

**UNIVERSITY OF NAIROBI**

**SCHOOL OF LAW**

**A Research thesis submitted in partial fulfilment of the requirements for the award of the degree of Masters of Laws (L.L.M) of the University of Nairobi**

**ASSESSMENT OF THE EFFECTIVENESS OF THE EXISTING LEGAL,  
REGULATORY AND POLICY FRAMEWORK IN ENSURING GENDER DIVERSITY  
IN THE BOARDS OF PUBLIC LISTED COMPANIES IN KENYA.**

**By**

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## **DECLARATION**

**I, NYONGESA FAITH MWILA**, do hereby declare this thesis to be my original work and that it has not been submitted elsewhere for the award of a degree or any other award in any other university. Where works by other people have been used, references have been provided.

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## **DEDICATION**

This thesis is dedicated to my beloved parents and siblings, who have continuously encouraged me to never give up in pursuit of education.

## **ACKNOWLEDGEMENTS**

I acknowledge with thanks everyone that has been instrumental in my research. I thank God for the strength and life to complete this thesis.

Special thanks to my supervisor Dr. Agnes Meroka for her guidance and directions throughout the research.

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## ACRONYMS

AfDB	African Development Bank
AG	Attorney General
CEDAW Women	The Convention on the Elimination of all Forms of Discrimination against Women
CEO	Chief Executive Officer
CIC	Commission on the Implementation of the Constitution
CMA	Capital Markets Authority
CMMP	Capital Markets Master Plan
CREAW	Centre for Rights Education and Awareness
EABL	East African Breweries Limited
ICESCR	The International Covenant on Economic, Social and Cultural Rights
KPLC	Kenya Power & Lighting Co. Ltd
OECD	Organisation for Economic Co-operation and Development
PLC	Public Listed Companies
PSCGT	The Private Sector Initiative for Corporate Governance
RDT	Resource Dependence Theory
SC	State corporations
SCAC	State Corporations Advisory Committee
UN	United Nations

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# CHAPTER 1

## INTRODUCTION AND BACKGROUND TO THE STUDY

### 1.1. Background of Study

The enactment of a Constitution<sup>1</sup> in Kenya in 2010 marked the climax of over a decade-long clamor for emancipation of women who had for years without number been subjected to discrimination and dastardly violations.<sup>2</sup> The exercise was thus not only a fulfillment of Kenya's obligations under international human rights instruments, but also a bold recognition of the irrefutably immense and extensive role women play in the growing economy. The law sought to, among other goals, recognise the aspirations of the Kenyan citizenry for a government and economy founded on the essential and fundamental values of human rights, equality, equity, freedom, democracy, social justice and the rule of law.<sup>3</sup> The Constitution espouses that all persons are equal before the law and have a right to equal protection and benefit of the law and that women and men have the right to equal treatment, including the right to opportunities in political, economic, cultural and social spheres.<sup>4</sup> In a nutshell, the Constitution sought to put to an end the widespread discrimination against women who surprisingly and ironically, comprised (and still comprise) the majority not only of the population but also of production as well as consumption in the economy.

According to the United Nations Food and Agricultural Organisation (FAO), women make up a staggering 70% percent of the informal sector of the economy-a sector characterised by poor remuneration, uncondusive work environment, instability and invisibility.<sup>5</sup> Prior to the enactment of the Constitution, most of these women labored away at farms and small businesses they could not own, inherit or pass to their heirs. Even in instances where women were educated and qualified for formal jobs, most were relegated to lower levels of employment. Their skills and competencies were unjustifiably undervalued. To date, while improvements towards inclusion have been notably tremendous and unprecedented, the African cultural

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<sup>1</sup> Constitution of Kenya 2010 (hereafter referred to as the Constitution).

<sup>2</sup> Institute of Directors of Kenya, 'Report of The Task-Force on Women Representation on Boards' (2017).

<sup>3</sup> The Constitution, Preamble.

<sup>4</sup> Ibid, Art. 27

<sup>5</sup> Africa Development Bank, 'Where Are the Women: Inclusive Boardrooms in Africa's Top Listed Companies?' (AFDB 2015).



contextualisation, definition and outdated perception of roles of women continue to persist curtailing rapid-fire transformation. This ostensibly explains why women continue to occupy very few managerial positions in companies and businesses despite being the majority of the workforce.<sup>6</sup> Further, a critical evaluation of their involvement in corporate boards, reveals a sorry state with a plethora of research providing conclusive and irrefutable evidence of under-participation, not for want of requisite qualifications, but on account of blatant discrimination.

The near-catastrophic economic crash of global economy in 2008 caused by greed on America's Wall Street threw the global corporate world into a soul-searching expedition to determine ways through which a recurrence of such devastation could be avoided in the future.<sup>7</sup> A lot of postmortem investigations were conducted on the collapsed and most affected companies not only in the United States of America but also across the globe including Brazil, Britain and Norway to determine what may have gone wrong. Unsurprisingly, most of the investigations unanimously pointed towards inefficient, poor and lackluster corporate governance practices as the primary cause.<sup>8</sup> It was argued that because corporate governance matrix, culture and value systems are to a large extent fundamentally determined by the composition of companies' management teams and boards, the conspicuous absence or underrepresentation of women in high-influence managerial positions and boards expose such organisations to the risk of overlooking or missing important perspectives of economic, social and people management as well as governance.<sup>9</sup> Gender diversity of the boards of organisations was found to have a unique direct correlation to long-term profitability and sustainability of such organisations.<sup>10</sup> Globally, corporate governance experts are extensively looking into the emerging proposition that had Wall Street and other affected organisations retained within their ranks a substantial number of women in key decision-making positions, the highly precipitous risk-taking that almost brought the global economy on its knees could have been avoided.<sup>11</sup> To assuage challenges faced and

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<sup>6</sup> *ibid.*

<sup>7</sup> Charles Kombo Okiaga, 'The Role of Women in Corporate Governance on Organizational Performance, A Kenyan Case' (2013) Vol. 3(3) *Journal of Research in Peace, Gender and Development*.

<sup>8</sup> Blackmore Jill, *Troubling Women: Feminism, Leadership and Educational Change* (1st edn, Open University Press 1999).

<sup>9</sup> Ifi Amadiune, *Daughters of The Goddess, Daughters of Imperialism: African Women Struggle for Culture, Power and Democracy* (1st edn, Zed Books 2000).

<sup>10</sup> Charles Kombo Okiaga (n7)

<sup>11</sup> Lars Rhode, 'Lessons from The Last Financial Crisis and The Future Role of Institutional Investors' (2011) 2011 *OECD Journal: Financial Market Trends*.

ameliorate global corporate governance and management, many institutions, corporates and quasi-governments bodies resorted to retention of more qualified women within their key decision-making and influential ranks such as the board. Ironically, women who were originally eschewed for being antipathetic to risk were now seen not only as risk aware but also shrewd.<sup>12</sup> This opened the doors for more women into the corporate boardroom globally.

While Kenya's resolve in 2010 to constitutionally facilitate broadened recognition, involvement and participation of women in political, economic and social undertakings cannot be wholly ascribed to the global commitment to rectification of the ramifications of global financial crisis, the coincidental occurrence of both events is undeniably fantastic. Unsurprisingly, a few local corporations and especially listed companies, handed over key leadership positions to women based on the global thesis just to stay afloat.<sup>13</sup> Aggressive women looking to take advantage of the new global rhetoric and the Constitution, saw an alluring opportunity in the failing global economy to climb the corporate ladder.<sup>14</sup> This slow but sure transformation has led to a corresponding evolution in the definition and description of corporate governance to include corporate decision making and control, explicitly structured to take into account leadership by women and its operating procedures.

Research indicates that good and effective corporate governance helps firms and organisations drive growth, manage risks, improve performance, attract and retain financiers and investors and survive damaging financial crises.<sup>15</sup> Therefore, to be truly and visibly effective and to make smart strategic decisions with enduring impact, corporate boards not only require diversity of skills, cultures and views but also gender. It is thus not surprising that many studies and research indicate a broad set of business benefits associated with corporate boards' gender diversity.<sup>16</sup> Some of these benefits include greater market knowledge and reputation (ostensibly due to the fact that women generally comprise the majority of the consumers), improved financial performance and shareholder value, increased customer and employee satisfaction and rising

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<sup>12</sup> Kathleen Coate, *Feminist Knowledge and The Ivory Tower: A Case Study*, *Gender and Education* (1st edn, 1999).

<sup>13</sup> Jane Kerubo Onsongo, 'Outsiders Within': Women's Participation in University Management in Kenya' (PhD, University of London 2005).

<sup>14</sup> Tabitha M. Kanogo, *African Womanhood in Colonial Kenya, 1900-50* (1st edn, James Currey 2005).

<sup>15</sup> International Finance Corporation, 'Corporate Governance; Women on Boards' (2014).

<sup>16</sup> *ibid*

investor confidence. According to Maendeleo Ya Wanawake, women representation on boards of companies in Kenya remains uneven despite awareness of these underlying benefits as well as the explicit provisions of the Constitution.<sup>17</sup> This challenge is however not unique to Kenya as many countries worldwide continue to witness uneven representation. However, a large number of companies in major Organisation for Economic Co-operation and Development (OECD) Countries have made tremendous steps with 100 percent of the companies surveyed by Corporate Women Directors International (CWDI) in Norway having a presence of women in their boards; United Kingdom having 75 percent; United States of America having 87 percent; and Germany having 82 percent.<sup>18</sup> On the other hand, the percentage of women directors, save for a few success stories like Norway (44.2 percent), is admittedly low across the globe with Arab countries registering the lowest compositions.<sup>19</sup> Success in Norway and other progressive countries have been ascribed to the institution of quotas for women's representation on boards of both state and public listed companies with the regulators putting pressure on corporations to diversify beyond imposition of quotas.

In Kenya, participation of women in corporate boards remains almost as invisible as it is insignificant as only a dismal 44 out of the total 462 board seats of public listed companies are occupied by women.<sup>20</sup> This translates into a measly 9 percent and tails both Uganda and Rwanda. Rwanda for instance, has an impressive 50 percent boardroom women representation.<sup>21</sup> Women underrepresentation in boards in Kenya has been broadly attributed to the widely adopted board recruitment style which is mostly done through the 'old-boys' network. Best practices in corporate governance have agreed to incorporate gender diversity, but sadly and disappointingly the same has not been matched by appropriate action. This disparity, as illustrated before, continue to pose existential risks to companies. While the Constitution advocates gender equity and spells out a requirement for composition of no less than a third of women in appointive positions, such provisions are only binding to state corporations and not to

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<sup>17</sup> Maendeleo Ya Wanawake, 'Gender Diversity of Corporate Boards' (2006).

<sup>18</sup> Corporate Women Directors International, '2015 CWDI Report on Women Directors of Fortune Global 200: 2004-2014 KEY FINDINGS' (CWDI 2015).

<sup>19</sup> *ibid*

<sup>20</sup> Waitere Mwita, 'More Women Should Sit on Boards, Urges CMA' *The Star* (2017).

<sup>21</sup> Nyokabi Kamanu, 'A Gender Blind Budget' [2008] *Journal of the Institute of Certified Public Secretaries of Kenya*.

private public listed companies which still rely heavily on good will and capital markets regulations to advance gender diversity in board composition.

Unless these disparities are addressed at the foundational level, under-representation of women in corporate boards is unlikely to abate soon enough. There is therefore an inherent need for corporate gender mainstreaming and encouragement of women to take advantage of the existing good will to showcase their skills, competencies and capabilities. In a bid to facilitate gender diversity within public listed companies in Kenya, the Capital Markets Authority (CMA) pursuant to the Capital Markets Act<sup>22</sup> developed a Code of Corporate Governance Practices which sets out the principles and specific recommendations on structures and processes, which companies should adopt in making good corporate governance and should form an integral part of their business dealings and culture.<sup>23</sup> The Code directs that boards and their respective committees should have the appropriate balance of skills; experience, independence and knowledge of the company and its business to enable them discharge their respective duties and responsibilities effectively. Further, the code directs that the Board should have a policy to ensure the achievement of diversity in its composition. CMA ensures compliance through an “Apply or Explain” mechanism. This approach requires boards to fully comply with the 2015 Code<sup>24</sup> failure to which the non-compliant companies must ‘disclose to the CMA the reasons for non-application and clearly indicate the time frame required and the strategies to be put in place towards full compliance. While these policy measures are laudably progressive, they are arguably not binding to these companies. This could ostensibly explain why most public listed companies in Kenya continue to operate corporate governance structures that are not gender diverse.

Based on this background, there is therefore a compelling need to critically investigate the adequacy of the existing legal and policy framework in not only championing but also ensuring and guaranteeing gender diversity in the boards of public listed companies.

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<sup>22</sup> Chapter 485A of the Laws of Kenya

<sup>23</sup> Nairobi Securities Exchange, 'NSE Leadership and Diversity Dialogue Series' (NSE 2017).

<sup>24</sup> Code of Corporate Governance Practices for Issuers of Securities to the Public 2015

## **1.2. Problem Statement**

Despite the advancement of the ‘gender agenda’ through Article 27(8) of the constitution<sup>25</sup> which requires that not more than two thirds of members of elective and appointive bodies shall be of the same gender and the CMA’s establishment of board composition diversity policy requirements through a ‘comply or explain’ and now ‘apply or explain’ mechanism, many listed companies continue to lag behind the constitutional benchmark arguably hinting to insufficiency and inadequacy of the existing legal and policy framework to ensure and guarantee compliance. Without a strict regime, it is highly likely the achievement of the intended gender diversity in corporate governance in Kenya will remain a pipedream. Research shows that while the enactment of the current Constitution helped increase women representation in public listed companies by up to 5 percent, that number remains fairly low since only 54 out of the total 467 directors of all the 57 listed companies are women.<sup>26</sup> This represents a measly 11.6 percent falling short of the 30 percent minimum. Further, nearly 40 percent (23) of the listed firms have no board female representation whatsoever.<sup>27</sup> Only 4 out of the 61-board leadership (chairpersons) are held by women.<sup>28</sup>

This study seeks to outline the extent to which the existing operating legal and policy framework fails to facilitate effective and comprehensive realisation of gender diversity policy goals in corporate governance in public listed companies in Kenya. It looks to generate effective and practicable working solutions to this challenge.

## **1.3. Research Objectives**

The overarching objective of this study is to determine the effectiveness of the existing legal, regulatory and policy framework in ensuring gender diversity in the boards of public listed companies in Kenya.

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<sup>25</sup> CoK(n1).

<sup>26</sup> Nairobi Securities Exchange (n23) 9.

<sup>27</sup> ibid

<sup>28</sup> ibid

Its specific objectives however include:

1. To determine the extent to which the existing legal, regulatory and policy framework on corporate governance not only facilitate gender diversity in the boards of public listed companies but also protects and sustains the gains and achievements realised thus far;
2. To gauge and understand the rationale of evolution of CMA Corporate Governance guidelines from 'Comply or Explain' approach to 'Apply or Explain' approach and to determine the implications of the same on gender diversity on boards of public listed companies;
3. To determine and understand the rationale for lack of sanctions or punishments in the law necessary to compel public listed companies to comply with board gender diversity requirements;
4. To draw legal, regulatory and policy lessons Kenya can learn from Norway-a country that has in place mandatory quota system for gender diversity in corporate governance and had achieved 100 percent compliance by all public listed companies.

#### **1.4. Research Questions**

This study sought elaborate answers to the following questions:

1. What factors necessitated migration of CMA Corporate Governance regime from 'Comply or Explain' approach to 'Apply or Explain' approach?
2. To what extent has the evolution of CMA's Corporate Governance Code from a 'Comply or Explain' regime to an 'Apply or Explain' facilitated gender diversity within the boards of public listed companies?
3. What legal, regulatory and policy measures can Kenya adopt to ensure compliance with Article 27(8) of the Constitution on corporate board gender diversity in public listed companies?

#### **1.5. Research Hypothesis**

1. The existing legal, regulatory and policy framework on corporate governance in Kenya is not adequately equipped to not only guarantee gender diversity in boards of public listed companies but also sustain the progress made thus far;

2. The change of regulatory regime by the CMA from ‘Comply or Explain’ approach to ‘Apply or Explain’ has very little impact, if any, on implementation of gender diversity guidelines by public listed companies especially with the prevailing lack of stringent legal sanctions for non-compliance;
3. Proper and effective implementation of gender diversity in boards of public listed companies can only be sustainably achieved through threat of legal sanctions for non-compliance;
4. There is noticeable reluctance on the part of the regulator (CMA) to institute stringent measures for non-compliance with corporate gender diversity requirements.

### **1.6. Justification of the Study**

There is an undeniably increasing global consciousness of the likely economic and social detrimental outcomes of absence of women in top echelons of management and boards of public listed corporations.<sup>29</sup> In a bid to assuage these potentially negative outcomes, global business agencies and various governments under the aegis of Capital Markets Authorities, Securities and Exchange Commissions and equivalent regulatory agencies have come up with a wide-range of measures and guidelines to incorporate women in the governance structure of companies.<sup>30</sup> In Kenya, while gender diversity in corporate boards has in recent times registered laudable improvements especially in middle-level management thanks to CMA’s policies, that change has been outpaced by the legal and policy dictates pointing to a possible crisis. Either the existing laws and policies are so progressive that widespread corporate practices have to slowly play catch-up; or the laws, policy and regulations in themselves lack effective legal sanctions sufficient and adequate to compel listed companies and corporations into substantial compliance. It is little wonder that current board appointment processes in listed companies help perpetuate discrimination against women leadership and membership. Most boards are male dominated and as such appointments are made from within acceptable circle of friends and ‘old boy’ networks.

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<sup>29</sup> Vincent O. Ongore and others, 'Board Composition and Financial Performance: Empirical Analysis of Companies Listed at the Nairobi Securities Exchange' (2015) 5 International Journal of Economics and Financial Issues.

<sup>30</sup> European Union, 'More Women In Senior Positions Key To Economic Stability And Growth' (Publications Office of the European Union 2010).

It is noteworthy that with approximately 11.6% of corporate board seats currently held by women, Kenya has one of the highest women board representation in Africa.<sup>31</sup> The country has arguably surpassed some of the developed countries including United States, Netherlands and France in corporate governance gender diversity promotion and advocacy.<sup>32</sup> East African Breweries Limited (EABL) is one of the most frequently-referenced public listed companies that demonstrates the positive implications of gender diversity on corporate governance. The eleven-member board of the company currently comprises 5 women translating into a nearly balanced gender representation.<sup>33</sup> The model company (EABL) and the country's relatively good board gender diversity credentials are attributable to multiple factors including: early adoption and advocacy of a Corporate Governance Code addressing gender diversity by the CMA; active non-governmental organisations that focus on advocacy and training on corporate gender diversity; as well as a constitutional mandate that seeks to impose a quota of women representation in corporate boardrooms. These notwithstanding, the palpable lack of a proper mechanism to effectively ensure and guarantee compliance with these legal and policy directives raises a fundamental question as to further progress as well as to the sustainability of the milestones already achieved. There is therefore a need for extensive situation research and study into the effectiveness of the existing legal and policy framework to not only facilitate the sustainability of the already-achieved gains but also create an environment conducive for advancement.

Kenya is credited as being one of the first countries worldwide to modify and adapt its Corporate Governance Code to incorporate global recommendations for gender diversity within the boards of public listed companies. Just before some of the OECD countries including Norway, Finland and Sweden proclaimed similar schemes in 2002, Kenya's CMA had amended its 'Guidelines on Corporate Governance Practices by Public Listed Companies in Kenya' to foster retention and participation of women on corporate boards.<sup>34</sup> Article 3(1)(vii) of the now-repealed Guideline provides that the process for appointment of directors should be sensitive to gender representation. Observers note that while the Corporate Governance Code prescribed by the CMA is not binding on public listed companies, the inclusion of gender diversity

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<sup>31</sup> Paul Hastings LLP, 'Breaking the Glass Ceiling: Women in The Boardroom' (Paul Hastings LLP 2015).

<sup>32</sup> *ibid*

<sup>33</sup> *ibid* 18

<sup>34</sup> *Guidelines on Corporate Governance Practices by Public Listed Companies in Kenya*, Gazette Notice No. 3362,



recommendation expanded visibility of the widespread underrepresentation of women in corporate boards. Since success or failure of regulatory policy framework developed by the CMA is foundationally dependent on the goodwill of the listed companies, there is a high likelihood that realisation of intended gender diversity in corporate boards may take long. In fact, there is an inherent risk of total reversal of the gains made so far. There is therefore, a justifiably significant need to re-evaluate the existing legal framework with the view to recommending measures that would ensure such requirements are obligatory in nature attracting appropriate legal sanctions for non-compliance.

As indicated before, the CMA in 2002 adopted the global Code of Best Practice for Corporate Governance developed by the Private Sector Initiative for Corporate Governance and incorporated the same into the now-repealed ‘Guidelines on Corporate Governance Practices by Public Listed Companies in Kenya’. These guidelines adopted a ‘Comply or Explain’ adoption mechanism which implied that all listed companies were required to indicate in their annual returns and filings whether they had complied with the 2002 guidelines. A company that failed to comply was expected to advance reasons for non-compliance and outline the steps and initiatives it is taking to ensure full compliance.<sup>35</sup> This approach was arguably practical due to its innate recognition of the impossibility to implement a “one-size-fits-all” regulatory mechanism. Unsurprisingly, most listed companies never actually complied with the 2002 guidelines implying the ‘Comply or Explain’ approach was as ineffective as it was inefficient. In fact, compliance only required an indication through ticking of a box in filling papers and was never followed up through supervision or any other methods of verification. As a consequence, many companies including Chase Bank, Uchumi Supermarkets and Imperial Bank that otherwise filed surprisingly positive returns almost collapsed in the face of these guidelines. This prompted CMA to devise measures to assuage any similar future problems. As a result, the Code of Corporate Governance Practices for Issuers of Securities to the Public (the 2015 Code) was gazetted in 2015 to replace the 2002 Guidelines. One fundamental change in the guidelines is the replacement of the ‘Comply or Explain’ approach with the ‘Apply or Explain’ approach to corporate governance. This new approach raises the bar in as far as compulsion of corporations

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<sup>35</sup> James Mukabwa, 'Corporate Governance in Kenya' (*LinkedIn.com*, 2016) <<https://www.linkedin.com/pulse/corporate-governance-kenya-part-i-james-mukabwa>> accessed 2 June 2017.

to comply with the requirements is concerned. It requires corporate boards to fully apply the code and failure to which non-compliant companies are required to extensively and clearly disclose to CMA their reasons for non-application and the time required and measures they are putting in place to ensure and guarantee full compliance and application.<sup>36</sup>

The fundamental difference between the two approaches is that while the ‘Comply or Explain’ approach required a board to comply with the code and guidelines verbatim or as stipulated, the ‘Apply or Explain’ approach affords the board an opportunity to fully substantiate reasons for non-compliance including an indication that, in particular circumstance, strict implementation of the recommendations within a specific timeframe would have been detrimental to the company. The ‘Apply or Explain’ approach allows companies to implement the recommendations in a way that is unique to their circumstances without necessarily deviating from the underlying intention of such recommendations provided such variations respect, uphold and propagate the foundational principles of corporate governance including fairness, transparency, responsibility and accountability. While the 2015 Code is a step in the right direction, it’s compulsion of corporates towards compliance merely lies in the semantics and still carries no legal threats or sanctions. There is therefore a need for research-focused investigation into the possibility or likelihood of the new code contributing to effective realisation of gender diversity within the boards of public listed companies.

It is sadly notable that while the ‘gender agenda’ advanced by the Constitution has stimulated progress and advancement within state-owned corporations, the gaping lack of a similar parallel mandate applicable to private sector has meant many such corporations lag behind in corporate gender diversity. As established before, the 2015 Code that recommends gender diversity on corporate boards is not binding on companies and does not include penalties or incentives to inspire compliance. Although various individuals and institutions have advocated for a formal quota for women participation in boards of public listed companies as is the strict practice in progressive OECD countries such as Norway, there is still no identifiable clear path towards

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<sup>36</sup> Code of Corporate Governance Practices for Issuers of Securities to the Public, Gazette Notice No. 1420 of 2015 (hereinafter referred to as ‘the 2015 Code’)

progress.<sup>37</sup> Just before her retirement, Stella Kilonzo, the former head of CMA credited with unprecedented evolution of the Kenyan corporate governance regulatory practices, indicated a possibility on introduction of quotas modelled along practices in the United Kingdom. To date, the follow-up on her proposition remains muted at best.<sup>38</sup>

Kenya's implementation of gender diversity in corporate governance as well as other best practices is arguably wholly dependent on goodwill of corporate leadership of individual companies. Noticing this weakness and vulnerability of the existing framework, a strong network of advocacy groups and organisations in Kenya continue to push for progressive compliance within public listed companies. These organisations focus on equipping women with the requisite skills, knowledge and competencies necessary to effectively facilitate their transition into corporate governance. They also work with media agencies to entice companies into full and comprehensive compliance. While reliance on good will for progressive realisation of fundamental ideals of corporate governance is encouraging, it is in itself insufficient and especially without the support of a strict policy and regulatory framework. This study is thus justified by the need for effective and in-depth appraisal of the viability and efficacy of the existing legal framework in advancing gender diversity in public listed companies.

## **1.7. Research Methodology**

To effectively test its hypothesis and adequately fulfill its objectives, this study adopted library research and interviews as its primary methods of data collection.

### **1.7.1. Library Research**

This study was predominantly qualitative and library-oriented. The research was complimented by a situational analysis and as well as a case study.

In the context of the study herein, a situational analysis refers to the process through which an aggregation of methods are employed by a research to not only examine an organisation's internal environment but to also appraise its interaction with external operating influence with the view to highlighting and understanding the capabilities of the organisation, its customers and

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<sup>37</sup> James Mukabwa (n34)

<sup>38</sup> Paul Hastings LLP (n30) 19.

operating environment. To this end, the study reviewed public reports and filings on target corporations, underscored their management and board gender composition and interfaced the same with operational policy guidelines provided by both the Constitution and the Capital Markets Authority (CMA). The aim of the comparison was to identify both legal and policy operational and functional weaknesses that are fixable within the study's terms of reference and objectives.

To facilitate thorough review of gender diversity in the boards of public listed companies in Kenya with the aim of identifying fixable legal and policy weaknesses, this research conducted a case study. It looked into the Norwegian corporate governance practices to determine lessons that Kenya could learn and implement to achieve broader board gender diversity. To this end, it reviewed Norwegian documentations on the same including: books, corporate press releases; select statutes; government publications; journals; interviews; presentation or lectures and magazines.

The case study involved a thorough case analysis of gender diversity practices in Kenya and Norway as documented by reputable observers as well as mandated through relevant respective legal instruments.

This research also had access material and data from statutory bodies and specialized institutions such as the Capital Markets Authority and Nairobi Stock and Securities Exchange, Kenya Institute of Directors, Kenya Association of Women Directors and Institute of Economic Affairs.

### **1.7.2. Field Work: Interviews**

To complement library research, this study deployed interview as a method of data collection. The interviews enabled the study pursue in-depth information on the research topic. It was useful in getting the story behind the interviewees' experiences in relation to the research questions.

This research adopted a general interview guide approach. This approach was intended to ensure that the same general areas of information were collected from each interviewee; this provided this study with more focus than the conversational approach, but still allowed a degree of freedom and adaptability in getting the information from the interviewee.

### **1.7.3. Scope of the Interviews**

As illustrated in the literature review, a lot of studies have been done to not only demonstrate the scientific correlation between board gender diversity and overall company performance but also to exhibit the general implications of that correlation on the larger society. On the local business landscape, such studies go to the depths of not only analysing the legal and policy framework on corporate gender diversity but also providing numerical statistical evidence of the same in respect of many listed companies. What was demonstrably lacking, is a deep thorough interrogation of the disconnect between policy and practice. The fundamental objective of the field study was not to regurgitate data already made public by those studies or in any way confirm them, but rather to go beyond the statistics to establish the rationale for the disconnect. Accordingly, it sought to get anecdotal understandings and explanations from various industry experts as to why the Kenyan corporate sector is demonstrably reluctant to effectively institutionalise board gender diversity in the face clear legal requirements for the same as well as evidence of associated sustained long-term corporate performance. Since this study was confined to listed companies, most of which are headquartered in Nairobi, its geographical scope was limited to Nairobi County.

The interviews targeted key industry players including: representatives of Kenya Institute of Directors; Kenya Association of Women Directors; The Law Society of Kenya; Federation of Women Lawyers; Transparency International; Institute of Economic Affairs; the Capital Markets Authority registry; as well as board representatives of 5 public listed companies. The interviews were open-ended intentionally to elicit as much information as possible.

### **1.7.4. Ethical Issues**

This research engaged in ongoing reflectivity while responding sensitively to the needs of individual interviewees. Below are some of the ethical issues that impacted the study as well as an outline of how this study handled them.

#### **1.7.4.1. Confidentiality and Privacy**

Where necessary, the study uses pseudonyms or initials or change other identifying details to conceal the identity of the participants. It only identifies participants who expressed wishes to remain anonymous. The study however informed participants of its inability to guarantee complete confidentiality, especially with narratives and life histories, even if pseudonyms were used. It promptly informed the participants of the boundaries of confidentiality; that is, what could not be held as confidential.

#### **1.7.4.2. Informed Consent**

The study took measures to provide detailed information to participants about the nature of the research and the need to gain written consent. To this end, the participants were from the outset, appraised of the purpose and scope of the study as well as the types of questions that were to be asked.

### **1.8. Limitations**

The study faced the following challenges when undertaking library research:

- a) Inadequate local literature addressing the subject under study;
- b) Difficulty in accessing the records and registers at the various statutory bodies and government offices; for instance, regulatory bodies especially CMA were slow to facilitate access to gender diversity and board representation reports and as well as company filings;
- c) Bureaucracy at the said offices;
- d) Most Norwegian books, journals and other publications relevant to this study were hard to find and even when found, most were published in English.

This study however adopted measures necessary to effectively assuage the above limitations. It actively and dynamically devised ways to deal with those challenges. For instance, journals and publications originally published in Norwegian language were translated using Google translator. Previous studies on the subject matter were reviewed to provide leads to critical publications effectively mitigating the challenge of scarcity of literature on the subject matter.

In addition, the study acknowledged the fact that it run the risk of lacking legitimacy or substantiating strength if it were to rely solely on secondary sources. It is on that supposition that it utilised open-ended questions interviews to establish the anecdotal realities that justify, dispute or vary the recorded assumptions, facts and opinions. To that end, it foresaw that such a process was likely to be subject not only to the limitations of subjectivity of the respondents but also to subconscious exaggerations. The study faced the following specific limitations:

- a) Self-selection bias; CMA officials and directors of some of the public listed companies likely to have unjustly profited or benefitted (though unknown to the research) from the ‘old boys’ network’ or through blatant discrimination on female contenders for similar positions, on some occasions provided misleading or inaccurate information. Even worse, many declined to cooperate with the study;
- b) Difficulty in securing appointment with key officials in the said regulatory bodies.

As indicated before, the study adopted various measures necessary to effectively assuage the above limitations as well as actively device ways to deal with those not reasonably foreseeable at the time. Provision of anonymity indeed provided better insurance to most of the interviewees originally adamant or reluctant to participate in the study. Below is an interview schedule.

<b>S/No.</b>	<b>Date</b>	<b>Name</b>	<b>Designation</b>	<b>Organisation</b>
1.	30/7/18	James Mukabwa	Associate	Dorion Associates
2.	8/8/18	Withheld	Executive	Safaricom Ltd
3.	16/8/18	Maurice Oduor	Analyst	Cytonn Group Ltd
4.	19/8/18	Zipporah Ndegwa	Chief Executive	KenGen
5.	20/8/18	Kwame Owino	Director	Institute of Economic Affairs
6.	22/8/18	Withheld	Official	Private Sector Corporate Governance Trust
7.	23/8/18	Withheld	Executive	Capital Markets Authority
8.	23/8/18	Withheld	Executive	Nairobi Stock Exchange (NSE)
9.	30/8/18	Angela Amboko	Partner	Wanga Amboko Advocates
10.	31/8/18	Abdirahman A.	Lawyer	Formerly an employee of CMA

*Table 1:* Interview Schedule

## **1.9. Theoretical Framework**

Good and effective corporate governance has been found to help companies improve performance, attract and retain investors, drive growth phenomenally, manage operational risks and weather the strongest of financial storms.<sup>39</sup> To be truly effective, a board requires a diversity of skills, cultures and perspectives to make smart and well-informed decisions with enduring impact. There are a broad set of benefits to corporations that are associated with gender diversity on management boards. From improved financial performance and shareholder value to increased customer and employee satisfaction, rising investor confidence and greater market knowledge and reputation, the benefits abound. To a greater extent therefore, the concept of corporate gender diversity can be best explained by both resource dependency and agency theories. This study will thus examine and discuss gender diversity in corporate boards based of these theories.

### **1.9.1. Agency Theory**

Due to the rise in complexity and size of corporations thanks to global trade and globalization generally, owners of businesses incrementally find it extremely unsustainable to effectively manage their businesses using traditional approaches.<sup>40</sup> This has necessitated separation of ownership from control of capital. The Agency theory was developed by Jensen and Meckling.<sup>41</sup> The theory advances that an agency relationship is a contract based upon which one or more persons (the principal) engages another (the agent) to perform certain services on their behalf. The process involves delegation of certain duties and obligations including some decision-making authority to the agent. This theory is primarily premised upon the existence of an inherent conflict of interest between the principal and the agent and which conflict forms the basis for introduction of effective but stringent governance mechanism.<sup>42</sup> It necessarily follows therefore that separation of ownership and control generally creates a conflict between

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<sup>39</sup> International Finance Corporation, 'Corporate Governance-Women on Boards' (The World Bank 2014).

<sup>40</sup> Vincent O. Ongore and Peter O. K'Obonyo, 'Effects of Selected Corporate Governance Characteristics on Firm Performance: Empirical Evidence from Kenya,' (2011) Vol. 1 International Journal of Economics and Financial Issues.

<sup>41</sup> Michael C. Jensen and H. W. Meckling, 'Theory of The Firm: Managerial Behaviour, Agency Costs and University Structure' (1976) Vol. 3 Journal of Financial Economics.

<sup>42</sup> Lex Donaldson and James H. Davis, 'Stewardship Theory or Agency Theory: CEO Governance and Shareholder Returns' (1991) Vol. 16 Australian Journal of Management.



shareholders and the management with a strong presumption being made that although the managers, as the agent of the shareholders, are expected to be rational, they cannot always be trusted to act in the best interest of the shareholders due to the inherent fact that they also serve their own individual interests.<sup>43</sup> To that extent, there is a need for institutionalisation of processes including risk-bearing and monitoring mechanisms that check the management's potentially deviant behaviour to avoid or assuage any moral hazards that might arise due to inability to control management.

The Agency theory advocates for a clear distinction and separation between decision management and control and is effectively concerned with resolving any conflicts between the principal and the agent.<sup>44</sup> Eisenhardt proposed two strategies of control that rely on performance evaluation to help mitigate challenges faced in agency arrangement.<sup>45</sup> These strategies are based on behaviour and outcome. The theory provides for a basis for organisation governance through both internal and external mechanisms.<sup>46</sup> These mechanisms are structured to facilitate proper and workable alignment between the interests of the principal and the agent to not only ensure protection of the interest of the shareholders but also to minimise costs associated with the agency. To that end, proper board diversity and balance and especially gender diversity provides an arguably strong balance that can prevent an individual or a group of individuals from unjustifiably and arrogantly dominating board decision-making process.<sup>47</sup> The Agency theory therefore affirms the need for gender diversity in corporate governance.

### **1.9.2. Resource Dependence Theory (RDT)**

Since procurement of external resources is foundational to tactical and strategic management of a company, it is important to study the implications of external resources of the organisation on organisational behaviour. This has been made possible thanks to the Resource Dependence

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<sup>43</sup> Oliver E. Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications* (1st edn, Free Press 1975).

<sup>44</sup> Kathleen M. Eisenhardt, 'Agency Theory: An Assessment and Review' (1999) Vol.14 *The Academy of Management Review*.

<sup>45</sup> Kathleen M. Eisenhardt, 'Control: Organizational and Economic Approaches' (1985) Vol.31 *Management Science*.

<sup>46</sup> J Roberts, T McNulty and P Stiles, 'Beyond Agency Conceptions of The Work of The Non-Executive Director: Creating Accountability in The Boardroom' (2005) Vol.16 *British Journal of Management*.

<sup>47</sup> Ronnie Hampel, 'Committee on Corporate Governance Final Report' (The Committee on Corporate Governance and Gee Publishing Ltd 1998).

Theory (RDT).<sup>48</sup>RDT provides a theoretical foundation for the role of directors as a resource to the organisation.<sup>49</sup> It appreciates the strategic importance of other stakeholders besides the immediate shareholders in guaranteeing firm's access to resources through affiliation with various constituencies.<sup>50</sup> Under the Resource Dependence Theory, the importance of the directors to the organisation lies in their unique abilities to identify, exploit and deploy their external network of contacts to attract resources indispensably important for the company to operate competitively and register exceptional performance.<sup>51</sup> In support of this assertion, Johnson argued that Resource Dependence Theory theorists emphasise focus on appointment of representatives of independent organisations as a channel for securing access to resources critical for firm's growth and success.<sup>52</sup>Provision of these resources therefore not only enhance organisational functioning and performance but also increases their chances of survival during tough economic downturns. It is a major argument of Resource Dependence Theory that organisations must always strive to exert control over their operating environment by co-opting resources necessary for their survival and growth.<sup>53</sup>

A study conducted by Pfeffer found out that the two most important factors to effective management of a firm's need for capital and the regulatory environment are the board size and the background of outside directors.<sup>54</sup> His findings are reinforced by Hillman's assertion that directors' background play a fundamental role in organisational success due to the inherent fact that they bring skills, competencies, knowledge, information and access to constituents key to the organisations operational success such as customers, suppliers, public policy makers and key social groups.<sup>55</sup> Williamson too supported the arguments of Pfeffer and opined that over and

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<sup>48</sup> Jeffrey Pfeffer and Gerald R Salancik, *The External Control of Organizations* (1st edn, Stanford Business Books 2009).

<sup>49</sup> Catherine M. Daily, Dan R. Dalton and Albert A. Cannella, 'Corporate Governance: Decades of Dialogue and Data' (2003) 28 *The Academy of Management Review*.

<sup>50</sup> Bello Lawal, 'Board Dynamics and Corporate Performance: Review of Literature, And Empirical Challenges' (2011) 4 *International Journal of Economics and Finance*.

<sup>51</sup> Catherine M. Daily, Dan R. Dalton and Albert A. Cannella (n48).

<sup>52</sup> Jonathan L. Johnson, Catherine M. Daily and Alan E. Ellstrand, 'Boards of Directors: A Review and Research Agenda' (1996) 22 *Journal of Management*.

<sup>53</sup> Jeffrey Pfeffer and Gerald R Salancik, *The External Control of Organisations, A Resource Dependence Perspective* (1st edn, Harper and Row Publishers 1978).

<sup>54</sup> Jeffrey Pfeffer, 'Size, Composition, And Function of Hospital Boards of Directors: A Study of Organization-Environment Linkage' (1973) 18 *Administrative Science Quarterly*.

<sup>55</sup> M. C. Hillman, S. M. Canella and F. D Paetzold, 'Corporate Governance: Decades of Dialogue and Data.' (2000) Vol. 28 *Academy of Management Review*.

above gaining access to requisite resources, organisations advantaged by appropriate network connections are more often in a better position to reduce costs otherwise associated with interaction with the external environment.<sup>56</sup>

Several scholars have used Resource Dependence Theory to advance arguments for proper and considerate board composition with specific focus on the need for outsider representation. Pearce and Zahra<sup>57</sup> for instance, argue that appointment of outsiders to boards of companies that are either failing or showing signs of capitulation tends to bring fresh perspectives that more often than not facilitate successful turn-arounds. The type of diversity is therefore indicative of the type of resources one will bring to the table. Women board members can contribute unique benefits and resources as they tend to have different backgrounds than those of men. In addition, women are said to bring information and skills sets to allowing for better decision making at the corporate level.<sup>58</sup> It is arguable on this premise therefore, that gender diversity within the board could potentially benefit a firm's governance not only through an influx of diverse skills, competencies and perspectives but also connections to requisite external constituents necessary for organisational success. Resource Dependence Theory therefore sanctions the need for gender diversity on corporate boards and to that end, helps advance the objectives of this study.

Both Resource Dependence and Agency theories are important to this study as they elaborate in detail not only the importance but also the implications of gender diversity in corporate boards. It is noteworthy that CMA relied heavily on the dictates of both theories to develop the corporate governance code of 2015. To that end, any interrogation of the sufficiency of the code and other policy documents as well as the constitution in facilitating gender inclusion in corporate boards, is incomplete without reference to the essentials of these theories.

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<sup>56</sup> Oliver Williamson, 'Corporate Governance' (1984) 93 *The Yale Law Journal*.

<sup>57</sup> John A. Pearce and Shaker A. Zahra, 'Board Composition from A Strategic Contingency Perspective' (1992) 29 *Journal of Management Studies*.

<sup>58</sup> Joseph Folkman and Jack Zenger, 'Are Women Better Leaders Than Men?' [2012] *Harvard Business Review* <<https://hbr.org/2012/03/a-study-in-leadership-women-do>> accessed 18 June 2017.

## **1.10. Literature Review**

This study relies on academic and scholarly work conducted by exemplary professionals and reputable organisations to not only establish the relationship between board gender diversity and effective corporate governance but also to understand how the same has impacted legal, policy and regulatory reforms over the years. The that end, it also reviews publications on situational analysis of gender diversity in the boards of public listed companies.

### **Relationship Between Board Gender Diversity and Corporate Governance**

According to Duncan M. Wagana and Joyce D. Nzulwa<sup>59</sup>, most research conducted in the past by corporate governance experts and industry professionals on the implications of gender diversity in corporate boards have predominantly focused on the financial benefits to the target firms while giving little consideration and recognition to non-financial benefits which more often than not facilitate such financial benefits, and in isolation, sometimes even outweigh them. Their study set out to conduct an extensive and critical appraisal of the existing literature on corporate governance to establish the implications of gender diversity on corporate performance.<sup>60</sup> They found out that while there is a reasonable general consensus in literature suggesting direct correlation between gender diversity and firm's financial performance, very few have veered off to investigate the implications and influence of such diversity on non-financial performance measures. The two quips that there is therefore a need for future studies to examine the link between gender diversity and non-financial performance.

Wagana and Nzulwa argue that most studies conducted previously on the implications of gender diversity on corporate governance suffer tremendous methodological drawbacks due to their demonstrably biased overreliance on the use of cross-sectional surveys which unsurprisingly limited effective identification of causality between board gender diversity and corporate performance. They recommend a balance of both longitudinal and cross-sectional survey methodologies for future studies to address the research question more exhaustively, broadly and conclusively. The two further argue that the sampling method adopted by most studies especially in Kenya are limited due to their gross lack of proper scientific validation. The say that the

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<sup>59</sup> Duncan M. Wagana and Joyce D Nzulwa, 'Corporate Governance, Board Gender Diversity And Corporate Performance: A Critical Review Of Literature' (2016) Vol. 12 European Scientific Journal.

<sup>60</sup> *ibid.*

studies conducted largely relied on case studies – a method that largely limited the ability of the samples to be considered as effectively and sufficiently representative. Wagana and Nzulwa also fault most of the studies conducted on the link between corporate gender diversity and performance for their over dependency on the agency and resource dependence theories at the expense of other otherwise important theories that could offer a variety of perspectives.<sup>61</sup> They single out stewardship, stakeholder, institutional, transaction cost and political theories as some of the perspectives that could guide researchers to better understand and validate their hypothesis as well as synthesize their research outcomes.

It is notable that Wagana and Nzulwa's study is of tremendous benefit to corporate governance policy makers. It not only illustrates the symbiotic relationship between corporate gender diversity and corporate performance but also prescribes ways through which policy makers can best use the findings of their study to better revise, revitalise and align the existing legal, policy and regulatory framework on corporate governance. The study also lends invaluable support to further research on corporate governance by providing in-depth and comprehensive model of board gender diversity characteristics. This research finds the study by the two critical to effective realisation of its objectives as it boldly and clearly lays bare the insufficiencies and inadequacies of the law and policy in ensuring gender diversity in corporate governance in the face of a plethora of studies and research outlining the admittedly significant positive financial and non-financial implications of the same on corporate performance.

In his study<sup>62</sup>, Charles Kombo Okiaga argues that there is an urgent need for the government and the private sector through the requisite regulatory bodies to collaboratively establish a data base of qualified and competent women from among whom both state-owned and public listed corporations can make picks for board appointments. Okiaga research looked into the role of women in corporate governance and the impact of the same in organisational performance in Kenya. He focuses on the evolution of the corporate role of women in an ideological and structural environment that he argues for years has been sex-typed and gender specific.<sup>63</sup>

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<sup>61</sup> *ibid* 229.

<sup>62</sup> Charles Kombo Okiaga, 'The Role of Women in Corporate Governance on Organizational Performance, A Kenyan Case' (2013) Vol. 3(3) *Journal of Research in Peace, Gender and Development*.

<sup>63</sup> *ibid*

Specifically, he argues that for years without number, and surprisingly to date and especially in Kenya, some corporate jobs were and to a large extent continue to be, a preserve for women. These include secretaries, typists and stenographers just to mention a few. Women managers also filled female-defined niches such as personnel or human resources, public relations and customer relationship management. And that was the nearest they ever came to corporate governance. Even as entrepreneurs, Okiaga argues, women were mostly successful in industries that were characterised as uniquely female. These included food production, cosmetics and women's wear retail. He says that the working environment, conditions and remuneration for women only began to expand following the Second World War and continues incrementally into the current state. He quips that despite the immensely long journey to emancipation thanks to the constitution amongst other catalysts, women still lag behind men in access to land, credit and decent jobs. This is also despite the existence of growing extensive research indicating strong direct correlation between enhancement of women's economic options and the overall growth of national economy. Okiaga recommends that the state should formulate a policy that would help foster participation of women in corporate boards as well as other in the general macroeconomic environment.<sup>64</sup>

To build on his hypothesis, Okiaga looked into the evolution of the global corporate governance best practices especially following the 2008 financial crises that threatened a complete wipe-out of the entire global financial sector. He reviewed research and reports published by prolific corporate governance professionals who passionately sought to establish factors that contributed to the avoidable meltdown. Okiaga argues, that while most of the reports provided varied causes for the mayhem, many, if not all, were interestingly unanimous on lack of corporate gender diversity in the boards of the major banks as the most immediate indirect cause. The irresponsible flagrant risk-taking that formed the center stage of the near collapse, Okiaga says, was largely attributable to lack of diverse perspectives in board decision making. He quips that had Wall Street retained a sizeable number of women within their corporate ranks, the high level of risk taking that drove the economy into a near financial abyss would have been avoided.<sup>65</sup> Women who were originally shunned and demonized as risk averse and ignorant were now being

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<sup>64</sup> Ibid 39

<sup>65</sup> Charles Kombo Okiaga (n48) 47

seen not only as shrewd but also risk aware, providing a window of opportunity for their ascension into corporate boards on a global scale. Okiaga argues that the shift in global perceptions of corporate gender diversity caught the attention of regulators too. The regulators reactionarily came up with measures to incentivise compliance among corporations. This they not only did through guidelines and policy directives but also through encouragement of widespread civic education and training of women to equip them with skills and competencies necessary for ascension into corporate boards.

Like Wagana and Nzulwa, Okiaga's study belabours the need for gender diversity in corporate governance by outlining not the benefits of the same but also the disadvantages of disregard of the same in organisational performance. While both studies emphasise the irrefutable need for good will for progressive realisation of the gender diversity in corporate governance, they give very little credence to the overarching role played by legal, policy and regulatory framework in furtherance of the same. This study seeks to fill this gap through extensive examination of the extent to which the existing regulatory framework is equipped not only to maintain and sustain the progress made thus far but also to facilitate advancement through incremental advocacy and requirement for strict compliance. It will propose measures through which any inefficiencies or insufficiencies in the framework identified in the study can be best dealt with to guarantee progress.

According to Vincent O. Ongore, Peter O. K'Obonyo, Martin Ogutu and Eric M. Bosire, there is evidentially an increasing global awareness on the detrimental implications of absence or underrepresentation of women in the top echelons of management and boards of corporations.<sup>66</sup> This has led to changes in corporate governance guidelines to incorporate women in company management and decision-making on a global scale. They argue that while the global trend is on the face value, encouraging, the progress made thus far is still below the expected levels. The quartet cites Kenya as a quintessential example of countries whose boards are male dominated thanks to appointments made through referrals or the good 'old-boys' networks. This practice has over the years denied women a chance for adequate representation in Kenyan corporate

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<sup>66</sup> Vincent O. Ongore and others, 'Board Composition and Financial Performance: Empirical Analysis of Companies Listed at The Nairobi Securities Exchange' (2015) 5 International Journal of Economics and Financial Issues.

boards. They contend however, that with the constitution, there is hope for progressive realisation of gender diversity in corporate governance. In a radical departure from the assertions by many researchers, the quartet argues that gender diversity is merely a microcosm of the foundational requirements of an effective corporate governance structure and function. Other factors including board size, qualifications and experience of members, presence of independent members and the composition of the board itself (a mix between executive and non-executive members) play far more important and significant role than a mere equational balance of genders in corporate governance.<sup>67</sup> They further quip that gender diversity as an important factor should never precede the most important considerations such as skills and competencies and that those selected to corporate boards should not be judged purely on the basis of gender but in terms of their likelihood to positively influence the long-term shareholder value.

The three argue that the nexus between gender diversity of corporate boards and organisational performance can be best explained by demand-supply dynamics in the market place. They say that if the impact of gender diversity on corporate governance is measured purely in terms of financial performance, then such benefits are obvious since women, who unsurprisingly comprise the majority of the consumers generally, are likely to bring to the board a better than average understanding of the market place. Further, a more diversified board is highly likely to be seen as representative of both consumer and employee diversity thereby enhancing the competitive edge of the companies. They found out that there exists a strong correlation between board diversity and board creativity and innovation with more diverse boards witnessing progressively innovative and market-focused decisions enhancing their overall company performance in the long run.<sup>68</sup> This, they argue, is possibly ascribable to the fact that gender diversity more often than not result in diversity of skill, perspectives, experiences and complimentary knowledge all which help boards make better, more sound and future-looking decisions. The quartet further add that due to the higher likelihood of women to ask the hard questions their male counterparts would ordinarily fail to ask (especially if such questions touch on risk), their presence on the board increases the board's ability to monitor and supervise the management more objectively. Additionally, the mere presence of women on the boards uplifts

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<sup>67</sup> *ibid.*

<sup>68</sup> *ibid* 36.



is known to uplift an organisation's image due to the positive signals they send to the labour, product and financial markets.

Ongore, K'Obonyo, Ogutu and Bosire conducted a bivariate analysis on gender diversity and board size using Pearson Product Moment Correlation and established a significant relationship between the two. They further used Pearson Chi-Square test for confirmation of their hypothesis and realised similar outcomes. According to their findings, on a simple linear relationship, gender diversity of boards had no significant influence on organisational financial performance. However, a test using a composite model where other subcomponents of board compositing were considered, the predictive power of gender diversity on firm performance showed that every unit increase in gender diversity resulted in 59.7 percent increase in firm's performance. They argue their findings are consistent with studies earlier conducted by Smith<sup>69</sup>, Robinson and Dechant<sup>70</sup> who advanced that gender diversity not only promotes a better appreciation of market place, increases originality, produces more operational problem-solving and governance, but also promotes effective worldwide business relationships. They however surmise that gender diversity is merely a part of the broader board diversity and should not be looked in isolation.

This study agrees with the quartet that there is an urgent need to reevaluate the clamor for gender diversity to rethink the entire process not merely as placement of women on corporate boards but as a process to bring diverse skills sets, experiences and competencies into board decision making process. Advocacy needs to go beyond the human anatomy to suitability of individuals. This could possibly explain the reason why the constitutional mandate is progressive in its directive for effective realisation of diversity. It also explains why the CMA is reluctant to prescribe legal sanctions for non-compliance. It is understandably due to this fact that a single 'one-fits-all' approach cannot be adopted to achieve gender diversity in corporate governance while at the same time guaranteeing sustainable organisational performance.

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<sup>69</sup> Nina Smith, Valdemar Smith and Mette Verner, *Do Women in Top Management Affect Firm Performance? A Panel Study Of 2500 Danish Firms* (1st edn, Institute for the Study of Labor 2005).

<sup>70</sup> Gail Robinson and Kathleen Dechant, 'Building A Business Case for Diversity' (1997) Vol. 11 The Academy of Management Executive.

## **Situational Review of Board Gender Diversity in Public Listed Companies in Kenya**

I also reviewed a comparative study conducted by Paul Hastings LLP<sup>71</sup> on the developments of corporate gender diversity and the presence of women in the boardroom in various countries across the globe including Kenya, Thailand, United States of America, Nigeria, Japan, Korea, Pakistan, Taiwan, France and the Netherlands.<sup>72</sup> Hastings notes that with nearly 20 percent of board seats of public listed companies held by women, Kenya not only leads Africa in corporate gender diversity but has also surpassed developed countries such as the United States, France and the Netherlands. While Hastings notes that the rapid-fire advancement of corporate gender diversity in Kenya is largely attributable to the Constitutional mandate as well as the resilient push for progress from a strong network of advocacy organisations that progressively equip women with skills and competencies necessary for effective board engagement, it is worried that the inherent lack of a proper mechanism for compliance may call into question the sustainability of little-already achieved gains as well as the promise for future progress.<sup>73</sup>

Hastings notes that Kenya was among the first countries to adopt the global best practice Corporate Governance Code that included within its recommendations, the requirement for effective representation of women in the boards of public listed companies.<sup>74</sup> It notes that while countries such as Finland, Norway and Sweden, were just announcing similar initiatives in 2002, Kenya under the aegis of the CMA had already amended its ‘Guidelines on Corporate Governance Practices by Public Listed Companies’<sup>75</sup> to facilitate effective involvement of women in corporate governance. To illustrate, Hastings cites the relevant provision which stated that the process of appointment of directors had to be sensitive to gender representation.<sup>76</sup> Hastings further argues that while the said Corporate Governance Code is not binding on public listed corporations or any other similar corporate entity, the mere inclusion of such progressive recommendation invaluablely increased visibility of the challenge of underrepresentation of

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<sup>71</sup> Hastings LLP (n30).

<sup>72</sup> Ibid.

<sup>73</sup> ibid 3.

<sup>74</sup> Ibid 18

<sup>75</sup> The Guidelines on Corporate Governance Practices by Public Listed Companies have since been repealed by the new Code of Corporate Governance Practices for Issuers of Securities to the Public 2015 (the 2015 Code) vide Gazette Notice No. 1420 of 2015.

<sup>76</sup> Hastings LLP (n30) 19

women on boards and catalyzed similar progress across the region with Uganda issuing new corporate governance guidelines with identical language on gender diversity a year after.

Hastings went further to look into the constitutional mandate on gender diversity. It points out that the Constitution, which was enacted thanks to vigorous advocacy by several non-governmental organisations, includes a mandate for representation of women in state-owned companies that requires that no more than two thirds of elective and state appointive opportunities can be composed of one gender. Hastings argues that the broad and wide-sweeping definition of the term “elective or appointive bodies” includes the boards of state-owned enterprises in which government owns more than 50 percent stake. It sums up that, technically therefore, the fact that most public listed companies are partially state-owned, that technicality effectively brings them within the scope of the Constitutional mandate.<sup>77</sup>

The conclusion by Hastings that the constitutional mandate as well as the CMA governance guidelines on gender diversity on corporate boards are merely advisory and non-binding on companies by not including penalties, sanctions or incentives to encourage compliance; affirms the hypothesis of this study that the existing legal, regulatory and policy framework on corporate governance are insufficiently equipped to effectively foster corporate gender diversity.

I also reviewed the report of the Taskforce on Enhancement of Women Representation on Boards in Kenya.<sup>78</sup> The taskforce was appointed by the Kenya Institute of Directors to among other terms of reference: first, recommend to the institute a framework for engagement with various stakeholders and in particular with the government and private sector, on issues relating to women representation in the boardroom with the aim of ensuring at least a third (1/3) representation of either gender by the year 2019; secondly, to recommend to the Institute a framework for ensuring that women members of the Institute of Directors (Kenya) having been trained and fully qualified in corporate governance get priority placement in public and private sector boards and commissions; third, to make recommendations on communication policies and strategies for women director activities, to enhance their role in the boardroom; and lastly, to

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<sup>77</sup> *ibid.*

<sup>78</sup> Institute of Directors of Kenya, 'Report of The Task-Force on Women Representation on Boards' (2017).

make recommendations on training initiatives targeting women in readiness for service in all types of boards. In dutiful fulfilment of its objectives, the taskforce formed a committee to specifically ascertain the gender composition of boards of both state-owned as well as public listed companies among others and to determine and interrogate the reasons for underrepresentation of women on those boards as well as to subsequently formulate a case for effectively realisation of gender diversity within those organisations.<sup>79</sup>

The taskforce established that only 12 percent (54) of the total 449 director seats in boards of all the 51 listed companies were held by women.<sup>80</sup> To explain the measly figures, the taskforce conducted extensive investigations with the assistance of various government and regulatory agencies including CMA and established a variety of causative factors. These include: the board nomination process; history culture and traditions; gender differences; tradeoff between work and family; tokenism; extension of retirement age lack of strong networks and exposure; inadequate number of qualified women and differences in mentorship and sponsorship for women versus men. The taskforce established that appointment of directors in public listed companies are done through nomination process with voting by the shareholders as the last and final step. Despite the availability of women qualified to occupy such positions, many were rarely nominated since nomination is normally based on the strength of shareholding. Most women do not meet those thresholds. On culture and history, the taskforce found out that the fact the most African communities are largely patriarchal in nature, women are often discouraged from assuming corporate leadership positions. The fact that women form minority of the existing boards, the taskforce found out, does not make it any easier for other women to cross over into corporate leadership with preference still being accorded to men even where the women are slightly more qualified.<sup>81</sup> This implies that for women to compete effectively for corporate leadership, they have to be twice as qualified as their next male competitor making it even harder for them especially if other inhibiting factors are also in play. The taskforce also found out that some boards merely try to show compliance through tokenism by offering a few board seats specifically designated for women (mostly one) and not a single more.

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<sup>79</sup> *ibid*

<sup>80</sup> *ibid* 5.

<sup>81</sup> Institute of Directors of Kenya (n57) 8.

To validate the need for gender diversity within corporate boards, the taskforce also conducted a study on the possible impact of corporate gender diversity on organisational performance. The found the following benefits to accrue from presence of women in the boardroom: strong financial performance; recruitment of top talent; heightened innovation; enhanced client insight; strong performance on non-financial indicators including better employee relations, more ethical product sourcing, greater support for local communities and strong environmental and human rights records; improved board effectiveness; and improved product development.<sup>82</sup>

The taskforce also examined the existing legal framework, policy and practice and noted that whereas state-owned corporations are under strict obligation to comply with the mandatory quota system within the specified time frame, the same may only apply to public listed companies as a matter of principle and good will as opposed to strict regulatory requirement. It states however that in support of national values, all public listed companies should be required to comply with constitutional requirement on gender equality and equity. This study finds the report by the taskforce to be highly invaluable considering it covers a broad range of considerations ranging from the sufficiency of the legal framework to operating organisational benefit of gender diversity. The broad-sweeping nature of the study of the taskforce could have also been its undoing. Most of their propositions and findings are insufficiently explained or substantiated. For instance, while their review of the constitution as a legal framework is relatively detailed, their analysis of policies and supporting regulatory framework on gender diversity in corporate governance are undeniably sketchy at best. This research seeks to conduct a study specifically focused on the in-depth evaluation of the existing legal framework with a view to establishing whether the same is sufficiently equipped to facilitate, protect and sustain gender diversity in corporate governance of public listed companies.

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<sup>82</sup> *ibid* 11.

## **CHAPTER 2**

### **OVERVIEW OF LEGAL AND POLICY FRAMEWORK ON GENDER DIVERSITY OF CORPORATE BOARDS OF PUBLIC LISTED COMPANIES IN KENYA**

#### **2.0 Introduction**

As highlighted in Chapter 1, studies are replete with evidence, both empirical and anecdotal, that gender inclusion in the boards of public listed companies has a direct influence not only on corporate governance but also on the overall performance of the companies. This phenomenon has thus engineered a rising need for recruitment of competent, diligent and commercially aware women into corporate boards. It is not strange therefore that the clamor for broader representation of women in the boards of public listed companies has found its foundation not only in the Constitution, supporting statutes and policies but also in general corporate practice. In line with the study's objectives and scope, this chapter specifically highlights the constitutional, statutory and policy dictates that advance this endeavor with the view to isolating the possible disconnect between policy and practice in the subsequent chapters.

#### **2.1 Legal Framework**

##### **2.1.1 International Legal Instruments**

###### **2.1.1.1 Convention on Elimination of all Forms of Discrimination Against Women (CEDAW)**

The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) that was adopted in 1979 by the United Nations General Assembly and ratified by 189 states including Kenya, obligates states to guarantee the exercise of human rights and fundamental

freedoms to women on an equal basis to men. The importance of women inclusion is also demonstrated by the fact that achieving gender equality is the United Nations' sustainable development goal number five. The target of this goal includes ensuring women's full and effective participation and equal opportunities for leadership at all levels of decision making in political, economic and public life.

Further, gender equity is the third of the United Nation's ten Millennium Development Goals. The CEDAW Convention calls for the equal or proportional participation of women in all spheres of life. Article 3 of the Convention states thus:

“States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.”

Article 11 of the Convention further obligates all states to take measures necessary and appropriate to effectively eliminate all forms of discrimination specifically targeting women in matters employment and labour relations. This provision aims at ensuring that, on the basis of equality, the male and female employees are not only treated equally and fairly but also accorded similar rights. These rights include but to limited to access to employment opportunities, the right to promotions, equal remuneration and equal treatment. CEDAW leans heavily towards the egalitarian or human rights approach that seeks balanced representation in elite groups. Accordingly, and especially in consideration of the fact that women not only comprise nearly half of the global population but also the workforce, their proportion should be adequately evident at decision making levels to ensure their interests are effectively taken into consideration. Privatisation and deregulation that has occurred in the past decade has effectively diminished the role of the state leading to an unprecedented and dramatic surge in corporate political power. This change cements the argument for the urgent need to ensure women are properly and adequately represented. The Convention as well as the arguments advanced to elaborate its objectives implores corporations and public listed companies to increase diversity of their boards

on the premise that the same would realise an outcome that is more equitable and, in a stronger sense, fairer.

### **2.1.1.2 Beijing Declaration**

Beijing Declaration is another international legal instrument that seeks to advance the course for effective representation of women in boards. While the platform is, unlike many other conventions, neither binding on any state nor provides a mechanism for redress of wrongs or enforcement, it is admittedly a consensus document that doubtlessly addresses several existential problems ranging from wanton human rights abuses to poverty. It recognises and flags the systemic and acute lack of gender perspective from governmental decision-making and corporate governance to educational systems. It implores people and organisations to commit addressing and piling pressure on the governments that have embraced the platform to commit themselves to effective realisation of its gender diversity objectives.

The governments participating in the Fourth World Conference on Women (The Beijing Conference), made a commitment not only to the equal rights and inherent human dignity of women and men as embodied in the UN Charter, the Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Discrimination Against Women (the Women's Treaty), and other international human rights instruments but also to the full implementation and acclamation of the human rights of women and the girl child as an inalienable, integral, and indivisible part of all human rights and fundamental freedoms. Further, the governments, acknowledging that women's rights are human rights and also convinced that eradication of poverty requires women's involvement in economic and social development and the equal opportunities of women and men in sustainable development, committed to, among other things: the full enjoyment of all human rights by women and girls and the elimination of discrimination and violence against them; the equal enjoyment of human rights and fundamental freedoms for women and girls who face additional barriers because of race, age, language, ethnicity, culture, religion, or disability, or because they are indigenous people; and equal access of women and girls to economic resources, including land, credit, science, technology, vocational training, information, communication, and markets.



The Platform acknowledges that globally, women are almost virtually absent from formulation of financial, monetary, business, tax, and employment policies despite comprising nearly half of the global workforce and general population. Women's share in the labor force continues to rise but women are concentrated in unremunerated and temporary work. Employment opportunities for women often have been limited to low pay and poor working conditions. When combined with inflexible working conditions, inadequate sharing of family responsibilities, and attitudinal obstacles, these factors restrict women's economic opportunities and economic autonomy. Women experience discrimination in education, training, hiring, promotion, and pay. Women migrant workers, including domestic workers, contribute to economies but experience higher levels of unemployment than men. In an attempt to address these challenges, the governments endorsing the Platforms committed themselves to the promotion of women's economic rights and independence, including access to employment and appropriate working conditions and control over economic resources through enactment and enforcement of legislation guaranteeing women equal rights to work; prohibiting discrimination in employment, social security, and tax benefits; and assuring equal access to economic resources. Additionally, the governments obligated themselves to facilitating women's access to resources, employment, markets and trade through supporting development of small enterprises and strengthen women's access to credit and capital on terms equal to those of men as well as provision of business services, training, and access to markets, information and technology.

Further, the Platform acknowledges that Women's empowerment and autonomy and the improvement of their social, economic, and political status are essential for the achievement of transparent and accountable government and administration and sustainable development in all areas of life. The power relations that impede women's attainment of fulfilling lives operate at many levels of society, from the most personal to the highly public. They are acutely underrepresented in most important decision-making processes, both public and private. To effectively address this challenge, the governments committed to take measures to ensure women's equal access to and full participation in power structures and decision-making through establishment and institutionalisation of gender balance in governmental bodies and committees, the judiciary, and all governmental and public administration positions. To guarantee sustainability of these commitments, the governments pledged to put in place measures to

consistently monitor and evaluate progress on the representation of women through regular collection and analysis of data.

It necessarily follows therefore, that one of the measures undertaken by the Kenyan Government to fulfill its obligations and live up to its commitments under the platform, is the introduction of constitutional gender composition minimums on appointive and elective positions. While these requirements are strictly binding on state corporations, they act as authoritative guidelines to public listed companies in the country.

### **2..1.1.3. International Covenant on Economic, Social and Cultural Rights (1966)**

The International Covenant on Economic, Social and Cultural Rights (ICESCR) is one of the nine core United Nations (UN) human rights treaties ratified by Kenya. It forms part of the International Bill of Human Rights alongside the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICPR). ICESCR rights are crucial to enable people to live with dignity. The treaty covers important areas of public policy, such as the right to: work, fair and just conditions of work. social security an adequate standard of living, including adequate food, clothing and housing, health education. Article 3 of the ICESCR for instance, spells out that parties ‘undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights’ in the Covenant. Article 3 is a cross-cutting obligation and applies to all of the rights stated in Articles 6 to 15 of the Covenant. It requires addressing gendered social and cultural prejudices, providing for equality in the allocation of resources and promoting the sharing of responsibilities in the family, community and public life. To that end, non-discrimination in economic and social life and with regard to the allocation of economic and social resources is crucial for women for inequality in this regard impacts upon their enjoyment of a range of human rights, including access to paid employment, political participation, and equality before the law. In advancing gender parity in both economic, cultural and social initiatives, the ICESCR doubtlessly provides effective legal anchorage to clamour for corporate board gender equity. It recognises that diversity has to be considered broadly but applied specifically. That is, equality between men and women has to be given due

consideration in every respects and aspects. It should be seen as an integral component of any progressive modern civilization.

#### **2.1.1.4. The Charter of The United Nations**

Known in the general parlance just as the UN Charter, the Charter of the United Nations was established by the common effort of several States who committed themselves to the respect, promotion and protection of human rights and fundamental freedoms. The party states' determination and mission found expression in the Preamble to the UN Charter (1945) as which states thus: 'to reaffirm faith in fundamental human rights, in the dignity and worth of human person, in the equal rights of men and women and of nations large and small.' Just three years following the formation of the UN Charter in 1945, the UN adopted the Universal Declaration of Human Rights, which entitles to all in Article 2, the rights and freedoms within its scope 'without distinction of any kind, such as race, colour, sex, language, religion, political and other opinion, national or social origin, property, birth or other status.' These two monumental documents laid the foundation for a series of successive treaties on human rights including the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966).

Mindful of the unfair treatment of women through the ages and the atrocities perpetrated during the two world wars and their aftermath, the United Nations Organisation at its formation, in its Charter (1945), its Declaration of Human Rights (1948) and in most of the treaties concluded under its aegis prudently devised and employed a universally acceptable all-inclusive and gender-neutral language. The United Nation's noble intent of proposing and universally promoting, protecting and guaranteeing equal treatment to all genders, men and women is visible in its Charter, which begins with the phrase, 'We the People'. This phrase is, in and of itself, a sufficient proof of the organisations' determination in creating a world free from discrimination. It necessarily follows, that the right of women to partake in economic and corporate matters, is not only advanced by the UN Charter but also promoted and protected through various mandatory member-state obligations.

## **2.1.2 Regional Instruments**

### **2.1.2.1. The African Charter on Human and People's Rights (1981)**

Also known as the Banjul Charter, the African Charter on Human and People's Rights is a human rights instrument that is intended to promote and protect human rights and fundamental freedoms in the African continent. It was born out of a desire to create a human rights instrument inspired by unique experiential African notions of human right. Accordingly, it favors universal human rights to the extent that it is compatible with African culture and values and can thus be seen as a legal and policy instrument that not only recognises and embodies universal notions of human rights but also creates an instrument that expresses African views of human rights in the belief that such expressions would be more adequate in dealing with the realities unique to Africa. The Charter demonstrably attempts at creating a delicate balance between tradition and modernity, that is, the balance between African modernity and the traditional international human rights law. To a larger extent therefore, it seeks to strongly affirm Africa's identity while expressing the continent's embrace of universalism.

The Banjul Charter provides that every person is entitled to enjoy the rights and freedoms that are guaranteed in the Charter without being discriminated on grounds of ethnic group, color, sex, language, religion or origin. It advocates that all persons are equal before the law and are entitled to equal protection of the law. The Banjul Charter clearly, albeit indirectly, supports corporate leadership gender diversity. In requiring states to not only support local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women but also integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life as well as take appropriate corrective and positive action in respect of areas where discrimination against women in law and in fact continues to exist, it affirms its commitment to the economic emancipation of women. This include their involvement in management strategy development in corporations, both private and public.

### **2.1.3 Domestic Laws**

#### **2.1.3.1 The Constitution**

The Constitution forms the foundation of all legal and policy endeavors in Kenya. As the supreme law of the country, its stipulations are binding on all persons and state organs and any law, policy or practice that is inconsistent with it is void. It obligates every person to not only respect but also uphold and defend its foundational and fundamental ideals. To that end, all principles of governance, including board gender diversity and policies emanating therefrom draw their legitimacy from the Constitution.

Article 10 (2)<sup>83</sup> lists national values and principles of governance to include: patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized; good governance, integrity, transparency and accountability; and sustainable development. The Constitution provides that these principles of governance and national values are binding on all state organs, state officers, public officers and all persons whenever they apply the Constitution; enact, apply or interpret any law; or make or implement public policy decisions.<sup>84</sup> Board diversity as a fundamental principle of corporate governance therefore has its foundation and protection in the supreme law.

On the global platform, the Constitution of Kenya doubtlessly prescribes one of the most progressive Bill of Rights fundamental to the realisation of effective public corporate governance.<sup>85</sup> It provides that the Bill of Rights is an integral part of the country's demographic state and is the framework for social, economic and cultural policies.<sup>86</sup> Article 19(2) states that the purpose of recognizing and protecting human rights and fundamental freedoms is to not only preserve the dignity of individuals and communities but also to promote social justice and the realisation of the potential of all human beings. The state is therefore under strict legal duty to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of

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<sup>83</sup> CoK.

<sup>84</sup> *ibid*, Art. 10(1).

<sup>85</sup> Paul Hastings LLP, 'Breaking the Glass Ceiling: Women in The Boardroom' (Paul Hastings LLP 2015).

<sup>86</sup> CoK (n1), Art. 19(1).

Rights. To this end, it (the State) is expected to take legislative, policy and other measures, including the setting of standards, to achieve progressive realisation of these liberties.

Article 27 of the Constitution is doubtlessly the most implicit provision in as far as diversity and non-discrimination of persons, and especially women, is concerned. It provides that every person is equal before the law and has the right to equal protection and benefit of the law and that equality entails full and equal enjoyment of all rights and fundamental freedoms. It further provides that men and women have a right to equal treatment including right to equal opportunities in political, economic, cultural and social spheres. The law mandates that the state or any individual shall not discriminate directly or indirectly against any person on any ground including sex, race, marital status, pregnancy, health status, colour, ethnic or social origin, age, religion, disability, conscience, belief, culture, dress, language or birth. This provision specifically addresses the historical cultural, economic and social marginalization women have suffered ostensibly due to our traditional societal cultural formations and their reluctance to morph to accept and integrate modern realities.

Corporate gender diversity advocacy perhaps has its most explicit foundation in Article 27 (6) which mandates the State to design legislative and policy measures aimed at redressing any disadvantage suffered by individuals or groups due past discriminations. Clause 8 specifically provides that the State is additionally under strict obligation to take legislative and policy measures to implement the quota principle in governance-that not more than two-thirds of the members of elective or appointive bodies are of the same gender. Since the term “elective or appointive bodies” is defined broadly to include the boards of state-owned businesses and enterprises in which the government owns more than fifty percent stake, a sizable number of Kenya’s largest public listed companies were brought within the scope of this provision. Moreover, the mere fact that a company is public and therefore acts in the broader interest of its diverse shareholders should reasonably bring it within the purview of this mandate.

It is not in doubt therefore, that one of the laws established pursuant to the Constitution's stipulation for effective governance and to a little extent, promotion of gender agenda in corporate governance is the Capital Markets Act<sup>87</sup>.

### **2.1.3.2 The Capital Markets Act**

The Capital Markets Act was enacted by Parliament to establish the Capital Markets Authority with a strict mandate to promote, regulate and facilitate the development of an orderly, efficient, fair and competent capital markets in Kenya. Section 5 of the Act establishes the Capital Markets Authority (CMA) as a body corporate with the perpetual succession and a common seal, capable of suing and being sued in its corporate name.

The fundamental objectives of the Authority (CMA) are to not only protect investor interests but also to facilitate effective development of all aspects of the capital markets with particular emphasis on the removal of impediments to, and the creation of incentives for longer term investments in productive enterprises.<sup>88</sup> It is also charged with the creation, maintenance and regulation of a market in which securities can be issued and traded in an orderly, fair, and efficient manner, through the implementation of a system in which the market participants are self-regulatory to the maximum practicable extent.

The Authority may for the purposes of discharging its functions and carrying out its objectives, implement policies and programs of the Government with respect to the capital markets. To this end, the Act<sup>89</sup> allows CMA to impose sanctions for breach of the provisions of the law or the regulations made under it, or for non-compliance with the Authority's requirements or directions, and such sanctions may include: levying of financial penalties proportional to the gravity or severity of the breach, as may be prescribed; ordering a person to remedy or mitigate the effect of the breach, make restitution or pay compensation to any person aggrieved by the breach; publishing findings of malfeasance by any person; and suspending or canceling the listing of any securities or exchange-traded derivative contracts, or the trading of any securities or exchange-traded derivative contracts, for the protection of investors.

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<sup>87</sup> Chapter 485A of the Laws of Kenya.

<sup>88</sup> *ibid*, s.11 (1).

<sup>89</sup> *ibid*, s. 11(3).

In addition to these responsibilities, CMA is mandated by the Act to prescribe notices or guidelines on corporate governance of a company whose securities have been issued to the public or a section of the public.<sup>90</sup> Section 12(1)(o) obligates the Minister to formulate rules and regulations as may be required to regulate the financial penalties or sanctions for breach of rules, guidelines or notices made or issued by the Authority or non-compliance with the requirements imposed by the Authority. To be effective and have the full force of the law however, these rules must take into account and be consistent with the objective of promoting and maintaining an effective and efficient securities market and public corporate governance.

It is on the premise of the legal mandate conferred upon it by Section 11(3)(v) of the Capital Markets Act that the CMA developed the Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015, for application by both listed and unlisted public companies in Kenya.

#### **2.1.4 Case Law**

Whereas the concept of corporate gender diversity in Kenya is yet to find specific jurisprudential direction through the local courts, there are a few Constitutional reference cases from which this study can infer parallel functional and operational guidance. Failure of the Constitution to explicitly prescribe specific mechanisms for the implementation of the one third gender rule has not only seen many an activist mount legal contestation as to composition of political party seats, both elected and nominated, but has also prompted the Attorney General to seek operational guidance from the Supreme Court. It is notable however, that despite the Constitutional recognition of the need for culture change that reflects diversity in all spheres of life, there is a growing tendency for diversity to be progressively examined purely from a political perspective and thus the many cases seeking interpretation. Less attention has been paid to the implication of the gender diversity rule on both the private and corporate sector where it matters the most.

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<sup>90</sup> *ibid*, s. 11(3)(v).



In *Advisory Opinion No. 2 of 2012 In the matter of Gender Representation in the National Assembly and the Senate*<sup>91</sup>, the Attorney General (AG) sought the Supreme Court’s guidance on the implementation of the one third gender rule with respect to both appointive and elective state positions. The AG was of the contention that Article 81(b) as read with Article 27(4), Article 27(6), Article 27(8), Article 96, Article 97, Article 98, Article 177(1)(b), Article 116 and Article 125 of the Constitution of the Republic of Kenya require progressive realisation of the enforcement of the one-third gender rule and did not required the same to be strictly implemented during the general elections of 2013. The Court held that the expression “progressive realisation”, as apprehended in the context of the human rights jurisprudence, would signify that there is no mandatory obligation resting upon the State to take particular measures, at a particular time, for the realisation of the gender-equity principle, save where a time-frame is explicitly prescribed. And any obligation assigned in mandatory terms, but involving protracted measures, legislative actions, policy-making or the conception of plans for the attainment of a particular goal, is not necessarily inconsistent with the progressive realisation of a goal.

The court argued that this position does not change, notwithstanding that the word “shall” may have attended the prescription of the task to be performed by the State. The word “shall” in the court’s perception, translates to immediate command only where the task in question is a cut-and-dried one, executed as it is without further molding or preparation, and where the subject is inherently disposable by action emanating from a single agency. It noted however, that the word “shall” may be used in a different context, to imply the broad obligation which is more institutionally spread-out, and which calls for a chain of actions involving a plurality of agencies; when “shall” is used in this sense, it calls not for immediate action, but for the faithful and responsible discharge of a public obligation; in this sense, the word “shall” incorporates the element of management discretion on the part of the responsible agency or agencies. The court determined finally that due to the fact that affirmative action programs, in and of themselves, require careful thought, multiple consultations, methodical design and coordinated discharge, such deliberate measures cannot, by their very nature, be enforced immediately, or contemplated to be enforced immediately.

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<sup>91</sup> [2012]eKLR

It can be argued that whereas the Supreme Court opinion on the one-third rule was geared more towards solving the logistical dilemma in implementation of the diversity requirements in elections without flouting other constitutional rights such as right to expression of political autonomy through election of preferred candidates by the electorate, it somewhat extends to the corporate sector where such a requirement would cause more operational damage than good.

As a follow up to the Supreme Court's opinion, the Centre for Rights Education and Awareness (CREAW), in *CREAW v Attorney General & another*<sup>92</sup> sought the High Court's order compelling the AG and the Commission on the Implementation of the Constitution (CIC), to take measures necessary for progressive realisation of the one-third gender rule as guided by the Supreme Court in *Advisory Opinion No. 2 of 2012*. First, the organisation sought the court's declaration that to the extent that the AG and CIC had thus far failed, refused and or neglected to prepare the relevant Bill(s) for tabling before parliament for purposes of implementation of articles 27(8) and 81(b) of the Constitution as read with article 100 and the said Supreme Court Advisory Opinion, they had violated their obligation under article 261(4) of the Constitution to "prepare the relevant Bills for tabling before Parliament as soon as reasonably practicable to enable parliament to enact the legislation within the period specified".

Secondly, it also sought for the High Court's declaration that the failure, refusal and or neglect by the AG and CIC was a threat to a violation of articles 27(8) and 81(b) as read with Article 100 of the Constitution and the Supreme Court Advisory Opinion. Lastly, CREAW sought an order of mandamus directed at both CIC and the AG directing them to within a duration specified by the court, prepare the relevant Bills for tabling before Parliament for purposes of implementation of articles 27(8) and 81(b) of the Constitution as read with article 100 and the Supreme Court Advisory Opinion of 2012. Both Respondents submitted that whereas they did not oppose the factual basis of CREAW's petition, they took exception with the Petitioners application for orders compelling them to implement the Supreme Court's guidance indication that such application was premature as the August 27, 2015 deadline guided by the Supreme Court was yet

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<sup>92</sup> [2015] eKLR

to lapse. Besides, the office of the AG had taken reasonably practicable steps to enable Parliament enact the requisite legislation.

The court considered the respective pleadings of the parties together with their submissions and noted that whereas it was apparent that there was not much dispute with regard to the factual position—that of the responsibility of the respondents, several issues were up for contention. First, whether the Supreme Court’s advisory opinion of 2012 was binding on the AG and the CIC. Secondly, whether the petition was premature considering the deadline prescribed by the Supreme Court opinion was yet to lapse. Thirdly, whether Parliament was a necessary party to the proceedings. Fourth, whether there was a violation or threatened violation of the Constitution by the AG and CIC and lastly, whether the orders sought by CREAW were to issue. The High Court held that, in view of Article 163(7),<sup>93</sup> which provides that all courts, other than the Supreme Court, are bound by the decisions of the Supreme Court, it was bound by the advisory opinion and so were the AG and CIC. On the question of whether there was a violation of a threat of violation of the Constitution by the AG and CIC in failing to implement the Supreme Court advisory opinion, the High Court sought guidance from the *Coalition for Reform and Democracy & Others vs Attorney General, Petition No 628 of 2014*<sup>94</sup> (the CORD case) and noted that a party needs not wait for a violation of a right or a contravention of the Constitution to occur before approaching the Court for relief. The Court held further that where a clear threat is made out, it cannot be properly argued that the petitioner should have waited for the violation or contravention to occur, and then seek relief. It noted however that it was not the Court’s mandate to in the petition to enquire generally into how far the AG and CIC had met their obligations under Article 261(4) and section 5 (6) of the Sixth Schedule, nor did it fall upon it to inquire how far there had been compliance with the constitutional timelines set out in the Fifth Schedule. Additionally, it was not the mandate of the Court to say how the two thirds gender rule should be implemented, whether by way of constitutional amendment, or by legislation. It noted however, that it was very well within its mandate to state in so far as the two thirds gender rule and the binding Advisory Opinion of the Supreme Court are concerned, there was an apparent failure by both the AG and the CIC to exercise their mandate under the Constitution.

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<sup>93</sup> CoK,2010

<sup>94</sup> [2015]eKLR

The Court granted the Petitioner's order for mandamus by issuing a directive to both the AG and the CIC directing them to prepare the relevant Bills for tabling before Parliament for purposes of implementation of Articles 27(8) and 81(b) of the Constitution as read with Article 100 and the Supreme Court Advisory Opinion of 2012 within forty days of the determination.

As a follow-up to both the Supreme Court's *Advisory Opinion No. 2 of 2012* and the High Court's decision in *CREAW v Attorney General & another*, the Center for Rights Education and Awareness in *Centre for Rights Education and Awareness & 2 others v Speaker the National Assembly & 6 others*<sup>95</sup> went to the High Court seeking orders for among others, declaration the National Assembly and the Senate had failed in their joint and separate constitutional obligations to enact legislation necessary to give effect to the principle that not more than two thirds of the members of the National Assembly and the Senate shall be of the same gender. It also sought an order of mandamus directed at both Parliament and the Senate directing them to for the purposes of implementation of articles 27(8) and 81(b) of the Constitution as read with article 100, the *Supreme Court Advisory Opinion of 2012* and the High Court decision in *CREAW v Attorney General & another*,<sup>96</sup> enact prepare and enact the requisite legislation. The Court considered the circumstances leading to the case and observed that Parliament had failed to meet the deadline stated in the advisory opinion but extended it by one more year, which also lapsed before the required legislation could be passed and that the said period could be legally extended, so that window closed. The Court observed further that the constitution is clear that the government is required to take steps to implement the two third gender rule. Specifically, Article 27 (8) provides that the "state shall take legislative and other measures to implement the principle that no more than two-thirds of the members of elective or appointive bodies shall be comprised of one gender."

The constitution upholds the equality of both male and female genders in the society. Article 27 (3) states that 'women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.'

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<sup>95</sup> [2017]eKLR

<sup>96</sup> Petition 182 of 2015 [2015]eKLR

The court observed that, having failed, refused and or neglected to implement the measures contemplated under Article 27 and 100, the Parliament had failed in its obligations under Article 21(1) which indicates that the State and every state organ have an obligation to observe, respect, protect, promote and fulfill the right of men and women to equality under Article 27. It (the Court) thus granted the orders sought by the Petitioners and issued a declaration that both the National Assembly and the Senate had failed in their joint and separate constitutional obligations to enact legislation necessary to give effect to the principle that not more than two thirds of the members of the National Assembly and the Senate shall be of the same gender. It also issued a declaration that the failure by parliament to enact the legislation contemplated under article 27 (6) & (8) and 81 (b) of the constitution amounted to a violation of the rights of women to equality and freedom from discrimination and a violation of the constitution. The court granted an order for mandamus and directed the Parliament and the AG to take steps to ensure that the required legislation is enacted within a period of sixty days and to report progress to the Chief Justice. Finally, the Court directed that following failure to enact the said legislation within the said time, the Petitioner was at liberty to petition the Chief Justice to advise the President to dissolve Parliament.

These cases, while inherently political at their very core and designed to address challenges to implementation of the one third gender in elections, offer guidance to application of the rule in other respects, more so appointive state positions, however remote. What remains to be seen however, is the employment of vigour and rigour in similar attempts with respect to corporate board diversity.

## **2.2 Policy Framework**

### **2.2.1 The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015 (the 2015 Code)**

As indicated before, the 2015 Code was developed by CMA in accordance with its mandate of corporate governance policy development as stipulated by Section 11(3)(v) of the Capital Markets Act.

The 2015 Code was designed to succeed the Guidelines on Corporate Governance Practices by Public Listed Companies in Kenya, 2002. It sets out the principles and specific recommendations on structures and processes, which companies should adopt in making sound corporate governance an integral part of their business dealings and culture.

It is noteworthy that Kenya was one of the first countries in the world to comprehensively redefine its Corporate Governance Code to include recommendations of gender diversity in public boards. The CMA recognised, supported and adopted several provisions of the Code of Best Practices for Corporate Governance developed by the then Private Sector Initiative for Corporate Governance in 2002 into its 2002 Guidelines on Corporate Governance Practices by Public Listed Companies in Kenya. Key among those provisions included that the appointment of directors should be sensitive to gender representation.<sup>97</sup>

The 2002 Guidelines adopted the “Comply or Explain” approach which obligated all public listed companies to comprehensively indicate in their annual reports and filings the extent to which they had complied with the Guidelines. In the event they were not compliant, the companies were strictly required to not only state their reasons for non-compliance but also indicate the steps and measures they were taking to ensure full compliance. This approach was generally accepted as practical due to its perceived recognition of the inability to have a “one-size-fits-all” application of its recommendations to corporates in the face of varying and sometimes overlapping administrative and operational challenges.

The flexibility of the “Comply or Explain” approach was doubtlessly its undoing. It quickly proved ineffective as most companies fell into non-compliance. Since compliance was only and simply, a matter of “ticking of a box”, many companies could easily fall through the cracks through falsification or misrepresentation of the realities. It is no wonder several companies collapsed under this regime ostensibly due to poor corporate governance. These include Chase Bank, Imperial Bank, Uchumi Supermarket, Mumias Sugar and now Transcentury, National Bank and Kenya Airways, the last three of which are facing imminent collapse.

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<sup>97</sup> Guidelines on Corporate Governance Practices by Public Listed Companies in Kenya 2002, Gazette Notice No. 3362.

It is against this background that CMA sought to reform the 2002 guidelines with the view to not only addressing its misgivings but also aligning it with modern day corporate governance realities and challenges. The 2015 Code thus effectively succeeded and repealed the 2002 Code. The 2015 Code of Corporate Governance Practices for Issuers of Securities to the Public moves from the “Comply or Explain” approach to “Apply or Explain” approach. The new approach obligates the boards to adequately and satisfactorily comply with the 2015 Code failure to which the non-compliant companies are required not only to comprehensively disclose to CMA their reasons for failure to apply the requisite prescriptions, but also outline the strategies they have put in place to ensure full application within a specified time-frame.

Another fundamental difference between the 2015 and 2002 approaches lies in the extent to which compliance with requisite corporate governance practices could be successfully implemented by public listed companies. While the 2002 “Comply or Explain” approach required boards to strictly comply with the guidelines as stipulated, the 2015 “Apply or Explain” provides room for boards to go beyond the dictates of the guidelines. This is essentially important for implementation of gender diversity in boards. One could argue that under the 2002 approach, Boards were required to mindlessly comply with the Code and its recommendations. One the other hand, the “Apply or Explain” approach means that the Board, in its collective decision making, could conclude that to follow a recommendation would not, in the particular circumstances, be in the best interests of the company. The board could decide to apply the recommendation differently or apply another practice and still achieve the objective of overarching corporate governance principles of fairness, accountability, responsibility, transparency and diversity.

As highlighted before, the 2015 Code advocates for the adoption of standards that go beyond the minimum prescribed by the legislation. The Code has moved away from the “Comply or Explain” approach to “Apply or Explain”. This approach is principle-based rather than rule-based, and recognises that a satisfactory explanation for any non-compliance will be acceptable in certain circumstances. The approach therefore requires boards to fully disclose any non-compliance with the Code to relevant stakeholders including the Capital Markets Authority with

a firm commitment to move towards full compliance. However, the Code contains mandatory provisions which are the minimum standards that issuers must implement, and these are replicated in the Capital Markets (Securities) (Public Offers, Listing and Disclosures) Regulations, 2002. Where Mandatory provisions are imposed by this Code, it is stated that companies shall comply with the particular requirement.

Issuers of restricted offers of securities to sophisticated, institutional or professional investors are exempted from strict compliance with the mandatory provisions and may adopt them as a matter of best practice.

The 2015 Guideline provides that a board of directors is doubtlessly the single most important institution in corporate governance.<sup>98</sup> It further states that effective corporate governance requires a Board composed of qualified and competent members capable of exercising objective and independent judgment, and focused on guiding strategy development and monitoring management. A proper understanding of the role and responsibilities of the Board must be shared not only by members of the Board, but also by company executives and external stakeholders, to ensure that the Board has appropriate autonomy, authority, and accountability in exercising its functions and that it can be held accountable by stakeholders. The Code provides that appointment to the board must therefore be a formal and transparent process. It mandates every board to put in place a policy to ensure achievement of diversity in its composition.<sup>99</sup> Guideline 2.1.5 for instance, recommends that every board must at all times investigate whether its size, composition, diversity and demographic make it effective and where diversity applies not only to academic qualifications but also technical expertise, relevant industry knowledge, experience, nationality, age, race and gender. The 2015 guideline further states that appointment of Board members must be gender sensitive and must not be perceived to be representative of a single narrow constituency interest. Additionally, it requires that where a company establishes a diversity policy, it must introduce appropriate measures to ensure the policy is implemented.

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<sup>98</sup> The 2015 Code (n9).

<sup>99</sup> *ibid*



The 2015 “Apply or Explain” approach is further cemented by Guideline 2.6.4 which mandates the board to establish a Board evaluation toolkit. Every board of public listed companies is required to identify and agree on the parameters to be used in the annual evaluation process. The parameters, to be contained in an evaluation tool are reviewed periodically when and where necessary so as to keep up with new developments in corporate governance. The Board is required to work with independent governance specialists to develop the parameters to be included in the evaluation toolkit. Further, Guidelines 2.10 requires the board to ensure strict compliance of the company not only with the Constitution but also with all applicable laws, regulations, national and international standards as well as its internal policies. To this end, every Board is obligated to establish internal procedures and monitoring systems to promote full and adequate compliance with applicable laws, regulations and standards. It must ensure that the company’s compliance strategy is at best aligned with its intraday operations.

To further ensure compliance with the gender agenda as well as other regulations, Chapter 3 of the 2015 Code stipulates the rights of individual shareholders to include the right to ask questions, seek clarification on the company’s performance as reflected in the annual reports and accounts or on any matter that may be relevant to the company’s performance or promotion of shareholders’ interests and to receive explanation from the directors and or management. This right is however to be exercised in such a way as not to disrupt the business of an Annual General Meeting.

Guideline 3.4 highlights the role of media in corporate governance in ensuring companies not only get access to broader perspectives otherwise not available internally but also facilitate full compliance with statutory requirements such as board gender diversity. Further, (according to Chapter 5) to make ethical and responsible decisions, companies are expected to not only comply with their legal obligations, but shall consider the reasonable expectations of their stakeholders. It is important for companies to demonstrate their commitment to appropriate corporate practices and strive to be socially responsible. Good corporate citizenship is thus the establishment of ethical relationship between the company and the society in which it operates.

As good corporate citizens of the societies in which they do business, companies have, apart from rights, legal and moral obligations in respect of their social and natural environments. The company as a good corporate citizen should protect, enhance and invest in the well-being of society and the natural ecology. One of the most important demonstration of good corporate citizenship is doubtlessly representation of consumer diversity in corporate boards. This on many occasions, implies gender diversity. Although a company is an economic institution, it remains a corporate citizen and therefore has to balance between economic, social and environmental value. The triple bottom line approach enhances the potential of a company to create economic value. By looking beyond immediate financial gain, the company ensures that its reputation, one of its most significant assets, is protected. Besides, there is growing understanding in business that social and environmental issues have financial consequences.

Chapter 7 of the 2015 Code requires disclosure, accountability and transparency from public listed companies. It provides that transparency and disclosure are crucial for the market-based monitoring of companies and are central to a shareholder's ability to exercise his or her ownership rights. Disclosure is a powerful tool for influencing companies and protecting investors. It can help to attract capital and maintain confidence in the markets. Weak disclosure can contribute to the practice of unethical behaviour, weakening of market integrity and loss of investor confidence. Insufficient or unclear information may hamper ability of markets to function, increase cost of capital and result in poor resource allocation. Disclosure also allows stakeholders to understand a company's activities, policies and performance with regard to environmental and ethical standards, as well as its relationship with the communities where the company operates. Transparency and disclosure allow companies to differentiate themselves from firms which do not practice good governance. The Code requires all public listed companies to have an internal corporate disclosure policies and procedures, which are practical and include feedback from stakeholders. These policies and procedures are to ensure compliance with the disclosure requirements set out in the listing requirements. In formulating these policies and procedures, the Board are guided by best corporate practices. One such disclosure requirement is compliance with the laws as well as board gender diversity and qualification expectations.

### **2.2.2 Mwongozo, Code of Governance for State Corporations**

anchored on article 10 of the constitution which lays down the national values and principles of governance, Mwongozo, the Code of Governance for State Corporations<sup>100</sup> was introduced in 2015 with the primary purpose of entrenching effective corporate governance practices within the state corporations. For years without number, a majority of Kenyan state corporations have continually witnessed weak financial performance traceable to the absence of an effective, elaborate and adequate corporate governance framework. The Taskforce on Parastatal Reforms established by the president noted in its final report that state corporations previously operated under a complex corporate governance regime. In its view, this complexity was doubtlessly the root of confusion and conflict that marred management and governance of state corporations. Accordingly, the Taskforce recommended development of an appropriate comprehensive and effective governance framework to ensure improved performance and viability of SCs.

Mwongozo addresses many of the operational needs without which most of the state corporations have persistently registered lackluster performance over the years. These include: effectiveness of boards, transparency, accountability, internal controls and risk management, ethical leadership, diversity and good corporate governance. These practices are fundamental to the values and principles of effective public service as set out under Article 232 of the Constitution of Kenya. Further, the Code provides a fairly comprehensive platform for addressing shareholder rights and obligations and ensuring more effective and productive engagement with stakeholders. The drafters hope it will ensure sustainability and stellar performance will become the hallmark of management of all state corporations.

The Code lays a solid foundation for the management, governance and oversight of state corporations. It is firmly grounded not only on the country's constitutional values and principles but also on fundamental global corporate governance practices. Since it rides and builds on the gains achieved thus far in the reform and transformation of management and governance of state corporations, it is anticipated that Mwongozo will result in effective, agile and responsive state corporations that deliver value to the citizenry in a timely, transparent and accountable manner saving on resources while at the same time improving the general public's perception of quality

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<sup>100</sup> State Corporations (Hereafter referred to as SCs).

and delivery of public service. Successful realisation of the goals of the Mwongozo is heavily dependent upon diligence and vigilance on the part of the State Corporations Advisory Committee (SCAC), a body established to meticulously implement the policy.

One of the fundamental objectives of the Mwongozo is to ensure and guarantee attainment of the requisite gender diversity requirements in the boards of SCs pursuant to Article 27(8) of the Constitution which requires that no more than two-thirds of the members of elective or appointive bodies comprise the same gender. Since the phrase “elective or appointive bodies” can be arguably defined broadly to include the boards of SCs in which the government owns a stake of more than 50%, a significant number of the country’s largest public listed companies were effectively brought within the realms of the mandate of the Mwongozo Code.

This Chapter set out to specifically highlight the constitutional, statutory and policy dictates that underpin the clamour for inclusion of women in the boards of public listed companies with the view to isolating the possible disconnect between policy and practice. Accordingly, it delved into both international and local legal, policy and institutional framework that have over the years been pivotal to the establishment and operationalization of gender diversity in corporate boards. It has established however, that while Kenya’s Constitutional gender quota requirements and the Corporate Governance Code’s response to the international requirements for corporate gender diversity are in and off themselves progressive, a clear lack of an effective mechanism to enforce compliance with those legal and policy directives raise significant questions about progress and sustainability. The next chapter delves into the outcome of the study. It seeks to reconcile the reality with these policy concerns and possibly address the sustainability question.

### **CHAPTER 3**

#### **SITUATIONAL REVIEW OF GENDER DIVERSITY IN BOARDS OF KENYAN PUBLIC LISTED COMPANIES**

### 3.1 Introduction

This chapter provides an in-depth discussion on the findings of the study. As indicated in the preceding chapters, this research was guided by four research assumptions with corresponding research questions and objectives. These assumptions were tested in the field using different methodologies as explained in chapter one. Interviews were carried out on 10 people from targeted key industry players including representatives of Kenya Institute of Directors; Kenya Association of Women Directors; The Law Society of Kenya; Federation of Women Lawyers; Transparency International; Institute of Economic Affairs; the Capital Markets Authority registry; as well as board representatives of 5 public listed companies. For clarity of purpose and ease of reference, the data findings are presented, discussed and analysed according to each assumption. Accordingly, the discussions, are crystallized into four thematic areas. Institutional representatives of various economic sectors are used as case studies. The case studies are accorded prominence since this research was about gender diversity in the boards of public listed companies in Kenya. The studies are therefore captured in most the four assumptions and illustrate different aspects of corporate gender diversity practice in Kenya.

### 3.2 Overview of the Case Studies

The table below illustrates the gender diversity status of the boards of twenty-three public listed companies' representative of various sectors of Kenya's economy. Each company is treated as a case study.

<b>Economic Sector</b>	<b>Case Study; Listed Company</b>	<b>Total Company Board Seats</b>	<b>Women held Board Seats</b>	<b>Women Held Board Seats (%)</b>
Agricultural	Sasini Africa Ltd.	9	2	22.2%
	Kakuzi Limited	8	0	0%
Banking	NIC Bank Ltd.	15	3	20%
	KCB Group Ltd.	11	1	9%
	Equity Group Ltd.	10	3	30%
Commercial and Services	Kenya Airways	14	3	21.4%
	Nation Media	15	2	13.3%
	Standard Media	9	2	22.2%
Construction and Allied	Athi River Mining	9	2	22.2%
	East African Cables	8	2	25%
Energy and Petroleum	KenolKobil Ltd.	5	0	0%
	KPLC. Ltd.	12	4	30%
	KenGen Ltd.	13	3	23.1%

Insurance	Sanlam Kenya Ltd	8	2	25%
	Kenya Re. Corp. Ltd	12	3	25%
Automobile and Accessories	Sameer Africa Ltd.	3	0	0%
	Marshalls (EA) Ltd.	5	0	0%
Investment	Centum Inv. Ltd.	10	4	40%
	Trans-century Ltd.	7	1	14.3%
	Nairobi Securities E.	11	3	27.3%
Manufacturing and Allied	EABL Ltd.	11	3	27.2%
	Eveready E.A Ltd	6	4	66.7%
Telecommunications	Safaricom Ltd.	11	4	36.4%

**Table 2:** Situational Review of gender diversity of Boards of leading public Listed Companies in every sector of Kenyan Economy as of August 28, 2018.

The above sampled public listed companies are not only sector leaders put also opinion shapers. They are closely watched not only by the government but also by investors to determine long-term sector performance as well as to spot market shifts ahead of time. Accordingly, they are representative enough to give substantive illustration on the status of PLC's board gender diversity in the country generally. They also provide a succinct indication and demonstration of the extent to which Kenyan firms have complied with the 2015 Code of Governance. Further, their board practices, including, corporate gender diversity practice trends or change patterns demonstrate the efficacy of the "Apply or Explain" approach to compliance with corporate governance practice requirements introduced by the Code.

### **3.3. Legal Framework and Institutionalisation of Board Gender Diversity**

The first assumption tested in the field was inadequacy of the existing legal, regulatory and policy framework on corporate governance in Kenya to not only guarantee gender diversity in boards of public listed companies but also sustain the progress made thus far. As illustrated by Table 2 here before, this study conducted a spot-check on the composition of the boards of sector leading PLCs to not only determine the proportion of female membership but also to underscore the measures those companies have put in place to ensure and guarantee adequate compliance with gender diversity requirements as stipulated by the 2015 Code and mandated by the Constitution. The argument behind this assumption was that unless the law prescribes mandatory

gender quota requirements for PLCs and clearly stipulates legal sanctions for non-compliance, the fundamental goal of the constitution and the good will of the law could potentially suffer a loss, as happens with every voluntary exercise. Even the gains realised thus far could suffer significant or even detrimental rollbacks.

This assumption was also tested by a situational case study approach where the sector leading PLCs were identified and their past and present board compositions analysed, compared and contrasted to establish board appointment trend and compliance of the same with the Capital Markets gender diversity requirements. In the studies leading to the formation of this hypothesis for instance, the Paul Hastings<sup>101</sup> research singled out and lauded East African Breweries Limited (EABL) for having the highest female board membership in Africa. Hastings assertions were supported by an extensive corporate gender diversity study conducted by the African Development Bank (AfDB) in 2015<sup>102</sup> which reported that, at an impressive forty five percent (45%), EABL had the highest female board membership in Africa. These reports credited the unprecedented board gender diversity in EABL and other leading Kenyan companies such as Safaricom, Nation Media and KenGen to the country's several attempts at addressing gender discrimination throughout the government and corporate sector. Some of these measures include passage of a progressive Constitution in 2010 which strongly advocates the gender agenda; ongoing efforts of civil society organisations such as Federation of Women Lawyers (FIDA), Women's Empowerment Link and the media to keep PLCs accountable.

However, Both Hastings and AfDB expressed concerns that while there are clear processes and quota requirements for board appointments to state corporations, the undeniably glaring lack of a complementary process for PLCs provides a fertile ground for heavy intrusion of politics, cronyism and favouritism. Both feared further that the lack of penalties for non-compliance with the set quota requirements for both state-owned companies and PLCs, could not only result in perpetual non-compliance but also encourage a rollback of gains made thus far by PLCs like Safaricom, EABL, Nation Media and KPLC. Hastings was very categorical that while Kenya's Constitutional gender quota requirements and the Corporate Governance Code's address of

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<sup>101</sup> Paul Hastings (n32).

<sup>102</sup> Africa Development Bank (n6).

gender diversity are in themselves progressive, a lack of an effective mechanism to enforce compliance with those policy directives raise significant questions about progress.

This study looked into the sustainability dilemma and came up with compelling policy revelations. The findings strongly affirm its original assumptions. The table below is an illustration of the changes in the female board compositions of key companies since the Hastings and AfDB studies were published (2015).

<b>Company/Case Study</b>	<b>Female Board Composition (2015)</b>	<b>Female Board Composition (August 2018)</b>
Safaricom Limited	30%	40%
Kenya Power & Lighting Co. (KPLC) Ltd	33.3%	30%
Nation Media Group Ltd.	26.7%	13.3%
East African Breweries Ltd. (EABL)	45.5%	27.2%
KenGen Limited	27.3%	23.1%

**Table 3:** Illustration of changes in female board composition of key public listed companies in Kenya

From the above tabular illustration, it is clear that the board gender diversity gains made by the five sample listed companies have, save for one (Safaricom) suffered tremendous rollbacks. EABL, formerly hailed as the quintessential company on matters corporate inclusion is now a pale comparison to what it was barely two years ago pointing to inadequacy of the current legal framework to not only ensure adequate inclusion of women in the boards of PLCs but also sustain and protect the gains already realised. This scenario is admittedly an incontrovertible proof that voluntary quota requirements as espoused by the Corporate Governance Code do not work, and even when they do, the gains are not just unsustainable but susceptible to rollback depending on the prevailing corporate will. Out of the five PLCs, only Safaricom and KPLC have female board composition above the threshold prescribed in the Constitution. This could be either by reason of natural happenstance, or a deliberate effort on the part of the companies to institutionalise gender inclusion in its corporate governance.



It is nearly nine years since the country enacted a new Constitution and four since the Corporate Governance Code recommending consideration of gender diversity on corporate boards was introduced, yet only a handful of companies have achieved the intended balance. Unsurprisingly, due to the general perception that compliance is voluntary, the few like EABL that raced to comply at the very beginning, are now slowly falling into non-compliance. An executive at Safaricom interviewed by this research revealed that their board and management is keen on improving the productivity of the company in a sustainable way not only through diversity of skill but also gender.<sup>103</sup> He added that the company has put in place measures to ensure the diversity of their customers and consumers is strongly reflected in their board, management and staff composition. That way, they remain adaptable to changes in consumer preferences.

Admittedly, inclusion of women in management and board, has had immense impact on Safaricom's shareholder value.<sup>104</sup> The interviewee could not however provide figures to illustrate but was categorical that the company is focused on gender diversity not as a matter of regulatory compliance, but as a mandatory adjustment to the needs of their consumers and the pressure to consistently deliver exceptional services and shareholder value. The Executive sought to remain anonymous and so did other the Executives from other PLCs interviewed by this research. Most did not elaborate on the rationale for their preference.

The findings outlined in Tables 2 and 3 provide a glimpse into the status of social inclusion in corporate governance in Kenya. The introduction of the "Apply or Explain" approach to the implementation of governance directives stipulated both in the Constitution and the Code, while a step in the right, direction, seems to elicit very little effort on the part of PLCs to ensure compliance, understandably due to lack of sanctions for non-compliance. It is no wonder even those considered to have complied originally are now slowly relapsing into non-compliance. There is therefore a need to put in place a mandatory gender quota for PLCs with elaborate sanctions for non-compliance.

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<sup>103</sup> An interview with a senior member of the Executive Management at Safaricom Limited conducted on August 18, 2018.

<sup>104</sup> Ibid.

### **3.3 Implications of the “Apply or Explain” Approach on Compliance with the 2015 Code on Board Gender Diversity**

The second assumption that guided this research was that the transition of corporate governance regulatory regime from the “Comply or Explain” approach to “Apply or Explain” approach has very little impact, if any, on implementation of gender diversity guidelines by public listed companies especially with the prevailing lack of stringent legal sanctions for non-compliance. This assumption was premised on the argument that both approaches espouse voluntary undertakings on the part of the companies to institutionalise social inclusion. The availability of opportunities to companies to provide detailed justification for compliance might as well be construed to offer a platform to provide explanations for falling from a state of dutiful compliance to utter non-compliance. Besides, it is always easy to provide justifications for the most difficult of endeavours. According to Kwame Owino of the Institute of Economic affairs<sup>105</sup>, most companies tend to offer some of the most mundane reasons for their unjustifiable inability to comply with the ideal corporate governance practices. Some of the reasons these PLCs provide include that costs involved in making such adjustments in the short term are too high compared to the foreseeable long-term gains.

Owino argues that requiring public companies and state-owned corporations to comply with good corporate governance practice voluntarily is as good as not having those requirements in the first place. He asserts that such a regime provides a fertile ground for bad governance since it allows institutions to short circuit the system by barely taking steps towards compliance and giving defeating justifications just to cover up and provide a lifeline to the actual practice-that of cronyism, discrimination and poor management. He quips further that, it is not sufficient to compel listed PLCs to provide detailed outline on how they intend to apply the regulations in the future. According to Owino, successful realisation of effective corporate governance practices including board gender diversity in the listed PLCs will only be possible in an environment of strict mandate with stringent sanctions for non-compliance.

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<sup>105</sup> An in-depth interview with Kwame Owino of the Institute of Economic Affairs on the reluctance of PLCs to adequately comply with the gender diversity quotas prescribed by the Constitution and the 2015 Code on August 20, 2018.

The findings in Tables 2 and 3 provide sufficient justifications to the arguments leveled by Owino against the “Apply or Explain” approach to entrenchment of good corporate governance practice in Kenya. The glaring disconnect between gender diversity policy expectations and the actual proportion of women in the boards of listed Public companies is indicative of failure of the legal and regulatory regime. Some listed public companies including Marshalls E.A Limited, Kakuzi Limited, Kenol Kobil and Sameer Africa do not have female representation in their boards whatsoever. Surprisingly, even companies ordinarily expected to be at the fore-front in championing board gender diversity have very fewer to no woman on their board. Nation Media Group and Standard Media Group have respective measly female representation of 13.3% and 22% in their boards. That even the biggest advocates of social inclusion can fall into non-compliance is indicative not only of a worrying trend but also of the glaring failure of the law.

With a 66.7% female membership, Eveready E.A Ltd is doubtlessly one of the most gender inclusive company in the world. It is closely followed by Safaricom at 40%. While these companies demonstrate the importance of corporate good will and alignment of individual company cultures with good corporate governance practices, their success is more a product of progressive leadership than it is about the need to fulfill their legal obligations. Such companies can thrive and operate responsibly and sustainably without the need for legislation. That is however not the case for a majority that tend to be driven by pure economic needs.

This study established that the only practical way to properly and sustainably entrench good corporate practices in the day-to-day operations of PLCs and any such institutions is through strict legal and institutional mandates backed by stringent legal sanctions. This establishment was supported by Zipporah Ndegwa, a non-Executive Director and a member of the board KenGen.<sup>106</sup> She argues that while good will is necessary to ensure effective implementation of gender inclusion in boards, unless backed by the threat of legal sanctions for non-compliance, it is on its own unsustainable in the long haul. To explain the value of good will, she directed this research to the company’s (KenGen’s) twelve-page Corporate Governance Statement.<sup>107</sup>

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<sup>106</sup> Interview with Zipporah Ndegwa on the August 19, 2018 on the need for imposition on gender quota on boards of listed PLCs.

<sup>107</sup> *Corporate Governance Statement* (KenGen Ltd 2014).

Ndegwa explained that KenGen has over the years entrenched effective corporate governance as the single most pivotal institutional framework through which it not only sets its operational objectives but also monitors progress. The Board has successfully embraced this function to be held accountable not only by their shareholders but also by the regulator. She argues the same practice has been of sustainable benefit to their shareholders. KenGen has years over years endeavoured to adhere to the highest ethical standards by embracing global best practice in its decision-making structures. These measures have enabled the company to comply with the applicable legal and policy requirements.

According to Ndegwa, the company (KenGen) fully subscribes to the Capital Markets Authority's (CMA) Corporate Governance Guidelines (the 2015 Code) and the ethical standards prescribed in its Code of Conduct. She explains further that KenGen is also in compliance with the fundamental corporate governance principles enshrined in the Code of Governance for Government-Owned Entities (Mwongozo Code) which is in tandem with the 2015 Code. The company also lives the foundational tenets of the Constitution and is in compliance with other operational legal frameworks. The company is even represented in the Working Group One Committee of the Capital Markets Master Plan (CMMP) which was officially launched in November 2014. The CMMP is a ten-year strategic blue print for the Kenyan capital markets for which the four formally constituted Working Groups are to provide the operational implementation path for actualisation of long term financial and economic goals as set out in the national development plan.<sup>108</sup>

This study established however, that despite its progressive outlook in terms of effective corporate governance and the best of intentions, at 23.1% female board membership, KenGen still falls short of the one-third (30%) gender requirements espoused by the Constitution, the 2015 Code and the Mwongozo Code, all of which the company claims to be in full compliance with. The failure of the law to specifically prescribe mandatory quota seems to elicit selective compliance just for convenience. This failure to comply with board gender diversity (at least according a majority of executives interviewed by this research) demonstrably has little to do with unavailability of experienced, skilled qualified women as argued by many and a lot to do

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<sup>108</sup> *ibid* 2.

with protectionism and corporate capture (mostly by irate and short-sighted investors chasing short term gains).

According to an official<sup>109</sup> with the Private Sector Corporate Governance Trust, the seemingly ineffective application of the “Apply or Explain” approach to tame female underrepresentation in boards of listed PLCs can be explained by the fundamental principles of corporate governance. The official argues that the principles of good corporate governance are neither prescriptive nor mandatory. They are designed as a basis to assist individual companies formulate their own specific and detailed codes of best practice. The Private Sector Initiative for Corporate Governance (PSCGT) expects that these principles will excite debate and result in the further evolution of better practices and procedures. The purpose for which these guidelines are formulated will have been served if every corporate entity in Kenya examines its own governance practices, improves what needs improvement and or otherwise enhances its own governance practices. He informed this study that the goal of PSCGT is to develop capacity and resources to assist corporate organisations develop and improve their own corporate governance practices. To him and PSCGT, corporate governance principles operate better in a free, unhindered environment much like the *laissez faire* principle. He argues that the question of strict compliance with good corporate practices is best left for determination by the market forces. He operates under the belief, that market tends to weed out companies with poor corporate governance practices naturally and over time rewards those with exceptional records.

Accordingly, the realisation of gender diversity in boards should be purely a function of market demand and shareholder value. It should be premised upon thorough and independent assessment of individual company’s needs as an independent entity. The official argues that gender diversity is just one of the tenets of governance that may work for some companies and might in some cases, prove detrimental to others, especially when forced through a mandatory quota scheme. He explains that the successful entrenchment of gender diversity in the boards of Norwegian PLCs is not known to have created major shareholder value to those companies. In fact, he

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<sup>109</sup> An interview with an official of the Private Sector Corporate Governance Trust intimately familiar with the status of corporate governance in Kenya and who provided information to this research on condition of anonymity.

contends, many have consistently registered growth far slower than those they did before the mandatory quota was introduced.

In his observation, James Mukabwa<sup>110</sup> argues that in adopting the “Apply or Explain” approach to implementation of principles of corporate governance, Kenya is making a step in the right direction. He says the primary difference between the earlier “Comply or Explain” approach and the new “Apply or Explain” approach lies in the flexibility of the mandate. Under the old regime (“Comply or Explain”) companies were expected to implement the policies on “as is” basis leaving no room either for improvement or adjustment to fit their operating circumstances. The 2015 mandate (“Apply or Explain”) provides a leeway for companies to comply beyond the policy prescriptions. Mukabwa argues that it is this flexibility that provides room for companies to figure out the best and the most convenient, economical and innovative ways to achieve sustainable compliance. Like the official of PSCGT, Mukabwa is adamant that the best way to enforce gender diversity in corporate governance is through legal sanctions. He is of the opinion that PLCs first priority should never be gender diversity but shareholder value. He believes that only shareholder value should dictate the ethical direction a company takes as opposed the converse. He believes that only when a company feels that board gender composition is likely to impact their shareholder value should they give it due attention otherwise it will almost always serve as a distraction from their primary purpose. Mukabwa clarifies that while he is a believer and an advocate of gender diversity, he would not impose those requirements on companies. Instead, he would create awareness and leave it to the interested institutions to decide their course of action.

Mukabwa observes that at the moment, Kenya’s main Codes of Corporate Governance are up-to-date with global standards and in particular the Organisation for Economic Cooperation and Development (OECD) Principles of Corporate Governance, 2015. In his opinion, which he argues is informed by his interaction with Kenyan State Corporations, Financial Institutions and Listed Companies, there is still a lot of ground to be covered especially with regards to capacity building and awareness. Board members, CEOs, senior managers and shareholders need first to

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<sup>110</sup> Interview with James Mukabwa, a Corporate Governance expert and an Associate at Dorion Associates conducted in July 2018.

fully understand and appreciate the need of corporate governance for it to be fully implemented in Kenya. He argues that the conclusion that the 2015 Code is inadequate in entrenching good corporate governance in the country is premature considering the Code is only three years old. He does not vouch for mandatory board gender quota as a solution to the prevalent poor female representation in the boards of PLCs. He concludes that PLCs should be given time under the existing legal regime to slowly adapt and ease into compliance with the gender diversity requirements.

### **3.4 Mandatory Gender Quota as the Way to Sustainable Board Gender Diversity in Kenyan PLCs**

The third assumption that formed the foundation of this study was that proper and effective implementation of gender diversity in the boards of public listed companies in Kenya can only be sustainably realised through institutionalisation of mandatory gender quotas with accompanying threat of legal sanctions for non-compliance. To test this hypothesis, this research conducted interviews with executives of some of the before mentioned case studies including: KenGen, Safaricom, Nation Media Group and Standard Media Group and Cytonn Investments. It also interviewed and sort opinions from international corporate governance experts, representatives of the regulator-Capital Markets Authority, and several organisations such as Institute of Economic Affairs, Law Society of Kenya, Federation of Women Lawyers and Association of Women Directors. It also relied on publications and documentations from countries such as Norway that have in the past ten years transitioned from a voluntary mandate to mandatory quotas.

In Alice Lee's<sup>111</sup> opinion, gender equity in the corporate world has long been a goal that is paid much lip service, with nothing to enforce it but good intentions. She argues that a handful of countries dissatisfied with the slow progress, have over the last decade introduced the concept of gender quotas to govern corporate boards. According to her, based purely on the available global statistics, the shift towards quotas is not entirely surprising. The proportion of female leadership

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<sup>111</sup> Alice Lee, 'Gender Quotas Worked In Norway. Why Not Here?' (*New Republic*, 2014) <<https://newrepublic.com/article/119343/impact-quotas-corporate-gender-equality>> accessed 31 March 2019.

in business and board composition remains disturbingly and stubbornly low despite global efforts throughout the years to promote equality, diversity and social inclusion.

To support her argument, Lee provides evidence that a quick review of the global business and corporate space reveals that a measly twelve percent (12%) of leading businesses worldwide have female Chief Executive Officers (CEOs). Only 24% of senior leadership roles in companies are held by women—a statistic, she argues has been consistent since 2007. Lee also refers to a study conducted by Bryce Covert<sup>112</sup> to further her argument. Bryce notes with concern that while women currently comprise nearly half of the global workforce, they are largely relegated to the bottom and middle rungs of the economy where their chances at advancement or promotion to senior corporate leadership are nearly nil compared to their male counterparts. They also comprise about two-thirds of minimum wage workers and approximately over half of management and professional employees. This, in Lee's and Bryce's views, means the very top of the corporate pyramid is still resoundingly pale and very male.

Like many corporate gender diversity advocates before her, Lee looks to Norway for answers. She argues that had the fate of board gender diversity been left at the behest of corporate will and the fancy and docile voluntary measures, Norway would still be grappling with the same question, its vibrant history of gender diversity in politics, equity and social inclusion notwithstanding. She adds that the Norwegian success has attracted the attention of its European counterparts who have for years laboured to whip corporates into voluntary board gender diversity compliance without much success. Spain, France and Iceland have all followed in Norway's footsteps. In 2013, the European Parliament passed a proposal requiring all its member states to put in place strict and stringent measures to ensure 40% of non-executive board members of all public listed companies are female by 2020. The proposal provides that European companies that fail to comply with the gender diversity requirements should be forced to fix their selection criteria so that hiring of women is prioritised.

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<sup>112</sup>Bryce Covert, 'It's Time to Fix the Very Pale, Very Male Boardroom' (*New Republic*, 2014) <<https://newrepublic.com/article/118596/corporate-diversity-needed-fix-economy>> accessed 31 March 2019. Bryce Covert is a contributing op-ed writer at *The New York Times* and also writes for the *New Republic*, *The Nation*, and other outlets. She is a recipient of the 2016 Exceptional Merit in Media Award from the National Women's Political Caucus.



Lee points however, that all the member states are yet to approve the report. She notes that whereas there needs to be a measure put in place to whip reluctant companies into compliance with diversity requirements, some instances do not necessarily call for compulsion especially in cases where business leaders are forward looking. She points to the case of Renault-Nissan Alliance head Carlos Ghosn and Lockheed Martin CEO who have both publicly come out in support of the quotas. At the 2014 World Economic Forum, Ghosn is reported to have said thus:

“When you have two percent of your management pool made by women, there is no way with big principles and good attitudes that you are going to change this radically. Quotas are important. Why? Because quotas lead to action. Action means hiring, training, coaching, and putting in the process of the company the systematic decision, forcing the selection of female potential at all levels”.

At the same forum, Christina Lagarde, the Managing Director of International Monetary Fund (IMF) previously opposed to the quota system approach to gender diversity, admitted to have changed her mind and is now its fiercest of advocates. She is reported to have said that “I soon realise that unless we had targets, if not quotas, there was no way we were going to make the right step.”

Lee also observes that part of the reason for the prolonged stagnancy with gender diversity fulfilments is due to the inherent fact that much of the discrimination that impedes the hiring of female board members is subconscious. While employers may not actively seek to exclude women, factors such as perceived family and child-rearing responsibilities lead to deep-seated stereotypes suggesting women are not able to take on corporate leadership roles. She points to an observation made by Ann Alstott<sup>113</sup>, a Yale Law Professor who has studied gender quota policies. Alstott says that some of the board members she has previously interviewed hold the rather outdated view that discrimination occurs only when there is conscious hostility-that is

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<sup>113</sup> Anne Alstott, 'Gender Quotas For Corporate Boards: Options For Legal Design In The United States' [2013] SSRN Electronic Journal

<[http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5875&context=fss\\_papers](http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5875&context=fss_papers)> accessed 31 March 2019. Anne Alstott is the Jacquin D. Bierman Professor in Taxation at Yale Law School. An expert in taxation and social policy, she was named a professor at Yale Law School in 1997 and originally named the Jacquin D. Bierman Professor of Taxation in 2004. She served as deputy dean in 2002 and 2004 and has won the Yale Law Women teaching award three times.

outright disinterest in hiring women purely on no account. She Argues that in the current operating corporate environment, discrimination is far subtle than that. Stereotyping can lead to exclusion of qualified female candidates, and so can conscious bias. Alstott concludes that in her considered view, gender quotas might be one way of prompting attention to the twenty-first century dynamics of discrimination that can exclude qualified women from high-level positions.

Lee indicates however, that quotas are not for every country. To elaborate, she directs us to a research done by Soo Min Toh and Geoffrey Leonardelli and documented in the Harvard Business Review.<sup>114</sup> This study found out that the level of success of a country with the mandatory quota system is dependent upon the type of its culture, whether it is loose or tight. They argue that countries with “tight” cultures are highly likely to succeed with gender quotas than those with “loose” cultures. The duo closely studied 32 countries with varying levels of cultural tightness. They define cultural tightness as the degree to which cultural norms are clear and likely to be enforced by authorities through the use of sanctions. If their definition is anything to go by, Norway and Pakistan qualify as “tight” while Kenya and the United States of America qualify as “loose”.

To support their thesis, Toh and Leonardelli used the 2005 World Bank data to investigate the percentage of female representation in different leadership positions in United States and Norway and established that within tight cultures, authorities are more likely to strictly enforce policies and demand higher levels of compliance. Further, the population within the tight culture countries were found to be highly likely to not only accept top-down policy dictates but also adhere to them.

Conversely, Toh and Leonardelli determined that countries with “loose” cultures like United States and Kenya are less likely to reinforce egalitarian policies and practices no matter how much they believe in social inclusion and equality. In their observation, quotas go against many of the society norms in these “loose” countries. Lee builds on the observations of the two by pointing to a deduction made by Kathleen Gershon, a New York University sociologist professor

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<sup>114</sup> Soo Min Toh and Geoffrey Leonardelli, 'Strategies To Promote Women Should Vary Across Cultures' (*Harvard Business Review*, 2016) <<https://hbr.org/2014/07/strategies-to-promote-women-should-vary-across-cultures>> accessed 31 March 2019.

who conducted a similar study and came to conclusions identical to those of Toh and Leonardelli. Gershon deduced that in “loose” countries such as United States and Kenya, arguing in favour of quotas goes against the notion that everyone has an equal opportunity to be represented as an individual rather than as a member of a group.

These arguments to a larger extent are in line with those fronted by James Mukabwa of Dorion Associates, Kwame Owino of the Institute of Economic Affairs and other local executives interviewed by this research on the matter and who were very categorical that PLCs should be allowed to operate an independent and free environment. All were in agreement that gender quotas would give gender-based preferences to board candidates, leading to the possible exclusion of more highly competent male candidates and the hiring of less competent female candidates.

After reviewing the studies of Toh and Leonardelli, Kathleen Gershon and Ann Alstott, Alice Lee concludes that given the skepticism around quotas as well as the cultural, social, and legal barriers, the “loose” states such as Kenya and the United States are likely to have a hard time enforcing gender quotas. She opines that one possible alternative that uses a top-down approach would be to create a system of incentives and penalties based on a company’s success in gender equity. To belabour her point, she points to Alstott. According to Alstott, this system more closely fits the business culture of the United States and Kenya, as both countries already use tax incentives to encourage certain business practices. Unlike the Norwegian model of liquidating a company for not meeting a quota, tax incentives are less threatening. The hiring of women would be more voluntary than forced, eliminating at least some of the bias that a woman was hired to just fill a quota.

According to an Executive<sup>115</sup> at the CMA interviewed by this research on condition of anonymity, the fundamental reason why the Authority (CMA) has been reluctant to introduce mandatory quota is the likelihood of occurrence of the “golden skirt” phenomenon that has plagued Norway since the country institutionalised a mandatory quota. He says that the Authority is skeptical that the introduction of the quotas would actually make significant

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<sup>115</sup> Interview conducted on August 23, 2018.

difference in improving female board representation considering this phenomenon. The phenomenon occurs when certain select few women or a circle of women hold multiple board positions, meaning that while more board positions are held by women, not as many new women are entering the board room as hoped.

The Executive notes that even with the current arrangement-that is before introduction of quotas locally, some women hold several board positions bringing to question their ability to positively impact the shareholder value of those companies. He names one prominent lady to illustrate his assertion. He argues that lady currently holds the record as the omnipresent corporate board operative with experience spanning several decades. He is however quick to point that his illustration has little to do with her qualifications, experience, skills and competencies, but more about likely detrimental effects of quotas on the original purpose-that of creating more positions for women and improving their involvement in corporate governance.

The Executive argues further that CMA is disturbed by the Norwegian corporate realities that despite having increased women membership and participation in boardrooms of PLCs to a minimum of 40%, a paltry 5% of Norwegian companies are headed by women. Additionally, the quota has had little impact on the composition of middle-level management. This, according to him, is an indication that the quota system is not without fault and may not realise intended gains especially when strictly imposed. He sums up that good will and intentions precede strict mandate and that legal sanctions for non-compliance with a requirement dependent upon such virtues are pointless and may even prove counterproductive in the long-run.

Nilofer Merchant<sup>116</sup> notes that the prevailing concerns that the quotas do little but help only elite classes of women are especially prescient ostensibly due to the inherent fact that most board seats are, as explained by the CMA Executive, held by a just a few women. Nilofer proffers that the total number of board seats held by women before the introduction of mandatory quotas was only four; currently, an average of eight board seats are held by women translating into nearly 100% improvement in female board composition. She notes however, that while at the very

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<sup>116</sup> Nilofer Merchant, 'Quotas for Women on Boards Are Wrong' (*Harvard Business Review*, 2011) <<https://hbr.org/2011/09/quotas-for-women-on-boards-are>> accessed 1 April 2019.

beginning of quotas the “Golden-Skirt” phenomenon should be expected due to scarcity of skills, knowledge and exposure on the part of many women, it should be expected to slowly wane as these women will hold fewer positions in the future and more competent, skilled and experience women will appear offering many companies a larger pool of qualified persons to pick from.

Therefore, in order to secure support for quotas among women’s organisations, a campaign highlighting the broad-reaching impacts for a larger class of women over many years, not just current gender disparities, may be more effective. Most gender activists dismiss the “golden-skirt” phenomenon as merely an adjustment of the quota system to the new realities and a perfect seal of a gap created by the same during the transition to the expected long-term benefits.

While Merchant sees the concept of “Golden-skirt” as courageous display of vigour and well-meaning aggression on the part of the women involved, she does not in any way support mandatory quotas. In fact, she is categorical that she has never believed in quotas. She argues that while reports all over the world are awash with evidence suggesting that improving female board membership almost always results in impressive shareholder value, very few have scientifically studied and verified this relationship. To her the relationship between gender diversity and company performance is correlational, not causal.<sup>117</sup> Effective boards just tend to pick effective members who happen to be women. She notes that she is not surprised by the race of many countries towards mandatory quotas not just in the wake of these reports but also in bowing to pressures from gender advocacy groups.

Merchant is of the opinion that the thinking that quotas will create a force function to overcome gender gap barriers especially in the corporate world is as backward as it is an insult to women—the intended beneficiaries. Merchant argues that quotas almost always signal tokenism. She reveals that most of the female directors she has interacted with and who are beneficiaries of the quota, view their board seats as the “woman’s seat”. To remedy such a situation, she proffers that all board members, male or female, should regard their ability to contribute as being on equal footing with all other members and only then can boards be capable of being effective.

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<sup>117</sup> Nilofer Merchant (n15).

According to Merchant, groups do not change dynamics until they decide to change their dynamics and quotas do not necessarily increase the right kind of diversity.<sup>118</sup> She notes that if change is imposed from external pressures, groups simply find a way around the new rules. Her argument is corroborated by the CMA Executive interviewed by this study. The Executive noted that the Authority observed that when pushed to apply the gender diversity requirements of the 2015 Code and the Constitution, many public listed companies refocus their selection process from qualifications, skills and competencies to gender and in the process cautiously work to ensure the exact number and no more of the required quota are appointed. Merchant points out that if a quota forced a board to bring on board a bunch of new members (obviously female), it is easy to imagine that the key discussions that would end up being made over dinner, pre-call or golf game rather than within the board meeting itself-thus undermining the well-intentioned goals of the quota.

She argues further, that it very possible to improve the gender ratios of the board without improving the diversity necessary for an individual company to deliver extraordinary performance. Merchant notes that perhaps the one most important reasons why companies with mixed gender boards perform well is because such companies tend to be more forward-thinking. Research shows that quotas tend to encourage less-enlightened and less forward-thinking firms to change the gender of their boards but still seek and retain their original biases, leading to more of the status quo. As stated by Margaret Heffernan, “our bias is a blindness that affects each of our ability to accept, adjust and take in new ideas.”<sup>119</sup>

Another argument against quotas made by Merchant is that quotas tend to de-emphasise skills, qualifications and experience. She points to a research on Norway conducted by Professors at the University of Michigan immediately following the introduction of quotas in the country. The professors found that at the initial stages of the implementation of the quota, the foundational interest of individual companies took a back stage. Many were forced to compromise on skills and competencies of their new hires just to meet the regulatory threshold ahead of the deadline. The professors also found that firms that were forced to increase the share of women on their

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<sup>118</sup> *ibid.*

<sup>119</sup> Margaret Heffernan, *Willful Blindness: Why We Ignore The Obvious* (1st edn, Simon and Schuster 2015).

boards by more than ten percent just to guarantee one measure of corporate value, fell by nearly 18%.<sup>120</sup>

Imposing quotas only targets the symptom not the disease.<sup>121</sup> Quotas neither encourage meritocratic selection nor do they increase the pipeline of qualified candidates. Merchant believes that all quotas do is sabotage better firm performance. She terms as flawed and misled the argument that the qualification gap is currently bridged by training offered by several institutions and organisations including those involved in gender diversity advocacy. Having participated in many of the programmes offered by most of these institutions, she terms them as useless. Instead of equipping women with the necessary skills and competencies to bridge the glaring gap or help them recognise what key career experiences they have, all these organisations do is charge exorbitant fees to polish resumes, promote use of buzzwords and embolden the women without sufficient qualifications to believe they are adequately prepared and ready for board positions.

In her observation, this practice merely dilutes the average strength of the applicants, and generates noise in the marketplace that makes connecting qualified candidates with those seeking them, harder. She adds that the clamour should not just be “more female board members” but more experienced, skilled and credible female board members capable of registering positive impact on the shareholder value. Merchant concludes that to achieve this, we need to promote women into roles where they can gain the relevant experience and once experienced, sponsoring and exposing them to the limitless opportunities to effectively and objectively apply their acquired skills without the baggage of tokenism.

Cytonn Investments’ Maurice Oduor<sup>122</sup> however takes exception with the arguments made by Lee as well as the CMA Executive against gender quotas. He argues that listed firms at the Nairobi Securities Exchange (NSE) that have incorporated gender diversity on their boards

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<sup>120</sup> 'Still Lonely At The Top' (*The Economist*, 2011) <<http://www.economist.com/node/18988694>> accessed 1 April 2019.

<sup>121</sup> 'Skirting The Issue' (*The Economist*, 2010) <[http://www.economist.com/node/15661734?story\\_id=15661734](http://www.economist.com/node/15661734?story_id=15661734)> accessed 1 April 2019.

<sup>122</sup> An in-depth interview with Maurice Oduor, Investment Manager at Cytonn Group Ltd at Sarova Hotel Nairobi on August 16, 2018.

recorded improved profitability last year, providing sufficient proof to the popular thesis that diversity tends to spur vigorous growth, both financial and non-financial to companies that embrace it. To support his argument, Oduor points to the Cytonn Corporate Governance Index Report of 2017<sup>123</sup> which is a culmination of a five-year study conducted on the over 50 public listed companies in Kenya. The report noted that companies with well-diversified boards in terms of gender and ethnicity outperformed those with low diversity in board composition in terms of gender and ethnicity.

Oduor reveals further that the stocks for top 25 companies in gender and ethnic diversity delivered a return of 40.2% and 26.1%, respectively, while the bottom 25 companies delivered a return of (8.1%) and 10.3%, respectively, over the last five years. He notes however, that despite the overwhelming proof of strong direct correlation between board gender diversity and overall company performance, many companies still operate the “old-boy” mentality in board appointments. He points out that although significant progress has been made since 2016 when women board presence stood at 18.3%, the slight drop of the same in 2017 to a measly 16.4% is undeniably worrying. Oduor argues that the drop is clearly an indication that there remains a lot to be done by listed public companies to improve and stabilise female participation in their governance at board level. He believes that full compliance with the CMA’s 2015 Code is key to the realisation of the intended balance.

At the release of the said report, Cytonn’s Chief Investment Office (CIO) Elizabeth Nkukuu noted that sound corporate governance practices and structures are essential for any firm today, especially those that are listed. She added the corporate governance in Kenya has come under the spotlight, which is partly attributed to the billions of losses that investors have suffered over the years due to poor corporate governance. She further stated that what was most notable is that after the ranking across 24 metrics of good corporate governance, the top half companies in terms of corporate governance have also delivered markedly better returns to their investors with the shares delivering a 43% better return than the bottom half, a clear indicator that corporate

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<sup>123</sup> Cytonn Investments Limited, 'Cytonn Corporate Governance Index Report 2017-Corporate Governance Key To Regaining Confidence And Protecting Shareholder Value In Kenyan Listed Companies' (Cytonn Investments 2017) <<https://www.cytonn.com/download/Cytonn%20Corporate%20Governance%20Index%20Report%20-%202017%20vfinal.pdf>> accessed 31 March 2019.



governance is important factor that investors should always consider in their investment decisions. In the report, KCB Group, Diamond Trust Bank Group and Jubilee Holdings emerged as the top three listed firms scoring the highest as a result of having the best corporate governance structures and practices.

According to the report, Uchumi was the most improved company with a comprehensive score of 60.4% from a score of 37.5% in the last report<sup>124</sup>. The improvement was attributed to better disclosures on board composition and activities such as meetings and evaluation of the board, shareholding of directors, and rotation of their auditor to KPMG from Ernst and Young (EY). WPP Scan Group improved to 66.7% from a score of 45.8% in 2016 while Liberty Holdings Ltd came in as the third most improved company with a score of 81.3% from 66.7% in 2016. EA Cables led the top decliners with a comprehensive score of 54.2% from a score of 62.5% in 2016. This was attributed to: a decline in female representation in the board, a decline in board meetings attendance by board members, and an increase in the average age of board members.

Angela Amboko<sup>125</sup> however disagrees with the arguments leveled by Oduor against introduction of mandatory quotas. She is concerned that the same arguments currently holding CMA from introducing gender quotas are not new. In fact, they are very identical to those made by the business community in Norway to oppose introduction of mandatory quotas. She argues that while providing businesses with a window to comply with board gender diversity requirements is in itself an expression of good will, it is not the most sustainable way of instituting long-term culture change. She points to Norway as the perfect illustration of her argument. Amboko argues that in 2002 when gender quota was introduced in Norway, compliance was purely voluntary. The political administration had bought into the excuses provided by corporates against making a strict mandate. It was not until 2005, that the then Prime Minister realised they were heading nowhere with the elective and voluntary measures. The PLCs were not making any progress and

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<sup>124</sup> Cytonn Investments Limited, 'Cytonn Corporate Governance Report-2016: Kenya Listed Companies Corporate Governance Analysis' (Cytonn Investments 2016)

<[https://www.cytonn.com/download/Cytonn\\_Corporate\\_Governance\\_Report.pdf](https://www.cytonn.com/download/Cytonn_Corporate_Governance_Report.pdf)> accessed 31 March 2019.

<sup>125</sup> An In-depth interview with Angela Amboko, a Managing Partner at Wanga Amboko and Company Advocates, an Advocate of the High Court and a member of the Federation of Women Lawyers (FIDA-Kenya) on August 30, 2018.

the situation was not getting any better for women. It is on this premise that the country introduced a mandatory quota with the threat of dissolution or liquidation or deregistration as the punishment for non-compliance. PLCs raced for the deadline so fast that by the set deadline, female composition of boards had improved from a measly 16% before the mandatory quota to 42%.

Angela argues that the quotas are important to safeguard the ideals of the Constitution and the interest of the most neglected-mostly women. She says further that leaving the fate of social inclusion in the hands of leadership discretion is perhaps the most irresponsible way to respond to dire situations. In establishing bare minimums, both the state and the regulator safeguard minority interests. Accordingly, she quips, mandatory quotas are an integral part of progression in the twenty first century, especially in situations and environments where the leadership is not keen on inclusion. The bare minimums need to be in place to guard against future changes. Angela concludes that the reason why EABL's board gender diversity, for instance swings from the most progressive in Africa to the least and back again to dominance, is due to lack of a mandatory threshold.

### **3.5 Reluctance of CMA to Introduce Mandatory Gender Quotas**

The fourth and last assumption of this research was that there is noticeable reluctance on the part of the regulator, CMA to introduce stringent or perhaps punitive measures for non-compliance with corporate gender diversity requirements. This assumption found its background on the fact that despite Kenya being one of the first countries in the world to pioneer a Code of Good Governance, ahead of Norway, Iceland and other progressive European countries, the country still lags behind in corporate gender diversity. It does not help that Norway, not only went ahead to experiment the voluntary compliance scheme and found it to be unsustainable but also reorganised its entire corporate governance framework introducing mandatory quotas in 2005, with no company becoming a victim of the prescribed legal sanctions in the last decade the law has been operational. Other than those already discussed, this research, was convinced that there are other factors and reasons behind the reluctance of CMA to institutionalise quotas and prescribe punitive legal sanctions for non-compliance.

According to Abdirahman Abubakar<sup>126</sup>, even if the idea of implementing mandatory quotas in Kenya took off, the country would still have to reconcile the quotas with their potential drawbacks, some of which have already surfaced in Europe. Though not widely reported in the mainstream media, a possible resentment of the “Golden Skirts” syndrome looms large in Norway. In particular, the phenomenon of women serving on multiple corporate boards in Norway creates the appearance that women are only halfheartedly involved, which could be damaging to the impression of women’s influence on boards. Moreover, the new female directors tend to have less management experience, something that skeptics and critics have noted. Abdirahman confirms that CMA has in the past received serious concerns regarding adoption of quotas. One such concern is that the higher paternalism of the Norwegian and European workplace could carry over to workplaces in Kenya should the country implement laws that effectively encourage or mandate promotions for women just to ensure gender diversity.

Abdirahman argues that Kenya’s unpalatable experience of bloated political leadership created by the Constitutional gender quota and mandatory top-up scheme, is beginning to create a negative perception of gender affirmative action. Most in business fear the same would prove as chaotic in business as it has with politics.

The other most significant drawback and the possible explanation to CMA’s reluctance on mandatory quotas is the general appearance of the same as tokenism. Abdirahman points to a concern previously raised against mandatory quotas by Elizabeth Corley, CEO of Alliance Global Investors Europe, in support of his argument. Corley said that quotas tend to have a disproportionately negative effect because there will always be a question in people’s mind that somebody only got into a board or into a certain position courtesy of the quota. It may therefore, be extremely difficult to eradicate these perceptions (of tokenism) even after several years of implementation.

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<sup>126</sup> An in-depth interview with Abdirahman Abubakar (a Lawyer and a former employee of the Capital Markets Authority familiar with CMA dealings on gender quotas) on August 31, 2018.

To understand the possible implications of perceptions of tokenism, this study reviewed previous research carried out on the same by Rosabeth Moss Kanter.<sup>127</sup> This study's efforts to reach Rosabeth both via email and social media (twitter) for an interview did not yield much as the same went unanswered. Kanter identified what she calls the three obvious consequences of tokenism: polarisation, visibility and assimilation.<sup>128</sup> Visibility may force performance pressure on an individual perceived to be the beneficiary of tokenism as a direct result of scrutiny making them uncomfortable succeeding or surpassing those perceived as dominant or deservedly appointed. Polarisation on the other hand makes it difficult for such beneficiaries to successfully integrate with the dominant. The dominants may even feel uneasy around them making it difficult for the token to succeed at their duties in the first instance. This could potentially result in catastrophic social isolation. Kanter notes that assimilation complements polarisation and visibility by encouraging a stereotypical treatment of the beneficiary almost as a lesser being. She explains, for instance, that when only one woman is present in a group, she may bear the burden of seeming to represent her entire gender. This runs the risk of influencing her board colleagues to think of her as fundamentally different or as an intruder rather than relating to her as a fellow board member.

### **3.6 Conclusion**

This study notes however, that tokenism and the stereotypes associated with it seems to take centerstage only in situations where gender diversity is extremely low, almost non-existent. According to female executives interviewed by this study, the presence of more than two female board members completely defeats the psychological barriers created by perceived tokenism. They point out that while the same might play in overtones in politics, it certainly does not in the corporate landscape. Most of those interviewed directed this study to the Norwegian situation which they say is the most gender progressive establishment in the world.

Situational review of the Norwegian application of the quota reveals that women in boards of PLCs felt strongly that they have been able to contribute meaningfully and significantly to the boards and corporate governance in the country. They also feel that they have tremendously

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<sup>127</sup> Janice D. Yoder, 'Looking Beyond Numbers: The Effects Of Gender Status, Job Prestige, And Occupational Gender-Typing On Tokenism Processes' (1994) 57 *Social Psychology Quarterly*.

<sup>128</sup> *ibid.*

generous access to critical information and never at all have they felt the need to sensor themselves. To the female executives interviewed, the more women on boards and management, the greater the level of their perceived influence. To a larger extent therefore, the concerns of tokenism raised by Kanter, while legitimate, seem to be more of a perceived threat than an actual problem especially within the context of corporate boards. According to these executives and Amboko, the fear of the perceived implications of tokenism operates more as a barrier to introduction of mandatory board quotas by CMA than a hindrance to effectiveness of women in delivering on their board expectations upon appointment.

## CHAPTER 4

### CASE STUDY: NORWAY

#### 4.1. Introduction

Having conducted a situational review of gender diversity in the boards of public listed companies in Kenya, it is imperative that the identified challenges and limitations be addressed from an experientially informed perspective. This study notes that of all established global economies scholarly investigated thus far, none have made progressive realisation of gender diversity in corporate governance like the Scandinavian countries. Of special importance to the study is Norway – a country that overcame all odds to introduce the largely unpopular quotas. This Chapter not only looks into the factors that led to the introduction of mandatory corporate gender diversity system in Norway but also conducts a situational review of the application of the same with the view to highlighting the achievements attained thus far, denoting the systems misgivings and isolating replicable benefits for the purposes of this research.

The chapter endeavors to test the study's assumption that there are numerous progressive legal, regulatory and policy lessons Kenya can learn from Norway in as far as corporate gender diversity practice is concerned. Part 4.2 of the chapter gives insights and justifications for Norway as the best choice for the case study. Part 4.3 delves into the history of gender diversity in Norway. Part 4.4 interrogates the supporting legal, policy and regulatory framework for corporate gender diversity in Norway. Part 4.5 conducts a situational review of the Norwegian application of the corporate gender diversity laws, policies and regulations. Part 4.6 explores the possible reasons for the success of quotas in Norway. Lastly, Part 4.7 explores the lessons Kenya can learn from the Norwegian corporate gender diversity practice.

#### 4.2. Why Norway?

Due to their culture and inherent belief in existence of direct correlation between gender equity in power and influence and a more just and democratic society, Scandinavian countries tend to register the highest levels of gender equality in the world.<sup>129</sup> This coupled with their well-

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<sup>129</sup> Vesselina Stefanova Ratcheva, 'Conclusions, Insight And Recommendations From The World Economic Forum Global Gender Gap Report 2016' (2017) 1 STEM Gender Equality Congress Proceedings.

developed welfare systems makes it easier for both genders to balance their work and family endeavors. From several corporate gender diversity surveys conducted globally, Norway ranks top.<sup>130</sup> This is however not surprising taking into account that gender equality issue has a long and strong tradition in the country.

The journey towards Norwegian legislative reforms to not only increase but also facilitate participation of women in the general societal concerns began in earnest in the early nineteenth century.<sup>131</sup> In 1839 for instance, women of over 40-years and unsupported were given a right and thus direct access to qualification as master craftswomen—a position previously reserved for men. About a decade later, women acquired inheritance rights. In 1882, women were given access to higher education<sup>132</sup>; in 1913, they acquired the suffrage right. In fact, the world's first Ombudsman of Equality and Anti-Discrimination was also established in Norway in 1978.

Despite being known globally as the pioneer country for women rights and gender parity, the country's move to introduce legally binding corporate gender diversity requirements in 2003 was unprecedented.<sup>133</sup> Norway made history as the first country in the world to introduce a mandatory quota system for the underrepresented gender in the country's corporate boards targeting both listed and non-listed public companies as well as state agencies.<sup>134</sup> The law faced tremendous opposition both in principle and practice with many industry experts and analysts giving indications of the inability of the country to realise those aspirations within the set compliance window. Evidently, the enactment and implementation of this law was not an entirely flawless process. The political process alone lasted nearly ten (10) years. From the first government motion sponsored by the Ministry of Children and Equality and submitted to the relevant respective consultative bodies in 1999 to comprehensive implementation by 2008, the

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<sup>130</sup> *ibid.*

<sup>131</sup> Karin Bruzelius Heffermehl, 'The Status of Women in Norway' (1972) 20 *The American Journal of Comparative Law* <<http://www.jstor.org/stable/839034>> accessed 21 April 2019.

<sup>132</sup> Pernille Lønne Mørkhagen, 'The Position Of Women In Norway' (*Explorenorth.com*, 2017) <<http://explorenorth.com/library/weekly/aa053101a.htm>> accessed 21st April 2019.

<sup>133</sup> Mingzhu Wang and Elisabeth Kelan, 'The Gender Quota And Female Leadership: Effects Of The Norwegian Gender Quota On Board Chairs And CEOs' (2012) 117 *Journal of Business Ethics*.

<sup>134</sup> 'Women On Corporate Boards Globally' (*Catalyst*, 2013) <<http://www.catalyst.org/knowledge/women-corporate-boards-globally>> accessed 21 April 2019.

process was manifestly lengthy, gradual and gruesome.<sup>135</sup> It was characterised by political conflict, intense public debate and a great media attention. However, at the end, the legislation was approved by a majority vote in Parliament.<sup>136</sup>

It is notable however, and impressively so, that all public listed companies (PLC's) had complied by the stipulated deadline. Thanks to the legislation, Norway currently boasts the highest proportion of women on corporate boards of public listed companies globally. This achievement was not by any chance a case of natural evolution but rather a tough result of mandatory gender diversity quota requirements imposed on boards of Norwegian PLC's by the end of 2005.<sup>137</sup>

Interestingly, the listed intention of the Norwegian government in introducing the mandatory quota system was not to improve presence of women in corporate boards just for the sake of gender balance but to trigger improved corporate board competence and governance.<sup>138</sup> Prior to the enactment of the law, a paltry four (4) percent of the managers in the most influential PLC's were women.<sup>139</sup>

#### **4.3. Background of the Norwegian Quota System**

While it is not in doubt that the inherent Norwegian cultural and social leanings towards inclusivity and diversity had an immeasurable influence in its eventual decision to introduce mandatory corporate gender diversity quota in 2003, the sacrifices and vigorous political advocacy that accompanied the process clearly played an undeniably immense role.<sup>140</sup> The beginning of political influence on the process can be traced to 1975 when the then two major political outfits in Norway unanimously adopted and vigorously implemented a subtle non-legislative gender quota for the nomination of representatives to the Norwegian Parliament.<sup>141</sup> Their implementation of the system was so robust and beneficial that it peaked the interest of

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<sup>135</sup> Aagoth Storvik and Mari Teigen, 'Women On Board The Norwegian Experience' (Friedrich Ebert Stiftung 2010) <<http://library.fes.de/pdf-files/id/ipa/07309.pdf>> accessed 21 April 2019.

<sup>136</sup> *ibid.*

<sup>137</sup> Indrè Bidlauskaitè, 'Corporate Boardrooms For Two By Quota Regulation? - The Case Of The European Union' (LLM, Tilburg University 2014).

<sup>138</sup> Beate Elstad and Gro Ladegard, 'Women On Corporate Boards: Key Influencers Or Tokens?' (2010) 16 *Journal of Management & Governance*.

<sup>139</sup> Mari Teigen, 'Gender Quotas For Corporate Boards In Norway' [2015] SSRN Electronic Journal <[http://vi.is/files/2011.05.13-Virkjum-Mari\\_1266626698.pdf](http://vi.is/files/2011.05.13-Virkjum-Mari_1266626698.pdf)> accessed 21 April 2019.

<sup>140</sup> Paul Hastings LLP, 'Breaking The Glass Ceiling: Women In The Boardroom' (Paul Hastings LLP 2013).

<sup>141</sup> *ibid.*



other political parties that quickly followed suit. The result was an unprecedented number of women in the Norwegian parliament and consequently, an introduction of laws replete with gender agenda.

Thanks to gender diversity in the legislative process, the Norwegian Parliament enacted the Gender Equality Act in 1979 ushering a new era of affirmative action.<sup>142</sup> The primary purpose of the law was to promote gender equality. To this end, it aimed at improving the position of women, who still comprised the minority in positions of power and policy influence.<sup>143</sup> Section 1 of the Act for instance obligated both public and private enterprises and organisations to promote equality between men and women. Further, the Act advocated for positive discrimination for the purposes of realisation of its objectives. It is notable however, that while the law was in itself progressive in as far as promotion of gender diversity in private and public entities is concerned, the fact that its provisions were not mandatory meant only little to immeasurable progress could be rationally expected as many saw its provisions as just but advisory. Besides, its non-binding nature gave credence to the fledging excuse offered by companies to explain or validate non-compliance; that they could not be reasonably expected to find enough women with comparative qualifications and expertise.<sup>144</sup> In a report published in 2010, the Norwegian Ministry for Children, Equality and Social Inclusion lamented that the proportion of women in corporate bodies and state organisations could not increase without special efforts. The report credited achievement of more balanced representation in governance and management to the introduction of mandatory quota in 2003.<sup>145</sup>

It is notable, that the introduction of the quota system in Norway was not without any challenges. The country witnessed one of the most intense political and public debates leading up to the decision of the parliament. Supporters and opponents of the quota both put forward formidable and substantive arguments relating to equality, discrimination, diversity and the independence of

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<sup>142</sup> Catherine Casey, Renate Skibnes and Judith K. Pringle, 'Gender Equality and Corporate Governance: Policy Strategies in Norway and New Zealand' (2010) 18 *Gender, Work & Organization*.

<sup>143</sup> Paul Hastings (n12).

<sup>144</sup> *ibid.*

<sup>145</sup> Mari Teigen and Lena Wängnerud, 'Tracing Gender Equality Cultures: Elite Perceptions of Gender Equality In Norway And Sweden' (2009) 5 *Politics & Gender*.

companies. Moreover, the business society did not entirely agree with the process.<sup>146</sup> In fact, gender diversity was almost unheard of a concept in corporate governance. A measly six percent (6%) of board seats in PLC's were held by women at the time the quota was introduced in 2002.<sup>147</sup> Ironically, Norway was at that time one of the countries in the world with the highest proportion of working women as well as the highest numbers of women in public politics.<sup>148</sup> This suggests that even countries regarded as the perfect examples of gender equality and diversity could struggle to replicate the same in business and especially the private sector. Despite having a rich tradition of gender equality and the strongest corporatism in Europe, Norway encountered tremendous hurdles implementing the quota system. Only when it made it mandatory in law did public and private corporate entities rush to comply. Non-compliant companies faced the threat of sanctions, the toughest of which was forced dissolution. When there were no sanctions in the initial phase, companies did not widely implement the policy on a voluntary basis. This ostensibly explains why countries with inherent discriminatory traditions achieve little in corporate gender diversity with voluntary approaches such as “comply or explain” or “apply or explain”. The Norwegian experience clearly demonstrates that there can never be change without a quota legislation. Once companies start recruiting more women for leadership positions, a widespread consensus emerges in business, politics and society as a whole.

The quota system was introduced in December 2003 through an amendment to the Company's Act adding a requirement that at least forty percent (40%) of both genders be represented in boards of both listed and non-listed PLC's as well as state agencies.<sup>149</sup> It came into force in January 2004 and provided a compliance and adjustment window to existing PLC's. While new PLC's and state agencies were required to be in full compliance, those established before the enactment of the law were given until 2008. Corporates and government agencies had to accept the new realities especially due to the then prevailing political climate. As indicated earlier, despite facing a myriad of political challenges, the bill received widespread political support

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<sup>146</sup> Paul Hastings (n12).

<sup>147</sup> Laura Kilday, Alexandra Mihailescu, Christine Nolan, Fiona Schreve, *Women on boards of directors: the case study of Norway*, 2009.

<sup>148</sup> Aagoth Storvik and Trygve Gulbrandsen, 'Included, But Still Not Equal? Gender Segregation at Quota Regulated Boards' (2016) 12 *Corporate Board: role, duties and composition*.

<sup>149</sup> Aagoth (n20).

leading to its enactment into law. It was proposed by the then Conservative-Centre Government Coalition (Bondevik II) and passed with the strong support of both the Labor and the Socialist Left Parties. Only a few representatives of the Progressive Party opposed it.<sup>150</sup> The proponents of the system argued it advanced the principle of equity and natural justice. They were concerned that the heavy male domination of Norwegian corporate boards was an unacceptable indication of systemic gender discrimination. The opponents on the other hand feared that such drastic a measure was likely to reduce the board recruitment processes to a mere gender selection exercise without due regard to the PLC's needs for skills, experience and expertise. To them, the process was activist and a total reversal of the fundamental goal of the board-that of ensuring good shareholder value.<sup>151</sup>

#### **4.4. Legal Framework on the Norwegian Quota System**

##### **4.4.1. The Public Limited Liability Companies Act**

The Norwegian quota system is governed by the Norwegian Public Limited Liability Companies Act, Act no. 45 1997 (NPLLCA) incorporating amendments introduced in 2003 to make mandatory application of the requirement that not less than forty percent (40%) of boards of both listed and non-listed PLC's shall comprise of one gender. The amendments came into force from 1 January 2006 with a two-year transitional period. The transitional period was established to give companies time to adjust the new legal realities.

While PLC's have received the most attention in as far as the quota is concerned, the application of the same has over the years been extended to boards of state-owned and inter-municipal companies.<sup>152</sup> The regulations have also been extended to cover the boards of municipal and cooperative companies. Further, there have been recent extension of the same within the framework of the Local Government Act to bring within the purview of the quota, private limited companies where the municipalities own not less than sixty six percent (66% or two-thirds) stake.<sup>153</sup>

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<sup>150</sup> Laura (n19).

<sup>151</sup> *ibid.*

<sup>152</sup> *ibid.*

<sup>153</sup> Terje Berg and Sjur Westgaard, 'Risk Reporting To the Board of Directors – Field Study among Norwegian Banks and Power Companies' [2011] SSRN Electronic Journal.

This study however restricts itself to statutes and legal provisions relating to PLC's. Section 6-11(a) of the Norwegian Public Limited Liability Companies Act stipulates the requirement for representation of both gender on the boards and states thus:

- “1. Where there are two or three board members, both genders should be represented;
2. Where there are four or five board members, both genders should be represented with at least two members each;
3. Where there are six to eight board members, both genders should be represented with at least three members each;
4. Where there are nine or more members of the board, each gender should be represented with at least 40 per cent each;
5. Rules 1 to 4 also apply to the election of deputy members.”

Below is a tabular representation of the above requirements.

<b>Number of Directors on a PLC's Board</b>	<b>Minimum Gender Representation Requirements</b>
2-3 Members	At least 1 (One)
4-5 Members	At least 2(Two)
6-8 Members	At least 3 (Three)
9+ Members	At least forty Percent (40%)

**Table 2:** Norwegian Board Representation Requirements for PLC's

#### **4.4.2. Gender Equality Act**

The first Norwegian attempt at institutionalisation of gender diversity in corporate boards was made by the then minority Centre government coalition (Bondevik 1) in 1999 through an amendment to the Gender Equality Act.<sup>154</sup> The amendment sought to extend Article 21 of the Act to include all company boards with an original requirement that not less than twenty-five (25%) of all corporate board seats should comprise one gender. This amendment was introduced through a Proposition to Parliament No. 77 of 2000/2001.<sup>155</sup> However, partially due to the need to conduct through and exhaustive evaluation of the proposed quota regulation, this amendment was excluded from the wider revision of the Gender Equality Act. Legal experts recommended that such revisions be done to the Companies law as opposed to the gender legislation. As a consequence, the government sought to not only introduce the said gender agenda into the

<sup>154</sup> Aagoth (n20).

<sup>155</sup> *ibid.*

Companies Act but also to increase the proposed quota from the original twenty-five percent (25%) to forty percent (40%). The proposed quota bump was aimed at creating harmony with the government quota requirements already institutionalised through Section 21 of the Gender Equality Act. The gender quota rule was finally adopted into the Companies Act after presentation to Parliament by the new Conservative-Centre Government coalition (Bondevik II) in 2003 through Proposition No. 97 of 2002/2003.<sup>156</sup>

### **Legislative process towards quota law implementation**

The legislative process that accompanied successful institutionalisation of the quota law in Norway spanned nearly ten years. Hereafter is a highlight of the events that formed an integral part of that process in a chronological order:

**1999-2000:** This period marked the first public hearings on the gender agenda. The quota law on corporate boards gender diversity was mooted by the Minister for Children, Equality and Social Inclusion with the intention to have the same incorporated into the first major revision to the Gender Equality Act.<sup>157</sup> The Act originally provided for a forty percent quota system in appointment to committees within the government and governmental agencies. This proposition sought to widen the scope of the quota to cover PLC's, trusts and foundations as well as government owned enterprises albeit with a twenty five percent corporate boards quota. Several alternatives on how to introduce and implement the law were discussed broadly.<sup>158</sup>

**2001-2002:** During this period, the government reviewed the alternatives on how to implement the quota law as submitted by both legal and corporate governance experts. It was prevailed upon by the professionals and experts to pursue implementation of the same through the Companies Act as opposed to the Gender Equality Act.<sup>159</sup> Further, the government was convinced to increase the quota from the originally proposed twenty five percent (25%) to forty percent (40%). These propositions and further requests for reviews and discussions prompted the government to organise and facilitate a second hearing in 2001.<sup>160</sup> At the hearings, three models

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<sup>156</sup> *ibid.*

<sup>157</sup> Indrè Bidlauskaitė (n9) 31.

<sup>158</sup> *ibid.*

<sup>159</sup> Knut Nygaard, 'Forced Board Changes: Evidence From Norway' [2011] SSRN Electronic Journal.

<sup>160</sup> *ibid* 38.

were proposed: first, that the quota strictly apply to and bind all government agencies; secondly, that public listed and non-listed public companies be required to voluntarily comply with the requirements without legal sanctions for non-compliance; and lastly, that the quota be strictly applied to PLC's only during the nomination of board members and not at the eventual appointment.

**2003:** This year heralded one of the most effective collaboration between government and the private sector. The duo worked tirelessly hard to encourage voluntary measures aimed at increasing the presence of women on corporate boards. This they did by not only offering incentives but also initiating several campaign programmes.<sup>161</sup> One such endeavour was the establishment of an online database where women interested in board memberships could enlist themselves and their credentials. Information from the Ministry of Children, Family and Equality at the time indicates that over 3,500 women had enlisted themselves by April 2003.<sup>162</sup> In June 2003, the quota law proposal was published. It covered both state-owned companies and PLC's and set July 2005 as the deadline for voluntary compliance with the forty percent (40%) gender quota requirements.<sup>163</sup> There would be no need for amendment of the law if all target companies and institutions complied by the said deadline. In December however, the proposition was presented to both Parliament's lower and upper chambers and was passed by majority votes without any changes or comments. It was anticipated that full compliance on the part of companies by the set deadline would render the law nugatory.<sup>164</sup> Since the law did not have a mandate or sanction, it was basically non-binding.

**2005-2008:** The July 2005 deadline for voluntary compliance with the proposed quota requirements passed with many state-owned enterprises and PLC's falling steeply into non-compliance. This generated massive media attention and thus questions as to the sustainability of

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<sup>161</sup> Gerald Traufetter, 'Taking Stock Of Pioneering Law: Have Gender Quotas Really Helped Norwegian Women? - SPIEGEL ONLINE - International' (*Spiegel Online*, 2017) <<http://www.spiegel.de/international/europe/taking-stock-of-pioneering-law-have-gender-quotas-really-helped-norwegian-women-a-745664.html>> accessed 23 April 2019.

<sup>162</sup> *ibid.*

<sup>163</sup> Laura Kilday (n19).

<sup>164</sup> Julie C. Suk, 'Gender Parity and State Legitimacy: From Public Office to Corporate Boards' (2011) 1 SSRN Electronic Journal.

the proposed voluntary corporate gender diversity even if all the entities were in compliance.<sup>165</sup> All PLC's and state-owned organisations faced one of the most stringent media scrutiny with debate raging as to whether mandatory quota was more sustainable especially in the long haul. In December 2005, the government decided to enforce the law, albeit with a few amendments. The amendments sought to introduce key ingredients the law previously lacked-mandate and sanctions. To force all target agencies into compliance, the amendments introduced forced liquidation as a sanction for non-compliance.<sup>166</sup> The then Prime Minister had even contemplated introduction of heavy fines to accompany the liquidation. All companies registered after January 2006 were required to immediately comply with the law or face sanctions. Existing firms were however, given two years within which to expedite and ensure strict compliance. These firms received letters from the Norwegian Registrar of Businesses informing them to comply ahead of the February 2008 deadline.<sup>167</sup> The law was so successful that only 12 of all PLC's and state-owned agencies had not complied by the set deadline. Due to the success however, the Registrar extended leniency to the non-compliant companies giving them notices and final warnings to comply or face liquidation or dissolution. By April 2008, all companies were in full compliance.<sup>168</sup> No state-owned enterprise or PLC was thus forced into dissolution for failure to meet the quota requirements.

#### **4.5. Situational Review of the Implications of the Norwegian Corporate Board Quota System**

To satisfactorily fulfill the objective of this study, there was a need to conduct an in-depth situational review of application of the quota system in Norway-almost ten years since it was institutionalised with the view to clearly determining the implications of the same not only on corporate governance but also on performance, financial or otherwise of both PLC's and state-owned enterprises.

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<sup>165</sup> Knut Nygaard (n31).

<sup>166</sup> *ibid.*

<sup>167</sup> *ibid.*

<sup>168</sup> *ibid.*

#### **4.5.1. Implication of the announcement of introduction of the quota system on the stock prices**

Several studies were conducted by political analysts, economists and corporate governance specialist to determine the implications of the announcement and the eventual application of the gender quota system on the stocks of listed PLC's.<sup>169</sup> The experts argue that the unusual nature of the 2002 announcement provided a clean test and determination of the general market's expectation of the effects of the quota not only on firm but also shareholder values. Their findings showed large and wider-than-expected declines in the value of Norwegian PLC's that did not have female representation on their boards compared with those that had.<sup>170</sup> This provided clear proof that the quota imposed significant and costly constraints on companies. The result was an indication of expectation of positive firm performances by investors.

#### **4.5.2. Impact of the Quota on firm and Shareholder value**

Studies have also been conducted over the last ten years to examine the impact of the quota on the long-run firm and shareholder value after the firms implemented the quota as mandated by the law.<sup>171</sup> Most observers note that though the quota provided an exogenous shock that put severe constraints on PLC's choices of directors, firms could have responded in several ways including strategically timing when they complied with the law.<sup>172</sup> Others would have elected to add female directors as scapegoats in advance of pathetic performance. The results of these studies demonstrate that the gender quota imposed substantial costs on shareholders of Norwegian firms and are consistent with the theory that boards are chosen to increase shareholder wealth. Firms with no female directors at the announcement of the gender quota lost over three percentage points in value compared to those with at least one female director.

The instrumental variable estimates used by the experts suggest that the forced addition of new female directors on boards led to value losses of upwards of twenty percent for the firms with large constraints. Reduced-form estimates confirmed the prior results and demonstrated that the value losses were persistent across time. Researchers and experts recognise that these

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<sup>169</sup> Kenneth R. Ahern and Amy K. Dittmar, 'The Changing Of The Boards: The Impact On Firm Valuation Of Mandated Female Board Representation \*' (2012) 127 *The Quarterly Journal of Economics*.

<sup>170</sup> *ibid* 155.

<sup>171</sup> *ibid* 160.

<sup>172</sup> Knut Nygaard (n31) 125.



magnitudes might have appeared large and were therefore conservative in their interpretation. However, it should not be forgotten how substantial the change in board composition could potentially be. These firms underwent a massive reorganisation of their shareholder representatives, where over thirty percent of the members of their board of directors changed, on average.<sup>173</sup> Given the unprecedented nature of the change required by the gender law, most of the economists and corporate governance experts admitted to having no clear comparison to which they could directly measure these magnitudes. Latest studies however provide evidence that indicate substantive shareholder value<sup>174</sup> almost invalidating earlier studies that could have potentially been blindsided by the massive board reorganisations.

#### **4.5.3. Impact of the quota on gender gap in earnings and overall company diversity**

The fundamental objective of the quota reform was to not only increase the representation of women in top positions in the corporate sector but also to reduce gender disparity in earnings within the sector. Interestingly, several studies conducted by the Norwegian National Bureau of Economic Research revealed that nearly all of the female directors appointed after the reforms were more qualified than those appointed before the introduction of the reforms hinting to the possibility that an untapped networks of top business women were activated by the policy.<sup>175</sup> Further, the Bureau established that the gender gap in earnings within the boards fell substantially following the reforms.<sup>176</sup> The Bureau notes however, that while the reform may have improved the representation of female employees at the very top of the earnings within PLC's and state-owned firms that were mandated to increase female participation on their boards, there is no evidence of these gains ever trickling down. Additionally, the reform had no obvious impact on highly qualified women whose qualifications mirror those of board members but who were not appointed to boards. While almost all post-reform studies have observed no statistically significant change in the gender wage gaps or in female representation in top positions, they all have been reluctant to rule out any potential meaningful economic gains due to the large standards of error.<sup>177</sup> Finally, most of the studies including the Bureau research argue

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<sup>173</sup> *ibid* 128.

<sup>174</sup> Kathleen A. Farrell and Philip L. Hersch, 'Additions To Corporate Boards: The Effect Of Gender' (2005) 11 *Journal of Corporate Finance*.

<sup>175</sup> Aagoth (n20) 8.

<sup>176</sup> Kenneth R. Ahern and Amy K. Dittmar (n41).

<sup>177</sup> *ibid*.

that there is very little evidence on the implication of the reform on the decisions of women generally. The reform did not even impact enrollment of women to business schools and in business education programs as originally anticipated. It is also notable that while young Norwegian women enrolled for careers in business report being aware of the reforms and its likely implications on their future earnings and career growth, the same had little to no impact on their fertility or marital plans.<sup>178</sup> Most of the studies conclude that the reform has had very little discernable impact on women beyond the beneficiaries of board appointments.

#### **4.5.4. Additional Observations**

It is noteworthy that the quota reform has received little attention within Norway since it was implemented.<sup>179</sup> A survey of the debate in the Norwegian newspapers reveals that the law was most ferociously debated in 2002, a year before its enactment.<sup>180</sup> A spot check shows the second time it received massive media attention was in 2005 just before the quota was made mandatory in law. Since then, it has received very little media attention. It is important to note however, that while no opinion poll has been conducted and very little opinion is in public domain following the introduction of the quota in law, employee associations intimately aware of the law have not reported any challenges possibly hinting to a flawless execution. Additionally, no boards or Chief Executive Officers (CEO's) have reported difficulties with compliance. These point to the possibility that the country is yet to experience any of the challenges that were originally levelled against the reform by the business community.

The quota law has led to tremendous changes in the composition of corporate boards of Norwegian PLC's. With nearly 450 public listed companies, the country is doubtlessly one of the most robust corporate heavens in Europe.<sup>181</sup> These companies have about 2,400 board seats with only 1,400 filled as at the time of this study. Of the 1,400 seats, women hold 600 representing 42%-nearly 2% above the watermark while men hold 800 seats.<sup>182</sup> While there were no reliable statistics on the proportion of women in corporate boards in the country in the early 1900s, it was

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<sup>178</sup> Kris Byron and Corinne Post, 'Women On Boards Of Directors And Corporate Social Performance: A Meta-Analysis' (2016) 24 *Corporate Governance: An International Review*.

<sup>179</sup> Siri Terjesen, Ruth Sealy and Val Singh, 'Women Directors On Corporate Boards: A Review And Research Agenda' (2009) 17 *Corporate Governance: An International Review*.

<sup>180</sup> *ibid* 122.

<sup>181</sup> Aagoth (n20) 8.

<sup>182</sup> *ibid*.

clear that board rooms were male dominated. The first ever proper statistical situational analysis was conducted in 2002 just before the reform was introduced. It showed a representation of only 6%. This proportion rose to 9% in 2004, then to 18% in 2006. While the changes were substantial, they were not as impressive as the gender advocates had anticipated. This was possibly due to the fact that compliance was voluntary at the moment. Only when the law introduced sanctions for non-compliance did the proportions skyrocket just before the 2008 deadline with 25% being registered in 2007, 36% in 2008 and finally 40% in 2009.<sup>183</sup>

It is notable that while the gender composition of Norwegian corporate boards has improved over the years thanks to the legislative efforts, within those boards, a gender hierarchy persists.<sup>184</sup> Only 5% of board leadership are held by women. The chair is almost always a man. Further, very few women serve as managing directors or CEOs. In fact, a paltry 2% of all Oslo Exchange listed companies are headed by women. General management does not fare any better; only 10% of management; both middle and senior, in PLC's are held by women. Gender experts and economists however, content that it is perhaps too early to judge the effects of the quota system.

#### **4.6.Reasons for Norway's Success with Corporate Boardroom Quotas**

In comparison to other Scandinavian countries and some of the most progressive European nations, Norway almost doubtlessly stands alone as the only country to have successfully institutionalised corporate gender quota through legislation. Successful proposition, enactment, implementation and sustainability of the system are attributable to several factors inherent in the Norwegian culture including: transparency, a robust history of gender diversity, equity and social inclusion as well as a vibrant corporate culture and structure.<sup>185</sup>

##### **4.6.1. Transparency**

That Norway's political, cultural and corporate leadership is deeply rooted in transparency might have helped it with institutionalisation of the quota system.<sup>186</sup> This arguably explains why the quota continues to function in a manner not replicable elsewhere. The quota has surprisingly not faced any challenge of compliance or opposition since it took root in 2005. One of the most

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<sup>183</sup> *ibid.*

<sup>184</sup> *ibid.*

<sup>185</sup> Harriet Alexander, 'Norway's Businesswomen And The Boardroom Bias Debate' *Telegraph* (2002).

<sup>186</sup> *Norwegians Drool Over Fresh Tax Records* (BBC News 2005).

conspicuous display of transparency in Norway was the introduction of a national tax list in 2002. This implies that personal income is public knowledge. Not only is this information available to everyone and anyone on request, it is searchable by simply reducing the search fields to an individual's name and residential municipality.<sup>187</sup> The practice set in motion and entrenched a culture of openness never before witnessed anywhere globally.

It is not in doubt therefore that the systemic tolerance for transparency was instrumental in Norwegian companies meeting their gender quota targets. That no company petitioned the local courts on the issue is sufficient proof of this assertion. In fact, many companies and state agencies leveraged the already public information to create databases of women adequately qualified to benefit from the quota.<sup>188</sup> Had the information been material non-public, the country would have struggled to achieve the mandate, legal sanctions notwithstanding. One of the key databases created to facilitate this awareness was the Female Future. It was established and is run by the Confederation of Norwegian Business and Industry, Norway's largest employers' association.<sup>189</sup> The Female Futures primary purpose is to provide training to women on skills pertaining to board membership, leadership and management. The confederation has also designed a programme aimed at lobbying companies to commit to identification of talented women and encouraging them to take on management and board positions.<sup>190</sup> Known locally as "pearl diving" due to the fact that reviewers tend to search for talented female board members among listed candidates, the program is designed to help women sell themselves more confidently and assertively. In other jurisdictions, such a robust transparency would dangerously and precariously border on invasion of privacy.

#### **4.6.2. Social Inclusion**

The Norwegian corporate boardroom quotas, though visibly contentious at the beginning, were doubtlessly not the first quotas ever introduced in the country to entrench gender diversity. The country has a rich history of gender diversity and social inclusion in many aspects of civil life.<sup>191</sup>

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<sup>187</sup> *ibid.*

<sup>188</sup> Aagoth Storvik and Trygve Gulbrandsen (n30).

<sup>189</sup> *ibid.*

<sup>190</sup> *ibid.*

<sup>191</sup> Eric Westervelt, 'In Norway, Law Promotes Women In Boardroom' (*NPR.org*, 2009) <<http://www.npr.org/templates/story/story.php?storyId=111673448>> accessed 24 April 2019.

So robust and manifestly progressive is the country that in 2003 it received a commendation from the United Nations Committee on Elimination of Discrimination Against Women (CEDAW).<sup>192</sup> The Committee lauded the country as a “haven for gender equality”.<sup>193</sup> In 1913, Norway became the first country to enfranchise women. It elected its first female Prime Minister in 1981 ushering a new era for women in leadership.<sup>194</sup> The new Premier promptly filled eight of her eighteen cabinet seats with exemplary women leaders.<sup>195</sup> Since then, the country has had a ministry specifically dedicated to matters gender, equality, family, equity, children and social inclusion. At an impressive consistent average of 36%, the Norwegian Parliament doubtlessly has the highest number of female membership-almost double the world’s average.<sup>196</sup>

These pioneering advancements may have helped lay out a friendly platform for the eventual introduction and institutionalisation of the boardroom quota and in the process affirmed the longstanding social norms that gender egalitarianism and social inclusion are values in and of themselves. Beyond the manifestly increased institutional capacities, gender diversity on corporate boards can be seen as a virtue and a value in itself if a society emphasises and prioritises strong examples of upward mobility for both genders. Norway’s history as a world leader in gender equality and social inclusion may also be a source of national pride, and a self-imposed national mantle of egalitarianism that can spur innovations in attaining equality and social inclusion.

The concept of social inclusion was not new to Norway when it first introduced quotas in 2003. In the 1980s for instance, the country enacted an Equal Opportunity Act which mandated that not less than forty percent (40%) of either of the genders be represented on public boards and committees that had membership of more than four.<sup>197</sup> To this extent it is arguable that social

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<sup>192</sup> United Nations Committee on Elimination of Discrimination Against Women (CEDAW), 'Norway-Haven For Gender Equality' (2003) <<http://www.un.org/News/Press/docs/2003/wom1377.doc.htm>> accessed 24 April 2019.

<sup>193</sup> *ibid.*

<sup>194</sup> Gregory H. Fox, 'The Right to Political Participation in International Law' (1992) 17 *Yale Journal of International Law* <<http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1600&context=yjil>> accessed 24 April 2019.

<sup>195</sup> Kristina T. Geraghty, 'Taming the Paper Tiger: A Comparative Approach to Reforming Japanese Gender Equality Laws' (2008) 41 *Cornell International Law Journal* <<http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1727&context=cilj>> accessed 24 April 2019.

<sup>196</sup> Julie Ballington and Azza Karam, *Women In Parliament: Beyond Numbers* (IDEA 2005).

<sup>197</sup> Pilita Clark, 'The Accidental Feminist' *Financial Times* (2005) <<https://www.ft.com/content/bd9bb15c-3a0f-11da-8dc4-00000e2511c8>> accessed 24 April 2019.

policies that favour women, such as the corporate boardroom quotas, stand better chances of success in jurisdictions with longstanding respect for gender diversity and acceptance of quotas in furtherance of social inclusion. Success of Norway with boardroom quotas is thus attributable to its acceptance of diversity and past success with quotas in the political space. It is notable however, that success with diversity quotas in the political space is not always indicative of the likelihood of success of such quotas in other spheres, especially business. While countries such as India, Bangladesh, Eritrea, Brazil, Nepal and Tanzania have achieved laudable gender diversity levels in politics, thanks to progressive gender equality policies and reforms, they conspicuously lag behind in corporate boardroom diversity.<sup>198</sup> In a nutshell, while political gender quotas may not necessarily guarantee or predict gender inclusion generally, it is almost always indicative of a society's attitude towards the role of women and its likelihood of extending the application of such quotas beyond the political space.

#### **4.6.3. Corporate Structure**

Unlike its continental Europe counterparts that largely operate a two-tiered corporate board system, Norway operates a single-tiered board system with compulsory labour representation.<sup>199</sup> The mandatory labour representation is very significant as it is more likely to influence activities, decisions and the power of the board. Studies are replete with compelling evidence that employee board representation tends to not only impact the firm's value positively but also increase its likelihood of nominating and installing a board more inclusive and representative of its employee diversity. This possibly explains why Norway experienced almost no difficulties not just in transitioning to the mandatory quota system but also sustaining it thereafter. Labour representation has been known to open board communication and entrench transparency much like the presence of women is known to do. Such open communication environments are known to be more receptive to quotas compared to the conventional ones.

#### **4.7. Lessons for Kenya**

The review of the Norwegian approach to operationalisation of corporate gender diversity brings to the fore interesting actionable insights relevant and relatable to the Kenyan situation.

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<sup>198</sup> Ricardo Hausmann, Laura D. Tyson and Saadia Zahidi, 'The Global Gender Gap Report' (World Economic Forum 2017) <[http://www3.weforum.org/docs/WEF\\_GenderGap\\_Report\\_2008.pdf](http://www3.weforum.org/docs/WEF_GenderGap_Report_2008.pdf)> accessed 24 April 2019.

<sup>199</sup> *ibid.*

First, adoption of progressive realisation of social equity in elective and appointive positions as well as boards of public listed corporations is not the most optimal approach to curing inherent gender diversity challenge. Without strict compliance timelines outlined both in the governing legal, policy and regulatory framework, realisation of the intended or anticipated diversity goals will most likely remain a pipedream. Like Kenya, Norway originally adopted this approach as the most suitable foundation for the attainment of corporate gender diversity. Corporations gave numerous excuses for non-compliance years after the commencement of the campaign pointing to a clear intentional disinterest. Many argued that there were few qualified women to assume the identified board positions. The slow pace of progress even after numerous campaigns prompted the country to take drastic legislative measures. To avoid further procrastination, the country adopted mandatory quota systems. Interestingly, all the public listed companies were in full compliance by the end of the 3-year compliance window. This leads to a possible summation that social injustices can only be cured through strict legal, policy and regulatory measures. Accordingly, for Kenya to realise corporate gender diversity and put an end to the decades-long clamor, quotas need to be introduced through a legislative means with punitive sanctions for non-compliance.

Second, it is normal for social injustice campaigns to elicit strong resistance. By their very nature, these campaigns challenge the status quo effectively seeking to destabilise that which has provided stability or benefit to a segment of the population for a very long time. In Kenya for instance, the clamor for corporate gender diversity seems to have attracted massive resistance from people who have benefited immensely from the established old-boy network. Not only are they fearful that operationalisation of the program would expose most of the corporate misdeeds but they are also worrisome it may limit their opportunities for further engagement. In is no wonder Kenyan public listed companies situationally examined in Chapter 3 fall into and out of gender diversity compliance at whim. Like, Kenya, Norway faced this resistance. The rush by corporations to comply with the quota requirements within the provided 3-year deadline is undeniably indicative that the reasons earlier advanced for non-compliance by the said corporations were merely excuses to protect the status quo. It is thus imperative for Kenya to,

like Norway, ignore these resistances, introduce the quotas and enforce strict compliance. Only then will the corporate gender diversity challenge be addressed.

Third, public listed corporations are not private per se and must thus operate in full compliance with public social justice policy measures. Listed corporations attract capital directly from the public and must thus be reflective of the general aspirations of the citizenry in their corporate governance practice. As demonstrated by the Norwegian case, where initiative is lacking, state intervention through strict policy measures is advisable. Without the quotas, Norway would still be grappling with the corporate gender diversity question. In contrast, the argument advanced for the lack of strict corporate diversity measures in Kenya is that public listed companies are private in nature and that their corporate governance adaptation should be informed more by market needs and less by state intervention. This approach has largely informed the slow pace of reaction to regulation by the CMA. The hands-off approach by the regulator and the recent operationalisation of elective corporate governance regulatory framework are partly responsible for the unpredictable gender diversity situations in the boards of public listed companies. Many scholars argue that without a substantive strict diversity framework, even the progress made thus far will not be sustained. Sustainability comes from predictability and dependability. Operationalisation of quotas, as done by Norway, introduces these two elements critical to sustainable realisation of corporate gender diversity.

Lastly, political goodwill among the leadership and operationalisation of enabling environment are key to sustainable institutionalisation of corporate gender diversity. Cognisant of the fact that most Norwegian women were less educated, inexperienced and underqualified for various board seats, the Norwegian government established various programs geared towards training and mentorship of women to assume board positions. The government was alive to the need to encourage diversity while at the same time guaranteeing quality and maintaining perspective. Women were not given positions purely on the premise of their femininity but rather on the basis of their experience, skills and competencies. While the scarcity of highly-qualified women led to the golden-skirt syndrome (where lack of qualified women led to one woman serving in numerous boards), it helped affirm to corporations that government commitment was not merely to elevate women for the sake of it but rather to elevate competent persons. This challenge has



been addressed progressively over the years through purposeful mentorship of women on leadership and industry to make them as competent as their male counterparts. Successful operationalisation of these measures is contingent on political goodwill.

#### **4.8. Conclusion**

From the preceding discussions, it is apparent that while the Norwegian historical leanings towards transparency, accountability, gender equity, social inclusion and the subsequent institutionalisation of gender quotas in politics may have significantly influenced its eventual adoption of boardroom quotas, no much progress was realised with the initial voluntary corporate gender diversity schemes. It was only until a mandatory quota together with threats of dissolution, deregistration and liquidation for non-compliance were introduced in law did corporates race for compliance. Further, the admission by the then Prime Minister that he did not discuss the quota proposition with a committee before making the public announcement for fear of sparking a disagreement in his government, is indicative of how difficult the process could have been had it been proposed by gender advocates or female politicians. To that end, it is conclusive to say that even in the most progressive and socially inclusive of societies, successful implementation of a corporate boardroom quota, is less dependent on voluntary will and on the force of the law and the associated threat of sanctions. Despite its impressive gender diversity credentials, Norway would not have achieved the boardroom quotas to date had the mandate remained largely voluntary.

## **CHAPTER 5**

### **CONCLUSION AND RECOMMENDATIONS**

This Chapter is a culmination of the research into corporate gender diversity in the boards of listed companies in Kenya. It condenses the findings into simple coherent statements of finality reflective of the established norm. Accordingly, it not only summarily restates the findings of the study in respect of each of the tested research assumption but also expounds on the respective lessons and insights, and recommends adjustments, policy or otherwise, necessary to effectively address shortcomings identified in the course of the study. It also proposes areas in need of further research or scholarly engagement.

#### **5.1 Adequacy of the existing legal, regulatory and policy framework**

##### **5.1.1 International Instruments**

The study established that corporate gender diversity and diversity as a concept is championed by both international and local legal and policy instruments. On the international front, the concept is advocated by the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW); the Beijing Declaration, The African Charter on Human and People's Rights; the International Covenant on Economic and Social Rights (ICESCR); and the Charter of the United Nations. These legal instruments, while varied and diverse in intentions and objectives, are evidently congruent on addressing gendered social and cultural prejudices, providing for equality in the allocation of resources, promoting the sharing of responsibilities and eliminating discrimination in all its forms.

In advancing gender parity in both economic and social initiatives, these global instruments doubtlessly provide effective legal anchorage to the clamour for corporate board gender equity. They uniformly recognise and assert that diversity has to be considered broadly but applied specifically. That is, equality between men and women has to be given due consideration in every respects and aspects. It should be seen as an integral component of any progressive modern civilisation.

Further, these instruments affirm their commitment to the economic emancipation of women by requiring states to not only support local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women but to also integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life. They also require states to take appropriate corrective and positive action in respect of areas where discrimination against women in law and in fact continues to exist. This include involvement of women in management strategy development in corporations, both private and public.

Whereas these instruments are doubtlessly central to operationalisation of corporate gender diversity in individual member states through legal and policy influence, the wide sweeping nature of their directives, undeniable lack of effective accountability mechanism and the admittedly varied legal, political and economic landscape of their member states, at best, render most of their noble intentions merely advisory if not entirely moot. Effective implementation and sustainable deployment are purely contingent on the political will of individual countries. In the absence of a dependable and replicable mechanism of enforcement, even the most progressive of nations could easily and unpredictably oscillate from excellence to discordance.

### **5.1.2 Local Instruments**

Locally, the study established that corporate board gender diversity has its foundations in the Constitution and further promoted by Case Law as well as the Capital Markets Act through the Code of Corporate Governance Practices for Issuers of Securities to the Public of 2015 (the 2015 Code). On the policy front, the concept is promoted by the CMA's "Apply or Explain" policy

anchored by the 2015 Code and the government's Mwongozo- code of governance for state corporations.

As highlighted previously, the Constitution forms the foundation of all legal and policy endeavors in Kenya. As the supreme law of the country, its stipulations are binding on all persons and state organs and any law, policy or practice that is inconsistent with it is void. It obligates every person to not only respect but also uphold and defend its foundational and fundamental ideals. To that end, all principles of governance, including board gender diversity and policies emanating therefrom draw their legitimacy from the Constitution.

Articles 10 (2), 19(2), and 27 of the Constitution specifically advance inclusivity and non-discrimination. Article 10 lists national values and principles of governance to include, among others, the rule of law, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability; and sustainable development. These principles of governance and national values are binding on all state organs, state officers, public officers and all persons whenever they apply the Constitution. Article 19 (2) on the other hand states that the purpose of recognising and protecting human rights and fundamental freedoms is to not only preserve the dignity of individuals and communities but also to promote social justice and the realisation of the potential of all human beings. The state is therefore under strict legal duty to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. To this end, it (the State) is expected to take legislative, policy and other measures, including the setting of standards, to achieve progressive realisation of these liberties.

This study found out that unlike Articles 10(2) and 19(2), Article 27 is by far the most explicit provision in as far as diversity and non-discrimination of persons, and especially women, is concerned. It provides that every person is equal before the law and has the right to equal protection and benefit of the law and that equality entails full and equal enjoyment of all rights and fundamental freedoms. It further provides that men and women have a right to equal treatment including right to equal opportunities in political, economic, cultural and social spheres. The law mandates that the state or any individual shall not discriminate directly or

indirectly against any person on any ground including gender. This provision specifically addresses the historical cultural, economic and social marginalisation women have suffered ostensibly due to our traditional societal cultural formations and their reluctance to morph to accept and integrate modern realities.

Clauses 6 and 8<sup>200</sup> mandate the State to design legislative and policy measures aimed at redressing any disadvantage suffered by individuals or groups due past discriminations. The State is under strict obligation to take legislative and policy measures to implement the quota principle in governance-that not more than two-thirds of the members of elective or appointive bodies are of the same gender. Since the term “elective or appointive bodies” is defined broadly to include the boards of state-owned businesses and enterprises in which the government owns more than fifty percent stake, a sizable number of Kenya’s largest public listed companies were brought within the scope of this provision. Doubt however lingers as to whether other public listed companies on which the state has either zero or minority of interest fall within the scope of the “elective or appointive bodies”. This lack of clarity effectively points to an inadequacy as it leaves room for numerous interpretations and thus non-compliance on the part of public listed companies with the policy-established corporate board gender diversity requirements.

The Capital Markets Act is another local legal instrument, besides the Constitution, that advocates corporate gender diversity. The Act establishes CMA and strictly mandates it to promote, regulate and facilitate the development of an orderly, efficient, fair and competent capital markets in Kenya. One such specific mandate is institutionalisation of inclusivity in corporate governance. This, the authority has endeavored to achieve through various policies and regulations including the “Apply or Explain” framework anchored by the 2015 Code.

Whereas the Constitution, the Capital markets Act, the Mwangozo and other policy frameworks established to advance gender diversity are in and of themselves effective tools towards institutionalisation of inclusion in the boards of public listed companies in Kenya, clear lack of accountability mechanism in the form of penalties for non-compliance reduce them to mere policy guidelines. There is thus an urgent need to reimagine the role of CMA entirely, rework

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<sup>200</sup> CoK, art. 27.

laws and policies on diversity to make them more specific and to introduce mandatory schemes with very elaborate and specific penalties for non-compliance.

## **5.2 Implications of “Apply or Explain” Approach**

As explained in Chapter 2, the CMA through the 2015 Code introduced an “Apply or Explain” scheme aimed at facilitating organisational compliance with the established corporate governance measures. It sets out the principles and specific recommendations on structures and processes, which companies should adopt in making sound corporate governance an integral part of their business dealings and culture. Key among the postulations of the code include that the appointment of directors should be sensitive to gender representation.

The 2015 Code morphed from the 2002 Code that adopted “Comply or Explain” approach. The original approach obligated all public listed companies to comprehensively indicate in their annual reports and filings the extent to which they had complied with the Guidelines. In the event they were not compliant, the companies were strictly required to not only state their reasons for non-compliance but also indicate the steps and measures they were taking to ensure full compliance.

The flexibility of the “Comply or Explain” approach was doubtlessly its undoing. It quickly proved ineffective as most companies fell into non-compliance. Since compliance was only and simply, a matter of “ticking of a box”, many companies could easily fall through the cracks through falsification or misrepresentation of the realities. It is no wonder several companies collapsed or nearly capitulated under this regime ostensibly due to poor corporate governance. These include Chase Bank, Imperial Bank, Uchumi Supermarket, Mumias Sugar and now TransCentury, National Bank and Kenya Airways, the last three of which are facing imminent collapse.

Unlike the “Comply or Explain” approach, the 2015 “Apply or Explain” approach obligates the boards to adequately and satisfactorily comply with the 2015 Code failure to which the non-compliant companies are required not only to comprehensively disclose to CMA their reasons for failure to apply the requisite prescriptions, but also outline the strategies they have put in

place to ensure full application within a specified time-frame. Further, while the 2002 approach required boards to strictly comply with the guidelines as stipulated, the 2015 approach provides room for boards to go beyond the dictates of the guidelines. This is essentially important for implementation of gender diversity in boards.

This study notes that whereas the “Apply or Explain” approach has in the broadest sense possible infused some sense in corporate governance in the country, the unpredictable and uncontrollable oscillation between compliance to non-compliance with the one third gender rule by most of companies as established in this study’s findings captured in Chapter 3, clearly shows that lack of clarity in the 2015 Code as to what amounts to gender diversity in corporate boards leaves room for chaos and unpredictability. This provides succinct proof and validation for Hasting’s<sup>201</sup> concerns that gender diversity in boards of public listed companies in Kenya is purely a demonstration of good will which, while laudable as a hallmark of evolution of societal thinking, is undeniably as unsustainable as it is unreplicable

### **5.3 Case for Mandatory Quota for Kenya**

The question of whether or not mandatory quotas for public listed corporations would be beneficial both from an economic and social standpoint is one this study not only grappled with but also found extremely difficult to find concise and precise antidote to ostensibly due to the numerous varied but admittedly insightful perspectives it elicited. On the one hand are social justice purists who care little about economic implication of inclusion but more about the sustainability and replicability of social equity. Their primary objective is to redress the inequities, discriminations and inadequacies of the past including exclusion of women in key decision-making areas of economy and governance. On the other hand are economists who, while moved by these inequities are slow to interfere on the principle understanding that the market is self-regulating and that any changes must not just be driven by human enthusiasm on account of perceived isolations, but rather organically by market needs. In other words, if the market perceives a more gender balanced corporate strategy would be sustainably beneficial for corporations’ growth and profitability, such change would be reflected in the demand-supply

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<sup>201</sup> Paul Hastings LLP (n32).

dynamics with more balanced companies flourishing and the non-compliant and rigid floundering.

The study found out that historical injustices reflected primarily in discrimination of women at the workplace through unjustifiable denial of promotion or appointments was one of the major reasons for the low presence of women on the boards of many public listed companies. Many boards, however progressive, had difficulties finding women more experienced, skilled and qualified enough to meet their recruitment competency requirements. Poor upward corporate mobility meant many otherwise competent, coachable and trainable women would be out of sight. This created a false notion of general lack of ambition, laziness, lethargy and lack of self-drive on the part of female employees forcing most of the boards to turn their attention to the pool of selected more qualified and perceivably ambitious men. According to gender activists interviewed by this study, the stifling of women corporate progress and advancement was as deliberate as it was calculated aimed specifically at maintaining the old boy networks. It had little to do with economic realities or needs of the concerned corporations.

Another case advanced in support of corporate gender diversity is that such inclusion invigorates sustainable long-term corporate performance. This study got hold of evidence depicting a compelling nexus between company financial and non-financial performance with gender inclusion. Companies with gender diverse boards were found to perform better than those that had more of one gender dominant. It was also established that the companies that suffered the most during the 2008 financial crisis were predominantly male in their boards. Such scenario was linked to the widely accepted notion and belief that men are predisposed to take more risk compared to their female counterparts.

The case for economic advancement was however countered by other scientific studies which established that while diversity was shown to stir economic and non-economic corporate progression and advancement, gender, being just one aspect of diversity could not be said to be the sole reason for the scenario. In fact, diversity in the boards of the sampled companies was found to be more of a happenstance than design. It just happened that in companies looking for competitive edge in the market through hiring of individuals with diverse skills, competencies,



experiences and influence likely to positively impact their bottom-line, they found these prerequisites embodied in both men and women. This explains their gender diverse boards. They did not begin their selection purely from the premise of sexuality. It was pure coincidence. Additionally, the study's disapproval of this association was further buttressed by findings of other studies on the implications of gender diversity on Norwegian Corporate performance following the introduction of the mandatory quotas. These studies found very little correlation between board gender diversity and corporate performance. In fact, Norwegian companies were performing far poorer than they were before the introduction of the quotas pointing to a possibility that deliberate social-equity driven diversity measures are far more economically disadvantageous than the free market measures.

Free market or laissez faire principle is another argument that this study established to be advanced strongly by economists against corporate board gender quotas. Economists argue that a market is a purely organic structure whose evolution, growth and development is strongly driven by demand and supply dynamics. Accordingly, institutions and corporations instinctively aware and properly and opportunistically aligned with these dynamics stand a better than to innovate, grow and benefit shareholders in the long run as opposed to those out of tune. Introduction of external influence tinkers with the market equilibrium prompting shifts and adjustments otherwise not instigated by the demand-supply dynamics. These influences could potentially trigger market reaction in three ways. First, the market could perceive them as positive and correspondingly give positive response and this is generally reflected in corporate performance. Second, the change could be perceived as non-issue effectively resulting in little to no effect. Lastly, the adjustments could be negatively perceived resulting a negative feedback loop or spiral oftentimes witnessed in waning profits and poor corporate governance.

In the eyes of free market advocates, the market is better left alone to dictate what it does or does not need. It operates purely on the notion of survival for the fittest. Corporations that fail to adapt to the organic market dictates die while those that comply and conform or even innovate positively thrive. On this ground alone, the purists oppose imposition of gender diversity on corporations as a measure of good governance. They argue that a change towards a gender

diverse workplace or management or boards should be as organic, intuitive and market driven as possible and in a way that is indeliberate.

It is notable however, that sacrificing inclusion or perpetuating social injustices and discrimination at the altar of market autonomy is as counterintuitive as it is socially irresponsible. Expecting changes and evolution to be driven by an entity (market) predominantly controlled by one gender is somewhat blindsiding and borderline naïve. It is no news that women across the globe have for many years been marginalised and treated as subpar humans who had very little say in major social and economic evolutions. Expecting a marginalised group to somewhat emerge or emancipate itself to the point of organically and intuitively influencing market changes is undeniably deluded.

Accordingly, there needs to be a balance between freedom and accountability in the market and corporate space as there is in other aspects of human pursuits and endeavours. On the one hand, changes to the market should be made in way that reflects societal makeup and reduces inequity, inequality and exclusion. The market should be representative of the general population with everyone playing their roles effectively. Corporate board gender diversity should not only be championed as a critical pillar of good corporate governance but also as a reflection of goodwill for general market evolution for the better. On the other hand, changes should not be so restrictive that they strongly upset free market dynamics. Kenya for instance has in place an arguably elective corporate gender diversity policies that while in and of themselves are progressive, are seldom implemented. It is this study's considered view, that for board gender diversity to become mainstream, institutions must be pushed into compliance through sanctions. Setting minimum and maximum gender composition requirements is not so disruptive enough as to upset the market dynamics.

Another objection to corporate gender quota established by the study is that while we can provide equality of opportunities, the outcomes in respect of the same cannot be equally equal or guaranteed to be equal. This argument was presented purely on the basis of the understanding that while opportunities to get into corporations can be offered equally to both men and women, upward mobility, skills advancement and experience that eventually lead individuals into higher echelons of management are primarily competency based and should not be subjected to gender

debate. While this assertion holds some modicum of truth and sense in it, it turns a blind eye to other factors fully in play in corporations that would generally see men progress and learn faster compared to women. One such major factor is availability of male mentors as well as the higher likelihood of women to be impeded or held back by family concerns. Even then, there are equally qualified women who have defied all odds to climb the corporate ladder but are oftentimes bypassed for less qualified males. In fact, this study established that on average, female board members were slightly more qualified than their male counterparts effectively implying different standards of selection. A woman has to be extremely qualified to convince boards to drop their bias for the less qualified competing male candidates.

#### **5.4 Lessons from Norway**

As established by the study, Norway is doubtlessly one of the most gender progressive countries in the world. Not only does the country take seriously matters inclusion and equity, it also continually devices various measures to guarantee sustainability. Its history with matters gender reform is strikingly similar to Kenya's. Like Kenya, the clamour for corporate gender diversity in Norway first began with advocacy for inclusion in political and appointive state positions. Further, like Kenya, introduction of gender equity within the Norwegian corporate space was originally elective with organisations and corporations given the free reign to determine when to comply with gender diversity policy dictates. However, unlike Kenya, persistent non-compliance by corporations prompted the Norwegian government to initiate strict legislative measures to guarantee compliance.

While the original Norwegian gender policy was in itself progressive in as far as promotion of gender diversity in private and public entities is concerned, the fact that its provisions were not mandatory meant only little to immeasurable progress could be rationally expected as many saw its provisions as just but advisory. Besides, its non-binding nature gave credence to the fledging excuse offered by companies to explain or validate non-compliance; that they could not be reasonably expected to find enough women with comparative qualifications and expertise. The study established that the introduction of mandatory quota system in Norway was not without any challenges. The country witnessed one of the most intense political and public debates leading up to the decision of the parliament. Supporters and opponents of the quota both put

forward formidable and substantive arguments relating to equality, discrimination, diversity and the independence of companies. Moreover, the business society did not entirely agree with the process. In fact, gender diversity was almost unheard of a concept in corporate governance. A measly six percent (6%) of board seats in PLC's were held by women at the time the quota was introduced in 2002.

Despite having a rich tradition of gender equality and the strongest corporatism in Europe, Norway encountered tremendous hurdles implementing the quota system. Only when it made it mandatory in law did public and private corporate entities rush to comply. Non-compliant companies faced the threat of sanctions, the toughest of which was forced dissolution. When there were no sanctions in the initial phase, companies did not widely implement the policy on a voluntary basis. This ostensibly explains why countries with inherent discriminatory traditions achieve little in corporate gender diversity with voluntary approaches such as “comply or explain” or “apply or explain”. The Norwegian experience clearly demonstrates that there can never be change without a quota legislation. Once companies start recruiting more women for leadership positions, a widespread consensus emerges in business, politics and society as a whole.

Like in the Kenyan scenario, the Norwegian proponents of the quota system argued it advanced the principle of equity and natural justice. They were concerned that the heavy male domination of Norwegian corporate boards was an unacceptable indication of systemic gender discrimination. The opponents on the other hand feared that such drastic a measure was likely to reduce the board recruitment processes to a mere gender selection exercise without due regard to the PLC's needs for skills, experience and expertise. To them, the process was activist and a total reversal of the fundamental goal of the board-that of ensuring good shareholder value.

A study of the Norwegian corporate landscape following the introduction of the quota system showed the change had little to negligible impact on corporate performance. Little declines were recorded in both company bottom lines and shareholder value possibly pointing to adjustments ordinarily expected due to such systemic changes. While the implications are far worse than was expected by the originators, it is fair to say that sustainability and replicability as well as the

anticipated future economic performance as a result of those changes can only be fairly and objectively judged over a longer period of operationalisation.

Kenya and indeed other nations seeking ways to entrench gender diversity and inclusion generally in the boards of corporate organisations must first appreciate that institutionalisation and operationalisation of certain desirable good governance measures cannot depend on good will alone, and while desirably so, must be backed by clear concise and precise laws with stringent and punitive sanctions for non-compliance.

## **5.6 Recommendations**

It is evident from the above that the legal, regulatory and policy framework in Kenya is not effective in ensuring there is gender diversity in the boards of public listed companies. Kenya will not be able to achieve gender diversity on boards if the same is left to corporations to determine whether they wish to have gender diverse boards or not. This study therefore recommends the following measures to be taken to ensure gender diversity is achieved on boards of public listed companies in Kenya.

- i. Parliament should enact laws to implement Article 27(8) of the Constitution that provides that not more than two-thirds of the members of elective and appointive bodies shall be of the same gender.
- ii. Capital Markets Authority should amend the Corporate Governance Code making it mandatory that boards should be comply with the two-thirds gender principle.
- iii. Capital Markets Authority should introduce mandatory gender quotas for all public listed companies with strict legal sanctions for companies that fail to comply within the set timelines

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## APPENDIX 1

### **QUESTIONNAIRE TO ASSESS THE EFFECTIVENESS OF THE EXISTING LEGAL, REGULATORY AND POLICY FRAMEWORK IN ENSURING GENDER DIVERSITY IN THE BOARDS OF PUBLIC LISTED COMPANIES IN KENYA**

QUESTIONNAIRE PURPOSE: This questionnaire aims at collecting data relating to effectiveness of the legal, regulatory and policy framework in ensuring gender diversity in the boards of Public Listed Companies in Kenya. All the information that you will provide will be treated in strict confidence and only used for purpose of this survey.

#### **Personal Information**

Name.....Position.....  
Office/Company.....Gender:.....

1. Is the composition of women on corporate boards in public listed companies in line with the two- third gender principle under Article 27(8) of the Constitution?
2. Is the legal and regulatory framework in Kenya sufficient to guarantee gender diversity on public listed companies in Kenya? Please Explain
3. What effect did the Code of Corporate Governance Practices for Issuers of Securities to the Public (the 2015 Code) have on gender diversity on corporate boards of public listed companies?
4. How did the change of regulatory regime by the Capital Markets Authority from ‘Comply or Explain’ approach to ‘Apply or Explain’ affect gender diversity on boards of public listed companies?

5. What measures (if any) should Kenya adopt to achieve the two-third gender rule on corporate boards of public listed companies?

S/No.	Date	Name	Designation	Organisation
1.	30/7/18	James Mukabwa	Associate	Dorion Associates
2.	8/8/18	Withheld	Executive	Safaricom Ltd
3.	16/8/18	Maurice Oduor	Analyst	Cytonn Group Ltd
4.	19/8/18	Zipporah Ndegwa	Chief Executive	KenGen
5.	20/8/18	Kwame Owino	Director	Institute of Economic Affairs
6.	22/8/18	Withheld	Official	Private Sector Corporate Governance Trust
7.	23/8/18	Withheld	Executive	Capital Markets Authority
8.	23/8/18	Withheld	Executive	Nairobi Stock Exchange (NSE)
9.	30/8/18	Angela Amboko	Partner	Wanga Amboko Advocates
10.	31/8/18	Abdirahman A.	Lawyer	Formerly an employee of CMA

ase and sustain gender diversity in boards of public listed companies in Kenya? Please explain your answer.

Thank you for your time.

## APPENDIX 2 – INTERVIEW SCHEDULE

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