UNIVERSITY OF NAIROBI

COLLEGE OF HUMANITIES AND SOCIAL SCIENCES

SCHOOL OF LAW

KIHIANYU ANTHONY GIKARIA

G62/88787/2016

CORPORATE GOVERNANCE IN STATE CORPORATIONS

A CRITICAL APPRAISAL OF FINANCIAL ACCOUNTABILITY, INTERNAL CONTROL AND PERFORMANCE MANAGEMENT PRINCIPLES OF MWONGOZO (THE CODE OF GOVERNANCE FOR STATE CORPORATIONS)

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF A DEGREE IN MASTER OF LAWS (LLM)

SEPTEMBER, 2020

DECLARATION

Candidate's Declaration

This thesis is my original work and has not been previously submitted for a degree at any other University, other than the University of Nairobi for academic credit.

Name: Kihianyu Anthony Gikaria Registration No. G62/88787/2016

Signature Date: ______________16/11/2020_________

Supervisor's Declaration

This work has been submitted with my approval as the Supervisor.

Name: Prof. Kiarie Mwaura

Signature ______________________________Date: November 24, 2021

University of Nairobi, School of Law

LIST OF ABBREVIATIONS

AGPO	Access to Government Procurement Opportunities
BAA	British Airports Authority
BVR	Best Value Review
CAG	Controller and Auditor General
CAJ	Commission for Administrative Justice
CDF	Constituency Development Fund
CEO	Chief Executive Officer
CIPFA	Chartered Institute for Public Finance and Accounting
CIPFA	Chartered Institute of Public Finance and Accounting
CIPS	Chartered Institute of Purchasing and Supply
CMT	Common Measurement Tool
COB	Controller of Budget
CPA	Comprehensive Performance Assessment
DFT	Department for Transport
ERS	Economic Recovery Strategy
GAO	Government Accountability Office
GDP	Gross Domestic Product
NPM	New Public Management
GHRIS	Government Human Resource Information System
HPWP	High Performance Work Practices
ICPAK	Institute of Certified Public Accountants of Kenya
ICT	Information and Communications Technology
IFRS	International Financial Reporting Standards
ISC	Inspectorate of State Corporations
ISO	International Standards Organization
IT	Information Technology
KPA	Kenya Ports Authority
KPIs	Key Performance Indicators
KRA	Kenya Revenue Authority
KRA	Key Result Areas
M&E	Monitoring and Evaluation
MDAs	Ministries, Departments and Agencies
MDGs	Millennium Development Goals
MIS	Management Information System
MPA	Major Projects Authority
MTP	Medium-Term Plan
NARC	National Alliance Rainbow Coalition
NBFIs	Nonbank Financial Institutions
NFA	National Fraud Authority

NFIB	National Fraud Intelligence Bureau
NHS	National Health Service
NZGP	New Zealand Government Procurement
OAG	Office of the Auditor General
OECD	Organization for Economic Co-operation and Development
OECD-DAC	Organization for Economic Cooperation and Development and Development Assistance Committee
OFA	Office of Fiscal Analysis
OSCAR	Online System for Central Accounting and Reporting
PAC	Public Accounts Committee
PACAC	Public Administration and Constitutional Affairs Committee
PACs	Parliamentary Public Accounts Committees
PFM	Public Finance Management
PFMR	Public Finance Management Reform
PIC	Public Investment Committee
PPOA	Public Procurement and Oversight Authority
PPRA	Public Procurement Regulatory Authority
PWD	Persons with Disability
RB PPS	Results-Based Personnel Performance System
RRI	Rapid Results Initiative
SAP	Structural Adjustment Program
SCAC	State Corporations Advisory Committee
SCOA	Single Chart of Accounts
SCs	State Corporations
SFS	Supplier Feedback Service
SMART	Specific, Measurable, Attainable, Realistic, and Time bound
SOEs	State Owned Enterprises
SPAS	Staff Performance Appraisal System
TNAs	Training Needs Assessments
TRF	Training Revolving Fund
UK	United Kingdom
UNDG	United Nations Development Group

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Constitutions

Constitution of Kenya, 2010

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Public Audit Act, 2015

Public Finance Management Act, 2012

The Urban Areas and Cities Act, 2011

Public Finance Management (PFM) Act, 2012

The Malaysian Code of Corporate Governance, 2012

The King Code of Governance for South Africa (King III) (2009)

The National Assembly (Powers and Privileges) Act, Cap 6

Accountants Act No. 15 of 2008

The Public Procurement and Disposal Act, 2015

The Public Officer Ethics Act, 2009

Whistle Blower Protection Bill, 2017

Public Procurement (Preference & Reservations) (Amendment) Regulations, 2013

The State Corporation (Performance Contracting) Regulations, 2004

Code / Guidelines

Public Service Commission and State Corporation Advisory Committee, *Mwongozo - The Code of Governance for State Corporations* (Government Printer 2015)

The Economic Recovery Strategy for Wealth and Employment Creation, 2003-2007

Guidelines on Terms and Conditions of Service for State Corporations, 2004

Presidential Task Force on Parastatal Reforms, 2011

Results-based Monitoring and Evaluation Toolkit, 2009

Government of Kenya, *Kenya Vision 2030* (Nairobi: Government Printer 2008).

Government of Kenya, *Kenya Vision 2030*: *First Medium Term Plan (2008-2012*) (Nairobi: Government Printer 2008)

Government of Kenya. *A Strategy for Performance Improvement in the Public Service* (Office of the President, Directorate of Personnel Management Nairobi, Kenya 2016).

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CHAPTER ONE

INTRODUCTION

1.1 Background to the Study

The public sector plays a major role in both developed and developing economies.[1] In most jurisdictions, public expenditure forms a significant part of the gross domestic product (GDP), and public sector entities are substantial employers and major capital market participants. As opposed to generating profits as is the case with the private sector, the main objective of public sector entities is enhancing or maintaining the overall well-being of the citizenry through service delivery.[2] Accordingly, good governance in the public sector encourages better informed and longer-term decision making as well as the efficient and accountable allocation and use of resources towards creating public value. Good governance also exerts pressure on improving public sector performance, tackling corruption, improved organizational leadership, management, as well as oversight. Ultimately, good governance in the public sector results in desirable and improved service delivery.[3]

Globally, and most pronounced in African countries, governments have been engaged in public sector management reforms with a view to overhaul their administrative systems to better serve the needs of both government and the citizenry, with improved delivery of public service to reduce poverty, improve livelihoods, and sustain good governance.[4] The wealth of reforms in public sector management in recent years has meant that government departments have experienced a continuous round of change programs. In Kenya, corporate governance is among

[1] Karan R, 'Selective Commercialization of Public-Sector Accounting and its Consequences for Public Accountability' (2003) 13 Australian Accounting Review 15, 33.
[2] Parker L, 'Changing Public Sector Accountability: Critiqueing New Directions' (1999) 23 Accounting Forum 109, 121
[3] Ayee, J. R. A, *Reforming The African Public Sector: Retrospect and Prospects* (Dakar: CODESRIA 2008) 16
[4] Farazmand A, 'Globalization and Public Administration' (1999) 5 Public Administration Review 509, 515

the latest in a long list of reforms which, beginning in the early 90s, have been introduced into the public sector. The concept of 'New Public Management' (NPM) has been identified as the common driver of many of these public sector management reforms.[5]

The concept of NPM concept is centered on the proposition that a distinct activity management can be applied to the public sector, as it has been applied in the private sector, and that it includes a number of elements including:[6] the adoption of private sector management practices in the public sector; an emphasis on efficiency; a movement away from input controls, rules, and procedures towards output measurement and performance targets; a preference for private ownership, contestable provision, and contracting out of public services; and the devolution of management control with improved reporting and monitoring mechanisms.

The NPM movement is driven to maximize productive and allocative efficiencies that are hampered by public agencies that are unresponsive to the demands of citizens. In addition, NPM makes a rigid formal separation between policy making and service delivery.[7] It is used to describe a management culture that emphasizes the centrality of the citizen or customer, as well as accountability for results.[8] It calls for changes in the structure of public organizations, their culture, management systems, and other aspects in support of the new initiative. It encompasses client oriented, mission-driven, quality-enhanced, and exercise-participatory management, using resources in new ways to heighten efficiency and effectiveness.[9]

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[5] Pollitt C, *The Essential Public Manager* (Open University Press, Maidenhead 2003) 12
[6] Aucoin P, 'Administrative Reform in Public Management: Paradigms, Principles, Paradoxes, and Pendulums' (1990) 3 Governance 115, 121
[7] Self P, *Government by the Market? The Politics of Public Choice*. (London: Macmillan, 1993) 55
[8] Manning N, *The New Public Management and its Legacy* (world bank publications 2000) 20
[9] Barzelay M, *Breaking Through Bureaucracy: A New Vision for Managing in Government*. (Berkeley, CA: University of California Press, 1992) 17

From the foregoing, it is notable that a key feature of NPM reforms has been the adoption, by State Corporations (SCs) among other public sector bodies, of modes of organization and governance more usually associated with the private sector, that is corporate governance.[10] Corporate governance is concerned with the structure and processes of the board and its relationships with shareholders, regulators, auditors, top management and any other legitimate stakeholders. It is possible to identify these elements in public sector organizations, although their delineation is less clear cut. Good corporate governance requires clear definitions of responsibility and a clear understanding of relationships between the organization's stakeholders and those entrusted to manage resources and deliver its outcomes.[11]

Corporate governance is defined as a system by which companies are directed and controlled.[12] It is the process and structure used to direct and manage the business and affairs of an organization towards enhancing business prosperity and corporate accountability with the ultimate objective of realizing long term shareholder value, while taking into account the interest of other stakeholders. The principle guides distribution of power and responsibility across various players in a company.[13] In the public sector, good corporate governance seeks to promote efficient, effective and sustainable corporations that contribute to the welfare of society by creating wealth, employment and solutions to emerging challenges; responsive and accountable corporations; legitimate corporations that are managed with integrity, probity and transparency;

[10] Barberis P, 'The New Public Management and A New Accountability' (1998) 76 Pubic Administration 451, 469
[11] Gruening G, 'Origin and theoretical basis of New Public Management' (2001) 4 International Publication 1, 10
[12] Sunday Kajola, 'Corporate Governance and Firm Performance: The Case of Nigerian Listed Firms,' (2008) 14, European Journal of Economic, Finance and Administrative Sciences 16, 19
[13] Hodges R, Wright M and Keasey K `Corporate Governance in the Public Services: Concepts and Issues', (1996) 16 Public Money and Management 2, 09

recognition and protection of stakeholders rights and an inclusive approach based on democratic ideals, legitimate representation and participation.[14]

Recent developments in the practice of corporate governance among SCs has seen the emergence of a major problem known as the agency problem arising from the agency relationship subsisting between the principals (the public) and their agents (the board).[15] This problem has provided a window for exploitation, both deliberate and unconscious premised on the position that the various players who are the agents are self-seeking and opportunistic, and in the process created certain tensions within the hierarchy. Resultantly, the interests of the principal and agent may not be identical and are likely to diverge over time. This is what creates what has come to be referred to as the core "corporate governance dilemma".[16]

There is increasing concern that the greater the discretion in the hands of the agent and the further away the control over his activities, the greater the opportunities for abuse. Such abuse is manifested through corruption and bribery as obvious examples of deliberate exploitation for personal gain. In order to address and overcome the agency problems that arise from separation of ownership and control, each country has through time developed a wide variety of mechanisms. This has necessitated the need to create a governance structure that balances the interests of the principles with those of their agents. [17]

One of the most defined and common approach has been the adoption of codes of good corporate governance as a corporate governance mechanism. A code of conduct has been defined as a

[14] Omoyefa P, 'Public Sector Reforms In Africa: A Philosophical Re-Thinking' (2008) 33 Africa Development 4, 11
[15] Pollitt C and Bouckaert G, *Public Management Reform: A Comparative Analysis* (USA: Oxford University Press 2004), 18.
[16] Mwenda A and Tangri R, 'Patronage Politics, Donor Reforms, And Regime Consolidation in Uganda' (2005) 104 African Affairs 449, 460
[17] McDonnell Brett, 'Convergence in Corporate Governance-Possible, but not desirable' (2002) *Vill. L. Rev.* 47, page 341, 351

principal instrument of self-regulation, providing rules and guidance on the standards of conduct in a given area. Codes of conduct when it comes to corporate governance have over time been shaped by events in the corporate sector.[18] The application of codes as procedures and / or a regulation mechanism ensures that there is leverage and control over the various institutional processes. It enables states to promote economic and social policies, the trick being to identify opportunities for corruption (the incentives) and to seek to remove those opportunities (by applying a disincentive). Where any organization departs from the regulatory mechanism imposed by the codes, the remedy is to impose sanctions for non-compliance. The very threat of such sanctions by itself operates as an incentive for future compliance and may be viewed as proactive deterrence.[19]

In an effort to improve service delivery in response to mounting public complaints on inadequacies in SCs among other public sector organizations, the government of Kenya has made major interventions including the introduction of various sectoral polices and strategic plans, the development of a code of governance for SCs titled *Mwongozo*.[20] *Mwongozo* outlines codes of good governance for SCs aimed at increasing efficiency and accountability in the use and deployment of scarce public resources and effective discharge of functions and services to realize public value and shared goals as a nation. Among others, *Mwongozo* addresses matters of effectiveness of Boards, transparency and disclosure, accountability, risk management, internal controls, ethical leadership and good corporate citizenship which are practices at the core of the values and principles of Public Service as enshrined under Article 232 of the Constitution of

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[18] Samaratunge R, Alam Q and Teicher J, 'The New Public Management Reforms In Asia: A Comparison Of South And Southeast Asian Countries' (2008) 74 International Review of Administrative Sciences 25, 30

[19] Ruth V, Aguilera, 'Codes of Good Governance Worldwide: What is the trigger?' (2004) 25 Organization Studies 415, 416

[20] Public Service Commission and State Corporation Advisory Committee, *Mwongozo: The Code of Governance for State Corporations* (Government Printer 2015), 2

Kenya, 2010. More importantly, *Mwongozo* seeks to ensure that sustainability, performance and excellence become the hallmark of management of State Corporations.[21]

1.2 Statement of the Problem

Noting the central role of public service in the economic and social development of any country, it cannot be gainsaid that the role of government primarily through SCs is to pursue social and economic transformation; facilitating and promoting national development; improving the delivery of public services to meet the basic needs of citizens; supporting the creation of employment opportunities in diverse sectors across the entire country and supporting the nation's regional integration initiatives and international partnerships.[22] This can only be achieved through the government pursuing prudent policies that are anchored in good governance practices manifested through probity, sensitivity to citizen needs, public accountability, efficient use of public funds and overall socio-economic transformation.[23]

To realize the foregoing challenges, the Government of Kenya developed *Mwongozo* as a critical building block in entrenching principles and values of public service and best practices in corporate governance.[24] It was hoped that implementation of *Mwongozo* would result in effective and efficient SCs that deliver value to Kenyans in a transparent and accountable manner. The *Mwongozo* framework was further hoped to lead to a positive impact on the Country's national budget while improving the public's perception of quality and delivery of public service. To achieve this, it was the Government's determination that all the provisions of *Mwongozo* would be fully and meticulously implemented by the State Corporations Advisory Committee (SCAC).

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[21] Constitution of Kenya 2010 Article 232
[22] Curristine T, Lont, Z and Joumard I, *Improving Public Sector: Challenges and Opportunities. (*Paris: OECD, 2006) 50.
[23] Boyne G and Law J, 'Setting Public Service Outcome Targets: Lessons from Local Public Service Agreements' (2005) 25 Public Money & Management 253, 262
[24] Supra note, 20

An analysis of practice and empirical literature however reveals that despite the existence of *Mwongozo* among various other legal, regulatory and policy instruments outlining and making provision for the principles of corporate governance which are expected to overturn the performance of SCs if fully implemented, the overall performance of a majority of SCs remains dismal.[25] This is underscored by cases and instances of misappropriation of public funds, corruption, tribalism and nepotism in awarding of tenders and other procurement opportunities, public complaints on discharge of services in various public institutions, external political interference, un-procedural decision making, un-procedural appointment of board of directors, mismanagement of funds and abuse of resources, leading to decline in economic growth thus affecting the socio-economic human development aspect. This is coupled with key development challenges in the country including poverty, inequality resource allocation, the skills gap between market requirements and the education curriculum, continued weak private sector investment, the vulnerability of the economy to internal and external shocks as well as low firm productivity to achieve rapid, sustained growth rates that will transform lives of ordinary citizens.[26]

This sorry state of affairs has been attributed to failure to implement *Mwongozo* in a mandatory, uniform and consistent manner due to the legal status of the Code, thus compromising the capacity of the Code to address the inefficiencies attributable to poor governance that have led to poor performance of most SCs. Additionally, the implementation of the Code has also run into headwinds by virtue of the ineffectiveness of SCAC to oversight and ensure the implementation

[25] Ochieng J, *Incorporating Principles of Corporate Governance in the Management of State Corporations in Kenya: A Critique of the 'Mwongozo' Code of Governance for State Corporations* (Unpublished Thesis University of Nairobi 2017) 3.

[26] Musikali L M. 'The Law affecting Corporate Governance in Kenya: a need for review' (2018) International Company and Commercial Law Review 213, 14

of the values and principles under the Code. This is coupled by the fact that there have been minimal reforms in the existing legislation to support the smooth implementation of the principles embodied under the Code. Resultantly, we still continue to face a corporate governance dilemma in the implementation of a Code that was expected to serve as a tool of enforcing ethical and good corporate governance and mainstreaming public service delivery in SCs.[27]

Against this backdrop, this study appraises the efficacy of the various interventions under *Mwongozo* which greatly borrow from and build on the provisions of the Constitution and the best international practices on good governance and how they impact on service delivery among SCs. These include financial accountability; internal controls in the procurement process; and performance management practices.

1.3 Objectives

i. To examine the extent to which financial accountability influences service delivery among State Corporations in Kenya.
ii. To determine the extent to which internal controls in the procurement process influence service delivery among State Corporations in Kenya.
iii. To assess the extent to which performance management practices influence service delivery among State Corporations in Kenya.

1.4 Research Questions

This thesis will seek to answer the following questions:

[27] Ibid

i. To what extent does financial accountability influence service delivery among State Corporations in Kenya?
ii. To what extent do internal controls in the procurement process influence service delivery among State Corporations in Kenya adequate?
iii. To what extent do performance management practices influence service delivery among State Corporations in Kenya?

1.5 Hypothesis

The research is based on the hypothesis that despite the formulation of *Mwongozo*, service delivery among SCs in Kenya remain dismal, which can be attributed to lack of adequate financial accountability mechanisms, weak internal control systems in procurement processes and ineffective performance management practices. The reasons for the Code's failure to achieve the desired results are varied but this study is emphatic that the Code has failed to achieve its overall desired objectives due to lack of an effective mechanism of implementation and enforcement of those principles.

Moreover, the prevailing political environment also plays another significant role since the intra-system mechanisms (the legal and institutional framework) backed by the law cannot operate in a vacuum. The need to instill a cultural change cannot also be gainsaid. SCs should adopt sound governance practices not as a matter of compliance but also as part of their culture. They should go beyond conforming to laid down statutes and codes regulating them, and embrace a culture of doing what is right. They also need to need to examine themselves inwards critically and have serious commitment to the full implementation and enforcement of the Code.

1.6 Literature Review

The concept of corporate governance and its effect on service delivery among state corporations has over the recent years gained currency among scholars internationally, regionally as well as in the Kenyan context. Accordingly, this section reviews the various previous studies that have been conducted along financial accountability, internal controls and the procurement process as well as performance management practices and their effect on service delivery in the public sector.

1.6.1 Financial accountability

Chalam and Ng'eni[28] studied financial accountability and financial reporting in a decentralized environment with reference to Tanzanian local government authorities. Among other things, the study found that quality of financial reporting is very significant in enhancing financial accountability of Tanzanian local governments. Also, it was found that the adoption of IPSASs accrual basis of accounting of local government will improve decision making, transparency and accountability. The local government management is urged to continue improving the proper utilization of public financial resources to ensure quality provision of social services to the citizens.

Mbugua[29] studied the effects of financial accountability on the performance of non-governmental organizations in Kenya. The study found that the NGOs that applied financial standards in ensuring accountability of finances in the organizations boosted Donor support which resulted in improved performance. The study also established a significant relationship between financial

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[28] Chalam G and Ng'eni V, 'Financial Accountability and Financial Reporting in a Decentralized Environment (A Case Study of Tanzanian Local Government Authorities)' (2018) 8 International Journal of Management (IJM) 14, 16

[29] Mbugua M, *The effects of financial accountability on the Performance of non-governmental organizations in Kenya* (Unpublished Maters Thesis, University of Nairobi 2013), 11.

performance of NGOs in Kenya and the independent variable financial accountability. The study finally concludes that taking the independent variables at zero, a unit increase in financial accountability will lead increase in the scores of financial performance in NGOs in Kenya.

Basri and Nabiha[30] studied accountability of local government in Indonesia and found that proper financial reporting plays major roles on enhancing and demonstrating accountability for easy assessment of operating performance of an organization.

Also, Hutagalung and Hum[31] argue in their study on the role of fiscal decentralization state finance in strengthening regional fiscal capacity in Indonesia that financial reporting contributes strongly in enhancing public accountability and transparency. Accountability and transparency are the key factors for the successful operations of public sector towards provision of social services.

Mir and Sutiyono[32] point out in their study on public sector financial management reform that financial reporting is very important in enhancing financial accountability of the public agencies and also assists in decision making for internal and external stakeholders. Apart from financial reporting, the success of financial accountability depends also on sound management system and effective institutional arrangement.

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[30] Basri H and Nabiha A, 'Accountability of Local Government' (2014) 3 Asia Pacific Journal of Accounting and Finance 1, 2.
[31] Hutagalung E M and Hum S M 'The role of Fiscal Decentralization State Finance in order to strengthen Regional Fiscal Capacity in Indonesia' (2016) 44 International Journal of Social Science 1, 5.
[32] Mir M and Sutiyono W 'Public Sector Financial Management Reform: A Case Study of Local Government Agencies in Indonesia' (2013) 7 *Australasian Accounting, Business and Finance Journal,* 97, 100

Adeolu and David[33] studied the challenges and prospects of accountability and transparency in public financial management in Nigeria and found that the successful operation of financial accountability requires good financial reporting, strong management system and effective organizational arrangements. The improvement of financial accountability demands also strong institutional arrangement to enable apparent working environment in local government dealings. Thus, all internal stakeholders of local governments have strong contributions to the success of financial accountability.

On a similar vein, Mande[34] studied the perceptions on government financial reporting in Nigeria and expounds on the relevance of strong mechanism of financial reporting in enhancing financial accountability as a key instrument of controlling misappropriation of public funds. Also, comprehensive financial reporting is enforced by demanding accountability on what local governments have done with public finances (Schaeffer and Yilmaz; 2008). Financial accountability helps to control misuse of public resources by focusing on those entrusted with public funds in order to facilitate smooth provision of public social services.

Koornhof and Du Plessis[35] took an empirical approach to assessing the usefulness of the annual report as a mechanism of accountability and found out that for the annual report to be the principle means by which an authority is held to account, it must contain improved measures of performance.

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[33] Adeolu A M and David A, 'Accountability and Transparency in Public Financial Management in Nigeria; Challenges and Prospects' (2012) 2 International Journal of Marketing and Technology 5, 7.

[34] Mande B, 'Perceptions on Government Financial Reporting in Nigeria' (2015) 6 Journal of Finance, Accounting and Management 1, 8.

[35] Koornhof C and Du Plessis D, 'Red flagging as an indicator of financial statement fraud: the perspective of investors and lenders' (2000) Meditari Accountancy Research 69, 77

Earlier in 1991, Kanyinga and Mitullah[36] surveyed three user groups to find out what they wanted in financial reports. Their study showed that the inclusion of performance information (five or ten-year trend) was desirable and would shed more light on the performance of NGO sector organizations.

Hladchenko[37] (2016) studied government financial accountability and transparency in the digital world and argues that government financial accountability and transparency contributes significantly on the performance of political system and quality of public administration. The main focus of financial accountability is not only to control public resources but also to stabilize good governance at the local government and public sector in general. Good governance ensures smooth operation and stabilization of social economic framework at the local government level. Therefore, the efforts of improving financial accountability should also correspond with the enhancement of good governance for local government authorities.

1.6.2 Internal Controls and the Procurement Process

Nduati[38] studied internal controls determinants of compliance with access to government procurement opportunities (AGPO) regulations for special groups by public universities in Kenya. The study established that internal processes positively contributed to level of compliance with AGPO regulations. The study also concluded that a higher threshold of internal controls leads to a higher level of compliance with AGPO regulations for special groups. The study recommended that government agencies should maintain a high threshold of internal controls to ensure a high compliance with AGPO regulations.

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[36] Kanyinga H and Mitullah R, 'Conscientiousness and managerial performance' (2007) Journal of Occupational and Organizational Psychology 171, 180

[37] Hladchenko L, *Government Financial Accountability and Transparency in the Digital World* (ICTERI 2016), 15

[38] Nduati M, *Determinants of Compliance with Access to Government Procurement Opportunities Regulations for Special Groups by Public Universities in Kenya* (Unpublished Phd thesis, Jomo Kenyatta University of Science and Technology, 2017), 2

Wuantai[39] studied the role of internal control systems on the security of state corporations' assets in Kenya. The findings revealed that control environment has a positive but not significant effect on security of SCs' assets in Kenya. Results reveal that risk assessment has a negative but insignificant effect on security of SCs' assets in Kenya. Monitoring activities and timely movement of information and feedback across levels of the organization were however found to have a powerful impact on efforts to secure assets of SCs.

Achuora, Arasa and Ochriri[40] examined the factors that affect effectiveness of public procurement audits for constituency development funds (CDF) in Kenya. Specifically, they investigated the effect of the legal framework, auditor's specific professional qualities, technical audit factors and client-related factors on effectiveness of public procurement audits, descriptive research design was employed, using a stratified random sampling to ensure representativeness. The study findings indicate that technical audit factors have greatest influence on effectiveness of public procurement audit, followed by regulatory framework, client related factors and auditor's professional qualities respectively.

Osei-tutu, Mensah and Ameyaw[41] assessing the level of compliance with the Public Procurement Act, 2003 (Act 663) in public entities in Ashanti region of Ghana. Public procurement in Ghana has undergone several reviews since independence with the intent of strengthening Public Financial Management Systems. The study was on the legal, institutional and regulatory framework of the public procurement reform in Ghana and analyzed its potential effect on entities in Ashanti region. The study revealed that the Public Procurement Act, somewhat,

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[39] Wuantai S, *Role of internal control systems on the security of state corporations' assets in Kenya* (Unpublished Masers Thesis KCA university, 2017), 15

[40] Achuora J, Arasa R and Ochriri G, 'Factors that affect effectiveness of public procurement audits for constituency development funds (CDF) in Kenya' (2010) 8 European Scientific Journal, ESJ 25, 31.

[41] Osei-tutu E, Mensah S and Ameyaw C, 'The level of compliance with the public procurement Act (Act 663) in Ghana' (2010) 8 Management and Innovation for a Sustainable Built Environment, 303, 312.

succeeded in harmonizing the process of procurement in the public entities to secure fiscal transparency, efficiency, and increase competition among the local industry. However, the challenge of creating procurement structures and recruiting appropriate personnel to manage procurement process limits the scope for efficiency and value for money.

Kamau and Rotich[42] studied the effect of internal control system on procurement procedures in constituency development funded projects. Accountability and transparency in CDF projects were found to be crucial in influencing the projects' procurement procedures. The study concluded that, accountability and transparency in CDF projects is crucial in influencing the projects' procurement procedures. The study recommended that watchdog organizations and relevant boards or civic organizations should demand for transparency and accountability in CDF projects' procurement and implementation.

According to the Public Procurement and Oversight Act, 2007[43], the integrity and transparency of a public procurement system is said to rely on a number of control mechanisms which include an effective control and audit system, an efficient appeals mechanism, a comprehensive information sharing system that enables civil society and other stakeholders to conduct social audit, and effective ethics and anti-corruption measures.

Integration of Information and Communications Technology (ICT) in procurement procedures is very important. This assertion is reinforced by the results of a study by Ngugi and Mugo[44] where it was established that ICT adoption affected procurement process at Kenya government ministries to a great extent. Incorporating ICT was found to enhance the process of effective

[42] Kamau P and Rotich G, 'Effect of internal control system on procurement procedures in constituency development funded projects' (2015) 8 International Journal of Economics, Commerce and Management 15, 16
[43] The Public Procurement and Oversight Act (2007) 73
[44] Ngugi J and Mugo M, 'Factors Influencing Procurement Practices in Government Ministries in Kenya' (2018) 5 The Strategic Journal of Business & Change Management 233, 244

tendering through advertising, sourcing reviews, pre-qualification, potential for cost savings and greater awareness for new development. The adoption of ICT was argued by the two scholars to capacitate the aforementioned ministries to provide excellent service to their suppliers in an effective and transparent manner.

1.6.3 Performance Management Practices

Jumbe[45] studied the role of performance appraisal on service delivery with reference to immigration department in Dar es Salaam. Results indicated that available performance appraisal policy is almost outdated to operate in the current work environment. Problems reported to face performance appraisal include lack of awareness of the performance appraisal, to the extent that some of them fail to understand the essence of performance appraisal. Apart from that, another problem that was mentioned is lack of direct involvement and support of top management especially the issue of sufficient budget to conduct training for employees, lack of financial support in the process of setting the criteria and harmonising them with subordinates.

Monari[46] studied the influence of performance management initiatives on service delivery in SCs in Kenya. The study found that reward programs have positive influence on service delivery among state corporations in Kenya. Further, HR audit practices were found to have significant positive effect on service delivery and therefore, this means that state corporations that adopt HR audit practices will have better service delivery. Performance appraisal was also found to have positive and significant influence on service delivery among the state corporations in Kenya. When effective, the appraisal process reinforces an individual's sense of personal worth and

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[45]Jumbe S, *The Role of Performance Appraisal On Service Delivery: A Case Immigration Department in Dar Es Salaam* (Unpublished Master Thesis, Open University of Tanzania, 2015) 15
[46]Monari D, 'Influence of performance management initiatives on service delivery in state corporations in Kenya' (2017) 4 International Journal of Education and Research 2, 6

assists in developing his/her aspirations. Additionally, feedback mechanisms were found to positively and significantly influence service delivery among the state corporations.

Korir, Rotich and Bengat[47] studied the role of performance management on public service delivery in Kenya and found that public institutions can improve on their service delivery process and enhance their competitiveness by adopting performance contracting in their management programme. It was also noted that public service reforms have entailed multiple performance improvement initiatives including rapid results initiative, performance contracting and service charter. The gains being recorded in the public sector performance in Kenya were attributed in the study to these performance improvement initiatives though to varying degrees.

Choke[48] studied the perceived link between strategic planning and performance contracting in SCs in Kenya and found that most managers perceive performance contracting as a management tool useful in achieving set targets.

Kiboi[49] on the other hand studied the management perception of performance contracting in state corporations and came to the same conclusion as Choke.

Similarly, Opondo[50] surveyed Strategic Planning and Performance of Public Corporations in Kenya, and concluded that the use of performance contracts is a process of performance management that leads to effective and efficient management practices, ensures improved staff performance, increased autonomy, and accelerated service delivery.

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[47] Korir S, Rotich J and Bengat J, 'Role of performance management on public service delivery in Kenya' 2015 3 European Journal of Research and Reflection in Management Sciences 4, 10

[48] Choke P, 'The perceived link between strategic planning and performance contracting instate corporations in Kenya' (2006) 55 International Journal of Productivity and Performance Management 448, 455

[49] Kiboi W, *Management perception of performance contracting in state corporations* (Unpublished MBA project. *University* of Nairobi 2006) 4

[50] Opondo W, 'A Survey of Strategic Planning and Performance of Public Corporations in Kenya' (*Unpublished MBA Project. University* of Nairobi 2004) 3.

Perceived factors affecting performance management among local authorities were investigated by Nzuve and Kaimuri[51]. They evaluated how stakeholder involvement, leadership and organizational culture affect performance management practices and concluded that if all the three are not incorporated then the performance management process is bound to fail. A study on the implementation of performance contracting in SCs was done by Wesonga, Tabitha and Muya.[52] In the study, they evaluated how the process should be managed through employee training and involvement.

Kinanga and Partoip[53] in a study on linkage between employee productivity and participation in target setting found that there was a strong positive correlation between performance target setting and employee performance. The study concluded that performance target setting had a strong positive effect on employee performance in public enterprises in Kenya and thus need to ensure performance target setting is well organized and planned. From the findings the study recommended that performance target setting in performance contracting be expanded to cover all areas of the organization and be cascaded to all employees of the organization and that evaluation be linked to some incentive system so that performance can be sustained.

The foregoing findings were similar to earlier findings by Kobia and Mohammed[54] in a study where they sought to establish Perceived Factors affecting Performance Management among Local Authorities in Kenya. The study found out that the perceived factors that influenced performance management were understanding of performance management, stakeholder

[51] Nzuve N and Kaimuri N, 'Perceived Factors affecting Performance Management among Local Authorities in Kenya: A Case of the City Council of Nairobi' (2013) 3 DBA Africa Management Review 59, 63
[52] Nyongesa J, Sewe T and Ng'ang'a J, *Challenges facing the implementation of performance contracts in state corporations in Kenya* (Unpublished Master Thesis, Masa Mara University. 2012) 17
[53] Kinanga R and Partoip S, 'Linkage between Target Setting in Performance Contracting and Employee Performance. A Kenyan Perspective' (2013) 2 Journal of Human Resources Management Research 2, 5
[54] Kobia M and Mohamed N, 'The Kenya experience with performance Contracting, A paper presented during the African Association for Public Administration & Management (2tfh AAPAM Annual Roundtable Conference' Arusha, Tanzania, on 4th - 8th December, 2006) 11

involvement, continuous monitoring, feedback, dissemination and learning from results, organizational culture and leadership commitment.

1.7 Theoretical Framework

This study will rely on several theories which will help us appreciate why there should be a case for reforming corporate governance in Kenya driven by the need to ensure that corporate power is exercised in the best interest of all stakeholders. The core focus of corporate governance being on values and principles of integrity, accountability, transparency, leadership and stakeholder protection and also providing the framework for achieving the objectives of the organization, and creating a benchmark for the measurement of corporate performance and disclosure.

1.7.1 Financial accountability

The study sought to examine the extent to which financial accountability influences service delivery among SCs in Kenya. To this end, various theories underpin the concept of financial accountability. Of relevance to the question of service delivery among state corporations include Agency and the Moral Agency theories.

Agency theory seeks to address the problem of misalignment of interests or address the core "corporate governance dilemma. Under this theory, it is argued that the various players are self-seeking and opportunistic hence the need to create a governance structure that balances the interests of the principles (the public) with those of their agents (the board). It also perceives the governance relationship as a contract agreement between principal and agent.[55] This theory arises from the reality that corporations are often owned by a large number of shareholders and

[55] Jensen MC and Meckling W H, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3 Journal of Financial Economics 305, 311.

run by “professional managers”.[56] These managers rarely own shares in such corporations and this results to a problem, a problem where directors of the company are the managers of the shareholders’ money and there is an element of risk that the directors will act in their own interests rather than the interests of the shareholders.[57]

This theory is relevant to this study in that in order to strike a balance between the competing interests / pluralist interests and common goals amongst the key players, the core pillars of corporate governance being accountability and responsibility come into play. For instance, when it comes to public procurement, the rationale behind public procurement regulation under the Principal / Agency Theory is to correct the problems of information asymmetry, conflict of interest, the agent’s tendency to abuse delegated discretionary powers and the agent’s natural tendency towards inefficiency.

As a matter of fact, numerous scandals witnessed in Kenya are attributable to instances where persons placed under fiduciary capacity by law, offended principles of corporate governance by engaging in unethical conduct. Adam Smith in addition to this recognized the issue of accountability as a dilemma that bedevils the corporation concept and it is factual that it is much a problem today in our era of the Uchumi Supermarkets Limited and East African Portland Cement scandals.[58]

The Organization for Economic Co-operation and Development (OECD) has enumerated guidelines on corporate governance of State Owned Enterprises (SOEs). It appeals to SOEs to observe high standards of accountability and responsibility and be the subject of high quality

[56] Byuiyan H U and Biswas P K, ‘Agency Problem and the Role of Corporate Governance’ (http://ssrn.com/abstract=1250842 2019) 9.
[57] Charreaux, G, ‘Corporate Governance Theories: From Micro Theories to National Systems Theories’ (2004) Working paper of FARGO, 19
[58] Adam smith, *An Inquiry Into The Nature and Causes of The Wealth of Nations* (University of Chicago Press 1976) 6

accounting, disclosure, compliance and auditing standards as listed companies. In doing this, SOEs are expected to provide financial and non-financial disclosures on an entity, which disclosures match with internationally recognized standards of corporate disclosure.[59]

The Constitution of Kenya also encompasses principles of accountability and responsibility. It also provides for national values and principles of governance.[60] This compounded with the *Mwongozo* code provides several devices for mitigating agency problems that include timely, accurate and sufficient disclosure of information, transparency in the ownership structure and active monitoring of executives.

The Moral Agency theory posits that corporations should be morally responsible citizens and engage in activities which are for the benefit of society. It is based on the understanding that a corporation, through its organs which include the Board and the general meeting, is able to make a moral choice on what is wrong or right. The people who can make such a moral choice for the organization are then its moral agents.[61]

The import of this theory is that such persons will be held morally and ethically accountable for the moral and ethical choices they make for the organization. Since they will be held personally responsible, directors will also ensure that organizations make proper and acceptable moral choices.[62]

SCs must therefore create value for society and play by the moral agency rule this being the only currency that can guarantee their sustainable success in business since they are competing in a field where all purchasing decisions are based on trust, relationships and referrals, hence their

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[59] OECD Guidelines 2015, 22
[60] Constitution of Kenya 2010 Article 10, 11.
[61] Donaldson T, *Corporations and Morality* (Englewood Cliffs, NJ: Prentice Hall 1982) 89.
[62] C.M Daily et al, 'Corporate Governance: Decades of Dialogue and Data' (2003) 28(3) Academy of Management Review 372, 381

ethical conduct must be beyond reproach. As espoused by the moral agency theory, administrators among SCs are expected to be accountable for the use of public funds through practice a trail of which should be presented in reports for public scrutiny.

1.7.2 Internal Controls in the Procurement Process

The study sought to determine how internal controls in the procurement process influence service delivery among SCs in Kenya. To this end, the study employs both Systems theory and Complexity theory to understand the relationship between internal controls in the procurement process and service delivery.

Systems theory is a concept that originated from biology, economics, and engineering, which explores principles and laws that can be generalized across various systems.[63] A system is a set of two or more elements whereby the behavior of each element has an effect on the behavior of the whole; the behavior of the elements and their effects on the whole are interdependent; and while subgroups of the elements all have an effect on the behavior of the whole, none has an independent effect on it. In other words, a system comprises of subsystems whose inter-relationships and interdependence move toward equilibrium within the larger system.[64]

All conventional models and theories of organizations typically embraced the closed systems approach to the study of organizations by assuming that the main features of an organization are its internal elements.[65] While closed systems approach consider the external environment and the organization's interaction with it, to be for the most part inconsequential, open systems approach views the organizations' interaction with the external environment as vital for organizational

[63] Yoon S and Kuchinke K P, Systems theory and technology. Lenses to analyze an organization (2005) 44 *Performance Improvement* 15, 16
[64] Martinelli D P, 'Systems hierarchies and management' (2001) 18 Systems Research and Behavioral Science 69.
[65] Sullivan T, 'The viability of using various system theories to describe organizational change' (2004) 42 Journal of Educational Administration 43, 45

survival and success. In open systems, any change in any elements of the system causes changes in other elements.[66]

The theory is relevant to the present study as it espouses how SCs operate an open systems model as public entities and therefore open to such external forces as public tendering and procurement functions, which necessitate putting in place internal control systems to ensure that in the course of discharging such functions as tendering and procurement, the system is not open to corruption, nepotism, tribalism among other social vices.

Complexity theory focuses on how parts at a micro-level in a complex system affect emergent behavior and overall outcome at the macro-level.[67] It is concerned with the study of emergent order in what otherwise may be considered as very disorderly systems. As the complexity of a system increases, the ability to understand and use information to plan and predict becomes more difficult. Over time, the increasing complexity leads to more change within the system.[68]

As the system becomes more complex, making sense of it becomes more difficult and adaptation to the changing environment becomes more problematic.[69] Complexity theory paradigm rejects the mechanical ontological models, which assume linear causality between events and effects.[70] According to Rhee,[71] the characteristic structural and behavioral patterns in a complex system are due to the interactions among the system's parts. Complex systems tend to be deterministic in

[66] Wang T, 'From general system theory to total quality management' (2004) 4 Journal of American Academy of Business 394, 399.
[67] McElroy M W, 'Integrating complexity theory, knowledge management and organization learning' (2000) 4 Journal of Knowledge Management 195, 200.
[68] Chakravarthy B, 'A new strategy framework from coping with turbulence' (1997) 8 Sloan Management Review, Winter 69, 75.
[69] Mason R, 'The external environment's effect on management and strategy. A complexity theory approach' (2007) 35 Management Decision 10, 13
[70] Styhre A, 'Non-linear change in organizations: organization change management informed by complexity theory' (2002) 23 Leadership & Organization Development Journal 343, 356
[71] Rhee Y, 'Complex systems approach to the study of politics' (2000) 17 Systems Research and Behavioral Science 487, 501

nature and evolve through a phase of instability, which eventually reaches another threshold where a new relationship is established between its internal and external environments and itself. Systems that operate near a threshold of instability tend to exhibit creativity and produce new and innovative behaviors at the level of the whole system.[72]

Complexity theory is relevant to the present study in that both the internal and external environment with which SCs interact through procurement processes is generally beyond the control of any SC and comprises of the staff in their hierarchies, the economy, suppliers, customers, social-cultural-demographic factors, political and legal governmental aspects and technology.[73] Based on the foregoing, SCs as other organizations are complex systems, which implies that the organization is able to learn from its environment and change its internal structure and its functioning over time, through such practices as establishment of internal control systems thus changing the behavior of individual elements which could include all the vices that work against an effective procurement system.[74]

1.7.3 Performance Management Practices

To assess the extent to which performance management practices influence service delivery among SCs in Kenya. To this end, the study employed both the Goal-setting and New Public Management (NPM) theories to understand the relationship between performance management practices and service delivery.

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[72] Styhre A, 'Non-linear change in organizations: organization change management informed by complexity theory' (2002) 23 Leadership & Organization Development Journal 343, 347.
[73] Capps C and Hazen S E, 'Applying general systems theory to the strategic scanning of the environment from 2015 to 2050' (2002) 19 International Journal of management 308, 313
[74] Sherif K, 'An adaptive strategy for managing knowledge in organizations' (2006), 10 Journal of Knowledge Management 72, 75

Goal Setting Theory was proposed by Edwin Locke in the year 1968 (Obasan and Sotunde, 2011:116).[75] The theory emphasizes the important relationship between goals and performance. The goal setting theory starts from the simple observation that setting performance goal for employees motivates them to strive towards achieving these goals. In this way, an assigned goal influences employees' beliefs about being able to perform the task at hand and if it becomes certain that current performance is not achieving desired goals, employees will be motivated to increase effort or change their strategy.[76] It suggests that the individual goals established by an employee play an important role in motivating him for superior performance. This is because the employees keep following their goals. If these goals are not achieved, they either improve their performance or modify the goals and make them more realistic. In case performance improves, it will result in achievement of the performance management system aims.[77]

The reason why goal setting typically has a positive effect on performance is that a specific high goal affects choice, effort, and persistence; that is, a specific goal or target increases a person's focus on what is to be accomplished versus putting it off for a later date. Commitment to a specific high goal also leads to persistence until the goal is attained.[78]

Goal setting theory was developed inductively from the results of empirical studies conducted in laboratory and field settings on individuals and teams. The theory as observed by Latham, Borgogni and Petitta[79] states that: A specific high goal leads to higher performance than an easy

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[75] Obasan KA and Sotunde OA, 'Goal Setting and Performance Appraisal in Public Sector of Nigeria: An Empirical Investigation' (2011) 2 Journal of Business Management and Economics 116, 118
[76] O'Neil J R and Drillings M, *Motivation: Theory and Research. Hillsdale* (Lawrence Erlbaum Associates 1994).
[77] Mabey C, Salaman G and Storey J, Human Resource Management: A Strategic Introduction (2nd Edition. London: Blackwell Publishers Ltd 1999), 5.
[78] McAdam R, Hazlett SA and Casey C, 'Performance management in the UK public sector Addressing multiple stakeholder complexity' (2005) 18 International Journal of Public Sector, Management 256, 258
[79] Locke EA and Latham GP, *Goal-Setting: A motivational technique that works* (Englewood Cliffs, NJ: Prentice Hall 1984), 60.

goal; a general goal such as ‘‘make children healthy’’ or an exhortation to ‘‘do one’s best,’’ or no goal setting; Given ability as well as commitment, the higher the goal, the higher a person’s performance; and Variables such as participation in decision making, feedback, including praise, competition, and monetary incentives only affect a person’s behaviour to the extent that they lead to the setting of and commitment to a specific high goal.

The theory is of pertinence to the present study in that regardless of the level of government, goal setting has a role to play in the practice of public sector management and administrative reform. The problem of intentionally setting vague performance outcome goals for employees at the national level may be overcome by setting specific high behavioural goals. Setting specific challenging learning goals would also appear to be applicable at any level of government where employees lack the knowledge of how to attain a given outcome. [80] It is therefore a useful tool in analyzing performance management and productivity among SCs in the country.

The NPM theory is an approach to running public service organizations that is used in government and public service institutions and agencies, at both sub-national and national levels. The term was first introduced by scholars in the UK and Australia[81] to describe approaches that were developed during the 1980s as part of an effort to make the public service more "businesslike" and to improve its efficiency by using private sector management models. As with the private sector, which focuses on "customer service", NPM reforms often focus on the "centrality of citizens who were the recipient of the services or customers to the public

[80] Latham GP, Borgogni L and Petitta L, Goal Setting and Performance Management in the Public Sector (2008) 11 International Public Management Journal 385, 388

[81] Andrews, Rhys and Steven Van de Walle, ‘New Public Management and Citizens' Perceptions of Local Service Efficiency, Responsiveness, Equity and Effectiveness’ (2013) 9 Public Management Review 8, 16

sector". NPM reformers experimented with using decentralized service delivery models, to give local agencies more freedom in how they delivered programs or services.[82]

In some cases, NPM reforms that use e-government consolidate a program or service to a central location to reduce costs. Some governments try using quasi-market structures, so that the public sector would have to compete against the private sector (notably in the United Kingdom (UK), in health care).[83] Key themes in NPM are "financial control, value for money, increasing efficiency, identifying and setting targets and continuance monitoring of performance, and handing over power to the senior management" executives. Under NPM, performance is assessed with audits, benchmarks and performance evaluations.[84]

Accordingly, NPM is relevant in the present study as informing the various performance management systems in place across the SCs in the country. As such, the theory was instrumental in underpinning how the various performance management practices influence service delivery among SCs.

1.8 Justification of the Study

Good corporate governance is essential element in the growth and development of competitive markets of developing countries, noting that SCs are established to engage in business on behalf of the government and this is essential in attracting domestic and foreign investment. SCs are headed by independent entities to protect them from socio-political interferences and biases. The difficulty in the case of developing countries is that the development of competitive markets is a slow process and once corruption has taken root, it is difficult to eradicate. It is a vicious cycle

[82] Cohen Nissim, 'Forgoing New Public Management and Adopting Post-New Public Management Principles: The On-Going Civil Service Reform in Israel' (2016) 36 Public Administration and Development 20, 29
[83] Horton, Sylvia, ed. *New Public Management: Its Impact on Public Servants' Identity*. (Bradford 2006) 36
[84] Morales Casetti, 'New Public Management in Chile: Origins and Effects' (2014) 3 Revista de Ciencia Politica 417, 420

emphasizing the fact that corruption is a contagious phenomenon.[85] As an accepted way of doing business, it may become entrenched as a cultural necessity with the consequent desire of all participants to conform.[86]

In this context, it has been argued that good corporate governance is the make or break of any entity, since it is primarily concerned with the establishment of an appropriate legal, economic and institutional environment that would facilitate and allow business enterprises to grow, thrive, survive and yield long term value. It is without doubt that corporate governance underpins public policy which drives national values and ethics through which the Government grants SCs authority to operate.

This study will provide insight on what needs to be done to improve the governance framework for SCs cutting across every sphere of their management, from action plans and internal controls, all the way to performance measurement and corporate disclosures. It will also contribute to the existing literature on corporate governance when it comes to SCs and how to boost their overall performance.

In this case this study shall pay special attention to proposals for practical interventions that will change the current attitudes and lack of national ethos, seek to entrench honorable behavior and integrity in SCs. It calls for a paradigm shift in strategy when it comes to implementation of *Mwongozo* noting it has always been said that strategy is often the road map that translates purpose into actions and results.

[85] Cadot Olivier, 'Corruption as a Gamble' (1987) 33 Journal of Public Economics 223, 226.
[86] Antoci, Angelo and Pier Luigi Sacco, 'A public contracting evolutionary game with corruption' (1995) 61 Journal of economics 89, 92.

1.9 Research Methodology

The study adopts an interpretivist point of view employing qualitative methodologies and methods and the target population includes all SCs in the country. The study is qualitative in nature and required an analytical approach involving analyzing the various codes of corporate governance that were utilized in the conception of the *Mwongozo* code. This required a collection of data from secondary sources.

The secondary sources included the *Mwongozo* code of corporate governance for SCs, the Constitution of Kenya, relevant national legislations and codes of best practices. Other sources encompassed information on the subject matter from textbooks, journals, case law (both national and international cases), newspapers and magazines. These materials were sourced from the internet, libraries such as the University of Nairobi and the resource centres at the Institute of Directors and Centre for Corporate Governance. Data is analyzed qualitatively through thematic content analysis.

1.10 Chapter Breakdown

The study is structured into seven chapters. Chapter One covers the introduction where the case for the study is built, pointing out the socio-economic and political problems warranting the study, the study objectives, theoretical foundation, the literature review and methodology.

Chapter Two on the other hand delves into a historical account of public service reforms in Kenya and the emergence of the concepts of NPM and corporate governance as well as the *Mwongozo* code of corporate governance for SCs.

Chapter Three explores financial accountability among SCs in Kenya where the various systems in place for financial accountability are explored as stipulated in *Mwongozo*.

Chapter four concerns the internal controls and the procurement process among SCs in Kenya where the pertinent stipulations of the *Mwongozo* code are discussed in relation to their application and applicability by SCs in the country.

Chapter Five delves into the various performance management practices applicable among SCs in the country and their effect on service delivery, drawing from both *Mwongozo* and the various legal, regulatory and policy texts.

Chapter Six details the various lessons from both the United Kingdom and New Zealand with reference to financial accountability, internal controls and the procurement process as well as performance management practices among state corporations.

The thesis culminates in Chapter Seven where the study presents the summary of key findings, conclusions and recommendations based on the results obtained and the inferences drawn. Suggestions for further studies are also provided.

CHAPTER TWO

HISTORICAL ACCOUNT OF PUBLIC SERVICE REFORMS IN KENYA

2.1 Introduction

Kenya's civil service has undergone a number of reform changes since gaining independence in the year 1963. Some of these changes include employee rationalization leading to wage bill reduction, performance improvement, structural adjustment programme after aid cuts, and the institutionalization of results-based management. This chapter delves into a historical account of public service reforms in Kenya and the emergence of the concepts of NPM and corporate governance as well as the *Mwongozo* code of corporate governance for SCs.

2.2 Structural Adjustment Programme (1986-1996)

To deal with the deteriorating economic conditions, the Kenyan government with the assistance of the World Bank and the International Monetary Fund designed a structural adjustment program (SAP) which was to be implemented at the beginning of June 1986 and ended in 1996. The SAP aimed at facilitating economic growth as a means of jump-starting the economy towards sustainable economic growth and development. SAPs introduced in the late 1980s are important events in Kenya's policy history. In particular, SAPs in Kenya consisted of price decontrols, tariff adjustments, the reforming of SCs and cost sharing in the delivery of social services.[87]

Among the reforms implemented within the SAPs in the country were the elimination of exchange controls including restrictions on inward portfolio investments and removal all trade restrictions, except for a short list of a few products controlled for health, security and environmental reasons. Steps were also taken to strengthen the financial system, including

[87] Karingi, Stephen and Mahinda Siriwandana, 'Structural Adjustment Policies and the Kenyan Economy: A Computable General Equilibrium Analysis' (2001) 13 African Development Review 301, 313.

enhanced prudential supervision of commercial banks, the closure of financially unsound banks, and strict enforcement of statutory requirements of nonbank financial institutions (NBFIs), some of which were either transformed into banks or merged with existing banks.[88] Firm actions were also taken to deal with the hitherto widespread mismanagement and corruption in the financial system involving access to credit from the Central Bank and budgetary resources. A major civil service reform programme aimed at reducing the overall size of the civil service and achieving cost containment, and rendering the civil service more efficient by improving working conditions.[89]

Overall however, SAPS came to be associated with adverse effects on the Kenyan economy. The programmes have been linked to the high rate of income inequality, inflation, unemployment, retrenchment, and so on, which ended up lowering living standards, especially, those relating to the material resources at the disposal of the individual family unit.[90] Furthermore, the SAPs in Kenya came to be linked to the increasing deviant and crime rates, ethnic hatred and discrimination and welfare problems, especially in the areas of education and health. IMF and World Bank and the government of Kenya criticized one another on the nature of implementation of structural adjustment programmes and their consequences.[91]

The IMF and World Bank, on their part, criticized the Kenya government for undermining the implementation process by being, often lethargic and sometimes acting contrary to the stated policies; that transparency and financial discipline were not undertaken, trade reforms were not

[88] Kimalu, Paul, Nancy Nafula, Damiano Manda, Germano Mwabu, and Mwangi Kimenyi. 'A Situational Analysis of Poverty in Kenya' (2002) KIPPRA Working Paper No. 6-2002. Nairobi: Kenya Institute for Public Policy and Research Analysis, 20

[89] Manda, Damiano and Kunal Sen, 'The Labour Market Effects of Globalization in Kenya' (2004) 16 Journal of International Development 11, 16.

[90] Ikiara 1, *Industrialization in Kenya: In Search of a Strategy* (Heinemann 1990) 18.

[91] Mwega FW and Ndulu K, *Economic Adjustment Policies*. In Barkan JD, *Beyond Capitalism Verses Socialism in Kenya and Tanzania* (East African Educational Publishers 1994) 88.

carried out, the pace was not incremental, and the commitment of top officials waxed and waned and thus lack of discipline and transparency dampened or nullified the structural reforms (Swamy 1994). The government of Kenya argued that the reforms addressed only the long-term implications of the economy while in the short run causing hardship, especially among the vulnerable.[92]

Like Kenya, the criticisms of SAPs in Africa have been at a number of inter-related levels with critics challenging the basis and assumptions of SAPs. They have also pointed to the fact that the process of designing them is undemocratic and is usually dominated by officials of the IFIs yielding a product 'not owned' by the implementing country. These have been underlined by the expectations raised by the programmes' advocates at their inception not materializing.[93] The modesty of the macro-economic gains of SAPs has been compared to the programmes' profound socio-economic and political effects, with the lop-sided distribution of limited gains and extensive hardships raising questions of social justice. A number of analysts and activists assert that SAPs have failed in Africa because they have been based on an assumption that a uniform set of principles can yield successful policies for all countries irrespective of their differences. This overlooking of important differences, it is said, has led to policies which ignore the differences between Africa and other continents and the differences within Africa itself.[94]

2.3 Economic Recovery Strategy (2003-2007)

The Kenyan economy had performed poorly over the 1980s and 1990s amidst the implementation of SAPs, leading to deterioration in the quality of life of Kenyans. Among the

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[92] Swammy G, *Adjustment in Africa: Lessons from Country Case Studies* (Washington, DC, the World Bank 1994) 101.
[93] World Bank and UNDP, *Kenya: Challenge of Promoting Exports (*Washington, DC, World Bank 1993) 99.
[94] Obidegwu C, *Recent Economic Trends, Adjustment and Poverty in Sub-Saharan Africa (*Washington DC, World Bank 1989) 71.

reasons for this poor performance include poor implementation of economic policies, mismanagement, and weak institutions of governance. After making initial gains soon after independence, the economy started a downward trend during the late 1980s and this deteriorated by late 1990s. The SAPs reforms of the 1980s and 1990s that sought to deal with structural problems appear to only have had limited success in stimulating economic growth. This is particularly so because little progress was made in improving economic governance. Resulting from that poor economic performance was increased poverty, unemployment, high domestic and foreign debt, crime, deterioration in health status, declining school enrolments and generally a marked decline in the quality of life.[95]

It is against this background that the Economic Recovery Strategy for Wealth and Employment Creation 2003-2007[96] was developed by the National Alliance Rainbow Coalition (NARC) Government as the blueprint that was aimed at guiding the Government's economic policies over the next five years. The NARC Government placed economic recovery on top of its policy agenda in order to reverse decades of slow and stagnant economic growth that had adversely undermined the well-being of Kenyans. The Action Plan was to harmonize strategies for accelerated economic growth with the country's poverty reduction strategies and the ideals outlined in the NARC Manifesto. The central focus of the Plan was job creation through sound macroeconomic policies, improved governance, efficient public service delivery, an enabling environment for the private sector to do business, and through public investments and policies that reduce the cost of doing business.[97]

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[95] Ferguson J, *Global Shadows: Africa in the Neoliberal World Order* (London: Duke University Press 2006) 16.
[96] The Economic Recovery Strategy for Wealth and Employment Creation 2003-2007, 65
[97] Ikiara GK, Nyandemo SM and Ikiara MM, *Kenya's service sector: emerging national, regional and global issues. Paper prepared for the African Economic Research Consortium (AERC)* (Collaborative Research Project on African Imperatives in the New World Order: Draft August 2013), 76.

The Plan also included an equity and social-economic agenda focusing on reducing inequalities in access to productive resources and basic goods and services. It further paid particular attention to promoting actions leading to the sustainable management of natural resources such as land, water, forests to which the very poor depend on. The Plan was therefore the Government's social contract with the people of Kenya. Compared to the 1980s and the 1990s, its implementation translated quite notably into sustained economic growth, wealth creation, poverty reduction and a broad improvement in the well-being of Kenyans, therefore fulfilling the aspirations and expectations of Kenyans as expressed by their electing the NARC government.[98]

Among the notable contributions of the Economic Recovery Strategy included the creation o f a new Ministry of Justice and Constitutional Affairs and a new department, under the President's Office, in charge of Governance and Ethics; the passage into law in May 2003 of two key pieces of legislation including the Anticorruption and Economic Crimes Act which created the Kenya Anticorruption Commission with responsibility to investigate corruption and economic crimes; and the Public Officers Ethics Act which provides for codes of conduct for all public officers including members of parliament, the executive and the judiciary, and which compels all officers to declare their wealth including that of their spouses and dependent children. Others included the programming for legislation of other governance-related bills such as the Public Procurement and Disposal of Public Assets, Financial Management and Accountability Bill, among others within the 2003/04 Financial Year; and the establishment of a Commission to investigate and

[98] World Bank/KIPPRA, *RPED survey for Kenya* (2009) 20

report on the Goldenberg scandal so that proper prosecution can follow and Government can recover some of the looted funds.[99]

2.4 Results Based Management (2004 to Date)

Introduced by the United Nations in 2000, RBM is viewed as a contemporary management approach and philosophy that is based on clearly defined results and aims to change the way in which an organization operates by attaining identified goals timeously and appropriately at all levels; its values, operating systems and decision-making procedures. The main elements of RBM include satisfying customers and mandating the organization, specifying results and performance expectations, linking budget allocation to output delivery, requiring performance reporting, promoting performance analysis and continuous improvement, and employing a merit system in managing human resources. [100]

A client focus is the key leading strength for effective RBM in organizations. Implementing an RBM System, an analysis of its customers and their needs, the mandate of the organization and the impacts and benefits the organization envisages to deliver, is crucial.[101] Once the main result areas have been determined, RBM requires their conversion into benchmarked and targeted measures. The private sector often uses three perspectives in specifying financial measures, namely those of clients, internal organizational processes, learning and growth.[102]

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[99] KIPPRA, 'Financial sector in the economic recovery process: role, challenges and future. Document circulated at a conference held on 4 March 2015, Mayfair Hotel, Nairobi' Kenya Institute for Public Policy Research and Analysis, 54

[100]Results-based Monitoring and Evaluation Toolkit 2009, 13

[101] Saldanha C, 'Promoting Results-based Management in the Public Sectors of Developing Countries. Paper presented on the Roundtable on Better Measuring, Monitoring, and Managing for Results' (World Bank, Washington, D.C 2002) 55.

[102] Bester A, 'RBM in the United Nations Development System: Progress and Challenges' (2012) A Report prepared for the United Nations Department of Economic and Social Affairs, for the Quadrennial Comprehensive Policy Review. Final Report. New York: United Nations, 60

Output-based budgeting refers to the process in which the cost of delivering outputs of agency budgets in an organization is assessed and allocated.[103] This type of budgeting is a logical outcome of applying RBM. However, the necessary skills required to determine outputs, cost and verifying its accuracy, monitor and report on its implementation, determine the necessity to revise budgets based on previous performance, often do not exist in developing countries.[104]

Regular performance reporting presents the crucial data on which the performance of an organization is measured against performance indicators which represent the results of the organization and the outcomes it has attained.[105] Since public sector institutions often do not have information on their performance readily available, the implementation of RBM must be accompanied by the concurrent introduction of an effective management information system that can provide timely feedback on the organization's performance.[106]

Performance analysis and continuous improvement are viewed to be a vital and integral element of RBM. Performance analysis identifies internal or external causes in order to adjust and improve performance in the organization. By reporting on performance, the organization identifies problems related to performance (negative variances) or opportunities to improve its performance (potentially positive variances).[107] RBM is successful if staff selection, remuneration and career planning are managed professionally and based on merit. Although human resources are a key factor in delivering organizational results, effective human resources

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[103] Amjad S, *Results-based Management Implementation for Outcomes: An Agenda for Action in Developing Countries* (Paper presented at the National Health Policy Unit, Islamabad 2008) 32
[104] Curristine T, 'Performance Information in the Budget Process: Results of the OECD 2005 Questionnaire' (2005) 5 OECD Journal on Budgeting 87, 95
[105] Col J.M, Holzer M., Posner P and Rubin M, *Results-based Management in Thailand. Evaluation Report. (*Bangkok: Royal Thai Government 2006), 24.
[106] Bohte J and Meier KJ, 'Goal Displacement Assessing the Motivation for Organisational Cheating' (2000) 60 Public Administration Review 173, 186.
[107] Perrin B, *Implementing the Vision: Addressing Challenges to Results Focused Management and Budgeting* (Paris: OECD 2002), 66.

management has been a major constraint to a results-oriented public sector in developing countries. Moreover, in developing countries public sector personnel positions have been influenced significantly by political forces.[108]

In Kenya, RBM was introduced in the year 2004 as a strategy to improve and measure performance. This was to be operationalized with the help of the Rapid Results Initiative (RRI) between 2006 and 2008 which succeeded in delivering tangible results that were in line with the reform process. During this period, the Government decided to shift the public service towards a results-orientation approach by introducing and facilitating the development and management of a holistic Results-Based Management system through the '*Results for Kenya'* programme. The aim was to enhance performance efficiency in all government ministries, departments and agencies. It also meant to reverse the negative image of the public service.[109]

In 2009, United Nations Development Programme (UNDP) supported the Kenyan government to step up public sector reforms to focus on national transformation. Before then, it was the Government that spearheaded institutionalization of results-based management in the public service but currently the focus is on transforming public service delivery through building partnerships. These efforts were boosted after the promulgation of the new Constitution of Kenya in 2010.[110]

The changes were considered an ideal opportunity to tackle deep-rooted problems of inefficiency because citizens are increasingly becoming empowered to demand for better services. This

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[108] Saldanha C, 'Promoting Results-based Management in the Public Sectors of Developing Countries' (2002) Paper presented on the Roundtable on Better Measuring, Monitoring, and Managing for Results, World Bank, Washington, D.C, 86.
[109] Obong'o SO, 'Implementation of Performance Contracting in Kenya' (2009) *5* International Public Management Review Electronic Journal 89, 96.
[110] Osiche M, '*Applying Rapid Results Approach to Local Service Delivery: Emerging Issues, Lessons and Challenges from Nairobi City Council* (Unpublished Masters Thesis 2006) 11

would be achieved through implementing the new Constitution, attaining of the Kenya Vision 2030, transforming public service delivery and private-public dialogue to enhance good governance. Rapid Results Initiative approach was launched in more than 38 ministries, 175 local authorities and more than 10 SCs. This has improved service delivery in several delivery areas, such as the processing and issuance of passports, national identity cards and birth certificates.

The Rapid Results Initiative made a widespread difference and managed to considerably offer lasting solutions in Kenya's public service sector when it came to service delivery. It provided social change that a village, government office or business would elect to choose and strive to accomplish in just 100 days. The State Law Office's Company Registry, for example, following use of rapid results approach, improved staff and customer satisfaction levels by 80 per cent in about 100 days. This reduced the time taken to register businesses from three weeks to one day and helped reduce a backlog of 500,000 Annual Returns and other documents. At the Ministry of Immigration and Registration of Persons, the number of days it took to issue a passport in Nairobi, Kisumu and Mombasa reduced from 30 to 20 days in 100 days. In addition, the number of uncollected identity cards reduced by 50 per cent, from 195,479 to 100,368 in the then eight districts hosting provincial headquarters in 100 days. Elsewhere, rural nomadic Maasai women in Elangata Enteritin Village of Kajiado County started enjoying access to water provided during the 100 days, thanks to the Rapid Results Initiative.

In 2013, the Government launched citizen service centres known as *Huduma* Centres as primary service delivery channels in all the 47 counties. These are a one-stop shop down in the countries where citizens can obtain their passports, land title deeds, identity cards, Kenya Revenue Authority personal identification numbers and driving licences without having to travel to

Nairobi to get the services. Kenyans expected that every civil servant whose role is to provide services such as education, healthcare, housing and other public services, to do so efficiently in the devolved governments. The performance has overall been satisfactory.[111]

There are six primary components of RBM being implemented in Kenya, including integrated development planning, the results-based budgeting system, results-based personnel performance system, results-based personnel performance system, results-based monitoring and evaluation and electronic government system. Integrated development planning is defined as a structured and systematic approach to development planning with a complete vertical-horizontal integration and a clear focus on both programme outcomes and impact. Integrated development planning entails both strategic planning of national priorities and cascading these priorities to contributing levels in a systematic manner.[112]

Results-based budgeting is viewed as a strategic management tool to assist in the improvement of both resource management and public sector accountability. Results-based budgeting presents an integrated outcomes-based programme budgeting system to plan and manage financial resources. It also changes policies into realities. In essence, results-based budgeting focuses attention on value for money.[113] The integrated performance management framework is at the core of the results-based budgeting system, which is usually in the form of a performance agreement. The performance agreement specifies the level of performance required by an entity for a given budget year. The integrated performance management framework is comprehensive

[111] Obongo SO, *The Rapid Results Approach/Initiative: Institutionalization of results based management in Kenya's public service (Web page, www.capam.org/_documents/rapidresultsapproach.kenya* 2008) 13.
[112] Thomas K, *Integrated Results-based Management – Country Experiences from Asia and Africa* (Paper presented at the Lee Kuan Yew School of Public Policy, University of Singapore 2005) 66
[113] Schatteman A and Ohemeng F, *RBM and Public Sector Performance in Ontario: A Revolutionary Advance or Passing Fancy?* (Paper prepared for the annual conference of the American Society for Public Administration (ASPA), Dallas, Texas (2008) 223.

since it focuses on long-term goals that match annualized objectives, provides baseline information that management can use for planning and goal setting and determines the required inter-agency coordination. Owing to its integrated nature, the integrated performance management framework is considered to be the primary performance monitoring and reporting tool.[114]

The results-based personnel performance System (RB PPS) has been viewed as one of the major elements in RBM. This system is useful in driving reform or introducing new performance initiatives. The role of RB PPS is to establish and mandate the accountability framework under RBM.[115] RB PPS ensures that staff performance at every level is systematically linked with substantive programme performance. The appraisal system under the personnel performance system weighs towards the performance of an individual staff member, which can ultimately be linked to the integrated performance management framework. The RB PPS facilitates the planning and implementation of human resources management and human resources development.[116]

Monitoring and evaluation which represents an internalized and institutionalized component of the IRBM system, is considered to be a critical and integral part of the IRBM system. The concept "result" in RBM, monitoring and evaluation monitoring means that monitoring in organizations essentially focuses on the higher level objectives/outcomes.[117] It is considered to be the routine collection and the analysis of information in an organization to determine the

[114] United Nations Development Programme, *Results-based Management. Overview and General Principles.* (Geneva: United Nations 2002) 53.
[115] Rasappan A, *From Vision to Reality: Managing for Development Results using the Integrated Results-based Management System* (Ankara. 2010) 79
[116] Perrin B, *Moving from Outputs to Outcomes: Practical Advice from Governments Around the World.* Managing for Performance and Results Series (Washington, DC: IBM Centre for the Business of Government and the World Bank 2006) 92
[117] Results-based Monitoring and Evaluation Toolkit 2009, 49

progress against a set of goals. This assists in identifying patterns and trends, adapting strategies and informing decisions for the sake of programme management. According to Muir,[118] if results are not measured, it is not possible to distinguish success from failure. Monitoring is built into all levels of an organization, but is based on key performance indicators (KPIs) and key result areas (KRAs) that support systematic programme performance management.[119]

Results-based management information system provides the framework for performance planning by identifying the goals that need to be met. However, close monitoring is required to ensure that the particular programme is on track. This requires sufficient details from the planning framework that needs to provide the necessary information. The information needs at the different levels can be identified by the management information system. Management Information System (MIS) can be perceived as an institutionalized framework that reveals information from the M&E system at all level to assist managers and role players in their effective decision-making on a timely basis. Therefore, the MIS is used to provide the basis for an effective decision-making support system at different levels of an organization.[120]

The electronic government system refers to digital interactions between a particular government and its employees, the government and businesses, government and government agencies, and the government and its citizens. According to Kusek and Khatouri[121] the e-Government is defined as the use of information technology (IT), information and communication technologies and other web-based telecommunication technologies to promote and improve both the

[118] Muir MJ, *A Survey of current RBM Practices in the Conservation Community* (New York: Nature Conservancy 2010) 110.
[119] Project/programme Monitoring and Evaluation (M&E) Guide 2011, 44
[120] Kusek JZ and Rist RC *Ten Steps to a Result Based Monitoring and Evaluation System* (Washington, DC: World Bank 2004) 161.
[121] Kusek JZ and Khatouri M, *Results-based Monitoring and Evaluation in Bank Projects* (Washington, DC: World Bank 2006) 196.

effectiveness and efficiency of service delivery in a particular public sector. The main components within the IRBM system provide the necessary structure for planning, implementing, monitoring and reporting on an organization's performance with the necessary systematic links to personnel performance.

2.5 Vision 2030 (2008 to Date)

Following the expiry of the Economic Recovery Strategy, the Government in early 2007 started developing a new strategy to take over from the ERS. In June 2008, Kenya Vision 2030 was launched as the new long-term development blueprint for the country to create a globally competitive and prosperous nation with a high quality of life by 2030, that aims to transform Kenya into a newly industrializing, middle-income country providing a high quality of life to all its citizens by 2030 in a clean and secure environment. The vision is implemented through medium term plans.[122]

In the context of public sector reforms among SCs, the Kenya Vision 2030 envisages a public service that is more focused, efficient, results-oriented and responsive to citizens' needs and aspirations. The first Medium-Term Plan (MTP) targets for the sector reforms included intensification of effort aimed at nurturing and instilling attitudinal change in the public service, deepening of Results Based Management and Performance Contracting. A number of achievements have been recorded so for in the respective target areas.[123]

A scheme to attract, reward and retain high achievers in the Civil Service has for instance been developed and final consultations are underway before implementation commences. The

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[122] Government of Kenya, *Kenya Vision 2030* (Nairobi: Government Printer 2008) 22.

[123] Government of Kenya, *Kenya Vision 2030*: *First Medium Term Plan (2008-2012)* (Nairobi: Government Printer 2008) 30

Government Human Resource Information System (GHRIS) is 90 percent complete. The same has been rolled out and is operational in all Ministries. Further, Performance Appraisal Instrument has been incorporated in GHRIS, and guidelines on operation of Ministerial Performance Appraisal Management Committees have been developed.[124]

A number of milestones have been realized under the Performance Contracting target area. These are:[125] 471 Ministries, Departments and Agencies (MDAs) have been put on performance contract; automation of performance contract process has been successful; performance contract evaluation carried out and results released; and sector performance standards were introduced. Implementation of Performance Contracting in Kenya has yielded significant benefits to the country that include: refocusing MDAs on realizing their core mandates; improved MDA performance, for instance, in improved profitability levels particularly in the commercial state corporations; introduction of citizen service delivery charters which refocused MDAs on identifying and delivering services against specific service standards; and improved levels of transparency and accountability where obligations of all public agencies are included in the publicly signed performance contracts and in most cases uploaded on the agencies' website for stakeholder reference.

The Performance Contract and Evaluation System has evolved to adapt to emerging issues that include expansion of indicators to reflect some of the overarching national concerns such as corruption; implementation of one of the most extensive system of performance contracts expanding from a pilot of sixteen SCs to a collective 476 Ministries, Departments, SCs

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[124] Government of Kenya. *A Strategy for Performance Improvement in the Public Service* (Office of the President, Directorate of Personnel Management Nairobi, Kenya 2016) 4.

[125] Republic of Kenya, *Sector Plan for Public Sector Reforms 2013 – 2017* (Government of Kenya 2013) 14.

Corporations, Local Authorities and Tertiary Institutions and the involvement of political leadership in supporting the performance contracting process.[126]

The aforementioned performance improvements have been recognized in the National Customer Satisfaction Survey where the overall customer satisfaction index was 63.5 (comparable to international benchmarks). This compares favourably with those of New Zealand (68% in 2007) and Canada (67% in 2005) which also employed the Common Measurement Tool (CMT). Consequently, Kenya has received awards in various fora: the 2007 United Nations Public Service Award in Category 1: Improving Transparency, Accountability, and Responsiveness in the Public Service; the Ash Institute for Democratic Governance and Innovation Award (Harvard University) and the overall winner in All Africa Public Sector Innovation Awards 2010 in "Innovation in Systems and Processes of Governance " sponsored by the Conference of African Ministers of Public Service under the auspices of the African Union.[127]

The Kenya School of Government was further established by the Kenya School of Government Act on 9th May 2012 to provide instruction for improved performance at all aspects of the public service; and to devise ways to inculcate public service values and ethics, and transformative leadership. The Council of the School was inaugurated on 16th October 2012. The School was expected to build capacity of government officers at the national and county levels. Further, funds were provided for the Kenya School of Government Campuses (former Government Training Institute (GTIs) to upgrade their facilities and build the School's capacity of the faculty of the School. For the School to achieve the envisaged goal it is important to develop certain core

[126] Ibid.
[127] Mungai W, Using ICTs for Poverty Reduction and Environmental Protection in Kenya: The "M-vironment" Approach (International Institute for Sustainable Development (IISD) 2015) 54.

capabilities of the faculty so that they can acquire the capabilities that are needed by the School for the delivery of its mandate.[128]

A comprehensive medical insurance scheme for civil servants, disciplined force and their families was rolled out and became operational in January, 2012. A manual on Public Service Human Resource policies and regulations has been developed. The Code of Regulations (COR) has also been reviewed and harmonized with the Constitution. A review of the Public Service Recruitment and Training Policy was started and Draft Recruitment and Training Policy developed. In terms capacity building, 620 officers have been sensitized and trained in 48 work performance areas. Twelve (12) Training Needs Assessments (TNAs) have also been undertaken. A Training Revolving Fund (TRF) has been established and guidelines for implementation developed. In addition, proposals for training and capacity building and management of scholarships from development partners have been developed and submitted. A data capture system to track scholarships offered by development partners has been developed and is being implemented. [129]

Reforms in the Administration of Justice area included judicial reforms; reforms in the Office of the Attorney General; National Police reforms and Public Prosecution System reforms. In particular, judicial reforms included a strong emphasis on infrastructural development that has entailed the building of new courts, strengthening capacity of the staff, vetting of judicial officers establishment of the Commission for Administrative Justice (CAJ) and reform of the prison service. The Office of the Attorney General, who is the principal legal advisor to the

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[128] Okello D, *'Open Access' An approach for building and financing pro-poor ICT infrastructure* (Pro-poor Community-driven Networks Seminar, 17 August 2016, Hotel Africana, Kampala 2016) 15

[129] World Bank, *Project Appraisal Document for Kenya, Productivity Project* (Report No. 28261-KE. World Bank. Washington D.C. USA 2017) 74

Government, has been reformed through capacity building, institutional reform and review of processes and procedures.[130]

To create operational efficiency, several offices were created from the Office of the Attorney General. These include: Registrar of Political Parties, Registrar of Trade Unions, Administration of Copyrights, Witness Protection Programme, National Crime Research Centre and the Directorate of Public Prosecutions. Other reforms included measures to reduce time in provision of registration services for business names and companies. In addition, there has been decentralization of legal services from the Nairobi to regional offices. Reforms were also undertaken in the police force by creating the National Police Service, the position of Inspector - General of Police and two Deputy Inspectors-General, establishment of the Independent Police Oversight Authority and the National Police Service Commission.[131]

By ushering in the new constitution, Kenyans expressed a need for a different kind of governance and specifically to rid of the system of management of urban areas under which the governance of urban areas has tended to give greater prominence to political expediency than the public service delivery. To deal with negative perceptions of local political leadership, Kenyans opted for professional management of local governance units. It is for this reason that the Constitution specifically called for distinct management structures that would address the concerns of urban residents, a situation that has been comprehensively addressed by the Urban Areas and Cities Act of 2011.[132]

Other reforms introduced during the 1st MTP include the entrenchment of the Public Finance Management Reform (PFMR) Programme launched in 2006 to coordinate reforms within the

[130] World Economic Forum, *The Global Competitive Report* (World Economic Forum, 2016) 25.
[131] Supra note 125, 19
[132] The Urban Areas and Cities Act, 2011, 35

public finance system. Since then, a number of changes have been made in budget formulation, public procurement, external audit, revenue collection, budget execution, internal audit, parliamentary oversight, payroll, debt and guarantee and pensions among others. Changes brought by the new constitutional dispensation had major implications for both fiscal and administrative decentralization. This presented an urgent need for more reforms in public financial management and the way resources were allocated to the devolved level.[133]

A number of new institutions with Public Finance Management (PFM)[134] mandate such as the Commission on Revenue Allocation, Salaries and Remuneration Commission and the Controller of Budget were created. Similarly, the PFM Act became operational with a provision for a new budget calendar with clear deadlines. The Act further clarified the roles and responsibilities for the actors, and established a new accounting standards body. The Act also introduced reforms including a Single Treasury Account at national and county governments and adopted a single unified PFM system for national and county governments. A review of the remuneration and benefits in the Public Service revealed the extent of disparities in pay and benefits across the Public Service and their effects on morale and performance. To address this disharmony, a mechanism through which public sector pay would be harmonized was devised through entrenchment in the Constitution of the Salaries Review and Remuneration Commission.

2.6 Corporate Governance: The Mwongozo Code of Conduct (2015 to Date)

The public service reforms that took effect in Kenya from the year 2015 were a deliberate Government response to the need for more effective utilization of public resources in the face of rising societal needs. These reforms targeted improving public service delivery as part of the

[133] Supra note 123
[134] Public Finance Management (PFM) Act 2012, 91

wider public reforms. To address the challenges of governance in SCs, the Government developed and launched the *Mwongozo* code of conduct for SCs in the year 2015 as a critical building block in entrenching principles and values of public service and best practices in corporate governance.[135]

The Code of Governance is anchored on the Constitution of Kenya, 2010.[136] Article 10 of the Constitution entrenches national values and principles of governance while Article 73 places emphasis on public trust, honor and dignity of public offices. Personal integrity, and values and principles of public service are reinforced in Article 232, which also provides for efficiency, effectiveness and economic use of resources. The Code takes into consideration Chapter Six of the Constitution on Leadership and Integrity as well as the Public Officers and Ethics Act, 2003.

The achievement of Vision 2030, Kenya's long term development blue print required full, transparent and accountable participation of SCs. Good corporate governance is therefore crucial in transforming SCs into engines of economic development and social wellbeing in the country. Further, good corporate governance promotes value enhancement for stakeholders including the public and the governments, thus ensuring that benefits flow to every aspect of the economy. Good corporate governance in the public sector in the country will result in accelerated development and fast track the transformation of the Kenyan economy into a newly industrialized country by 2030.[137]

Global best practices demonstrate the strong linkage between good governance and enterprise growth and profitability. The institutionalization of good governance practices in the leadership and governance of SCs is therefore expected to spur growth, development, employment creation

[135] Supra note 20
[136] Constitution of Kenya 2010 Article 10, 65
[137] Supra note 125, 67

and economic transformation of the country. The *Mwongozo* code therefore seeks to improve the governance of SCs by addressing the challenges identified, and to pro-act to international best practice in corporate governance. In this respect, the Code incorporates lessons learned in the development of similar codes in United Kingdom, South Africa, Malaysia, Singapore and India. Specific provisions in the Malaysian Code of Corporate Governance, (2012),[138] the King Code of Governance for South Africa (King III), (2009),[139] and the SCAC Guidelines (2004),[140] have been reviewed for their relevance to Kenya's SCs. Appropriate principles and practices have been incorporated in this Code, with modifications as necessary. Reference has also been made to the Corporate Governance Regulations of the Capital Markets Authority (CMA) and relevant principles and practices adopted, as necessary. This Code has incorporated some principles benchmarked from best practices by the SCAC Taskforce (2011)[141] from China, South Africa, Singapore and Malaysia.

The Corporate Governance framework developed into this Code embodies the six principles of good governance developed by OECD, and which are now global benchmarks for corporate governance principles. These are: ensuring the basis for an effective corporate governance framework; the rights of shareholders and key ownership functions; the equitable treatment of shareholders; the role of stakeholders; disclosure and transparency; and the responsibilities of the Board. Further, the Code also takes into account the 2005 OECD *Guidelines on Corporate Governance of State-Owned Enterprises*, which were meant to cater for governance of SCs. The governance guidelines include requirements that: State-owned enterprises should observe high standards of transparency in accordance with OECD principles of corporate governance; the

[138] The Malaysian Code of Corporate Governance, 2012, 88
[139] The King Code of Governance for South Africa (King III) (2009), 39
[140] Guidelines on Terms and Conditions of Service for State Corporations 2004, 55
[141] Presidential Task Force on Parastatal Reforms, 2011, 32

boards of state-owned enterprises should have the necessary authority, competencies and objectivity to carry out their function of strategic guidance and monitoring of management; and members of the Board are required to act with integrity and be held accountable for their actions.[142]

[142] OECD Guidelines on Corporate Governance of State-Owned Enterprises 2005, 47

CHAPTER THREE

FINANCIAL ACCOUNTABILITY AMONG STATE CORPORATIONS IN KENYA

3.1 Introduction

Accountability can be defined as the liability to give an account of what one has done, or not done, to another who has authority to assess the account and allocate praise or blame.[143] According to Lawson and Rakner,[144] accountability denotes a relationship between a bearer of a right or a legitimate claim and the agents or agencies responsible for fulfilling or respecting that right. It also denotes the duty to be accountable in return for the delegation of a task, a power or a resource. The concept of accountability has also been described as denoting how those entrusted with the powers of the State are held responsible for their actions.[145] It is also considered as a proactive process by which public officials inform about and justify their plans of action, their behaviour, and results and are sanctioned accordingly.[146]

Public financial accountability forms part of a wider process of public financial management. This cycle flows from the planning and preparation of the budget based on agreed government policy priorities, through the execution of that budget and the implementation of its implied policy objectives, to the process of accounting and reporting for expenditure and performance, and then to the independent audit and scrutiny of that expenditure and performance, the legislative adjudication of probity and efficiency, and finally the feedback of lesson-learning for improved financial control and more efficient public-sector performance. Accountability is critical not only as a means of identifying and penalizing malfeasance or maladministration, but

[143] Jacobs K, Jones K and Modell S, *Parliamentary financial oversight and accountability in the Antipodes*, (APIRA2007) 23
[144] Lawson, A and Rakner L, *Understanding Patterns of Accountability in Tanzania – Final Synthesis Report for DFID* (Oxford OPM 2005) 79
[145] OECD, *Public Sector Modernisation: Modernising Accountability and Control* (OECD Policy Brief 2005), 82
[146] Ackerman J S*ocial Accountability in the Public Sector: A Conceptual Discussion* (Social Development Papers No. 82, Washington DC: World Bank 2005), 151

also as a mechanism for securing sustained improvements in the system of public financial management.

Financial reporting on the other hand concerns how public entities account for how they have used public money. It enables oversight authorities to check and challenge the work of the government, and to scrutinize how effectively and efficiently it delivers against its aims. Financial reporting helps its users make informed decisions. It reveals what has been done and, when linked to performance reporting, it helps those outside the government see the impact of internal decisions and policies. Good financial reporting makes government spending transparent to the public and to external organizations. The discipline of preparing high quality external reports also means that better data is available for internal decision-making. It can therefore help to improve both the performance of, and trust in, the government. Financial reports must meet the needs of a range of users in a changing environment. It is therefore important that the government monitors and regularly reviews the reports that it produces, their content, the form they take, and keeps abreast of the changing needs of users.

Accordingly, the *Mwongozo*[147] code of governance in Kenya tasks state corporations through the Board to ensure that adequate processes and systems of accountability are in place. As a principle of governance, state corporations are required to ensure that financial statements are prepared in an accurate and timely manner. Financial reporting is particularly provided as a governance parameter under accountability, in which the Board is charged to ensure the timely preparation of the books of accounts and pronounce its responsibility in the annual report, for preparing the accounts and the report. State corporations are also directed to prepare half- yearly

[147] Supra note 20, 31

management accounts and annual financial statements complete with supporting qualifications or assumptions as appropriate. Accordingly, this section sets out to examine the extent of financial accountability among State Corporations in Kenya.

3.2 Internal Auditing

Mwongozo code[148] stipulates in the accountability, risk management and internal control principle under the audit committee and the external auditor governance parameter that the board committee responsible for audit in a state corporation should oversee the internal audit function and the external audit. The board is instructed to ensure that the chairperson of the audit committee is independent; ensure that at least one member of the committee has relevant qualifications and expertise in audit, financial management or accounting, with experience and knowledge in risk management and is a member of a professional body in good standing; establish an internal audit function; ensure that there is an effective risk-based internal audit system; approve the internal audit charter; ensure that the internal audit function is independent; ensure that the internal audit function reports to the Committee; and ensure that the Head of Internal Audit holds a Senior position in the management team, is professionally qualified and is a member in good standing, of the professional body responsible for regulating Auditors.

The Public Audit Act, 2015[149] establishes the Office of the Auditor General (OAG) which comprises as its statutory head, the Auditor General, and all other staff who are appointed by the Auditor General. The Act[150] provides that the final report by an internal auditor which has been deliberated on and adopted by an audit committee of a state organ or public entity, may be copied to the Auditor-General. Accordingly, the Auditor-General shall have unhindered access to

[148] Supra note 20, 33
[149] Public Audit Act of 2015 Part II section 4, 25
[150] Public Audit Act of 2015 Part IV section 33, 42

all internal audit reports of a state organ or any public entity, which is subject to audit by the Auditor-General as provided for under Article 229 (4)[151] of the Constitution.

The Act[152] further gives the Auditor General powers to require a public body or any person employed by the public body to produce any official document in the body's custody, care or control; and provide the Auditor General with information or an explanation about any official information, system or asset. The Auditor-General may further in the course of exercising his or her functions, duties or powers, track a transaction into the account of any person in any bank through an order of the courts, if the Auditor General has reason to believe that the money belonging to a public body has been fraudulently or wrongfully paid into such person's account.[153]

The Public Finance Management Act, 2012[154] further provides for the responsibilities of the accounting officers, the national government and the national government entities. National government entities are particularly charged under section 73[155] to institute appropriate arrangements in place for conducting internal audit according to the guidelines of the Accounting Standards Board; ensure that internal audits in respect of the entity are conducted in accordance with international best practices; and that every national government public entity shall establish an audit committee whose composition and functions shall be as prescribed by the regulations.

The Public Finance Management Act, 2012[156] establishes the Public Sector Accounting Standards Board, that is responsible for providing accounting frameworks and to set generally

[151] Constitution of Kenya 2010 Article 229 (4), 98
[152] Ibid, 99
[153] Ibid, 99
[154] Public Finance Management Act 2012, 55
[155] Public Finance Management Act 2012, Section 73
[156] Public Finance Management Act 2012, 60

accepted standards for the development and management of accounting and financial systems by all State organs and public entities. In particular, the Board is required to set generally accepted accounting and financial standards; prescribe the minimum standards of maintenance of proper books of account for all levels of Government; prescribe internal audit procedures which comply with this Act; prescribe formats for financial statements and reporting by all state organs and public entities; publish and publicize the accounting and financial standards and any directives and guidelines prescribed by the Board; in consultation with the Cabinet Secretary, Gazette the dates for application of the standards and guidelines; and perform any other functions related to advancing financial and accounting systems management and reporting in the public sector.

3.3 External Auditing

Mwongozo[157] code tasks state corporations to perform, complete and submit in a timely manner, an external audit of the financial statements within stipulated timelines as per any legislation and government policies. State corporations are further tasked to ensure that the annual external audit is conducted by a qualified, competent and independent external auditor with a view to give assurance in an objective manner that the financial statements are adequately and truly indicative of the performance and financial position of the institution. It is further provided in the *Mwongozo*[158] code that the Audit Committee should meet with external auditors at least once a year; nominate the external auditor for appointment by the Shareholders; approve the terms of engagement and remuneration for the external auditor; deliberate on and propose solutions for any material findings in any audit report; and review the quality and effectiveness of the external audit process.

[157] Supra note 20
[158] Ibid

Article 229 (4)[159] of the Constitution provides that within six months after the end of each financial year, the Auditor-General shall audit and report, in respect of that financial year, on the accounts of all funds and authorities of the national and county governments; the accounts of any other entity that legislation requires the Auditor-General to audit; as well as the accounts of any entity that is funded from public funds. The Auditor General is also tasked to ensure that an audit report confirms whether or not public money has been applied lawfully and in an effective way, which shall be submitted to Parliament or the relevant county assembly.[160] Within three months after receiving an audit report, Parliament or the county assembly shall debate and consider the report and take appropriate action.[161]

In tandem with Article 229 (4)[162] of the Constitution, the Public Audit Act, 2012 provides in Part IV section 34[163] that the Auditor-General may, upon request or at his or her own initiative conduct periodic audits which shall be proactive, preventive, and deterrent to fraud and corrupt practices, systemic and shall be determined with a view to evaluating the effectiveness of risk management, control and governance processes in State Organs and public entities. The Auditor-General shall further conduct audits of financial statements under Article 229 of the Constitution for State Organs and public entities and report annually to Parliament and relevant county assembly.[164] The Auditor General is also empowered to outsource audit services from duly registered audit firms whose partners and staff are not employees of the Office of the Auditor-General and the public service to assist in an examination and audit of accounts.

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[159] Constitution of Kenya 2010 Article 229 (4)
[160] Constitution of Kenya 2010 Article 229 (6)
[161] Constitution of Kenya 2010 Article 229 (7)
[162] Constitution of Kenya 2010 Article 229 (4)
[163] Constitution of Kenya 2010 Part IV section 34
[164] Constitution of Kenya 2010 Part IV section 35

Beyond article 229, Section 7 of the Public Audit Act 2015 contains a further role of the Auditor General in Kenya, to: give assurance on the effectiveness of internal controls, risk management and overall governance at national and county government; satisfy himself or herself that all public money has been used and applied to the purposes intended and that the expenditure conforms to the authority for such expenditure; confirm that (i) all reasonable precautions have been taken to safeguard the collection of revenue and the acquisition, receipt, issuance and proper use of assets and liabilities; and (ii) collection of revenue and acquisition, receipt, issuance and proper use of assets and liabilities conforms to the authority; and provide any other reports as may be necessary under Article 254 of the Constitution.[165]

3.4 Integrated Financial Management Information System

Integrated Financial Management Information System is an automated system that is used for public financial management. It interlinks planning, budgeting, expenditure management and control, accounting, audit and reporting.[166] The IFMIS is designed to improve systems for financial data recording, tracking and information management. This is in response to increasing demands for greater transparency and accountability in the management of the public's finances. The IFMIS system ensures higher degree of data quality improves workforce performance for improved business results and links planning, policy objectives and budget allocations. The system also enhances reporting capabilities to support budget planning; automates the procurement process: requisition, tendering, contract award and payment; facilitates auto-reconciliation of revenue and payment with automatic file generation; facilitates automated

[165] The Public Audit Act 2015 Section 7

[166] Kahari CK, Gathogo G and Wanyoike D, 'Assessment of Factors Affecting the Implementation of Integrated Financial Management Information System in the County Governments: A Case of Nyandarua County, Kenya' (2015) 3 International Journal of Economics, Commerce and Management 1352, 1355.

revenue collections for improved cash forecasting; and provides accurate and up to date information on the Government's financial position.[167]

The Integrated Financial Management and Information System was first launched in 2003 in Kenya.[168] This however introduced only limited modules, with other financial management processes remaining manual. IFMIS Re-engineering was therefore deemed necessary to introduce a full cycle end-to-end integrated approach for efficient and effective public financial management and service delivery to citizens.[169] IFMIS Re-engineering is an initiative of the Ministry of Finance to enhance efficiency and effectiveness in Public Financial Management (PFM). In February 28th 2011, the Deputy Prime Minister and former Minister for Finance Hon. Uhuru Kenyatta launched the IFMIS Re-engineering Strategic Plan (2011-2013).[170]

The IFMIS system has recorded both an array of achievements and challenges in its implementation towards realizing its objectives in accountability, risk management and internal controls among state corporations in Kenya. Among the achievements include the undertaking of business process reviews of all public financial management processes and facilitated a review and removal of obsolete process steps. The programme has also activated three new financial modules of cash management, fixed assets, and purchasing order in ten pilot ministries. Other achievements include the automation of Approval processes in transaction processing and payments in the system, the digitization of payment vouchers, Local Service and Purchase Orders.

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[167] Lundu BL and Shale N, 'Effect of Intergrated Financial Management Information System (Ifmis) Implementation on Supply Chain Management Performance in the Devolved Government Systems in Kenya: A Case of Nairobi City County' (2015) 1 International Academic Journal of Procurement and Supply Chain Management 26, 30.
[168] Office of Auditor General, *Effectiveness of Ifmis in Public Sector –Kenya Case* (Office of Auditor General 2016), 67.
[169] Musee KJ, *Factors Affecting Effective Implementation of Integrated Financial Management Information Systems in Government Ministries in Kenya* (University of Nairobi, Nairobi 2011), 4.
[170] IFMIS Re-Engineering Strategic Plan (2011-2013), 23

Other achievements include its implementation to connect all government ministries, agencies and departments to a core network for purposes of effecting a single public financial management system in line with the Public Financial Management Act 2012[171]; stabilization of three accounting modules - General Ledger, Purchasing Order and Accounts Payable and activation of additional modules - cash management, accounts receivables, and fixed assets; development of a new Single Chart of Accounts (SCOA) and mapped it into the IFMIS system;[172] 2012-2013 national budget developed using the new SCOA; district Vote book system updated with the new SCOA; development and implementation of a Plan to Budget system that has enhanced the efficiency and effectiveness of budget making. This system was used to develop the revised budget in December 2012; as well as the establishment of IFMIS Academy to build capacity of IFMIS end users in ministries, departments and agencies.[173]

Among the challenges in the implementation of IFMIS include resistance to change and inadequate user training;[174] connectivity challenges when the national IFMIS server is down;[175] low administrative commitment;[176] system complexity, technological risks of failure and deficient functionality.[177]

[171] The Public Financial Management Act 2012 (12)
[172] Wainaina AM, *The Effects of Integrated Financial Management Information System on Financial Performance of Commercial State Corporations in Kenya* (University of Nairobi, Nairobi 2014), 100.
[173] Ibid
[174] Mwakio B, 'Challenges Facing County Governments in the Implementation of IFMIS: Case of Taita Taveta County' (2015) 5 IJRCM 14, 16
[175] Miheso S, *Adoption of Integrated Financial Management Information Systems by National Government in Kenya* (Unpublished Dissertation, University of Nairobi 2013), 20.
[176] ICPAK, *A Baseline Survey on Devolution in Kenya with Respect to Public Financial Management Systems – One year on* (ICPAK ISBN No. 978-9966-1808-0-3 2014), 41.
[177] Mutui M, *Integrated Financial Management Information Systems and Procurement performance of the public sector in Kenya* (Unpublished Dissertation, University of Nairobi 2014), 21.

3.5 Parliamentary Committees

A strong committee system is the hallmark of a dynamic legislature. Indeed, the debate in the parliamentary reform programme across the globe has been on how to strengthen the legislative committee system.[178] This is based on the understanding that a vibrant committee system is a useful instrument for the House in charting policy direction upon those matters that come before it for consideration. For a Legislature to be independent of the Executive arm, it must have a strong internal mechanism to enable it carry out the complicated task of policy oversight that would otherwise not be possible in the plenary session. The advantage of having an effective parliamentary committee system is to ensure that different parliamentary interests and points of view are taken into account when the House makes its decisions. They provide avenues for meaningful probe and debates; management of complex parliamentary business and above all, mechanisms for parliamentary accountability.[179]

3.5.1 Public Accounts Committees

Within the framework of intra-governmental horizontal accountability in most Commonwealth countries, responsibility for scrutinizing public expenditure, and for calling and holding government to account for that expenditure, rests with the Parliamentary Public Accounts Committees (PACs).[180] Across and beyond Commonwealth countries, PACs occupy a key position at the apex of legislatures' scrutiny and oversight processes over the use by governments of public sector resources. This role draws upon the traditions of the British "Westminster" system of public financial accountability dating back to 1857 and to the establishment of the UK

[178] KPMG, *The Parliamentary Public Accounts Committee: An Australian and New Zealand Perspective* (KPMG Australia 2006), 16.
[179] Jacobs K, Jones K and Smith X, *An analysis of the sources of public accounts committee inquiries: The Australian experience* (Paper presented at the 103rd Annual Meeting of the American Political Science Association, Chicago 2007), 19
[180] O'Brien M, Stapenhurst F and Johnston N (Eds), *Parliaments as Peacebuilders in Conflict-Affected Societies* (Washington, DC: World Bank 2008), 133.

PAC in 1861 (House of Commons, 1857: 7). But in many countries the current practices depart markedly from this original model. It has been complicated and adapted because of a variety of pressures: the existence of strong informal practices alongside more formal constitutional mechanisms of accountability; the differing patterns of competitive multiparty politics; the development of presidential systems of government; and, demands from international organizations for new forms of accountability.[181]

The effectiveness of a PAC charged with oversight of government spending is thus dependent not only upon features of the committee itself but also on the political, economic, social and cultural contexts in which it operates. Any strategy, either domestic or international, to improve the work of PACs in enhancing financial probity, efficiency and value for money must appreciate and address the factors that can promote and inhibit such reforms within the distinctive circumstances of specific countries.[182]

The characteristics of the "ideal" Public Accounts Committee are envisaged by the World Bank Institute based upon responses to a survey on PAC effectiveness by Commonwealth PAC Chairs. The important requirements are that: it would be small (5-11 members); senior opposition figures would be involved with it, possibly chairing it; the chair would be a senior, fair-minded, respected parliamentarian; it would be adequately staffed; its roles would be clearly understood; it would hold regular and frequent meetings; hearings would be open with transcripts made publicly available; a steering committee would plan work; typically taking evidence from an official; auditors' reports would be referred automatically to the PAC with the Auditor meeting

[181] Pelizzo R and Stapenhurst F, Strengthening public accounts committees, in: A. Shah (Ed.) Performance Accountability and Combating Corruption (Washington, DC: The World Bank 2007), 88.
[182] Pelizzo R, Stapenhurst F, Saghal V and Woodley W, 'What makes public account committees work? A comparative analysis' (2006) 34 Politics and Policy 774, 800

them to discuss them; the PAC would sometimes investigate issues other than those raised by the Auditor; it would strive for consensus; reports would be issued to Parliament at least annually; it would have measures for monitoring the implementation of recommendations; the Auditor would be used as an adviser; and there would be an annual parliamentary debate of its work.[183]

In Kenya, the Public Accounts Committee was established in 1948, when the UK Government passed a law (Orders-in-Council) for the colonial Government in Kenya to start accounting to the Legislative Council, for the tax collected within as well as grants remitted from England. It consists of a chairperson and not more than sixteen other Members. The Public Accounts Committee is responsible for the examination of the accounts showing the appropriations of the sum voted by the House to meet the public expenditure and of such other accounts laid before the House as the Committee may think fit. The Public Accounts Committee constituted immediately following the general election shall serve for a period of three calendar years and that constituted thereafter shall serve for the remainder of the parliamentary term.[184]

Since independence, the Public Accounts Committee (PAC), traditionally chaired by the leader of the official opposition in the House has been the key watchdog tool of budgetary oversight of Government ministries and departments. The mandate of the Committee as stated in the Standing Orders of the National Assembly is to examine the annual reports of the Controller and Auditor General (CAG) on the Central Government expenditure and fund accounts of ministries/departments. The Committee may also examine special audit reports on current issues that may require urgent attention. Its work is mainly to undertake a post-mortem examination and follow up analysis of issues raised by the CAG, and make recommendations to the Executive

[183] Stapenhurst F, Vinod S., Woodley W and Pelizzo R, *Scrutinizing Public Expenditures: Assessing the Performance of Public Accounts Committees in Comparative Perspective* (Washington, DC: World Bank 2005), 50.
[184] Institute of economic Affairs, *The Parliamentary Budget Oversight in Kenya* 2009, 15.

to implement. However, over these years, the Executive branch has not always implemented resolutions of the House faithfully.[185]

The Principal Secretary, Treasury is the overall Accounting Officer in the Government. S/he is charged with the responsibility of appointing the Principal Secretary for all the ministries who in turn are held accountable for Government revenues collected and money expended by their ministries. The Accounting Officers, as per stipulations of the provisions of the Exchequer and Audit Act prepare the financial statements for their respective ministries and forward them to the Controller and Auditor General for audit review. The Controller and Auditor General upon a review of the accounts of all Government departments compile a report. This report forms the basis of deliberation by the Public Accounts Committee. Upon the review of the reports of the Controller and Auditor general and after hearing evidence from relevant officials, PAC compiles a report and presents it to Parliament clearly highlighting the action to be taken on those who misappropriate public funds and resources. Despite the good work of the PAC the same issues arise year in year out. The reason being that there are no mechanisms to enforce the recommendations of PAC and there are no penalties to deter commitment of the same crime.[186]

For PAC, the chain of effective accountability depends as much upon the wider financial governance environment within the public sector as it does upon the specific roles and activities of the institutions vested with responsibility for securing that accountability. Such effectiveness relies critically upon the quality and timeliness of government reporting outputs (such as financial statements and departmental performance reports) and the follow-up by the executive of recommendations by the PAC. In combination these requirements imply the roles of the two

[185] CPA and World Bank Institute, *Parliamentary Oversight of Finance and the Budgetary Process: A Commonwealth Parliamentary Association Report*. Nairobi Kenya, 10th -14th December, 2001, 84
[186] Reports of the Public Accounts Committee and the Controller and Auditor General (1991-93), 102

institutions must be respected and taken seriously by the political executive and the bureaucracy, and that established working practices must at a minimum provide reliably the submission of complete and timely financial statements that can be audited and enquired into.[187]

3.5.2 Public Investments Committee

Before the establishment of the Public Investment Committee (PIC), PAC was the central focus and executor of the fundamental role and duty of Parliament as the custodian and watchdog of the public funds, and in particular, as authorized by the House in the Appropriation Act and the Estimates of Expenditure for each Fiscal Year. However, it became clear that the PAC was shouldering a gigantic task. Consequently, at the end of the Fourth Parliament (1974-1979), the House resolved to amend its Standing Orders to create a separate Committee to supervise and scrutinise audit reports relating to public investments. This resulted into formation of the Public Investments Committee, which today, executes Parliament's role and duty as custodian and watchdog of public funds invested in the various State Corporations and Companies.[188]

Though performing what is basically a post-mortem exercise, the Committee is expected to be satisfied by their scrutiny that chief executives applied or spent prudently the voted provisions on purposes authorized by the House. Any diversion to that authority must be explained to the satisfaction of the Committee. In the same breath, the Committee is expected to ensure that expenditure as incurred was void of excesses and extravagance and ensured frugality. Any excess expenditure (votes) must be sanctioned by the PIC before the House can vote funds to pay them off. Although the work of PIC is a postmortem, its reports, are forward looking and seek to offer firm guidance on how to tackle the causes of the shortfalls emanating from the review of

[187] CPA and World Bank Institute (2001) Parliamentary Oversight of Finance and the Budgetary Process: A Commonwealth Parliamentary Association Report. Nairobi Kenya, 10th -14th December, 2001, 10.
[188] Supra note 184

the audit reports. Occasions do arise when the Committee is obliged to make recommendations proposing amendments to statutes.

The entire role and function of the PIC are carried out under the cloak of Parliamentary privilege awarded to the House, Committees and individual Members by the National Assembly (Powers and Privileges) Act, Cap 6, Laws of Kenya. Thus, the Committee has the power to travel within Kenya to gather evidence, call witnesses and order the production of papers and documents. All witnesses appearing can be examined on oath and enjoy privilege as that of witnesses before a Court of Law. The deliberations of Members are as privileged and enjoy immunities as before the House, pursuant to section four (4) of Cap 6.[189]

3.5.3 Budgets and Appropriations Committee

The Motion and subsequent Fiscal Management Bill 2006 sponsored by the Hon. Aloo Aringo, brought into being the Office of Fiscal Analysis (OFA) and the Fiscal Analysis and Appropriations Committee, which was letter changed to the Budgets and Appropriations Committee with the passing of the new constitution. The Budgets and Appropriations Committee comprise of 15 Members of Parliament. It has the following functions: examines the annual and supplementary estimates of the expenditure presented to the House; and examines draft annual and supplementary estimates of expenditure.[190]

Other functions include to evaluate the tax expenditure, economic and budgetary policies and programmes with direct budget outlays; evaluate the Money Bills and Money clauses in other Bills; and evaluate Plans for economic and social development and reports relating to fiscal and economic performance laid before Parliament by the cabinet secretary. The committee was

[189] The National Assembly (Powers and Privileges) Act Cap 6
[190] Supra note 184

managed to push a lot of agenda on the role of parliament in budget making. It did adopt the Fiscal management bill. It has also managed to push for reforms especially those related to the review in the standing orders. However, it was still challenged more by the fact that it was a Sessional committee which was not recognized by the standing orders.

3.6 Office of the Controller of Budgets

The Office of the Controller of Budget in Kenya is an independent office and its role is crucial in public finances. The office of the controller of budget is one of the mechanisms that enhance accountability in the expenditure of public resources. Article 228 of the Kenyan Constitution establishes the office of the controller of budget. The office of the controller of budget oversees the implementation of the national and county government budgets. The office exercises the oversight by authorizing withdrawals from public funds. The holder of the Office of the Controller of Budget in Kenya is entitled the Controller of Budget (COB). The person serves for a non-renewable term of eight years and is not eligible for re-appointment thereafter.[191]

The role of the Controller of Budget in Kenya include oversight, which involves overseeing the implementation of the budgets of both national and county governments. The Controller of Budget in this role, therefore, monitors the use of public funds in-year and reports to Parliament on how the funds have been utilized. The Controller of Budget performs this role through the controlling role which involves authorizing withdrawals from public funds. Before authorizing any withdrawal from Public funds, the Controller of Budget must first be satisfied that the said withdrawal is authorized by law, as per Article 228 (5) of the Constitution. Public funds in this regard include: Equalization Fund (Article 204 of Kenyan Constitution); Consolidated Fund (Article 206); and County Revenue Fund (Article 207).

[191] Constitution of Kenya 2010 Article 228

The office also performs a reporting role, which entails the preparation of quarterly, annual and special reports to the legislature and executive on budget implementation matters of the national and county governments as provided by law according to (Article 228 (6) of) the Constitution. The type of reports includes but are not limited to: Quarterly Reports on Budget Implementation to the Executive and Parliament – Article 228 (6); Annual Reports on Budget Implementation to the President and Parliament – Article 254 (1); Special Reports to the President and Parliament – Article 254 (2), investigation reports (Article 254 (2)) and reports on stoppage of funds for governments units as per Article 225 of the Constitution; Arbitration/Mediation Reports to Parliament on matters relating to Budget Implementation – Article 225 (7a) Article 252 (1a&1b); Performance reports for the activities of Office of Controller of Budget; and any other report on Budget implementation that may be required. To ensure transparency all the reports are published and publicized as per Article 254 (3) which states that "Every report required from a commission or holder of an independent office under this Article shall be published and publicized".

The office further performs an advisory role which involves giving advice to Parliament on financial matters where a Cabinet Secretary has stopped the transfer of funds to a State organ or public entity. The suspension of funds cannot be lifted or sustained before the Controller of Budget gives a report to Parliament. The Office of the Controller of Budget is expected to investigate the matter regarding the financial performance of a State organ or entity after which it should prepare and present a report on the matter to Parliament which will be used to approve or renew the decision to stop transfer of funds to a State organ or public entity as provided for under Article 225 (7) of the Constitution. The Controller of Budget also gives advice to government entities on improving budget implementation e.g. low absorption of funds by Ministries, Departments and Agencies and County entity. This, therefore, promotes accountability in the use of public financial resources.[192]

Under Article 252 (1) (a) of the Constitution, the Controller of Budget (independent office) has the power to conduct investigations on its own initiative or following a complaint made by a member of the public on budget implementation matters. The Article provides that "Each commission, and each holder of an independent office— (a) may conduct investigations on its own initiative or on a complaint made by a member of the public". The office also has a public sensitization role which involves the dissemination of information to the public on budget implementation at both national and county levels as stipulated under section 39(8) of the Public Finance Management Act, 2012. This role is buttressed by Article 35 of the Constitution which provides that the public has the right to access any information held by the state.

3.7 Financial Reporting

The *Mwongozo*[193] code tasks SCs through the Board to disclose in the annual report, the Management Discussion and Analysis which sets out: the assessment of Management of the factors that affected the organization's financial condition and results of operation over the period under review; and known trends which are reasonably likely to have a material effect on the financial condition and results of operations in the future. This includes an indication that it has complied with applicable financial reporting standards in preparing the financial statements, any deviation from financial policies and related party transactions.

[192] Constitution of Kenya 2010 Article 225(7)
[193] Supra Note 20

Section 83 of the Public Financial Management Act, 2012[194] provides that an accounting officer for a national government entity shall prepare a report for each quarter of the financial year in respect of the entity. The section further directs that in preparing a quarterly report for a national government entity, the accounting officer shall ensure that the report contains information on the financial and nonfinancial performance of the entity; and is in a form that complies with the standards prescribed and published by the Accounting Standards Board from time to time. It is also provided in subsection 3[195] that not later than fifteen days after the end of each quarter, the accounting officer shall submit the quarterly report to the Cabinet Secretary responsible for the entity and the National Treasury.

Subsection 4 of the Public Financial Management Act, 2012 further stipulates that the Cabinet Secretary responsible for an entity shall forward a copy of the report to the Cabinet Secretary and Controller of Budget;[196] and that not later than forty-five days after the end of each quarter, the National Treasury shall consolidate the quarterly reports and submit them to the National Assembly with copies of the reports to the Controller of Budget, Auditor-General and the Commission on Revenue Allocation; and publish and publicize the reports.[197] In the case of an entity that is a state corporation, the accounting officer for the corporation shall submit the quarterly report to the Cabinet Secretary responsible for the corporation who shall, upon approving it, forward a copy to the Cabinet Secretary.[198]

[194] Section 83 of the Public Financial Management Act 2012
[195] subsection 3
[196] Subsection 4
[197] Subsection 5
[198] Subsection 6

3.8 International Financial Reporting Standards

The International Financial Reporting Standards (IFRS) are a set of independent accounting standards stating how particular types of transactions and other events should be reported, and widely used by the private sector. IFRS Standards are developed and issued in the public interest by the International Accounting Standards Board. The Conceptual Framework for Financial Reporting describes the basic concepts that underlie the preparation and presentation of financial statements for external users. This standardizes financial reporting, making it more consistent, credible and understandable.[199]

International Financial Reporting Standards set common rules so that financial statements can be consistent, transparent, and comparable around the world. They specify how organizations must maintain and report their accounts, defining types of transactions, and other events with financial impact. IFRS were established to create a common accounting language so that organizations and their financial statements can be consistent and reliable from organization to organization and country to country.[200]

In Kenya, the IFRS are domesticated by the Institute of Certified Public Accountants of Kenya (ICPAK) which is also the professional organization that regulates the activities of all Certified Public Accountants in Kenya. It was established in 1978 by the Accountants Act CAP 531. Since then, ICPAK has been "dedicated to development and regulation of the accountancy profession in Kenya so as to enhance its contribution and that of its members to national economic growth and development". In 2008, a new Accountants Act No. 15 was enacted to replace the 1978

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[199] Posner Elliot, 'Sequence as explanation: The international politics of accounting standards' (1 October 2010) 17 Review of International Political Economy 639, 650.

[200] Bradshaw M, 'Response to the SEC's Proposed Rule- Roadmap for the Potential Use of Financial Statements Prepared in Accordance with International Financial Reporting Standards (IFRS) by U.S. Issuers' (2010) 24 *Accounting Horizons* 1, 65

Accountants Act to take into account the various developments that had shaped the accounting profession in Kenya and globally.[201]

The ICPAK charges all entities that are publicly accountable to adopt the full IFRS Standards. Publicly accountable entities in this regard include, but are not limited to: state-owned enterprises and/or public organizations that are owned in whole or in part by the State or that are otherwise controlled directly or indirectly by the State; entities whose debt or equity instruments are traded in a public market (a domestic or foreign stock exchange or an over-the-counter market, including local and regional markets), or are in the process of issuing such instruments for trading in a public market; entities that hold assets in a fiduciary capacity for a broad group of outsiders as one of its primary businesses.; as well as private organizations in which the State has a non-controlling equity interest.[202]

[201] Accountants Act No. 15 2008

[202] International Accounting Standards Board, Conceptual Framework for Financial Reporting, paragraph 4 (2010).

CHAPTER FOUR

INTERNAL CONTROLS AND THE PROCUREMENT PROCESS AMONG STATE CORPORATIONS IN KENYA

4.1 Introduction

Internal controls help organizations run smoothly, reduce costs, avoid waste, hold officials to account for their actions, and report to the public and oversight institutions on the performance and value for money achieved. Internal controls are the policies, structures, procedures and processes that enable an organization to identify and appropriately respond to internal or external risks, to comply with its mandate or objectives, safeguard its assets, and use public resources properly and efficiently (OECD, 2017[5]).[203]

A good internal control system is a key factor in helping organizations achieve its goals and missions and reduces operational problems or risks such as potential fraudulent activities.[204] An organization's success is dependent on its familiarity with the nature of risks that may occur in the environment and the enterprise itself, as well as by the adequate risk management. An internal control system is also viewed as the first line of defense against fraudulent activities.[205]

It is provided in the *Mwongozo*[206] code under the Accountability, Risk Management and Internal Controls principle that the Board should ensure that effective processes and systems of risk management and internal controls are in place; and that the Board should ensure that the procurement process is cost-effective and delivers value for money. It is particularly stipulated in the internal controls governance parameter that the Board should maintain an efficient and

[203] OECD, *OECD Integrity Review of Coahuila, Mexico: Restoring Trust through an Integrity System* (OECD Public Governance Reviews, OECD Publishing 2017) 93
[204] McNulty T, Florackis C and Ormrod P, 'Boards of Directors and Financial Risk during the Credit Crisis' (2013) Corporate Governance Review, 33, 45
[205] Institute of International Finance (IIF), *Governance for Strengthened Risk Management* (*www.iif.com/download.php?id=PTVGcYdhz8I* 2012) 12.
[206] Supra Note, 20

effective internal control system; set out in the Board Charter, its internal controls responsibility; and delegate to administration, the responsibility of implementing, designing and monitoring effectiveness of systems of internal control. The Board is also instructed to receive on a quarterly basis, a written evaluation of the effectiveness of internal control systems both from the internal audit and the external auditor function; and to ensure that any weaknesses identified by the external auditor are rectified and monitored by the internal audit function. Against this backdrop, this chapter set out to determine the adequacy of internal controls in the procurement process among State Corporations in Kenya.

4.2 Internal Control Systems

Internal controls are policies, procedures, practices and organizational structures implemented to provide reasonable assurance that an organization's business objectives will be achieved and undesired risk events will be prevented or detected and corrected, based on either compliance or management initiated concerns.[207] Internal control can be defined as the whole system of controls, financial or otherwise, established by management in order to carry on the business of an enterprise in an orderly and efficient manner, ensure adherence to management policies, safeguard the assets and secure as far as possible, the completeness and accuracy of the records. Proper internal control does not only ensure that assets and records are safeguarded but also create an environment in which efficiency and effectiveness are encouraged and monitored.[208]

Internal control processes protect governments from fraud, corruption, waste and abuse. A robust internal control system, comprising effective internal control, risk management and audit, is fundamental to better governance, safeguarding of taxpayers' money, and to preserving public

[207] Financial Stability Board (FSB), *Principles for an Effective Risk Appetite Framework* (*www.financial stabilityboard.org/publications/r_131118.pdf* 2013), 32.
[208] Messier WF, Levy D and Smith A, Importance of Organizational Structure and Internal Control (London: Demand Media 2008) 22.

trust. They help governments to measure value-for-money, assess risk, and ensure compliance with laws, regulations and policies. By adopting a risk-based approach to integrity, including systematic risk assessments and implementing targeted controls, governments can demonstrate to citizens that they are using public funds in line with the principles of efficiency, effectiveness and value for money.[209]

4.2.1 Code of Conduct and Ethics

Mwongozo[210] provides a code of conduct and ethics as a governance parameter under the ethical leadership and corporate citizenship principle. The parameter charges SCs in Kenya, through the Board to ensure that a code of conduct and ethics is developed; ensure that all members of the organization subscribe to the code of conduct and ethics; review the code of conduct and ethics as necessary; promote ethical conduct and sanction misconduct; ensure that a corporate gifts policy is in place; and receive from the Committee responsible for Governance and Compliance, a report on the level of adherence to the code of conduct and ethics by members of the organization.

Section 8 of the Public Officer Ethics Act, 2009[211] provides that a public officer shall, to the best of his ability, carry out his duties and ensure that the services that he provides are provided efficiently and honestly and to the extent appropriate to his office, seek to improve the standards of performance and level of professionalism in his organization all the while carrying out his duties in accordance with the law. Section 11 of the Act further stipulates that a public officer shall not: use his office to improperly enrich himself or others; accept or request gifts or favours from a person who has an interest that may be affected by the carrying out, or not carrying out,

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[209] Manifest information Services, *Board Practices: Incentives and Managing Risks – United Kingdom, Sweden, Portugal, Brazil and Japan* (Report commissioned by the OECD (unpublished) 2010), 20.
[210]Supra note, 20
[211] The Public Officer Ethics Act 2009 Section 8

of the public officer's duties; carry on regulated activities with respect to which the public officer's organization has a role; or has a contractual or similar relationship with the public officer's organization; and for the personal benefit of himself or another, use or allow the use of information that is acquired in connection with the public officer's duties and that is not public.[212]

Sections 35 and 36 provide for investigation and disciplinary actions for public officers found to contravene the provisions of the Act. Section 35 provides that the responsible Commission for a public officer may investigate to determine whether the public officer has contravened the Code of Conduct and Ethics, which may be made on the Commission's own initiative or pursuant to a complaint by any person. The Commission may also refer a matter to another appropriate body for investigation and that body shall investigate the matter within a reasonable time and submit a report to the Commission on its findings. An investigation may be conducted even if the subject of the investigation has ceased to be a public officer.[213]

Section 36 provides for the disciplinary action, stating that if an investigation discloses that the public officer has contravened the Code of Conduct and Ethics, the responsible Commission shall, within the time period take the appropriate disciplinary action; or if the responsible Commission does not have the power to take the appropriate disciplinary action, refer the matter to a body or person who does have that power.[214] The time period referred to in subsection (1) is within thirty days after the completion of the investigation; or if another body investigated the matter under section 35(3), within thirty days after the responsible Commission receives the report of that body. The responsible Commission shall then inform the public officer concerned

[212] The Public Officer Ethics Act 2009 Section 11
[213] The Public Officer Ethics Act 2009 Section 35
[214] The Public Officer Ethics Act 2009 Section 36

of any action it takes or intends to take either before it takes the action or within thirty days after it does so. If, as a result of an investigation the Commission is of the view that civil or criminal proceedings ought to be considered, Section 38 requires that the Commission refers the matter to the Attorney-General or other appropriate authority.[215]

4.2.2 Risk Management

The board should ensure the development of a policy on risk management, which should take into account sustainability, ethics and compliance risks; set out its responsibility for risk management in the board charter; approve the risk management policy and the risk management framework; delegate to management the responsibility to implement the risk management plan; monitor that risks taken are within the set tolerance and appetite levels; review the implementation of the risk management framework on a quarterly basis; appoint a committee responsible for risk management in the organization; ensure that the committee obtains relevant technical advice where necessary; evaluate the performance of the committee once a year; establish a risk management function within the organization; ensure that risk assessment is carried out on a continuous basis; receive from the Internal Audit function, a written assessment of the effectiveness of the system of internal controls and risk management; and receive assurance from management that the risk management framework is integrated in the daily activities of the organization.

The second schedule of the Public Procurement and Disposal Act, 2015[216] provide for the control of the major public private partnership risks in the course of procurement. These include design risk, where the private party is responsible for designing the goods or services to meet a specified

[215] The Public Officer Ethics Act 2012 Section 38
[216] The Public Procurement and Disposal Act 2015, Second schedule

level. Contractually, this typically means that the private party accepts the design risk and must pay all redesign costs if the facility which does not meet the required performance standards. The Act also provides for construction risk, in which the private party shall be required to construct a facility according to performance specifications and a time schedule. In the contract, this is often dealt with by letting the private party bear all costs of meeting specifications and schedule requirements. Site risk on the other hand, relates to underlying site conditions and soil contamination and results in clean-up costs, addition construction costs or frustration of contract. The risk is borne by the procurement entity if it has provided the site or by the private party where such party has been responsible for obtaining the site.

Other risks foreseen in the Act include operating risk where the private party is allowed full control over operating costs, including staffing numbers and levels. Contractually, the private party shall be made responsible for all operating costs and shall be expected to absorb all increases except where such increased costs arise from discriminatory change in law or increase in tariffs and related taxes in regulated industries. The service provider shall bear all costs of meeting specifications and schedule requirements. The Act also anticipates demand risk and provides in this regard that the private party's revenues depend on the willingness and ability of users to purchase its services or goods. Contractually, the private party shall be expected to identify and satisfy the demand for the services or goods. In situations where the Public Private Partnership does not sell directly to end users, the demand risk shall vest in the procuring entity.

Tariffs risks concern regulated industries, in which payments for the goods or tariffs for the service are often set by the government or the sector regulator. Contractually, the private party shall accept that tariffs may not be adjusted automatically and hence need to agree on measures to deal with situations such as tax increases that may affect the project's financial viability adversely. Collection risk is also provided for, where in some public private partnerships, the private party collects tariff revenues without any collection rate guarantee from the government, while in others, the private party sells to the procuring entity. In the first scenario, contractually, the private party shall bear all the risks for collecting revenues from users of the goods or services, while the collection risk in the other scenario shall rest with the procuring entity.

The Act further anticipates and provides for credit risk, force majeure risk and political risk. With regard to these risks, the private party shall solely be responsible for paying its debt and the Government shall make no debt investment. The private party shall be responsible for its debt and debt service. Force majeure refers to events or circumstances that affects either party to the public private partnership and are not within the reasonable control (directly or indirectly) of the party affected, and which cannot be prevented, avoided or removed by such party acting in accordance with prudent operating practice such as acts of war, acts of God, epidemics, explosions, national wide labour disputes like strikes or lockouts and change in. Generally, if a party is prevented from or delayed in performing an obligation by reason of force majeure the affected party shall be relieved from the consequences of its failure to perform that obligation; and shall be allowed time extension. Political risks include events or circumstances arising from an action or inaction of the government or any Governmental authority exercising authority over a party which adversely affect the public private partnership such as blockade, embargo, riots, discriminatory change in law, expropriation and non-renewal or revocation of project licenses without default on the part of the private party. The political risks shall be best placed with the Government.

4.2.3 Whistle-Blowing

SCs in Kenya are further charged by the *Mwongozo* Code[217] under the whistle blowing governance parameter of the ethical leadership and corporate citizenship principle, to through the Board, ensure that there is a whistle blowing policy in the organization; the whistle-blowing policy protects and prohibits victimization of those who disclose or provide information in good faith; and that an independent party is responsible for receiving and investigating reports received.

Kenya has various laws that have a bearing on whistleblowing. Such laws aim at reducing corruption and encouraging good governance. They assure any person who is a witness to a crime, protection from retaliation by those mentioned. These laws however do not prioritize whistleblowing and hence, no single law or institution established under these laws has promoted a culture of whistleblowing in Kenya to ensure that vices that are obstacles to Kenya's socio-economic development are eliminated. The Anti-Corruption and Economic Crimes Act, 2003 provides protection for "assistants, informers, witnesses and investigators." However, the Act does not define an "informer"; thereby making it difficult to determine whether it means the same thing as whistleblower.[218]

The Public Officer Ethics Act, 2009[219] states that "A person who, without lawful excuse, divulges information acquired in the course of acting under the Act is guilty of an offence and is

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[217] Supra note, 20
[218] Kichana Philip, *Kenyan Laws Cannot Protect Whistle Blowers* (Transparency International Kenya website, http://www.tikenya.org/documents/adili81.pdf 2006) 21
[219] The Public Officer Ethics Act 2009, 7

liable, on conviction, to a fine not exceeding five million shillings or to imprisonment for a term not exceeding five years or to both." The irony is that this section of the Act outlaws whistleblowing, while at the same time the rest of the Act purports to introduce and standardize the ethical code and standards of public officials.

There is lack of a comprehensive and dedicated law on whistleblower protection at the national level. The lack of a comprehensive legal safeguard for whistleblowers presents a potential weakness in the country's fight against corruption. This is because systematic victimization of whistleblowers has contributed to a 'culture of silence' in both public institutions and private sector organizations. While whistleblower protection is provided for as part of numerous individual laws, there is currently no single overarching law providing for whistleblower protection in Kenya. This lack of protection for whistleblowers results in the fear of retaliation which is a significant factor inhibiting people from speaking out in the public interest. In order to ensure certainty, clarity and seamless application of the framework, a stand-alone legislation is preferable to a fragmented or a sectoral approach to whistleblower protection.

In light of the foregoing, the Whistle Blower Protection Bill, 2017[220] outlines the purposes of the Act should it be enacted as: to facilitate the disclosure and investigation of significant and serious matters in or relating to public or private bodies, which an employee or any other person believes may be unlawful, dangerous to the public or prejudicial to the public interest; to enhance ethics and integrity in public and private bodies, and among State officers and public officers in the case of public bodies; to protect all persons who make disclosures under this Act; to manage, investigate and make recommendations respecting disclosure of improper conduct and reprisals; to promote public confidence in the administration of public and private bodies; to enhance the

[220] Whistle Blower Protection Bill 2017, 33

procedures and mechanisms for promoting the administration of justice; to provide a framework for public participation in preventing and combating improper conduct; to reward persons who contribute to preventing and combating improper conduct; and to facilitate any other purpose prescribed in the regulations.

Section 11[221] of the Bill stipulates that the provisions of this Act shall apply in respect of a number of forms of improper conduct in public or private bodies, including among others, a contravention of an Act of Parliament or of a County Assembly, or a regulation made pursuant thereto; bribery, corruption or economic crimes as defined in the Anti-Corruption and Economic Crimes Act, 2003 or any other written law; offer, solicitation or acceptance of any gift or other advantage which might reasonably be seen to influence the exercise of official duties or responsibilities; failure by a person to comply with any legal obligation to which that person is subject; unfair discrimination contrary to Article 27 of the Constitution or any law made pursuant thereto; or knowingly directing or counselling an individual to commit improper conduct mentioned in sub-sections (a) to (k).

Section 12[222] of the Bill requires every public or private body to establish and maintain, in accordance with this Act, written procedures, including time periods, for managing and investigating disclosures by employees or persons the public or private body is responsible for. The procedures established include, at a minimum, procedures for receiving and reviewing disclosures; procedures for referring a disclosure to an appropriate public body if the disclosure would more appropriately be dealt with there; procedures for referring a disclosure to the Commission on Administrative Justice established under section 3 of the Commission on the

[221] Whistle Blower Protection Bill 2017 Section 11
[222] Whistle Blower Protection Bill 2017 Section 12

Administration of Justice Act, 2011, as soon as reasonably practicable; procedures for reviewing and investigating disclosures; procedures respecting the confidentiality of information collected in relation to disclosures and investigations, and procedures for protecting the identity of individuals involved in the disclosure process, including an employee or a person making the disclosure. Section 21 of the Bill requires that a public or private body shall develop and put in place whistleblower policies and procedures appropriate to its size and the scale and to the nature of its operations.

Section 24[223] of the Act provides for the protection of the whistle blower. It states that a whistleblower shall be entitled to confidentiality of the information given; immunity from civil or criminal liability in relation to the disclosure; and protection against reprisal. Protection shall be extended to any person who may be in need of protection by virtue of being related to a whistleblower; or on account of evidence given by the whistleblower; or for any other reason which the Commission may consider sufficient. It is further provided that the protection shall not be limited or affected in the event that the disclosure does not lead to disciplinary action or prosecution of a person against whom the disclosure has been made. Also, the motive or intention of a whistleblower in making a disclosure is not a consideration in whether the whistleblower or any other person is entitled to protection in accordance with this section. Upon determination by the Commission that a whistleblower has reasonable cause to believe that his or her life or property or the life or property of a member of the his or her family is endangered or likely to be endangered as a result of the disclosure, the Commission may refer the matter to the Witness Protection Agency.

[223] Whistle Blower Protection Bill 2017 Section 24

4.2.4 Conflict of Interest

State corporations, through the board, are directed under the conflict of interest governance parameter of the ethical leadership and corporate citizenship principle of the *Mwongozo* code[224] to ensure that a policy on the management of conflict of interests is in place. Board members are particularly required to declare any real or perceived conflict of interest with the organization upon appointment to the Board; declare to the Board any real or perceived conflict of interest that may subsequently arise; not take part in any discussions or decision-making regarding any subject or transaction in which they have a conflict of interest; and not influence in any manner whatsoever decision making on any matter in which they have interest.

Accordingly, Section 12 of the Public Officer Ethics Act[225] stipulates that a public officer shall use his best efforts to avoid being in a position in which his personal interests conflict with his official duties. Public officers are also prohibited from holding shares or having any other interest in a corporation, partnership of other body, directly or through another person, if holding those shares or having that interest would result in the public officer's personal interests conflicting with his official duties. The Act proceeds that a public officer whose personal interests conflict with his official duties shall declare the personal interests to his superior or other appropriate body and comply with any directions to avoid the conflict; and refrain from participating in any deliberations with respect to the matter. A public officer is also not to award a contract, or influence the award of a contract, to himself, a spouse or relative, a business associate; or a corporation, partnership or other body in which the officer has an interest.

[224] Supra Note, 20
[225] The Public Officer Ethics Act 2009 Section 12

4.2.5 Information Communication Technology (ICT)

Information Communication Technology is provided as a governance principle in the *Mwongozo*[226] code, under the accountability, risk management and internal control principle. In the provision, state corporations are required, through the Board, to establish an ICT Policy, which is aligned to the objectives of the Organization; establish an ICT function in the organization; integrate ICT in the operations of the organization; ensure that an appropriate Business Continuity Plan (BCP) is in place; ensure that ICT related risks are identified and managed; and utilize ICT in monitoring the performance of the organization.

4.3 Procurement Process

Mwongozo[227] provides in the Accountability, Risk Management and Internal Controls principle under the Procurement Process governance parameter that the Board should: establish a procurement policy that promotes sustainability, high ethical standards and best practice; establish a procurement function in the organization, which is managed by competent and professionally qualified persons of high integrity; approve the annual procurement plan, which should be aligned with the annual budget; periodically review the implementation of the procurement plan; receive a quarterly report on the actual expenditure compared to the budget and demand explanations from management on any variances; ensure that the Committee responsible for risk monitors risks in the procurement process and that they are addressed in accordance with the organization's risk management policy; and ensure that there exists a clearly documented audit trail of procurement activities. Further, under the Transparency and Disclosure principle, the *Mwongozo*[228] code provides under the procurement governance parameter that the Board should disclose: the policy of the organization on procurement; the top ten contracts of the

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[226] Supra Note, 20
[227] Supra Note, 20
[228] Supra Note, 20

organization in terms of value; and that the number of legal challenges to procurement decisions including details of any that may have been successful.

Public procurement in Kenya is governed by the Public Procurement and Asset Disposal Act 2015[229] to provide procedures for efficient public procurement and for assets disposal by public entities; and for connected purposes. This legislation came into effect on 7 January 2016, repealing the previous Public Procurement and Asset Disposal Act of 2015,[230] and all state organs and public entities within Kenya are required to comply with this law in regard to planning and undertaking procurement, inventory management, asset disposal and contract management, except where the provisions of the Public Private Partnership Act, 2013 already apply to procurement and disposal of assets, or where procurement and disposal of assets takes place under bilateral or multilateral agreements between the Government of Kenya and any other foreign government or multilateral agency.[231] The law provides for the National Treasury to be responsible for public procurement and asset disposal policy formulation.[232]

Article 227 of the 2010 Constitution of Kenya provided for new standards for public procurement. This article requires public procurement to be set up in a manner that is fair, equitable, transparent, competitive, and cost effective. It also set requirements for the Kenyan parliament to pass procurement regulations that would provide for preferential allotment of contracts and protection for disadvantaged groups. It will also have to pass regulations that

[229] Public Procurement and Asset Disposal Act 2015 Section 4
[230] Public Procurement and Asset Disposal Act 2015 Section 4
[231] Public Procurement and Asset Disposal Act 2015 Section 4.2(e) (f)
[232] Public Procurement and Asset Disposal Act 2015 Section 7.1

would provide for sanctions for non-performing contractors and those found guilty of corruption, tax violations, or labor law violations.[233]

The Cabinet Secretary for the National Treasury published the Public Procurement (Preference & Reservations) (Amendment) Regulations 2013[234] whose objective is to accord the youth and other disadvantaged groups in Kenya preference in the supply of goods and services to the government through the Access to Government Procurement Opportunities (AGPO) Program. The aim of the initiative is to facilitate the youth, women and persons with disability-owned enterprises to be able to participate in government procurement. This will be made possible through the implementation of the Presidential Directive that 30% of government procurement opportunities be set aside specifically for these enterprises.

The Access to Government Procurement Opportunities is an affirmative action aimed at empowering youth, women and persons with disability-owned enterprises by giving them more opportunities to do business with Government. The Public Procurement Directorate under the Ministry of Finance is in charge of the AGPO initiative. This is in line with one of the key promises of the government to give the youth, persons with disability (PWD) and women at least 30% of all supply contracts in public procurement. The regulations also make it possible for procuring entities to divide supplies in lots of goods, works and services into practicable quantities which the youth SMEs and other disadvantaged groups can afford.

The Public Procurement and Disposal Act, 2015[235] established the Public Procurement and Oversight Authority (PPOA) which later transited to the Public Procurement Regulatory Authority (PPRA) whose functions included to ensure that the procurement procedures

[233] Constitution of Kenya, 2010, Article 227
[234] Public Procurement (Preference & Reservations) (Amendment) Regulations 2013
[235] Public Procurement and Disposal Act, 2015 section 20 (3) (*b*)

established under this Act are complied with; to monitor the public procurement system and report on the overall functioning of it in accordance with section 20 (3) (*b*) and present to the Minister such other reports and recommendations for improvements as the Director-General considers advisable; as well as to assist in the implementation and operation of the public procurement system and in doing so to prepare and distribute manuals and standard documents to be used in connection with procurement by public entities; to provide advice and assistance to procuring entities; to develop, promote and support the training and professional development of persons involved in procurement; and to issue written directions to public entities with respect to procurement including the conduct of procurement proceedings and the dissemination of information on procurements; and to ensure that procuring entities engage procurement professionals in their procurement units. PPRA is further mandated to initiate public procurement policy and propose amendments to this Act or to the regulations; and to perform such other functions and duties as are provided for under this Act.

CHAPTER FIVE

PERFORMANCE MANAGEMENT PRACTICES AND SERVICE DELIVERY AMONG STATE CORPORATIONS IN KENYA

5.1 Introduction

Performance management can be described as the policies, strategies and techniques intended to direct managers' and employees' attention towards the improvement of an organization's performance. Armstrong (2000)[236] defines performance management as a "strategic and integrated process that delivers sustained success to organizations by improving the performance of people who work in them and by developing the capabilities of individual contributors and teams". Indeed, according to Moullin (2002)[237] and de Bruijn (2001),[238] the objectives of performance management at the heart of the government reform agenda are: rationalization, in terms of size, cost and functions; the introduction of more effective systems of financial accountability; greater transparency in the operation of these public institutions; the upgrading of the skills base of the sector and the modernization of its functional principles, procedures and systems; and the development of a realistic remuneration policy based on performance.

Mwongozo[239] posits as a governance principle, that the goals and objectives of the organization should focus on the long term sustainability of the organization. Accordingly, the Government of Kenya has been implementing reforms in the public service, aimed at improving efficiency and effectiveness in delivery of public services and ultimate increase in overall economic growth. The country aims to build a public service that is citizen-focused, ethical, professional and

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[236] Armstrong M, *Performance Management – Key Strategies and Practical Guidelines,* (2nd ed., Kogan Page, London 2000) 10
[237] Moullin M, *Delivering Excellence in Health and Social Care* (Open University Press, Buckingham 2002) 32
[238] de Bruijn H, *Managing Performance in the Public Sector* (Routledge, London 2001) 17
[239] Supra Note, 20

results-oriented as reflected in the entrenchment of national values and principles of governance in the Constitution. In view of the above, performance management is critical in facilitating the improvement of public service delivery among SCs in Kenya. It is against this backdrop, that this chapter seeks to assess the extent to which performance management practices influence service delivery among SCs in Kenya.

5.2 Performance Management Practices

According to *Mwongozo*[240] The Board should put in place a performance management system that is linked to the mandate of the organization and which is aligned to the national development plans and sector performance standards; set performance targets that will form the basis of performance evaluation; ensure that the performance targets are Specific, Measurable, Attainable, Realistic, and Time bound (SMART); agree on the performance parameters and targets with the National Government or oversight body as the case may be and ensure that the obligations of the parties are documented; ensure that the performance targets are cascaded to the management and staff of the organization through a performance management system; and continually monitor organizational performance and identify areas that require improvement.

Performance management among state corporations in Kenya is overseen by the Inspectorate of State Corporations (ISC) whose function involves review and provision of feedback on the quarterly and annual performance reports of SCs as provided in the Legal Notice No. 93 of 2004.[241] ISC primarily provides two (2) types of monitoring including: scheduled quarterly and annual monitoring which involves review of quarterly and annual performance reports of SCs which is carried out in accordance with guidelines issued by Government from time to time; and

[240] Supra Note, 20
[241] Legal Notice No. 93. The State Corporations Act. (Cap. 446)

projects/programme monitoring which involves continuous monitoring of the projects and programs beyond the annual Performance Contracts and it's done through scheduled visits to state corporations.

5.3 Result Based Management

Result Based Management strategy can be defined as a management strategy that solely focuses on performance and achievement of outputs, outcomes and impact while using feedback mechanisms to achieve goals.[242] Organization for Economic Cooperation and Development and Development Assistance Committee (OECD-DAC)[243] defines results based management as a management strategy focusing on performance and achievement of outcomes, outputs and impacts. According to (UNDG, 2011),[244] RBM is a tactic where all actors on the ground are able to contribute either directly or indirectly to the realization of a set of development goals and ensure that their processes, product and services led to the achievement of desired results (outputs, outcomes and goals).

The Result Based Management strategy has a focus on the timely and effective achievement of relevant objectives and goals through strategic planning, implementation and resource planning. This is followed by performance measurement, monitoring and reporting as well as systematic use of performance information to improve policy decision making and the programme

[242] Kusek JZ, Rist RC and White EM, How will we know the millennium development goal results when we see them? Building a results-based monitoring and evaluation system to give us the answers (2005) 11 *Evaluation* 26, 32
[243] OECD-DAC, *Managing for Development Results; Principles in Action: Sourcebook on Emerging Good Practices* (OECD-DAC 2006) 50
[244] UNDG, *Standard Operational Format and Guidelines for Reporting Progress on the United Nations Development Assistance framework (UNDAF)* (2010)

performance at all levels.[245] RBM puts an emphasis on the importance of results through systematic goals and objectives and it clearly states how results should be obtained.[246]

Results based management as a performance based framework was first introduced in the Malaysian public sector in 1990. It was then adopted by countries such as Mauritius, Australia, India, Zimbabwe, Namibia and Botswana. The Ministry of Finance in Malaysia has implemented RBM currently referred to as CEDRE for close to a decade. The performance agreement also known as the Program Agreement in Malaysia is normally prepared using a Program Logic Chart as part of the budgetary process. The Ministry of Finance administers RBM through the use of administrative circulars and the focus on results is clearly spelled out. Through the implementation of RBM, the Malaysian Ministry of Finance had identified the following recommendations: RBM requires adequate strategic inputs and needs assessment before goals and objectives are set out for the individual projects and overall program. The inputs should on a top down approach, from the top leadership with departmental heads being the major stakeholders in the proposed results. [247]

The aim of RBM is to manage an intervention while trying to ensure its relevance, efficiency, effectiveness, impact and other quality criteria. It is a strategy by which all stakeholders, contributing directly or indirectly to achieving a set of results, ensure that their processes, products and services contribute to the achievement of desired results. The general principles of results based management include accountability, national ownership of results, inclusiveness,

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[245] UNDG, *Results-based Management Handbook: Harmonizing RBM concept and approaches for improved development results at country level* (2011) 30.
[246]McAllister E, *Results Based Management, in OED Views* (Operations Evaluation Department, World Bank 2009) 29.
[247] Koshy T, *Catalan numbers with applications* (Oxford University Press 2008) 36.

evidence based learning and managing, promoting and supporting a results culture and transparency.[248]

The concept of shared responsibility has become recognized as a standard for measurement of programme effectiveness and efficiency, although there are concerns about actual implications. Mutual accountability in this regard means the independence of individual responsibility of parties working together toward shared outcomes. The implication to this is that the host countries are the principal owners and implementing agencies of development programmes and they are answerable to citizens for delivering on national development objectives. Results occurring at this level are mainly attributed to the government although this may sometimes be different and dependent on the country context.[249]

Ownership implies that every country takes sole responsibility for its own development. Achievement of sustainable development is greatly influenced by national policies and development approaches. In order for a country or programme to capitalize on national possession and authority, development programmes of countries must be based on national importance, policies and its citizen's needs. Results Based Management aims at ensuring that country wide ownership should go beyond few people to include as many partners as possible. In this regard, monitoring and evaluation activities, findings, recommendations, best practices and lessons learned should be entirely owned by those answerable for the results and at the same time

[248] Kenny G, 'From the stakeholder viewpoint: designing measurable objectives' (2012) 33 Journal of Business Strategy 40, 42.
[249] Mackenzie A, *Results-based Management at country Level: systemic issues that prevent good UNDAF results and the use of UNDAF results information* (E*nsayo para el Grupo de Trabajo sobre Politicas de Programación* 2008), 34.

make use of them. Without national ownership, information gathered will never be used or will be of very little use if any.[250]

A strong RBM process should aim at engaging all stakeholders as openly and resourcefully as possible. Mostly it should be on what they want to realize while encouraging them to establish themselves to accomplish what they have set as benchmark. This includes instituting a process for monitoring and evaluation of progress, and subsequent use of information for improvement of performance. Convincing evidence shows that sustainability of development programmes is more likely to be achieved when stakeholders are involved in every stage of the programme cycle from planning, to defining results and indicators, implementation, monitoring, evaluation and reporting.[251]

Using the results information to support programmes management is another aim of Results Based Management approaches. As noted by Meier,[252] in most organizations and programmes there is a tendency for monitoring information to be used mainly for reporting purposes, but best practices point to the necessity to see monitoring results and information as evidence for decision making. Results information use involves identification and communication of best practices in programme planning and implementation.

There are many ways of promoting a results culture in an organization. The best practices in promotion of a results culture are inclusion of programme managers at the various levels asking for results information in planning and programme management. It also includes having a

[250] Mulikita N M, *Applying Results Based Management (RBM) Strategies in African Public Administration: Challenges and Opportunities* (2015) 34.
[251] Munyaradzi R, *The Implementation of Results Based Management in Zimbabwe* (A presentation at the 5th AFCOP Annual Meeting; 12 December 2012. Tunis, Tunisia 2012) 3.
[252] Meier W, *Results Based Management: Towards a common understanding among development cooperation agencies* (Prepared for the Canadian International Development Agency, Performance Review Branch, for consideration by the DAC Working Party on Aid Effectiveness and Harmonisation, October 2003) 11.

results-oriented planning, financial allocation and monitoring and evaluation systems in place. This implies that both formal and informal motivators are required in programmes that support Results Based Management approaches. This includes giving programme managers independence to accomplish results and a liability system that identifies the challenges of management for results.[253]

A well thought out results monitoring framework is a good basis to improve transparency. This is because without actual monitoring and close examination of the results being accomplished, the Results Based Management approach will not actualize its objectives. There is a wide experience and understanding presented on measuring results. The best practice here is to make use of this understanding and put extra plans in place to control the quality of data being collected. Transparency calls upon measuring the results and costs associated with achieving the results for efficiency purposes. It is also necessary to evaluate the level at which reported results are attributable to a given programme.[254]

Results based management was introduced in the Kenya public service through a cabinet memorandum of 24th September 2004 to, among other things, deliver the Economic Recovery Strategy for wealth and Employment Creation. The Head of Public Service, in an April, 2005 circular to the Public Service detailed an institutional framework for institutionalization of RBM to deliver effective, efficient and ethical targeted results for Kenyans.[255] Accordingly, in Kenya, RBM is employed primary as a tool to improve efficiency and effectiveness in service delivery among state corporations in the country.

[253] Adaptation Fund Board (AFB), *Results Based Management Framework* (Adaptation Fund Board Meeting 16-18 November 2009, Bonn, Germany) 77.
[254] Aly WO, ‘A Framework for Results Based Management to The Public Sector in Egypt: Challenges and Opportunities’ (2015) 5 Journal of Public Administration and Governance 23, 29.
[255] Barrados M and Mayne J, Can public Sector Organizations Learn? Case studies on Institutions (2003) 3 *OECD Journal on Budgeting* 87, 90

The programme entails deepening results-based management strategies in order to meet citizens' expectations. It therefore targets all government ministries/departments and regional development authorities. To attain a citizen-focused public service, the government will develop and implement a results-based performance for monitoring systems, common public service delivery measurement standards and service delivery action plans. Current RBM tools in use in the public sector include Rapid Results Initiatives, Performance Contracting, Performance Appraisal System, Service/Citizen Charters, Program- based budgeting and ISO Certification.

5.3.1 Performance Contracting

Performance contracts originated from the perceptions that the performance of the public sector has been consistently falling below the expectations of the public. This has been associated with excessive controls, multiplicity of principles, frequent political interference, poor management and uptight mismanagement.[256] While several approaches have been used to address these challenges it is hoped that PC will be an effective tool for managing productivity. There is therefore need to determine the impact PCs have had on service delivery. The initiatives to adopt performance contracts in public institutions have been driven by the changes in the political environment in terms of securing better value for money in public services, encouraging greater openness and accountability, and for service improvements in dealing with the general public s consumers.[257]

The objectives of performance contracts in the civil service include: improving service delivery to the public by ensuring that top-level managers are accountable for results, and in turn hold those below them accountable, reversing the decline in efficiency and ensuring that resources are

[256] RBM Guide Kenya, *Results Based Management*: *Training Manual* (2005) 12.
[257] Martin LL, 'Performance Contracting in the Human Services: An Analysis of Selected State Practices' (2000) 24 Administration in Social Work 29, 33.

focused an attainment of the key national policy priorities of the government; institutionalizing performance oriented culture in the civil service through introduction of an objective performance appraisal system; measuring and evaluating performance; linking reward to measurable performance and strengthening and clarifying the obligations required of the Government and its employees in order to achieve agreed targets.[258]

In Kenya, performance contract adoption began with the establishment of a Performance Contract Steering Committee in August 2003, and the issue of legal notice No.93, the State Corporations Performance Regulations, (2004).[259] According to the State Corporations Performance Contracting Regulations (2004), performance is defined as evaluated results of achievement of greed performance targets. According to the Act[260], every SC shall have all the powers necessary or expedient for the performance of its functions.

SCs are particularly required through the Board of to implement budget approved by the Treasury and the parent Ministry; recruit staff including the chief executive of the SC; develop and negotiate with the parent Ministry performance targets for the SC for a specified financial year; develop, maintain and review on a regular basis the strategic plan for the SCs; manage the assets of the SC; enter into and implement performance contracts with the chief executive of the SC; submit quarterly reports of the performance of the SC to the parent Ministry, the Treasury and the Inspector-General (Corporations); and perform any other duties that may be deemed necessary or expedient for the implementation of the performance contracts.

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[258] OECD, ‘Performance Contracting: Lessons from Performance Contracting Case Studies: A framework for Performance Contracting (PUMA/PAC)’ (1999) International Journal of Research in Management, Economics and Commerce, 20
[259] The State Corporation (Performance Contracting) Regulations, 2004.
[260] The State Corporation (Performance Contracting) Regulations, 2004, Section 4

Section 7[261] of the State Corporations Performance Contracting Regulations (2004) further requires that the performance contracts for each financial year be signed between the Board of a SC and the parent Ministry and shall be counter-signed by the Treasury every last month of the financial year in order to become effective on the first month of the financial year. The chairman and one other Board member of a SC are required to sign the performance contract on behalf of the SC. Further, for the purposes of implementing the performance contracts, the Act[262] bestows upon the parent Ministry and the Treasury the responsibility for negotiating and signing performance contracts with the SC; and reviewing performance targets with the SC.

Also for the purpose of implementing the performance contracts, the inspector-general (corporations) is tasked with evaluating actual results of operation and management on the basis of agreed performance targets; determining methods for evaluating performance on the basis of specified and agreed targets; developing evaluation criteria; submitting results of evaluation to the Treasury and the parent Ministry within three months after the end of the financial year; and advising the administrator of the performance contracts.[263]

According to Section 10 of the Act,[264] the relevant minister shall submit the results of evaluation of SCs to the controller and auditor-general, the National Assembly and the President. Section 11 provides for the removal of the Director due to non-performance.[265] It is particularly stipulated that subject to the provisions of any other Act, the Minister may, in consultation with the committee, and based on results of evaluation, remove a Director of a SC whose performance is unsatisfactory.

[261] The State Corporation (Performance Contracting) Regulations, 2004, Section 7
[262] The State Corporation (Performance Contracting) Regulations, 2004, Section 8
[263] The State Corporation (Performance Contracting) Regulations, 2004, Section 9
[264] The State Corporation (Performance Contracting) Regulations, 2004, Section 10
[265] The State Corporation (Performance Contracting) Regulations, 2004, Section 11

Section 12[266] on the other hand provides for Incentives and Bonuses, in which the Minister for the time being responsible for matters relating to finance may, in consultation with the committee, approve incentives for Board members and employees of SCs whose performance achieves the agreed targets. Further, the Minister for the time being responsible for matters relating to finance, shall in consultation with the Committee, develop guidelines on sanctions against Board members and employees of SCs whose performance is below the agreed targets.

Performance contracting was introduced in the country against a backdrop of poor and declining performance, which inhibits realization of sustainable economic growth. The Public sector had consistently fallen below expectations due to: excessive regulations and controls; frequent political interference; poor leadership and management; outright mismanagement (Kenya Railways, Kenya Meat Commission); bloated staff establishments; multiplicity of principals and non-performing employees. In addition to regressing economic growth, the decline in the standards of public service resulted in poor performance, poor service delivery, degeneration of infrastructure and severe brain drain.[267]

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[266] The State Corporation (Performance Contracting) Regulations, 2004, Section 12
[267] GOK, *Results for Kenyans: Capacity Building Programme for Transforming the Public Service* (Public Service Reform and Development Secretariat, December, 2006) 40.

5.3.2 Rapid Results Initiative

In Kenya one of the approaches that widely supported to deliver and is promoted by the World Bank is the Rapid Results Initiative (RRI), otherwise known as the Rapid Results Approach.[268] Obongo[269] indicates that since 2003 there has been three waves of RRI initiatives moving from being a mere tool for generating results within 100 days to being a robust tool for transforming the public service from process orientation to results based management culture; establishing public service values and providing a mechanism that supports the achievement of Economic Recovery Strategy (ERS), the attainment of Millennium Development Goals (MDGs) and the Vision 2030 – Kenya’s flagship strategy for public service renewal. In praise of these approach Obongo [270] contend that capacity to fulfil its responsibility and responsiveness to citizens' needs and rights are key to RRIs in the public sector

Rapid Results Initiative was first introduced in Kenya on a pilot basis in 2004 through partnership between the Government of Kenya and the World Bank.[271] The pilot was run within the National Aids Control Council and the Ministry of Water and Irrigation and was a resounding success. Following the success of the RRI wave in the first two institutions, in 2006 the government decided to undertake institution-wide RRIs in five additional ministries and following significant success in this further deployment, the Government instructed all ministries, departments and agencies to deploy RRI as a tool for mainstreaming results based management in the Public Service. Rapid Results Initiative is an innovative results focused tool adopted by the Kenyan Government to enhance efficiency and effectiveness in service delivery.

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[268] Ibid
[269] Obongo SO, ‘Implementation of Performance Contracting in Kenya’ (2009) 10 International Public Management Review 2, 6
[270] Ibid
[271] Akaranga EM, *The Process and Effects of Perfromance Contracting in Kenyan Public Sector* (United States International University (USIU), Nairobi 2008) 18.

The tool creates a sense of urgency, personal challenges, clearly defines success and raises stakes and visibility for success or failure. The tool has been successful in improving performance in service delivery.[272]

The Rapid Results Approach is results focused learning process aimed at starting major change efforts and enhancing implementation capacity. It tackles large-scale medium and long term change efforts through a series of small-scale, results-producing and momentum-building initiatives. The aim of the Rapid Results approach is to create a context for learning and for enhancing implementation capacity, by helping ministries work on sharply defined initiatives that will ensure delivery of the Economic Recovery Strategy targets. The Government's adoption of the Rapid Results Approach as one of the tools for implementing Results Based Management in the Public Service is therefore consistent with the focus on Results, Capacity enhancement and client ownership.[273]

Current pressure to increase transparency and accountability burdens to demonstrate the efficiency and effectiveness in order to justify future allocation of resources make the use of performance measurement very attractive. There is need to ensure that managers and organizations retain enough capacity in the introduction of performance management should not be allowed to inhibit innovation and reasonable experimentation with alternative modes of delivering public service. [274] Verbeeten[275] posited that the development and growth of twenty-first century organizations will be increasingly tied to not only organizational capability of being

[272] Kiboi W, *Management perception of performance contracting in state corporations* (An unpublished MBA project. University of Nairobi 2006) 22.
[273] GOK, *Ministry Human Resources Development Strategy* (Government Printers: Nairobi 2005) 25.
[274] Dehn, Jan, Ritva Reinikka and Jakob Svensson, *Survey Tools for Assessing Performance in Service Delivery* in *The Impact of Economic Policies on Poverty and Income Distribution: Evaluation Techniques and Tools*, edited by François (2003) 23.
[275] Verbeeten HM 'Performance Management practices in Public Sector organisations – Impact on performance' (2008) 21 *Accounting, Auditing and Accountability Journal* 3, 8.

efficient, in order to produce competitive outputs; but on organizational ability to comprehend and manage the links between the organizational business processes and the external environment.

5.3.3 ISO Certification

International Standards Organization (ISO) is the world's largest developer and publisher of international standards. ISO has the most comprehensive scope in the improvement of organizations performance through the promotion of quality.[276] ISO family of standards are internationally recognized and designed to demonstrate the capability of a firm to control the processes and hence make the product or service acceptable; therefore, their implementation could be a source of competitive advantage, enhancing the company's performance.[277] Organizations globally are experiencing changes in the business milieu due to growing consumer awareness of quality, technological advancement and innovation, globalization and intense competition. To respond to these challenges and ensure their survival, many organizations have implemented mixed quality improvement drives as a means to improve their competitiveness and organizational performance. Many African countries, including Kenya, have adopted ISO standards.[278]

The ISO 9001 standards is a quality management standard that embraces principles of total quality management and which merges organizational concerns with customer satisfaction, shareholder satisfaction, process efficiency, and employee wellbeing. ISO 9001 encompasses organizational practices across sectors with its application being relevant to organizations

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[276] Evangelos L and Psomas E, 'The effectiveness of the ISO quality management system in service firms' (2013) 24 Total Quality Management and business excellence 769, 771.
[277] Lamport M, Seetanah B, Cohhyedass P and Sannassee RV 'The association between ISO 9000 certification and financial performance*'* (2004) 9 International Research Symposium in Service Management 3, 5.
[278] Emeka S, Dunu and Michael FA, '*The Impact of ISO 9000 Certification on the Financial `performance of organizations'* (2008) 2 Journal of global business 135, 143.

regardless of the business they are in. This has made this particular certification relevant to most organizations thus gaining most popularity compared to other ISO standards. ISO 9001 provides a tried and tested framework for taking a systematic approach to managing business practices to consistently turn out quality products. [279]

ISO 9001 encompasses organizational practices across sectors with its application being relevant to organizations regardless of the business they are in. This has made this particular certification relevant to most organizations thus gaining most popularity compared to other ISO standards. Cognizant of the importance of system certification (especially ISO 9001:2008), the government of Kenya issued a directive (in 2010) that all public agencies should begin the process of ISO 9001:2008 certification and ensure that they are fully certified by 2012. [280]

When Kenya's Ministry of State for Planning, National Development and Vision 2030 were certified to ISO 9001:2008, the then Prime Minister of Kenya noted that the Government of Kenya sees the process of ISO certification to Quality Management Systems as central to enhancing the performance of public servants and restoring public confidence in the civil service. He further noted that standards are a useful intervention for tackling shortcomings in the public service delivery that have, in the past, constrained Kenya's quest for development. He compared ISO 9001:2008 certification to a mustard seed that will mushroom into a culture of quality and efficiency in government business.[281]

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[279] Chow-Chua C, Goh M and Wan B, 'Does ISO 9000 certification improve business performance?*'* (2003) 8 International Journal of Quality and Reliability management 936, 956.
[280] Ibid
[281] Ngware M W, 'Total Quality Management in secondary schools in Kenya' (2006) 14 Quality Assurance in Education 339, 343

Accordingly, a 2012 survey of certifications[282] shows that Kenya has the highest number of organizations in East Africa achieving ISO certification. In 2012 there were 460 organizations with ISO 9001 certification (quality); 32 organizations with ISO 14001 certification (environment) and 118 organizations with ISO 22000 certification (food safety). ISO 9001 leads the pack and also has highest rate of conversion from non-certified to certified organizations over the last 10 years. Trade is a crucial driver of growth. For Kenya to achieve the double-digit economic growth envisaged in Vision 2030, the country must be able to respond to local and global market demands.[283]

Kenya, just like many African countries, is confronted by a myriad of challenges in improving its capacity to meet production and quality standards which are obligatory to access foreign markets, especially the European Union which is one of Kenya's biggest trading partners. Nicholas Stern, the former World Bank chief economist and senior vice president, notes that without addressing market access and international standards compliance issues, African firms and farmers will be unable to take full advantage of market opening initiatives.[284] ISO offers Kenya convenient solutions that will not only respond to the local and global market demands, but also be a panacea to the technological problems that it encounters. No country can successfully develop without addressing the critical issue of demand and supply on energy. An organization which is certified to ISO 9001 is expected to enhance customer satisfaction and

[282] Nyaga DK and Gakobo J, 'Effect of quality management practices on organizational performance of savings and credit co-operatives in Kirinyaga County, Kenya' (2017) 4 International Academic Journal of Human Resource and Business Administration 30, 41.
[283] Emeka S and Dunu Michael, 'The Impact of ISO 9000 Certification on the Financial `performance of organizations' (2008) 2 Journal of global business 135, 138.
[284] Psomas E and Kafetzopoulos D, '*Performance measures of ISO certified and non-certified manufacturing firms' Benchmarking* (2014) 5 An International Journal of Quality and reliability management 756, 773

consistently provide products that meet customer and applicable statutory and regulatory requirements.[285]

According to Yong and Wilkinson,,[286] some of the benefits of implementing ISO include increased efficiency, improved consistency, improved quality of product/service, better-motivated employees, cost savings, fewer mistakes, less re-work, less waste, wider market opportunities, increased customer satisfaction, increased competitiveness, increased profits, better use of time and resources and improved communication.

5.3.4 Citizen Service Charters

A citizen charter has been defined as a written statement prepared by a public institution which outlines the nature, quality and quantity of service that citizens should expect from the institution and how to make complaints or suggestions for improvement. A number of benefits have been associated with the successful implementation of Citizen Charters. Firstly, Citizen Charters help public institutions to manage user expectations about public services and to provide a framework for public participation. Secondly, they encourage public bodies to measure and assess performances by committing themselves to standards of service that the public expects and evaluating how they measure against those standards. Thirdly, Citizen Charters provide the public with recourse to file complaints and seek redress where the standards have not been met.[287]

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[285] Lakhal L, The Relationship Between ISO 9000 Certification, TQM Practices, and Organizational Performance (2014) 5 International Journal of Quality & Reliability Management 215, 220

[286] Yong J and Wilkinson A, 'In search of quality: the quality management experience in Singapore' (2001) 18 International Journal of Quality & Reliability Management 813, 815.

[287] Parrado S, 'Improving customer orientation through service charters UNED and Governance (2006) 2 International Quality Management in Public Sector 27, 30

Citizen Charters were first introduced in the United Kingdom in 1991 during the premiership of John Major with the aim of ensuring that public services were responsive to the citizens they served. Variants of citizen charters have since been embraced in diverse countries thereafter including India, Mauritius, Uganda and Kenya.[288] In Kenya, Citizen Charters were introduced in 2004 within the framework of Results Based Management with the aim of directing government efforts towards the achievement of pre-determined outcomes and re-orientating goals and objectives towards cost effectiveness and responsiveness to customer demands.

Properly implemented, Citizen Charters can result in improved service delivery through a more responsive attitude from officials towards the public and greater public satisfaction with services. They typically embody a number of characteristics including stakeholder participation in their design; establishment of clear, realistic and measurable service standards; openness and information about service delivery; choice for the citizen and consultation with users about service levels and quality; courtesy and helpfulness in service delivery; and provision of redress when services are not delivered to the published standards. They also provide yardsticks through which stakeholders can monitor and evaluate the performance of public institutions.[289]

For purposes of this study, a Citizen Service Charter was conceptualized as a public statement that defines what an organization is, its mandate, the services it provides, and the standards of services to be expected by its customers. It also includes mechanisms about how consumers may seek redress if they are dissatisfied with the service(s). This study proceeded from the premise that a typical policy cycle usually involves a time span of a decade or more, from emergence of a

[288] OECD, *Improving customer orientation through service charters. A handbook for improving quality of public services* (OECD/Ministry of Interior the Czech Republic/Governance International, Paris 2007) 30
[289] Torres L, 'Service charters in Spain: transparency and citizen empowerment or government marketing' (2006) 26 Public Money Manage 159, 161

problem through sufficient experience with implementation to render a reasonably fair evaluation of the policy's impact. Citizen Service Charters which have been in implementation for the last decade or so; now seem like an appropriate time to evaluate the effect of this reform effort on service delivery.[290]

Mang'era and Bichanga[291] have carried out a study on the challenges of implementing citizen charters in public hospitals whose objectives were to evaluate the disposition of the implementers, competence of hospital staff, and management structures in support of implementation of the charter. The study identified inadequate training, poor staffing and conflict between charter objectives and organizational rules and regulations as some of the hindrances to the implementation of Citizen Charters. The study was carried out at a facility that is fully owned and operated by the central government and funded through allocations from the exchequer.

Jela[292] conducted an evaluation of the effect of citizen charters on service delivery in state corporations in Kenya with reference to the Kenya Civil Aviation Authority established that the implementation of Citizen Charters has affected service delivery in public institutions positively by making them more citizen-centric in their orientation. The Constitution of Kenya 2010 has also raised accountability threshold by creating the constitutional Commission on Administrative Justice that acts as an independent and impartial guarantor of service delivery, accountability and due process.

[290] Clifton J, Comín F and Díaz D, 'Empowering Europe's citizen's? Towards a charter for services of general interest' (2005) 7 Public Manage Rev 417, 420

[291] Mang'era J O and Bichanga BO, 'Stakeholder democracy: redesigning the governance of firms and bureaucracies' (2013) *4* Interdisciplinary Journal of Contemporary Research in Business 513, 515

[292] Jela E, *An evaluation of the effect of citizen charters on service delivery in state corporations in Kenya. A case study of the Kenya Civil Aviation Authority* (Unpublished Masters Thesis, Kenyatta University 2015) 2.

5.3.5 Performance Appraisal System

The Staff Performance Appraisal System (SPAS)[293] is a critical component of the overall human resource management function in the public service. It is predicated upon the principle of work planning, setting of agreed performance targets, feedback and reporting. It is linked to other human resource management systems and processes including recruitment, placement, training and development, career progression, rewards and sanctions. The Performance Appraisal process provides a mechanism for employees to contribute to the achievement of organizational objectives. It facilitates communication between the employee and the immediate supervisor by providing a structure for feedback on performance. The successful implementation of the process will lead to development of employee potential and improve communication relating to performance; improved productivity and reinforce the values and principles of public service; and inculcate a culture of high performance in the service.

The overall objective of the SPAS is to manage and improve performance of the public service by enabling a higher level of staff participation and involvement in planning, delivery and evaluation of work performance. The specific objectives are to Link individual performance targets with organizational strategic objectives and work plan; promote communication between Appraisee and Supervisor with continuous feedback on work progress; set the basis on which the performance of an officer is monitored and evaluated as stipulated in the individual work plan; align operational and financial performance targets with budgetary provisions; assess the learning and development needs of staff on a timely basis; and provide information for decision

[293] Public Service Commission, *Staff Performance Appraisal Report* (Government Printer 2016) 36.

making on administrative and human resource issues such as renewal of contracts, promotions, delegation of duties, training, deployment, rewards and sanctions.

The Staff Performance Appraisal System employs a five-point performance evaluation rating scale from “Poor”, “Fair”, “Good”, “Very good”, and “Excellent”. Excellent rating is reserved for the individual whose work performance is clearly and consistently superior to the standards required for the position. This caliber of performance is easily recognized by others in related areas as well as outside of the individual’s own group or function. Achievement is higher than 100% of the agreed performance targets. The “Very good”” rating demonstrates a level of accomplishment that goes beyond reasonable and demanding standards, particularly in key knowledge, skills and abilities. Performance is characterized by achievement up to 100% of the agreed performance targets and the individual demonstrates planning and execution of all routine functions and most major functions with minimal guidance.

An individual rated as “Good” demonstrates a level of accomplishment that clearly fulfills expectations. The rating reflects good, solid and consistent performance achievement between 80% and 99% of the agreed performance targets. The employee demonstrates ability to execute and control routine functions and several major functions with occasional guidance. Individuals rated as “Fair” on the other hand demonstrate a level of accomplishment that is below the standards of performance and does not meet or marginally meets the requirements. He/she demonstrates an inconsistent level of achievement between 60% and 79% of the agreed performance targets and requires more direction and guidance than normally expected for routine functions. Individual rated as “Poor” demonstrate unsatisfactory performance; achievement up to 59% of the agreed performance targets.

The Staff Performance Appraisal System identifies an appraisee's training and development needs with the help of a supervisor based on performance gaps. The supervisor and employee jointly assess training needs and development based on assignments or activities of the review period to help in the job and career growth. Focus is made on the benefits from the training and how it will be applied to the job; activities that will enhance the employee's current performance and prepare the employee for greater challenges or career advancement. Training and/or development can be internal or external and on or off-the job. The appraisee further commits to achieve the agreed individual performance targets by signing on the SPAS Report upon setting the targets in consultation with the supervisor.

A mid-year performance review is performed with a view to accord both the Supervisor and Appraisee the opportunity to jointly review the progress made by the Appraisee in accomplishing the performance targets agreed on at the beginning of the appraisal period. During the review, targets varied mid-year are discussed between the Supervisor and Appraisee and recorded in the respective sections of the appraisal report. The review, which is in the form of discussions should be focused on what has been achieved; any constraints experienced and whether there is need to vary the initial performance targets in order to accommodate any unforeseen circumstances. Any changes, additions or removal of performance targets should however, only be made in the event that there have been significant changes in the nature of functions carried out by the appraisee, and which may necessitate revision of performance targets. In the event that the Supervisor or appraisee leaves the institution/department, they are required to appraise or be appraised as the case may be on pro-rata basis.

Reports on performance are further done on quarterly basis, but reflecting cumulative achievements on agreed targets. The End of Year Appraisal then takes place at the end of the reporting period. The Supervisor and appraisee are required to meet at the end of the year to discuss the overall performance over the whole appraisal period. The Supervisor will evaluate the extent to which the appraisee has achieved the performance targets, taking into account any unforeseen developments that may have affected performance during the period. The Supervisor may recommend other specific interventions other than sanctions depending on insight gained during the appraisal. Where the appraisee is not satisfied with the SPAS evaluation, they may appeal to the Ministerial Performance Management Committee in writing through the Secretary, and present documentary evidence to support the appeal.

5.3.6 Rewards and Sanctions

A key element in performance management is rewarding of exemplary performance and sanctioning of poor performance within a framework that also supports the objective to attract, nurture and retain qualified and highly productive staff. It is against this background that a Performance Rewards and Sanctions Framework in the public service[294] has been developed with the objective of rewarding exemplary performance while sanctioning poor performance. This Performance Rewards and Sanctions Framework for the Public Service creates a centralized framework with clear criteria for rewarding exemplary performance and sanctioning poor performance. In so doing, institutional arrangements have been put in place to administer rewards and sanctions in the public service. The Framework further details the circumstances under which recognition initiatives may be applied for employees who perform exceptionally well and therefore warrant special recognition.

[294] Public Service Commission, *Performance Rewards and Sanctions Framework in the public service* (Government Printer 2016) 11.

The framework provides a guide on the implementation of rewards and sanctions that will help the Government in institutionalizing performance management in the Public Service. The rationale of the Performance Rewards and Sanctions Framework is to establish a basis for rewarding exemplary performance and administering sanctions for poor performance, motivate employees to have positive attitude to work and to enhance productivity in the Public Service. This will also create linkages between institutional and individual performance. The overall goal of the Framework is to establish an integrated approach to boost performance and ultimately the productivity of the public service. The objectives will be to: establish a basis for rewarding exemplary performance; link rewards and sanctions to measurable performance; motivate public servants for improved productivity; encourage competitiveness in service delivery; and promote innovation and creativity in service delivery.

The framework creates a centralized system with clear criteria for rewarding excellent performance and sanctioning poor performance in the Public Service. It is envisaged that successful implementation of the framework will serve to encourage excellence, recognize meritocracy, and address the issue of poor performance for a high performing public service. To ensure compliance with standards, an effective monitoring and evaluation System and institutional arrangement has been specified. Key institutions that will administer the framework include: The Public Service Commission; the Ministry responsible for Public Service; the National Treasury and Ministerial Performance Management Committees.

According to PSC,[295] based on the performance evaluation reports, rewards or sanctions will be recommended by the MPMC as per the provisions of rewards and sanctions framework issued by PSC from time to time. The authorized officer shall approve all the rewards and sanctions for

[295] Ibid

submission to PSC before implementation. Members of the MPMC may also be eligible for the awards, provided that they excuse themselves from participating in any decision-making regarding any award for which they are being considered.

5.3.7 Benchmarking

Magutu et al (2011)[296] found out that participating in benchmarking would give Kenyan public universities a better understanding of practice, process, or performance and insights of the academic operations and functions. The three most critical factors facing the benchmarking processes in Kenya were found to be: time and resource availability; limited duration; comparability and compatibility which happened to be the probable reason why the institutions don't practice international benchmarking.

Ouma (2014)[297] studied benchmarking practices adopted by the Kenya Revenue Authority (KRA) and their impact on performance of the Authority. The study found out that KRA adopts strategic and process benchmarking as expressed in the reform and modernization programme and the corporate plan objectives. The study further established that KRA not only adopts benchmarking practices in customs but such benchmarking practices have positively affected performance of KRA. Based on the findings it can be concluded that benchmarking has contributed to KRA's success and has significantly led to improved performance both in revenue collection and service delivery.

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[296] Magutu PO, Mbeche IM, Nyamwange SO, and Nyaoga RB, 'A Survey of Benchmarking Practices in Higher Education in Kenya: The Case of Public Universities' (2011) 5 *IBIMA Business Review* 9, 14

[297] Ouma J, *Benchmarking Practices and Performance of Kenya Revenue Authority* (Unpublished Thesis, University of Nairobi 2014) 12.

Mwayayi (2015)[298] explored the benchmarking strategy for service delivery enhancement at Kenya Ports Authority (KPA). The study established that KPA employs numerous benchmarking practices aimed at enhancing service delivery at the port. Various industry performance indicators are applied by KPA as well as United Nations Conference on Trade and Development performance measures. The study also established that KPA has benefited from benchmarking strategy through increased efficiency of operations, customer satisfaction and increased competitiveness. Challenges encountered included government bureaucracy and long procurement procedures for equipment, spares, services and materials.

Akuma (2007)[299] conducted a study on the use of benchmarking as a continuous improvement tool by the ministry of agriculture in Kenya found out that most Parastatals had systems that facilitate the systematic comparison and evaluation of practice process and performance with any best practices or smarter institutions in improvement and self-regulation.

[298] Mwayayi D, *Benchmarking strategy for service delivery enhancement at Kenya ports authority (Unpublished thesis.* University of Nairobi 2015) 8.
[299] Akuma OE, *A survey on the use of benchmarking as a continuous improvement tool by the ministry of agriculture parastatals in Kenya (*Unpublished thesis. University of Nairobi 2007) 16.

CHAPTER SIX

LESSONS FROM THE UNITED KINGDOM AND NEW ZEALAND

6.1 Introduction

An in-depth review of pertinent literature points out both the United Kingdom and New Zealand as two model countries with regard to the practice of corporate governance among public sector institutions. In this regard, the study thematically reviews corporate governance as practiced in the two countries and draws lessons for their application among SCs in Kenya.

6.2 Financial accountability

In July 1995, the Chartered Institute for Public Finance and Accounting (CIPFA)[300] developed the first corporate governance framework for the public sector in the United Kingdom, containing a common set of principles and standards for management and control of public organizations. The corporate governance framework for the public sector, developed by the CIPFA approaches three key areas: The first key area titled *organizational processes and structures* refers several aspects regarding: responsibility towards the law; responsibility for public money; communication with stakeholders; roles and responsibilities for balance between power and authority, council, president, non-executive members of the board of directors and executive management. The second area of the corporate governance framework, *controls and financial reporting*, consists of the following components: annual reporting, internal controls including risk management and internal audit; audit committees and external audits.

There has been a continuous drive to improve government financial reporting in the UK since the implementation of resource accounting and budgeting in the late 1990s. Resource accounting and budgeting introduced accruals accounting and budgeting concepts where transactions are

[300] The Chartered Institute of Public Finance and Accountancy, Corporate Governance: A Framework for Public Service Bodies, London July 1995, 13

recognized and recorded when they occur, rather than when there is a cash payment. This transparent and consistent way of reporting financial information is best practice in the public and private sectors throughout the world.[301]

The first whole of government accounts were published in 2011, consolidating financial information from across the public sector into a single report. Over 7,000 entities from across the public sector are now consolidated and the Whole of Government Accounts are published each year. The UK is among the most advanced countries in this regard and the Whole of Government Accounts are a uniquely comprehensive product as they are the only set of consolidated public sector accounts that include central government, local government and government owned corporations.[302]

Other aspects of the reporting system in government were substantially overhauled by the Clear Line of Sight project (2010), a major alignment exercise for budgets, Estimates, and accounts. Previously, there was significant misalignment between the different bases on which financial information was presented to Parliament. This led to a lack of understanding and trust in the information presented. From the financial year 2011-12, a simpler and more transparent system, with a single set of numbers, was implemented.[303]

With budgets, Estimates, and accounts in better alignment, the government focused its attention on the annual report and accounts. The Treasury carried out a review of the impact of accruals accounting and asked how these documents could better meet the needs of users. It found that reporting was difficult to navigate and often lacking a coherent narrative message. Mandatory

[301] Shleifer A and Vishny W, 'A Survey Of Corporate Governance' (2017) 7 The Journal Of Finance 2, 5.
[302] Albu, N, Durica A, Grigore N, Grigoras D, Mateescu R and Ichim A, 'Corporate Governance in Romania. Perceptions and perspectives' (2013) 3 Academy of Economic Studies Bucharest 6, 9
[303] Corneliussen F, *Justifying non-compliance: A case study of a Norwegian biotech firm* (London School of Economics and Political Science 2014), 15.

requirements for a mass of detail were obscuring the big picture and limiting the usefulness of annual reports. In 2014, the Treasury published Simplifying and streamlining statutory annual report and accounts, proposing a move to a more streamlined and integrated format and then held a public consultation on the suggested changes. Parliament, the National Audit Office, and government departments all supported the proposed improvements. The new annual reports and accounts format were first published in the financial year 2015-16.[304]

In the response to the first 'Accounting for democracy' report by the Public Administration and Constitutional Affairs Committee (PACAC), the government committed to doing a review of government financial reporting. The Treasury launched the government financial reporting review in summer 2018, with 3 overall aims: to clearly state the purposes of government financial reporting; to review and better explain the current practices for government financial reporting; and to take steps to improve government financial reporting. This report presents the findings of the review. It combines statements of principle, best practice examples to support departments looking to improve their reporting, and actions for the Treasury.[305]

Currently, the UK Treasury has rolled out a programme of regular thematic reviews, like the thematic reviews of private sector financial reporting carried out by the Financial Reporting Council with a view to constantly improve financial reporting in the future. These short reviews target specific areas of concern, sharing best practice and finding opportunities to update and improve guidance. To target the thematic reviews effectively, the Treasury intends to engage better with users of government financial reports through an advisory body. This group meets

[304] Almqvist R, Catasu B and Skoog M, 'Towards the next generation of public management: a study of management control and communication in the Swedish Armed Forces' (2017) 24 International Journal of Public Sector Management 122, 124.
[305] Chow D, Humphrey C, Moll J. 'Developing whole of government accounting in the UK: grand claims, practical complexities and a suggested future research agenda' (2007) 23 Financial Accountability and Management 274, 277

twice a year to bring together representatives of both preparers and users of government financial reports. The ways in which information are shared and used are constantly developing, in line with technical advancements and the changing expectations of users. Annual reports and accounts published by departments must also develop to keep in line with technological advances. Opportunities for improved financial reporting highlighted by this review will feed into government planning for digital transformation. The Treasury intends to ensure that the needs of the external users of government financial reports are considered as data systems are developed.[306]

In the ‘Accounting for democracy’ reports, PACAC set out four key purposes for government financial reporting and recommended that the Treasury adopt them as guidance: to maintain and ensure the House of Commons control of government spending, enabling, in particular the House of Commons to hold the Government accountable for its spending; to enable the public and researchers (both in civil society and Parliament) to understand and consider the value for money offered by public spending, so that they can make decisions about the effectiveness, efficiency and economy of particular policies or programmes; to provide a credible and accurate record which can be relied upon; and to provide managers inside departments (including both Ministers and civil servants) with the information they require to run the departments and its agencies efficiently and effectively.[307]

The Online System for Central Accounting and Reporting (OSCAR) is a cross government public spending database managed by Treasury. This system provides key management

[306] Goddard A, ‘Accounting and NPM in UK local government – contributions towards governance and accountability’ (2005) 21 Financial Accountability & Management 191, 195
[307] Grossi G and Thomasson A, ‘Jointly owned companies as instruments of local government: comparative evidence from the Swedish and Italian water sectors’ (2011) 32 Policy Studies 277, 279.

information and data for public reporting. Individual departments regularly upload financial information to the system and this underpins many areas of financial reporting such as Public Sector Finances, Supply Estimates and Whole of Government Accounts. In addition, another dataset is published on a quarterly basis on the same day as the Office for National Statistics' monthly Public Sector Finances National Statistics release. The dataset provides quarterly updates to monthly outturn data and the public are able to see monthly patterns in spend by government departments in a spreadsheet format. At the same time, users are able to drill down beneath previously released high-level aggregates to interrogate detailed spend by individual departments.

An annual report and accounts provides an overview of what a government organization has spent, received, owns and owes. Organizations prepare annual reports and accounts at the end of each financial year to report their financial results to Parliament. Each includes: a performance report, an accountability report and Financial statements. The performance report sets out the structure, aims and objectives of the organization and a review of how it has performed against these during the year. Central government departments report against the strategic objectives and the performance indicators set out in their single departmental plans.

An accountability report on the other hand sets out how the organization ensures good governance, and the systems and controls in place to manage risks. This section also includes a reconciliation of how the organization has spent the resources allocated to them by Parliament through the Supply Estimates process and is supported by separately published Common Core Tables which show core financial data in a generic format in Excel across central government. Financial statements that cover the previous financial year and represent the organisation's financial position in accordance with International Financial Reporting Standards as adapted and interpreted by the Financial Reporting Manual.

The financial statements are independently audited to ensure both Parliament and the public can be confident about the figures presented. The audit report includes an opinion on whether the financial statements give a true and fair view and an opinion on whether income and expenditure has been incurred in accordance with Parliamentary and other relevant authorities (the regularity opinion). If an audit opinion is qualified, the accounting officer could be called to the Public Accounts Committee or other relevant Parliamentary select committee to explain the circumstances that led to the qualification, helping Parliament hold departments and other public bodies to account for their spending. All government organizations covered in the Supply Estimates process are required to lay annual reports and accounts in Parliament each year, and are expected to do this within 3 months of the end of the financial year.

In New Zealand, public sector organizations constitute a range of organizational structures, with a variety of accounting requirements. Government Departments are responsible directly to a Cabinet Minister, with whom they contract to provide certain outputs. Audited financial reports are required for accountability over these outputs. However, many items of government expenditure, such as pensions, school operating costs and subsidies, are not themselves the responsibility of the Departments, and financial reporting monitoring devices are provided to a lesser extent. State-owned Enterprises (SOEs) are governed by a board, and their chief executives are not directly responsible to Cabinet, but report to their board.[308]

[308] Hossain M, Cahan SF and Adams MB, 'The investment opportunity set and the voluntary use of outside directors: New Zealand evidence' (2018) 30 Accounting and Business Research 263, 265.

The SOE board reports to Cabinet in the same format as a listed company does to its shareholders. Local governments have extensive powers including the authority to raise their own revenue through rates (property taxes) and to spend it. They are subject to very detailed accountability requirements including publication of an annual plan, which is open for public submissions, and subsequent publication of a detailed report on performance of the activities in the plan. Various categories of other organizations, known as crown entities, have decentralization, accountability and financial reporting arrangements depending on the activities they are set up for.[309]

Management and accountability in the New Zealand public sector have been thoroughly reformed in the years since the election of a reforming government in 1984 (Boston, Martin, Pallot and Walsh, 1991; Wistrich, 1992).[310] The State-owned Enterprises Act 1986 requires every state enterprise to operate as a successful business, which is "as profitable and efficient as comparable businesses that are not owned by the Crown," and to be a good employer and "exhibit a sense of social responsibility" (Duncan and Bollard, 1992, p. 11).[311] The government delegates decision making by each SOE to a board of directors, which appoints a chief executive. The accountability of the directors is similar to that of a listed company. SOE annual reports are prepared under the Companies Act 1993 and meet the same requirements as the annual reports of public listed companies.

Accountability is achieved in practice for Chief Executive Officers (CEOs) via monitoring by the State Services Commission on behalf of Cabinet. The monitoring includes annual reviews of

[309] Guthrie J, 'Application of accrual accounting in the Australian Public Sector: rhetoric or reality?' (1998) 14 Financial Accountability and Management 19, 20.
[310] Boston J, Martin J and Walsh P, *Reshaping the State: New Zealand's Bureaucratic Revolution* (Oxford University Press, Auckland 1991), 29.
[311] Duncan I and Bollard A, *Corporatization and Privatization: Lessons from New Zealand*, (Oxford University Press, Auckland 1992) 45.

performance based on the audited statement of service performance in the departmental annual report (Boston,1993).[312] Monitoring by Parliament also occurs through debates of the annual financial report and statement of service performance by Parliamentary committees and Parliament itself. In contrast to the accountability imposed on Departmental CEOs regarding outputs, there are no explicit requirements for Ministers to report on their performance in achieving outcomes, although this had been envisaged initially. This is partly because outcomes are influenced by factors that are also outside the control of Ministers (like the effect of increased unemployment or changing social values upon crime rates in the example referred to earlier). Nevertheless, a former Auditor-General has criticized the lack of accountability by Ministers for outcomes as a significant omission from accountability requirements (Tyler, 1989, p. 147).[313]

The current New Zealand Accounting Standards Framework (the ASF) sets down a financial reporting strategy for New Zealand and establishes which suite of reporting standards and reporting tiers apply to which entities. It involves a multi-standard, multi-tiered approach that uses tiers of reporting to match costs and benefits. It establishes: a system of financial reporting tiers consisting of up to four tiers for each of two sectors (the for-profit sector and the public benefit sector); the criteria to determine which entities are eligible to be in each tier with the criteria being such that each tier will comprise different classes of entities; and different accounting requirements or standards for each tier that are appropriate for the entities concerned

[312] Boston J, 'The Appointment and Accountability of Departmental Chief Executives' (1993) 16 Public Sector 15, 20.
[313] Tyler B, *Accountability in the New Public Sector* (Paper presented at the New Zealand Society of Accountants Public Sector Convention 1989) 16.

because they reflect the relative cost and benefits of reporting by entities, including taking into account international convergence and harmonization with Australia.[314]

The New Zealand financial reporting framework consists of two parts: the statutory financial reporting framework, which sets out the types of entities that have statutory financial reporting obligations: preparation, audit, and filing requirements; and the accounting standards framework, which establishes the accounting standards to be applied by entities with statutory financial reporting obligations. Standards for for-profit entities are based on IFRSs and standards for public benefit entities are based on International Public Sector Accounting Standards. The PBE standards are divided into two sectors – public benefit entities in the public sector and not-for-profit public benefit entities. Within each sector are four tiers of standards which could apply based on an entity's size and whether it has public accountability. The Financial Reporting Standards Board, a committee of the New Zealand Institute of Chartered Accountants, has established New Zealand equivalents to IFRS (NZ IFRS) for application by reporting entities, whether profit-oriented or not.[315]

Financial statements are prepared for the Government as a whole as specified in the Public Sector Finance Act 1989. Parliamentary and state sector entities and organizations for which statements are prepared include: Ministers, Departments, Offices of Parliament, State-owned enterprises, Crown Entities, the Reserve Bank of New Zealand and New Zealand Superannuation Fund. Government finances take into account all of the issues any business does, including revenue and expenditure, and assets and liabilities. And like any business, the government must also prepare financial statements at regular intervals including month-end and year-end financial

[314] Hossain M, Prevost A and Roa R, 'Corporate governance in New Zealand: the effect of the 1993 companies Act on the relation between board composition and firm performance' (2001) 9 *Pacific-Basin Finance Journal* 119, 121.
[315] Hunt G, 'Reward barely outweighs risk in NZ boardrooms' (1994) 30 National Business Review 28, 30.

statements. These statements are prepared by the Treasury and cover all government entities, including Ministers of the Crown, Offices of Parliament, departments, crown entities, state-owned enterprises (including mixed ownership model companies) and the Reserve Bank of New Zealand.

The Treasury is responsible for establishing and maintaining controls to ensure that all government financial transactions are within statutory authority, and that all use of public money is properly recorded. The Treasury's role in managing the government's finances can be broken into three broad areas: preparing the Financial Statements of the Government in accordance with the Public Sector Finance Act 1989; preparing guidance for departments on Financial Management and Reporting by State sector entities, and preparing forecasts (Economic and Fiscal Updates) as part of the annual Budget process.[316]

6.3 Internal Controls and the Procurement Process

The government procurement process in the UK is governed by the European Union Procurement Directives and the UK Procurement Regulations. To mitigate corruption and fraud in the procurement process, a range of internal controls are put in place in the UK. Government departments, agencies and non-departmental public bodies undertake a 'spend-and-recovery' audit on their accounts payable system, to detect overpayments to suppliers. In 2009, the Home Office commissioned a spend and recovery audit on the organization's accounts payable system to detect overpayments to suppliers. The provider examined six years of external expenditure and to date has detected and recovered £4m in overpayments on behalf of the department. The

[316] Gunasekarage A, Locke S, Reddy K and Scrimgeour F *Corporate governance practices of large firms in New Zealand and firm performance: An empirical investigation* (Paper presented at the Paper presented at the 19th Annual Australian Finance and Banking Conference, Sydney 2006), 15.

Department for Transport (DFT) has since commissioned the same provider to review payments made over six years across the entire DFT family accounts payable systems.[317]

The Chartered Institute of Purchasing and Supply (CIPS) is ideally positioned to develop and deliver procurement fraud training programme for new and existing public sector procurement specialists, auditors and prosecutors to tackle procurement fraud. CIPS provides training and qualifications for procurement professionals across all sectors and the Government remains committed to a professional, skilled procurement workforce in the public sector. Such training would raise the awareness of fraud risk amongst procurement specialists and help establish a counter fraud culture in the specialism.[318]

In 2010, Sir Philip Green undertook a review of the efficiency of Government spending. The Green Review highlighted a number of inefficiencies in public procurement, some of which were due to departmental autonomy over purchasing. He recommended that the Government should leverage its purchasing power by seizing opportunities to procure as a single entity. The Green Review has prompted a number of changes to Government procurement which are currently being led by ERG. Spending on ICT contracts above £5m now require central approval and the new Major Projects Authority (MPA) oversees large-scale projects which will be centrally funded and managed.[319]

The transition to these new processes and systems creates a significant opportunity to design processes and procedures that reduce the risk of fraud. Centralized procurement will mean fewer

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[317] Humphrey C, Miller P and Scapens RW, 'Accountability and accountable management in the UK public sector' (1993) 6 Accounting Auditing and Accountability Journal 29, 31
[318] LeGrand J, 'Competition, cooperation, or control? Tales from the British National Health Service Health Affairs' (1999) 18
[319] Mulgan R, 'Comparing accountability in the public and private sectors' (2000) 59 Australian Journal of Public Administration 87, 88.

contracts to process but these contracts are likely to be more significant in size and value. Therefore, should fraud occur, the losses will significantly increase. Conversely if the policy environment and internal controls are robust they will protect a larger segment of the Government procurement spend. This shows the importance of performing a risk assessment of the new processes at the outset, which achieves the right balance between efficiency and fraud control. This presents an opportunity for a new independent panel of counter fraud experts to advise the MPA on designing fraud risk out of the transition to centralized procurement and the resultant crown contracts.[320]

Since early 2011, Local Authorities have been encouraged to publish all spending activity over £500. Central Government departments now publish all spending activity over £25,000. This push for greater transparency over public spending is a positive step in efforts to disrupt and deter procurement fraud. In the OFT case, cartels operated effectively because they were aware of the lack of transparency around public procurement. If the public can see who public bodies are contracting with and how they are spending public money, then an additional layer of detection and disruption can be added.[321]

The outcome of the Green Review has also prompted a re-evaluation of current procurement processes in Government. Typically, Government procurement can take more than 350 days to complete, which is time consuming and expensive for both the procuring body and prospective suppliers. Following a review in 2010, the Government is currently piloting 'lean' procurement principles on a number of procurement exercises in central Government. Lean principles present

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[320] Osborne SP, *The introduction. The (New) Public Governance: a suitable case for treatment? In: Osborne SP, editor. The New Public Governance? Emerging perspectives on the theory and practice of public governance* (London: Routledge 2010) 43

[321] Polidano C, 'Why bureaucrats can't always do what ministers want: multiple accountabilities in Westminster democracies' (1998) 13 Public Policy and Administration 35, 40

an opportunity for the myriad of policies and procedures currently dominating public procurement to be rationalized and prompt positive behaviour from procurement specialists who will now have no need to bypass existing bureaucracy. Lean procurement pilots present an opportunity to assess the risk of fraud and we believe the independent panel of fraud experts should be deployed to help design out fraud.[322]

In the medium term, the public sector in the UK takes a more holistic approach to preventing fraud and corruption in the procurement process. A counter fraud culture amongst procurement specialists is being encouraged with to disrupt and prevent procurement fraud. The complexities around detecting and preventing procurement fraud, particularly in the pre-contract award phase, mean improving the awareness and understanding of the problem amongst procurement specialists must be the first step. Elements of an effective counter fraud culture include awareness of the problem, an understanding of how and why the problem should be mitigated, and the creation of suitable incentives to prevent, detect and report suspicions of fraud. Procurement fraud training will provide a basis for embedding a counter fraud culture.[323]

A holistic approach is further conducted to ensure fraud risk assessments are undertaken before embarking on procurement. Risk assessments are performed in two ways. Firstly, they are undertaken before the procurement process is underway, in order to identify and mitigate fraud risk. Secondly, assessments are undertaken by auditors once the procurement process is complete – the aim being to detect fraud and take appropriate action. In central Government, the Starting Gate and Gateway Review processes for major projects provides a framework in which fraud

[322] Smyth S, 'Contesting public accountability: a dialogical exploration of accountability and social housing' (2012) 23 Critical Perspectives on Accounting 230, 231.
[323] Bruijn H de van Helden G J, 'A plea for dialogue-driven performance-based management systems: evidence from the Dutch public sector' (2006) 22 Financial Accountability and Management 405, 421

risk assessment can take place. Starting Gate reviews are undertaken before major projects begin (thus before procurement). If fraud risks are considered at this early stage, the risk can be designed out of the project and subsequent procurement. Once the project is underway, fraud risk assessments can be subsumed within Gateway Reviews, to audit the success of efforts to design fraud out of projects as well as identify new risks which may have arisen along the way.[324]

In 2010, the Chartered Institute of Public Finance and Accounting (CIPFA), together with Transport for London (TFL), published the *Contract Audit Toolkit*. The Toolkit is designed to assist auditors in detecting and mitigating risks during their audits of procurement and contract management. The Toolkit contains specific measures for identifying fraud in the entire procure-to-pay lifecycle. Since 2009, TFL has used this approach to identify and mitigate fraud risk in the Crossrail programme.[325]

Where structured data on procurement is available, data analytics must be deployed to detect and subsequently prevent fraud. The British Airports Authority (BAA) place data analytics at the forefront of their strategy to prevent procurement fraud. BAA use a forensic auditor to undertake holistic contract audits, which identify areas of efficiency savings as well as potential fraud. On average, the audit identifies eight per cent of potential savings through greater efficiencies and preventing potential fraud.[326]

Another internal control practiced in the UK is whistle-blowing and fraud reporting. Where risk assessments and the use of analytics detect suspected fraud, suspicions are reported and properly

[324] Barretta A, 'The functioning of co-opetition in the health-care sector: an explorative analysis' (2008) 24 Scandinavian Journal of Management 209, 210.
[325] The Chartered Institute of Public Finance and Accounting (CIPFA) & Transport for London (TfL) (The Contract Audit Toolkit, London 2010) 67
[326] Grossi G and Newberry S, 'Special issue theme of whole of government financial reporting: international trends' (2009) 29 Public Money & Management 209, 211.

investigated. Many public bodies run in-house whistle-blowing services for staff. While this is useful, in-house services sometimes lack the anonymity necessary to give staff and other persons the confidence to report their suspicions. The National Fraud Authority (NFA's) insider-enabled fraud scoping study report identified a need to improve cross-government fraud reporting mechanisms. Specifically, this includes a single, integrated fraud reporting service for Government where suspicions of procurement fraud can be reported anonymously. Reports should be collated and analyzed centrally, in order to understand the extent of the problem and target action. Similar services operate in the National Health Service (NHS) and help build a single intelligence picture on which to target investigation.[327]

Information sharing and intelligence are also employed as internal control mechanisms. Undertaking risks assessments, using data analytics to prevent and detect fraud, and having an integrated fraud reporting service generate better information and intelligence on which to understand the full extent of procurement fraud. It is crucial that this is analyzed in a single place so that the clearest possible picture of procurement fraud against public services can be generated. In the UK, the National Fraud Intelligence Bureau (NFIB) is best placed to receive and analyze data on procurement fraud and public bodies should make every effort to share information and intelligence through NFIB.[328]

In New Zealand, various internal controls are also in place aimed at promoting compliance with effective anti-fraud, anti-bribery and corruption policies by all parties involved in the public

[327] Dubnick M, 'Accountability and the promise of performance: in search of the mechanisms' (2005) 28 Public Performance and Management Review 376, 376

[328] Chow D, Humphrey C and Moll J, 'Developing whole of government accounting in the UK: grand claims, practical complexities and a suggested future research agenda' (2007) 23 Financial Accountability and Management 27, 30

procurement process.[329] Under the Public Finance Act 1989 the Treasury is responsible for establishing and maintaining a system of internal control designed to provide reasonable assurance that the transactions recorded are within statutory authority and properly record the use of all public financial resources by the Government reporting entity. All Government reporting entities are further responsible for establishing a system of internal control designed to provide reasonable assurance as to the integrity and reliability of financial reporting.[330]

State-owned corporations are tasked to conduct appropriate due diligence in relation to fraud, bribery and corruption risks before any third parties are engaged. The appropriate level of due diligence varies depending on the circumstances and staff are encouraged to use their judgement on a case by case basis. The approach is proportionate to the risk and the size of the organization. ‘Adequate’ will be a higher benchmark if the organization is large, or the Fund is operating in overseas markets where bribery is known to be commonplace. Some high risk transactions, industries, legal jurisdictions or countries will require further due diligence which may require a greater level of investigation and care be taken.[331]

New Zealand’s Guide [332] to supplier feedback and complaints gives suppliers a short overview of how to give feedback or raise concerns about a government procurement process, how to make a formal complaint, and how to use other options to resolve a problem if previous steps do not give satisfaction. It includes information about the procurement process, suppliers’ rights in the process, the responsibilities of those involved in the process, and the role of the Ministry of

[329] New Zealand Government, *Constructive Market Engagement: A Guide to Engaging Effectively with Suppliers* (Wellington, New Zealand 2015) 3.
[330] Anderson HD and Marshall BR, ‘Takeover motives in a weak regulatory environment surrounding a market shock: a case study of New Zealand with a comparison of Gondhalekar and Bhaqwat's (2003) US findings’ (2007) 29 Review of Quantitative Finance and Accounting 53, 60.
[331] Dalziel P, ‘New Zealand's economic reforms: an assessment’ (2002) 14 Review of Political Economy 31
[332] New Zealand Government Procurement, *Guide to supplier feedback and complaints: How to provide feedback or make a complaint about procurement* (2015) 60

Economic Development. It also explains how an agency should respond to supplier complaints and provides useful contacts.

A supplier may complain to an agency if it has concerns about any part of a procurement process and if it believes the agency has failed to follow the rules. This process supports ongoing development and improvement in procurement throughout government, during and after the tender process. Concerns can be raised at the agency dealing with the process or using the New Zealand Government Procurement's Supplier Feedback Service (SFS). New Zealand Government Procurement (NZGP) monitors the number and nature of supplier complaints. If necessary, it will clarify procurement policy and practice guidance for agencies, so that similar problems are less likely to arise in the future. NZGP must be sent copies of all written complaints (and related correspondence) that government agencies' chief executives receive. SFS allows suppliers to voice their concerns to a neutral agency and gives government an understanding of the problems suppliers are experiencing in the procurement process.[333]

According to the Guide, suppliers have several options for communicating their concerns: In the first option, suppliers can attempt to sort the matter out directly with the agency. Options available include discussions and formal complaint. The second option is for the suppliers to engage third party to help resolve the issue with the agency Options available here include mediation or alternative dispute resolution and an independent review or investigation, also called a "probity audit". The third option is for the suppliers to escalate complaint to an authority and/or go to court. Options available to this end include: investigation by the Auditor-General,

[333] Evans L, Quigley N and Counsell K, *Protection of private property rights and just compensation: An Economic analysis of the most fundamental human right not provided in New Zealand (*Wellington, New Zealand: New Zealand Institute for the Study of Competition and Regulation 2009) 19.

investigation by the Ombudsman, investigation by the State Services Commission and going to court.[334]

Access controls and audit trails are further employed by state-owned corporations. To ensure that users have access to the functions they need to do their jobs, an e-procurement system is in place incorporating a "roles-based" access control mechanism. This allows a particular role to be assigned to each user of each application, and to determine which functional areas this role incorporates. The e-procurement system also incorporates a comprehensive audit trail, with a record of who did what and when at various important stages of the purchasing process. The system also allows internal control rules to be incorporated. For example, the person who approves a requisition must be different from the requisition originator. Setting out such principles in the purchasing application can be a useful countermeasure against possible fraud.[335]

Before implementing any electronic procurement solution, public entities are required to assess all risks to information and services. This will determine the security levels required. With an e-procurement system, the higher the value or confidentiality of the transactions through the system, the higher the required security level. The level of security a public entity chooses as being appropriate to e-procurement will affect a number of other security decisions, including: user identification, or verification of use by unique user identification; authentication, or validation (through password or digital certificate) that the user's identification belongs to the user who presented it; access control, or verification of the privileges of authenticated users; integrity, or verification that data does not change at any point in the process; non-repudiation, or

[334] Evans L, *Capital market integration: the structure of the New Zealand economy and its capital markets*. A Report Prepared for the Ministry of Economic Development and the Capital Market Development Taskforce (2009) 1.
[335] Hossain M, Cahan SF and Adams MB, 'The investment opportunity set and the voluntary use of outside directors: New Zealand evidence' (2000) 30 Accounting and Business Research 263, 266

verification of authorship and integrity of transactions – this authenticates the audit trail associated with the transaction; and confidentiality, or the prevention of access by unauthorized persons.[336]

State-owned enterprises further employ authentication controls and electronic invoicing (e-invoicing) in electronic procurement. Any purchasing system must support authentication of users so that individual transactions can be traced back to the relevant person. Generally, this is by user name and password. Alternatively, the authentication mechanism could use network logins or other directory services, while higher security requirements may demand token-based methods such as digital certificates, smartcards, or biometric devices. The latter options are based on the common security principle of requiring "something you have" (for example, a smartcard) as well as "something you know" (such as a password or personal identification number) to achieve a much higher degree of security.[337]

State-owned enterprises are further required to apply relevant policies and procedures when e-invoicing, covering: the content of the invoice; the means of demonstrating that the invoice is for a genuine supply; the means for maintaining an audit trail, including arrangements for an auditor to access information; the content of credit notes, including how they will enable the original invoice to be identified; the means for ensuring the authenticity of the origin and integrity of the invoice; the decision on whether self-billing will be carried out (this is an arrangement where the public entity determines the value of goods or services supplied, raises the supplier's invoice, and forwards it to the supplier, with or separate from payment) and, if so, how self-billing will be

[336] McGregor J, *New Zealand census of women's participation* (Wellington: Human Rights Commission 2008) 12.
[337] Reddy K, Locke SM, Scrimgeour FG and Gunasekarage A, *The efficacy of the principle-based corporate governance practices on firm performances: An empirical investigation using New Zealand data* (Paper presented at the Paper presented at the 12th New Zealand Finance Colloquium, Palmerston North 2008) 22.

controlled; the means for storing electronic invoices; and the decision on whether digital signatures are an accepted method of authentication for e-invoices, and the controls and audit trail that will be needed.[338]

6.4 Performance Management Practices and Service Delivery

In the United Kingdom, New Labour government initiatives, such as 'Best Value Review' (BVR) and ‘Comprehensive Performance Assessment’ (CPA), are processes of measurement and evaluation that require local authorities to achieve targeted standards of performance across the range of their services. Best Value Review was introduced in 2000 with the stated aim of encouraging a programme of continuous quality improvement though a five-year audit cycle of every council service. In response to criticisms about the inspection burden imposed by BVRs, Comprehensive Performance Assessment was introduced in 2002 with promises to reduce the level of audit for well performing public sector organizations. The first CPAs of the case study organizations took place after the Best Value reviews but many of the issues stemming from the Best Value approach to performance measurement apply to CPA. Both processes aim to inform future improvement plans as well as assess existing service provision and past performance. At an organizational level, they require local authorities to continuously seek out ways of working and develop HR practices that will increase their internal capabilities and enhance standards of service delivery (CIPD, 2002).[339]

Best Value Review possesses the characteristics of a classic linear approach to performance management in that it identifies standards, uses these to measure and evaluate performance and finally sets specific targets as organizational priorities in a subsequent improvement plan. The

[338] Turner R, ‘Board of directors’ leadership’ (1985) 59 New Zealand Journal of Business 69, 70
[339] Hoffman WH, Neumann K, Speckbacher G. The effect of interorganizational trust on make-or-cooperate decisions: disentangling opportunism-dependent and opportunism-independent effects of trust 2010 7 European Management Review 101, 115.

actual process of BVR has four main stages, known as ‘the four C’s’. These are to challenge why and how a service is being provided, compare its performance with others to see how the service could be better provided, consult with local taxpayers and service users about what they want from the service and compete, wherever practicable, fairly and openly to provide the best service.[340]

Best Value Review has the potential to establish organizational priorities and develop supportive HR policies through processes of internal consultation involving the senior executive, the HR function, line management, employees and the recognized trade unions. The ‘challenge’ requirements of an HR review appear to provide a real opportunity to examine high performance work practices (HPWP) operating in other organizational settings and for the HR function to champion innovation. As a performance system, the principles of BVR support ‘a model of HRM as a strongly integrated management approach' where the emphasis is placed on best practice and strategic synergy.[341]

In the UK, performance-related pay schemes are also employed in the public sector, usually introduced alongside targets, whereby bonuses are paid if particular targets are achieved. For example, the government introduced an incentive programme for doctors in 2004, whereby bonuses are awarded based on the achievement of 146 targets. These targets focus on a wide range of areas, including clinical care, practice organization and patient satisfaction. The bonuses are on a sliding scale – so even if not all of the targets are achieved, some of the available bonus would be paid. Having such reward schemes is designed to improve the motivation of the

[340] Armstrong M and Baron A, *Performance Management, the new realities* (London: Institute of Personnel and Development, London 1998) 6
[341] Murphy G and Southey G, ‘High performance work practices – perceived determinants of adoption and the role of the HR practitioner’ (2003) 32 Personnel Review 73, 75.

management and staff, and it is argued that this improves the overall performance of the organization.[342]

Performance contracts were introduced in 1995 in the Finnish public sector and can be largely characterized as quasi-contracts. This means that contracts between Ministries and executive agencies are not statutory and the word contract refers more to a mutually negotiated agreement than to a contract in the strict legal sense. The informal nature of the contracts made the implementation much easier than this would have been the case with a legal model. However, it also caused some difficulties in ensuring the compliance of the actors and making contracting parties accountable for their actions. The performance contracting process of the Ministry of Social Affairs and Health shows performance contracting increased the co-operation between Ministries and agencies as well as among agencies. It also strengthened the strategic thinking in central government agencies and made the agencies more cost-conscious and results-oriented.[343]

In addressing accountability in the public sector, the New Zealand public management model focuses strongly on the concept of performance. To achieve this, it has developed and emphasized contractual relationships using a range of contractual instruments to improve efficiency and effectiveness in public institutions. In New Zealand. the heads of government agencies are each accountable to one or more ministers. When a department provides services for more than one minister, the department is accountable to each minister for the services provided to him or her, but responsible for the management of the department to just one, designated, minister. Ministers, in turn, are accountable to the legislature for their performance. The

[342] Boxall P and Purcell J, 'Strategic Human Resource Management: where have we come from and where should we be going?' (2000) 36 International Journal of Human Resource Management 183, 185
[343] Chartered Institute of Personnel and Development, *People Management and development in the public services,* (CIPD London 2002), 10

legislature, Parliament, is ultimately accountable to the electorate. The roles of ministers and government agencies in the system have been distinguished as follows.[344]

Ministers choose which outcomes (i.e. goals) to pursue and then choose which outputs (i.e. goods and services) to produce or buy to meet those goals. Government agencies - and other organizations from whom the government makes purchases – are thus accountable to ministers for the production of outputs. Ministers are accountable to Parliament for the choice of outputs and for the choice and achievement of outcomes. The formal public-management system can be broken down into three components: (1) ex-ante agreements setting out plans for the period ahead, (2) interim monitoring and ex-post reporting on the extent to which the plans are being, or have been, achieved, and (3) the assessment of performance and the application of rewards or penalties.[345]

Under the ex-ante agreements, each year, about three months before the budget, the Executive sets out its strategic priorities for the budget and its long-term fiscal-policy goals. Recently, the Executive has also published a set of “strategic Result Areas” in which it lists the key contributions the public sector is intended to make over the next three years to the achievement of the Government’s long-term goals. In the budget, the Executive then sets out detailed expenditure plans for the year ahead. Portfolio by portfolio, ministers specify: what groups of outputs they intend to buy from government departments, non-departmental governhent

[344] Samkin G and Schneider A, Accountability, narrative reporting and legitimation: the case of a New Zealand public benefit entity (2010) 23 Accounting, Auditing and Accountability Journal 256, 258
[345] Office of the Auditor General, *Maintaining a future focus in governing Crown-owned companies (*New Zealand: Office of the Auditor-General 2014) 9.

agencies, and other organizations; what investments they intend to make in government agencies; and what grants, benefits, debt-repayments, and other payments they intend to make.[346]

The budget provides a description of each group of outputs ministers intend to buy, along with various measures of their quantity, quality, and cost, and a statement of the outcomes to which they are intended to contribute. The budget focuses on outputs. Although departments estimate the value of their consumption of various categories of resource, such as personnel and operating expenses, the budget does not prescribe what types of input are to be used in the production of goods purchased or provided by the government; it leaves this decision to agencies. Moreover, though the budget states the outcomes to which the outputs are intended to contribute, it does not attempt to provide a justification for the purchase of outputs, or to describe the linkage between outputs and outcomes. Parliament must approve the amounts of money ministers want to spend on each output group, as well as the other payments they wish to make. In a sense, the budget represents an agreement between the ministers and the legislature.[347]

In recent years, the government party has held a majority of seats in Parliament, and Parliament's approval of the budget has been a formality. With the advent of a new electoral system based on proportional representation it is possible this will change. Paralleling this agreement between the Executive and the legislature are more detailed performance agreements between ministers and the heads of the government departments that report to him or her. The agreements take the form of contracts, signed by both the minister and the chief executive, as the agency heads are known. The agreements themselves do not have the force of legal contracts, since the minister and his or

[346] NZ Treasury, *Performance expectations – how performance will be assessed* (New Zealand: NZ Treasury 2013) 7.
[347] Norman R, *Obedient servants? Management freedoms and accountabilities in the New Zealand public sector* (New Zealand: Victoria University Press 2003) 10

her department are considered part of the same legal entity, but they do bear upon the legal employment contracts of the heads of departments. The main part of the performance agreement specifies some “key results” that the chief executive should give priority to achieving. The key result might be the delivery of one or more important outputs linking to the Government’s key strategic objectives, as further discussed below, the improvement of the department’s accounting systems, the achievement of some major departmental reorganization, or some other important goal.[348]

Under the ex-post reporting system, chief executives provide reports to their ministers that compare actual performance with planned performance, with respect to both the ownership and the purchase interests. Progress reports are prepared through the year, with a final report at the end of the financial year. Most departments present interim financial reports every month; very small departments can present them quarterly. All departments present quarterly reports of output delivery. The Executive, in turn, provides various reports on its performance to Parliament. It provides financial statements for the government as a whole, which give information on the government’s total income and expenses, its cash-flows, and its balance sheet. The Executive also provides reports on outputs it has bought from non-departmental sources and reports of departmental performance, which include both financial statements and “Statements of Service Performance” detailing departments’ success in providing the outputs they had agreed to produce.[349]

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[348] Newberry S and Pallot J, ‘Fiscal (ir)responsibility: privileging PPPs in New Zealand’ (2003) 16 *Accounting, Auditing and Accountability Journal* 467, 480.
[349] McDavid J, *The iron cage recreated: The performance management of state organisations in New Zealand* (Canadian Public Administration 2011) 112.

The performance of chief executives is assessed at the end of each financial year. The assessment, like the performance agreement, is confidential. Although the performance agreement is between the minister and the chief executive, the chief executive's performance is assessed not by the minister but by the State Services Commissioner, taking into account the minister's views. The system includes two formal mechanisms for encouraging good performance. First, chief executives' salaries may vary according to the State Services Commissioner's assessment of their performance. Second, chief executives are employed on fixed-term contracts, which may or may not be renewed, depending on among other things the State Services Commissioner's assessment of their performance.[350]

[350] Lye J, Perera H and Rahman A, 'The evolution of accruals-based Crown (government) financial statements in New Zealand' (2005) 18 *Accounting, Auditing and Accountability Journal* 784, 788

CHAPTER SEVEN

CONCLUSION AND RECOMMENDATIONS

7.1 Introduction

The study set out to assess the effectiveness of the various interventions under the Mwongozo Code of Governance on service delivery among state corporations in Kenya. More specifically, the study sought to examine the extent to which financial accountability influences service delivery among SCs in Kenya; determine the extent to which internal controls in the procurement process influence service delivery among SCs in Kenya; and to assess the extent to which performance management practices influence service delivery among SCs in Kenya.

The study was based on the hypothesis that despite the formulation of *Mwongozo*, service delivery among SCs in Kenya remain dismal, which can be attributed to lack of adequate financial accountability mechanisms, weak internal control systems in procurement processes and ineffective performance management practices. The reasons for the Code's failure to achieve the desired results are varied but this study was emphatic that the Code has failed to achieve its overall desired objectives due to lack of an effective mechanism of implementation and enforcement of those principles. Against this backdrop, this chapter presents the conclusions drawn from the findings and the resulting recommendations.

7.2 Conclusion

The conclusions herein made are as informed by the findings of the study as presented in the preceding chapters. The conclusions are thematically presented in the order of the specific objectives of the study, including financial accountability, internal control systems and the procurement system and performance management systems.

7.2.1 Financial accountability

The study sought to examine the extent to which financial accountability influences service delivery among SCs in Kenya. The study established that among the mechanisms put in place by SCs in the country for financial accountability include internal auditing, external auditing, the integrated financial management information system, parliamentary committees including public accounts committees, public investments committee and the budgets and appropriations committee; office of the controller of budgets. The study is of the conclusion that the mechanisms in place among SCs in the country for financial accountability have a significant potential to enhance service delivery if implemented to the letter. This calls for holders of key offices across the SCs to institute internal measures for the implementation of pertinent legal provisions, regulations and policies.

Mwongozo requires all SCs to ensure that there is an effective risk-based internal audit system; approve the internal audit charter; ensure that the internal audit function is independent; ensure that the internal audit function reports to the committee; and ensure that the head of internal audit holds a senior position in the management team, is professionally qualified and is a member in good standing, of the professional body responsible for regulating Auditors. Accordingly, The Public Audit Act, 2015[351] which establishes the office of provides that the Auditor-General shall have unhindered access to all internal audit reports of a state organ or any public entity, which is subject to audit by the Auditor-General as provided for under Article 229 (4)[352] of the Constitution.

[351] Public Audit Act of 2015, Part II, section 4
[352] Constitution of Kenya, 2010. Article 229 (4)

National government entities are also charged under section 73[353] of the Public Finance Management Act, 2012 to institute appropriate arrangements in place for conducting internal audit according to the guidelines of the Accounting Standards Board; ensure that internal audits in respect of the entity are conducted in accordance with international best practices; and that every national government public entity shall establish an audit committee whose composition and functions shall be as prescribed by the regulations. The Act further establishes the Public Sector Accounting Standards Board, that is responsible for providing accounting frameworks and to set generally accepted standards for the development and management of accounting and financial systems by all State organs and public entities.

SCs are further tasked to ensure that the annual external audit is conducted by a qualified, competent and independent external auditor with a view to give assurance in an objective manner that the financial statements are adequately and truly indicative of the performance and financial position of the institution.[354] Article 229 (4)[355] of the Constitution provides that within six months after the end of each financial year, the Auditor-General shall audit and report, in respect of that financial year, on the accounts of all funds and authorities of the national and county governments; the accounts of any other entity that legislation requires the Auditor-General to audit; as well as the accounts of any entity that is funded from public funds. Further, in tandem with Article 229 (4)[356] of the Constitution, the Public Audit Act, 2012 provides in Part IV section 34[357] that the Auditor-General may, upon request or at his or her own initiative conduct periodic audits which shall be proactive, preventive, and deterrent to fraud and corrupt practices, systemic

[353] section 73
[354] Ibid
[355] Constitution of Kenya, 2010. Article 229 (4)
[356] Constitution of Kenya, 2010. Article 229 (4)
[357] Part IV section 34

and shall be determined with a view to evaluating the effectiveness of risk management, control and governance processes in state organs and public entities.

The study also established that IFMIS is designed to improve systems for financial data recording, tracking and information management. This is in response to increasing demands for greater transparency and accountability in the management of the public's finances. The IFMIS system has recorded both an array of achievements and challenges in its implementation towards realizing its objectives in accountability, risk management and internal controls among SCs in Kenya. Among the achievements include the undertaking of business process reviews of all public financial management processes and facilitated a review and removal of obsolete process steps. The programme has also activated three new financial modules of cash management, fixed assets, and purchasing order in ten pilot ministries. Among the challenges in the implementation of IFMIS include resistance to change and inadequate user training;[358] connectivity challenges when the national IFMIS server is down;[359] low administrative commitment;[360] system complexity, technological risks of failure and deficient functionality.

Other mechanisms in place include parliamentary committees including the Public Accounts Committees whose oversight effectiveness on government spending is dependent not only upon features of the committee itself but also on the political, economic, social and cultural contexts in which it operates. The study also found that the public accounts committee, though performing what is basically a post-mortem exercise, is expected to be satisfied by their scrutiny that chief executives applied or spent prudently the voted provisions on purposes authorized by the House.

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[358] Mwakio, B. (2015). Challenges Facing County Governments in the Implementation of IFMIS: Case of Taita Taveta County, 5 *IJRCM* 14, 21

[359] Miheso, S. (2013). *Adoption of Integrated Financial Management Information Systems by National Government in Kenya*. Unpublished Dissertation, University of Nairobi 11

[360] ICPAK, (2014). *A Baseline Survey on Devolution in Kenya with Respect to Public Financial Management Systems – One year on*, ICPAK ISBN 978, 996

The budgets and appropriations committee serves the function of examining the annual and supplementary estimates of the expenditure presented to the House; and examining draft annual and supplementary estimates of expenditure. The office of the controller of budget was further found to oversee the implementation of the national and county government budgets. The office exercises the oversight by authorizing withdrawals from public funds.

In financial reporting, it was found that the SCs are obligated by both *Mwongozo* and Section 83 of the Public Financial Management Act, 2012 to prepare a financial report for each quarter of the financial year in respect of the entity and forward a copy of the report to the cabinet secretary and controller of budget. SCs are also required to comply with applicable financial reporting standards that is the International Financial Reporting Standards domesticated in the country by domesticated by the Institute of Certified Public Accountants of Kenya.

7.2.2 Internal Controls in the Procurement Process

The study sought to determine the extent to which internal controls in the procurement process influence service delivery among SCs in Kenya. To this end, the study established that the main internal control systems put in place by SCs pertinent to the procurement process include the code of conduct and ethics, risk management, whistle-blowing, measures to address conflict of interest and adoption of ICT. As with financial accountability, the study also finds that the internal control systems in the procurement process are adequately elaborate in text and require equality adequate measures in place geared at their implementation in order to improve service delivery among SCs in the country.

Mwongozo[361] provides code of conduct and ethics as a governance parameter under the ethical leadership and corporate citizenship principle. The parameter obligates SCs in Kenya, through the Board to ensure that a code of conduct and ethics is developed; and ensure that all members of the organization subscribe to the code of conduct and ethics. Section 8 of the Public Officer Ethics Act, 2016[362] provides that a public officer shall, to the best of his ability, carry out his duties and ensure that the services that he provides are provided efficiently and honestly and to the extent appropriate to his office, seek to improve the standards of performance and level of professionalism in his organization all the while carrying out his duties in accordance with the law. Section 11 of the Act further stipulates that a public officer shall not: use his office to improperly enrich himself or others; accept or request gifts or favours from a person who has an interest that may be affected by the carrying out, or not carrying out, of the public officer's duties; carry on regulated activities with respect to which the public officer's organization has a role; or has a contractual or similar relationship with the public officer's organization.

SCs are further directed to ensure the development of a policy on risk management, which should take into account sustainability, ethics and compliance risks; set out its responsibility for risk management in the board charter; approve the risk management policy and the risk management framework; and delegate to management the responsibility to implement the risk management plan. To this end, the second schedule of the Public Procurement and Disposal Act, 2010 provides for the control of the major public private partnership risks in the course of procurement including design risk, construction risk, site risk, operating risk, demand risk, tariffs risks, collection risk, credit risk, *force majeure* risk and political risks.

[361] Ibid
[362] The Public Officer Ethics Act, Section 3

SCs in Kenya are further charged by the *Mwongozo* Code under the whistle blowing governance parameter of the ethical leadership and corporate citizenship principle, to through the Board, ensure that there is a whistle blowing policy in the organization; the whistle-blowing policy protects and prohibits victimization of those who disclose or provide information in good faith; and that an independent party is responsible for receiving and investigating reports received. The study also found in this regard that Kenya has various laws that have a bearing on whistleblowing. Such laws aim at reducing corruption and encouraging good governance. They assure any person who is a witness to a crime, protection from retaliation by those mentioned. These laws however do not prioritize whistleblowing and hence, no single law or institution established under these laws has promoted a culture of whistleblowing in Kenya to ensure that vices that are obstacles to Kenya's socio-economic development are eliminated. The Whistle Blower Protection Bill, 2017 promises to address this should it be enacted into law.

SCs, through the board, are directed under the conflict of interest governance parameter of the ethical leadership and corporate citizenship principle of the *Mwongozo* code to ensure that a policy on the management of conflict of interests is in place. Accordingly, Section 12 of the Public Officer Ethics Act stipulates that a public officer shall use his best efforts to avoid being in a position in which his personal interests conflict with his official duties. The Act proceeds that a public officer whose personal interests conflict with his official duties shall declare the personal interests to his superior or other appropriate body and comply with any directions to avoid the conflict; and refrain from participating in any deliberations with respect to the matter.

7.2.3 Performance Management Practices

The study sought to assess the extent to which performance management practices influence service delivery among SCs in Kenya. A number of performance management practices, strategies and policies were identified in this regard. These include the Result Based Management strategy which is operationalized through various tools including rapid results initiatives, performance contracting, performance appraisal system, service/citizen charters, program-based budgeting and ISO certification. Other practices include rewards and sanctions and benchmarking. The foregoing practices and strategies were found to improve service delivery to a notable extent by raising staff productivity, motivation and satisfaction although gaps still exist.

The study deduces that the result based management strategy has a focus on the timely and effective achievement of relevant objectives and goals through strategic planning, implementation and resource planning. This is followed by performance measurement, monitoring and reporting as well as systematic use of performance information to improve policy decision making and the programme performance at all levels

Established by the State Corporations Performance Contracting Regulations (2004) [363], the study finds that performance contracts are implemented in the civil service with the aim of among others, improving service delivery to the public by ensuring that top-level managers are accountable for results, and in turn hold those below them accountable, reversing the decline in efficiency and ensuring that resources are focused an attainment of the key national policy priorities of the government; and institutionalizing performance oriented culture in the civil service through introduction of an objective performance appraisal system,.

[363] The State Corporation (Performance Contracting) Regulations, 2004, Section 7

For the purpose of implementing the performance contracts, the inspector-general (corporations) is tasked with evaluating actual results of operation and management on the basis of agreed performance targets; determining methods for evaluating performance on the basis of specified and agreed targets; developing evaluation criteria; submitting results of evaluation to the Treasury and the parent Ministry within three months after the end of the financial year; and advising the administrator of the performance contracts.

The study further established that since its introduction in Kenya on a pilot basis in 2004 through partnership between the Government of Kenya and the World Bank, the Rapid Results Initiative has been effective in its purpose, which is to enhance efficiency and effectiveness in service delivery. The tool has been quite satisfactorily been implemented as a focused learning process aimed at starting major change efforts and enhancing implementation capacity. It has largely tackled large-scale medium and long term change efforts through a series of small-scale, results-producing and momentum-building initiatives.

Another tool under the results based management strategy, ISO 9001, was found to encompass organizational practices across sectors with its application being relevant to organizations regardless of the activities they are in. The study found that Kenya has among the highest number of organizations in East Africa achieving ISO certification. Among the benefits of implementing ISO include increased efficiency, improved consistency, improved quality of product/service, better-motivated employees, cost savings, fewer mistakes, less re-work, less waste, wider market opportunities, increased customer satisfaction, increased competitiveness, increased profits, better use of time and resources and improved communication.

Further, the study found that a number of benefits have been associated with the successful implementation of Citizen Charters. Firstly, Citizen Charters help public institutions to manage user expectations about public services and to provide a framework for public participation. Secondly, they encourage public bodies to measure and assess performances by committing themselves to standards of service that the public expects and evaluating how they measure against those standards. Thirdly, Citizen Charters provide the public with recourse to file complaints and seek redress where the standards have not been met.

The study also found that performance appraisal systems are employed by SCs to manage and improve performance of the public service by enabling a higher level of staff participation and involvement in planning, delivery and evaluation of work performance. The specific objectives are to Link individual performance targets with organizational strategic objectives and workplan; promote communication between Appraisee and Supervisor with continuous feedback on work progress; set the basis on which the performance of an officer is monitored and evaluated as stipulated in the individual work plan; align operational and financial performance targets with budgetary provisions; assess the learning and development needs of staff on a timely basis; and provide information for decision making on administrative and human resource issues such as renewal of contracts, promotions, delegation of duties, training, deployment, rewards and sanctions.

The study established that performance rewards and sanctions framework for the public service creates a centralized framework with clear criteria for rewarding exemplary performance and sanctioning poor performance. In so doing, institutional arrangements have been put in place to administer rewards and sanctions in the public service. The Framework further details the circumstances under which recognition initiatives may be applied for employees who perform exceptionally well and therefore warrant special recognition.

7.3 Recommendations

Based on the foregoing study findings and the subsequent conclusion, it is hereby recommended that for adequate financial accountability, SCs ought to fully implement the pertinent provisions of the *Mwongozo* code of governance for state corporations. SCs are also advised to put in place internal measures for the implementation of the relevant pieces of legislation pertaining to financial accountability. These include the Constitution of Kenya, 2010 and the Public Finance Management Act, 2012 and the Public Audit Act, 2015.

Focus should be given on mainstreaming internal and external audits and leveraging the integrated financial management information system to bring about accountability in various processes such as procurement and expenditure. Relevant parliamentary committees with a bearing on financial accountability, the offices of the Attorney General and the Control of Budgets should also invoke their functions including oversight, scrutiny, advisory and reporting roles to bring SCs' leadership to account as far us use of public funds is concerned.

It is also recommended that for the SCs to have a more effective implementation of IFMIS, they should seek internal acceptance of IFMIS by all stakeholders by educating them more on the benefits; consulting them more; and management should lead by example by being more pro-active and supportive. Skills upgrading courses should be planned more regularly for staff working with IFMIS both by the SCs and the National Treasury; and motivation provided to retain the trained staff in the institutions. The technological infrastructure required to roll out IFMIS to the institutions should be provided. The political class should also change their attitudes towards IFMIS and provide more support and leadership; adequate resources should be allocated towards the implementation of IFMIS; and the institutions should include long term plans towards the support of IFMIS in their strategic plans since the benefits of IFMIS are already being realized.

Further, the significant role played by financial reporting in securing accountability mechanisms enforces author to advise pertinent administrators and other key stakeholders including central government to direct effort on improving financial reporting. It is undeniably fact that quality of financial reporting helps to improve transparency operations and accountability for government officials. Government financial reports are an opportunity to recognize and celebrate good performance, along with an honest appraisal of any areas of concern or opportunities for improvement. Equally, the quality of financial reporting creates confidence to tax payers and other stakeholders that public money is spent appropriately to enhance provision of public services. As such, SCs are encouraged to adhere to the international reporting standards relevant to public sector institutions.

The study further recommends that the various systems of internal control pertinent to the procurement process including code of conduct and ethics, risk management, whistle-blowing and measures to address conflict of interest and adoption of ICT should be adequately implemented for a transparent, efficient and effective procurement system. SCs ought to particularly implement the pertinent provisions of the *Mwongozo* code of governance for state corporations.

In the same vein, SCs are advised to put in place internal measures for the implementation of the relevant pieces of legislation pertaining to internal control in the procurement process. These include the Public Procurement and Disposal Act, 2010 and the Public Officer Ethics Act, 2016.

The study also recommends that the Whistle Blower Protection Bill, 2017 be enacted to provide for the protection and rewarding of whistle blowers and the prosecution and punishment of perpetrators of contraventions of the relevant legislations and policies.

The study further recommends that both written guidelines and sensitization activities should aim at creating a general awareness of the legal framework and institutional setup guiding procurement in Kenya, as well as the main principles of sound, fair, transparent and efficient procurement. In line with the assessment conclusions, it is in addition recommended that rules and procedures relating to certain subjects are given particular attention when developing procurement guidelines and sensitization activities: use of procurement methods, advertisement, use of registration lists, use of prequalification, tender evaluation and award criteria, use of technical capacity as a selection criterion when contracting for services, safekeeping of procurement records, procurement planning, appropriation of funds, processing of invoices and payments and preparation of completion reports. In addition to the development of procurement guidelines and sensitization activities on these issues, and in order to cover the pressing need for ad hoc advice, it is recommended that the PPOA establishes a helpdesk which PEs are encouraged to use on a needs basis.

The study further notes that while a system for Performance Contracting and Performance Assessment has already been established in Kenya, evidence from the assessment still suggests a need for further improved incentive structures in the procurement area. In order to make the most of the existing systems, it is hence recommended that the established Performance Contracting and Performance Assessment System is carefully reviewed with a view to optimizing these tools so that they support sound procurement practices through effective incentives.

The following issues should be looked at when optimizing the system: whether the Key Performance Indicators at individual and organizational level support sound procurement practices; whether Key Performance Indicators support sound procurement in areas of special concern according to this assessment (e.g. procurement planning and contract management); whether clear links exist between individual performance management and organizational performance management; whether there is high performance followed up by adequate incentives and re-wards; as well as how performance data is used and stored. Based on this review, a detailed optimization plan should be developed and implemented.

The study further recommends that policy makers ensure that there are performance management systems that enable the performance of SCs to be compared over time, between authorities, and with similar institutions elsewhere. SCs in the country should make more use of approaches involving benchmark competition and international comparisons. Performance management does not operate in a vacuum. As such, it is important that policy makers encourage leadership capacity and organizational culture which lead to openness to, and effective use of, performance management.

A key recommendation to improve the performance management deployment would be to implement a rigorous review and continuous improvement process within the performance management system. Throughout the implementation process there was little evidence of systematic review and resultant improvement actions. There is also a need to develop the appraisal and reward and recognition schemes, along with other motivational influences, to ensure that staff objectives are consistent with the organizational and stakeholder objectives.

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