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REFORMING THE LAW ON CORPORATE GOVERNANCE FOR HEALTH CARE PROVIDERS IN KENYA: FOCUS ON QUALITY OF CARE

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DECLARATION AND APRPOVAL

Declaration

I, **JACKSON MACHARIA GITHU WANGARI** do hereby declare that the work contained in this project is my own original work, which all sources used or quoted have been acknowledged by means of complete references, and that this project was not previously submitted by me or any other person at any other university for an award of an LL.M or otherwise.

Signature ………………………….. Date ……………………………..

Approval by supervisor

This project was done under my supervision and has been submitted to the University of Nairobi, School of Law for examination by my approval as candidate supervisor.

Signed……………………………………… Date…………………………

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Finally, I acknowledge everyone else who supported me on this journey. The staff in the library, classmates, Law Society of Kenya for the seminars and opportunity to publish my previous work and many other people who all cannot be mentioned here. Thank you.

DEDICATION

I dedicate this work to my children. In you, I see a bright and blessed future. May you always search and obtain knowledge and walk in the right ways and be successful in all that you do. May this work be a motivation for your to be the best in your studies, activities and craft.

TABLE OF STATUTES

1. Basic Education Act, Act No. 14 of 2013
2. Capital Markets Authority, Cap 485A of the Laws of Kenya
3. Capital Markets (Securities) (Public Offers, Listing And Disclosures) (Amendment) Regulations, 2016
4. Central Bank of Kenya, Prudential Guidelines for Institutions Licensed Under the Banking Act.
5. Code of Corporate Governance Practices or Issuers of Securities to the Public 2015, Kenya
6. Companies Act 2015, Act No. 17 of 2015
7. Consumer Protection Act, Act Number 46 of 2012 of the Laws of Kenya
8. Competition Act, Act No. 12 of 2010.
9. Clinical Officers (Training, Registration and Licensing) Act, Cap 244 of the Laws of Kenya
10. Health Laws (Amendment Bill) 2018, National Assembly Bill No. 14, 2018
11. Insurance Regulatory Authority, Corporate Governance for Insurance and Reinsurance Companies
12. Kenya Medical Supplies Agency, Act No. 20 0f 2013 of the Laws of Kenya
13. Law of Succession Act, Cap 260 of the Laws of Kenya
14. Limited Liability Partnerships Act, Chapter 30A of the Laws of Kenya
15. Medical Practitioners and Dentists (Inspections and Licensing) Rules, 2014
16. Medical Practitioners and Dentists (Private Medical Institutions) Rules, 2000
17. Medical Practitioners and Dentists (Private Medical Institutions) (Amendment) Rules, 2017
18. Medical Practitioners and Dentists (Continuing Professional Development) Regulations, 2005

19. Medical Practitioners and Dentists (Practitioners and Health Facilities) (Advertising) Rules, 2016

20. Medical Laboratory Technicians and Technologists Act, Act No 10 of 1999 of the Laws of Kenya

21. Medical Practitioners and Dentists Act, Chapter 253 of the Laws of Kenya

22. National Health Insurance Fund Act, Cap 255 of the Laws of Kenya

23. Non-Governmental Organizations Co-ordination Act, Chapter 134 of the Laws of Kenya

24. Nurses Act, Cap 257 of the Laws of Kenya

25. Partnerships Act, Act No. 16 of 2012

26. Penal Code, Cap 63 of the Laws of Kenya

27. Pharmacy and Poisons Act, Chapter 244 of the Laws of Kenya

28. Public Benefits Organisation Act, Act No. 18 of 2013 of the Laws of Kenya

29. Public Health Act, Cap 242 of the Laws of Kenya

30. Registration of Business Names Act, Cap 499 of the Laws of Kenya

31. Science and Technology (Amendment) Act of 1979 of the Laws of Kenya

32. Technical and Vocational Education and Training Act, Act Number 29 of 2013 of the Laws of Kenya

33. Trustee Act, Chapter 167 of the Laws of Kenya

34. Universities Act, Act Number 42 of 2012 of the Laws of Kenya

ABSTRACT

This research paper seeks to examine the law on corporate governance for health care providers in Kenya with a focus on quality of care. The state of health care in Kenya is wanting in several ways with several instances of medical negligence, unqualified persons handling patients amongst others. This paper examines whether there are improvements which can be made on corporate governance laws for health care providers in Kenya to better focus on quality of care and therefore reduce the instances of poor quality of care.

The paper argues that there are few black letter legal provisions on specific corporate governance arrangements for health care providers in Kenya but there are numerous laws prescribing quality of care of requirements for health care providers. The legal provisions on corporate governance arrangements require some improvements to amongst other things ensure that there is a prescribed corporate governance code for different level of health care providers. This can be borrowed from other countries or from the education sector in Kenya which has an elaborate corporate governance arrangements in various statutes for various level of educational facilities.

Corporate governance refers to how an organisation is led, managed or controlled. It is therefore vital for every health care provider to enshrine quality of care requirements in all aspects of the organisation and give quality of care enough prominence and attention at the board of directors/governing body level. Whereas there are several laws prescribing quality of care requirements and there is no law prohibiting a health care institution from putting in place corporate governance arrangements focussing on quality of care, the law falls short by failing to have a minimum corporate governance code for health care providers. This means that the law prescribes the standards of care but does not provide for a minimum corporate governance arrangement to enable the health care institutions achieve the standards. Some institutions established through the State Corporation Act such as the Kenyatta National Hospital and the Moi Teaching and Referral Hospital have corporate governance requirements in the constituting law but these require to be revamped to give quality of care the prominence it deserves for example by having a dedicated committee of the board dealing with quality of care issues.

TABLE OF CONTENTS

REFORMING THE LAW ON CORPORATE GOVERNANCE FOR HEALTH CARE PROVIDERS IN KENYA: FOCUS ON QUALITY OF CARE

COVER PAGE……………………………………………………………………………….I
DECLARATION AND APPROVAL……………………………………………………..II
ACKNOWLEDGMENT……………………………………………………………………III
DEDICATION…………………………………………………………………………..….IV
TABLE OF STATUTES…………………………………..…………………………..…..V
ABSTRACT……………………………………………………………………………..VII

CHAPTER ONE

REFORMING THE LAW ON CORPORATE GOVERNANCE FOR HEALTH CARE PROVIDERS IN KENYA: FOCUS ON QUALITY OF HEALTH CARE

1.1 Introduction………………………………………………………………............1
1.2 Statement of Research Problem……………………………...…………………... ..5
1.3 Justification of the Study……………………………………………………………7
1.4 Theoretical Framework……………………………………………………...…….7
1.5 Research Objectives……………………………………………...……...……….9
1.6 Research Questions ……………………………………………...……...……….10
1.7 Research Hypothesis……………………………………………...……...……...10
1.8 Research Methodology……………………………………………...……...……..10
1.9 Literature Review……………………………………………………………..…….11
1.10 Limitation of the Study…………………………………………………............14
1.11 Chapter Breakdown ……………………………………………………………….15

2 CHAPTER TWO

THE LAW ON CORPORATE GOVERNANCE OF HEALTH CARE PROVIDERS IN KENYA WITH A FOCUS ON QUALITY OF CARE

2.1.1 Introduction……………………………………………………………..…………16
2.1.2 Principles of Corporate Governance and Quality of Care……………………………17
2.2 Constitution……………………………………………………………………….....17
2.3 Health Specific Statutes…………………………………………………………...…..17
2.3.1 Medical Practitioners and Dentists Act…………………………………………...….17
2.3.1.1 Medical Practitioners and Dentists (Inspections and Licensing) Rules, 2014……….20
2.3.1.2 Medical Practitioners and Dentists (Medical Institutions) Amendment Rules, 2017..22
2.3.1.3 Medical Practitioners and Dentists (Continuing Professional Development) Regulations, 2005……………………………………………………...………..25
2.3.1.4 The Medical Practitioners and Dentists (Practitioners and Health Facilities) (Advertising) Rules, 2016…………………………………………………...…26
2.3.1.5 The Medical Practitioners and Dentists (Fitness to Practice) Rules 2016………...…26

2.4 Other Health Specific Statutes……………………………………………………...……27
2.5 Statutes Not Specific to Health………………………………………………………..28
2.5.1 Companies Act…………………………………………………………………...…..28
2.5.2 Consumer Protection Act………………………………………………………….31
2.5.3 Capital Markets Authority Act…………………………………………………....32
2.5.4 Non-Governmental Organizations Co-ordination Act and Public Benefits Organisation Act…………………………………………………………………..34
2.6 Lessons to draw from the Education sector………………………………………. …..35
2.6.1 Basic Education Act………………………………………………………...…..35
2.6.2 Universities Act and Technical and Vocational Education and Training Act, 2012..37
2.7 Conclusion……………………………………………………………………………38

3 **CHAPTER THREE**
CORPORATE GOVERNANCE FOR HEALTH CARE PROVIDERS WITH A FOCUS ON QUALITY – LESSONS FROM OTHER COUNTRIES
3.1 Introduction…………………………………………………………………….......40
3.2 Corporate and Clinical Governance in Health Care Providers………………...………40
3.2.1 State of the patient……………………………………..……………………41
3.2.2 Cost of mistakes…………………………………………………………..…41
3.2.3 Capital intensive infrastructure………………………..………………………42
3.2.4 Highly regulated industry…………………………………………………………43
3.3 Corporate governance arrangements in selected countries…………………………..…44
3.3.1 England's National Health Services…………………………………………………44
3.3.1.1 Structure of the NHS……………………………...……………………………45
3.3.1.2 Corporate Governance Guidelines for NHS…………………………………………46
3.3.1.3 Application of Agency or stakeholder Approach by NHS …………………………..48
3.3.1.4 Quality considerations when formulating strategy for an organisation………..……49
3.3.1.5 Quality considerations when setting up accountability structures…………………...49
3.3.1.6 Corporate Governance for Health Care Providers in USA………………...……...53
3.3.1.7 Corporate ethics and quality of care……………………………………...…..54
3.4 Conclusion ………………………………………………………………………….55

4 CHAPTER FOUR
CONCLUSIONS AND RECOMMENDATIONS
4.1 Conclusions………………………………………………………………………....58
4.2 Recommendations……………………………………………………………………..61
Bibliography…………………………………………………………………………......63

CHAPTER ONE

REFORMING THE LAW ON CORPORATE GOVERNANCE FOR HEALTH CARE PROVIDERS IN KENYA: FOCUS ON QUALITY OF HEALTH CARE

1.1 Introduction

The health care sector plays a key role in promoting and restoring health of the society. There are several good stories of wellness and success in the sector. However, the state of health care provision in Kenya, especially the public health care, is in dire need of reforms.[1] The health care system has various shortcomings.[2] Public service medical professionals such as nurses and doctors are on frequent strikes across various counties in Kenya. There are instances of serious patient neglect in both private and public health facilities. In the month of September 2018, the governor of Nairobi County stormed Pumwani Maternity Hospital and unearthed 12 bodies of infants hidden in a store in the hospital. He also found patients waiting for a gynaecologist who had not reported to work. The governor immediately dissolved the hospital board as the hospital's governing body and ordered the board to explain within 14 days why disciplinary action should not be taken against them.[3] In late 2016, it was widely reported that an unqualified person running a private health facility in Nairobi had sedated and sexually molested his patient.[4] There have been widely reported cases of a person who had been engaged by a county government as a medical doctor and yet he had never been to a medical school. The person had been promoted to the level of a medical superintendent and had performed several surgeries.[5] This paper considers both public and private health care providers.

Several medical negligence cases handled by the Kenya Medical Practitioners and Dentists Board (KMPDB), the country's regulator of dentists and doctors, have been reported by the

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[1]Health care is generally used in this study to mean systems and undertakings that relates to prevention, diagnosis and treatment of diseases, illness, and injuries and covers various areas such as public health, promotion of wellness and absence of diseases, public health insurance, rehabilitative and palliative care.

[2] Luis Franceschi, 'Health law remains undeveloped in Kenya' *Daily Nation* (Nairobi, 4 November 2016) <http://www.nation.co.ke/oped/blogs/dot9/franceschi/2274464-3440938-aie75l/>accessed on 4 November 2016.

[3] John Mutua, 'Nairobi governor dissolves Pumwani Maternity Hospital Board' (*Business Daily* Nairobi 17 September 2018) <https://www.businessdailyafrica.com/news/counties/Nairobi-governor-dissolves-Pumwani-Maternity-Hospital-board/4003142-4764084-gthms4z/index.html> Accessed on 22 September 2018.

[4] See the story of Mugo Wairimu, who faced several charges including of raping a patient, pretending to be a gynecologist and others. Nancy Agutu, 'Mugo wa Wairimu charged afresh with rape, pretending to be gynaecologist' *The Star* (Nairobi, 10 November 2016) <http://www.the-star.co.ke/news/2016/03/14/mugo-wa-wairimu-charged-afresh-with-rape-pretending-to-be_c1312544 > accessed on 11 November 2016.

[5] Rael Jelimo, 'Sub-County Hospital as a medical superintendent', *The Standard (*Nairobi, 29 November 2018) < https://www.standardmedia.co.ke/health/article/2000224446/nandi-county-health-office-paid-fake-doctor-sh150-000-per-month> Accessed on 30 November 2016.

mainstream media.[6] Statistics shows that 985 complaints have been lodged before KMPDB between 1997 and 2018, a number which may not represent the correct overview because not all medical negligence matters are reported.[7] All these are examples of instances where the health care system has failed patients. These failures raise the question whether the poor quality of health care can be avoided or minimised if the respective health care providers were managed in a better way. Is the Kenyan law appropriately structured to imbue good ethos of corporate governance in both the public and private health care providers (hereinafter collectively known as health care providers) in Kenya? Can the law on corporate governance assist in improving the quality of health care? Quality of (health) care is used broadly in this paper to mean patient safety, effectiveness of care and patient experience.[8]

Corporate governance, discussed in detail below, refers to how an organisation is managed, led and controlled. Principles of good corporate governance which includes accountability, transparency, stewardship and responsibility[9] can be used to enrich and enhance quality of care for patients. For example, a hospital which pays enough attention to transparency would put in place a clear transparent way of handling customer complaints and therefore enhancing quality of care. Secondly, a health care institution which places responsibility and accountability at the heart of all the employee ranks would put in place clear accountability mechanisms for employees coming in contact with patients e.g. how long does a patient take with one medic and is that time too long or too short compared to the expectations. Such a time taken with a patient will have a bearing on any medical negligence claim brought against the medic since it evidences the time taken with the patient by the medic. Therefore there is a link between quality of care and having a good corporate governance arrangements for a health care provider and applying the principles of corporate governance. Quality of health care is used broadly in this

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[6] Jeckonia Otieno and Graham Kajilwa 'Association put to task over errant doctor' *Standard Newspaper* (Nairobi, 14 September 2016) https://www.standardmedia.co.ke/article/2000215954/association-put-to-task-over-errant-doctors, Accessed on 30 May 2018.

[7] Maureen Kakah, 'Hope for victims' families as court rules on medical negligence case' *Daily Nation* (Nairobi) https://www.nation.co.ke/news/Hope-for-victims--families-court-rules-medical-negligence-case/1056-4549996-giibjo/index.html, Accessed on 10 November 2018.

[8] NHS, 'The Healthy NHS Board Principles for Good Governance' Foresight Partnership, London, at page 8, available at http://www.ntda.nhs.uk/wp-content/uploads/2013/04/THE-HEALTHY-NHS-BOARD.pdf. Accessed on 1 February 2018.

[9] Pearse Trust, 'The Core Principles of Good Corporate Governance', https://www.pearse-trust.ie/blog/bid/108866/the-core-principles-of-good-corporate-governance. Accessed on 10 November 2018.

paper to mean patient safety, effectiveness of care and patient experience.[10] At a bare minimum, the quality of care must meet the standard of care required of a health care provider by law and this can be extrapolated to include higher standards where these are set an institution.

There are industries or sectors of a country's economy which have statute backed special corporate governance arrangements because of their role in the society. Insurance and banking are examples of sectors in Kenya which have sector specific corporate governance arrangements.[11] Education sector, particularly, basic education, has also recently joined the sectors with a customised statute backed corporate governance arrangements after the enactment of the Basic Education Act which provides for an elaborate corporate governance arrangement for basic education providers.[12] Health care sector is increasingly requiring a customised corporate governance arrangements.[13] Considering the overall growing concern about quality of health care the world over, a customised statute backed corporate governance is critical in the health care sector. A customised statute backed corporate governance regime means a sector specific corporate governance regime deliberately formulated to address the needs of the sector such as quality needs. For example, such a regime would stipulate that the board of a health care provider must include a qualified doctor or nurse or clinical officer, a representative from the staff, a representative from the community or from a body representing patients amongst others.

The need for customised corporate governance requirements is premised on factors such as the risk inherent in the sector, the nature of interaction with the public and nature and centrality of the services to the public. Health care providers in Kenya are in a sector which should now require the legal backing of a specialised corporate governance arrangements. Indeed, the Word Health Organization provides leadership and governance as one of the six building blocks of a healthcare system. These building blocks comprise of health workforce, health financing,

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[10] 'The Healthy NHS Board Principles for Good Governance' Foresight Partnership, London, at page 8, available at http://www.ntda.nhs.uk/wp-content/uploads/2013/04/THE-HEALTHY-NHS-BOARD.pdf. Accessed on 1 February 2017.

[11] For example, see corporate governance requirements for banks in the Prudential Guidelines for Institutions Licensed Under the Banking Act. Available under https://www.centralbank.go.ke/wp-content/uploads/2016/08/PRUDENTIAL-GUIDELINES.pdf. Accessed on 3 March 2017. For insurance companies, Insurance Regulatory Authority has promulgated Corporate Governance for Insurance and Reinsurance Companies (2011), available in http://www.ira.go.ke/attachments/article/63/Corporate%20Governance%20Guidelines.pdf. Accessed on 3 March 2018.

[12] For example, See Part VIII and IX of Basic Education Act, Act no. 14 of 2013 which provides for corporate governance arrangement for schools and the regulations on quality.

[13] This paper will give selected examples of corporate governance arrangements and requirements for health care providers in the United Kingdom.

medical products, vaccines and technology, leadership/governance, information research and service delivery.[14] Leadership and governance is considered from the perspective of both private and public institutions.[15] Kenya Health Policy considers leadership and governance as one of the eight orientations (key action areas) where investments will need to be made for the attainment of the policy objectives and improved quality of health care.[16] The policy covers the all health care providers in Kenya. The public sector only 41% of the registered facilities in Kenya with the commercial private sector taking 43% and faith based organisations taking 16%.[17]

Corporate governance is generally understood to mean the integral management of an organization in its entirety by considering all internal components which work together but which eventually are integrated to the leadership and implementation of risk management, financial management and internal control management.[18] Corporate governance is also viewed as the structure and system of rules and controlling the institution to benefit the many stakeholders in an organization.[19]

It has been argued that good corporate governance principles should not be restricted to only entities in the private sector but also include entities in the public sector.[20] On 25th March 2015, the President of the Republic of Kenya vide an Executive Order directed that all parastatals and state corporations abide by the Mwongozo Code of Corporate Governance (hereinafter 'Mwongozo')[21] subject to the provisions of any written law. Organisation for Economic

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[14] The WHO Guidelines, Available in http://www.wpro.who.int/health_services/health_systems_framework/en/. Accessed on 30 September 2018.
[15] Ibid.
[16] Ministry of Health, *Kenya Health Policy 2014 – 2030*, Nairobi.
[17] Ministry of Medical Services (MoMS) 2006, quoted in Jeff Barnes, Barbara O'Hanlon, Frank Feeley III - 2010 - Medical, and available in https://books.google.co.ke/books?id=Xd3rQeEGytIC&pg=PA8&lpg=PA8&dq=private+sectors+owns+what+percentage+of+health+care+providers+in+kenya&source=bl&ots=_593PWPrUB&sig=poBlKWu3KZxbbr_an_CkT-l-uxM&hl=en&sa=X&redir_esc=y#v=onepage&q=private%20sectors%20owns%20what%20percentage%20of%20health%20care%20providers%20in%20kenya&f=false. Accessed on 15 November 2016.

[18] Matei Ani, Drumasu Cyprian, 'Corporate Governance and public sector entities', (4th World Conference on Business, Economics and Management, Cyprus November 2016), www.sciencedirect.com/12hgjs.d accessed on 11 November 2016.
[19] Mwongozo, The Code of Governance for State Corporations, Public Service Commission and State Corporations Advisory Committee (SCAC), Kenya 2015, available in <http://www.icpsk.com/index.php/membership/e-library/finish/9-cs-practioners-corner/459-mwongozo-code-of-governance-for-state-corporations> accessed on 15 November 2016.
[20] Supra note 13.
[21] Supra note 14.

Cooperation and Development (OECD) has developed Guidelines on Corporate Governance of State-Owned Enterprises[22]. In Kenya, some of the parastatals and state owned enterprises which deals with health care matters include National Health Insurance Fund (NHIF)[23], Kenya Medical Supplies Agency (KEMSA)[24] and Kenya Medical Research Institute (KEMRI)[25] though there are various other public entities dealing with different aspects of health. One of the values enshrined in Mwongozo and various other corporate governance codes is customer focus, which requires that quality of care be given sufficient attention by the organisation's leadership. Corporate governance can lead to improvement in performance in public entities and other benefits.[26] Corporate governance also includes governance in health care as can be seen from the latter's definition by World Health Organisation as the process of creating an organizational vision and mission - what it will be and what it will do - in addition to defining the goals and objectives that should be met to achieve the vision and mission; of articulating the organization, its owners and the policies that derive from these values - policies concerning the options that its members should have in order to achieve the desired outcomes; and adopting the management necessary for achieving those results and a performance evaluation of the managers and the organization as a whole.[27]

1.2 Statement of Research Problem

Kenya's health sector has experienced several challenges which touch on quality of health care. These challenges include medical negligence cases which can be avoided,[28] ineffective medical

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[22]OECD Guidelines on Corporate Governance of State Owned Enterprises, <http://www.oecd.org/daf/ca/guidelines-corporate-governance-soes.htm> accessed on 20 November 2016

[23] Established by National Health Insurance Fund Act, Cap 255 of the Laws of Kenya.

[24] Established by Kenya Medical Supplies Agency, Act No. 20 0f 2013 of the Laws of Kenya.

[25]Established under Science and Technology (Amendment) Act of 1979 of the Laws of Kenya.

[26]Supra note 13.

[27] Supra note 13

[28] Infra note 25.

negligence redress mechanisms,[29] health insurance fraud,[30] patient neglect and labour unrests,[31] unqualified persons providing medical services[32].

Whereas there are several laws prescribing quality of care requirements, Kenyan law falls short by failing to have a corporate governance code for health care providers yet a number of challenges experienced in the health care sector can be addressed by a comprehensive corporate governance regime. For example one of the tenets of corporate governance is that the organisation in question must put in place mechanisms to comply with regulatory requirements and lawful government directives. In Kenya, the Ministry of Health has issued the Kenya National Patients' Rights Charter[33] which requires medical professionals and health care providers to recognise and give full effect to patients' rights such as right to give informed consent to treatment and the right to receiving treatment information including available options. If these rights were fully given effect by various medical professionals, a number of medical negligence cases which ends up in the courts and various regulators are likely to be avoided. If the law goes ahead to stipulate a corporate governance arrangements for various categories of health care providers covering aspects such as the board composition, board committees including a committee on quality, internal audit functions, documented processes and steps to inform patients of the various treatment options available, a number of quality challenges would be addressed. Some institutions established through the State Corporation Act such as the Kenyatta National Hospital and the Moi Teaching and Referral Hospital have corporate governance requirements in the constituting law but these require to be revamped to give quality of care the prominence it deserves for example by having a dedicated committee of the board dealing with quality of care issues.

The constitution provides that every person has the right to the highest attainable standard of health, which includes the right to health services, including reproductive health care.[34] The constitution further provides that a person shall not be denied emergency medical treatment[35]

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[29] Kilonzo Eunice, 'Only one doctor has been found guilty of misconduct in 19 years', *Daily Nation* (Nairobi, 29 February 2016) <http://www.nation.co.ke/news/Only-one-doctor-has-been-found-guilty-of-misconduct/1056-3096208-17s5wv/index.html>accessed on 20 November 2017.

[30] Griffins Omwenga, 'Fraud threatens health insurance', *Daily Nation (*Nairobi, 7 May 2012) <http://www.nation.co.ke/lifestyle/smartcompany/Fraud-threatens-health-insurance---/1226-1401102-118ijwnz/index.html> accessed on 20 November 2017.

[31] Daily Nation Team, 'Suffering as nurses strike hits counties', *Daily Nation* (Nairobi 28 August 2015), <http://www.nation.co.ke/news/Suffering-as-nurses-strike-hits-counties/1056-2838288-wc9ifwz/index.html> accessed, accessed on 20 November 2017.

[32] Supra note 11.

[33] http://medicalboard.co.ke/resources/PATIENTS_CHARTER_2013.pdf. Accessed on 20 April 2017.

[34] Article 43, (1) (a).

[35] Article 43 (2).

and these rights are provided for in the bill of rights (chapter four) which binds and places an obligation on all persons,[36] including the state, public and private companies, associations or other body of persons whether incorporated or unincorporated.[37] The constitution therefore places a heavy constitutional burden on health care providers. A corporate governance legal regime for health care providers or a high level prescription would go to great lengths in assisting health care providers achieve these constitutional requirements and ultimately enhance quality of health care. The country has prescribed a corporate governance regimen for basic education providers[38] in order to give effect to children's constitutional right to free basic education.[39] The same should be done for health care providers. And Kenya can draw lessons from countries such as the United Kingdom or the United States of America which have more developed requirements, in one way or the other, on corporate governance requirements for health care providers.

This paper interrogates how the problem of inadequate quality of care and can be addressed by having a legally backed corporate governance regime for health care providers. The central problem which this study seeks to answer is therefore how Kenya can structure its laws on corporate governance for health care providers in order to address or alleviate the challenges on quality of health care.

1.3 Justification of the Study

The quality of health care in Kenya's health sector is in a poor state. Every effort needs to be put in place to ameliorate the situation. This study is focussing on an area which has not been exhaustively covered, if at all covered in the past. Therefore the study of the law on corporate governance of Kenya's health care providers, with a focus on quality is an important study. It is expected that the outcome of the study will assist in addressing some of the challenges experienced in Kenya's health care sector by *interalia* proposing legal reform in the sector's corporate governance arrangements. This is important because a statute backed corporate governance requirement is stronger and likely to be more effective compared to optional codes of regulations which are likely not to have the full backing of the law.

1.4 Theoretical Framework

[36] Article 20(1).
[37] Article 260.
[38] Part VIII, Basic Education Act, Act No. 13 of 2013.
[39]Article 53, 1 (b)

This study is anchored on two main theories. The first theory is legal positivism. Legal positivism provides that law is the command of the sovereign and that law is synonymous with positive norms, that is, norms made by the legislator or considered as common law or case law. Law is not considered law unless it has been put in place in accordance with the laid down procedures. John Austin argues that the principal distinguishing feature of a legal system is the presence of a sovereign who is habitually obeyed by most people in the society, but not in the habit of obeying any determinate human superior. A rule R is legally valid (that is, is a law) in a society S if and only if R is commanded by the sovereign in S and is backed up with the threat of a sanction.[40] This paper posits that there is a need for a statute backed corporate governance regime or code with a focus on quality for health care providers. This will have a force of law as argued by legal positivism that law is law when it is made by the sovereign in accordance with the laid down procedures and it should have sanctions for non-compliance. There are laws prescribing quality requirements but there is a gap in not having a corporate governance code or regime prescribed for health care providers with a focus on quality. Such a corporate governance code anchored on a statute would have sanctions for non-compliance and would lead to overall improvement in the quality of care offered to patients.

The second theory is the stakeholders' theory in corporate governance as distinguished from the agency theory. The dominant theory in corporate governance has been said to be the agency theory.[41] The theory postulates that shareholders appoint a board of directors who are expected to be the agents of the shareholders and work to their level best to maximise shareholders returns.[42] The board of directors appoints the management and staff who are also agents of the shareholders. There are, however, broader conceptions of corporate governance.[43] Companies should act as good corporate citizens and society should hold them to account when they do not.[44] This approach is closely associated with stakeholders' theory which holds that managers must take into account the interests of a broad range of constituents such as employees, creditors, suppliers, customers and the local community when making decisions[45]. It has been

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[40] Legal Positivism, Internet Encyclopaedia of Philosophy. Available on https://www.iep.utm.edu/legalpos/. Accessed on 10 November 2018.

[41] Greenfield, Kent. "Proposition: Saving the World with Corporate Law." *Emory Law Journal* 57, no. 4 (2008): 948-984.

[42] Ibid.

[43]Joan Loughrey, 'Corporate Lawyers and Corporate Governance, Cambridge University Press (Cambridge) 2011, 14.

[44]A. Carver, 'Corporate governance-capitalism's fellow traveller,' in F. Patfield (ed.) Perspectives on Company Law : 2 (London:Kluwever Law International, 1997) p.76.

[45]R E Freeman, Strategic Management: A Stakeholder Approach (Boston, MA: Pitman, 1984), pp 31-2 and 55

argued that the shareholder oriented approach, which encourages managers to focus narrowly on financial performance, created disasters such as Enron, and the financial crisis.[46]

On the other hand, this study is supported by the stakeholder's theory of corporate governance[47] which holds that managers must take into account the interests of a broad range of constituents such as employees, creditors, suppliers, customers and the local community when making decisions with a particular focus on the patient as a customer of health care providers. Health care customers are likely to be more vulnerable compared to a customer of such an entity as a bank and therefore, it should be the business of the law to ensure that corporate governance of health care providers is geared towards patient protection as one of the critical components. In fact, the Company's Act[48] require directors to consider and protect the interests of stakeholders while running a company.[49] A director must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole. In doing so, the director is required to have regard to likely consequence of the decision in long term, interest of company employees, need to foster company's business relationship with suppliers, customers, and others, impact of company on the community and the environment, desirability of the company to maintain a reputation for high standard of business conduct and the need to act fairly as between members of the company. Some health care providers in Kenya are registered as companies. Whereas this section is only applicable to companies registered under the Companies Act, it provides the modern day thinking behind the modern organisations, irrespective of the legal regime of incorporation/registration. In health care, irrespective of the regime of registration of the health care provider, due consideration of the stakeholders, particularly the patient, is critical.

1.5 Research Objectives

The objectives of this research can be broadly categorised into three. The first objective is to study if Kenya has laws prescribing corporate governance arrangements for health care providers with a focus on quality of health care. If such laws exist, they will be studied and evaluated.

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[46]T Clarke (ed.) Theories of Corporate Governance: The Philosophical Foundations of Corporate Governance (London:Routledge, 2008), pp. 19-20.
[47]Supra note 29.
[48] Act No. 17 of 2017.
[49] Section 143 of the Companies Act 2017.

The second main objective is to draw specific lessons from other sectors in Kenya such as the education sector on how to model a corporate governance regime. Specific lessons will also be drawn from countries such as the United Kingdom on how to enhance corporate governance laws focusing on quality of health care by health care providers. The attempt to draw lessons is not a comparative study and will be done in a manner cognisant of the reality that circumstances are different in several jurisdictions.

The third and final objective is to make recommendations on how Kenya can reform its corporate governance laws to focus on quality of health care by health care providers in a better way.

1.6 Research Questions

This study will focus on addressing three main research questions. The first question is to what extent has Kenya enacted corporate governance laws focussing on quality of health care offered by health care providers?

The second question is what are the lessons to be drawn from other sectors in Kenya such as the education sector and from health sector of countries such as the United Kingdom on how to enhance corporate governance laws to better focus on quality of health care?

The third research question is what recommendations can be made on the best way to reform corporate governance laws in Kenya's health care providers to better focus on quality of health care?

1.7 Research Hypothesis

When undertaking the study, a number of hypotheses have be made. The first hypothesis is that the legal regime covering Kenya's health care sector does not prescribe corporate governance requirements which adequately focus on improving the quality of health care.

The second hypothesis is that there are lessons that can be drawn from other sectors such as education sector in Kenya and from other jurisdictions such as the United Kingdom on how to reform corporate governance of Kenya's health care providers to better focus on quality of health care.

1.8 Research Methodology

This study is based on desktop research. It relies on both primary and secondary sources. Some of the primary sources referred to will include the constitution of Kenya, codes of regulations,

Acts of Parliament and treaties amongst others. Secondary sources will include books, articles, journal publications, research papers, electronic sources and other scholarly works that have been published on various thematic areas. No field work will be undertaken.

1.9 Literature Review

A lot has been written on corporate governance. The materials written on corporate governance in health care are mainly on more developed health care systems such as those in the UK, US and Scotland.

Michael W Peregrine[50], a health care corporate governance lawyer, explains that 'the healthcare sector is in the midst of seismic, generational change—prompted by a variety of economic, legislative, competitive, and quality-of-care forces. These forces, and the changes they are unleashing, are creating board of directors' agendas of unprecedented complexity and challenge.'[51] These changes mean that it will be incumbent on hospital and health system board members to anticipate and plan for these new governance challenges. He examines the effects of Affordable Care Act[52] on corporate governance of health care providers and other changes in the United States of America. Kenya can draw lessons on how to deal with unprecedented change in health care to assist the health care providers prepare for changes such as the right to emergency treatment enshrined in the Kenya constitution.[53] *Interalia*, he explains that in such situations of great change, the board should review its size and the entire corporate framework to ensure that the organisation is able to respond to the change appropriately. He posits that such transformational change will require board members (of the institution's highest governing body) to work "smarter, faster, and longer."[54] Some institutions established through the State Corporation Act[55] such as the Kenyatta National Hospital and the Moi Teaching and Referral Hospital have corporate governance requirements in the constituting law but these require to be revamped to give quality of care the prominence it deserves for example by having a dedicated committee of the board dealing with quality of care issues.

[50] Michael W Peregrine, 'Healthcare Governance, Amidst Systemic Industry Change: What the Law Expects', Governance Institute, National Research Corporation, Winter 2014 (Chicago).
[51] Ibid.
[52] The Patient Protection and **Affordable Care Act** (PPACA), commonly called the **Affordable Care Act** (ACA) or Obamacare, is a United States federal statute enacted by President Barack Obama on March 23, 2010. The Act seeks to increase access to health care by US Citizens.
[53] Article 42 of the Constitution of Kenya provides that every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care.
[54] Supra note 16.
[55] Chapter 446 of the Laws of Kenya.

George D Pozgarin in his book, Legal Aspects of Health Care Administration[56] argues that it is expected that each corporation has a governing body (e.g. a board of directors) that has the ultimate responsibility for the operations of the organisation. The existence of this authority creates certain duties and responsibilities for governing board and their individual members. The governing body is legally responsible for establishing and implementing policies regarding the management and operation of the organisation. Some of the key governance considerations in health care corporations includes implied duty to select competent physicians. This is a key requirement which can be borrowed by Kenya to ensure that a health care provider employs qualified personnel for the job in question. Establishing board of directors committees and their composition is another corporate governance arrangement which is central to quality of health care because the board of management is the highest governing body of an organisation, second only to the annual general meeting for shareholders (where these exist). Preventing and managing medical malpractice issues including corporate negligence are central in enhancing quality of health care and these requires that the organisation puts in places working processes and procedures. Other important areas of concern which should be handled from a corporate governance perspective which the author has covered and can be borrowed to the Kenya includes the aspect of licensing, adequate staffing, safety of medical staff and patients and financing.

Clinical governance, unlike corporate governance, pays attention to continuous improvement of quality of care and patient safety. This is explained in the publication Governance in Healthcare – Linkages, Boundaries and the Problems between Corporate and Clinical Governance[57] which draws a distinction between corporate and clinical governance.[58] It is argued that 'the basics of governance within healthcare systems, especially the linkages and boundaries between corporate and clinical governance, are often ill understood inside health organizations. At times of significant turmoil and change in healthcare, one aspect of improved performance is clarification of the roles and responsibilities in the corporate and clinical governance arms of the institution and working with the major confounders of effective

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[56]George D Pozgar, Legal Aspects of Health Care Administration , Jones & Bartlett Learning (Maryland USA) 2012 at pp. 144.

[57]Dowtown Consulting International, Governance in Healthcare Linkages Boundaries and the Problems Between Corporate and Clinical Governance, http://www.dowton.com/journal/2011/06/governance-in-healthcare-%E2%80%93-linkages-boundaries-and-the-problems-between-corporate-and-clinical-governance/ Accessed on 21 November 2016.

governance – people and customs.'[59] Clinical governance is a phrase that was first used by United Kingdom's National Health Services.[60] It means a framework through which organisations are accountable for continuously improving the quality of their services, safeguarding high standards by creating an environment in which excellence in clinical care will flourish.[61] The publication is important in drawing lessons on the various interplay between corporate and clinical governance and how such lessons can be applied in Kenya. The publication is important in clarifying the position that the board of management remains responsible for both corporate and clinical governance of a health care provider.

Healthcare Improvement Scotland's Code of Corporate Governance[62] is based on the general principles of the UK Corporate Governance Code and the International Framework: Good Governance in the Public Sector (the Framework)[63]. The code explains that the main principle is that every institution should be headed by an effective board, which is collectively responsible for the long-term success of the organisation and that the board should establish formal and transparent arrangements for considering how they should apply the corporate reporting, risk management and internal controls principles. The code also provides that good governance is characterized by robust scrutiny, which places important pressures on improving public sector performance and tackling corruption and that good governance can improve organisational leadership, management, and oversight, resulting in more effective interventions and, ultimately, better outcomes.

In Total Quality Management in Kenya's Healthcare Industry[64], the author studies how Total Quality Management (TQM) has been implemented in Kenyatta National Hospital and Nairobi Hospital. The role of Total Quality Management in an organization is to seek to integrate all organizations functions to focus on meeting customers' needs and organizational objective. The author argues that TQM has steadily become popular and it maintains that organizations must strive to continuously improve the processes by incorporating the knowledge and experience of workers. The study is important because it uses primary data and gives a glimpse

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[59]Supra note 42.
[60] Ibid.
[61] Ibid.
[62]Healthcare Improvement Scotland <http://www.healthcareimprovementscotland.org/previous_resources/policy_and_strategy/corporate_governance.aspx> accessed on 20 November 2016.
[63]Ibid at page 3.
[64] Githuku Margaret Wamuyu, 2015, Research project submitted in partial fulfilment of the requirements for the award of Master of Business Administration, School of Business, University of Nairobi, available in http://erepository.uonbi.ac.ke/bitstream/handle/11295/93413/Wamuyu_Total%20Quality%20Management%20in%20Kenya%20s%20Healthcare%20Industry.pdf?sequence=3. Accessed on 20 May 2017.

of the attempt to improve quality of health care in Kenya's largest public hospital (Kenyatta National Hospital) and one of Kenya's most prominent and respected private hospital (Nairobi Hospital). However, the study focusses purely on TQM as a quality management tool and does not dwell much on the nexus between corporate governance and patient experience and safety.

In Corporate Governance and Accountability Mechanisms and Challenges in The Private Hospitals in Kiambu County, Kenya,[65] Festus Mutuku Kioko examines accountability mechanisms and challenges from a corporate governance perspective in private hospitals in Kiambu County. The paper seeks to examine the corporate governance and accountability mechanisms of board of directors and composition, board meetings frequency, reporting and controls and challenges of organization structure and culture, managerial and political and legal challenges in the 18 (eighteen) private hospitals in Kiambu County.[66] The study recommends that full corporate governance and accountability mechanisms be implemented in all the private hospitals so as to ensure better management of hospitals in Kiambu County and the country at large to increase transparency in the hospitals. In addition, the study recommends that the nature of the contract between owner's representative/board and managers informing the latter what to do with the funds and management of the organization should be clearly and thoroughly outlined as much as possible to reduce agency conflicts between the agents and the principals. Further the study recommends board members should be compensated in a manner commensurate to the time spent in the hospital business and their payments should be as per the compensation structures approved by the hospital board.[67] The paper gives a glimpse of the linkage between corporate governance and accountability in Kiambu County, the second largest county in Kenya in terms of population size. However, the paper does not address the linkage between the law, corporate governance and quality of care, which is the subject of this research paper.

1.10 Limitations of the Study

While undertaking this research, a number of limitations may hamper this work and any reader of this work needs to be alive of these limitations. These limitations are inaccessibility of information on corporate structures and policies of health care providers due to the

[65] Festus Mutuku Kioko, 'Corporate Governance and Accountability Mechanisms and Challenges in The Private Hospitals in Kiambu County, Kenya'. Accessed from http://erepository.uonbi.ac.ke/bitstream/handle/11295/15179/Mutuku_Corporate%20governance%20and%20accountability%20mechanisms%20and%20challenges%20in%20the%20private%20hospitals.pdf?sequence=3 on 20 May 2017.
[66] Ibid.
[67] Ibid.

unavailability and confidential nature of such documents. Time limitation is also expected to be a factor which will restrict the number of countries whose corporate governance arrangement for health care providers can be studied. Resources in terms getting all the desired books and materials is also likely to limit this study because this is an area where the number of materials available is limited.

1.11 Chapter Breakdown

This research consists of four chapters broken down as follows:

1) Chapter One - Introduces the topic being studied. It includes aspects such as theoretical framework, background of the study, literature review and research objectives amongst other introductory matters.

2) Chapter Two – The chapter will be on the law on corporate governance of health care providers in Kenya. The chapter will discuss the corporate governance of health care providers in Kenya with a focus on quality of care. Corporate governance is very broad and this research topic has deliberately focused on the corporate governance requirements which have a bearing on quality of care.

3) Chapter Three – The chapter will draw specific lessons on anchoring corporate governance requirements for health care providers in law to better focus on quality of health care. The chapter will not be a comparative study but will draw lessons from the education sector in Kenya and health sector in countries such as the United Kingdom.

4) Chapter Four – This will be on the conclusions and recommendations.

CHAPTER TWO

'Quality is not an act, but a habit'[68]

THE LAW ON CORPORATE GOVERNANCE FOR HEALTH CARE PROVIDERS IN KENYA WITH A FOCUS ON QUALITY OF CARE

2.1.1 Introduction

Kenya has laws on quality of care by healthcare providers in Kenya spread across many statutes. Whereas there are several laws prescribing quality of care requirements, the law falls short by failing to have a minimum corporate governance code for health care providers. This may be the missing link because despite all the laws stipulating quality requirements, there are still cases of poor quality such as instances of medical negligence discussed in chapter one. The laws on quality of care have governance requirements and but there is no comprehensive statute or regulation that has all the requirements on corporate governance either generally or with a bias for quality. This is unlike the situation in the United Kingdom where the National Health Service (NHS) has promulgated a statute backed corporate governance code for foundation trusts which run majority of the health care institutions.[69] The spread of few corporate governance requirements across many statutes is mainly because of the different registration regimes for various health care providers. These registration regimes can be broadly categorised into two groups.[70] The first category consists of facilities which are owned and controlled by the National and County Governments and run by the respective departments of health. This first category consists of public health care providers. The second category mainly consists of private health care providers registered under different legal regimes such as companies under the Companies Act[71], partnerships registered under the Registration of Business Names Act[72] or under the Limited Liability Partnership Act[73] or under the Partnership Act[74], sole proprietors registered under the Registration of Business Names Act[75], incorporated or unincorporated trusts with substantive legal regime being the Trustees Act[76], Non-

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[68] Aristotle, <https://www.brainyquote.com/quotes/aristotle_379604> Accessed on 10 April 2018.

[69] National Health Service, NHS Foundation Trusts Code of Governance, https://www.gov.uk/government/publications/nhs-foundation-trusts-code-of-governance. Accessed on 10 April 2018.

[70] Part III of the Health Act, Act Number 21 of 2017.

[71] Act No. 17 of 2015 of the Laws of Kenya.

[72] Cap 499 of the Laws of Kenya.

[73] Chapter 30A of the Laws of Kenya.

[74] Act No. 16 of 2012 of the Laws of Kenya.

[75] Cap 499 of the Laws of Kenya.

[76] Chapter 167 of the Laws of Kenya.

Governmental Organisations registered under the repealed Non-Governmental Organizations Co-ordination Act[77] and public benefits organisations under the yet to be implemented Public Benefits Organisation Act[78].

There are other overreaching laws, statutes and regulations on quality and corporate governance of health care providers. These include the Constitution of Kenya which has provisions on consumer rights[79] and right to health[80] and the Medical Practitioners and Dentists Act[81] which has regulations on registration of health facilities. Other statutes includes the Public Health Act[82] and Health Act.

This chapter discusses these corporate governance requirements for health care providers in Kenya with a bias for quality. It also seeks to borrow a leaf from the education sector's corporate governance requirements under Basic Education Act[83]. The chapter is divided into four main parts covering the constitution, health specific statutes, non-health specific statutes and lessons to draw from the education sector.

2.1.2 Principles of Corporate Governance and Quality of Care

The importance of corporate governance for health care providers was recently demonstrated. On Monday 17 September 2018, Kenya was treated to news regarding the country's oldest maternity hospital. The governor of Nairobi County stormed Pumwani Maternity Hospital and unearthed 12 bodies of infants hidden in a store in the hospital. He also found patients waiting for a gynaecologist who had not reported to work. The governor immediately dissolved the hospital's board as the hospital's governing body and ordered the board to explain within 14 days why disciplinary action should not be taken against them.[84] Whereas there were concerns raised on the process applied by the governor, the matter buttresses a key plank of this research paper – that corporate governance is a huge determinant of quality of care offered by health care providers. The board of directors or the governing body is required to put in place measures to ensure that proper care is afforded to the patients.

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[77] Chapter 134 of the Laws of Kenya.
[78] Act No. 18 of 2013 of the Laws of Kenya.
[79] Article 46 of the Constitution.
[80] Article 43 of the Constitution.
[81] Chapter 253 of the Laws of Kenya.
[82] Cap 242 of the laws of Kenya.
[83] Act No. 14 of 2013 of the laws of Kenya.
[84] John Mutua, 'Nairobi governor dissolves Pumwani Maternity Hospital Board' (*Business Daily* Nairobi 17 September 2018) <https://www.businessdailyafrica.com/news/counties/Nairobi-governor-dissolves-Pumwani-Maternity-Hospital-board/4003142-4764084-gthms4z/index.html> Accessed on 22 September 2018.

Principles of good corporate governance which includes accountability, transparency, stewardship and responsibility can be used to enrich and enhance quality of care for patients. For example, a hospital which pays enough attention to transparency would put in place a clear transparent way of handling customer complaints and therefore enhancing quality of care. Secondly, a health care institution which places responsibility and accountability at the heart of all the employee ranks would put in place clear accountability mechanisms for employees coming in contact with patients e.g. how long does a patient take with one medic and is that time too long or too short compared to the expectations. Such a time taken with a patient will have a bearing on any medical negligence claim brought against the medic since it evidences the time taken with the patient by the medic. Therefore there is a link between quality of care and having a good corporate governance arrangements for a health care provider and applying the principles of corporate governance.

2.2 Constitution

According to the constitution, every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care.[85] Further, consumers have the right to goods and services of reasonable quality, to the information necessary for them to gain full benefit from goods and services and the protection of their health, safety, and economic interests.[86] There are other articles in the constitution buttressing the health aspect including the right to a clean and healthy environment and the right of children to good nutrition and health. The constitution goes further to allocate different duties relating to health between the national and the county governments.[87] The national government is responsible for the health policy and national referral health facilities while the county governments are responsible for county health services, including, in particular county health facilities and pharmacies; ambulance services; promotion of primary health care; licensing and control of undertakings that sell food to the public; veterinary services (excluding regulation of the profession); cemeteries, funeral parlours and crematoria; and refuse removal, refuse dumps and solid waste disposal.[88]

The constitution provides for a governance framework which enshrines principles of good corporate governance. The national values and principles of governance bind all state organs,

[85] Article 43 (1) (a) of the Constitution.
[86] Article 46 (1) of the Constitution.
[87] Fourth Schedule to the Constitution.
[88] Part 2 of the Fourth Schedule to the Constitution.

state officers, public officers and all persons and all persons whenever any of them applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.[89] These national values and principles of national governance include good governance, integrity, transparency and accountability.[90] This is a framework which can be helpful in fostering good corporate governance for health care providers if appropriately applied. The constitution also provides for the framework within which parliament makes laws such as the Companies Act which guide and shape corporate governance.

2.3 Health Specific Statutes

2.3.1 Medical Practitioners and Dentists Act[91]

This is the statute that governs the registration of medical practitioners and dentists in the country. It is the governing statute for registration of medical facilities in the country. This is one of the statute set to be amended if the Health Laws (Amendment Bill) 2018[92] is approved. One of the changes introduced by the amendment is renaming of the Medical Practitioners and Dentists Board to Medical Practitioners and Dentists Council and alter its composition by in various ways. These include having the chairman appointed by the President instead of the Cabinet Secretary, having a council member nominated by the Kenya National Human Rights Commission and having a person representing the health sector and even another member representing the public. The council will be more representative than the current board set up.

The Act establishes the Medical Practitioners and Dentists Board[93] (the Board) and the office of the Registrar under the Board with responsibilities to maintain the register.[94] The Registrar is the Director of Medical Services[95]. The Act imbues good corporate governance ethos on quality in the following ways.

First, it establishes a register of medical practitioners in the country.[96] The registrar is required to make any necessary alterations including removals and additions in the register and importantly, the register is supposed to be published in the Kenya Gazette as soon as practicable and in print and electronic media once every year by 31st of March.[97] Publication of the register

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[89] Article 10(1) of the Constitution.
[90] Article 10(2) of the Constitution.
[91] Cap 253 of the Laws of Kenya.
[92] National Assembly Bill No. 14, 2018.
[93] Section 4 of Cap 253 of the Laws of Kenya.
[94] Section 5 of Cap 253 of the Laws of Kenya.
[95] Established under section 9 of the Public Health Act, Cap 242.
[96] Section 5 of Cap 253 of the Laws of Kenya.
[97] Section 9 of Cap 253 of the Laws of Kenya.

is a prima facie proof of a member's registration. This brings an aspect of accountability to the public and access to information by the public on the licensed practitioners. The register is available in an online portal maintained by the Board.[98] The Act also has provisions for licensing of persons to render medical or dental services including in their private capacities.[99] Licenses are issued for a period of one year. This demonstrates good corporate governance it provides for an accountability mechanism whereby a health care provider is required to employ people whose credentials can be cross checked by a member of the public. By being required to employ doctors or dentists in the register, this enhances quality of care since such persons would be qualified.

Secondly, the Act prescribes minimum eligibility requirements for persons to be registered as medical or dental practitioners.[100] Such a person must be a holder of a degree, diploma or other qualification which is recognized by the Board, has after obtaining the required qualification been in training employment in a medical capacity for at least one year in institution(s) approved by the Board, satisfies the Board that he has acquired sufficient knowledge during training and that he is a person of good moral character and fit and proper to be registered. The Board has a raft of options to enforce these requirements including failing to register a person who has not met the requirements and requiring such a person to undergo further trainings. The Board has supervisory powers to ensure that students admitted to study medicine or dentistry are undertaking studies and examinations to guarantee that the holder has acquired the minimum knowledge and skills necessary.[101]

Thirdly, the Board has disciplinary powers over persons it has registered. If a medical practitioner or dentist or a person licensed under the Act is convicted of an offence under the Act or under the Penal Code[102] whether the offence was committed before or after the coming into operation of the Act, or is, after inquiry by the Board, found to have been guilty of any infamous or disgraceful conduct in a professional respect, either before or after the coming into operation of this Act, the Board may, remove his name from the register or cancel any licence granted to him. At least ten members of the board have to agree to such removal or cancellation. A person removed from the register or even a person whose name has never been in the register

[98] Medical Practitioners and Dentists Board, Register of Practitioners, Nairobi 2018 <http://medicalboard.co.ke/online-services/retention/> Accessed on 11 April 2018.
[99] Sections 13, 14 and 15 of Cap 253 of the Laws of Kenya.
[100] Section 11 of Cap 253 of the Laws of Kenya.
[101] Section 11A of Cap 253 of the Laws of Kenya.
[102] Cap 63 of the Laws of Kenya.

is not allowed to practice and if found guilty of such a practice, is liable to a fine not exceeding ten thousand shillings, or to imprisonment for a term not exceeding twelve months or to both.[103]

There are several subsidiary regulations issued under the Act. These include the Medical Practitioners and Dentists (Medical Institutions) (Amendment) Rules, 2017, Medical Practitioners and Dentists (Referral of Patients Abroad) Rules, 2017, Medical Practitioners and Dentists (Professional Fees) Rules, 2016, Medical Practitioners and Dentists (Advertising) Rules, 2016 Medical Practitioners and Dentists (Medical Camp) Rules, 2016, Medical Practitioners and Dentists (Fitness to Practice) Rules 2016, Medical Practitioners and Dentists (Inspections and Licensing) Rules, 2014, Medical Practitioners and Dentists (Training, Assessment and Registration) Rules, 2014 and Medical Practitioners and Dentists (Disciplinary, Proceedings and Procedure) (Amendment) Rules, 2013. These regulations have a bearing on corporate governance in one way or the other and with an element of quality of care. Some of the most relevant regulations have been discussed below.

2.3.1.1 Medical Practitioners and Dentists (Inspections and Licensing) Rules, 2014

The rules are the basis of the private medical practice by doctors and dentists in Kenya. The rules provides various requirements which ha3e an effect on quality. A committee of the Board known as the Inspections and Licensing Committee is established by the regulations and its main duty is to receive, review and approve applications for licensing.[104] A medical practitioner is eligible to practice in private if he has worked continuously in Kenya on a full time basis for a period of not less than one year though the Board may waive this requirement for a license person if such a waiver is in the public interest.[105] The regulations provides for the modalities of applying and granting of a license including ways of appealing a decision to deny the license.[106] The regulations also allows the Board to grant a conditional licence. The regulations also provides for the framework for allowing specialists practice, practice of private clinical radiological laboratory medicine[107] and private clinical laboratory medicine.[108] Locums are provided for and it is worth to note that these are only allowed to be held by a qualified

[103] Section 22 of Cap 253 of the Laws of Kenya.
[104] Regulation 3, Medical Practitioners and Dentists (Inspections and Licensing) Rules, 2014.
[105] Regulation 5, Medical Practitioners and Dentists (Inspections and Licensing) Rules, 2014.
[106] Regulation 7, Medical Practitioners and Dentists (Inspections and Licensing) Rules, 2014.
[107] Part VII, Medical Practitioners and Dentists (Inspections and Licensing) Rules, 2014.
[108]Part VI, Medical Practitioners and Dentists (Inspections and Licensing) Rules, 2014.

practitioner licensed under the Act i.e. a person holding a locum must be fully licensed doctor or a dentist.[109]

The regulations have a number of other corporate governance requirements with a bias for quality.[110] First, the regulations requires that practice in a private clinic must be in a premises licensed by the board. A private practitioner who wishes to operate a private clinic is required to apply to the Board in writing for permission to use the premises intended for use as a private clinic before applying for a licence to engage in private practice and the Board is required to grant or refuse to grant a licence within thirty days of receiving the application.[111]

Secondly, a licence for the premises has conditions that the premises shall be kept in good order and a good state of repair, be kept reasonably secure from unauthorized entry and conform to the minimum requirements set out in Part A or Part B of the Second Schedule, as the case may be, and any other written law, and in particular the Public Health Act (Cap. 242).[112] Part A of the Second Schedule contain minimum requirements for a premises for general practitioner while Part B of the same schedule contain requirements for a dental surgery. A licensed clinic is open to supervision and inspection by the Board and any person who wilfully obstructs an officer of the Board acting in the course of his duty is guilty of an offence and liable to a fine not exceeding one thousand shillings. A practitioner is not allowed to operate more than two private clinics.[113] A licensee is required to display his name in an unostentatious manner outside the clinic and comply with the regulations relating to description of qualifications.[114]

Thirdly, in line with good corporate governance requirements there is a requirement to ensure that the employed staff are of appropriate qualifications and skills. The regulations provides that a licensee may employ as an assistant any person who has undergone a recognized training in medicine, dentistry, nursing or midwifery in an approved training institution, and who is not registered as a medical practitioner or dentist, to undertake defined duties under the immediate supervision of the licensee or a registered practitioner employed by him. Further, where any assistant employed under paragraph (1) undertakes or offers to undertake any form of medical or dental treatment independently without the immediate supervision of a medical practitioner

[109] Regulation 10, Medical Practitioners and Dentists (Inspections and Licensing) Rules, 2014.
[110] Part III, Medical Practitioners and Dentists (Inspections and Licensing) Rules, 2014.
[111] Regulation 9, Medical Practitioners and Dentists (Inspections and Licensing) Rules, 2014.
[112] Regulation 13, Medical Practitioners and Dentists (Inspections and Licensing) Rules, 2014.
[113] Regulation14, Medical Practitioners and Dentists (Inspections and Licensing) Rules, 2014.
[114] Regulation 12, Medical Practitioners and Dentists (Inspections and Licensing) Rules, 2014.

or dentist is guilty of an offence.[115] The licensee is also required to dress and groom well in accordance with the Code of Professional Conduct and Discipline.[116]

Fourthly, there are restrictions on what a licensee can do or not do. For example, a private practitioner is not allowed to operate clinical radiological laboratory or a clinical laboratory unless some conditions on qualification and supervision of the personnel working in the laboratories are satisfied.[117]

Finally, the regulations provides for detailed guidance on the essential requirements regarding a clinic, nursing home, hospital, clinical radiology laboratory, clinical laboratory, X ray premises and others. This is intended to ensure that there minimum standards which can be enforced against errant or non-compliant health care providers. It is however worthy to note that the fine applicable for offences under the regulations where a penalty is not prescribed is a maximum of Kenya Shillings ten thousand[118] or imprisonment for a period not exceeding twelve months or to both such fine and imprisonment.[119] This fine amount is too little and should be increased.

2.3.1.2 Medical Practitioners and Dentists (Medical Institutions) Amendment Rules, 2017

These regulations provide for the basis of regulations of a medical institution. The regulations were for decades only applicable to private medical institutions but were amended in 2017 to replace reference to private medical institutions with medical institutions. This implies that after January 2017 when the amended regulations were issued, both public and private institutions are required to apply to the Board for licensing.

A medical institution is defined as premises of a health facility which offers medical or dental services, and where persons suffering from any sickness, injury, or infirmity are given medical, surgical, dental treatment or nursing care, and includes a hospital, a maternity home, a mission hospital, an institutional clinic, a convalescent home, a nursing home, a medical centre, a dispensary, a health centre, a laboratory and other specialized medical institutions other than those licensed under Rule 9 of the Private Clinic Rules, but does not include hospitals or other medical establishments operated by the Government or by a local authority.[120] The last part

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[115] Regulation 16, Medical Practitioners and Dentists (Inspections and Licensing) Rules, 2014.
[116] Regulation 19, Medical Practitioners and Dentists (Inspections and Licensing) Rules, 2014.
[117] Regulation 20, Medical Practitioners and Dentists (Inspections and Licensing) Rules, 2014.
[118] Regulation 42, Medical Practitioners and Dentists (Inspections and Licensing) Rules, 2014.
[119] Regulation 39, Medical Practitioners and Dentists (Inspections and Licensing) Rules, 2014.
[120] Regulation 2 of the Medical Practitioners and Dentists (Private Medical Institutions) Rules, 2000.

excluding facilities owned by the government or local authorities appears inconsistent with the amendments in 2017 which implies that the rules are also applicable to publicly owned medical facilities. All medical institutions are required to be registered by the Board and words such as 'hospital' or 'nursing home' are protected and can only be used with the permission of the Board.[121]

The regulations cover various aspects of medical institutions. These include licensing after meeting the prescribed requirements[122], maintenance of a register of medical institutions, issuance of certificate of registrations on annual basis[123] amongst others. A licence is required to be granted if the premises and its proposed facilities and equipment are approved by the Board as suitable for the purpose indicated in the application, and the Board is satisfied as to the character and ability of the applicant to run the private medical institution.[124]

An institution is registered and licensed where the premises conform to the minimum requirements set out in the regulations (such as the size, aeration, hygiene and waiting areas); the medical officer of health of the county where the premises are located submits a satisfactory report on the premises to the Board; the medical practitioners or dentists providing services at the institution is the holder of a valid private practice licence issued under the Act to render medical or dental service at the institution and all professional staff working or intending to work in the institution are qualified and are registered by the relevant registering authority as required.[125]

It is a requirement that the quality of health care to be provided at the institution be such of a nature to comply with the minimum standards acceptable to the Board.[126] The question is what is the minimum standard acceptable to the Board? This is left to the Board to prescribe the standards acceptable opening a wide room for the Board to determine such standards.

For purposes of licensing, the Board categorises medical institutions in different categories. First is the Level 1 which is a community health facility or a health facility that focuses on ensuring individuals, households and communities carry out appropriate healthy behaviour and recognition of signs and symptoms of conditions that need to be managed at other levels of the

[121] Regulation 3 of the Medical Practitioners and Dentists (Private Medical Institutions) Rules, 2000.
[122] Regulation 4(2) of the Medical Practitioners and Dentists (Private Medical Institutions) Rules, 2000.
[123] Regulation 8 of the Medical Practitioners and Dentists (Private Medical Institutions) Rules, 2000.
[124] Regulation 10 of the Medical Practitioners and Dentists (Private Medical Institutions) Rules, 2000.
[125] Regulation 6 of the Medical Practitioners and Dentists (Private Medical Institutions) (Amendment) Rules, 2017.
[126] Regulation 8 of the Medical Practitioners and Dentists (Private Medical Institutions) (Amendment) Rules, 2017.

system. Level 2 includes medical clinics, dental clinics, dispensaries (including faith based), mobile clinics and eye clinics. Level 3A consists of a basic health centre (including a faith based basic health centre), comprehensive health centre (including faith based), medical or dental centre and stand-alone funeral homes. Level 3B categories of facilities are nursing homes, cottage hospitals and maternity homes while Level 4 facilities are hospital level 4, internship training centres, county hospitals and faith based hospital. Level 5 consists of a hospital level 5, county referral hospitals, secondary care hospitals and faith based hospitals. Level 6 A facilities categories are specialized tertiary referral hospitals, faith based specialized tertiary referral hospital while level 6B has national tertiary referral and teaching hospitals and hospitals or national tertiary referral and teaching faith based hospital. [127] The regulations specifies the infrastructure, personnel, size of land/office space required under each level of hospital.

The regulations specify that every licence issued to a medical institution shall specify the nature of the services that may be provided by the institution, though this does not prevent the carrying out at a medical institution in case of an emergency of any other treatment as may in the opinion of a medical practitioner, be necessary. Every licence is required to state the maximum number of patients who may be accommodated in the institution at any one time, and may be limited to any particular class or classes of patients.[128]

Where the owner or managing body of a medical institution does not comply with the rules, the Board may refuse to register or license the institution. Further, the Board may refuse to renew the licence of a medical institution which is operated in a manner that contravenes any provision of the Act or the rules. A licence may at any time be revoked by the Board if the licensee wilfully neglects or refuses to comply with any provision of the rules or obstructs, impedes, or hinders any person carrying out any duties or responsibilities under the Act and these rules; if in the opinion of the Board, the medical institution is managed in a manner contrary to the rules or in such a manner that the revocation of the licence is required in the public interest; if, after inquiry the Board finds that there has been professional misconduct.[129]

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[127] Schedule to the Medical Practitioners and Dentists (Private Medical Institutions) (Amendment) Rules, 2017.
[128] Regulation 8 of the Medical Practitioners and Dentists (Private Medical Institutions) (Amendment) Rules, 2017.
[129] Regulation 10 of the Medical Practitioners and Dentists (Private Medical Institutions) (Amendment) Rules, 2017.

All medical institutions shall be subject to inspection by the Board.[130] The operator of a medical institution is required to submit to the Board once in every six months list of all medical practitioners and dentists in their employment; all medical practitioners and dentists who are authorized to use their premises, indicating in each case the authorized place for use as a private clinic. This ensures that the Board is aware of what is happening in the medical institutions and where different personnel are working.

The regulations also apportion responsibility and a duty of care. It is the responsibility of the owner and the managing body of a medical institution to acquaint themselves fully with the qualifications and the professional conduct of all medical practitioners and dentists working at the medical institution and they are required to consult the Board in case of any doubt. Further, the owner and the managing body of a medical institution, as well as the medical practitioner or dentist concerned, shall be responsible for any instance of professional misconduct occurring within the premises about which they know or ought reasonably to have known.[131] This is an important provision to boost quality of care from a corporate governance perspective. The owners and the managing body are responsible for any instance of professional misconduct. These aspects however need to be expanded to even cover unprofessional conduct and remove the aspect of what the owners and the managing body 'know or ought reasonably to have known' since they should be by law required to be responsible for everything that happens in their medical facilities.

The administrators of a medical institutions are required to ensure that no medical practitioners or dentists working there engages in private practice outside the areas of specialization and competence for which they have been licensed except in cases of emergency or in cases where practitioners with the requisite specializations are not reasonably available.[132]

2.3.1.3 Medical Practitioners and Dentists (Continuing Professional Development) Regulations, 2005[133]

[130] Regulation 11 of the Medical Practitioners and Dentists (Private Medical Institutions) (Amendment) Rules, 2017.
[131] Regulation 12 of the Medical Practitioners and Dentists (Private Medical Institutions) (Amendment) Rules, 2017.
[132] Regulation 13 of the Medical Practitioners and Dentists (Private Medical Institutions) (Amendment) Rules, 2017.
[133] Regulation 7, Medical Practitioners and Dentists (Continuing Professional Development) Regulations, 2005.

These regulations mandate the Board to offer or accredit courses to be offered to medical practitioner and dentists as part of the continuing professional development. The regulations require that every application for an annual retention certificate be accompanied by proof that the applicant has secured five units upon attending and participating in the continuing professional development or education programmes during the preceding year. [134] This is an important tool to assist the medics continuously improve their knowledge. It is required that every continuing professional development or education programme emphasizes ethical, practical and professional aspects of clinical practice and/or strategic health planning and must be relevant to the practice of medicine, and be aimed at the improvement of the professional competence of the medical and dental practitioners.[135]

2.3.1.4 The Medical Practitioners and Dentists (Practitioners and Health Facilities) (Advertising) Rules, 2016

The advertising rules applies to all practitioners and medical institutions. It applies to all forms of advertising in all types of media including over the internet.[136] A practitioner or health institution registered under the Act is prohibited from directly or indirectly permitting any promotion which may be reasonably regarded as calculated to attract patients, clients or business except as provided under the rules. An advertisement made under the rules is required to be objective, true and dignified, be respectful of the professional ethics of the profession, not attempt to denigrate other practitioners or health institutions or the profession and not infringe on patient confidentiality. The regulations proceed to prescribe what the advertisement should contain or not contain. Using intermediaries to obtain services or unlawfully advertise is not permitted.[137] The advertisement should not be erroneous or misleading or lead to unrealistic expectations. It is upon the board of directors or the governing body of a medical care provider to ensure that they comply with the said rules on advertising.

2.3.1.5 The Medical Practitioners and Dentists (Fitness to Practice) Rules 2016

The rules establish a process of having the Medical Practitioners and Dentists Board makes inquiry and decisions regarding impairment of practitioners. The board is required to make an

[134] Regulation 7, Medical Practitioners and Dentists (Continuing Professional Development) Regulations, 2005.
[135] Regulation 4, Medical Practitioners and Dentists (Continuing Professional Development) Regulations, 2005
[136] Regulation 2, The Medical Practitioners and Dentists (Practitioners and Health Facilities) (Advertising) Rules, 2016.
[137] Regulation 4, The Medical Practitioners and Dentists (Practitioners and Health Facilities) (Advertising) Rules, 2016.

inquiry on a complaint. Impairment means a mental, social, or physical condition which affects or has the potential to affect competence, attitude, judgement or performance of professional acts by a registered practitioner or a medical or dental student.

Definition of impairment is very broad and covers many aspects which goes to the root of quality of care offered to patients. It is upon the governing body of a health care institution to ensure that it complies with the regulations, together with its staff. An institution can report a practitioner to the Board if its suspected that such an individual unfit to practice.

2.4 Other Health Related Statutes

There are other statutes which have a bearing on corporate governance arrangement for health care providers with an aspect of quality of care. However, the Medical Practitioners and Dentists Act[138] provides the main regulatory framework at institutional level for all medical professionals because it is the statute which provides the licensing framework for institutions. And corporate governance is mostly exercised at institutional level, spearheaded from the governing board's level.

The Health Act[139] seeks to rationalise health services in Kenya on the face of recent changes. It seeks to establish a unified health system, to coordinate the inter-relationship between the national government and county government health systems, to provide for regulation of health care service and health care service providers, health products and health technologies. It creates the Kenya Health Professions Oversight Authority[140] which works with the relevant professional bodies in the health sector. From a corporate governance perspective, the statute buttresses the need for quality in health care services. Further, it provides a detailed programme on complaints.[141] Any person has a right to file a complaint about the manner in which he or she was treated at a health facility and have the complaint investigated appropriately. The relevant national and county governments are required to establish and publish the procedure for the laying of complaints within public and private health care facilities in those areas of the national health system for which they are responsible.

The procedures for laying complaints are required to be displayed by all health facilities in a manner that is visible for any person entering the establishment and the procedure must be

[138] Cap 253 of the Laws of Kenya.
[139] Act No. 17 of 2017 of the Laws of Kenya.
[140] Section 45 of the Act No. 17 of 2017 of the Laws of Kenya.
[141] Section 14 of the Act No. 17 of 2017 of the Laws of Kenya.

communicated to users on a regular basis; and be primarily handled by the head of the relevant facility or any person designated by the facility as responsible for handling user complaints. Every complainant has a right to be informed, in writing and within a period of three months from the date the complaint was lodged, of the action taken or decision made regarding the complaint.[142] Where a health facility or a regulatory body fails to resolve a complaint to the satisfaction of the complainant, the Kenya Health Professions Oversight Authority has the legal obligation to take necessary action.

Other health related statutes such as the Nurses Act[143], Clinical Officers (Training, Registration and Licensing,[144] Medical Laboratory Technicians and Technologists Act[145] have requirements which have a bearing on the quality of care. For example, they provide for the licensing, registration and regulation of the specific professionals under the respective regime. However, these statutes do not have direct corporate governance requirements which have been discussed elsewhere in this paper.

2.5 Statutes Not Specific to Health

2.5.1 Companies Act[146]

This Act was enacted in 2015 and is a huge piece of legislation with 42 Parts, 1026 sections, six (6) schedules and all these running into 1022 pages. The Act introduced major changes in Kenya's corporate history such as having a one shareholder company, introduction of a small companies regime[147], removal of a mandatory requirement for all companies to have a company secretary such that these are only required for public companies and private companies whose paid share capital is five million shillings or more[148], codified duties of directors[149] amongst other departures from the previous Act.[150]

A medical institution or health provider registered as a company under the Act will be subject to requirements of the Act. If the Act has any corporate governance requirements touching on quality of care, those requirements would apply to such institutions registered under the Act. The first and major corporate governance requirement enshrined in the Companies Act is the

[142] Ibid.
[143] Cap 257 of the Laws of Kenya.
[144] Cap 260 of the Laws of Kenya.
[145] Act No 10 of 1999 of the Laws of Kenya.
[146] Act No. 17 of 2015 of the Laws of Kenya.
[147] Section 624 of the Companies Act.
[148] Section 243(1) of the Companies Act.
[149]Section 140 – 150 of the Companies Act.
[150] Companies Act, Cap 486.

corporate governance as we know it today. The Act provides that a company will have its members (shareholders) and directors. The members appoint the directors who are answerable to the members through the annual general meeting and other processes. If the members who are often the owners are unhappy with the governance arrangement of the company, they can change the board of directors. The board of directors appoint the day to day managers of the company. Therefore, the corporate governance arrangement as we largely know it today is enshrined in the Act and it is expected that any significant quality issue would be addressed in that channel therefore enhancing the quality of care.

Under the Act[151], regulations may prescribe model articles of association. The cabinet secretary can prescribe articles which can also have special requirements on quality for health care providers. The law provides default application of model articles.[152] These model articles provides for the mode of appointment and removal of directors, directors meeting processes, processes in the annual general meetings, company secretarial requirements, shares and distributions amongst other requirements. There is no specific requirement on quality of services or goods offered to clients or a requirement that companies meetings (both at the members and directors level) include a standing agenda on quality of services offered to its customers, although these can be imposed by the cabinet secretary.[153] The Act requires that an applicant seeking registration of a company to seek views of specified public officer or body if regulations so require.[154] For example, in practice, one cannot register the name of a hospital or a clinic without availing evidence of qualifications.

The Act provides for a detailed process of appointment, qualification, disqualification and removal of directors.[155] Directors constitute the managers of the company. They are voted in by the shareholders in practice though the companies Act is silent on that aspect and the definition of the term director is broad enough to cover senior management staff of the company.[156] They appoint the managers or the employees who run the company on day to day basis. The law apportions various duties to directors such as the duty to act within powers[157],

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[151] Section 20 of the Companies Act.
[152] Section 21 of the Companies Act.
[153] Ibid.
[154] Section 51 of the Companies Act.
[155] Part IX of the Companies Act.
[156] Section 1 of the Companies Act.
[157] Section 142 of the Companies Act.

duty to promote the success of the company[158], duty to exercise independent judgment[159], duty to exercise reasonable care skill and diligence[160], duty to avoid conflicts of interest[161] and duty not to accept benefits from third parties.[162] Failure to observe these duties or a breach thereof can lead to court action and censure as provided the Act.[163]

All the duties imposed on the directors will have a bearing on the quality of services offered to a company's clients. However, the duty of director to promote the success of the company is worded in a way that brings the requirement of quality of services in a clear way. The law requires that a director of a company shall act in the way in which the director considers, in good faith, would promote the success of the company for the benefit of its members as a whole, and in so doing the director shall have regard to (a) the long term consequences of any decision of the directors; (b) the interests of the employees of the company, (c) the need to foster the company's business relationships with suppliers, customers and others and (d) the impact of the operations of the company on the community and the environment.[164] This section underpins the stakeholder theory which provides that companies have a wide array of duties to different stakeholders such as employees, customers, suppliers and not just to make profits for the directors. From a quality of care perspective, a health care provider registered as a company implies that its directors are required to comply with this section of the law. The requirement to foster the company's business relationships with customers requires the board to go out of its way to ensure that the quality of services is acceptable.

To conclude, companies are one of the most common business enterprises in Kenya. Health care providers registered as companies are required by law to conduct their business in a certain way. The duties of directors are a good examples of the corporate governance requirement in the law with a bias for quality. Directors are required to promote the success of the company and consider the relationship with customers which cannot be good without quality services. There are other sections in the Act which would be relevant such as the audit requirements and director's remuneration report which apply to certain category of companies.

[158] Section 143 of the Companies Act.
[159] Section 144 of the Companies Act.
[160] Section 145 of the Companies Act.
[161] Section 146 of the Companies Act.
[162] Section 147 of the Companies Act.
[163] Section 150 of the Companies Act.
[164] Section 150 of the Companies Act.

2.5.2 Consumer Protection Act[165]

The legislation was put in place to amongst other things implement the consumer rights in the constitution. This is relevant from a corporate governance perspective because it provides for minimum quality requirements to be offered to consumers. It is upon an institution from a corporate governance perspective to put in place mechanisms to meet the requirements of the law. It provides for the protection of the consumer and seeks to prevent unfair trade practices in consumer transactions.[166] The underlying message in the statute is for consumers to receive goods or services of proper quality. The statute provides for detailed consumer rights, remedies, credit agreement requirements, leasing agreements and even the establishment of Kenya Consumers Protection Advisory Committee.[167] The Competition Act also provides for protection of consumer welfare as a primary objective of the Act and provides that in case of inconsistency with other laws, the Competition Act will prevail.[168]

The Consumer Protection Act defines a consumer agreement to mean an agreement between a supplier and a consumer in which the supplier agrees to supply goods or services for payment and a consumer transaction means any act or instance of conducting business or other dealings with a consumer, including a consumer agreement.[169] A supplier is deemed to warrant that the goods or services supplied under a consumer agreement are of a reasonably merchantable quality.[170] This also applies to services such as health or medical care. It is upon the board and management of a health care providers to ensure that they have put in place mechanisms and processes to deliver quality services to their consumers.

The Act provides for a category of services known as personal development services. Personal development service means services provided for health, fitness, diet or matters of a similar nature, modeling and talent, including photo shoots relating to modeling and talent, or matters of a similar nature, martial arts, sports, dance or similar activities or such other services as may be prescribed and also facilities provided for or instruction on the services referred to in clause (a) and any goods that are incidentally provided in addition to the provision of the services.

[165] Act Number 46 of 2012 of the Laws of Kenya.
[166] The long title of the Consumer Protection Act.
[167] Section 89 of Act Number 46 of 2012 of the Laws of Kenya.
[168] Section 5 of the Competition Act, Act No. 12 of 2010.
[169] Section 1 of Act Number 46 of 2012 of the Laws of Kenya.
[170] Section 5 of Act Number 46 of 2012 of the Laws of Kenya.

Using the statutory interpretation principle of *ejusdem generis*[171], the word health in the definition of personal development services does not appear to include medical services because the list provided has items like fitness, diet or matters of a similar nature. The providers of personal development services have a detailed requirement of quality aspects which they must consider.[172] These include requirements on the provision of personal development services agreement must be in writing[173], must be for less than year but can be renewed[174], cooling off periods[175], initiation fees[176], instalment plans[177] amongst others. A health care provider in that space must ensure that the corporate governance arrangement ensures that the minimum legal requirements are met.

2.3.4 Capital Markets Authority Act

The Capital Markets Authority Act[178] is a statute for promoting, regulating and facilitating the development of an orderly, fair and efficient capital market. The statute regulates the process of issuing shares and securities to the market and provides a regulatory framework for listed companies, market intermediaries and other related aspects. The Act has several requirements on corporate governance. However, at the moment, there is health care provider licensed or regulated by the Capital Markets Authority and the regulations therein would only kick in if an entity is licensed or regulated by the CMA.

If a hospital or a medical care provider was to be listed in the Nairobi Stock Exchange, a number of corporate governance requirements with a bias for quality would kick in. For example, under The Capital Markets (Securities) (Public Offers, Listing And Disclosures) (Amendment) Regulations, 2016, every issuer is required to establish formal and transparent policies and procedures, which are to be approved by shareholders for amongst other things, effective communication with stakeholders, corporate disclosure policies and procedure amongst others.[179] The capital markets has an elaborate corporate governance requirements

[171] Where a law lists specific classes of persons or things and then refers to them in general, the general statements only apply to the same kind of persons or things specifically listed. https://legal-dictionary.thefreedictionary.com/Ejusdem+generis. Accessed in October 2018.
[172] Sections 24-29 of Act Number 46 of 2012 of the Laws of Kenya.
[173] Section 24 of Act Number 46 of 2012 of the Laws of Kenya.
[174] Section 25 of Act Number 46 of 2012 of the Laws of Kenya.
[175] Section 29 of Act Number 46 of 2012 of the Laws of Kenya.
[176] Section 27 of Act Number 46 of 2012 of the Laws of Kenya.
[177] Section 27 of Act Number 46 of 2012 of the Laws of Kenya.
[178] Cap 485A of the Laws of Kenya.
[179] Regulation 13, The Capital Markets (Securities) (Public Offers, Listing And Disclosures) (Amendment) Regulations, 2016.

which can enhance quality of care for health care providers. These include requirements to have independent directors, communication with stakeholders, annual audit, auditor rotation, board to have a quality assurance process, stakeholder relationships, annual reporting and annual general meetings amongst others. Indeed an entire chapter in The Code of Corporate Governance Practices or Issuers of Securities to the Public 2015 is dedicated to stakeholder relationships.[180]

The regulations provides that effective management of stakeholders will positively impact the company's achievement of its strategy and long-term growth. Stakeholders are considered to be any group who can affect, or be affected by the company, its decision and its reputation. They include shareholders, customers, suppliers, employees, creditors, regulators, lenders, media, auditors and potential investors. The corporate governance framework should recognise the rights of stakeholders and encourage active co-operation between companies and stakeholders in creating wealth, and sustainability of financially sound enterprises.[181] For a company to achieve strategy and long term growth, it must give quality to its customer. The board of management is required to ensure that the corporate governance put in place is customer centric. The board is required to take into account the interests of all key stakeholder groups before making its decisions.[182]

From a quality of care perspective, the corporate governance requirements obligates the Board to establish a formal process to resolve both internal and external disputes.[183] The Board is required to ensure the established channels of dispute resolution are used in the first instance. Disputes involving companies are an inevitable part of doing business. Companies are required to have mechanisms for resolving the disputes in a cost effective and timely manner. Mechanisms to avoid their recurrence are also required to be established and implemented. It is incumbent upon directors and executives, in carrying out their duty of care to a company to ensure that disputes are resolved effectively, expeditiously and efficiently. Further, dispute resolution shall be cost effective and not a drain on the finances and resources of the company.[184] This means that at the very least, a medical institution governed by the regulations would be required to at the very least have a complaint redress mechanism. Complaints leads

[180] Chapter 4, The Code of Corporate Governance Practices or Issuers of Securities to the Public 2015, Kenya.
[181] Ibid.
[182] Ibid.
[183] Ibid.
[184] Ibid.

to disputes if not handled well. Therefore, this is a key quality of care corporate governance requirement in the regulations.

2.5.4 Non-Governmental Organizations Co-ordination Act and Public Benefits Organisation Act

The Non-Governmental Organizations Coordination Act[185] was repealed by the Public Benefits Organisation Act[186] (hereinafter PBO Act) thought the latter is yet to be fully operationalised. Entities registered under these regimes usually provide a form of a service to the public but often privately sponsored. It is possible to register a public benefits organisation entity for providing health care. The PBO Act requires institutions registered under it to have organisational integrity and internal self-regulation.[187] The governing body of a public benefit organization is required to be distinct and separate from the administrative and day-to-day management body of the organization.[188]

Further, the law requires that the principles of transparency and accountability be applied to all the affairs and activities of a public benefit organization, whether with the Government, the target population or beneficiaries, donors, other public benefit organizations or other stakeholders. The governing body of a public benefit organization is obligated to establish clear and unambiguous guidelines relating to conduct and operations of the organization, including guidelines to ensure that the personal interests of its members, the staff and volunteers do not conflict with those of the organization or influence, or affect the performance of their duties.[189] A public benefit organization is required not to discriminate against any person but where a public benefit organization is created to assist targeted populations which have been determined in line with social justice values, they are not required to assist people of other populations.[190] The activities of a public benefit organization are upon request open and accessible to scrutiny by its respective stakeholders, except for personal matters, legal matters and proprietary information, as may be provided for by or under any law.[191] Serving in the governing body of a public benefit organisation is required to be voluntary with no remuneration, other than reimbursement of the costs and expenses.[192]

[185] Act Number 19 of 1990 of the Laws of Kenya.
[186] Act Number 18 of 2013 of the Laws of Kenya.
[187] Section 25 of Act Number 18 of 2013 of the Laws of Kenya.
[188] Ibid.
[189] Ibid.
[190] Ibid.
[191] Ibid.
[192] Section 26 of Act No. 18 of 2013 of the Laws of Kenya.

The PBO Act provides for other requirements on quality. For example, the aspect of annual audits, annual reporting, ethical requirements for all public benefits organisations amongst others. The Public Benefit Organizations Disputes Tribunal is established by the PBO Act[193] and mandated to hear disputes relating to any breach of a provision in the PBO Act, including ethical requirements. It is therefore the responsibility of a governing body to ensure that the requirements of the law are complied with by the public benefit organisation, including the need to ensure that quality of care is maintained.

2.6 Lessons to Draw from the Education Sector

The education sector provides a good example of a sector which has defined corporate governance requirements with a bias for quality. Right from the basic education institutions to the university institutions, the law prescribes one or another form of corporate governance arrangement. The question is why would the law prescribes these requirements in the education sector and not in the health care sector. Although education is not devolved (other than early childhood education) like the health sector, both sectors share similarity in terms of the reach to the common person, the stretch of facilities across various societal strata, public private investments mix and a host of other similarities. Different statutes in the education sector are examined below.

2.6.1 Basic Education Act [194]

This piece of legislation provides a good example of a corporate governance regime for a sector comparable to a health care sector – education sector. The Act is applicable to institutions such as primary schools, secondary schools, pre-primary educational institutions and centres, borstal institutions and others. Amongst other things, the Act provides for the values and principles of basic education and legislates the free compulsory and basic education.[195]

The Act provides for management of basic education facilities at two levels. At the government level which is managed by government offices such as the county education boards and at the school level. The focus of this research is at the institutional level. The Act provides that there shall be a board of management for every public pre-primary institution, primary school, secondary school, adult and continuing education centre, multipurpose development training

[193] Part V of Act No. 18 of 2013 of the Laws of Kenya.
[194] Act Number 14 of 2013 of the Laws of Kenya.
[195] Section 28 of the Act Number 14 of 2013 of the Laws of Kenya.

institute or middle level institutions of basic education.[196] The schools are also required to have a parent's teachers association.[197] The requirement to establish a board of management does not apply to private schools are required to establish a parents' teachers association.[198] The Board of Management established consists of the members appointed by the County Education Board being six persons elected to represent parents of the pupils in the school or local community in the case of county secondary schools, one person nominated by the County Education Board, one representative of the teaching staff in the school elected by the teachers, three representatives of the sponsors of the school, one person to represent special interest groups in the community, one person to represent persons with special needs, a representative of the students' council who is an ex officio member.[199]

Sponsoring faith based institutions are allowed to have a controlling hand in appointing the chairman of the board. Teachers at the school cannot be chairpersons of the board. The function of the board of management is to run the school in all its main facets including finances, making decisions amongst others. Of more relevance to this research is the duty of the board of management to promote the best interests of the institution and ensure its development and promote quality education for all pupils in accordance with the standards set under the law.[200] The board of management is required to make an annual governance report.[201] The secretary to the board of management is required to be the head of the board of management. This is a good practice where the chief executive officer of some institutions sit in the board as the secretary for easier management and implementation of the board's decision.

The conduct and affairs of the Board of Management is regulated by the Fourth Schedule of the Act. The Board of Management is a body corporate capable of owning property and suing or being sued in its name. The Act provides for an executive board of management which includes the chairperson of the Board, the secretary of the Board, the chairperson of a Parents Teachers Association; and two other Board members.[202] The tenure of the board members is required to ensure continuity such that there is always a mix of the new and older members. The law requires that at least the board meets once in four months.[203] Decisions are made by

[196] Section 55 of the Act Number 14 of 2013.
[197] Third schedule of the Act Number 14 of 2013.
[198] Section 56(1) Act No14 of 2013.
[199] Section 56 Act No14 of 2013.
[200] Section 59 Act No14 of 2013.
[201] Section 60 Act No14 of 2013.
[202] Section 2 of the Fourth Schedule, Act No14 of 2013.
[203] Section 6 of Act No14 of 2013.

majority of the votes or unanimity. The chairman has a casting vote. Board members are required to disclose and document conflict of interest or else if found guilty be liable to a fine of fifty thousand shillings, or to imprisonment for a term of six months, or to both.[204] The board has the mandate to hire staff or consultants to help it execute its functions.

The board is required to have necessary committees but at least the following committees are required as a matter of law - finance, procurement and general purposes committee, academic standards, quality and environment committee, discipline, ethics and integrity committee, audit committee and human rights and student welfare committee.[205] The legal stipulation of these committees serves to buttress the importance of quality as a central matter in every educational institutions. Amongst other things, the board of management is required to prepare annual estimates of income and expenditure and there are detailed provisions on how to deal with unexpended money.[206]

2.6.2 Universities Act[207] and Technical and Vocational Education and Training Act, 2012[208]

The Universities Act provides for the development of university education, the establishment, accreditation and governance of universities, the establishment of the Commission for University Education, the Universities Funding Board and the Kenya University and Colleges Central Placement Service Board and for connected purposes. It provides for regulation and conduct of universities in Kenya. The Act provides for establishment of a governing body called the Universities Council which is charged with administering and governing a university.[209] The council is required to apply some governance principles such as promoting good education and research and declaration of conflict of interest.[210] The Act allows a university to come up with a flexible management arrangement in the charter, subject to the Act. It is worthy to note that the governance arrangements provided for in the Universities Act are not as elaborate as those in the Basic Education Act. This could be due to the nature of personnel, activities and circumstances under which the two levels of institutions operate. There are no direct corporate governance requirements on quality but these can be deduced

[204] Section 10 of Act No14 of 2013.
[205] Section 61 of Act No14 of 2013.
[206] Section 13 of Fourth Schedule Act No14 of 2013.
[207] Act No. 42 of 2012.
[208] Act No. 29 of 2013.
[209] Section 60 of Act No. 42 of 2012.
[210] Section 64 of Act No. 42 of 2012.

from statutory requirements[211] for all universities which therefore fall under the duties and obligations of the university council.

Technical and Vocational Education and Training Act[212] is An Act of Parliament which provides for the establishment of a technical and vocational education and training system, governance and management of institutions offering technical and vocational education and training and provides for coordinated assessment, examination and certification amongst other duties. The Act provides for a detailed corporate governance in the second schedule which is on the membership and governance procedures for boards of governors for training institutions. Amongst other requirements, the Act provides for the Composition of Board of Governors for Technical Colleges, principles to be applied by the board of governors, designation of the principal of the institution as the secretary to the board of governors, committees of the board of governors, terms of office, frequency of meetings, remuneration of the board members, quorum, annual estimates of income and expenditure amongst other things.

2.7 Conclusion

This chapter has considered the existing law on corporate governance affecting the quality of care offered by health care providers. The chapter has focused on the constitution, health specific statutes such as the Medical Practitioners and Dentists Act, non-health specific statutes such as the Companies Act and sought to borrow lessons from the education sector which has specific provisions on corporate governance for schools in various categories. It is evident that the law as it is provides some minimal quality of care corporate governance requirements and there is need to enhance the same. There immense lessons to be drawn from the education sector. The chapter has come up with a number of conclusions and recommendations which are discussed in chapter four, conclusion and recommendations. The next chapter will discuss the corporate governance arrangement for health care providers in other countries, with a focus on quality of care.

[211] Section 3(2) of Act No. 42 of 2012. Universities are required to observe national values in Article 10 of the Constitution. In terms of quality, they are required to promote quality and relevance of its programmes.
[212] Act No. 29 of 2013.

CHAPTER THREE

CORPORATE GOVERNANCE FOR HEALTH CARE PROVIDERS WITH A FOCUS ON QUALITY – LESSONS FROM OTHER COUNTRIES

'…it was a tragedy born of high hopes and ambitions… '[213]

3.1 Introduction

This chapter discusses corporate governance systems in health care providers with a particular bias on quality of care and patient safety. The chapter draws lessons from jurisdictions such as England, the United States of America and Canada since these are some of the jurisdictions with a more developed health care system and corporate governance regimes. The chapter posits that health care providers needs to have good corporate governance to assist the provider in achieving its objectives and goals. It is important to note that the jurisdictions from which key lessons are drawn from have requirements in the laws to govern corporate governance health care providers.

Enhancing the quality of health care and patient safety is a key tenet of corporate governance regime for health care providers. Quality of health care is used broadly in this paper to mean patient safety, effectiveness of care and patient experience.[214] This is the meaning borrowed from the United Kingdom. This tenet is repeated severally in corporate governance guidelines, codes, writings which relates to health care providers.[215] Most importantly, this requirement is also anchored in laws. And the business perspective of this prominence of quality is crystal clear – most health care providers are commercial enterprises which requires excellent customer experience for them to thrive in a competitive environment. Quality is also critical for the non-profit making health care providers because of factors such as regulatory requirements, need to comply with the objects of the institutions and public oversight. Ensuring

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[213] Ian Kennedy et al, *The Report of the Public Inquiry into children's heart surgery at the Bristol Royal Infirmary 1984-1995, Learning from Bristol (The Bristol Royal Infirmary Inquiry), CM 5207(I), Presented to Parliament by the Secretary of State for Health by Command of Her Majesty, July 2001. Available at* http://webarchive.nationalarchives.gov.uk/20090811143745/http:/www.bristol-inquiry.org.uk/final_report/the_report.pdf*. Accessed on 18 February 2017.*

[214] 'The Healthy NHS Board Principles for Good Governance' Foresight Partnership, London, at page 8, available at http://www.ntda.nhs.uk/wp-content/uploads/2013/04/THE-HEALTHY-NHS-BOARD.pdf. Accessed on 1 February 2017.

[215] An example include 'The Healthy NHS Board Principles for Good Governance' Foresight Partnership, London, at page 8, available at http://www.ntda.nhs.uk/wp-content/uploads/2013/04/THE-HEALTHY-NHS-BOARD.pdf. Accessed on 1 February 2017. Another example is the Larry Gage, 'Transformational Governance Best Practices for Public and Nonprofit Hospitals and Health Systems', American Hospital Association's Centre for Health Care Governance, 2012 at page ii.

that the corporate governance of a health care provider makes the quality of health care a central pillar of the organisation is critical as highlighted in the massive failure of corporate governance in the infamous case at Bristol Royal Infirmary between 1988 and 1995. In the hospital, the mortality rate was roughly double than other places in about five years of seven years under consideration. This translates to between 30 and 35 children more children than what was expected after considering all the material considerations and trends. Further, the management had received complaints but were quick to deny that these was a result of a weakness hospital in the hospital systems.[216] Some of the corporate governance failings at Bristol Royal Infirmary included lack of a whistleblowing policy, inadequate complaints redress mechanisms, conflict of interest, and inability to place quality of care as a central tenet, unchecked staffing levels and unbridled ambition without fairly balancing this with risk management.[217]

Quality of services is not only vital to healthcare providers but all enterprises. An enterprise should be able to provide services or goods of quality to its clients in order for the enterprise to survive and thrive. It is clients, not boards of management which keeps an enterprise afloat. An enterprise may have a board of management that complies with all the legal and statutory requirements but the enterprise will most likely fail if it does not place emphasis on the quality of the services and its customer experience. This may not be true for category of enterprises such as state backed monopolies which enjoy legal monopolies. But such monopolies needs to be very careful because clients are likely to bolt out or look for other alternatives at the earliest available opportunity if their experience with the monopoly has been less than pleasant.

3.2 Corporate and Clinical Governance in Health Care Providers

Corporate governance in health care providers must be alive to a number of realities regarding health care providers. Every corporate organisation exists within a number of realities and it is reasonably understood that corporate governance guidelines and standards cannot be one size fit for all. Various realities such as those described below should be factored in when structuring a corporate governance structure of a health care provider.

Related, though different, to corporate governance in health care providers is the concept of clinical governance. England's Department of Health defined clinical governance as the system of holding the health care providers accountable for continuous improvement of the quality of

[216] Patrick Butler, 'The Bristol Royal Infirmary: the issue explained' *The Guardian* (London 17 January 2002) <https://www.theguardian.com/society/2002/jan/17/5> Accessed on 1 February 2017.
[217] Ibid.

services and safeguard high standards of care, by creating an environment in which clinical excellence can flourish.[218] The concept of clinical governance has been over time incorporated into the mainstream corporate governance of health care providers. Placing patient safety and quality of care as central to corporate governance of a health care provider is actually enhancing clinical governance of the provider.

3.2.1 State of the patient

The first reality is that health care providers attend to clients who are likely to be in a state of helplessness or not at their best. The clients may be suffering from various ailments or conditions such as unconsciousness, terminal illness, mental challenges or minor conditions like common cold. The corporate governance structures must be able to put measures in place to ensure that a patient is not taken advantage of because of his state. Such measures would include compliance with any applicable patient's charter, ensuring that the persons attending to the patient are qualified, patient's belonging are taken care of amongst other measures.

3.2.2 Cost of mistakes

The second reality facing health care providers is that instances of clinical negligence or substandard care can be very costly to the patient, relatives of the patient, heath care provider and the society. A momentary lapse of judgment can lead to loss of life, livelihood, limb and change lives forever. On the other hand, good medical practice can save a life, livelihood and save people from suffering. Professor Shaun D. Pattinson gives an illuminating example of a certain surgeon Robert Liston. In the time before anaesthesia, a surgery was supposed to be undertaken quickly. Robert was reputed to be the fastest since he could amputate a limb in less than 2.5 minutes. By the time his career came to an end, he was said to be the first to use ether in a major operation. His mistakes were as prominent and shocking as his successes. Three of his mistakes are striking. On one occasion, he disagreed with a house surgeon's analysis that a pulsatile tumour on a boy's neck was an aneurysm of an artery and he insisted that it had to be an abscess because aneurysm did not occur in young patients of that age. When he operated on the tumour, the patient died soon afterwards because he cut through an artery as he had been forewarned. At other point, he accidentally removed a patient's testicles when amputating a leg. When amputating another patient's leg, he accidentally slashed through an observing surgeon and took of his assistant's fingers. The observing surgeon died of shock believing that

[218] 'The Healthy NHS Board Principles for Good Governance' Foresight Partnership, London, at page 8, available at http://www.ntda.nhs.uk/wp-content/uploads/2013/04/THE-HEALTHY-NHS-BOARD.pdf. Accessed on 1 February 2017.

he had lost his manhood and both the patient and the assistant died as a result of gangrene. Robert's mistakes had serious consequences. Errors in medical practice can be very costly and expensive to all persons concerned and a momentary lapse of judgment by a tired doctor can cause the life and health of a patient.[219]

Further, health care providers treatment may have a direct bearing on whether a patient survive or does not survive. This ability and skills comes with a lot of responsibilities and power. Medical care professionals may evoke both fear and awe. And since human beings value human life, a health care professional must handle their duties with due care and skill. Any realisation that a life was lost which could have been saved were it not for the misdeeds of a health care professional is likely to be traumatic to people close to the deceased person.

Most often than not, a patient is cared for by various persons in the health care chain. These persons may include a nurse, a doctor, a lab technologist and a specialist. The health care provider must therefore put in place various governance mechanisms to ensure that mistakes at all levels can be prevented and if they occur, they should be addressed as soon as possible with least harm possible caused to the patient.

3.2.3 Capital intensive infrastructure

For healthcare providers to be able to provide good care of expected standard, they require a certain minimum level of infrastructure. This includes sophisticated equipment, good physical facilities, qualified personnel of sufficient numbers, appropriate and sufficient drugs in the pharmacies amongst others. Medical equipment are widely known to be expensive.[220] Part of the reasons which make medical equipment expensive are likely to be a costly licensing process, cost of production, intellectual property rights and lack of transparency on the profit margins applied by the manufacturer and distributors. The board of management of a health care provider must find itself in the unenviable position of balancing the need for a modern and sufficient medical infrastructure for better quality care with the need to run a profitable or fiscally sustainable institution. This calls for a bold board of management with diverse skills such as capital raising, hospital administration, supply chain management and medical knowledge. Strategic planning and forward thinking is critical for the board of management to be able to manage the institution in a proper manner both in the short term and in the long ran.

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[219] Dr. Shaun D. Pattinson, *Medical Law & Ethics*, 1st Edition, London, Sweet & Maxwell, 2006, 62.
[220]Brian Buntz, 'Why Medical Technology Is So Expensive in the United States', 6 August 2013. Available on http://www.qmed.com/news/why-medical-technology-so-expensive-united-states. Accessed on 1 February 2017.

Further, medical equipment may get obsolete fast in light of changing technology. Some states of the United States of America still maintain the requirements on certificate of need (CON). This is a document issued by the local government authority to a hospital or health care provider before that provider is allowed to expand their facilities. The certificate-of-need requirement was originally based on state law, however, this mutated later into federal law and several states passed certificate of need legislation.[221] The government authority is required to establish whether the intended expansion is necessary to meet the needs of a community. In this way, it is believed that hospitals will not get into an unhealthy competition and not convince patients to be hospitalized unnecessarily in order to recoup the cost of expansions.[222] A board of management has to be able to strategically position the institution in order to comply and benefit from the certificate of need requirements.

3.2.4 Highly regulated industry

Health care providers generally operate in a regulated environment. For example in Kenya, a limited liability company running a hospital with doctors, nurses, clinical officers is subject to the regulatory oversight of at least five bodies. These bodies are the Registrar of Companies[223], Medical Practitioners and Dentists Board[224], Nursing Council of Kenya[225], Clinical Officers Council[226], Pharmacy and Poisons Board[227] and Director of Medical Services.[228] It has been argued that the regulation of medical practice in Kenya is in a state of confusion that does not seem to have any clear philosophy.[229]

A corporate governance structure of a health care provider must be able to efficiently respond and comply with regulatory requirements. This calls for a number of practices such as having persons experienced with dealing with regulators in the board or in the senior management of the provider, thorough understanding of the different regulatory requirement and periodic review of the level of compliance amongst others.

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[221] *Hyman, Herbert Harvey, Health Planning: A Systematic Approach, (2nd ed.). Aspen Publishers. p. 253. ISBN 0-89443-379-2*. Retrieved *2015-02-28 and accessed on 1 February 2017.*

[222] Ibid.

[223] Under the Companies Act, Act No, 17 of 2015, the Registrar of Companies has immense regulatory oversight over companies. This oversight includes deregistration of companies, power to direct change of name in specified circumstances and major aspects of incorporation and continuous compliance of a company.

[224] Established by Section 4 of the Medical Practitioners and Dentists Act, Chapter 253 of the Laws of Kenya.

[225] Established by the Nurses Act, Chapter 257 of the Laws of Kenya.

[226] Established by The Clinical Officers (Training, Registration and Licensing) Act, Cap 244 of the Laws of Kenya.

[227] Established under the Pharmacy and Poisons Act, Chapter 244 of the Laws of Kenya.

[228] Established under Public Health Act, Chapter 242 of the Laws of Kenya.

[229] Jackson Macharia Githu, *'Whose Patient is She – Appraising the Law on Medical Malpractice in Kenya'*, Law Society of Kenya Journal, 2016 Volume 2, 62.

3.3 Corporate governance arrangements in selected countries

Because of the realities of healthcare providers some of which have been discussed above, there is always a need to tailor the corporate governance structures to meet the realities. It is also widely understood that corporate governance structures cannot be one size fit all, both at an industry level and at an organisation level. In other words the corporate governance structures of large hospital with 1000 employees should not be similar to that of a large telecom with 1000 employees. Further, the corporate governance structures of the hospital with 1000 employees should not be similar to that of a smaller hospital 20 employees.

The corporate governance regime in more developed countries is explored in details from a country to country perspective.

3.3.1 England's National Health Services

The National Health Services (NHS) in England is a complex organisation with many dimensions. It straddles both public and private sector. It is a publicly funded national health system. It is the largest and the oldest single-payer healthcare system in the world. Primarily funded through the general taxation system and overseen by the Department of Health, the system provides healthcare to every legal resident in England, with most services free at the point of use. Some services, such as emergency treatment and treatment of infectious diseases are free for everyone, including visitors.[230] NHS is established by an Act of Parliament and provides care to more than 90% of all legal residents in England with the rest being provided by private health care providers.[231] In comparison with the healthcare systems of ten other countries (Australia, Canada, France, Germany, Netherlands, New Zealand, Norway, Sweden, Switzerland and USA) the NHS was found to be the most impressive overall by the Commonwealth Fund in 2014.[232]

3.3.1.1 Structure of the NHS

According to the NHS[233], NHS England has several key components which includes the Secretary of State, the Department of Health, NHS England, Clinical Commissioning Groups,

[230] National Health Services, Guidance on Overseas Visitors Hospitals Charging Regulations, London 2015, <https://www.gov.uk/government/publications/guidance-on-overseas-visitors-hospital-charging-regulations> Accessed on 10 February 2017.
[231] Though it is important to note that NHS also engages private and for profit organisations to provide health care.
[232] NHS Confederation, NHS Statistics, Facts and Figures, London 2017 <http://www.nhsconfed.org/resources/key-statistics-on-the-nhs>. Accessed on 2 February 2017
[233] National Health Services, NHS Structure Explained, London 2017 <http://www.nhs.uk/NHSEngland/thenhs/about/Pages/nhsstructure.aspx> Accessed on 1 February 2017.

Health and wellbeing boards, Public Health England and Vanguards. NHS is definitely a complex structure and a study of its corporate governance systems needs to be cognizant of this structure.

The Secretary of State provides overall leadership and responsibility for the Department of Health[234] which provides strategic direction for all matters relating to public health and social care. The Department of health is a ministerial department with various agencies and public bodies providing supporting.[235] NHS England is an independent body to the government whose main role is to set priorities and direction of the NHS and also improve health and care outcomes for the people of health. It commissions primary care services such as GPs, dentists, pharmacists and even specialized services. Its resources are largely allocated to clinical commissioning groups (CCGs).[236] CCGs are statutory bodies responsible for the planning and commissioning of the health care services to the respective local areas. CCG members usually includes GPs and clinicians such as nurses and consultants. CCGs are responsible for about 60% of the NHS budget and have powers to commission service providers which meets NHS Standards and costs.[237] CCGS are required to be satisfied of the quality of services they commission considering the National Institute for Health and Care Excellence (NICE)[238] guidelines and the Care Quality Commission's (CQC)[239] information and data on service providers. It is a requirement that NHS England and CCGs involves their patients, carers and the public in decisions about the services they commission.[240]

Local authorities establishes the health and wellbeing boards authorities as a forum for local commissioners across the NHS, social care, public health and other services. These boards are intended to have various input with democratic perspectives into strategic decisions about health and wellbeing services and also improve working relationships between health and social care and to promote cohesive commissioning of health and social care services.[241] Amongst other duties, Public Health England provides national leadership and expert services

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[234] Ibid.
[235] Ibid.
[236] Ibid.
[237] Ibid.
[238] NICE provides national guidance and advice to improve health and social care. It is sanctioned by an Act of Parliament, Health and Social Care Act 2012.
[239] The Care Quality Commission (CQC) regulates all health and social care services in England. The commission ensures the quality and safety of care in hospitals, dentists, ambulances, and care homes, and the care given in people's own homes. It is a public body sponsored by the Department of Health. See http://www.cqc.org.uk Accessed on 2 February 2017.
[240] Supra note 228.
[241] Ibid.

on matters relating to public health.[242] Vanguards were introduced in 2015 as part of the NHS strategic plan for the following five years. The 50 chosen vanguards are required to develop new care modes and potential redesign health and care system.[243]

It is worth to also consider the regulatory environment which consists a number of different bodies. The Care Quality Commission is a public body under the Department of Health and regulates all health and social care services in England and ensures the quality and safety of care in hospitals, dentists, ambulances, and care homes, and the care given in people's own homes. The second regulatory body is the NHS Improvement which is an umbrella organization which brings various organisations being the Monitor, NHS Trust Development Authority, Patient Safety, the National Reporting and Learning System, the Advancing Change team and the Intensive Support Teams. All these bodies have a role in the regulation of the health and care system. The other category of regulatory bodies are the individual professional regulatory bodies which includes the General Dental Council, Health and Care Professions Council, Nursing and Midwifery Council and the General Medical Council. Other audit and inspection bodies also plays a role in the regulation.[244]

3.3.1.2 Corporate Governance Guidelines for NHS

Corporate governance guidelines have been developed to guide the complex NHS health care system.[245] The guidelines were developed as a result of research, interviews, studies and other activities[246] to ensure that the guidelines are useful, effective and realistic. One of the key overriding requirement is that boards must put quality at the heart of all they do. The guidelines defines quality to mean patient safety, effectiveness of care and patient experience. Assuring the three elements of quality for patients are required to be central to the work of everyone in the NHS organisations. It is important to also note that incentives to improve quality such as linking payment to patient experience are being put in place with the end result being to improve quality of health care in all its three parameters.[247]

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[242] Ibid.
[243] Ibid.
[244] Ibid.
[245] 'The Healthy NHS Board Principles for Good Governance' Foresight Partnership, London, at page 2, available at http://www.ntda.nhs.uk/wp-content/uploads/2013/04/THE-HEALTHY-NHS-BOARD.pdf
Accessed on 4 February 2017.
[246] Ibid, foreword.
[247] Ibid.

The purpose of NHS boards, is understood to be effectively govern and build public and stakeholder confidence that the healthcare is being shepherded well. Since resources are limited, the boards must invest resources in an optimal way and take care of aspects such as quality, optimal health outcomes, accessibility, responsiveness, efficiency, effectiveness and public input.[248] It has been postulated that traditionally, many healthcare boards have focused on finances and community relations and have deferred responsibility for quality of care to the medical or professional staff. This deferral reflects not only recognition of the expertise of clinical leaders on these issues but also the historical separation of responsibilities between the administration and the medical staff, the former being responsible for financial and operational issues, and the latter for quality of care.[249] There is however empirical evidence to support an assertion where the board spends time on quality such as setting the quality standard, receiving feedback on quality, measuring quality and other quality related tasks, there is an increase in the level of quality output.[250] Tying remuneration of the senior executives to quality would also increase quality.[251]

It has been well provided that effective NHS boards demonstrate leadership by undertaking three key roles:

a) Formulating strategy for the organisation.

b) Ensuring accountability by holding the organisation to account for the delivery of the strategy and through seeking assurance that systems of control are robust and reliable.

c) Shaping a positive culture for the board and the organisation.[252]

These three key roles are central in steering any board of management. The rise or fall of an organisation depends on the leadership. And it is the role of leadership to ensure that an organisation is led properly to succeed. Focus on quality on each of the three areas is discussed below.

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[248] Ibid.

[249] Denis J-L, Champagne F, Pomey M-P, Préval J, Tré G. Toward a framework for the analysis of governance in healthcare organizations and systems. Ottawa: Canadian Council on Health Services Accreditation. 2005.

[249] Ibid.

[250] Ibid.

[251] Ibid.

[252] Ibid.

3.3.1.3 Application of Agency or stakeholder Approach by NHS

It is important to note that the NHS corporate governance guidelines do not pay much attention to a specific theory of corporate governance such as 'the agency theory' or the 'contractarian theory' but understands that a corporate structure exists at different conceptualisations. It is however evident that NHS is really concerned with stakeholder's input and welfare in its corporate plans and pays a lot of attention to proper and good co-existence of NHS organisations within the respective communities. This is evidenced by different value statements in the corporate guidance referring to public and stakeholder confidence, requirements that the communities must be heard and represented in board meetings and various community engagements initiatives.

NHS recognises that the models of governance are wide drawn from practices, guidance and other factors. Different board members will have different perspectives and sound governance derives from blending all these different perspectives.[253] Therefore corporate governance models such as agency, stakeholder, stewardship, policy governance and generative governance/governance as leadership all have their places in an organisation such that various models may apply to an organisation. For example, having a strong audit and internal control mechanism is a key tenet in the agency model but the staff may not engage in questionable practices because they are inspired and are engaged to help the community and may not want to engage in activities which threaten that overarching goal. The different perspectives can play an important role in the governance of the organisation. For example, commitment by staff to ensure that all controls are working well may stem out of the commitment by staff to values such as patient safety. Further, the generative governance model which inter alia promotes deep understanding of the patient experience is not incompatible with distinguishing the roles of the board and the management.[254]

3.3.1.4 Quality considerations when formulating strategy for an organisation

It has been observed that boards need to focus on quality and commit resources to that process and not the other way round. Where boards have failed patients, it has been as a result of the board focus being directed in the wrong areas and lack of appropriate governance arrangements in place to bolster quality of care.[255]

[253] Supra note 244.
[254] Ibid.
[255] Ibid, foreword.

Strategy goes to the heart of what the organisation is intending to undertake. If quality is not part of this it is likely that this may be lost in the corporate noise. An organisation usually has many aspects requiring the attention of the board and if not quality is not made a deliberate agenda of the board, it is likely not to receive the due consideration it requires. One may reason that quality may be considered by the board in various different aspects such as good financial performance and indeed a certain study in Canada found that boards have dealt with quality from different perspectives by not using consistent indicators or consistent approach. At the end of it all, the board does not understand their role.[256] However, more compelling studies on the other hand demonstrate that dedicating board time to quality enhances quality. Having quality as a standing item in the board agenda and placing it at the top increases the attention given to quality across the organisation while dedicating at least 20% of the board time to quality leads to an improvement in the quality of the outcomes.[257]

In the Canadian study referred to in above, dedicating significant board time to quality was in various shapes and included setting strategic goals for quality enhancement, board quality committees, agenda items on quality, application of measurements items of clinical quality and patient safety by the board and measuring the performance of the CEO on quality and patient safety metrics. [258] Further, creating and measuring the implementation of the quality plan is not just a role of the board but should be cascaded to the senior management and all the staff in the organisation.[259]

As noted elsewhere in this paper, there has been a traditional demarcation of responsibilities in a health institution where the board has traditionally been concerned about financial and strategic direction while quality and patient experience has been left to medical leadership. However, this is no longer tenable in several jurisdictions where the board of management takes the overall leadership of the organisation and takes responsibility for its failures or success. To avoid the board getting bogged down with too much operational information, a system can be created where issues of quality and patient experience may be categorised into

[256] Infra note 252.
[257] 'The Healthy NHS Board Principles for Good Governance' Foresight Partnership, London, available at http://www.ntda.nhs.uk/wp-content/uploads/2013/04/THE-HEALTHY-NHS-BOARD.pdf, 30. Accessed on 5 February 2017.
[258] Supra note 252.
[259] Supra note 252.

different classes e.g. high, medium low and have the board look at high or medium issues and how these are being addressed. This is important because the board must be concerned about the resolution of issues which affects the performance of an organisation.

In the Canadian study[260] it was found that board were struggling to execute effectively despite taking responsibility for quality and safety. It was suggested that just like the boards create structures for financial oversight and performance, the same should apply to quality matters. There needs to be a system to create goals, agree on indicators, measure progress and take action where there are deficiencies. This is a good way of board to act on a certain matter i.e. set goals through a consultative process, agree on relevant indicators, monitor progress and ensure that appropriate action is taken if goals have not been achieved.

3.3.1.5 Quality considerations when setting up accountability structures

Setting up accountability structures is another area that the board of management can get involved in pushing the quality agenda. Other than at an organisation level setting goals, agreeing on the metrics of performance, monitoring progress and taking appropriate action when goals have not been met, the board of management should go beyond when setting up accountability structures.

One of the role of the board is to have a quality assurance and clinical governance structures. The board being the ultimate decision making body of the organisation needs to play a key role in safeguarding quality of care. Quality of care has been considered to consist of three key facets which are effectiveness of care, patient safety and patient experience. The board will require to scrutinise the quality of care by accessing clear and comprehensible summarised and actionable information.[261]

A certain study in the US reviewed high performing health care organisations and found that such organisations are significantly more likely to receive, review and a use a quality dashboard, however it is designed. [262] In England, boards of health care organisations are statutorily required to observe and maintain quality for the organisation. [263] In order to achieve that statutory obligation of quality, it is recommended that board members need to appreciate and understand their ultimate responsibility and accountability for quality, the structure of the

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[260] Supra note 252.
[261] Supra note 252.
[262]Jha AK. Epstein AM, 'Boards and Governance in U.S. Hospitals and the Relationship to Quality of Care. Health Affairs', 5 November 2009, quoted in supra note 90.
[263] Section 18 of the Health Act 1999. Later repealed and replaced by Section 45 of the Health and Social Care (Community Health Standards) Act 2003.

organisation must clarify the duties and responsibilities for ensuring quality, quality performance reviews by the board from the top (board level) to the point of care and back to the top, a standing board agenda on quality which also should be integrated in all major decisions and discussions and a stable working and effective quality committee.[264]

In England, boards are by law and regulations required to confirm and sign declarations of quality assurance to the regulators and ensure compliance to registration requirements by the regulators in charge of quality.[265] It has been correctly postulated that scrutiny of quality information is not enough, board members needs to step out of the boardroom and get a real time and first-hand information on quality from patient and staff experience and this has been greatly observed to enhance quality. Related to this aspect, clinical leaders should be empowered to lead quality in the field such that both the board and the clinical aspects are benefiting from reflections on innovative ways of addressing quality and its improvement. [266]

As part of the accountability structures, the board must establish committees which support quality. The audit committee can have its mandate extended to include assurance of quality. However, a more recent practice has emerged where quality committees are being established. The quality committee as the name suggests should ensure that the organisation's governance arrangements can monitor and on continuous basis improve quality of health care. A proper working quality committee enhances board oversight on quality and obtains quality input from the relevant players such as clinical leaders, nurses, management staff and even non health care staff. This is however done with the appreciation that the board maintains the ultimate responsibility and accountability for quality.[267]

2.1.1.1 Quality as a key consideration when shaping culture of an organisation

A proper functioning board understands that a positive culture for the organisation and the board are vital for the organisational success. Shared culture, ethos, structures and systems are critical in this aspect.[268] It has been argued that people and customs are the biggest confounders

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[264] 'The Healthy NHS Board Principles for Good Governance' Foresight Partnership, London, at page 11, available at http://www.ntda.nhs.uk/wp-content/uploads/2013/04/THE-HEALTHY-NHS-BOARD.pdf.
[265] Ibid.
[266] Ibid.
[267] Ibid.
[268] Ibid.

of corporate and clinical governance of health care institutions.[269] Positive culture has the potential of addressing organisational challenges because when people repeatedly do things in a certain way and believe that this is the way the certain things should be done, that becomes an organisational culture. On the other hand, if the organisational culture is negative or less desirable, it becomes very difficult to change or improve things because of the inertia that people exhibit before changing culture. It is the role of a board of management to shape positive culture in an organisation. In fact individuals who hold positions of leadership within an organization create, either explicitly or implicitly, an ethical climate and moral tone that sets the stage for, and determines the outcome of, individual decision making in the corporate setting.[270] Formalistic mechanisms such as ethical codes of conduct are far less important than more intangible factors such as offering support and encouragement, modelling, rewarding ethical behaviour and decision making, and fostering an environment that is open to discussing ethical issues within the corporation.[271]

Research with hospital boards in Canada suggests that the prominence of safety and quality as part of the values of the organisations improves when they are set by the board and at the board level. Inter alia, this leads to increased focus on quality and its various facets such as priorities of the team, initiatives and resources.[272] Board influences organisational culture on safety and research in the UK, Canada and the US has clearly indicated that boards input on quality includes quality agenda, discussing quality with staff at the front line of care, listening to stories of patient experience at the board, board and staff focus groups, issuing safety briefings in the organisation, setting up a quality training agenda and schedule for the all the staff amongst others. Innovation as a culture should be encouraged to flow from top to bottom and vice versa but innovation should never be at the expense of safety.[273] Staff groups at the board and staff levels can improve the safety culture of an organisation.[274] It has also become clear over time that quality should be given similar or more attention as the financials receive at the board level and that focus should be on clinical effectiveness, patient safety and quality of the patient

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[269] Dowtown Consulting International, http://www.dowton.com/journal/2011/06/governance-in-healthcare-%E2%80%93-linkages-boundaries-and-the-problems-between-corporate-and-clinical-governance/ Accessed on 21 November 2016.
[270] Lynne L. Dallas, *Corporate Ethics in the Health Care Marketplace*, 3 SEATTLE J. SOC. JUST. 213 (2004).
[271] Ibid.
[272] Baker GR, Denis J-L, Pomey M-P, MacIntosh-Murray A. Effective governance for quality and patient safety in Canadian Healthcare organizations: a report to the Canadian Health Services Research Foundation and the Canadian Patient Safety Institute. Ottawa: 2009.
[273] Ibid.
[274] Ibid.

experience and the data should be real time as much as possible.[275] It is critical that directors are properly qualified in order to discharge their roles on quality effectively.[276]

One of the ways organisations can work on their quality is to have routine and systematic collection and analysis of feedback from various people (users) such as patients, minority groups. Of critical importance is that boards needs to demonstrate that this feedback alongside information on effectiveness of patient care and safety informs allocating of resources and other related decisions.[277] Where partnerships are involved, the board must ensure that there is a focus on quality on all the necessary aspects and elements.

3.3.1.6 Corporate Governance for Health Care Providers in USA

It has been explained [278] that in the United States of America, healthcare organisations are incorporated under state law as free standing both profit or not for profit entities or corporations. Corporations usually have a governing body with the final and ultimate responsibility for all aspects of the organisation. This governing body is legally responsible for setting up structures for running of the organisation and day to day operations are led by a chief executive officer (CEO).[279] Different laws, both and state levels have different requirements on how organisations should be conducted, including on quality governance.

The governing body must have good representation from both the community and organisation's medical staff. The business of the governing body is generally conducted through a variety of committees such as the executive, finance, planning, patient care, audit and regulatory committees amongst others.[280] It is expected that a governing body with proper membership will have quality considerations at the heart of what they do.

3.3.1.7 Corporate ethics and quality of care

Prominence and effectiveness of initiatives and measures to support quality and patient safety are heavily affected by corporate ethics. Corporate ethics can be defined in several ways but

[275] Ibid.
[276] Ibid.
[277] Ibid.
[278] George D Pozgar, Legal Aspects of Health Care Administration, Jones & Bartlett Learning (Maryland USA) 2012 at pp. 184.
[279] Ibid.
[280] Ibid.

the working definition is the daily practices, processes and conducts in an organisation.[281] Ethical behaviour with a particular bias in an organisation can be improved in various ways such as providing a written code of ethics and conduct, training, professional resolution of ethical issues in the workplace, whistleblowing policies amongst others. Organisation's leadership should lead on the ethical front.[282] It is a legal requirement that governing body members have a fiduciary duty to act primarily for the benefit of the corporation and failing in this duty can lead to appointment of a receiver to manage the corporation.[283] The governing body must be prudent and exercise powers in good faith.[284]

A number of governing activities may have quality perspectives. One of this is the requirement to appoint medical staff. The body must ensure that the bylaws, rules or regulations include application requirements for clinical privileges, credentialing[285] and admission to the medical staff. Other required elements includes a process for granting emergency staff privileges, requirements for medical staff consultations, a peer review process; process on auditing of medical records, correcting action on staff amongst others.[286]

Failure of the governing body to appoint competent staff after necessary screening can lead to liability for injuries suffered by patients as a result of that omission, as was the case in *Johnson v. Misericordia Community Hospital*[287]. In that case, the patient instituted a malpractice suit against the hospital for granting orthopaedic privilege without due scrutiny. The hospital had failed to comply with its policies and statute requirements. The Wisconsin Court of Appeal held for the claimant and observed that had the hospital complied with its policies, it would not have hired that physician[288]. The governing body has a duty to comply with the law and it is responsible for ensuring that the organisation complies with all the applicable laws and failure to which there could be sanctions. Related to this requirement is the duty to comply with

[281] George defines corporate ethics as in the following manner, 'corporate ethics describes the ethics of an organisation and how it responds to internal or external circumstances affecting the organisation's mission and values.'
[282] Ibid.
[283] Ibid.
[284] Ibid.
[285] Physician credentialing is the process of gathering information regarding a physician's qualifications for appointment to the medical staff, whereas delineation of clinical privileges denotes those specific services and procedures that a physician is deemed qualified to provide or perform. See https://www.acep.org/clinical---practice-management/physician-credentialing-and-delineation-of-clinical-privileges-in-emergency-medicine/ Accessed on 10 February 2017.
[286] Supra note 110.
[287] 301 N.W.2d 156(Wis.1981).
[288] Supra note 110.

accreditation standards applicable including certificate of needs[289] requirements. A number of these standards relates to standard and quality of care.

The governing body has a duty to avoid conflicts of interest which is understood to be promotion of self-interest or self-dealing. This may have a detrimental effect on an organisation and may exist at all levels of an organisation though it can be most detrimental at the governing body level because of the responsibilities and access to information and resources at that level.

The governing body has a duty to provide timely treatment in a safe environment. It is also a requirement that patient valuables such as jewellery be safeguarded. [290]

3.4 Conclusion

This chapter has explored what corporate governance in a heath care provider entails, with a particular bias on quality. Quality has been broadly used to mean patient experience, patient safety and clinical effectiveness of the care given. It has been demonstrated that in some jurisdictions such as England, the board has a statutory duty for quality. And in such instances, the board is required to put in place mechanisms to enhance quality. Irrespective of whether there is such a statutory duty for quality or not, it has been established that organisations where boards spend time on quality matters – setting quality policy and goals, agreeing on indicators of quality, monitoring compliance with the quality metrics and taking appropriate action on compliance and non-compliance – perform at least 20% better on quality.

It is therefore vital that relevant laws on corporate governance place an emphasis on quality. At the very least, the law should place an obligation of quality on the board of management of a health institution. Further, the law should have reasonable initiatives to promote quality. Such other initiatives can include controlled disclosure of information e.g. how many times the quality committee met in a year, quality initiatives undertaken in the organisation in the year and such quality matters. One of the trending practice in the boards is to have a quality committee. This seems to separate quality from the ordinary day to day corporate noise. Whereas quality of care may be ingrained in several management aspects, it is evidently clear that giving special attention to quality on its own achieves better results for the organisation.

[289] Refers to requirement that hospitals and other health care institutions obtains a certificate of need from a government agency before constructing new facilities, purchasing major medical equipment or institution.
[290] Supra note 110.

Better results which may result in better reputation will definitely have a good effect on an organisation's bottom line.

A board's responsibilities must at minimum include review of quality data, holding staff accountable for patient safety and quality of care, avail resources for quality, set goals linked performance, provide incentives for quality, put in place oversight for continuous improvement and encourage an organisational culture that values quality of care and patient safety. [291]

Finally, we conclude by echoing the timeless observation that in order to promote a genuine ethic of caring, we must develop mechanisms to measure caring. So central, so important, and yet so elusive is the concept of care. In this age of corporate delivery of health care services, we must not lose sight of the "care" in health care.[292] The law has to play its role in enforcing good ethos aimed at improving quality of care and customer safety in health care services.

CHAPTER FOUR

CONCLUSIONS AND RECOMMENDATIONS

In this age of corporate delivery of health care services, we must not lose sight of the "care" in health care.[293]

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[291] Larry Gage, 'Transformational Governance *Best Practices for Public and Nonprofit Hospitals and Health Systems*' 82, available in www.americangovernance.com/resources/reports/transformational-governance/transformational-governance12.pdf. Accessed on 6 February 2017.
[292] Mark A. Hall, *A Corporate Ethic of 'Care' in Health Care,* 3 SEATTLE J. SOC. JUST. 417 (2004).
[293] Mark A. Hall, *A Corporate Ethic of 'Care' in Health Care,* 3 SEATTLE J. SOC. JUST. 417 (2004).

4.0 CONCLUSIONS

This research paper has explored the topic of reforming the corporate governance law for health care providers in Kenya with a special focus on quality of care. The first chapter introduced the topic of study. It covered aspects such as theoretical framework, background of the study, literature review and research objectives amongst other introductory matters. The second chapter covered the law on corporate governance of health care providers in Kenya. The chapter discussed the laws on corporate governance of health care providers in Kenya with a focus on quality of care. The chapter is divided into four broad areas being the constitution, health specific statutes, non-health specific statutes and lessons to draw from the education sector in Kenya. Chapter three has focussed on drawing specific lessons on anchoring corporate governance requirements for health care providers in a way that focuses on quality of health care in a better way. The chapter is not a comparative study but draws lessons from other countries such as the United Kingdom.

The study sought to answer a number of research questions. The first question was to what extent has Kenya enacted corporate governance laws focussing on quality of health care offered by health care providers? This question has been answered in chapter two of the research work. Kenya has enacted legislation and corporate governance laws focussing on quality of health care offered by health care providers to a large extent but a substantial gap still remains. It was established that Kenya has various statutes which have a bearing on corporate governance for health care providers with a dimension on quality of care. These laws include the Medical Practitioners and Dentists Act[294] and its subsidiary legislation, the Constitution, the Companies Act[295], the Public Benefits Organisation Act[296], the Health Act[297] amongst others. However, there are gaps in terms of having a clear statute backed corporate governance with minimum requirements, requiring the board of directors to focus on health or having a board standing committee on quality of health. A good example of statutory requirements on corporate governance requirement with a focus on quality of care is contained in the Medical Practitioners and Dentists (Private Medical Institutions) (Amendment) Rules, 2017. The regulations apportion responsibility and a duty of care. Under the regulations, it is the responsibility of the owner and the managing body of a medical institution to acquaint themselves fully with the qualifications

[294] Cap 253 of the Laws of Kenya.
[295] Act Number 17 of 2015.
[296] Act No. 18 of 2013.
[297] Act No. 21 of 2017.

and the professional conduct of all medical practitioners and dentists working at the medical institution and they are required to consult the Board in case of any doubt. Further, the owner and the managing body of a medical institution, as well as the medical practitioner or dentist concerned, shall be responsible for any instance of professional misconduct occurring within the premises about which they know or ought reasonably to have known.[298]

The second question was what lessons could be drawn from other sectors in Kenya such as the education sector and from health sector of countries such as the United Kingdom on how to enhance corporate governance laws to better focus on quality of health care. This question was answered positively to the effect that there are various lessons to be learnt. For example, the Basic Education Act[299] and other statutes in the education sector have elaborate provisions on corporate governance requirements for schools and colleges. Although the extent of devolution between the education sector and the health sector is different, the two sectors are comparable in terms of size, reach, importance, funding amongst other factors. It is expected that the two would have almost similar corporate governance arrangement but this is not the case. The governing boards for the educational institutions have clear obligations for quality of care.[300] The National Health Services corporate governance regime in the United Kingdom provides valuable lessons on quality. Boards of health care organisations are statutorily required to observe and maintain quality for the organisation.[301] An organisation usually has many demands requiring the attention of the board and if quality is not made a deliberate agenda of the board, it is likely not to receive the due consideration it requires. Compelling studies demonstrate that dedicating board time to quality enhances quality. Having quality as a standing item in the board agenda and placing it at the top increases the attention given to quality across the organisation while dedicating at least 20% of the board time to quality leads to an improvement in the quality of the outcomes.[302]

The third research question was on the recommendations which could be made on the best way to reform corporate governance laws in Kenya's health care providers to better focus on quality

[298] Section 12 of the Medical Practitioners and Dentists (Private Medical Institutions) (Amendment) Rules, 2017.
[299] Act No. 14 of 2013.
[300] Schedule 4 of the Basic Education Act.
[301] Section 18 of the Health Act 1999. Later repealed and replaced by Section 45 of the Health and Social Care (Community Health Standards) Act 2003.
[302] 'The Healthy NHS Board Principles for Good Governance' Foresight Partnership, London, available at http://www.ntda.nhs.uk/wp-content/uploads/2013/04/THE-HEALTHY-NHS-BOARD.pdf, 30. Accessed on 5 February 2017.

of health care. This aspect has been discussed throughout the research paper and conclusively covered in the recommendations part of this chapter.

When undertaking the study, a number of hypotheses had been made. The first hypothesis was that the legal regime covering Kenya's health care sector does not prescribe corporate governance requirements which adequately focus on improving the quality of health care. This assumption was found not to be the case. As discussed in this chapter and in chapter two of this paper, the law in Kenya prescribe corporate governance requirements with a focus on quality of care. For example, the Health Act provides a detailed programme on complaints. Any person has a right to file a complaint about the manner in which he or she was treated at a health facility and have the complaint investigated appropriately. The relevant national and county governments are required to establish and publish the procedure for the laying of complaints within public and private health care facilities in those areas of the national health system for which they are responsible.[303] The law often prescribes quality of care requirements but seldom prescribe corporate governance requirements with a bias for quality.

The second hypothesis was that there are lessons that can be drawn from other sectors such as education sector in Kenya and from other jurisdictions such as the United Kingdom on how to reform corporate governance of Kenya's health care providers to better focus on quality of health care. This hypothesis has been answered in the positive. Different lessons can be drawn from the education sector and other developed markets. These have been discussed earlier in this chapter and in chapter 3 of the research paper. The third hypothesis that there will be recommendations to be made has been established to be the case. These recommendations have been made throughout the research paper and also in the recommendation section of this paper.

In conclusion, the law in Kenya prescribes quality of care requirements for health care providers. There is a redress mechanism for breach of quality of care requirement. The corporate governance arrangements are expected to consider quality in their ranks. There is now law mandatorily requiring boards to set goals on quality of care. Likewise, there is no law barring the boards to set goals on quality of care. The law has some shortcomings but these shortcomings can therefore be addressed by a forward thinking governing board to set a strategy and an operational model with a focus on quality of care.

4.1 RECOMMENDATIONS

[303] Section 14 of the Health Act.

A number of recommendations are necessary as a result of this study. The recommendations touch on the legislative and governance aspects of health care providers. The recommendations are intended to improve the quality of care offered to patients. Quality of care is used broadly in this paper to mean patient safety, effectiveness of care and patient experience.[304] At a bare minimum, the quality of care must meet the standard of care required of a health care provider by law and this can be extrapolated to include higher standards where these are set by an institution.

First, Kenya should enhance its corporate governance laws for health care providers to make these focus on quality in a better way. For example, there is a need for a clear statute backed corporate governance code with provisions and requirements on quality. The current laws prescribe quality requirements and has snapshots of corporate governance requirements on the same but there is need for more to be done. Such a regime can be borrowed from the Basic Education Act[305] and Technical and Vocational Education and Training Act[306] which provides a detailed corporate governance framework for the respective institutions in the second and fourth schedules respectively. There is no plausible explanation why the education sector has a clear corporate governance and the health sector does not. The two sectors are comparable despite few differences. Such a corporate governance regime should contain aspects such as the board size for various levels of health care providers, diverse board composition, a committee on quality, annual reporting requirement on status and quality of care including the number of complaints touching on quality of care and how these were concluded and such requirements. A corporate governance scheme has been put in place by National Health Services for health care providers in the United Kingdom.

Secondly, the governing bodies of health care institutions should include quality and its measurement in the institutions strategy and operating model. Even though there is now law mandatorily requiring boards to set goals on quality of care, there is no law barring the boards or governing bodies to set such goals. In fact the law requires the institutions to put in place mechanisms to ensure that the expected standard of care to patients is met.[307] The owners of

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[304] 'The Healthy NHS Board Principles for Good Governance' Foresight Partnership, London, at page 8, available at http://www.ntda.nhs.uk/wp-content/uploads/2013/04/THE-HEALTHY-NHS-BOARD.pdf. Accessed on 1 February 2017.

[305] Act No. 14 of 2013.

[306] Act No. 29 of 2013.

[307] Section 12 of the Medical Practitioners and Dentists (Private Medical Institutions) (Amendment) Rules, 2017.

medical institutions have a duty and a self-interest to ensure that quality care is offered to patients. Quality of services is not only vital to healthcare providers but all enterprises. An enterprise should be able to provide services or goods of quality to its clients in order for it to survive and thrive. It is clients, not boards of management or owners who keeps an enterprise afloat. An enterprise may have a board of management that complies with all the legal and statutory requirements but the enterprise will most likely fail if it does not place emphasis on the quality of the services and its customer experience.

Thirdly, there is need for the governing bodies, whether it is put in the law or not, to spend enough amount of time on quality. A governing body's time is limited and stretched at any single time to cover various aspects of the organisation such as finances, strategy, community relations, supplies, regulatory relations amongst others. The governing body needs to dedicate time to quality of care. There is empirical evidence to support an assertion where the board spends time on quality such as setting the quality standard, receiving feedback on quality, measuring quality and other quality related tasks, there is an increase in the level of quality output.[308] Having quality as a standing item in the board agenda and placing it at the top increases the attention given to quality across the organisation while dedicating at least 20% of the board time to quality leads to an improvement in the quality of the outcomes.[309] It is the governing body's responsibility to ensure that proper care is accorded to the patients and for this to happen, the institution has to have proper clinical and corporate governance. When the board spends enough time on quality of care, it is expected it will come up with good measures to enhance quality such as tying remuneration of the senior executives to quality which would enhance quality of care.

Lastly, it is also recommended that the governing bodies of health care providers establish a quality committee with clear objectives to enhance the quality of care. The quality committee as the name suggests should ensure that the organisation's governance arrangements can monitor and on continuous basis improve quality of health care. A proper working quality committee enhances board oversight on quality and obtains quality input from the relevant players such as clinical leaders, nurses, management staff and even non health care. Scrutiny of quality information is not enough, board members needs to step out of the boardroom and

[308] Denis J-L, Champagne F, Pomey M-P, Préval J, Tré G. Toward a framework for the analysis of governance in healthcare organizations and systems. Ottawa: Canadian Council
[309] Ibid.

get a real time and first-hand information on quality from patient and staff experience and this has been greatly observed to enhance quality.[310]

[310] Ibid.

BIBLIOGRAPHY

35. Constitution of the Republic of Kenya (2010)

Acts of Parliament and Codes of Regulations

36. Basic Education Act, Act No. 14 of 2013

37. Capital Markets Authority, Cap 485A of the Laws of Kenya

38. Capital Markets (Securities) (Public Offers, Listing And Disclosures) (Amendment) Regulations, 2016

39. Central Bank of Kenya, Prudential Guidelines for Institutions Licensed Under the Banking Act. Available under https://www.centralbank.go.ke/wp-content/uploads/2016/08/PRUDENTIAL-GUIDELINES.pdf. Accessed on 3 March 2017

40. Code of Corporate Governance Practices or Issuers of Securities to the Public 2015, Kenya

41. Companies Act 2015, Act No. 17 of 2015

42. Consumer Protection Act, Act Number 46 of 2012 of the Laws of Kenya

43. Competition Act, Act No. 12 of 2010

44. Clinical Officers (Training, Registration and Licensing) Act, Cap 244 of the Laws of Kenya

45. Health Laws (Amendment Bill) 2018, National Assembly Bill No. 14, 2018

46. Insurance Regulatory Authority, Corporate Governance for Insurance and Reinsurance Companies (2011), available in http://www.ira.go.ke/attachments/article/63/Corporate%20Governance%20Guidelines.pdf . Accessed on 3 March 2018

47. Kenya Medical Supplies Agency, Act No. 20 0f 2013 of the Laws of Kenya

48. Law of Succession Act, Cap 260 of the Laws of Kenya

49. Limited Liability Partnerships Act, Chapter 30A of the Laws of Kenya

50. Medical Practitioners and Dentists (Inspections and Licensing) Rules, 2014

51. Medical Practitioners and Dentists (Private Medical Institutions) Rules, 2000

52. Medical Practitioners and Dentists (Private Medical Institutions) (Amendment) Rules, 2017

53. Medical Practitioners and Dentists (Continuing Professional Development) Regulations, 2005
54. Medical Practitioners and Dentists (Practitioners and Health Facilities) (Advertising) Rules, 2016

55. Medical Laboratory Technicians and Technologists Act, Act No 10 of 1999 of the Laws of Kenya

56. Medical Practitioners and Dentists Act, Chapter 253 of the Laws of Kenya

57. National Health Insurance Fund Act, Cap 255 of the Laws of Kenya

58. Non-Governmental Organizations Co-ordination Act, Chapter 134 of the Laws of Kenya

59. Nurses Act, Cap 257 of the Laws of Kenya

60. Partnerships Act, Act No. 16 of 2012

61. Penal Code, Cap 63 of the Laws of Kenya

62. Pharmacy and Poisons Act, Chapter 244 of the Laws of Kenya

63. Public Benefits Organisation Act, Act No. 18 of 2013 of the Laws of Kenya

64. Public Health Act, Cap 242 of the Laws of Kenya

65. Registration of Business Names Act, Cap 499 of the Laws of Kenya

66. Science and Technology (Amendment) Act of 1979 of the Laws of Kenya

67. Technical and Vocational Education and Training Act, Act Number 29 of 2013 of the Laws of Kenya

68. Trustee Act, Chapter 167 of the Laws of Kenya

69. Universities Act, Act Number 42 of 2012 of the Laws of Kenya

Foreign Acts of Parliament

70. The Health and Social Care (Community Health Standards) Act 2003 (United Kingdom)

71. The Patient Protection and Affordable Care Act (PPACA), USA

Books

72. Carver, A ‘Corporate governance-capitalism’s fellow traveller,’ in F. Patfield (ed.) Perspectives on Company Law : 2 (London:Kluwever Law International, 1997) p.76

73. Champagne F et all, ‘Toward a framework for the analysis of governance in healthcare organizations and systems. Ottawa: Canadian Council on Health Services Accreditation. 2005

74. Dallas LL, *Corporate Ethics in the Health Care Marketplace*, 3 SEATTLE J. SOC. JUST. 213 (2004)

75. Epstein AM, ‘Boards and Governance in U.S. Hospitals and the Relationship to Quality of Care. Health Affairs’, 5 November 2009

76. Gage L, ‘Transformational Governance *Best Practices for Public and Nonprofit Hospitals and Health Systems*’ 82, available in www.americangovernance.com/resources/reports/transformational-governance/transformational-governance12.pdf. Accessed on 6 February 2017

77. George, P, Legal Aspects of Health Care Administration , Jones & Bartlett Learning (Maryland USA) 2012 at pp. 144

78. Hall M.A, *A Corporate Ethic of ‘Care’ in Health Care,* 3 SEATTLE J. SOC. JUST. 417 (2004)

79. Harvey H.H, *Health Planning: A Systematic Approach,* (2nd ed.). Aspen Publishers. p. 253. *ISBN 0-89443-379-2. Retrieved 2015-02-28* and accessed on 1 February 2017

80. Lewis K, “The Nexus of Contracts Approach to Corporations: A Comment on Easterbrook and Fischel.” Columbia Law Review 89, no. 7 (1989): 1449-1460

81. Loughrey J, ‘Corporate Lawyers and Corporate Governance, Cambridge University Press (Cambridge) 2011, 14

82. Pattinson S, *Medical Law & Ethics*, 1st Edition, London, Sweet & Maxwell, 2006, 62

83. Peregrine Michael, ‘Healthcare Governance, Amidst Systemic Industry Change: What the Law Expects’, Governance Institute, National Research Corporation, Winter 2014 (Chicago)

84. R E Freeman, Strategic Management: A Stakeholder Approach (Boston, MA: Pitman, 1984), pp 31-2 and 55

85. T Clarke (ed.) Theories of Corporate Governance: The Philosophical Foundations of Corporate Governance (London:Routledge, 2008), pp. 19-20

Journal Articles

86. Ani M et al 'Corporate Governance and public sector entities', (4th World Conference on Business, Economics and Management, Cyprus November 2016), www.sciencedirect.com/12hgjs.d accessed on 11 November 2016

87. Dowtown Consulting International, http://www.dowton.com/journal/2011/06/governance-in-healthcare-%E2%80%93-linkages-boundaries-and-the-problems-between-corporate-and-clinical-governance/ Accessed on 21 November 2016

88. Githu J M, *'Whose Patient is She – Appraising the Law on Medical Malpractice in Kenya'*, Law Society of Kenya Journal, 2016 Volume 2, 62

89. Kent G "Proposition: Saving the World with Corporate Law." *Emory Law Journal* 57, no. 4 (2008): 948-984

90. Kioko FM, 'Corporate Governance and Accountability Mechanisms and Challenges in The Private Hospitals in Kiambu County, Kenya'. Accessed from http://erepository.uonbi.ac.ke/bitstream/handle/11295/15179/Mutuku_Corporate%20governance%20and%20accountability%20mechanisms%20and%20challenges%20in%20the%20private%20hospitals.pdf?sequence=3 on 20 May 2017

91. Wamuyu G.M, 2015, Research project submitted in partial fulfilment of the requirements for the award of Master of Business Administration, School of Business, University of Nairobi, available in http://erepository.uonbi.ac.ke/bitstream/handle/11295/93413/Wamuyu_Total%20Quality%20Management%20in%20Kenya%20s%20Healthcare%20Industry.pdf?sequence=3. Accessed on 20 May 2017

Policy Documents

92. Healthcare Improvement Scotland <http://www.healthcareimprovementscotland.org/previous_resources/policy_and_strategy/corporate_governance.aspx> accessed on 20 November 2017

93. Ministry of Health, *Kenya Health Policy 2014 – 2030*, Nairobi

94. Mwongozo, The Code of Governance for State Corporations, Public Service Commission and State Corporations Advisory Committee (SCAC), Kenya 2015, available in <http://www.icpsk.com/index.php/membership/e-library/finish/9-cs-practioners-

corner/459-mwongozo-code-of-governance-for-state-corporations> accessed on 15 November 2016

95. National Health Service, NHS Foundation Trusts Code of Governance, https://www.gov.uk/government/publications/nhs-foundation-trusts-code-of-governance. Accessed on 10 April 2018

96. National Health Services, Guidance on Overseas Visitors Hospitals Charging Regulations, London 2015, <https://www.gov.uk/government/publications/guidance-on-overseas-visitors-hospital-charging-regulations> Accessed on 10 February 2017

97. NHS Confederation, NHS Statistics, Facts and Figures, London 2017 <http://www.nhsconfed.org/resources/key-statistics-on-the-nhs>. Accessed on 2 February 2017

98. NHS, 'The Healthy NHS Board Principles for Good Governance' Foresight Partnership, London, at page 8, available at http://www.ntda.nhs.uk/wp-content/uploads/2013/04/THE-HEALTHY-NHS-BOARD.pdf. Accessed on 1 February 2018

99. OECD Guidelines on Corporate Governance of State Owned Enterprises, <http://www.oecd.org/daf/ca/guidelines-corporate-governance-soes.htm> accessed on 20 November 2016

100. Patients Charter, Ministry of Health, {http://medicalboard.co.ke/resources/PATIENTS_CHARTER_2013.pdf. Accessed on 20 April 2017

Newspaper Articles

101. Agutu N, 'Mugo wa Wairimu charged afresh with rape, pretending to be gynaecologist' *The Star* (Nairobi, 10 November 2016) <http://www.the-star.co.ke/news/2016/03/14/mugo-wa-wairimu-charged-afresh-with-rape-pretending-to-be_c1312544 > accessed on 11 November 2016

102. Buntz B, 'Why Medical Technology Is So Expensive in the United States', 6 August 2013. Available on http://www.qmed.com/news/why-medical-technology-so-expensive-united-states. Accessed on 1 February 2017

103. Butler P, 'The Bristol Royal Infirmary: the issue explained' *The Guardian* (London 17 January 2002) < https://www.theguardian.com/society/2002/jan/17/5> Accessed on 1 February 2017

104. Daily Nation Team, 'Suffering as nurses strike hits counties', *Daily Nation* (Nairobi) 28 August 2015, <http://www.nation.co.ke/news/Suffering-as-nurses-strike-hits-counties/1056-2838288-wc9ifwz/index.html> accessed, accessed on 20 November 2016

105. Franceschi L, 'Health law remains undeveloped in Kenya' *Daily Nation* (Nairobi), 4 November 2016<http://www.nation.co.ke/oped/blogs/dot9/franceschi/2274464-3440938-aie75l/>accessed on 4 November 2016

106. Jelimo R, 'Sub-County Hospital as a medical superintendent', *The Standard (*Nairobi, 29 November 2018) < https://www.standardmedia.co.ke/health/article/2000224446/nandi-county-health-office-paid-fake-doctor-sh150-000-per-month> Accessed on 30 November 2016

107. Kilonzo E, 'Only one doctor has been found guilty of misconduct in 19 years', *Daily Nation* (Nairobi)29 February 2016<http://www.nation.co.ke/news/Only-one-doctor-has-been-found-guilty-of-miscnduct/1056-3096208-17s5wv/index.html>accessed on 20 November 2016

108. Kilonzo E, 'NHIF tells members to choose hospitals for outpatient treatment' Daily Nation, (Nairobi, 5 January 2017), http://www.nation.co.ke/news/NHIF-tells-members-to-choose-hospitals-for-outpatient-treatment/1056-3021554-ewlmc7z/index.html. Accessed on 5 May 2017

109. Mutua J, 'Nairobi governor dissolves Pumwani Maternity Hospital Board' (*Business Daily* Nairobi 17 September 2018) <https://www.businessdailyafrica.com/news/counties/Nairobi-governor-dissolves-Pumwani-Maternity-Hospital-board/4003142-4764084-gthms4z/index.html> Accessed on 22 September 2018

110. Aristotle, <https://www.brainyquote.com/quotes/aristotle_379604> Accessed on 10 April 2018

111. Omwenga G, 'Fraud threatens health insurance', *Daily Nation* 7 May 2012 (Nairobi) <http://www.nation.co.ke/lifestyle/smartcompany/Fraud-threatens-health-insurance---/1226-1401102-118ijwnz/index.html> accessed on 20 November 2016

112. Otieno J et al 'Association put to task over errant doctor' *Standard Newspaper* (Nairobi, 14 September 2016) https://www.standardmedia.co.ke/article/2000215954/association-put-to-task-over-errant-doctors, Accessed on 30 May 2018

Special Reports

113. Baker GR, Denis J-L, Pomey M-P, MacIntosh-Murray A. Effective governance for quality and patient safety in Canadian Healthcare organizations: a report to the Canadian Health Services Research Foundation and the Canadian Patient Safety Institute. Ottawa: 2009

114. Ian Kennedy et al, *The Report of the Public Inquiry into children's heart surgery at the Bristol Royal Infirmary 1984-1995, Learning from Bristol (The Bristol Royal Infirmary Inquiry), CM 5207(I), Presented to Parliament by the Secretary of State for Health by*

Command of Her Majesty, July 2001. Available at http://webarchive.nationalarchives.gov.uk/20090811143745/http:/www.bristol-inquiry.org.uk/final_report/the_report.pdf. Accessed on 18 February 2017

Case Law

115. *Johnson v. Misericordia Community Hospital* 301 N.W.2d 156(Wis.1981)