

**THE ROLE OF LAW IN PROMOTING EFFICIENT AND EFFECTIVE CORPORATE
GOVERNANCE PRACTICES IN KENYAN STATE CORPORATIONS**

**A Thesis submitted in partial fulfillment of the requirements
For the award of degree of Master of laws (LLM) of the University of Nairobi**

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DECLARATION

I, **JANEFRANCES MUTIO MUTISYA** do hereby declare that, this thesis is my original research and all sources used are cited. I further certify that the work has not been submitted for a degree in any other university.

Signed J. Mutio Mutisya
JANEFRANCES MUTIO MUTISYA

Date 6/10/2016

This thesis has been submitted for examination with my knowledge and approval as the university supervisor.

Signed Albert Mumma
PROFESSOR ALBERT MUMMA

Date 12-10-2016

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I wish to take this opportunity to thank the Lord for having brought me this far. May glory and praise be unto him.

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To you all, may God bless you abundantly.

DEDICATION

To my dear husband Ibrahim and children: Gloria and Emmanuela for whom without their love and understanding I would not have gone this far.

To my parents, for their prayers, encouragement, and continued support.

LIST OF ABBREVIATIONS

- CDG – Centre for Corporate Development
- ECSAFA - Eastern, Central and South African Federation of Accountants
- GBEs - Government Business Enterprises.
- OECD - Organization for Economic Corporation and Development
- SCAC – State Corporations Advisory Committee
- UK - United Kingdom
- LSKJ – Law Society of Kenya Journal.
- SOE - State Owned Entity.

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CHAPTER 1

1.0 Introduction

“Corporate Governance relates to the internal means by which corporations are operated and controlled.”¹ The distribution of rights amongst different stakeholders such as the board of directors, managers, shareholders, creditors, auditors, regulators is identified through governance structures of corporations.² Governance structures of corporations also stipulate the rules and procedures of a particular organization.³ It has been proved that, the success of a country’s corporate governance system is determined by a country’s legal system.⁴ Research has proved that countries with strong efficient legal systems are likely to attain good corporate governance practices.⁵

Law provides the legal framework for procedural governance in corporations.⁶ The legal framework for procedural governance of corporations is expected to ensure that, institutions are governed efficiently and effectively.⁷ To foster quality governance systems, laws must be effective and efficient.⁸ Recommendations have been made to the effect that, in formulating policies, the governance rules and policies to be adopted by a particular organization must fit its particular needs.⁹ Organizations are, therefore, advised to adopt the use of the most efficient framework for their long term strategies.¹⁰ It is opined that such framework will assist organizations in adjusting easily to uncertainties, encourage investment, innovation and

¹Organization for Economic Co-Operation and Development, (2004) Principles of Corporate Governance, <http://www.oecd.org/dataoecd/32/18/31557724.pdf><Accesed on 14th January 2015>

² *ibid.*

³ R. la Porta, F. Lopez-de-Silanes and R.W.Vishny, “Legal Determinants of External Finance, (1999)52(3), Journal of Finance at p. 1131.

⁴ *ibid.*

⁵ *ibid.*

⁶ *ibid.*

⁷ Stephen Bloomfield, *Theory and Practice of Corporate Governance, An Integrated Approach* (Cambridge University Press 2013) at p. 85

⁸ *ibid.*

⁹ *ibid.*

¹⁰ *ibid.*

entrepreneurship.¹¹ The dimensions of corporate governance are procedural, administrative or behavioral.¹² These different corporate governance dimensions affect both shareholders and stakeholders.¹³ Procedural governance largely affects shareholders while behavioral dimension affects both.¹⁴ Procedural governance is a legal requirement and is provided for under statutes such as the State Corporations Act,¹⁵ the Companies Act,¹⁶ or associated subordinate legislation.¹⁷ Behavioral aspects are concerned with generally accepted control systems which go beyond the legal structures established by the law.¹⁸ They deal with the use of appropriate monitoring mechanisms such as board committees, nomination of directors, remuneration of directors, audit and oversight, the powers and duties of non-executives directors, stakeholder involvement and stewardship.¹⁹ "Regulation for the purposes of corporate governance, is the increased control over a firm by the State, for instance the State through a statute may prescribe a particular board structure for an organization."²⁰ Legal framework therefore determines the kind of corporate governance structure of corporations.²¹

Against this background, this study will examine the existing legal framework on selection and appointment, roles and responsibilities of the board of directors and the government oversight functions in State Corporations. It will further examine how governance challenges such as incompetence of directors, conflict of interest, lack of autonomy of directors and excessive regulation arising from the government's exercise of its oversight roles in corporate governance of State Corporations affect the attainment of efficient and effective corporate governance practices. Finally, it will suggest possible recommendations on the existing law, all aimed at addressing the challenge of inefficiency and ineffectiveness in corporate governance of State Corporations.

¹¹ La Porta, Lopez & Vishny, Supra note 3.

¹² Stephen, Supra note 7.

¹³ *ibid.*

¹⁴ *ibid.*

¹⁵ *ibid.*

¹⁶ Companies Act Cap 486.

¹⁷ Stephen, Supra note 7.

¹⁸ *ibid.*

¹⁹ *ibid.*

²⁰ Morrison, J, "Legislating for Good Corporate Governance: 'Do We Expect Too Much?'"(2004)15, Journal of Corporate Citizenship at p. 123.

²¹ *ibid.*

1.1 Background of the Study

Corporate governance of State Corporations in Kenya is a commonly discussed topic.²² This is because of the crucial role they play in a country's economy.²³ They are expected to promote economic growth, facilitate and promote national development, improve public services delivery and create employment opportunities for a country's citizens.²⁴

Studies carried on the performance of State Corporations have shown that, majority of them have not actualized the expected roles resulting in poor performances.²⁵ Inefficient and ineffective corporate governance practices in such corporations have been cited as major reasons that contribute to poor performances.²⁶ Conflict of interest, lack of autonomy, incompetence of directors and excessive government regulation arising from government's exercise of its oversight roles in corporate governance of State Corporations have been identified as the major challenges to the attainment of efficient and effective corporate governance practices in State Corporations.²⁷ The failure of majority of State Corporations to actualize the expected roles has necessitated the constitution of various committees and taskforces to investigate reasons for such poor performances.²⁸ A recent taskforce²⁹ observed that the major challenge in corporate governance of the State Corporations in Kenya exists in the existing legislation.³⁰ The taskforce³¹ observed that the existing legislation establishes many oversight and regulatory institutions that create multiple and sometimes unclear reporting lines thereby creating significant ownership and oversight challenges.³² The many institutions established by the existing law, also pose a major challenge in directors accountability.³³ Attainment of an efficient and effective board in

²² The Presidential Taskforce Report on Parastatal Reforms (2013), www/cofec.co.ke/Report%20of%20The%20Task%20force%20on%20Parastatal%20Reforms.pdf. Reforms.pdf, Accessed on 23rd January 2015.

²³ *ibid.*

²⁴ *ibid.*

²⁵ *ibid.*

²⁶ *ibid.*

²⁷ Kiarie Mwaura, "The Failure of Corporate Governance in State Owned Enterprises and the Need for Restructured Governance in Fully and Partially Privatized Enterprises: 'The Case of Kenya,'" (2007) 31(1) *Fordham International Law Journal* 34 at. p 49-57

²⁸ Presidential Taskforce Report, *Supra* note 22.

²⁹ *ibid.*

³⁰ *ibid.*

³¹ *ibid.*

³² *ibid.*

³³ *ibid.*

such circumstances are challenged.³⁴ The inability of weak and inefficient boards in State Corporations, to enforce good corporate governance practices, leads to lack strategic direction.³⁵ The situation is further aggravated by director's lack of expertise and skills required in the formulation of policies.³⁶ Enforcement of various provisions of law also creates conflict of interest and lack of autonomy of State Corporations directors.³⁷ In conclusion, the taskforces have faulted the provisions of the law as stipulated in the governing statutes, particularly the State Corporations Act,³⁸ as a major challenge to the attainment of efficient and effective corporate governance practices.

Kenya expects to actualize majority of vision 2030 targets, through efficient and effective operations of State Corporations.³⁹ The actualization strategy calls for a review of the existing law on governance of State Corporations, with a view to attaining efficient and effective corporate governance practices. This necessitates a review of the law in this aspect.

1.2 Statement of the Problem

State Corporations are viewed as inefficient and ineffective entities, totally incapable of accelerating economic growth, facilitating and promoting national development, improving public services delivery and providing employment opportunities as expected of them.⁴⁰ Due to such inefficiencies the performance of State Corporations in Kenya has fallen below the expected corporate governance practices.⁴¹ Passive boards resulting from incompetence of directors, excessive regulation arising from the government's exercise of its oversight roles in State Corporations, lack of autonomy, excessive political interference and conflict of interest of directors, have been cited as the major reasons that foster inefficiency in State Corporations.⁴²

It has been argued that, the failure of the existing law to stipulate an elaborate, structured procedure or criteria for the selection and appointment of directors in State Corporations boards

³⁴ Presidential Report, Supra note 22.

³⁵ *ibid.*

³⁶ *ibid.*

³⁷ *ibid.*

³⁸ *ibid.*

³⁹ *ibid.*

⁴⁰ *ibid.*

⁴¹ *ibid.*

⁴² Kiarie, 34 at p.40, supra note 27.

has enabled Cabinet Secretaries to appoint their political allies, relatives of former politicians or their own relatives to State Corporations boards as directors.⁴³ Research has proven that such directors are often lacking in terms of expertise and skills required in formulating policies thereby affecting the attainment of efficient and effective corporate governance practices adversely.⁴⁴

Secondly, the provisions of the law requiring directors in State Corporations to consult and obtain approvals of the State Corporations Advisory Committee, the Cabinet Secretaries of the Parent Ministries and the Treasury, before the determination of a State Corporations staff establishment, recruitment of Chief Executive Officers and Senior Managers creates conflict of interest between those of State Corporations directors, the appointing authority who are Cabinet Secretaries and of the organizations thereby impairing their ability to make sound and efficient decisions.⁴⁵ The requirement also compromises the autonomy, and independence of State Corporations directors.⁴⁶

Lastly the legal framework, on corporate governance of State Corporations establishes many oversight institutions with similar or conflicting roles.⁴⁷ Compliance with directives and requirements of the oversight agencies create, significant functional overlaps, consequently affecting the attainment of efficient and effective corporate governance practices.⁴⁸

Since 1980, more than 40 (forty) State Corporations, where Kenyan government has shares and control have been placed under receivership.⁴⁹ These depressing performances have discouraged

⁴³ Austin Ouko, "Appointment of Parastatal Directors and Chief Executive Officers Amidst Perceived Judicial Activism" (2013) 9(2), LSKJ 37 at p.51

⁴⁴ *ibid.*

⁴⁵ *ibid.*

⁴⁶ *ibid.*

⁴⁷ Presidential Report, *Supra* note 22.

⁴⁸ *ibid.*

⁴⁹ Centre for Governance and Development (CDG), "A Decade of Parastatal Waste"

'A study of the Audited Accounts of State Corporations Over the Period from 1993 to 2002.'

[http://www.cgd.or.ke/publications.asp? Title=&formost=1&documenttypeid=Year=2005&languageid=<](http://www.cgd.or.ke/publications.asp?Title=&formost=1&documenttypeid=Year=2005&languageid=<) accessed on 23rd February 2015.

investors and donors from investing in State Corporations for fear of not achieving returns for their investments.⁵⁰ The need to address these glaring anomalies in law necessitates this study.

1.3 Conceptual /Theoretical Framework

State Corporations are distinct legal entities, set up by Acts of Parliament with all powers and privileges of a natural person.⁵¹ The governance of State Corporations is vested on the board of directors appointed by the President and the Cabinet Secretaries.⁵² They are established as statutory corporations under the State Corporations Act⁵³ or companies under the Companies Act and scrutinized by the Parliament through the Parent Ministries.⁵⁴ The powers of State Corporations emanates from the State Corporations Act⁵⁵ and other enabling legislations.⁵⁶ Their powers are however limited by Presidential or Ministerial directives.⁵⁷ State Corporations are established by the government for the purposes of either meeting commercial and social goals.⁵⁸ In other instances they are established to correct market failure, for instance where the services to be provided by a State Corporation are not provided by private investors.⁵⁹ State Corporations are funded with government taxes meaning that, the government owns or controls majority of shares or stock therein on behalf of its citizenry.⁶⁰

Corporate governance has been defined, as “the embodying process and systems by which corporate entities are directed, controlled and held to account. It refers to the manner in which the power of a company/corporation is exercised in the stewardship of the company’s total portfolio of assets and resources with the objectives of satisfying the stakeholder’s expectations.”⁶¹

⁵⁰ Governance Report, Supra note 49.

⁵¹ Kiarie, 34 at p.47, Supra note 27.

⁵² Guidelines on the Good Governance of Parastatal Organizations, “An ECSAFA perspective,” (August 2004) – docslide.us/documents/guidelines-on-the-good-governance-of-parastatal-organizations.html. Accessed on 24th February 2015.

⁵³ State Corporations Act 2012.

⁵⁴ Yvonne Awuor Otieno, “Corporate Governance Problems Facing Kenyan Parastatals ‘A Case Study of the Sugar Industry’” (July 2009) Bucerius Law School, 1 at p 11.

⁵⁵ Act, Supra note 53.

⁵⁶ Kiarie, 34 at p.47, Supra note 27.

⁵⁷ Act, Section 7, Supra note 53.

⁵⁸ Ouko, Supra note 43.

⁵⁹ *ibid.*

⁶⁰ Guidelines, Supra note 52.

⁶¹ Governance report, Supra note 49.

Corporate governance “is the means by which an organization is directed, controlled and held to account.”⁶² “Corporate governance encompasses the authority, accountability, stewardship, leadership, direction and control exercised in corporations.”⁶³ State Corporations are established and funded with government taxes; meaning that the real investors or owners of State Corporations are a country’s citizens.⁶⁴ State Corporations, therefore, need to be managed taking into consideration the interests of a country’s citizens.⁶⁵

Law is defined as “a command of unlimited sovereign.”⁶⁶ According to this definition laws are coercive orders that impose duties and obligations on individuals.⁶⁷ Law is also defined “as a system of social rules and rules are social because they regulate the conduct of members of societies and are derived from human practices.”⁶⁸ According to Hart, there are primary rules that impose duties or obligations on individuals for example the rules of criminal law or the law of tort and secondary rules which can be divided into three types i.e. rules of adjudication, rules of change and rules of recognition.⁶⁹ Rule of recognition is a set of criteria by which officials determine which rules are not parts of a legal system.⁷⁰ The standards applied are referred to as justifications for the actions of officials though to some extent, the standards are also created by those actions.⁷¹ Rules of change stipulate who can change or alter existing rules.⁷² Rules of adjudication define the procedures to resolve disputes.⁷³ Laws must be easily understandable, enforceable, not contradictory, and require a conduct beyond abilities of those affected to be regarded as efficient and effective.⁷⁴

⁶² Guidelines, Supra note 52.

⁶³ *ibid.*

⁶⁴ *ibid.*

⁶⁵ *ibid.*

⁶⁶ Austin, J.L., “*The Province of Jurisprudence Determined* (W.E. Rumble.edn., Cambridge University Press, Cambridge, 1995) at p.1832

⁶⁷ *ibid.*

⁶⁸ Hart, H.L.A, *The Concept of Law* (Clarendon Press Oxford, 1961, 2nd edn, 1994, 3rd ed. Leslie Green, Joseph Raz and Penelope A Bullock ed. 2012) at p.82-86.

⁶⁹ *ibid.*

⁷⁰ *ibid.*

⁷¹ *ibid.*

⁷² *ibid.*

⁷³ *ibid.*

⁷⁴ Lon Fuller, *The morality of Law* (Yale University press New Haven 1969).

They should also remain relatively constant through time and there should be congruence between laws announced and laws applied.⁷⁵

The theory of the firm as expounded by Jensen and Meckling,⁷⁶ defines an agency relationship as “a contract under which one or more persons the principal, engage another person the agent, to perform some service on their behalf which involves delegating some decision making authority to the agent.”⁷⁷ The theory assumes that both parties are utility maximisers,⁷⁸ in that the agent is always unsure of whose interests to serve between his personal interests or those of the principal.⁷⁹ It therefore becomes necessary for the principal to monitor the agent to ensure that, he carries out his authority as required, in doing so, the principal incurs agency costs.⁸⁰ The agency theory assumes that managers are driven by self-interest and cannot be relied on to act in the best interests of shareholders.⁸¹ An effective and efficient system of corporate governance under the agency theory should be designed to minimize the agency problem by making the board of directors more effective at monitoring the decisions of the executive management and designing schemes of remuneration for directors and senior managers that align their interests with those of shareholders.⁸² Corporate governance of State Corporations in Kenya presents a typical scenario of the kind of agency-principal conflicts expounded by Jensen and Meckling.⁸³ Directors in State Corporations are always at conflict or unsure of whose interests to serve between those of the organization, their personal interests and those of the appointing authority.

This study argues that, the kind of legislation governing corporate governance of State Corporations should be designed to minimize the agency conflicts by making the board of directors more efficient and effective at monitoring the decisions of Executive Management and designing schemes of remuneration for directors and senior managers that align their interests

⁷⁵ Fuller, Supra note 74.

⁷⁶ Jensen & Meckling, “Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure (1976) 3(4), *Journal of Financial Economics* 305 at p.360

⁷⁷ *ibid.*

⁷⁸ Utility maximization is an economics concept which states that when making a purchase decision, a consumer attempts to get the greatest value possible from the expenditure of least amount of money. The consumer objective is to maximize the total value derived from available money.

⁷⁹ *ibid.*

⁸⁰ Jensen & Meckling, Supra note 76.

⁸¹ *ibid.*

⁸² *ibid.*

⁸³ *ibid.*

with those of shareholders.⁸⁴ Again the agency- principal relationship requires delegation of a certain amount of authority and powers to the agent to undertake certain acts on behalf of the principal and the principal is required to ratify those acts as if he is the one who has done them. The government as the major shareholder of State Corporations should therefore consider delegating a considerable amount of authority to directors and senior managers in corporate governance of State Corporations. The legislation on corporate governance should aim at granting State Corporations boards a considerable amount of power and authority to undertake their duties without necessarily seeking or obtaining approvals from other government agencies.

The social institutional theory of legislation in corporate governance views a company as a living institution which forms part of the broader society.⁸⁵ Corporate governance is hence relationship oriented, rather than market based.⁸⁶ This model of corporate governance is widely accepted in Japan and Germany where historical and cultural factors are acknowledged to be significant.⁸⁷ The regulatory response under the social institutional approach is usually to come up with two tier board as is the case with Germany.⁸⁸ Adopting a two tier board promotes a stakeholder approach by having employees representatives on the supervisory board.⁸⁹ The social institution approach advantages include the fostering of trust and shared goals; it also places emphasis on co-operation through unity of goals.⁹⁰ It has also been seen as promoting stability and long term strategies.⁹¹

The principle of corporate legitimacy seems to be in agreement with the social institution theory, according to this principle a corporation should be managed for the benefit of its stakeholders, its customers, suppliers, owners, employees and local communities.⁹² The rights of these groups are expected and must participate in some sense in decisions that affects their welfare.⁹³ “The corporation being a social institution and deriving its workforce, profits and other benefits from

⁸⁴ Jensen & Meckling, Supra note 76.

⁸⁵ Morrison, Supra note 20.

⁸⁶ *ibid.*

⁸⁷ *ibid.*

⁸⁸ *ibid.*

⁸⁹ *ibid.*

⁹⁰ Morrison, Supra note 20.

⁹¹ *ibid.*

⁹² Stephen, Supra note 7.

⁹³ *ibid.*

the society must be made socially responsible to the society in general and more particularly to the affected units in the society.”⁹⁴ “It must therefore be made to act and be seen to act in a manner that is in conformity with the social character.”⁹⁵

Thus while enacting legislation on corporate governance of State Corporations; care should be exercised to ensure that directors are able to balance well the interests of stakeholders, customers, suppliers, employees and local communities while discharging their duties.⁹⁶ At the same time directors are expected to formulate policies and strategies taking into consideration the interests of the organization, its relationship with various stakeholders and ensure its sustainability for the benefit of various stakeholders.⁹⁷ Directors therefore need to be in possession of the necessary skills and expertise required in the formulation of policies in corporate governance of State Corporations to undertake these functions. A competent board in the circumstances becomes a necessity.

1.4 Literature Review

This research will review works done by other researchers on similar subject with an aim of setting a benchmark on my study.

A report by the Center for Corporate Governance⁹⁸ highlights major governance challenges and failures in Kenyan State Corporations. It concludes that, the attainment of efficient and effective corporate governance practices in Kenyan State Corporations has been greatly hampered by law and excessive political interference.⁹⁹ It observes that, the excessive powers vested on the President under the State Corporations Act¹⁰⁰ in the appointment of the Chairmen of boards, appointment and revocation of State Corporations director’s appointments and boards, as a way

⁹⁴ The basis of this approach is the writings of philosophical thinkers like Roseau, Hobbes, Locke and Kant on their writings on The Theory of Social Contract.

⁹⁵ *ibid.*

⁹⁶ Morrison, *Supra* note 20.

⁹⁷ *ibid.*

⁹⁸ Governance Report, *Supra* note 49.

⁹⁹ *ibid.*

¹⁰⁰ *ibid.*

of granting him absolute powers in corporate governance of State Corporations.¹⁰¹ The report finds the supervisory mechanisms of corporate governance in State Corporations not strong enough to foster efficient and effective corporate governance practices.¹⁰² The participation of the Parent Ministry through a representative of the Principal Secretary compromises, his ability to supervise and criticize decisions in State Corporations due to his participation in the decision making process.¹⁰³ It recognizes the need of a structured, skilled based board selection processes and regular evaluation of board performance.¹⁰⁴ This report will provide useful information in respect of governance challenges faced by State Corporations in Kenya in the recent past.

The Guidelines on the Good Governance of Parastatal Organizations an Eastern, Central and South African Federation of Accountants (ECSAFA)¹⁰⁵ perspective observes that, “ the overall governance framework, the roles of Parliament, Ministries or other oversight bodies of State Corporations in Kenya often overlap.”¹⁰⁶ They recognize the need for a legal framework that clearly defines the roles and responsibilities of various government oversight bodies.¹⁰⁷ According to these guidelines “Clarity of roles and responsibilities is essential.”¹⁰⁸ The guidelines further recommend the enactment of an appropriate legal framework which clearly defines the roles of governing bodies, the Chief Executive officers, and other related legal framework of authorities and their responsibilities at each level of corporate governance.¹⁰⁹ They further provide that an “effective framework would provide solutions to governance challenges such as inefficiency in State Corporations, by providing a common consistent environment and practice in all State Corporations.”¹¹⁰ Study of these guidelines will be helpful in appreciating the governance challenges arising from the existing legislation on corporate governance of State Corporations.

¹⁰¹ Governance Report, Supra note 49.

¹⁰² *ibid.*

¹⁰³ *ibid.*

¹⁰⁴ Guidelines, Supra note 52

¹⁰⁵ *ibid.*

¹⁰⁶ *ibid.*

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid.*

¹⁰⁹ *ibid.*

¹¹⁰ *ibid.*

The State Corporation's Performance Contracting Regulations¹¹¹ stipulate the director's roles and responsibilities in State Corporations boards, the responsibilities of the Parent Ministry, the State Corporations Advisory Committee and the Inspector General of State Corporations in corporate governance of State Corporations.¹¹² These regulations will create an in-depth understanding of the expected roles of each government agency established under the rules.

The OECD Guidelines on Corporate Governance 2005¹¹³ defines various legal forms and frameworks that are expected to be adopted while legislating for corporate governance of State Owned Enterprises. The guidelines set out elaborate procedures and suggestions that have been adopted by governments in other jurisdictions to improve and modernize their legal framework on corporate governance of State Owned Enterprises.¹¹⁴ The guidelines further observe that "the legal and regulatory framework on which State Owned Enterprises operate is often complex, inconsistent, and incoherent."¹¹⁵ State Corporations are therefore unable to apply the provisions of the law effectively and efficiently.¹¹⁶ These guidelines will be useful in providing an understanding on the major weaknesses and challenges in the existing legislation and suggesting an appropriate governance framework for use in corporate governance of State Corporations.

An OECD Comparative Report on Corporate Governance of State Owned Enterprises¹¹⁷ provides a comparative analysis of corporate governance practices in State Owned Enterprises in other jurisdictions. This report will be useful to this study in providing an understanding of corporate governance practices in State Owned Enterprises in other jurisdictions.

Kiarie Mwaura¹¹⁸ attributes inefficient and ineffective corporate governance practices in Kenyan State Corporations to failure to measure performance by profitability.¹¹⁹ He cites lack of incentives as the major reason that foster inefficient and ineffective corporate governance

¹¹¹ State Corporations Performance Contracting Regulations (2004).

¹¹² Regulations, Supra note 111.

¹¹³ OECD principles, Supra note 1.

¹¹⁴ *ibid.*

¹¹⁵ *ibid.*

¹¹⁶ *ibid.*

¹¹⁷ OECD Comparative Report on Corporate Governance of State Owned Enterprises (2004)

<http://www.oecde.org/dataoecd/32/18/31557724.pdf>< Accessed on 25th February 2015>

¹¹⁸ Kiarie, 34 at.p.43-74, Supra note 27.

¹¹⁹ *ibid.*

practices in Kenyan State Corporations.¹²⁰ He further attributes the poor performance of State Corporations to conflict of interests arising from the Principal- Agency relationship between directors of State Corporations, voters and appointing authorities, that is, the Cabinet Secretaries and the President.¹²¹ He observes that, the Principal-Agency relationship requires State Corporations directors to satisfy the appointing authority's interests alongside those of the electorate.¹²² His considered view is that the challenges faced by directors in State Corporation boards of satisfying the appointing authority's interests, emanate from the State Corporations boards' selection and appointment processes.¹²³ He observes that, the appointment of directors to State Corporations boards by the Cabinet Secretaries politicizes such appointments.¹²⁴ He posits that, such appointment leaves directors with no choice, other than to act in furtherance of the appointing authority's interests and the electorate to preserve their appointments.¹²⁵ Satisfaction of such interests according to him creates conflict of interest between the interests of the organization, the directors, different constituents or stakeholders and those of the appointing authority.¹²⁶ His considered view is that such conflict of interests impairs the director's ability in discharging their duties.¹²⁷ Kiarie Mwaura views the many conflicting and sometimes overlapping regulations as a major challenge to the attainment of efficient and effective corporate governance practices in Kenyan State Corporations.¹²⁸ He argues that, the multiple and sometimes conflicting laws coupled with political appointments pose a major challenge to the accountability of directors.¹²⁹ His considered view is that the manner of appointment of State Corporations directors compromises their integrity and impartiality, thereby affecting the attainment of efficient and effective corporate governance practices in Kenyan State Corporations adversely.¹³⁰ The streamlining of the many overlapping regulations would be the only way to the attainment of autonomy in Kenyan State Corporations, such autonomy according to him will enable State Corporations in meeting their performance targets thereby establishing

¹²⁰ Kiarie, Supra note 27.

¹²¹ *ibid.*

¹²² *ibid.*

¹²³ *ibid.*

¹²⁴ *ibid.*

¹²⁵ *ibid.*

¹²⁶ *ibid.*

¹²⁷ *ibid.*

¹²⁸ *ibid.*

¹²⁹ *ibid.*

¹³⁰ *ibid.*

efficient and effective organizations.¹³¹ He proposes that, governments should desist from involving themselves in day to day running of State Corporations by granting them full operational autonomy.¹³² This paper will be useful to this study in providing an understanding of various corporate governance challenges arising from the provisions of the existing legal framework on corporate governance of Kenyan State Corporations.

Ouko¹³³ observes that whereas the State Corporations Act¹³⁴ and the Performance Contracting Regulations¹³⁵ mandate the board of directors to appoint the Chief Executive Officers in Kenyan State Corporations, it however fails to prescribe the procedure for such appointments.¹³⁶ According to him the solution provided under Section 5(3) of the State Corporations Act¹³⁷ that “the staff in State Corporations including the Chief Executive Officers shall be recruited by the corporation on such terms and conditions of service as the Cabinet Secretaries in consultation with State Corporations Advisory Committee may approve”¹³⁸ pose a major challenge to the attainment of efficient and effective corporate governance practices.¹³⁹ Ouko argues that, the provisions of this law have the overall effect of reducing the selection and appointment processes to a consultative process.¹⁴⁰ According to him the consultative process has allowed Cabinet Secretaries to interfere with the functioning of State Corporations consequently affecting the attainment of efficient corporate governance practices.¹⁴¹ He further argues that the consultative process creates opportunistic tendencies for Cabinet Secretaries to employ their relatives or political allies.¹⁴² He finds such appointees lacking in terms of skills and expertise required in undertaking their responsibilities which impairs their ability while discharging their work.¹⁴³ He recognizes the need of a structured, skilled based transparent process in the appointment of State

¹³¹ Kiarie, Supra note 27.

¹³² *ibid.*

¹³³ Ouko, Supra note 43.

¹³⁴ Act, Supra note 53.

¹³⁵ Regulations, Supra note 111.

¹³⁶ Ouko, Supra note 43.

¹³⁶ *ibid.*

¹³⁷ Act, Supra note 53.

¹³⁸ *ibid.*, Section 5(3).

¹³⁹ Ouko, Supra note 43.

¹⁴⁰ *ibid.*

¹⁴¹ *ibid.*

¹⁴² *ibid.*

¹⁴³ *ibid.*

Corporations boards.¹⁴⁴ His considered view is that, such nomination process will ensure that directors act in furtherance of State Corporations interests.¹⁴⁵ This paper will be useful to this study in creating an in depth understanding of how the law on director's roles and responsibilities in State Corporations boards affect the attainment of efficient and effective corporate governance practices.

A Presidential Taskforce Report on Parastatal reforms¹⁴⁶ identifies burning issues with the existing legislation on governance of State Corporations in Kenya. The absence of single law and the adverse effects of compliance with the existing, sometimes conflicting and multiple legislations are major deficiencies identified in this law.¹⁴⁷ According to the provisions of this report, the multiple and sometimes conflicting laws establish an institutional framework with many actors.¹⁴⁸ State Corporations are therefore required to report, take directions and act on directions issued by the many agencies established by law.¹⁴⁹ The reporting requirements to multiple government agencies and actors create a major challenge in director's accountability, in that they are often confused about their responsibilities in State Corporations.¹⁵⁰ The report also recognizes the need of a well-defined legal framework to aid in the attainment of viability, efficiency and effectiveness in State Corporations in Kenya.¹⁵¹ This report will be useful to this study, in creating an in-depth understanding of the corporate governance challenges arising from the existing legislation.

The Mwongozo Code of Governance for State Corporations¹⁵² provides an elaborate policy on corporate governance of State Corporations.¹⁵³ The code recognizes the need of an effective and efficient board, it provides that "the board of any State Corporation must comprise of competent,

¹⁴⁴ Ouko, Supra note 43.

¹⁴⁵ *ibid.*

¹⁴⁶ Presidential Report, Supra note 22.

¹⁴⁷ *ibid.*

¹⁴⁸ *ibid.*

¹⁴⁹ *ibid.*

¹⁵⁰ *ibid.*

¹⁵¹ *ibid.*

¹⁵² Mwongozo "The Code of Governance for State Corporations" (2015) <http://www.icdc.co.ke/index.php/about-us/Publications/Mwongozo-Code-of-governance/file>. Accessed on 22nd February 2015.

¹⁵³ *ibid.*

diverse, qualified members capable of exercising independent and objective decisions.”¹⁵⁴ It provides elaborate guidelines on the procedures and processes of board selections and appointments in State Corporations. It provides that “the board should be appointed through a transparent and formal process governed by the overriding principle of merit, should take into consideration the right mix of skills and competencies required for the achievement of the organizations long-term goals.”¹⁵⁵ The provisions of this code will be useful in providing understanding of the expected corporate governance practices in State Corporations.

The UK Code of Practice for Ministerial Appointments¹⁵⁶ provides that, appointments to the board should be governed by principle of merit, through independent scrutiny, taking into consideration the need for providing citizens with equal opportunities, ensuring that board members will be committed to principles of public service and perform their duties with integrity, principle of openness, transparency and proportionality.¹⁵⁷ The code vests the appointment of State Corporations directors to the Ministers.¹⁵⁸ A Report of the Auditor General of Canada¹⁵⁹ provides that competence and experience requirements must be specified while undertaking board selections and appointments.¹⁶⁰ The Governance Arrangements for Commonwealth Government Business Enterprises (GBEs)¹⁶¹ provides that the boards of directors should be composed of people with appropriate mix of skills, be appointed on basis of their individual capacity to contribute to the board and must have an appropriate balance of mix of skills.¹⁶² These codes will be useful to this study in providing an insight on global governance practices in government owned enterprises in other jurisdictions.

¹⁵⁴ Mwongozo, Supra note 152.

¹⁵⁵ Mwongozo, Section 1(1, 2&5), Supra note 152.

¹⁵⁶ The UK Code of Practice for Ministerial Appointments: The Code of Practice’s Principles, UK Government Office of the Commissioner for Public Appointments, (August 2005) <http://www.ocpa.gov.uk/pages/code.cfm>. Accessed on 27th March 2015.- As cited in OECD Comparative Report on Corporate Governance of State Owned Enterprises.(2005)

¹⁵⁷ *ibid.*

¹⁵⁸ *ibid.*

¹⁵⁹ Report of the Auditor General of Canada, Governance of Crown Corporation December (2000) 1 at. p. 18-20- As cited in OECD Comparative Report on Corporate Governance of State Owned Enterprises.(2005)

¹⁶⁰ *ibid.*

¹⁶¹ Governance Arrangements for Commonwealth GBEs, Australian Government, June 1997, Section 3.4, 1 at. p 8. -As cited in OECD Comparative Report on Corporate Governance of State Owned Enterprises.(2005)

¹⁶² *ibid.*

The study will also rely on relevant text books which discuss the topic under study notably, Theory and Practice of Corporate Governance,¹⁶³ and Corporate Governance Principles Policies and Practices.¹⁶⁴

The Government Owned Entities Bill¹⁶⁵ which is a bill seeking to review the State Corporations Act¹⁶⁶ will be useful to this study in providing a general overview of the proposed amendments to the State Corporations Act.¹⁶⁷

1.5 Objectives of the Study

The main objective of this study is to analyze how incompetence, conflict of interest, and lack of autonomy of State Corporations directors affect the attainment of efficient and effective corporate governance practices in Kenyan State Corporations. The study will also analyze how compliance with multiple, regulatory rules arising from the government's exercise of its various oversight functions in State Corporations affect the attainment of efficient and effective corporate governance practices.

The second objective will be to suggest possible areas of review in the existing legislation aimed at enhancing the attainment of efficient and effective corporate governance practices in Kenyan State Corporations.

1.6 Hypothesis

The researcher makes the following Hypothesis:

Incompetence, lack of autonomy, conflict of interests of directors in corporate governance of State Corporations and the adverse effects of compliance with multiple, inconsistent, duplicated legislation arising from the governments exercise of its various oversight functions in State Corporations are the major hurdles to the attainment of efficient and effective corporate governance practices in Kenyan State Corporations.

¹⁶³ Stephen, Supra note 7.

¹⁶⁴ Bob Tricker, *Corporate Governance Principles Policies and Practices* (Oxford University Press 2011) 300 at.

p 306

¹⁶⁵ Government Owned Entities Bill 2014.

¹⁶⁶ Act, Supra note 53.

¹⁶⁷ *ibid.*

Secondly the success and practice of good corporate governance practices in Kenyan State Corporations is largely influenced by the quality of legal framework governing such corporations.

1.7 Research Questions

This study will endeavor to answer the following questions

- (i) How does incompetence of directors in Kenyan State Corporation boards affect the attainment of efficient and effective corporate governance practices?
- (ii) How does conflict of interest and lack of autonomy of directors in Kenyan State Corporations affect the attainment of efficient and effective corporate governance practices?
- (iii) How does the adverse effects of compliance with multiple, unclear, overlapping regulations affect the attainment of efficient and effective corporate governance practices in Kenyan State Corporations?
- (iv) Is there need for review of the existing legislation?

1.8 Research Methodology

This research work is designed to be exploratory based on review of existing literature from various statutes, scholarly articles and available taskforce reports undertaken in relation to the topic under study. The provisions of various government circulars in relation to the subject under the study will be analyzed and reviewed. Corporate governance challenges arising out of challenges/gaps in the existing legislation on selection and appointment, roles and responsibilities of directors in State Corporations, adverse effects of compliance with multiple laws arising from the Government's exercise of its oversight role in corporate governance of

State Corporations will be cited. Review and use of various textbooks and judicial decisions in respect of the topic under study will also be employed in the study.

1.9 Justification of the Study

Kenya has set for itself ambitious but attainable targets under vision 2030 flagship projects.¹⁶⁸ Majority of these targets are to be actualized through efficient and effective operations of State Corporations. Studies undertaken on corporate governance of State Corporations have identified challenges resulting from deficiencies in the existing legal framework. Incompetence, lack of autonomy, conflict of interests of State Corporations directors, excessive political interference, and the adverse effects of compliance with multiple laws arising from the government's exercise of its oversight roles in State Corporations have been identified as the major challenges to the attainment of efficient and effective corporate governance practices. Considering that State Corporations are established to assist countries to attain social and economic goals, which goals can only be actualized through efficient and effective operations of State Corporations. The actualization strategy calls for a review of the existing legal framework geared towards the attainment of efficient and effective corporate governance practices. This necessitates this study.

1.10 Limitations

This research is basically desktop, based on review of existing Statutes, government circulars, scholarly material, judicial decisions and textbooks.

1.11 Chapter Breakdown

The study will be broken in various chapters. Each chapter will discuss different issues.

Chapter 1: Will be the introductory chapter it will discuss the background of the study, statement of the problem, theoretical and conceptual framework, research methodology, literature review, research objectives, research questions, hypothesis of the study, limitations of the study, justification of the study and the chapter breakdown of the study.

¹⁶⁸ Presidential Report, Supra note 22.

- Chapter 2: Will discuss the law on selection and appointment of State Corporation's directors with a view to understanding how incompetence of directors affect the attainment of efficient and effective corporate governance practices in State Corporations boards. Suggestions and recommendations on the provisions of the existing law will be made, all geared towards the attainment of efficient corporate governance practices.
- Chapter 3: Will discuss the law on director's roles and responsibilities in Kenyan State Corporations with particular reference to how conflict of interest and lack of autonomy arising from director's duties and responsibilities as provided by the existing legal framework affect the attainment of efficient and effective corporate governance practices and suggest possible areas of review in the law.
- Chapter 4: Will analyze the law in respect of government's oversight roles in State Corporations with a view to understanding how the adverse effects of compliance with multiple, unclear, overlapping, inconsistent regulations arising from government exercise of its oversight role in State Corporations affect the attainment of efficient and effective corporate governance practices. It will finally, suggest possible areas of review in the existing laws.
- Chapter 5: Will be the concluding chapter and will provide a general overview, conclusion, and recommendations on the topic under discussion.

CHAPTER 2

SELECTION AND APPOINTMENT OF STATE CORPORATIONS BOARDS

2.0 Introduction

The Board of Directors performs a crucial role in corporate governance of Kenyan State Corporations.¹⁶⁹ As the corporation's supreme executive body, it monitors and advises corporations, to ensure they act in furtherance of shareholders and stakeholders interests.¹⁷⁰ It formulates and implements policies, procedures and business strategy of an organization.¹⁷¹

The quality of a board's performance to a large extent depends on the capabilities and skills possessed by directors.¹⁷² This means that, the overall performance of the board will be determined and influenced by skills, experience and qualifications of individual directors.¹⁷³ Selection processes of the board of directors are therefore important in ensuring that directors possess the required skills to perform their duties efficiently and effectively.¹⁷⁴

An efficient and effective board is necessary in assisting organizations to achieve their strategic objectives.¹⁷⁵ The board must comprise of diverse and qualified members capable of exercising objective and independent judgment.¹⁷⁶ It needs to be accountable to shareholders by acting responsibly and taking into consideration various stakeholders interests while exercising its functions.¹⁷⁷

It is essential to ensure that the board of a corporation is efficient and effective considering its functions of policy framing and directing the operations of a corporate entity.¹⁷⁸ "It should be

¹⁶⁹ Bob, Supra note 164.

¹⁷⁰ Mahmud Ezzamel and Robert Wattson, *Wearing Two Hats: "The Conflicting Control and Management Roles of Non-Executive Directors, as cited in Kevin Kease, "Corporate Governance: Thompson and M.Wrighted. "Economic Management and financial issues,"* (Oxford University Press, 2nd. edn.2002)1 at p. 54-79.

¹⁷¹ Bob, Supra note 164.

¹⁷² ibid.

¹⁷³ ibid.

¹⁷⁴ ibid.

¹⁷⁵ Mwongozo, Supra note 152.

¹⁷⁶ ibid.

¹⁷⁷ ibid.

¹⁷⁸ Bob, Supra note 164.

large enough to ensure fruitful deliberations and include the necessary expertise required to meet its demanding work.’’¹⁷⁹ A limited size of the board is also necessary to ensure it does not foster indecision.¹⁸⁰ Board selections and appointments should therefore be done with utmost care to ensure it represents the interests of different stakeholders, promotes teamwork in the group, and all board members are able to fit and perform well in the group.¹⁸¹

Against this background, this chapter will cast a critical analysis of the law on selection and appointment of directors in State Corporation boards. An in depth analysis of the existing law will be done with a view to ascertaining whether it fosters incompetence of directors in State Corporations boards. The study will also suggest possible areas of review in the existing legislation all aimed at enhancing the attainment of efficient and effective corporate governance practices in State Corporations boards.

2.1 Constitution of State Corporations Boards

State Corporations boards are constituted in various ways. The first categories of boards are those that are constituted by the Cabinet Secretaries, they include boards that run educational institutions and development agencies.¹⁸² The second category include the boards appointed in line with the provisions of the memorandum and articles of a firm; they include State Corporations or companies in which government has a controlling stake such as the Kenya Commercial Bank and Agricultural Finance Corporation.¹⁸³ Lastly, there are those State Corporations boards which are appointed by stakeholders, including the responsible Parent Ministry; they include the boards of regulatory agencies such as the Electricity Regulatory Board.¹⁸⁴

A State Corporation board of directors consists of a non-executive Chairman appointed by the President, the Chief Executive Officer, the Permanent Secretary to the Parent Ministry, the Permanent Secretary to the Treasury and not more than eleven other members not being

¹⁷⁹ Bob, Supra note 164.

¹⁸⁰ *ibid.*

¹⁸¹ *ibid.*

¹⁸² Ouko, Supra note 43.

¹⁸³ *ibid.*

¹⁸⁴ *ibid.*

employees of the State Corporation, of whom not more than three shall be public officers appointed by the Cabinet Secretary.¹⁸⁵ This in effect means that the State Corporations Act¹⁸⁶ creates an institutional framework with actors such as the Permanent Secretary to the Treasury and a representative of the Parent Ministry in State Corporations boards.¹⁸⁷ Ideally the function of constitution of State Corporations boards is of the President and the Cabinet Secretary of the Parent Ministry of a particular State Corporation.

2.2 An Efficient/ Effective Board

Achieving the right mix of talent in State Corporations boards is critical for the attainment of efficient and effective corporate governance practices.¹⁸⁸ Good corporate governance practices recognize the need for a required mix of skills and talents in the board to enable it discharge its functions efficiently and effectively.¹⁸⁹ Appropriate mix means that the selected board should have the necessary mix of individuals, skills and personalities.¹⁹⁰ Factors such as balance of age groups, gender, geographical spread, and the rights of persons with disabilities, the youth, the interests of minorities, marginalized groups and ethnic balance are to be taken into consideration while undertaking board selections and appointments.¹⁹¹ This ensures diversity of skills and representation in the board.¹⁹² Appropriate combination of executive and non-executive director's particularly independent non-executive directors is also an essential factor to be taken into consideration.¹⁹³ It is meant to ensure that no group of directors dominate or influence the board in its decision making process.¹⁹⁴ The Mwongozo¹⁹⁵ recommends that a third of directors should be independent and should remain so during the entire period of their appointment.¹⁹⁶ Again the personalities appointed to the State Corporations boards should be able to work as a team in furtherance of a corporation's strategic objectives and policy formulation.¹⁹⁷

¹⁸⁵ Act, Section 6 (1), Supra note 53.

¹⁸⁶ *ibid.*

¹⁸⁷ Presidential Report, Supra note 22.

¹⁸⁸ Mwongozo, Supra note 152.

¹⁸⁹ *ibid.*

¹⁹⁰ *ibid.*

¹⁹¹ The Constitution of Kenya 2010, www.kenyalaw.org. Accessed on 20th April 2015.

¹⁹² UK Code, Supra note 156.

¹⁹³ *ibid.*

¹⁹⁴ *ibid.*

¹⁹⁵ Mwongozo, Supra note 152.

¹⁹⁶ *ibid.*

¹⁹⁷ Bob, Supra note 164.

While undertaking board selections care should be exercised to ensure that, the appointed directors exhibit the essential attributes and core competencies expected of them.¹⁹⁸ Integrity is one of the vital attributes to be taken into consideration.¹⁹⁹ Integrity means that, directors are expected to judge corporate behavior accordingly, are able to distinguish between good and right, the best interests of the corporation, to put the interests of the corporation above personal interests and possess the ability to declare conflict of interest whenever they arise.²⁰⁰ In a nutshell integrity means acting honestly and in furtherance of a corporation's goals and interests.²⁰¹ Directors are also required to demonstrate intellect, that is, one must be capable of exercising strategic, visionary, critical faculty and perspective reasoning.²⁰² Other attributes of a competent director include being independent minded, objective, impartial and knowledgeable of the business of the organization.²⁰³ Lastly, the person to be appointed as a director must demonstrate experience and knowledge of board processes, and possess the necessary expertise and skills required in undertaking board work.²⁰⁴ Experience in corporate governance means incremental acquisition of knowledge acquired through various work places exposure, exposure to board dynamics, experience in people management, financial literacy, be available to undertake the board's duties and must have knowledge of the interests of the organization.²⁰⁵ In conclusion, "a successful director looks ahead, anticipates problems and can articulate possible solutions. He or she is open, welcomes questioning and seeks feedback. But he or she also listens, tries to understand others point of view and seeks consensus. Overall he or she is reliable and trusted by his or her chairman and own peers."²⁰⁶

The Mwongozo²⁰⁷ sets out elaborate criteria for the appointment and composition of State Corporations boards. Under the Code²⁰⁸ "appointments to State Corporations boards shall be

¹⁹⁸ Bob, Supra note 164.

¹⁹⁹ *ibid.*

²⁰⁰ *ibid.*

²⁰¹ *ibid.*

²⁰² *ibid.*

²⁰³ *ibid.*

²⁰⁴ *ibid.*

²⁰⁵ *ibid.*

²⁰⁶ *ibid.*

²⁰⁷ Mwongozo, Supra note 152.

²⁰⁸ *ibid.*

done in line with Article 27 of the Constitution of Kenya²⁰⁹ that is, the board should be appointed through a transparent, formal process, governed by the overriding principle of merit, and should take into consideration the right mix of skills and competencies required for the achievement of an organizations long-term goals.”²¹⁰

The provisions of the code further stipulate that, board members of State Corporations shall be appointed by the Cabinet Secretary of the Parent Ministry and shall at minimum possess the qualifications, skills and relevant experience set out in attachment 1. The requirements stipulated in attachment 1 of Mwongozo²¹¹ provide that one, must “hold a degree in relevant field from a university recognized in Kenya, have proven business management or other professional experience, has served in a position of senior management for at least six years, has not served in the same entity as an employee in the preceding five years, meets the requirements of chapter six of the Constitution of Kenya²¹² and the requirements of the fit and proper test.”²¹³ Each board member shall be formally appointed through a Gazette Notice and thereafter by issue of an appointment letter.²¹⁴ The board member is expected to sign the letter of appointment and return the same to the appointing authority to signify his acceptance after conducting due diligence.²¹⁵

One must meet the requirements of Chapter six of the Constitution to qualify for appointment as a director in Kenyan State Corporations.²¹⁶ “The proposed appointee must meet the guiding principles of leadership and integrity which includes selection based on personal integrity, competence and suitability, or election in free and fair elections, objectivity, impartiality in decision making process and in ensuring that decisions are not influenced by nepotism, favoritism, or other improper motives or corrupt practices.”²¹⁷ “Other guiding principles include selfless service based solely on public interest and demonstrated by honesty in the execution of

²⁰⁹ Constitution, Supra note 191.

²¹⁰ Mwongozo, Section 1(1, 2 & 5), Supra note 152.

²¹¹ *ibid.*

²¹² Constitution, Supra note 191.

²¹³ Mwongozo, Addendum 1, Supra note 152.

²¹⁴ *ibid.*

²¹⁵ *ibid.*

²¹⁶ *ibid.*

²¹⁷ Constitution, Supra note 191.

public duties and the declaration of any personal interest that may create conflict of interests in his decisions, actions, discipline and commitment in service of the people.”²¹⁸

An essential factor to be taken into consideration to ensure the attainment of efficient and effective corporate governance practices in State Corporations would be to ensure that, the boards are independent and autonomous while discharging their duties and Cabinet Secretaries do not interfere with the day to day operations of a corporations affairs.²¹⁹ Separation of the Chief Executive Officers and the Chairman’s roles would also enhance the attainment of efficient and effective corporate governance practices in Kenyan State Corporations.²²⁰

It is imperative to ensure that, a State Corporations board is assisted by qualified and competent Corporation Secretary while discharging its duties.²²¹ This ensures the practice of effective and efficient corporate governance practices in State Corporation’s boards.²²² It is the duty of the board of directors to recruit the Corporation Secretary competitively.²²³ The Corporation Secretary being an officer of the corporation is expected to act in good faith, in the best interest of the corporation and avoid conflict of interest while discharging his or her obligations.²²⁴

The Corporation Secretary plays a key role in corporate governance of State Corporations in ensuring that board procedures are followed and reviewed.²²⁵ The Chairman and the board of directors will look to the Corporation Secretary for guidance on what their responsibilities are, under the rules and regulations to which they are subject to and how those responsibilities should be discharged.²²⁶ All directors should have access to the advice and services of the Corporation Secretary and recognize that, the Chairman is entitled to strong support of the Corporation Secretary in ensuring that, the board functions efficiently and effectively.²²⁷

²¹⁸ Constitution, Chapter 6, 2(a-e), Supra note 191.

²¹⁹ OECD Report, Supra note 117.

²²⁰ Mwongozo, Supra note 152.

²²¹ Presidential Report, Supra note 22.

²²² *ibid.*

²²³ *ibid.*

²²⁴ Bob, Supra note 164.

²²⁵ *ibid.*

²²⁶ *ibid.*

²²⁷ Mwongozo, Supra note 152.

“The Corporation Secretary should provide guidance to the board of directors on their duties, responsibilities and assist in carrying out board induction and training, updating board and committee charters, preparation of board work plans, board evaluation, governance audit, and the implementation of the corporation’s code of conduct and ethics. It is also the duty of Corporation Secretary to ensure timely preparation and circulation of board and committee papers.”²²⁸ Other duties of a Corporation Secretary includes, acting as the custodian of the seal of the organization and to account to the board for its use, maintain and update a register of conflict of interests, to ensure board members are aware of the relevant laws affecting the organization, facilitate effective communication between the organization and shareholders, and to ensure annual returns are promptly filed with relevant authorities.²²⁹

Directors are also required to attend formal induction processes as a way of enhancing the practice of efficient and effective corporate governance practices in State Corporations.²³⁰ This practice is recognized internationally and is largely meant to introduce newly appointed directors to the processes of the board and the organization itself.²³¹ The processes are also meant to ensure that, directors are briefed about their responsibilities, familiarize themselves with the operations of the organization, general principles of corporate governance, board practices and the levels of performances expected of them.²³² Again, it is through board induction processes that new board members are oriented to the organizations strategic plans, financial status and policies, risk management and compliance, and the corporation’s code of conduct and ethics.²³³ Board induction is a function of the board.²³⁴ Being a function of the board, the Chairman of the board must ensure that it takes place and the organizations policies make a provision to that effect.²³⁵ The Chairman is assisted by the Chief Executive Officer and the Corporation Secretary and in absence of a Corporation Secretary the Legal Officer in undertaking the induction processes.²³⁶ The Chief Executive Officer’s role is to facilitate the Chairman and the Corporation

²²⁸ Mwongozo, Supra note 152.

²²⁹ *ibid.*

²³⁰ *ibid.*

²³¹ Presidential Report, Supra note 22.

²³² *ibid.*

²³³ Mwongozo, Supra note 152.

²³⁴ Bob, Supra note 164.

²³⁵ Mwongozo, Supra note 152.

²³⁶ Bob, Supra note 164.

Secretary to undertake the processes.²³⁷ The chairman of the board is expected to identify the needs of the newly appointed directors.²³⁸ Since board induction is a function of the board, directors are required to ensure that proper mechanisms are put in place, are fully oriented and provided with suitable induction programs.²³⁹ Basically the role of the Chairman is to lead and direct the process from the beginning to the end.²⁴⁰ Board members are also required to update their professional skills regularly to equip them with the necessary skills and knowledge to manage State Corporations boards efficiently.²⁴¹

Regular evaluation of State Corporations boards is another way of enhancing the attainment of efficient and effective corporate governance practices. Board evaluation processes provides avenues for an organizations sustained improvement in the quality of board's efficiency and effectiveness.²⁴² It is based on an objective assessment of an organization past performance and changing needs.²⁴³ Regular board review assists in the determination of a board's behavior and performance.²⁴⁴ The board review should take a strategic perspective, taking into consideration the director's ability to manage the performance of both long term and short term goals.²⁴⁵ Good corporate governance practices require that, board evaluation processes should at least be undertaken once in a year.²⁴⁶ However interim board evaluation processes may be undertaken where there is a dysfunctional board.²⁴⁷ Evaluation may be of the performance of an individual director or the board as a whole. Evaluation of a director's individual performance helps in assessing the director's positive contribution and commitment to corporation's strategic objectives.²⁴⁸

²³⁷ Bob, Supra note 164.

²³⁸ *ibid.*

²³⁹ *ibid.*

²⁴⁰ *ibid.*

²⁴¹ *ibid.*

²⁴² *ibid.*

²⁴³ *ibid.*

²⁴⁴ *ibid.*

²⁴⁵ *ibid.*

²⁴⁶ *ibid.*

²⁴⁷ *ibid.*

²⁴⁸ Mwongozo, Supra note 152.

2.3 Global Practices.

Few countries have clear-cut defined processes for the selection and appointment of directors in State Corporations.²⁴⁹ The selection criteria depend on the model of ownership.²⁵⁰ Under the unitary model of ownership, the owner entity takes full charge of the selection and appointment processes while under other models of ownership, dual or decentralized state representatives are nominated by the Ministers concerned with the approval of the Cabinet.²⁵¹

A generic process is adopted in United Kingdom to prevent political interference.²⁵² Selection and appointment of board members to State Owned Entities is undertaken by the shareholding Ministry in line with the provisions of the Code of Practice for Ministerial Appointments.²⁵³ The selection procedure is managed from the office of Public Appointments, with the Chairman of the State Owned Enterprise concerned sitting on the selection panel.²⁵⁴ The ultimate responsibility of appointments however, rests with the Minister.²⁵⁵ The selection process is governed by the principle of merit, well informed individuals with the requisite abilities and experience matching the needs of the corporate entity.²⁵⁶ The process must also take into consideration factors such as provision equal of opportunities, probity, openness and proportionality.²⁵⁷ The selection and appointment process is scrutinized by an independent panel consisting of an independent assessor who is tasked with the responsibility of ensuring that all necessary factors are taken into consideration.²⁵⁸

In Australia appointments to State Owned Entities boards are undertaken through a consultative process between the sector Minister and the government.²⁵⁹ The process in some instances involves negotiations amongst the concerned state agencies.²⁶⁰ In Canada appointments to State

²⁴⁹ OECD Report, Supra note 117.

²⁵⁰ *ibid.*

²⁵¹ *ibid.*

²⁵² UK Code, Supra note 156.

²⁵³ *ibid.*

²⁵⁴ *ibid.*

²⁵⁵ *ibid.*

²⁵⁶ *ibid.*

²⁵⁷ *ibid.*

²⁵⁸ *ibid.*

²⁵⁹ SOE Board Nomination Process in Australia as cited in OECD Report, Supra note 117.

²⁶⁰ *ibid.*

Owned Entities are done by systematic identification of the prospective candidates and thereafter interviewing them based on specified competencies and experience required of each position.²⁶¹

Other countries have established nomination committees to undertake board selection and appointment processes.²⁶² In Denmark, appointment processes are done by a special committee in consultation with the Minister concerned and Deputy Prime Ministry which is required to ensure that the process is based on professional merit.²⁶³ Similarly board selections and appointment processes in Norway are undertaken by an election committee composed of shareholding Ministry and members of the Company Supervisory Assembly.²⁶⁴ Other countries like Finland and Sweden maintain databases of qualified candidates and rely on recruitment agencies while undertaking board appointment and selection processes.²⁶⁵

2.4 Competence of Directors in State Corporations' Boards: A Critique.

The State Corporations Act²⁶⁶ does not provide for a structured and skill based board selection and appointment processes as required of good corporate governance practices.²⁶⁷ This lacuna in law has left the prerogative of board appointments in State Corporations to the Cabinet Secretary and the President.²⁶⁸ The political nature of Cabinet Secretaries appointments and lack of structured, skilled based nomination processes has enabled them to appoint their allies, former politicians, colleagues and relatives of politicians to State Corporations boards.²⁶⁹

Research has proved that the directors so appointed lack the requisite skills for discharging their duties.²⁷⁰ This leads to lack of necessary mix of skills and talent required in undertaking the strategic objectives of corporations which are critical for the attainment of efficient and effective corporate governance practices.²⁷¹ The performance of the State Corporations in the

²⁶¹ Report of Auditor General of Canada, Chapter 18; as cited in OECD Report, Supra note 117.

²⁶² OECD Report, Supra note 117.

²⁶³ *ibid.*

²⁶⁴ *ibid.*

²⁶⁵ *ibid.*

²⁶⁶ Act, Supra note 53.

²⁶⁷ Ouko, Supra note 43.

²⁶⁸ *ibid.*

²⁶⁹ *ibid.*

²⁷⁰ Ouko, Supra note 43.

²⁷¹ *ibid.*

circumstances is therefore adversely affected.²⁷² Elsewhere lack of a formal framework in respect of appointment of State Corporations boards has created an enabling environment for politicians to interfere with appointment and recruitment processes of State Corporations boards and Chief Executive Officers.²⁷³ The participation of many players in the recruitment process of Chief Executive Officers and State Corporations boards leads to inconsistencies and lack of integrity in the board selections and appointment processes.²⁷⁴

The State Corporations Act²⁷⁵ vests absolute powers to the President and Cabinet Secretaries in the selection and appointment processes of State Corporations directors. The Mwongozo Code of Governance²⁷⁶ seems to advocate for similar powers.²⁷⁷ Such powers have been a major hurdle to the constitution of an efficient and effective board in State Corporations. The current appointments to State Corporations boards would be a clear testimony to this assertion. The appointments did not take into consideration the clear and elaborate selection and appointment criteria set out under the provisions of the Code.²⁷⁸ Majority of the appointed directors comprised of politicians who lost in 2013 general elections, relatives of politicians and ex-politicians and ex-civil servants, often described as lacking in terms of necessary attributes stipulated under the code.²⁷⁹ These blatant violations of good corporate governance practices can be attributed to two factors; the enormous powers vested on the President and the Cabinet Secretaries in respect of board selection and appointment processes in State Corporations. Secondly, the failure of Mwongozo Code of Governance,²⁸⁰ to stipulate sanctions and penalties for its non-compliance. This calls for urgent review of the existing legislation in this aspect.

²⁷² Ouko, Supra note 43.

²⁷³ *ibid.*

²⁷⁴ Presidential Report, Supra note 22.

²⁷⁵ Act, Supra note 53.

²⁷⁶ Mwongozo, Supra note 152.

²⁷⁷ *ibid.*

²⁷⁸ *ibid.*

²⁷⁹ Rawlings Otieno and James Omoro, Standard Newspaper 29th April 2015, Jubilee Parastatal Appointments draw Praise Criticism from Leaders www.standardmedia.co.ke/article/2000160348/jubilee-parastatal-appointments-draw-praise-criticism-from-leaders-public. Accessed on 30th May 2015.

²⁸⁰ Mwongozo, Supra note 152.

Despite the importance attached to the Corporation Secretary's role in corporate governance of State Corporations, the State Corporations Act ²⁸¹ does not provide for the same.²⁸² This omission in law, has given rise to the practice of combining the Corporation Secretary's roles with those of the Chief Executive Officers in many State Corporations.²⁸³ It has been argued that, the combination of these roles would not be in tandem with good corporate governance practices.²⁸⁴ Good corporate governance practices stipulate that, the roles of the Chief Executive Officer and Corporation Secretary are quite distinct and different.²⁸⁵ Separation of these roles is therefore a must.²⁸⁶ The Chief Executive Officer manages the business of a corporation while the Corporation Secretary advises the board in relation to their responsibilities under the law.²⁸⁷

In absence of a clearly defined position of a Corporation Secretary in law,²⁸⁸ the role of a Corporation Secretary is a delegated function in corporate governance of many State Corporations.²⁸⁹ Legal officers are required to perform the duties of a Corporation Secretary under the supervision of the Chief Executive Officers.²⁹⁰ In-house advocates owe a duty to the organization.²⁹¹ As officers working for the organization, more often than not they are expected to take sides and offer advice to protect a particular interest of an organization.²⁹² In view of the position they occupy in such corporations, the advice offered might not be independent or to the required standards to foster efficient and effective corporate governance practices. Good corporate governance practices require the Corporation Secretary to exercise independent judgment while advising on governance issues.²⁹³ Again the provision of accurate independent legal advice enables directors in State Corporation's boards to make decisions from an informed

²⁸¹ Act, Supra note 53.

²⁸² Presidential Report, Supra note 22.

²⁸³ *ibid.*

²⁸⁴ *ibid.*

²⁸⁵ Mwongozo, Supra note 152.

²⁸⁶ *ibid.*

²⁸⁷ *ibid.*

²⁸⁸ *ibid.*

²⁸⁹ *ibid.*

²⁹⁰ Jill E. Fish, Kenneth M. Rosen, "Is There a Role for Lawyers in Preventing Future Enron's," (2003) 48 Vill. L. Rev. at p 1097.

²⁹¹ *ibid.*

²⁹² *ibid.*

²⁹³ Jill & Kenneth, Supra 290.

perspective.²⁹⁴ The absence of proper, independent, and accurate legal advice in State Corporations boards leads to passing of inaccurate, irresponsible and careless decisions which ultimately affect the attainment of efficient and effective corporate governance practices in State Corporations.²⁹⁵

Good corporate governance practices require State Corporations directors to attend regular induction processes. There is however lack of commitment in undertaking effective board induction processes and continuous development of directors skills in many State Corporation's boards.²⁹⁶ This is occasioned by the fact that the existing legislation does not provide for such processes.²⁹⁷ In absence of such requirements in law, directors are therefore unable to develop and update their skills as required.²⁹⁸ Lack of necessary development skills impairs their ability to discharge their duties, consequently affecting the attainment of efficient and effective corporate governance practices in Kenyan State Corporation's.²⁹⁹ The State Corporations Act³⁰⁰ does not also make a provision for regular board evaluations.³⁰¹ This omission in law has occasioned the neglect of board evaluation processes.³⁰² In absence of regular board evaluation processes, State Corporation boards are unable to gauge their performances as required leading to poor corporate governance and visionary strategy practices in Kenyan State Corporations.

Again, State Corporations boards as constituted, appear too large, lacking in terms of making independent judgment from a business perspective.³⁰³ This is occasioned by challenges presented in law by including many players for instance representatives from the Treasury, State Corporations Advisory Committee and state administration in the constitution of State Corporations boards.³⁰⁴ The inclusion of representatives of the Permanent Secretary and

²⁹⁴ Jill & Kenneth, Supra 290.

²⁹⁵ *ibid.*

²⁹⁶ Presidential Report, Supra note 22.

²⁹⁷ *ibid.*

²⁹⁸ *ibid.*

²⁹⁹ Jill & Kenneth, Supra 290.

²⁹⁹ *ibid.*

³⁰⁰ Act, Supra note 53.

³⁰¹ Governance Report, Supra note 49.

³⁰² *ibid.*

³⁰³ *ibid.*

³⁰⁴ Act, Supra note 53.

Treasury in State Corporations boards creates a complex scenario in that they lack the moral authority to criticize decisions where either their representatives or themselves participate in.³⁰⁵ Consequently the functioning of State Corporations boards becomes impaired leading to inefficient and ineffective corporate governance practices.³⁰⁶

2.5 Attaining an Efficient/Effective Board: A Need for Review.

The role played by State Corporations in the development of a country's economy cannot be under estimated. However, the existing law on appointment and selection of directors to State Corporations boards presents a challenge to the attainment of efficient and effective corporate governance practices. The existing law vests absolute powers to the President and Cabinet Secretaries in respect of board appointments. There is generally no provision for a structured and skilled based selection and appointment processes in the existing legislation. A review of the law in this aspect is therefore necessary. This study makes the following recommendations to this end.

There is a need to review the law on appointment and selection of directors to Kenyan State Corporations boards. The law should clearly stipulate the qualifications and attributes expected of a proposed State Corporation director. The law should also make a provision to the effect that appointments should be done through a formal, rigorous and transparent process taking into consideration appropriate balance of skills and expertise, independence and knowledge of the organizations functions and should be premised on an objective criteria,. This will enable State Corporations directors to discharge their respective duties and responsibilities effectively and efficiently.

Again, there is need to insulate board selection and appointment process from political intrusion. This is attainable by vesting the powers of selection and appointment of State Corporations directors to an independent agency. The study recommends the establishment of an independent agency to be known as Board Selections and Appointment Authority, which will be tasked with

³⁰⁵ Governance Report, Supra note 49.

³⁰⁶ Ibid.

the responsibility of selection, appointment and monitoring the operations and performance of State Corporations directors.

There is need to review the law on board composition to include the position of an independent Corporation Secretary. To ensure independence, the Corporation Secretary should report to the Chairman of the board of directors on board issues or functions and to the Chief Executive Officer on administrative issues.

There is need to review the law on board composition to provide for a board structure of limited size.³⁰⁷ A limited size of board will result in fruitful, efficient discussions and quality decisions in State Corporations Boards.³⁰⁸

Finally there is need to review the law and make a provision to the effect that board evaluations and induction processes should be mandatory in all State Corporations boards. To ensure strict compliance, the law should stipulate sanctions and penalties for non-compliance.

2.6 Conclusion

It is therefore correct to argue that State Corporations in Kenya indeed face serious corporate governance challenges. Some of these challenges arise from gaps in respect of the legal framework on the selection and appointment processes of directors to State Corporation boards. The study has endeavored to demonstrate that, failure of the law to provide for structured and skilled based nomination processes, has created avenues for Cabinet Secretaries and the President to appoint their allies, ex-politicians, relatives or relatives of former politicians as directors in State Corporations boards. It has been proven that, the directors so appointed end up lacking in terms of skills and expertise required in discharging their duties. Again, the omission of law to include the position of Corporation Secretary in board composition, to provide for board induction and evaluation processes affects the attainment of efficient and effective corporate governance practices in Kenyan State Corporations adversely. Review of the law in these aspects is therefore necessary.

³⁰⁷ Presidential Report, Supra note 22.

³⁰⁸ *ibid.*

CHAPTER 3

DIRECTORS ROLES AND RESPONSIBILITIES IN CORPORATE GOVERNANCE OF STATE CORPORATIONS

3.0 Introduction

A State Corporation's board of directors as the supreme executive body of an organization monitors and advises the corporation.³⁰⁹ It formulates and implements policies, and the business strategy of an organization.³¹⁰ It also acts on behalf of shareholders and stakeholders to ensure that a corporation's activities are conducted in a manner that complies with the law in furtherance of shareholders and stakeholders interests.³¹¹

The overall task of the board is to direct a corporation, this explains the reason why directors are so called.³¹² Directing a corporation involves four basic elements that is "strategy formulation, policy making, supervision of executive management and accountability to shareholders and other stakeholders."³¹³ The board works closely with the top management in formulating strategy.³¹⁴ In doing so, it is expected to look at the future prospects of a corporation in its strategic external environment and translate policies to guide top management actions and provide plans for control.³¹⁵ "In monitoring management the board is required to take into consideration the current managerial situation and evaluate its current performance."³¹⁶

Against this background, this chapter analyses the law in respect of director's roles and responsibilities in State Corporations boards as stipulated under the State Corporations Act³¹⁷ with a view to establishing whether it fosters conflict of interests and lack of autonomy of

³⁰⁹ Mahmud & Robert, Supra note 170.

³¹⁰ *ibid.*

³¹¹ *ibid.*

³¹² Bob, Supra note 164.

³¹³ *ibid.*

³¹⁴ *ibid.*

³¹⁵ *ibid.*

³¹⁶ *ibid.*

³¹⁷ Act, Supra note 53.

directors in corporate governance of State Corporations. It will further suggest possible solutions to the challenges presented by the law.

3.1 Directors Roles & Responsibilities in State Corporations.

A State Corporations' board is required to "implement budgets approved by the Treasury and the Parent State Department, recruit staff including the Chief Executive Officer, develop and negotiate with the Parent State Department performance targets for a specified financial year, develop, maintain and review on regular basis the strategic plan of a State Corporation, manage the assets of the State Corporation, enter into and implement performance contracts with the Chief Executive Officer, submit quarterly reports on the performance of a State Corporation to State Department, the Treasury and the Inspector General of State Corporations and perform any other duties that may be deemed necessary or expedient for the implementation of the performance contracts."³¹⁸

Other responsibilities of directors includes, "the setting of a company's strategic aims, providing leadership to put them into effect, supervising management and reporting to shareholders and stakeholders on their activities in running and management of firm's affairs."³¹⁹ Boards act differently in respect of the extent to which they carry out their functions or delegate work to the Chief Executive Officers and other management team while ensuring that the necessary control and monitoring mechanisms are put in place.³²⁰

3.2 Directors Remuneration in State Corporations

Directors in State Corporations are entitled to allowances for the performance of their duties.³²¹ The power to approve and determine director's remuneration is vested on the board of directors based on approved rates by the State Corporations Advisory Committee.³²² "The Chairman and the board members, other than the Chief Executive Officer, shall be paid out of the funds of the State Corporation such sitting allowances or other remuneration as the board may, within the

³¹⁸ Regulations, Supra note 111.

³¹⁹ *ibid.*

³²⁰ Bob, Supra note 164.

³²¹ Act, Section 10, Supra note 53.

³²² *Ibid.*

scales of remuneration specified from time to time by the State Corporations Advisory Committee approve.”³²³ “A board may within the scales specified by the State Corporation’s Advisory Committee, refund travelling and other expenses incurred by the Chairman or members of the board in the performance of their duties.”³²⁴

The government however, issues directives from time to time in respect of director’s remuneration in State Corporations Boards. A 2004 government directive spelt out director’s allowances, as a taxable sitting allowance of Twenty Thousand shillings per sitting, an accommodation allowance up to a maximum of Ten Thousand shillings per day and lunch allowance of Two Thousand per day when lunch is not provided. The Chairman of the board of directors is also entitled to a taxable monthly honorarium of Eighty Thousand shillings.³²⁵ Board members are also reimbursed of any expenses in respect of travelling costs to and from the State Corporations business or actual mileage at prevailing AA rates when they use their personal car on board business. The circular however recommends the use of the most effective means of transport.³²⁶

3.3 Conflict of Interest and Lack of Autonomy in State Corporations Boards

The provisions of law in respect of director’s roles, responsibilities and determination of remuneration tend to create conflict of interest and lack of autonomy in State Corporations boards. Conflict of interest may arise between the interests of a particular director and those of the organization, or between those of the appointing authority and director’s duty to the organization and finally between those of the director and the owners of the corporation ideally the government in this case.

³²³ Act, Section 10, Supra note 53.

³²⁴ *ibid.*

³²⁵ Guidelines on Terms and Conditions of Service for State Corporations, Chief Executive Officers, Chairmen and Board Members, Management Staff and Unionisable Staff.

³²⁶ Regulations, Supra note 111.

Regulation 4 of the State Corporations (Performance Contracting) regulations³²⁷ grants the board of directors of a State Corporation, powers to recruit staff including the Chief Executive Officer.³²⁸ It does not however prescribe the procedure and the essential attributes to be taken into consideration in undertaking such recruitments.³²⁹ A clarification in this aspect is provided for under section 5(3) of the State Corporations Act³³⁰ that “a State Corporation may engage and employ such number of staff including the Chief Executive Officer on such terms and conditions of service as the Minister may in consultation with the State Corporations Advisory Committee approve.”³³¹ The provisions of Mwongozo³³² are similar in this aspect. Under the code the board of directors of a particular State Corporation is empowered to hire the Chief Executive Officer, on such terms and conditions of service as may be approved by the relevant government organs.³³³ The government is also required to approve the appointment of senior staff and the staff establishment of a particular State Corporation.³³⁴ This means that the procedure for the engagement of staff in State Corporations is a consultative, joint responsibility of the board of directors of a particular State Corporation, the State Corporations Advisory Committee and the Cabinet Secretary.³³⁵ Directors are also required to obtain the Treasury’s approval before undertaking major investments, and justify their accounts before the Public Accounts Investment Committee of the Parliament.³³⁶ In light of these provisions of law, it would be right to argue that directors in State Corporations are not autonomous, independent and are assigned duties with limited powers to carry them.³³⁷ The requirement of directors to obtain prior approval of other government agencies in performance of the duties, to large extent impairs their ability to make commercially viable decisions consequently affecting the attainment of efficient and effective corporate governance practices in State Corporations.³³⁸

³²⁷ Regulations, Supra note 111.

³²⁸ *ibid.*

³²⁹ Ouko, Supra note 43.

³³⁰ Act, Supra note 53.

³³⁰ *ibid.*, Section 10 (2)

³³¹ Act, Section 5(3), Supra note 53.

³³² Mwongozo, Supra note 152.

³³³ *ibid.*

³³⁴ *ibid.*

³³⁵ Ouko, Supra note 43.

³³⁶ Act, Section 15, Supra note 53.

³³⁷ Kiarie, Supra note 27.

³³⁸ *ibid.*

Even though the relationship between the board of directors and the State is viewed as that of the principal and agent, it might not be necessarily so.³³⁹ In view of the fact that, the state derives its mandate from the electorate through elections and State Corporations are funded with taxpayer's resources, it would be correct to argue that, the real owners of State Corporations are the electorates.³⁴⁰ The electorates then delegate the powers of management of State Corporations to the State.³⁴¹ Directors in State Corporations are therefore agents of the electorates or citizens and the State.³⁴² Arising from this relationship, directors are sometimes called upon to act in the interests of the State in the performance of their duties.³⁴³ At times the duties to be performed could be of political nature and not necessarily in pursuit of either the corporations or stakeholder's interests.³⁴⁴ Quite often directors are required by the appointing authorities to act in furtherance of their own interests.³⁴⁵ Considering that, the prerogative to dissolve a State Corporation's board or revoke a director's appointments is vested on the Cabinet Secretaries and the President; directors tend to give in to such demands to protect their appointments without taking into consideration the corporation's interests.³⁴⁶ Good corporate governance practices require directors to owe a duty to the organization and not to the appointing authority.³⁴⁷ The director's compliance with the appointing authority's demands in this aspect creates conflict of interests between those of the appointing authority and the organization thereby compromising their integrity and transparency in corporate governance of State Corporations.³⁴⁸

The overall Ministerial responsibility of management of State Corporations is vested with the Deputy President.³⁴⁹ This means that directors in State Corporation are supervised by both the Deputy President and Cabinet Secretaries.³⁵⁰ Again, the President has powers to revoke the

³³⁹ Kiarie, Supra note 27.

³⁴⁰ *ibid.*

³⁴¹ *ibid.*

³⁴² *ibid.*

³⁴³ *ibid.*

³⁴⁴ *ibid.*

³⁴⁵ *ibid.*

³⁴⁶ *ibid.*

³⁴⁷ Mwongozo, Supra note 152.

³⁴⁸ Kiarie, Supra note 27.

³⁴⁹ Act, Supra note 53.

³⁵⁰ *ibid.*

appointment of directors or to dissolve State Corporations boards.³⁵¹ This means that the survival of directors in State Corporations boards is largely dependent on the President and the Cabinet Secretaries. In addition the President may also issue directions of general or specific nature to a State Corporation board with regard to the better exercise and performance of their functions and the board is expected to put into effect those directions.³⁵² The government therefore exercises immense control over State Corporations.³⁵³ The government as the appointing authority and supervisor of State Corporations may issue directions that might not necessarily be in the best interest of a particular State Corporation and directors are required to give effect to those directions.³⁵⁴ Directors in such circumstances find themselves at crossroads between their duty to the organizations and that of their masters. The fact that, the state has the prerogative to dissolve or revoke board appointments leaves directors with no option other than to enforce such instructions to preserve their appointments.³⁵⁵ Compliance with such directives creates conflict of interests between the director's duty to the organization and that of the appointing authority. Good corporate governance practices require directors to owe a duty to the organization and not to the appointing authority.³⁵⁶ The director's act of putting into effect Presidential directions, without taking into consideration the interests of a State Corporation to a large extent affects the attainment of efficient and effective corporate governance practices.³⁵⁷ Again excessive Ministerial intervention impairs the director's ability to make effective and efficient decisions.³⁵⁸

Directors are required to act in good faith and exercise due diligence while discharging their duties.³⁵⁹ An obligation is therefore imposed on directors to discharge their duties diligently taking into consideration the corporations interests.³⁶⁰ Duty to act in good faith includes duty to act honestly and in the best interest of the organization, not to appropriate the organizations opportunities or receive secret profits and endeavor to fulfill the purpose for which an

³⁵¹ Act, Section 7(3), Supra note 53.

³⁵² *ibid*, Section 7(3)

³⁵³ Presidential Report, Supra note 22.

³⁵⁴ Act, Supra note 53.

³⁵⁵ *ibid*, Section 7(3)

³⁵⁶ Mwongozo, Supra note 152.

³⁵⁷ Kiarie, Supra note 27.

³⁵⁸ *ibid*.

³⁵⁹ Mwongozo, Supra note 152.

³⁶⁰ *ibid*.

organization is established for.³⁶¹ This is necessary to drive forward a corporations' strategy.³⁶² By acting diligently, directors are able to protect the interests of a corporation thereby enhancing its sustainability.³⁶³ This obligation is similar to common law requirements that require directors to subscribe to duty of loyalty, act in good faith, and ensure that they do not put themselves in a position where conflict of interest may arise between their duties to the organization and their personal interests.³⁶⁴ Directors are sometimes required to execute the interests of the appointing authorities in State Corporations. At times the duties to be performed could be of political nature and not necessarily in pursuit of stakeholder's interests.³⁶⁵ This creates conflict of interest between the director's duty to the organization and those of the appointing authorities. The State Corporations Act does not however make a provision of director's duties and responsibilities in this aspect; however the Government Owned Entities Bill 2014 has made a major milestone in this regard, by clearly making a provision for director's duties of care and skill.³⁶⁶

State Corporations boards are required to obtain prior approval of the Parent Ministry, the State Corporations Advisory Committee and Treasury before the engagement of senior staff and determination of a State Corporation's staff establishment.³⁶⁷ This in effect means that, directors lack autonomy or powers to determine the staff establishment of a particular corporation, and the appointment of senior staff. The Parent Ministry in consultation with Treasury is required to approve such staff establishment and the remuneration to be paid to such staff.³⁶⁸ The procedure for obtaining such approvals is lengthy and involving, this affects the efficient and effective functioning of State Corporations.³⁶⁹ Again the requirement that directors do obtain prior approval of relevant government agencies tends to undermine their autonomy, consequently depriving director's powers to carry out certain essential functions.³⁷⁰ In view of the fact that, the members of the state committees are politicians with little or no knowledge of the industry,

³⁶¹ Mwongozo, Supra note 152.

³⁶² *ibid.*

³⁶³ *ibid.*

³⁶⁴ *ibid.*

³⁶⁵ *ibid.*

³⁶⁶ Government Bill, Supra note 165.

³⁶⁷ Act, Supra note 53.

³⁶⁸ *ibid.*, Section 7(3).

³⁶⁹ *ibid.*

³⁷⁰ OECD Report, Supra note 117.

the skilled staff in State Corporations may find it frustrating to wait for the delayed approvals.³⁷¹ This creates a challenge in retaining quality staff in State Corporations; the attainment of proper staff establishment in the circumstances is curtailed.³⁷² Attainment of efficient and effective corporate governance practices in the circumstances is adversely affected.

In addition to the provisions of the State Corporations Act³⁷³ and the State Corporations (Performance Contracting) Regulations,³⁷⁴ the government may issue directives in respect of appointment of directors and Chief Executive Officers of State corporations.³⁷⁵ A government circular dated 5th November 2004³⁷⁶ directed that “the appointment of Chief Executive Officers to Kenyan State Corporations shall be selected competitively by boards either by themselves or through reputable recruitment agencies. In both cases, the selection agency is expected to select the best three (3) candidates who will be recommended to the Cabinet Secretary for appointment of one of them.”³⁷⁷ One short coming with this directive is that it denies the board of directors, an opportunity of selecting a Chief Executive Officer of their choice. Considering that, the board of directors is expected to understand the peculiar needs of a particular organization; this study argues that directors would be best placed to undertake the recruitment processes. It is imperative to vest the powers of recruitment, dismissal, and determination of terms of engagement of Chief Executive Officers in State Corporations with the board of directors.³⁷⁸ This ensures the accountability, efficiency and effectiveness of a State Corporation.³⁷⁹ The practice would also foster a relationship of openness between the board of directors and the Chief Executive Officer.³⁸⁰ Another notable challenge with the provisions of this circular is that it does not state the criteria to be applied by the board of directors, the selection agency and Cabinet Secretaries, in the selection of the best candidates for appointment. Justice Weldon Korir observed this in Judicial Review Case Number 53 of 2015³⁸¹ “a reading of the guidelines and application of the

³⁷¹ Yvonne, Supra note 54.

³⁷² *ibid.*

³⁷³ Act, Supra note 53.

³⁷⁴ Regulations, Supra note 111.

³⁷⁵ Act, Supra note 53.

³⁷⁶ Government Circular Ref Number OP CAB 9/1a dated 5th November 2004.

³⁷⁷ *ibid.*

³⁷⁸ OECD Report, Supra note 117.

³⁷⁹ *ibid.*

³⁸⁰ *ibid.*

³⁸¹ Justice Weldon Korir in Republic versus National Water Conservation & Pipeline Corporation, Cabinet

same to facts of the case does not disclose any breach of the same by respondents. The top three candidates are picked by the board of a State Corporation after interviews have been conducted. Various factors have to be taken into account by the board before the top three candidates are selected. One such factor is the issue of regional balance.”³⁸²

The provisions of this guideline means that the prerogative of appointment of Chief Executive Officers in State Corporations is a reserve of the Cabinet Secretary. Directors are therefore not fully autonomous in dealing with the Chief Executive Officers since the power to dismiss them is vested with the Cabinet Secretary.³⁸³ Lack of autonomy of State Corporations directors in dealing with the Chief Executive Officers adversely affects the attainment of efficient and effective corporate governance practices in State Corporations.

Thus the State Corporations Act³⁸⁴ and the State Corporations Performance Contracting regulations³⁸⁵ do not clearly set out the director’s roles and responsibilities in respect of engagement and recruitment of staff. The board of directors is required to obtain approvals from the State Corporations Advisory Committee and Treasury before the determination of staff establishment and recruitment of senior officers.³⁸⁶ The procedure for obtaining such approvals is lengthy, and involving.³⁸⁷ Recruitment processes of staff therefore tend to be lengthy and lacking in terms of integrity.³⁸⁸ Attainment of a proper staff establishment is therefore challenged in the circumstances.³⁸⁹ In absence of a proper staff establishment the performance of State Corporations is not guaranteed or to the required standards.³⁹⁰ Lack of clear expression and limitations of director’s roles and responsibilities in respect of staff engagement has also created loopholes for the Cabinet Secretaries to interfere with the recruitment processes in State

Secretary Ministry of Environment Water and Natural Resources and 10 Other Interested parties. High Court (Nairobi) (2015) 53.

³⁸² Korir J., Supra note 381.

³⁸³ OECD Report, Supra note 117.

³⁸⁴ Act, Supra note 53.

³⁸⁵ Regulation, Supra note 111.

³⁸⁶ *ibid.*

³⁸⁷ Ouko, Supra note 43.

³⁸⁸ *ibid.*

³⁸⁹ *ibid.*

³⁹⁰ *ibid.*

³⁹⁰ *ibid.*

Corporations.³⁹¹ Directors are often left confused about their responsibilities and roles in the corporate governance of State Corporations.³⁹² This is occasioned by the fact that Cabinet Secretaries have the ultimate responsibility of control, supervision and dissolution of State Corporations director's appointments.³⁹³ The enormous powers vested on them, enable them to assume total control over corporate governance of State Corporations thereby impairing director's performance as stipulated in the Performance Contracting Regulations.³⁹⁴ Lack of a proper staff establishment and retention of quality staff curtails the attainment of efficient and effective corporate governance practices in State Corporations.³⁹⁵

The power of approval and determination of director's allowances in State Corporations boards is vested on the board of directors in consultation with State Corporation Advisory committee and the Treasury.³⁹⁶ One challenge posed by this law is that it allows the board of directors to determine the reimbursable amount as travelling allowance to the Chairman and other board members. It does not however prescribe the limit within which such travelling costs and allowances should cover. This provision is subject to abuse by board of directors in State Corporations in that directors are sometimes tempted to circumvent the provisions of the law to award themselves huge travelling allowances in form of mileage claims.³⁹⁷ One such avenue has been to pay travelling allowances from their rural homes.³⁹⁸ The determination of director's remuneration should be based on formal and transparent procedures and directors should not be allowed to determine their own remuneration.³⁹⁹ Again the levels of remuneration should be good enough to attract, retain and encourage directors with requisite skills, expertise and experience to take up directorship roles in State Corporations.⁴⁰⁰ This practice is necessary in enhancing board professionalism and business perspective.⁴⁰¹ The remuneration package of executive directors should be designed to align their interests with those of shareholders and also

³⁹¹ Ouko, Supra note 43.

³⁹² *ibid.*

³⁹³ Act, Supra note 53.

³⁹⁴ Regulations, Supra note 111.

³⁹⁵ Mwongozo, Supra note 152.

³⁹⁶ Act, Supra note 53.

³⁹⁷ *ibid.*

³⁹⁸ Governance Report, Supra Note 49.

³⁹⁹ The Combined Code on Corporate Governance (2003), <http://www.frc.org.uk/combined.cfm>. Accessed on 3rd May 2015.

⁴⁰⁰ *ibid.*

⁴⁰¹ OECD Report, Supra note 117.

offer director's incentives to enhance and motivate their performance.⁴⁰² In determining the remuneration package for non-executive directors there is need to ensure that such remuneration compensates the time, commitment and responsibilities assigned to this role.⁴⁰³ The amount of allowances to be paid to directors should also be sufficient to attract and retain the kind of skills and expertise required of directors to perform their work successfully.⁴⁰⁴ The remuneration should be designed to cater for experience and enormous responsibilities vested on directors.⁴⁰⁵ Since the allowances paid to directors in State Corporations are not commensurate with their expected performances and roles, they are known to adopt opportunistic tendencies such as colluding with employees in the award of tenders or conferring themselves other underserved benefits. One such avenue has been to register companies using proxies to get work from such State Corporations. In many instances, where directors have had a working relationship with the State Corporations the quality of work is usually poor and not to the required standards. The immense powers and impunity directors tend to confer to themselves in State Corporations boards create difficulties in supervision or evaluation of works performed by them. State Corporations should aim at improving director's allowances to be attractive enough to enable them act in the best interests of such corporations in line with the fiduciary duties assigned to them.⁴⁰⁶ Other avenues that directors have used in State Corporations are by creating unnecessary board meetings that are not provided for in the organizations board calendar or even paying themselves allowances over the amount provided under the remuneration guidelines.⁴⁰⁷ This creates conflict of interest between those of an individual director and those of the organization. Directors find themselves at crossroads in determining whose interests to serve between their individual interests and those of the organization.⁴⁰⁸ Conflict of interest's affects the integrity and overall performance of State Corporations thereby affecting the attainment of efficient corporate governance practices.⁴⁰⁹

⁴⁰² Combined Code, Supra note 398.

⁴⁰³ *ibid.*

⁴⁰⁴ Malaysian Code of Governance 2012 [www.mia.org.my/new/downloads/circular and resources/circulars/2012/21/mccg-2012.pdf](http://www.mia.org.my/new/downloads/circular%20and%20resources/circulars/2012/21/mccg-2012.pdf). Accessed on 14th May 2015

⁴⁰⁵ *ibid*

⁴⁰⁶ Ouko, "Management of Parastatals in Kenya; 'A Critique in Light of the New Constitution.'" (2011), 7 (1) LSKJ at p.49

⁴⁰⁷ Governance Report, Supra Note 49.

⁴⁰⁸ Mwongozo, Supra note 152.

⁴⁰⁹ *ibid.*

The appointment of senior staff and Chief Executive Officers in State Corporations is a consultative process.⁴¹⁰ A State Corporations board is required to obtain approval of the Cabinet Secretary in consultation with the State Corporations' advisory committee.⁴¹¹ This process delays the appointment processes in State Corporations. Such delays, burden the officers acting for the officers to be appointed, thereby compromising the quality of work.

The employment process in State Corporations is a consultative process.⁴¹² Appointments are done in consultation with the Cabinet Secretaries.⁴¹³ As Cabinet Secretaries are political appointees they are known to take advantage of the consultative process to award the constituent electorates with employment opportunities in State Corporations.⁴¹⁴ Appointment process are therefore not transparent thereby affecting the quality of work in State Corporations.⁴¹⁵ The resultant effect is that the appointed staffs are known to exhibit complacent tendencies in the performance of their duties thereby affecting the attainment of efficient corporate governance practices thereof.⁴¹⁶

3.4 Attaining a Conflict Free, Autonomous Board

The role played by the Kenyan State Corporations in development of the country's economy cannot be underestimated hence need for an urgent review of the legal framework in respect of director's roles and responsibilities in State Corporations boards. This study makes the following recommendations.

There is need to review the existing law in respect of directors duties and responsibilities in respect of appointment and engagement of staff in Kenyan State Corporations. The legislative framework should empower State Corporations boards to formulate and determine their staff establishments, empower them to recruit staff without necessarily consulting the Parent Ministries and the Treasury. The law should make a provision to the effect that appointments

⁴¹⁰ Ouko, Supra note 43.

⁴¹¹ Act, Supra note 53.

⁴¹² Ouko, Supra note 43.

⁴¹³ *ibid.*

⁴¹⁴ *ibid.*

⁴¹⁵ *ibid.*

⁴¹⁶ *ibid.*

should be based on formal, transparent, fair process, and merit taking into consideration the provisions of the Constitution. This will enable appointments to be done within reasonable periods and attain staff establishments tailored to meet the peculiar needs of State Corporations.

There is need to review the law on determination of directors remuneration, the law should clearly stipulate the limits within which compensation of directors mileage claims should be paid. Secondly, the role of determination of directors allowances should be vested in a different agency preferably a salaries and remuneration committee. There is also need to improve director's allowances with a view to ensuring that serious professionals take up directorship posts in State Corporations boards and also curb the temptation of directors to engage in unethical practices. In reassessing the allowances, considerations such as the onerous work required to be performed by directors and enormous responsibilities bestowed on them should be taken into consideration.

3.5 Conclusion

In conclusion this study finds that, the provisions of Section 5 (3) of the State Corporations Act⁴¹⁷ and Regulation 4 of the State Corporations (Performance Contracting) Regulations⁴¹⁸ have the effect of creating conflict of interests and lack of autonomy in State Corporations Boards. Conflict of interest arise between directors duties to the organization, duty to the appointing authority or their personal interests. Such conflict of interests greatly affects the director's capacity to discharge their duties efficiently as required. The uncertainty in respect of director's roles and responsibilities in State Corporations tends to create a fertile ground for political interference in the efficient and effective functioning of State Corporations boards. Excessive political interference has also been isolated as the major hindrance to the attainment of efficient corporate governance practices in Kenyan State Corporations.⁴¹⁹

⁴¹⁷ Act, Supra note 53.

⁴¹⁸ Regulations, Supra note 111.

⁴¹⁹ Governance Report, Supra note 49.

CHAPTER 4

GOVERNMENT'S OVERSIGHT ROLE IN CORPORATE GOVERNANCE OF STATE CORPORATIONS

4.0 Introduction

“Oversight refers to the overseeing of the affairs, practices, activities, behavior and conduct of a State Corporation, to ascertain whether they are conducted in the manner expected of them and in accordance with all normal, commercial, legislative and other prescribed norms.”⁴²⁰ “The oversight function of government in State Corporations concerns itself with review, monitoring and overseeing the management of State Corporations, their strategic and business planning, the conduct of their business operations and reporting and accounting functions thereof.”⁴²¹ “The government oversight function also includes the reviewing and monitoring of State Corporations with a view to establishing whether they are effectively managed by their executive management and that their assets and goodwill are protected and preserved.”⁴²²

In exercise of its various oversight roles, the government relies on a number of oversight agencies, policies and statutes of general application.⁴²³ Majority of State Corporations rely on the provisions of the establishing statutes, such as legal notices, statutes of general application and State Corporations Act⁴²⁴.⁴²⁵ This means that, each State Corporation operates under the provisions of the statute establishing it, statutes of general application and the provisions of State Corporations Act.⁴²⁶ However State Corporations operating under the Companies Act,⁴²⁷ the Banking Act⁴²⁸ and the Insurance Act⁴²⁹ are required to comply with the provisions of the law as stipulated therein alongside the provisions of State Corporations Act⁴³⁰.⁴³¹ Those that are

⁴²⁰ Presidential Report, Supra note 22.

⁴²¹ *ibid.*

⁴²² *ibid.*

⁴²³ *ibid.*

⁴²⁴ Act, Supra note 53.

⁴²⁵ Presidential Report, Supra note 22.

⁴²⁶ *ibid.*

⁴²⁷ Companies Act 448.

⁴²⁸ Banking Act 488.

⁴²⁹ Insurance Act 487.

⁴³⁰ Act, Supra note 53.

⁴³¹ Presidential Report, Supra note 22.

incorporated under Capital Markets Act ⁴³² are required to comply with the provisions of the Capital Markets Authority regulations.

Against this background, this chapter seeks to interrogate the law in respect of government oversight roles in corporate governance of State Corporations. It will endeavor to establish how government's regulation arising from its various oversight roles in corporate governance of State Corporations affect the attainment of efficient and effective corporate governance practices. It will finally suggest possible areas of review in the existing legal framework with a view to addressing governance challenges arising thereof.

4.1 Global Best Practices

Law determines the relationship between State Corporations and the State by defining their rights and responsibilities as major stakeholders in corporate governance.⁴³³ As a way of aligning their legislative frameworks to international and local developments, many countries subject their laws to periodical review.⁴³⁴

Regular review of the law assists in resolving conflicts arising from the practical impact of the legislative framework on State Corporations and States.⁴³⁵ It is done with a view to enhancing the attainment of efficient and effective corporate governance practices and performance of State Corporations.⁴³⁶ Countries refine their laws to define government's roles as the owner of State Corporations and its oversight roles.⁴³⁷ Research has proved that regular review of legislative framework gives rise to quality and easily understandable frameworks that have contributed to the attainment of effective, and efficient corporate governance practices in State Corporations.⁴³⁸

⁴³² Capital Markets Act 485 A.

⁴³³ OECD Principles, Supra note 1.

⁴³⁴ *ibid.*

⁴³⁵ *ibid.*

⁴³⁶ Presidential Report, Supra note 22.

⁴³⁷ *ibid.*

⁴³⁸ *ibid.*

Such effective and efficient corporate governance practices enhance the government's ability to monitor the performance of State Corporations.⁴³⁹

4.2 Government's Oversight Agencies

The government oversight functions in State Corporations are undertaken by various government agencies such as the Ministry of Finance, State Corporations Advisory Committee, several line Parent Ministries, Inspectorate of State Corporations, Performance Contracting Secretariat, Efficiency and Monitoring Unit, and Salaries and Remuneration Commission.⁴⁴⁰ These agencies perform these functions either as independent agencies or agencies under their respective Ministries.

The State Corporation's Advisory Committee (SCAC) established under the State Corporations Act⁴⁴¹ comprises of "the Permanent Secretary in the office of the President who shall be the Chairman, Permanent Secretary to the Treasury, Director of Personnel Management, the Inspector General of State Corporations and eight other members appointed by the President."⁴⁴² The SCAC is mandated to "approve the engagement and employment of staff in consultation with the Cabinet Secretary, with the assistance of experts where necessary review and investigate the affairs of State Corporations and make such recommendations to the President as it may deem necessary, in consultation with the Attorney General and the Treasury advise the President on establishment and reorganization of State Corporations, advise on appointment, removal or transfer of staff in State Corporations and secondment of Public Officers to State Corporations, advise on the terms and conditions of any appointment to State Corporations, to examine any management or consultancy agreements made or proposed to be made by the State Corporations with any other party or person and advise thereon."⁴⁴³ The SCAC may enter into and examine proposals made by a State Corporations to acquire interests in any business.⁴⁴⁴

⁴³⁹ Presidential Report, Supra note 22.

⁴⁴⁰ *ibid.*

⁴⁴¹ Act, Supra note 53.

⁴⁴² *ibid.*

⁴⁴³ Act, Supra note 53.

⁴⁴⁴ *ibid.*

The Act ⁴⁴⁵ also establishes the office of the Inspector General of State Corporations whose duties are, “to advise the government on all matters affecting the effective running of the State Corporations, to report periodically to the Minister on management practices within any Kenyan State Corporation, to report to the Controller and Auditor General any cases where monies appropriated by parliament are not applied for the purposes they were appropriated for.”⁴⁴⁶ Under the Act, the Inspector General is empowered to conduct investigations in cases where funds appropriated by Parliament are not being applied for the purposes they were appropriated for.⁴⁴⁷ Upon conclusion of investigations the Inspector General has powers to disallow any item on account that is contrary to the law or to issue any lawful direction to the State Corporation.⁴⁴⁸ The Inspector General can surcharge the amount of any expenditure on the person responsible for incurring such expenditure.⁴⁴⁹

The Parent Ministries also exercise a supervisory role over State Corporations. Under the Act,⁴⁵⁰ “the President assigns Ministerial responsibility of State Corporations and any matters relating thereto to the Deputy President and several Cabinet Secretaries as the President may by writing determine.”⁴⁵¹ The Act ⁴⁵² also empowers the President, the Parent State Department and the Cabinet Secretary to appoint and revoke appointments of State Corporations directors.⁴⁵³ The President may also issue directions of general or specific nature to a State Corporation board with regard to the better exercise and performance of the functions of the corporations and the board is expected to implement them.⁴⁵⁴ It can thus be concluded that, the government exercises immense control over Kenyan State Corporations.

Other ways in which the Parent Ministries and the Treasury participate in corporate governance of State Corporations is by having their representatives in their boards. A State Corporation’s board of directors consists of “a Chairman appointed by the President who shall be non-

⁴⁴⁵ Act, Supra note 53.

⁴⁴⁶ *ibid*, at Section 18.

⁴⁴⁷ *ibid*.

⁴⁴⁸ *ibid*.

⁴⁴⁹ *ibid*.

⁴⁵⁰ *ibid*.

⁴⁵¹ *ibid*.

⁴⁵² *ibid*.

⁴⁵³ *ibid*.

⁴⁵⁴ *ibid*.

executive unless the President otherwise directs, the Chief Executive Officer, the Permanent Secretary of the Parent Ministry, the Permanent Secretary to the Treasury and not more than eleven other members not being employees of the State Corporation, of whom not more than three shall be Public Officers appointed by the Cabinet Secretary.”⁴⁵⁵ Thus the Act⁴⁵⁶ establishes the roles of the Principal Secretary of the relevant ministry and Principal Secretary to the Treasury in State Corporation’s boards.⁴⁵⁷ Each of these representatives is required to articulate and further the interests of their respective Ministries.⁴⁵⁸

4.3 Government Oversight Role: A Challenge to the Attainment of Efficient & Effective Corporate Governance Practices

The provisions of the State Corporations Act⁴⁵⁹ establishes an institutional framework with many actors such as the President, Cabinet Secretary through the Parent Ministry, Treasury, board of directors, State Corporations Advisory Committee and the Inspectorate of State Corporations.⁴⁶⁰ These many actors are required to issue instructions or directives to State Corporations and expect them to comply.⁴⁶¹ The roles of these agencies are similar if not the same. Due to similarity of roles, the oversight agencies are sometimes known to issue contradictory instructions on the same issues.⁴⁶² In other instances they may request for similar information to that requested by other agencies in similar or slightly different formats.⁴⁶³ Compliance with the multiple and similar directives burdens the State Corporations thereby affecting the actualization of efficient and effective corporate governance practices.⁴⁶⁴

The participation of the Principal Secretary to the treasury, the Principal Secretary to the relevant Parent ministry and the Inspector General of State Corporations in the functions of State Corporations boards, creates an institutional framework with many actors in State Corporations

⁴⁵⁵ Act, Supra note 53.

⁴⁵⁶ *ibid.*

⁴⁵⁷ *ibid.*

⁴⁵⁸ *ibid.*

⁴⁵⁹ *ibid.*

⁴⁶⁰ Presidential Report, Supra note 22.

⁴⁶¹ *ibid.*

⁴⁶² *ibid.*

⁴⁶³ *ibid.*

⁴⁶⁴ *ibid.*

boards.⁴⁶⁵ Formulation of policies and attainment of the strategic functions of State Corporations in the circumstances becomes a challenge.⁴⁶⁶ Under the Act⁴⁶⁷ the overall supervision of a State Corporation is vested on the Cabinet Secretary.⁴⁶⁸ The Principal Secretary who is also the accounting officer of the Ministry sits in State Corporations boards either by himself or a duly appointed representative, this means that he is a party to all decisions made by such boards.⁴⁶⁹ His participation in the decision making process of State Corporations makes it difficult for him to scrutinize and criticize such decisions.⁴⁷⁰ The effective and efficient supervisory role of Principal Secretary in circumstances is greatly affected.⁴⁷¹

There is generally lack of a coordinated legal framework for the enforcement of various government oversight roles in State corporations.⁴⁷² The numerous oversight agencies established by law poses a major challenge in respect of accountability lines in State Corporations.⁴⁷³ Quite often State Corporations find themselves accountable to many institutions which require a lot of information, at times of conflicting nature.⁴⁷⁴ In addition, State Corporations are required to meet different and sometimes conflicting demands from each agency without any notice and in different formats requiring extensive work in adjustment of templates.⁴⁷⁵ State corporations may also find themselves at crossroads on where they are accountable to.⁴⁷⁶ The uncertainty in respect of accountability lines tends to promote inefficient and ineffective corporate governance practices in State Corporations.⁴⁷⁷

⁴⁶⁵ Presidential Report, Supra note 22.

⁴⁶⁶ *ibid.*

⁴⁶⁷ Act, Supra note 53.

⁴⁶⁸ Governance Report, Supra note 49.

⁴⁶⁹ *ibid.*

⁴⁷⁰ *ibid.*

⁴⁷¹ *ibid.*

⁴⁷² Presidential Report, Supra note 22.

⁴⁷³ *ibid.*

⁴⁷⁴ *ibid.*

⁴⁷⁵ *ibid.*

⁴⁷⁶ *ibid.*

⁴⁷⁷ *ibid.*

The State Corporation Act ⁴⁷⁸ establishes various government agencies for the enforcement of its oversight functions, which functions are similar and duplicated.⁴⁷⁹ Such similar and duplicated roles tend to undermine the attainment of efficient corporate governance practices in State Corporations.⁴⁸⁰ “Indeed some of the roles vested in these agencies serve the purpose of defeating operational autonomy, flexibility and accountability while perpetuating conflict of interest in oversight.”⁴⁸¹ Again the interpretation of the many laws established by the legislative framework becomes a challenge to small State Corporations which might not have the necessary legal support.⁴⁸² Compliance with the many conflicting laws requires huge financial resources for enforcement.⁴⁸³ This creates challenges for countries like Kenya that may lack adequate financial resources.⁴⁸⁴

There is uneven exercise of government oversight roles across different State Corporations.⁴⁸⁵ This is occasioned by the many institutions established by the State Corporations Act.⁴⁸⁶ Each institution exercises the role so conferred in a manner that it deems appropriate and prudent.⁴⁸⁷ The exercise of the oversight functions consequently becomes fragmented and uneven thereby hindering the attainment of efficient and effective corporate governance practices.⁴⁸⁸

A number of institutions are required to oversee government functions such as oversight, policy making and regulation in State Corporations.⁴⁸⁹ Research has found such organizations lacking in terms of skills, capacity and expertise required to perform such tasks.⁴⁹⁰ Consequently the interpretation of these laws becomes difficult leading to non-compliance thereby impairing the performance of State Corporations⁴⁹¹ “In this regard, governance requirements from various

⁴⁷⁸ Act, Supra note 53.

⁴⁷⁹ Presidential Report, Supra note 22.

⁴⁸⁰ *ibid.*

⁴⁸¹ *ibid.*

⁴⁸² *ibid.*

⁴⁸³ *ibid.*

⁴⁸⁴ *ibid.*

⁴⁸⁵ *ibid.*

⁴⁸⁶ *ibid.*

⁴⁸⁷ *ibid.*

⁴⁸⁸ *ibid.*

⁴⁸⁹ *ibid.*

⁴⁹⁰ *ibid.*

⁴⁹¹ *ibid.*

laws and agencies are often at conflict thereby affecting the decision making processes and effectiveness of State Corporations.”⁴⁹²

The many oversight agencies established by law tend to create confusion in reporting lines.⁴⁹³ When issues arise in respect of corporate governance of such entities, State Corporations find themselves at crossroads in identifying who to report to or seek necessary guidance.⁴⁹⁴ This is occasioned by the existence of multiple government oversight agencies, which agencies exercise the same or similar roles.⁴⁹⁵ The roles of the Executive Authority, State Corporations boards and the organization’s Chief Executive Officers are not clearly defined in the management and governance laws.⁴⁹⁶ Good corporate governance practices require clear separation of roles of different constituents in corporate governance.⁴⁹⁷ Due to lack of clear guidelines in respect of the roles of different oversight agencies, some oversight agencies are known to usurp the roles of other agencies thereby creating confusion and functional overlaps in corporate governance of State Corporations.⁴⁹⁸

The State Corporations Advisory Committee in consultation with the Attorney General is required to advise the President on establishment, reorganization or dissolution of State Corporations.⁴⁹⁹ This means that, the government is expected to exercise a supervisory role in the establishment, reorganization or dissolution of State Corporations.⁵⁰⁰ Despite this clear requirement of the law, no adequate consultations are undertaken before the establishment, reorganization or dissolution of State Corporations.⁵⁰¹ Failure to adhere to express provisions of law has led to the establishment of State Corporations with unclear mandates.⁵⁰² The establishment of these corporations burdens the exchequer in meeting their financial

⁴⁹² Presidential Report, Supra note 22.

⁴⁹³ *ibid.*

⁴⁹⁴ *ibid.*

⁴⁹⁵ *ibid.*

⁴⁹⁶ OECD Report, Supra note 117.

⁴⁹⁷ Mwongozo, Supra note 152.

⁴⁹⁸ Presidential Report, Supra note 22.

⁴⁹⁹ *ibid.*

⁵⁰⁰ *ibid.*

⁵⁰¹ *ibid.*

⁵⁰² *ibid.*

obligations.⁵⁰³ Examples of such Corporations include “Kenya National Shipping Line formed by Kenya Ports Authority, Yatta Vines Limited formed by Kenya Wines Agencies Limited, Kenya Safari Lodges and Hotels, Golf Hotel, Mount Elgon Lodge and Sunset Hotel Kisumu formed by Kenya Tourist Development Corporation.”⁵⁰⁴ Major functional overlaps arise from the establishment of State Corporations which are not guided by careful considerations of the law.⁵⁰⁵

The State Corporations Act⁵⁰⁶ empowers the President to issue directions of general or specific nature to State Corporations and corporations are expected to put into effect those directions.⁵⁰⁷ This provision of law coupled with the manner of appointment of Chairmen to State Corporations boards, the composition of SCAC and other oversight agencies and the manner of appointment and removal of State Corporation’s boards tend to create a leeway for political interference in corporate governance of State Corporations.⁵⁰⁸ It confers the President an upper hand in corporate governance of State Corporations.⁵⁰⁹ Considering the fact that, the supervision of State Corporation lies with the Parent line Ministry with the guidance of SCAC whose role is basically advisory; it becomes difficult to resolve conflicts between various government Ministries and the President whenever they arise.⁵¹⁰

4.4 A Review of Legislative Framework

There is need to review the legal framework on government oversight roles in State Corporations. The legislative framework should be tailored to allow for consolidation of various government oversight roles by creating a single, independent oversight authority.⁵¹¹ It is hoped that this will improve accountability, integrity, efficiency and effectiveness in State Corporations.⁵¹² The law should repeal all other laws that regulate government oversight roles in corporate governance of State Corporations.⁵¹³

⁵⁰³ Presidential Report, Supra note 22.

⁵⁰⁴ *ibid.*

⁵⁰⁵ *ibid.*

⁵⁰⁶ Act, Supra note 53.

⁵⁰⁷ Governance Report, Supra note 49.

⁵⁰⁸ *ibid.*

⁵⁰⁹ *ibid.*

⁵¹⁰ *ibid.*

⁵¹¹ Presidential Report, Supra note 22.

⁵¹² *ibid.*

⁵¹³ *ibid.*

The similar, duplicated, fragmented, and sometimes conflicting legal framework should be repealed and consolidated into one piece of legislation that will guide the operations of all State Corporations.⁵¹⁴ Such consolidation will enable State Corporations to overcome the adverse effects of overlapping, conflicting, duplicated provisions of the existing law, that lead to confusion in interpretation and application.⁵¹⁵

The government should grant State Corporations board's full operational autonomy and desist from involving itself with their day to day operations.⁵¹⁶ State Corporations boards should be mandated with ensuring that, they have the requisite competencies to carry out their functions, act with integrity, to be held accountable for their actions, and have the power to appoint and remove the Chief Executive Officers, exercise objective and independent judgment and appraise their annual performance.⁵¹⁷

A review of the law with a view to clarifying the level of interaction between State Corporations boards, the Executive Management and government as the major shareholder of all State Corporations is also deemed necessary.⁵¹⁸ The Mwongozo⁵¹⁹ has made a major milestone in addressing a number of challenges inherent in the current legislative framework by clearly defining the roles and responsibilities of State Corporations boards and their Chief Executive Officers.⁵²⁰ However compliance with its provisions is hampered by lack of enforcement mechanisms to ensure strict compliance with the law. This calls for urgent review of law in these aspects.

⁵¹⁴ Presidential Report, Supra note 22.

⁵¹⁵ *ibid.*

⁵¹⁶ OECD Principles, Supra note 1.

⁵¹⁷ Presidential Report, Supra note 22.

⁵¹⁸ Mwongozo, Supra note 151.

⁵¹⁹ *ibid.*

⁵²⁰ Presidential Report, Supra note 22.

4.5 Conclusion

The study concludes that, the government's exercise of its various oversight roles in State Corporations has occasioned serious inefficiencies in corporate governance of State Corporations.⁵²¹ The inefficiencies arise from the duplicated roles assigned to various government oversight agencies, compliance with many conflicting legislations, instructions and directives from various government agencies which tend to perpetuate excessive political interference.⁵²² Lastly, the legal framework on corporate governance of State Corporations establishes many institutions which are expected to guide and issue policies to State Corporations.⁵²³ It is argued that these institutions create confusion in terms of compliance thereby hampering the attainment of efficient and effective corporate governance practices in such corporations.⁵²⁴

⁵²¹ Presidential Report, Supra note 22.

⁵²² *ibid.*

⁵²³ *ibid.*

⁵²⁴ *ibid.*

CHAPTER 5

5.0 CONCLUSION ON THE RESEARCH TOPIC

5.1 Introduction.

Critical analysis of the law on appointment and selection, roles and responsibilities of directors in State Corporations and government oversight roles reveals major gaps/shortcomings. The gaps have been identified as the major challenges that hinder the attainment of efficient and effective corporate governance practices in State Corporations. Inefficient and ineffective corporate governance practices in Kenyan State Corporations have hampered the actualization of State Corporations expected goals, of acceleration of economic growth, facilitation and promotion of national development, improvement of public services delivery and creation of employment opportunities.⁵²⁵

5.2 Notable Challenges/Gaps

The study has identified a number of challenges/gaps in the existing legal framework that hinder the actualization of efficient and effective corporate governance practices in Kenyan State Corporations. The challenges include but are not limited to the areas discussed hereunder.

Challenges have been identified in respect of the law on appointment of directors to State Corporations boards. The study argues that, the existing legal framework fails to offer adequate guidance on the selection and appointment criteria, qualifications and core attributes expected of a proposed director in State Corporations boards.⁵²⁶ The study further argues that, this omission in law has created a leeway for Cabinet Secretaries to reward their political allies, relatives, former politicians and relatives of former politicians with employment opportunities through appointments to State Corporations boards.⁵²⁷ The haphazard and callous manner of appointment of directors to State Corporations boards leads to lack of necessary skills required in the

⁵²⁵ Presidential Report, Supra note 22.

⁵²⁶ Ouko, Supra note 43.

⁵²⁷ *ibid.*

formulation of policies and strategic objectives of State Corporations.⁵²⁸ Such practices hamper the actualization of efficient and effective corporate governance practices.⁵²⁹

Secondly, the State Corporations Act⁵³⁰ fails to make a provision for the Corporation Secretary's role in corporate governance of State Corporations.⁵³¹ The study argues that, the Corporation Secretary's role is vital in ensuring that, a State Corporation's board is provided with proper, independent legal guidance and advice. Provision of independent legal advice and guidance is important to ensure that, the functions of the board are transacted efficiently, effectively and in compliance with the provisions of the law. The study faults the current practice of combining the roles of the Corporation Secretary with those of the Chief Executive officers in Kenyan State Corporations boards. It considers the combination of the two roles not in tandem with good corporate governance practices and argues that each is expected to perform different, distinct roles. The Chief Executive Officer is required to manage the day to day operations of a State Corporation while the Corporation Secretary advises the board in relation to their duties and responsibilities as provided by the law. The practice of combining the two roles hampers the attainment of efficient corporate governance practices in State Corporation boards.⁵³²

The study further argues that, the remuneration of directors in State Corporations boards is not good enough to attract serious professionals to take up directorship posts. The remuneration package is also not good enough to minimize the temptation of directors from engaging in unethical practices, and furtherance of personal interests. The study argues that, omissions in law to provide guidance on the assessment of director's mileage allowances has created opportunistic tendencies in State Corporations boards thereby subjecting the integrity of State Corporations directors to test. It further faults the practice of vesting the role of assessment of director's remuneration and allowances to State Corporations directors. It has been rightly argued that, the vesting of such powers to board of directors is prone to the creation of conflict of interest between the interests of directors and those of the organization.⁵³³

⁵²⁸ Ouko, Supra note 43.

⁵²⁹ *ibid.*

⁵³⁰ Act, Supra note 53.

⁵³¹ Presidential Report, Supra note 22.

⁵³² *ibid.*

⁵³³ Mwangozo, Supra note 152.

Lack of clear expression of roles and responsibilities of directors and Cabinet Secretaries in State Corporations boards hinder the attainment of efficient corporate governance practices in Kenyan State Corporations. The lacuna in law to clearly state the roles of directors and those of Cabinet Secretaries has allowed Cabinet Secretaries to interfere with corporate governance of State Corporations in Kenya. Consequently State Corporation directors are left confused about their roles, which affects the efficient and effective performance of their duties.

The existing legal framework does not confer full autonomy to State Corporations directors while transacting boards' corporate business. State Corporations boards' are required to obtain approvals from State Corporations Advisory Committee (SCAC) and the Treasury before the determination of a corporation's staff establishment and engagement of senior staff.⁵³⁴ Directors are also required to obtain the Treasury's approval before undertaking major investments and to justify their accounts before Public Investments Committee of the Parliament.⁵³⁵ Again State Corporations boards are only required to choose three names from the list of candidates interviewed and then forward the same to the Cabinet Secretary in respect of appointment of State Corporations Chief Executive Officers.⁵³⁶ The criterion to be applied in the selection of one of the three candidates is not clearly stipulated. This means that the appointment of State Corporations Chief Executive Officers is a prerogative of the Cabinet Secretaries. This method of appointment of Chief Executive Officers limits the powers of State Corporations directors in dealing with the Chief Executive Officers since the power to terminate such appointments lies with the Cabinet Secretary.⁵³⁷

The State Corporations Act⁵³⁸ establishes an institutional framework with many actors to oversee corporate governance of State Corporations. The many institutions established by the legal framework, sometimes issue contradictory or similar directives which ultimately create confusion in corporate governance of Kenyan State Corporations.⁵³⁹ In the circumstances State

⁵³⁴ Ouko, Supra note 43.

⁵³⁵ Yvonne, Supra note 54.

⁵³⁶ Act, Supra note 53.

⁵³⁷ OECD Report, Supra note 117.

⁵³⁸ Act, Supra note 53.

⁵³⁹ Presidential Report, Supra note 22.

Corporations directors and management are often confused on who they are accountable to. Lack of proper accountability lines creates complacent tendencies, in both the management and State Corporations directors thereby affecting the attainment of efficient corporate governance practices adversely.⁵⁴⁰ Lastly the failure of law to make regular board evaluation, board induction processes and continual skills development skills mandatory practices impacts negatively on the attainment efficient and effective corporate governance practices in Kenyan State Corporations.

5.3 A Review of Legislative Framework

The role played by the Kenyan State Corporations in Kenya's economy cannot be underestimated. This calls for urgent review of the existing legal framework with a view to addressing the existing corporate governance challenges. A review towards this end is suggested in the areas discussed hereunder.

There is need to review the law on appointment and selection of directors to Kenyan State Corporations boards. The law should clearly stipulate the expected qualifications, the attributes and core competencies to be considered in appointment and selection of directors. It should also make a provision to the effect that, appointments to State Corporations boards should be done through a formal, rigorous, transparent procedure, taking into consideration the appropriate balance of skills and expertise, independence of directors to be appointed, in line with the relevant provisions of the Constitution of Kenya⁵⁴¹ and knowledge of the organizations functions. The legislative framework should aim at establishing a champion board.⁵⁴²

Again, there is need to insulate the appointment and selection processes of directors to State Corporations boards from political intrusions. The actualization strategy calls for the vesting of

⁵⁴⁰ Presidential Report, Supra note 22.

⁵⁴¹ Constitution, Supra note 191.

⁵⁴² A champion board "is a board where team work is the spirit, there is no antagonism, and everyone is willing and listens to one another. Teamwork is an essential feature and people in the board are capable of working as a team. It is often described as an effective board" Bob Tricker, *Corporate Governance Principles Policies and Practices* (Oxford University Press 2011).

the powers of board selections and appointment to an independent body. This study recommends the establishment of an independent agency to be known as the State Corporations Board Selections and Appointment Authority. The agency should be vested with powers to select, appoint, monitor and appraise the performance and operations of State Corporations directors.

The law on State Corporation's board composition should be reviewed to make a provision for the position of a Corporation Secretary. To ensure independence, the Corporation Secretary should report to the Chairman of the board of directors on board issues or functions and to the Chief Executive Officer on administrative issues. Again the law should provide for a limited size of board. A limited size board would limit indecision in the board.

There is need to review the existing law on appointment and recruitment of staff in Kenyan State Corporations. The legislative framework should empower State Corporations boards to formulate and determine their staff establishment's requirements and recruit staff without necessarily consulting the relevant Parent Ministries and the Treasury. Again such appointments need to be based on formal, transparent, meritorious and fair processes. State Corporation directors should also be granted full autonomy to transact corporate business without seeking approvals from other government agencies.

The law on remuneration of directors needs to be reviewed to state clearly the limits within which mileage and compensation allowances of State Corporations directors should be paid. To minimize conflict of interest, the role of determination of director's allowances should be vested in a different agency. The study recommends the establishment of a salaries and remuneration committee which will be tasked with the responsibility of determination of such allowances. Directors' allowances should also be improved to be attractive enough to encourage serious professionals to take up directorship roles in State Corporations boards and curb director's temptations from engaging in unethical practices in furtherance of their own interests.

There is need to review the legal framework in respect of government oversight roles in State Corporations. The review should aim at consolidating the functions of various government oversight agencies through the establishment of a single oversight authority. The oversight

authority should also be tasked with the function of overseeing the corporate governance of all State Corporations. It is hoped that the establishment of single oversight authority will improve accountability, efficiency and effectiveness in State Corporations. The study further recommends a consolidation of various laws on governance of State Corporations to an easily understandable one piece of legislation. This will assist State Corporations directors and managers to access and interpret the law easily.

There is need to provide clarification on the level of interaction between the State Corporations boards, the Executive management and the government as the major shareholder of all State Corporations.⁵⁴³ The Mwongozo⁵⁴⁴ has made a major milestone towards addressing this challenge by clearly defining the duties and responsibilities of State Corporations boards and the Chief Executive Officers.⁵⁴⁵ However compliance with the provisions of this code is limited by lack of sanctions in its enforcement to ensure compliance.

The law should be reviewed to grant State Corporations board's full operational autonomy.⁵⁴⁶ It should be tailored to ensure that, the government is not involved in daily operations and management of State Corporations.⁵⁴⁷ The boards should be capable of attaining the necessary competencies to carry out their functions, act with integrity and be held accountable for their actions, have the power to appoint and remove the Chief Executive Officers, exercise objective and independent judgment and appraise their annual performance.⁵⁴⁸

Regular board evaluation, induction and continual development processes of directors in State corporations boards should be made mandatory. To ensure objectivity in the appraisal and annual performance of State Corporation boards the study recommends that such appraisals be undertaken by independent agencies or consultants.

⁵⁴³ OECD report ,Supra 117

⁵⁴⁴ Mwongozo, Supra note 152.

⁵⁴⁵ Ibid.

⁵⁴⁶ OECD report ,Supra 117

⁵⁴⁷ OECD Principles, Supra note 1.

⁵⁴⁸ *ibid.*

5.4 Conclusion

It can thus be concluded that, the law on appointment and selection, roles and responsibilities of directors in State Corporations and government oversight roles, adversely affects the attainment of efficient and effective corporate governance practices in Kenyan State Corporations. This explains the reason why majority of Kenyan State Corporations have been unable to attain their expected roles of acceleration of economic growth, facilitation and promotion of national development, improvement of public services delivery and creation of employment opportunities.⁵⁴⁹ The major challenges posed by this law include: inefficient and ineffective State Corporations boards, faced with challenges of lack of autonomy and accountability of directors, conflict of interests between the personal interests of directors, the interests of State Corporations and the appointing authorities and excessive political interference. Finally the existing legal framework on government oversight roles establishes many unclear, duplicated, conflicting institutions. The many institutions established by law create duplicated, sometimes multiple, conflicting roles which adversely affect the attainment of efficient corporate governance practices in Kenyan State Corporations. The Mwongozo⁵⁵⁰ and the Government Owned Entities Bill 2014⁵⁵¹ have endeavored to address some of these challenges by providing an elaborate criterion to be followed while undertaking board selection and appointments, the position of a Corporation Secretary, making a provision for director's duties and responsibilities as stipulated under common law. However the major challenge of excessive government interference in corporate governance of State Corporations still remains unaddressed. This necessitates further review of the law in this aspect.

⁵⁴⁹ Presidential Report, Supra note 22.

⁵⁵⁰ Mwongozo, Supra note 152.

⁵⁵¹ Government Bill, Supra note 165.

BIBLIOGRAPHY/REFERENCES

Acts

Banking Act, Cap 488.

Companies Act, Cap 486.

Constitution of Kenya, 2010.

Insurance Act, Cap 487.

Government Owned Entities Bill 2014.

State Corporations Act, Cap 446.

State Corporations Performance Contracting Regulations 2004.

Books

Austin, J.L., *The Province of Jurisprudence Determined* (W.E. Rumble edn., Cambridge University Press, Cambridge, 1995).

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

Hart, H.L.A., *The Concept of Law* (Clarendon Press Oxford, 1961., 2nd edn, 1994, 3rd edn. Leslie Green, Joseph Raz and Penelope A Bullock ed.2012).

Lon Fuller, *The Morality of Law* (Yale University Press New Haven 1969).

Stephen Bloomfield, *Theory and Practice of Corporate Governance* (An Integrated Approach, Cambridge University Press, 2013).

Circulars

Government Circular Ref Number OP CAB 9/1a (5th November 2004).

Guidelines, Terms and Conditions of Service for State Corporations Chief Executive Officers Chairman and Board Members and Unionisable Staff (23rd November 2004).

Codes

Malaysian Code of Governance 2012 www.mia.org.my/new/downloads/circular_and_resources/circulars/2012/21/mccg-2012.pdf. Accessed on 14th May 2015.

Mwongozo “The Code of Governance of State Corporations” (2015)

<http://www.icdc.co.ke/index.php/about us/Publications /Mwongozo-Code -of-governance/file>.

Accessed on 22nd February 2015.

The UK Code of Practice for Ministerial Appointments: The Code of Practice’s Principles (August 2005), UK Government Office of the Commissioner for Public Appointments, <http://www.ocpa.gov.uk/pages/code.htm>. Accessed on 26th May 2015.

The Combined Code on Corporate Governance (2003), <http://www.frc.org.uk/combined.cfm>. Accessed on 3rd May 2015 .

Guidelines

Organization for Economic Co-operation and Development, (2004) Principles of Corporate Governance, <http://www.oecd.org/dataoecd/32/18/31557724.pdf><accessed on 14th January 2015>

Guidelines on Good Corporate Governance Perspective “An ECSAFA Perspective-August (2004) docslide.us/documents/guidelines-on-the-good-governance_of_parastatal_organizations.html. Accessed on 24th February 2015.

Judicial Decisions

Republic versus National Water Conservation & Pipeline Corporation, Cabinet Secretary Ministry of Environment Water and Natural Resources and 10 Others (2015) High Court, Milimani,(53).

Journal Articles

Austin Ouko, “Appointment of Parastatal Directors and Chief Executive Officers, Amidst Perceived Judicial Activism” (2013) 9(2) LSKJ.

Austin Ouko, “Management of Parastatals in Kenya: ‘A Critique in Light of the New Constitution.’” (2011) 7 (1) LSKJ.

Jill E.Fish, Kenneth M. Rosen, “Is There a Role for Lawyers in Preventing Future Enron’s,” (2003), 48 Vill. L. Rev.

Kiarie Mwaura, “The Failure of Corporate Governance in State Owned Enterprises and the Need for Restructured Governance in Fully and Partially Privatized Enterprises: ‘The Case of Kenya,’” (2007) 31(1) Fordham International Law Journal.

Mahmud Ezzamel and Robert Wattson, "Wearing Two Hats, "The Conflicting Control and Management Roles of Non-Executive Directors as cited in Kevin Kease, Thompson, and M. Wrighted case, "*Corporate Governance Economic Management and Financial Issues*"(Oxford University Press, 2nd edn. 2002) 54.

M.C. Jensen and W.H Meckling, "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure (1976) 3(4), Journal of Financial Economics.

Morrison, J., "Legislating for Good Corporate Governance: 'Do We Expect Too Much?'" (2004) 15 Journal of Corporate Citizenship.

R. la Porta, F. Lopez-de-Silanes and R.W.Vishny, "Legal Determinants of External Finance", (1999) 52(3), Journal of Finance 1131.

Yvonne Awuor Otieno, "Corporate Governance Problems Facing Kenyan Parastatals: 'A Case Study of the Sugar Industry'" July 2009 Bucerius Law School.

Internet Sources.

Centre for Governance and Development (CDG), "A Decade of Parastatal Waste" A Study of the Audited Accounts of State Corporations over the Period from 1993 to 2002." <http://www.cgd.or.ke/publications.asp?Title=&formost=1&documenttypeid=Year=2005&languageid=<accessed on 23rd February 2015.>

OECD Comparative Report on Corporate Governance of State Owned Enterprises (2004) <http://www.oecd.org/dataoecd/32/18/31557724.pdf>< accessed on 25th February 2015>

The Presidential Taskforce Report on Parastatal Reforms (2013), www/cofec.co.ke/Report%20of%20The%20Task%20force%20on%20Parastatal%20Reforms.pdf. Accessed on 23rd February 2015.

Rawlings Otieno and James Omoro, Standard Newspaper 29th April 2015, Jubilee Parastatal Appointments Draw Praise Criticism from Leaders www.standardmedia.co.ke/article/2000160348/jubilee-parastatal-appointments-draw-praise-criticism-from-leaders-public. Accessed on 30th May 2015.