can be criticized as being open to political interference as the president is responsible for the formulation and subsequent appointment of the chairperson. However, with *mwongozo* code that advocates for gender sensitivity in the appointments, this study argues that the principles of equality will be followed.

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

Mwongozo provides for governance principles and it stipulates that the composition of the board of directors should provide for gender diversity. [60] The board of directors should be composed of

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[57] Beatrice Akala, 'Gender inequality in education is still an issue in Kenya and South Africa' (The Conversation, 03 November 2019) <https://theconversation.com/gender-inequality-in-education-is-still-an-issue-in-kenya-and-south-africa-125747> accessed 01 August 2021.
[58] State Corporations Act Cap 466, sec 3.
[59] Ibid, sec 6.
[60] Mwongozo (n 5).

diverse people to ensure that there is better accountability, good judgment and integrity in its functions.[61]

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

The president issued Executive Order No.7 to provide "for directions for the effective governance and oversight of State Corporations."[62] All boards of state corporations were directed to implement the provisions of the *mwongozo*.

h) Companies Act, 2015

The Act guides the duties of the board of directors of public and private companies. The duties include the duty to exercise independent judgment; duty to exercise reasonable care, skill and diligence and the duty to promote the success of the company.[63] The Act is however silent on gender diversity on the corporate boards and reference can be made to the code developed by the Capital Market's Authority.

i) Capital Market Authority's Code of Corporate Governance for Issuers of Securities to the Public, 2015

The code encourages listed and unlisted public companies to accommodate gender diversity on their boards. The code states further that board members appointment should be gender sensitive and where a diversity policy exists measures should be put in place to ensure their implementation is adhered to.[64]

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[61] Ibid, 40.
[62] Executive Office of the President, Implementation of Mwongozo; The Code of Governance for State Corporations (Executive Order No.7), 2.
[63] Companies Act 2015, sec 143-145.
[64] CMA (n 7).

j) Public Finance Management Act, 2012

The Act establishes a Public Sector Accounting Standards Board composed of professionals from diverse offices such as from the National Treasury; Auditor-General; Capital Markets Authority, amongst others.[65] The Board's mandate includes setting the financial and accounting standards and prescribing the minimum standards of maintenance of books of accounts for all the levels of government.[66] Any standard set by the board should promote transparency and other constitutional values and principles.[67] Gender diversity in the composition of the board is not expressly provided for but it is implied that *mwongozo* would act as a guide in the appointment of the board members. Further, if the Act is mandating that constitutional values be followed by the board, this could be reflective of the same values such as gender equality being implemented in the selection criteria.

2.2 Conclusion

Provisions of the laws, especially the Constitution, reflect similar provisions in international and regional instruments. The Constitution dictates the two third gender rule that seeks to ensure equality in composition of bodies such as corporate boards. The recent statistics illustrate that there is goodwill from corporations to implement not only the provisions of the constitution but also provisions of the other laws and codes such as the *mwongozo*. The provisions of the laws are expansive qualifying them as good laws, and their implementation should continue to be encouraged.

[65] Public Finance Management Act 2012, sec 193.
[66] Ibid, 194.
[67] Ibid.

CHAPTER THREE

STATUS OF REPRESENTATION OF WOMEN ON BOARDS IN KENYA AND FACTORS THAT RESULT TO GENDER DISPARITY IN THE BOARD

3.0 Introduction

This chapter examines the current status of representation of women on public corporate boards in Kenya. It also examines the factors that result in gender disparities in the public corporate boards. Some of the factors considered in the disparities are: misconceptions and stereotypes; biased hiring and promotion practices; non-implementation of gender guidelines; lack of qualified women, non-accommodative work spaces and sexual harassment in workplaces. The outcome of this chapter is important in advancing appropriate recommendations on how to enhance gender equality in the public corporate boards.

3.1 Current Status of Women Representation on Public Corporate Boards in Kenya

A board diversity and inclusion report of 2021 indicated a tremendous increase in the representation of women on public corporate boards. The report by the Kenya Institute of Management noted that the percentage of women stood at 36% in comparison with only 21% in 2017.[68] Further, as compared to the global percentage of women on boards, Kenya's 36% is significant as against the global 23.3%.[69] The number of women who hold chairperson positions, according to the report, is at 21% compared to the global average of 3.0%.[70]

Prior to the release of the 2021 report which is commendable, previous studies pointed out the low representation of women on the public corporate boards. For instance, the Kenya Institute of

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[68] KIM (n 12) 10.
[69] Ibid, 14.
[70] Ibid, 15.

Management (KIM) report of 2017 indicated that only 21% of women were board members in listed companies as compared to 18% in 2015.[71] In a 2012 study, KIM observed that state corporations boards had 20% women as compared to publicly listed companies' boards that had only 12% women board members.[72] The representational data of the 2012 study is as in the table below.

Table I: Data on Directors of State corporations and Listed Organizations

Measures	**State Corporations**	**Listed Companies**
Number of state corporations	98	51
Number of directors	1091	449
Number of men directors	872	389
Number of women directors	221	54

[71] KIM (n 9).
[72] KIM (n 10).

Percent (%) of men directors	80	88
Percent (%) of women directors	20	12
Number of men chairpersons	85	50
Number of women chairpersons	13	1
Percent (%) men chairpersons	87	98

Measures	**State Corporations**	**Listed Companies**
Percent (%) women chairperson	13	2

Source: *Survey Data, 2012* ***Kenya Institute of Management***

In 2014, Institute of directors Kenya (IOD (K)) undertook another study that revealed that public corporations had 26% of women representation while publicly listed companies had 18%. Specifically, women who served as chairpersons stood at 15% for public corporations with 8% of the publicly listed companies.[73] The representational data of the (IOD (K)) study is as follows:

Table II: Board Representation

Measures	**Professional Associations**	**Insurance Companies**	**Deposit Taking Microfinance Institutions**	**Banks**	**Publicly Listed Companies**	**State Owned Enterprises**
Number of organizations sampled	16	19	9	44	59	87
Total number of Board Members	168	153	70	347	471	874
Number of men directors	124	130	52	307	387	644
Number of women directors	44	23	18	40	84	230
Percent (%) of men directors	74%	85%	74%	88%	72%	74%
Percent (%) of women directors	26%	15%	26%	12%	18%	26%
Number of men chairpersons	15	19	8	43	54	74

[73] Institute of Directors Kenya, 'Report on the Taskforce on Women Representation on Boards' (2015) 6.

Number of women chairpersons	1	0	1	1	5	13
Percent (%) of men chairpersons	94%	100%	89%	98%	92%	85%
Percent (%) of women chairpersons	6%	0%	11%	2%	8%	15%

Source: Survey Data February, IOD (Kenya)

While acknowledging that representation of women has increased in the boards, looking at past history on the under representation is paramount in portraying the patriarchal society that Kenya is. The increment is encouraged but it is still dismal and factors that contribute to disparity in the boards need to be addressed so as to place Kenya as amongst countries that rank the highest in gender diverse boards.

The reasons for existing disparity are discussed herein below.

3.2 Factors resulting in gender disparities

Women are integral actors just as men and the same is evident in enacted laws that advocate for their inclusion and also evident in literature discussed in previous chapters that reveal the value addition in performance of corporations when women are included on the corporate boards. The value addition attributed to having them on the boards makes it imperative to consider some of the factors that have for the most part led to their exclusions from the boards.

3.2.1 Misconceptions and Stereotypes

A taskforce report by the Institute of Directors Kenya[74] cited the patriarchal nature of African society as always discouraging women from seeking leadership positions as the same is thought

[74] Ibid, 8.

to be a preserve for men. Further, the report noted that gender disparities in career selection has seen women being guided to only a set of careers allegedly fit for them. Additionally, women are viewed as home makers and the choice of juggling between family and work is viewed as unattractive even to some women themselves. Women have been burdened with the responsibilities of taking care of the family from child bearing to rearing and this becomes an unequal burden that is heaped on them by society.

Men being considered as deserving of the corporate positions has seen the corporate world flooded by men. Wachodi and Mboya[75] write that Kenyan corporate boards are male dominated largely based on the '*old boys network*' concept. The concept works in a way where the existing directors before retirement recommend their male acquaintances to the boards and this automatically locks out women deserving of the same positions. In Australia, Sheridan[76] notes that the old boys' network has constrained women participation and representation on public boards and research on how women on the boards acquired their positions revealed that it is not on qualifications or experience criteria but rather on the influential person who you know that would recommend the women to those positions.

Beliefs that women are inadequate in decision making massively affects their potential to be considered as board members as well as other stereotypes. The effect of such misconception has a similar effect to women not only in Kenya but also worldwide with a few variations. Burke and Collins[77] massively capture the impact that stereotyping has on women's advancement as follows:

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[75] John Wachudi and Josphat Mboya, 'Effect of Board Gender Diversity on the Performance of Commercial Banks in Kenya' (2012) 8, European Scientific Journal April, 129.
[76] Alison Sheridan, 'A view from the top: women on the boards of public companies' (2001) 1 Corporate Governance, 8-15.
[77] Sarah Burke and Karen Collins, 'Gender Differences in Leadership Styles and Management Skills' (2001) 16 Women in Management Review, 244-257.

> "Male managers, who often make decisions affecting the upward mobility of women, have been found to perceive the characteristics needed for managerial success as being associated with those generally attributed to men. The fact that male managers may not consider 'female' characteristics important for managerial success can negatively impact decisions made by males concerning women's careers, including job placement, promotion, and access to developmental and training opportunities."

From their analysis, misconceptions and stereotypes in Kenya are concluded to have a spilling effect on so many factors such as hiring of women to the boards, promotion and also networking opportunities that are accosted to men than women and the same shall be clearer in the next illustrations.

3.2.2 Biased hiring and promotion practices

In their report the Institute of Directors Kenya (IOD (K)) states that even though women possess similar qualifications and skills as men, they are often bypassed as the hiring and recruitment processes are subjective in nature and stereotypes, misconceptions and archaic beliefs may lead to biased decisions which are a disadvantage for women. The report also states that women being a minority on most boards, recruitment of others will be under great scrutiny and stricter than of men who are already a majority thus less scrutiny. Lack of transparency is also a factor identified as being disadvantageous for women as biases may come into play.[78] For board nominations, the report notes that in publicly listed companies, directors' appointments are "done through a nomination process and shareholders vote as the last step" while for state corporations appointments are majorly a preserve of the Cabinet Secretary in charge of the corporation. In both

[78] IOD-K (n 73) 8-9.

scenarios, women are rarely nominated despite those with the required qualifications being available.[79]

Women are oftentimes not considered for promotional opportunities in corporate boards. In Kenya, some promotions do involve being relocated geographically and this prompts most women to refrain from taking up such opportunities for the sake of their already settled families. As societal expectations have made women believe that family life is more important than professional advancement.[80] It is thus expected that to lessen the effect of societal expectations and to also promote women, corporate policies should have fairer promotion terms such as exclusion of relocation as a condition for the promotion. However, the corporations are still operating on unfair grounds for women thus making their number inadequate on the boards.

Additionally with fewer women on the boards, the likelihood of their promotion is also minimal. The situation in Kenya mirrors other jurisdictions as well and in 2020 McKinsey and LeanIn reported that in corporate America the number of women promoted in leadership positions was still minimal despite efforts of trying to achieve gender equality." For every 100 men that were promoted to manager positions, women were only 85."[81] In an earlier report,[82] McKinsey and LeanIn observed that women experience bias at the workplace and they are disadvantaged as they are often missed out on promotions based on their gender and this slows down the rate of advancement for women as compared to men.

[79] Ibid, 8.
[80] Omukaga (n 25) 59.
[81] McKinsey and LeanIn, Women in the WorkPlace 2020, 9.
[82] McKinsey and LeanIn, Women in the WorkPlace 2015,13.

3.2.3 Less qualified women and Lack of strong networks

Education marginalization in Kenya is rife with beliefs that girls should remain at home helping with chores and get married off eventually has affected the number of girls who have attained education as compared to men.[83] Their marginalization translates to having lesser women in the corporate ladder and even a lesser pool of qualified women to choose from in searching for board members. For the few qualified women, there is a reluctance by them to take on challenges and advance their careers and this contributes to the inadequate number of qualified women to fill board positions as reported by IOD (K).[84]

In its 2019 report McKinsey Global Institute examined the barriers to gender equality in workplaces in African countries, including Kenya, and states that most women limit their options and they are reluctant or afraid to take risks that would assist in their career advancement. This self-limiting mindset then becomes a barrier translating to lack of confidence by women.[85] The reluctance by women also extends to networking with colleagues[86] and this definitely affects the exposure and insights that strong networks offer. Women not networking with male board members indicates that women will most probably not be recommended or scouted for the board positions.[87]

A study conducted by Tara Mohr in the United States based on an internal report of hiring at Hewlett-Packard revealed that men and women applied for jobs differently. For women they felt that they needed to meet 100% of the required qualifications before they tendered in their

[83] IOD-K (n 73) 8.
[84] Ibid, 10.
[85] McKinsey Global Institute, 'The power of parity: Advancing Women's Equality in Africa' (2019), 17.
[86] Ibid.
[87] IOD-K (n 73) 10.

applications as opposed to men who were confident applying with 60% of qualifications met.[88] Mohr notes that women are socialized to follow rules and guidelines and this is a disadvantage for women as the rules should at times be viewed in a lighter weight. As relevant to the current study this could be a barrier to women accessing corporate positions as a majority even in Kenya would rather meet all qualifications as stated in the advertisements before applying for the positions. With a little boost in their confidence, and belief in themselves women can be aggressive as men and apply even with only 60% of the requirements met.

3.2.4 Non accommodative Work Spaces

Having women on corporate boards in a typically male dominated field entails adaptation of a flexible schedule bearing in mind the unique needs of women. However, workplaces that do not take into account specific needs of women such as "providing flexible working arrangements and spaces for nursing mothers," have been deemed as a barrier to gender equality at the workplace.[89]Marshall[90] undertook research to establish why women in the United Kingdom who had reached senior and middle level of management opted to leave or were contemplating leaving their positions. Bullying was considered an issue with the women reporting that some of their male colleagues were hostile and their opinions were constantly undermined by the men who felt that the place of women was not in the corporate world, leave alone leadership positions.

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[88] Tara Mohr, 'Why Women Don't Apply for Jobs Unless They're 100% Qualified' (2014) Harvard Business Review, <https://hbr.org/2014/08/why-women-dont-apply-for-jobs-unless-theyre-100-qualified> accessed 14 September 2021.
[89] McKinsey (n 85).
[90] Judi Marshall, 'Working at Senior Management and Board Levels: Some of the Issues for Women' (1995) 10 Women in Management Review, 21-25.

General interpersonal behaviour of board members came off as hostile as well and in the boardrooms the women felt isolated and lonely.[91] Women on corporate boards in Kenya are a minority and working in a male dominated space will confirm findings of the various studies on women feeling bullied, their opinion being undervalued and inflexible work hours as well being unattractive for them. Other than these findings, sexual harassment is also a nonaccommodative factor in any work space and it is discussed in detail hereunder as a separate element on its own.

3.2.5 Sexual Harassment in workplaces

Often when sexual harassment is talked about at the workplace the general notion is always that an employee (sub-ordinate) is being harassed by her boss (superior). However, even women in leadership positions are subjected to sexual harassment incidences. Folke et al[92] in their research on sexual harassment of women leaders, with a focus on Japan, United States and Sweden noted that women having power in the workplace did not protect them from sexual harassment. They state that for women occupying male dominated spaces, such as leadership roles, thrusts them into a space where they have to deal with stereotypes and misconceptions from the men with some of the men being hostile by virtue of their mentality that the man always gets his way.[93] The authors also state that women in leadership roles are harassed by their subordinates. Some men employees, based on their misconceptions, do not believe that a woman can supervise them and harassment from the men is a result of jealousy.[94]

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[91] Ibid.
[92] Folke Olle, 'Sexual Harassment of Women Leaders' (2020) 149 Journal of the American Academy of Arts & Sciences, 194.
[93] Ibid, 186.
[94] Ibid.

It is therefore not strange for cases of sexual harassment of women on corporate boards which are predominantly male dominated. Sexual harassment is frowned upon by the laws in Kenya. The Employment Act defines sexual harassment to include the direct or indirect request for any form of sexual activity; the language that is sexual in nature; exhibiting physical behaviours that are sexual and offensive or unwelcome and using visual materials of a sexual nature.[95] An employer who has employed twenty or more employees is mandated to ensure that there is an anti-sexual harassment policy document. The policy document should define: what sexual harassment is, lay down the procedure of reporting an incident and steps the employer shall take to minimize sexual harassment incidences.[96]

In their 2019 report, Equileap assessed 60 leading companies in Kenya on gender equality and on anti-sexual harassment policies; and only 21 companies had published an anti-harassment policy.[97] Sexual harassment is an impediment to the performance of women at work and even in leadership roles where people would not expect its presence, it is unfortunately still prevalent. It is clear that for the Kenyan corporate world, there is a need to pay closer attention to sexual harassment and a need for the anti-sexual harassment policy documents to be prepared ensuring that all employees are knowledgeable of these provisions of the law and the consequences as well.

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[95] Employment Act 2007, sec 6.
[96] Ibid.
[97] Equileap (n11) 12.

3.3 Conclusion

The survey of women in boards in 2012, 2014, 2017 and 2021 definitely shows that there has been a gradual increase of women taking leadership positions on the boards. Despite the implementation and achievement of the bare minimum provisions of the laws to achieve equality, the discussed factors contribute to the continued exclusion of women from the corporate boards. The boardroom unfortunately still remains a strange place for women as most boards are still male dominated. Unlearning some of the impediments such as misconceptions will result in board diversity. Recommendations on the same and the other factors as well shall be made in another subsequent chapter.

CHAPTER FOUR
DRAWING LESSONS FROM NORWAY AND SOUTH AFRICA ON GENDER EQUALITY ON PUBLIC CORPORATE BOARDS

4.0 Introduction

This chapter evaluates and examines two countries, Norway and South Africa. Norway is one of the countries that has attained gender equality and diversity on the corporate boards of management in the world. Norway was the trendsetter in adopting a strong legislature that increased women's presence on corporate boards. The country provides the best benchmark to evaluate and recommend various value propositions for achieving gender diversity on the corporate boards in Kenya. For South Africa, its lived reality is similar to Kenya's and it is also considered as one of the countries in Africa that implements board diversity.

4.1 Gender Quota System

Historical injustices, cultural practices and misconceptions have played a massive role in the constant under-representation of women in leadership including corporate leadership. To ensure a change in attitude towards women and their competencies, policies and laws are implemented to ensure their number is at least capped at a specific minimum. Gender quotas form an example of such laws and policies. The quotas are majorly justified as aiming to have an automatic increase of positions held by women and are not necessarily concerned about the causal impact that quotas have on a specific field.[98]

The proponents of the quota system mainly stress that its importance is the improvement of gender equality on the corporate boards[99] and also there is at least a 20% improvement of performance of a board when it is diverse.[100]

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[98] Rohini Pande and Deanna Ford, 'Gender Quotas and Female Leadership: A Review Background Paper for the World Development Report' (2011), 1-3.
[99] International Labour Office, 'Women in Business and Management: The Business Case for Change' (2019) 56.
[100] Ibid, 49.

Critics however argue that quota system may lead to potential hiring of incompetent women to just fill up the positions and also a belief that women are hired only through preferential selection rather than the qualifications that they rightfully possess.[101] Corporate gender quotas are majorly divided into two categories. Voluntary gender quotas where companies are voluntarily requested to commit to gender diversity on their boards. The other is legislated gender quota as is with the case in Norway as evident in the next section.[102]

4.2 Gender Quota Law in Norway

Just as is evident in other countries across the world, women representation on corporate boards in Norway was low owing to cultural aspects and traditional mentality that perceived women as being undeserving of positions on the corporate boards.[103] As a move to ensure that there is equality of the sexes and acknowledge the competences of women, the government sought to introduce the quota gender law to ensure that women were adequately represented.[104] The first suggestion to introduce corporate gender quotas was suggested in 1999 and subsequently in 2003 a conditional law amendment was passed by the Norwegian Parliament. At the time the government urged the corporations to comply voluntarily only to compulsorily mandate compliance on 9th December 2005.[105]

With the forced compliance rule came along the sanction for non-compliance which was forced liquidation of the corporations.[106] It is opined that if there was voluntary compliance with the quota

[101] ILO (n 99).
[102] Pande (n 98) 10-11.
[103] Knut Nygaard, 'Forced Board Changes: Evidence from Norway' (2011) Norwegian School of Economics and Business Administration, 5.
[104] Ibid.
[105] Ibid.
[106]Ibid.

by mid-2005 the law would not have been made compulsory.[107] The quota law requires that each gender has to make at least 40% and "this rule applies to all public limited liability companies, state-owned and inter-municipality companies."[108] Existing companies had to comply with the rule by 1st January 2008 while for new companies registered after 1st January 2006, the compliance was immediate.[109] Towards the end of December 2005 when the mandatory compliance was imposed, 79.9% of the companies were not in compliance and the average percentage of the female directors was 15.5%. Fortunately, there was a tremendous improvement in 2008 when the average female directors stood at 40.7%.[110]

4.3 Evaluation of the Quota Law in Norway

While the law focuses on gender representation on the corporate boards, scholars and critics have however evaluated the success of the quota system and the value performance.

4.3.1 The Positives

The quota law saw an incredible increase in the number of women board members in the country. Existing companies were given up until January 2008. This was a grace period of two years when the grace period ended, out of listed companies only 77 out of 450 had not met the gender requirements. This was however remedied when the Norwegian federal Brønnøysund Registration Centre with a threat of dissolution of those companies issued an ultimatum of four weeks and by mid of 2008 all companies had complied.[111] In 2010, female representation on corporate boards stood at 40.3%.[112]

[107] Ibid, 6.
[108] Pande (n 98) 10.
[109] Nygaard (n 103) 4.
[110] Ibid, 6.
[111] Pande (n 98) 15.
[112] Ibid, 35.

4.3.2 The Negatives

Although the law's intended purpose was to increase the representation of women board members, critics criticized the value performance of having women on the boards. Ahern and Dittmar[113] write that the gender quota in Norway caused a sudden decline of stock prices at its commencement and it has continued to cause decline over the years and also, the boards have had to introduce younger and less experienced women and this has massively affected the general performance of the companies. Eckbo et al[114] faults the approach taken by Ahern and Dittmar embarking on a study of their own where they concluded that when the quota system was made mandatory it took the stock market by surprise and the sudden decline of stock prices was only a natural occurrence.

Further, over the years the decline of stock prices of the companies are not attributed to having women on boards but rather to other factors such as bankruptcy and mergers and acquisitions. Additionally, the 2008 financial crisis was a worldwide crisis and its effect on listed companies was not related whatsoever to the quota law. The authors note that to avoid a decline in a company's performance based on the qualification of the members, qualified females who meet all the qualifications inclusive of experience should be hired.[115]

Again, Ahern and Dittmar suggest in their study that as a way to circumvent the provisions of the law, some companies at that time chose to be private as opposed to being public limited companies, while other companies chose to deregister from Norway and register in the United Kingdom.[116] Their observation, in a similar manner as the one discussed above, has been stated to be merely

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[113] Kenneth Ahern and Amy Dittmar, 'The Changing of the Boards: The Impact on Firm Valuation of Mandated Female Board Representation' (2012) 127 The Quarterly Journal of Economics, 137.
[114] Espen Eckbo et al, 'Valuation Effects of Norway's Board Gender-Quota Law Revisited' (2021) Management Science, 20-21.
[115] Ibid, 21.
[116] Ahern (n 113) 182.

suggestive as the study is not empirically able to fault the quota law for those steps taken by the companies.[117]

Despite the criticism, literature as discussed in this current study shows that women inclusion on corporate boards have positively impacted corporations performances in some aspects as opposed to the traditionally male dominated boards. Also, the main purpose of the quota law in Norway, as is with others in general, was not on performance evaluation but rather on the increment of women on the boards. Its purpose was to rectify practices that have seen women being excluded from spaces in which they duly qualify and can be instrumental. While noting the criticism, the positives are the main focus for the study.

4.4 South Africa

Kenya has borrowed from the good practices of South Africa (SA) before and the most notably is the 2010 Constitution which is a mirror document to the SA's Constitution of 1996. In terms of corporate governance and gender diversity, Norway is an excellent example for the study, and the same is evidenced above. However, a closer reality comparison with a country much similar to Kenya is necessitated, making South Africa a perfect fit. It is prudent to examine the laws and borrow good practices, if any, that would be significant in advocating for more representation of women on the corporate boards in Kenya.

4.5 Evaluation of Equality Laws in South Africa

The Constitution of South Africa, 1996 advocates for gender equality and stipulates that every person is equal before the law and no one should be unfairly discriminated against on grounds

[117] Pande (n 98) 15.

including gender and sex.[118] This provision is similar to provisions of the Kenyan Constitution and it advances the argument of having women on corporate boards.

The Employment Equity Act, 1998 was enacted to give effect to the provisions of equality advanced in the Constitution. The Act's purpose is to achieve equity in work spaces by fair and equal recruitment practices and also adopting affirmative action measures to address designated groups of persons who have predominantly been discriminated against in the work spaces.[119] The Employment Equity Act further requires designated employers to have an employment policy document that indicates steps taken to ensure equal opportunities in work places for designated groups including women.[120] In addition to the policy document, the Act requires designated employers to implement affirmative action measures for the designated groups. These measures must include measures to further diversity and to end unfair discrimination.[121]

The Companies Act, 2008 and the Companies Act Regulations, 2011 regulate private and public companies in SA. The Act stipulates that on social and ethical manners companies have to appoint a committee that would advise on the same.[122] The Companies Act Regulations then proceeds to list amongst others, prevention of unfair discrimination and principles of equality as some of the considerations that the committee must examine and make recommendations on.[123] There is however no legal sanction for failure by the companies to consider the recommendations.[124]

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[118] Constitution of South Africa, 1996, sec 9.
[119] Employment Equity Act, 1998, sec 2.
[120] Ibid, sec 5.
[121] Ibid, sec 15.
[122] Companies Act 2008, Sec 72.
[123] Companies Act 2008; Regulations (2011), regulation 43.
[124] Anita Bosch et al, 'Women on South African boards -facts, fiction and forward thinking' (2020), University of Stellenbosch Business School, South Africa, 26.

King IV Report, 2016 contains a Code that sets out principles and practices that are recommended for the proper governance of companies. Its compliance is voluntary and its principles have massively been adopted by companies as accepted good practices.[125] The compliance is guided by the application regime or principle of 'apply and explain' which requires the organizations to apply the principles and later explain how their adopted practices have taken into account application of the principles.[126] The report defines diversity to include the "different perspectives and approaches offered by members of different identity groups."[127] It includes diversity in terms of amongst others, gender.[128] On composition of board members, the report stipulates that the board should be composed of a balance of diversity for efficient and objective discharge of the governance role.[129] The application of the principles having been accepted in wide applications, courts can take them into account in evaluation of companies and boards conduct.[130]

The unsuccessful Women Empowerment and Gender Equality Bill, 2013. The Bill was introduced in the National Assembly with a purpose of further giving effect to the equality clause in section 9 of the Constitution in as far as the empowerment of women was concerned.[131] The Bill required equal representation of women on corporate boards calling for a 50% women representation.[132] To achieve the 50% representation, companies were to implement plans and measures that would develop support systems for women and measures that would address the attitudes of communities

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[125]Ibid, 24.
[126] King IV Report (2016) 37.
[127] Ibid, 12.
[128] Ibid.
[129] Ibid, 40.
[130] Bosch (n 124) 24.
[131] Women Empowerment and Gender Equality Bill, 2013.
[132] Ibid, clause 7.

in accepting women's participation as equal to that of men.[133] The Gender Bill was however not enacted into law as it was withdrawn for purposes of further consultation and till date it has not been presented for debate.[134]

4.6 Analysis of current situation

The laws of SA do not impose any mandatory quotas in any of its laws, as is the case in Norway, that would ensure a compulsory inclusion of women into the boards. However, the equality principles of the King IV report have been adopted by several companies and compliance is steadily being followed. As is the case in Kenya, laws do exist that advocate for equality in board representations but the compliance is voluntarily left to the good will of the corporations.

Women representation in SA has always been similar in percentages as in Kenya. For instance, the Equileap 2019 report indicated Kenya's representation of females on the boards at 23%.[135] Morgan Stanley Capital International data shows the representation of women from 2015 to 2018 in SA was 18.9%; 18.6%; 21.4% and 24.6% respectively.[136] Kenya's percentages from the same periods are similar and the same has been evidenced in a previous chapter. With the increase of representation of women in boards of SA with each reported year, the good will of the corporations is highlighted as no sanction is in force to make it mandatory.

4.7 Conclusion

There is the existence of similar legal provisions on corporate diversity in both Kenya and SA. Further, good will of corporations, in both countries, rather than mandatory quotas still sees an

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[133] Ibid.
[134] Bosch (n 124) 27.
[135] Equileap (n 11).
[136] Bosch (n 124) 7.

increase in women representation on the corporate boards. The only divergent element is that the courts in SA can take into account the provisions of the King IV report in determination of corporations compliance with principles of equality and inclusivity. This is an element that Kenya can borrow and the *mwongozo* can be used as a reference guide in courts.

Quotas increase the number of women on boards and this acknowledges that achieving gender equality is not merely an abstract concept. Women representation in Norway improved when the sanction for mandatory compliance was introduced, this is an illustration that through the law societal practices that have discriminated against women can be eradicated without much resistance. Several countries have emulated Norway and Kenya should definitely draw a few lessons as will be captured in the next chapter under recommendations.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

This chapter presents the discussion of findings, recommendations and conclusions derived from the findings of the study.

5.0 Conclusion

The study's specific objectives set out to examine the legal provisions on gender parity in public corporate boards of management in Kenya; examine the current status of women representation in the public boards and factors that contribute to gender disparity and finally to examine the best practices and lessons that can be drawn from Norway and South Africa in order to attain gender parity on public boards.

Legal provisions on gender parity on corporate boards

The study identified that the country has very well formulated laws on gender equality that applies to the corporate boards as well. The implementation of the laws can also not be faulted as the recent statistics did confirm that the constitutional requirement of one-third being of the same gender in composition of the boards was met.

Current status of women representation and factors that contribute to gender disparity

The current status was reflective of the gender disparities on the boards thus prompting an analysis as to the factors such as stereotypes, misconceptions and biased hiring and promotion practices that contribute to the disparities. These factors have been found to be an impediment in the attainment of increased female representation on the corporate boards.

Best Practices from Norway and South Africa

In borrowing good practice from Norway, the study examined the gender quota law in Norway that made it mandatory for women to be represented on the boards and non-adherence would result in dissolution of the corporations. The study observed that the quota increased the number of board members and all corporations adhered with the provisions of the law.

For South Africa, the provisions of the laws are similar to Kenya. It is goodwill from the corporations that result in gender diverse boards, and not mandatory quotas as the case of Norway.

5.1 Recommendations

The study advances the following recommendations:

Legal provisions on gender parity on corporate boards

Kenya already has the one-third gender rule enshrined in its Constitution and its implementation in the recent report of 2021 shows that its threshold has been met. However, to ensure that there will not be a negative slip, the National Assembly needs to enact a law to actualize the rule. The purpose of the law will be to ensure that women are accorded positions on the corporate boards.

Current status of women representation and factors that contribute to gender disparity

Gender disparities still exist on corporate boards and to address the factors that contribute to the same, the corporations need to consider the following:

a. Gender and Sexual Harassment Prevention Policies

The corporations should have gender policies that will in part capture provisions of the laws on gender equality and those against harassment and every person should be aware of them.

Consequences of sexual harassment as per the existing laws should also be made clear and procedure that the corporation will take when a complaint is made should be clear on the policy.

b. Workshops to unlearning stereotypes and misconceptions

Education is an important tool of unlearning most misconceptions and discriminatory practices. Workshops on a regular basis to discuss and reinforce the importance of equality will ensure that eradication of long held beliefs of inadequacy of women. Corporations should constantly hold workshops to evaluate and in the process learn the positives of diversity.

c. Flexible working schedule

There should be a balance between professional work and personal life. Research has shown that women would rather opt out of the corporate positions to focus on their family lives because of the late hours of work and demanding working hours that do not favour them. For the most part, women are heaped with the responsibility of caregiving in their homes and they should be afforded the opportunity to balance their family life with their work. Flexible working schedules should thus be adapted to avoid them quitting their work for their families.

d. Fair Selection and Promotion Practices

Flowing from the unlearning of discriminatory practices, the hiring and promotion practices will need to factor in gender equality. This implies that the corporations will have in their employment practices, provisions of diversity bearing in mind the two third gender rule. Qualified women should be considered for positions that meet the selection criteria, they should also not be ignored in promotion opportunities.

Other than the corporations, the Ministry of Education can be engaged in helping to end some of the impediments to gender parity. The Ministry should monitor compliance of the education equality laws. The girl child should be in school in the same way as the boy child, thus compliance as to this should be ensured. While the efforts of the ministry of education in ensuring that every student transitions to the next level are welcomed,[137] more needs to be done to ensure that all girls transition from primary level to secondary and tertiary institutions. Education of the girl child will ensure that women have qualifications to qualify for board positions just as men.

Best Practices from Norway and South Africa

The gender rule is known, laws and the codes have urged the companies to ensure diversity on their boards. Rather than await sanctions and threats of dissolution to prompt compliance, the companies should voluntarily comply with the law. The known advantages of having women on boards are easily deduced and the companies should embrace them and comply. This is the same position as is in South Africa.

Should the voluntary compliance fail then sanctions should be imposed on corporations that fail to adhere to the two-third gender rule in composition of its corporate board members. For efficiency, a law will need to be enacted that will issue these sanctions as is the case in Norway. Norway's penalty of dissolution of non-compliant corporations should be adopted as it is the most effective. Fines should also be imposed with dissolution being the last resort option. As of mid-

[137] Harold Odhiambo, 'Push to achieve 100 percent transition bearing fruit, says CS Magoha' *The Standard*, (26 August 2021, <https://www.standardmedia.co.ke/education/article/2001421776/push-to-achieve-100-per-cent-transition-bearing-fruit-says-cs-magoha> accessed 28 August 2021.

2008, all listed companies in Norway had complied with the law, the same can be possible in Kenya so long as the sanctions are well imposed.

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