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**CPA CS ANGELA NJERI CHEGE - G62/40716/2021**

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**DEPOLITICIZATION OF GOVERNANCE PRACTICE IN STATE  
CORPORATIONS IN KENYA**

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**Submitted in Fulfillment of the Requirements for the**

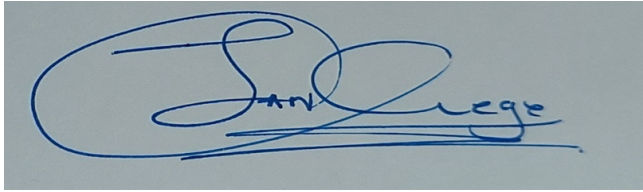
**Conferment of the Award of Master of Laws (LLM)**

**December 2023**

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**The Depoliticization of Governance Practice in State Corporations in Kenya**

**DECLARATION** I, ANGELA NJERI CHEGE, do hereby declare that this Research Thesis is my original work submitted in partial fulfilment for the award of a Degree in Master of Laws (LL.M) at the University of Nairobi, School of Law, and has not been submitted for the award of credit in any other University and referenced authors of texts, articles, working papers, journals and monographs have been fully acknowledged.



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**Date 6<sup>th</sup> December 2023**

**DR. WYNE KENNETH MUTUMA**

# The Depoliticization of Governance Practice in State Corporations in Kenya

## Acknowledgment

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I wish to dedicate this LLM project to my Dad Mr. Bernard Chege Njuguna. My father has been instrumental in my life in uncountable ways, one of the most fundamental been that he instilled in me a love for the pursuit of knowledge. He believed in me and my abilities, without any reservations, and always reminded me, even when I and the world had lost sight, of my brilliance, my gift. Because of his confidence in me, I have had a solid foundation that has kept me joyful and content yet also audacious, tenacious, resilient, indefatigable, and undefeated in challenging circumstances. Unafraid to be my own authentic self and to lend my strengths, abilities, and service to many, whilst demonstrating a willingness to take surprisingly bold risks. This thesis is one such risk, exploring the delicate possibility of Government agencies devoid of the tantrum nature of our Country's politics.

Am sure he is well-pleased that through the journey to my Magister Legum I have found my way and my place and will continue to trail-blaze for the benefit of my children, family, my community, country and the world.

Thank you, Dad. *Twihamwe*

# The Depoliticization of Governance Practice in State Corporations in Kenya

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## Table of Abbreviations

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Board	Board of Directors
CEO	Chief Executive Officer
CoK, 2010	Constitution of Kenya (2010)
CS	Cabinet Secretary
GDP	Gross Domestic Product
GG	Governance Guidelines
GLC	Government Linked Corporations
GS	Governance Standards
ICS	Institute of Certified Secretaries
ISC	Inspectorate of State Corporations
OECD	Organization for Economic Co-operation and Development
PS	Principal Secretary
SAGAs	Semi-Autonomous Government Agencies
SCs	State Corporations
SCAC	State Corporations Advisory Committee
SOEs	State Owned Enterprises
SRC	Salaries & Remuneration Commission

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# The Depoliticization of Governance Practice in State Corporations in Kenya

## *Abstract*

This study investigates the dynamics surrounding the influence of national politics on the governance practice within state corporations in Kenya. Against the backdrop of a political landscape that is historically intertwined with public-sector entities, this research critically examines the impact on performance and sustainability of these entities and additionally evaluates the policy, legal and institutional framework which has facilitated their systemic politicization. It seeks to consider the transformative processes and mechanisms that will be necessary to mitigate political interference, foster administrative autonomy and actualize the socio-economic benefits envisioned for this sector. Drawing on a comprehensive review of policy and legal framework, scholarly literature, case studies, and in-person on the job experience the study elucidates the historical context that has shaped the politicization of state corporations in Kenya. It analyzes the various strategies, policy and legal reform interventions undertaken by government to disentangle these entities from political influences and enhance their effectiveness and attempts to recommend enhancements of this framework

The research employs primarily the doctrinal approach, combining qualitative analyses to delve into the complexities of political influence, and quantitative assessments to gauge the impact of depoliticization measures on the overall performance of state corporations. Findings reveal a landscape politics that sits at the core of these institutions, resulting in susceptibility to the election cycles and/or the political environment. Initiatives to streamline and professionalize governance in this sector have encountered some successes, but the challenges far outweigh the gains as the undocumented nature of politicization allows it to take root without a trail. Key themes explored in this study include the role of policy and legal frameworks in safeguarding autonomy, the establishment of independent regulatory institutions, and the implementation of merit-based appointment processes. Additionally, the research scrutinizes the implications of

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political interference on decision-making processes, organizational culture, and stakeholder relationships.

This study contributes to the existing body of literature by offering insights into the contextual factors that shape the depoliticization discourse in the Kenyan public sector. It provides policymakers, scholars, and practitioners with a nuanced understanding of the complexities involved in enhancing the autonomy of state corporations. Ultimately, the findings of this research aim to inform evidence-based policy recommendations for fostering effective governance practices and mitigating the detrimental effects of political interference in state corporations in Kenya.

## CHAPTER ONE

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### 1.1 Introduction

This project will research the viability of depoliticization of governance practice in state corporations in Kenya. The study will investigate the policy, legal and institutional frameworks of governance, its structures and practices that are heavily influenced by national politics and consequently are susceptible to the five-year presidential election cycles in Kenya. This is against the backdrop that governance of state corporations has often been usurped by the political elite and that the institutions have in some instances become conduits of corruption or as a reward for political allies and friends of the ruling elite with limited regard for the national goals and furtherance of the interests of the citizens of our country.

The study delves into the impact of this influence in the overall performance and sustainability of the corporations. This project will attempt to breathe life into some of the poignant views during the Constitutional Review process during which deep dissatisfaction by *wananchi* was recorded from their submissions. These views are restated in this paper to provide the foundation for this research.

*“...It is clear that what the people were asking for was the re-establishment of the principles of public service, neutrality, impartiality, and independence. The people of Kenya wanted to see appointment processes that are transparent and offices that are not only accountable to the people but also capable of guarding public wealth and resources. There was considerable*

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*disquiet about the apparent inability of public officers to exercise powers independent of political pressure...”<sup>1</sup>*

The literature on experiences in other jurisdictions such as China, South Africa and Singapore will be referenced throughout the paper in a bid to enrich the identification and development of recommendations that can be implemented so as to depoliticize governance of the state corporations. The implementation of these recommendations will contribute significantly towards the improvement of the performance of the organizations, their prosperity and perpetuity.

### 1.2 A Synopsis of the Historical Background of State Corporations in Kenya

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State Corporations in Kenya were conceptualized and established after independence, through implementation of the policies in Sessional Paper no. 10 of 1965, African Socialism<sup>2</sup>. It was envisioned that the entities would spur socio-economic growth, ensure regional reach of services, promote indigenous entrepreneurship and foreign investment. The performance of SCs was however lackluster from the initial stages; they were marred by overreliance on public financing, misuse of funds, lack of streamlined operations and a bludgeoning wage bill.

The performance reviews in 1979 in the Report on the Review of Statutory Boards and 1982 and in the Report of the Working Party on Government Expenditures<sup>3</sup> indicated that growth in

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<sup>1</sup> © Constitution of Kenya Review Commission (CKRC) 2005, The Final Report of the Constitution of Kenya review commission, approved for issue at the 95<sup>th</sup> Plenary Meeting of the Constitution of Kenya Review Commission held on 10<sup>th</sup> February 2005.

<sup>2</sup> <https://repository.kippra.or.ke/bitstream/handle/123456789/2345/African-Socialism-And-Its-Application-To-Planning-In-Kenya.Pdf>

<sup>3</sup> [www.pc.go.ke/privatization-programme](http://www.pc.go.ke/privatization-programme)

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the parastatal sector had not had the corresponding impact on growth of the parameters that it was expected to impact. In fact, there was widespread malpractice, financial mismanagement, shifting from the core purpose and infiltration of political influence in their operations.

In light of the outcomes delineated in the evaluations of performance, the Sessional Paper No. 1 of 1986 was embraced, and as a remedial measure, the State Corporations Act (Cap) 446 of the Laws of Kenya was enacted in 1986. This legislation was geared towards providing a legal framework to facilitate streamlining of the management of Parastatals, unfortunately whilst this has partially been effective in addressing some of the challenges the study will demonstrate that it has not been a panacea of all the ills. Indeed, some of the state corporations have connivingly been excluded from the purview of the Act through separate entity-specific legislation. Consequently, the legal framework for governance has become disintegrated and discombobulated arising from the multiple policy and legal framework documents.

As the country struggles to remain a going concern against an increasing debt burden as documented by the Central Bank of Kenya which reported the country's total debt at KShs 8.206 trillion comprising of KShs 4.032 trillion domestic and KShs 4.174 trillion external debt as the end of December 2021<sup>4</sup> with projections of continued increase. With at least two hundred and sixty-two (261) State Corporations as per an inventory in October, 2013<sup>5</sup>, most of which are financed through the exchequer the discussion of a reform agenda for the sector is inevitable. Indeed, the international Monetary Fund (IMF) has often set preliminary demands for countries to restructure the parastatals in order to qualify for financing in cognizance of the

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<sup>4</sup> <https://www.centralbank.go.ke/public-debt/>

<sup>5</sup> Report of The Presidential Taskforce on Parastatal Reforms, Current Inventory of State Corporations, Republic of Kenya Executive Office of The President, October 9th 2013.

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resource drain witnessed in these entities. In July 2021, for example, IMF required the restructuring of eighteen (18) parastatals, including Kenya Airways, Kenya Airports Authority, Kenya Ports Authority, Kenya Railways, Kenya Wildlife Services amongst others as a precondition to a grant of a 2.34 Billion Dollar loan facility<sup>6</sup>. Unfortunately, the struggles that have led to underperformance of these entities have been pre-supposed to arise from political interference. Whereas this is often reported because the political meddling is often by way of oral instructions a paper/audit trail is rarely left to document or support the allegations of political interference.

The situation has been dire, and it would appear that many of these institutions cannot be salvaged from the infiltration of politically induced corruption. Possibly within this framework, the Presidential Task Force on Parastatal Reforms in 2013 has advocated for privatization<sup>7</sup> chaired by Hon. Abdikadir. H. Mohamed and Mr. Isaac Awuondo. In the report they submitted that the reform agenda should include privatization, this would be in line with the global phenomenon of a shift from State to private ownership of public enterprises, vis-à-vis their financial and social profitability. The report articulated the need for divestiture and privatization as the returns on Government investments were dismal at the time. It is against this historical context that this study lends itself to research on interventions that can promote recovery of the institutions in a bid to avoid a recurring of the many state corporations that have experienced major challenges that have resulted in abuse/misuse, loss of public funds and collapse<sup>8</sup>.

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<sup>6</sup> <https://www.the-star.co.ke/business/kenya/2021-07-09-kenya-bows-to-imf-pressure-to-restructure-18-state-agencies/>

<sup>7</sup> Report of the Presidential Task Force on Parastatal Reforms Presented to His Excellency Hon. Uhuru Kenyatta October 2013

<sup>8</sup> Report of The Presidential Task Force on Parastatal Reforms, Chaired jointly by Hon. Abdikadir H. Mohamed and Mr. Isaac Awuondo October 2013.

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The study is timely as it is at a time when the value of state-owned enterprises to national economies is becoming more pronounced and provides justification for efforts to salvage them. For example, data from the Organization of Economic Co-operation and Development (OECD) indicates that the majority of State-Owned enterprises are part of 51,000<sup>9</sup> entities operated by the Chinese Government in one of the fastest growing economies. Indeed, in Kenya, one of the most successful times in our economy during the “Kibaki Era”<sup>10</sup> was characterized by the greatest number of State Corporations established by the President under section (3) of Cap 446. Consequently, the populist advocacy for a reform agenda that is geared towards dissolution of many of these entities, often championed by the Bretton-Woods Agencies may not be entirely accurate. Whereas there are entities that may have become redundant there is evidence to suggest that an overhaul of the governance practice may catapult these organizations to good performance.

Indeed researchers<sup>11</sup> are now diverting from the earlier position that State-owned enterprises were on their deathbed and would be extinct in the short-term. The Chinese and Singaporean experience has necessitated a reconsideration of this as the state-owned entities have in some instances transformed to become the largest, most successful, and sustainable enterprises. The international arena provides useful examples such as the Singapore Airlines which is government-owned through its holding company Temasek Holdings which has a majority shareholding of 56% of the voting stocks. Arising from well-established and streamlined

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<sup>9</sup> Radosław Miązek Corporate governance in state-owned enterprises. A systematic literature review: an international perspective *Jagiellonian University, Cracow, Poland*

<sup>10</sup> The period between December 2002- April 2013 when the late Hon Emilio Mwai Kibaki CGH served as the President of the Republic of Kenya.

<sup>11</sup> Tan Cheng-Han, Dan W. Puchniak, Umakanth Varoni! Faculty of Law and (nter for Law and Business, National University of Singapore of Singapore  
<https://journals.library.columbia.edu/index.php/cjal/article/download/3347/3376/11718>



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governance in the 1<sup>st</sup> quarter of the FY 2023/2024, for example, the Airline reported a net profit of USD 734 million<sup>12</sup>.

Another world-class example that demonstrates that state-owned enterprises can achieve economic viability and success is an examination of the journey of Embraer Ltd, starting in 1969 as wholly owned by the Brazilian Government it provides a useful blueprint on the progression of State Corporations and validates the fact that through sound policy, legal frameworks and well-founded country ethos government entities can achieve major business milestones. The question that this study will attempt to consider is whether the state corporations in Kenya can achieve this magnitude of success, through various strategies, including depoliticization forms the gist of this research.

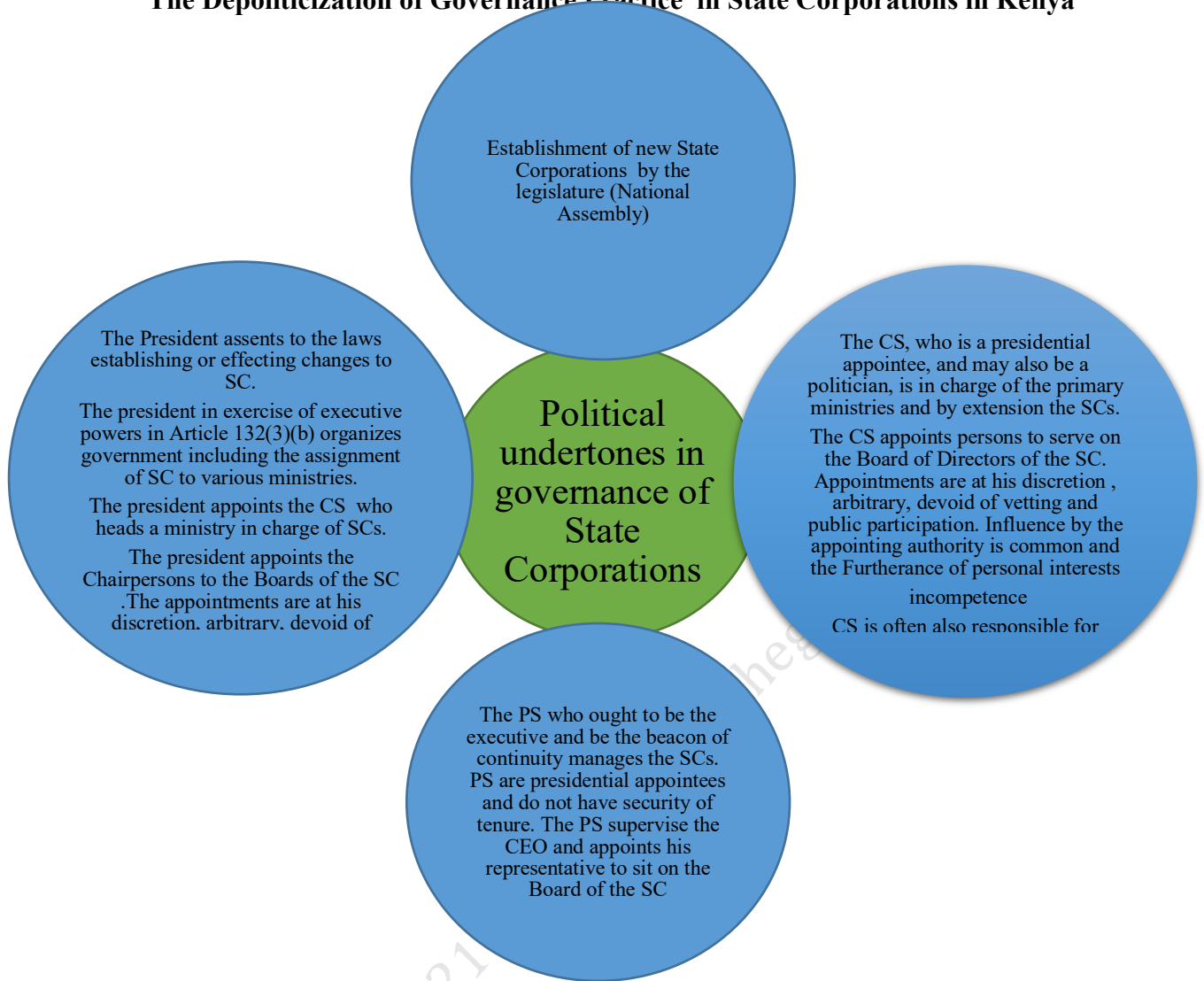
It is useful to provide a visual demonstration of the extensive intersectionality which have provided opportunities for ungainful politicization of the governance practice and operations of SCs to take root. The Chart also illustrates the dependency of the SCs on the leadership/political dispensation in place at any particular time.

### Illustration One (1)

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<sup>12</sup> Q1 FY 2023/2024 Quarterly Report of the SIA (Singapore Airlines) Financial Report <https://www.singaporeair.com/saar5/pdf/Investor-Relations/Financial-Results/SGXNET/bu-q1fy2324.pdf>

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### 1.3 Key Definitions

#### 1.3.1 What is a State Corporation?

A state corporation (SC) (formerly referred to as parastatals) in Kenya, and state-owned enterprises (SOEs) in other jurisdictions have been defined as entities in which the Government has whole or part ownership/control. They are specialized institutions established to meet critical government objectives such as provision of primary needs to the citizens e.g., health, education, water, transportation etc. The contributions of the SCs are significant in developed

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and less developed countries but mostly in developing countries, with a contribution of 20-50% in the latter's economy and 50% of the jobs in the Middle East and North Africa<sup>13</sup>

SCs are specialized government agencies established to deliver on critical mandates. Some SCs are under the supervision of the Cabinet Secretary (CS) in charge of a particular primary ministry, whilst other categories are subject to an elected Board of Directors. The organization of the state corporations is prescribed primarily by the President of the Republic of Kenya through executive powers conferred by Article 132 (3)(b) of the CoK. The entities are overseen by a Board of Directors and the mandate is discharged by an executive management team.

The scope of the research will cover state corporations in Kenya. There are approximately two hundred and sixty-two (262) state corporations<sup>14</sup>. SCs are defined in Section (2), of the State Corporations Act (Cap) 446 of the Laws of Kenya to include;

- i. Entities established under section (3) of Cap 446;
- ii. State corporations established pursuant to an Act of Parliament or other written law;
- iii. Financial institutions authorized under the Banking Act (Cap. 488), including banks, or entities established under the Companies Act (Cap. 486), wherein the government or another state corporation possesses either full ownership or a predominant controlling stake;
- iv. Subsidiaries of a state corporation.

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<sup>13</sup> Heo Kyoungsun, 'Effects of Corporate Governance on the Performance of State-Owned Enterprises' (28th Aug 2018) World Bank Policy Research Working Paper No. 8555.

<[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3238399#:~:text=Kyoungsun%20Heo,-KIPF%20\(Korea%20Institute&text=More%20recently%2C%20efforts%20to%20strengthen,performance%20of%20state%20Downed%20enterprises.>](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3238399#:~:text=Kyoungsun%20Heo,-KIPF%20(Korea%20Institute&text=More%20recently%2C%20efforts%20to%20strengthen,performance%20of%20state%20Downed%20enterprises.>) accessed on 16th October, 2023.

<sup>14</sup> 'Report of The Presidential Task Force on Parastatal Reforms', (October 2013) <<https://www.headofpublicservice.go.ke/sites/default/files/2023-06/PARASTATAL%20REFORMS.pdf>> accessed on 15th October, 2023.

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The Inspector General's Office<sup>15</sup> (Inspectorate of State Corporations ISC) has categorized the entities in eight (8) groupings based on function as follows;

- i. Financial;
- ii. Commercial manufacturing;
- iii. Regulatory;
- iv. Public universities;
- v. Training and research;
- vi. Service;
- vii. Regional development;
- viii. Tertiary education and training organizations.

Other categorizations of state corporations include those that generate their own income vis-a-vis those that are financed entirely by the Government. The latter category are often referred to as Semi-Autonomous Government agencies (SAGAs).

### **1.3.2 What is Governance in State Corporations?**

Governance and specifically corporate governance is a core ingredient to the success of organizations. Several studies on the correlation between governance and performance of corporations demonstrate a positive variation pattern<sup>16</sup>. Governance can be defined as a concept edified in practice, policies and legal frameworks. The objective is to facilitate the administration of organizations. Administration includes directing of operations, control,

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<sup>15</sup> established pursuant to Section 18 of Cap ( 446)

<sup>16</sup> Kyongsun. H, Effects of Corporate Governance on the Performance of State-Owned Enterprises World Bank, Korea Institute of Public Finance, 2018

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oversight and accountability for the prudent, efficient utilization of resources, quality assurance etc. with an overarching objective to discharge the entities' mandate.

Good governance is expected to have mechanisms that ensure the functions are discharged objectively, effectively, efficiently, equitably, having regard to the welfare of the citizenry, the heritage and environment, utmost common/public good, sustainability, morality and decency. Article 10(2) (c) of the Constitution of Kenya (2010) CoK, emphasis on the national values and principles of governance, the centrality of good governance, integrity, transparency, accountability and sustainable development.

Evidently governance can be good or poor and it appears that *prima facie* the performance of organizations is significantly determined by the nature of governance. The research will attempt to scrutinize the current governance policy and regulatory framework for state corporations in Kenya. This investigation will highlight areas within the framework which are highly susceptible to the negative influence of the *hand of politics*. Case studies will be used to demonstrate how deeply rooted the vice is and the extent to which it has hampered the sustainability and success of state corporations.

In a nutshell the policy and legal framework for governance of state corporations in Kenya is not consolidated. The State Corporations Act is the primary statute, however where a state corporation is established by an Act of parliament the enabling statute is primary. The framework also includes subsidiary legislations, directives and circulars from the Head of Public Service, the State Corporations Advisory Committee (SCAC), the office of the Attorney

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General, ISC etc. This discombobulation is one of the contributing factors to lacunas that are likely to be misused by the political elite in the governance of state corporations.

There has been an attempt to codify and domesticate the principles of good governance issued by the Organization of Economic Co-operation and Development (OECD) which were adopted in July 2015. This was through the Executive Order No. 7, 2015 which issued the *Mwongozo* – which is the national Code of Conduct for State Corporations. Unfortunately, the viability of the code has been affected by the blatant disregard and contravention of its provisions.

Despite the elaborate framework, checks and balances in place to ensure proper governance, this has not translated to measurable gains in the sector. Whereas there may be several contributing factors including ignorance, insufficient funding, lack of integrity, poor implementation strategies, nevertheless politicization remains a major component and the focus of this research. This is the genesis of the problem statement that will be considered in the study.

### **1.3.3 Politics and Depoliticization**

The study identifies politics as a significant variable to the good performance of state corporations. Politics is a term often used to have many connotations and meanings, e.g., common parlance references such as *family politics*, *church politics* and *office politics*. The focus of the research pertains to the actions associated with obtaining and exercising authority

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in the public domain, encompassing the capacity to shape decisions that impact a nation or a societal entity.<sup>17</sup>

The influence of politics in governance is not novel, particularly in Kenya, for example Stultz (1988)<sup>18</sup> defined SCs as “political firms”. The likelihood that politics have a negative influence on performance of SCs is sufficiently researched<sup>19</sup>. In fact, a scholar<sup>20</sup> in considering the hybridity of SOEs in China noted that some directors appointed to the Boards of this organizations viewed it as an entry point to national politics or an opportunity to network within political circles. Another example relevant but not unique to the Kenyan jurisdiction is the perceived manner of appointment to Boards of SCs for example as a reward or appeasement from political cronies. A similar case study is given in Zimbabwe where retired army service men are given these positions<sup>21</sup> in SCs in complete disregard to the principles of good governance.

Depoliticization can broadly refer to the process of significantly reducing political influence from the decision making and management of State-owned corporations. It is presupposed that this can be achieved by establishing independent Boards of Directors, appointing non-political executives and following transparent, meritocratic process for appointments and remuneration. These interventions are intended to ensure that the entities are run in a professional and efficient

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<sup>17</sup> The oxford learner's dictionary, 9th edition.

<sup>18</sup> Stulz, ReneM, ‘Managerial control of voting rights,’ (1988) 20 Journal of Financial Economics, 25-59. <<https://ideas.repec.org/a/eee/jfinec/v20y1988ip25-54.html>> accessed on 17th September, 2023.

<sup>19</sup> Ongeti W.J, Organizational Resources, Corporate Governance Structures and Performance of Kenyan State Corporations, PhD Thesis, University of Nairobi, 2014.

<sup>20</sup> Okhmatovskiy. I (Nova SBE, Portugal), Grosman A. (Loughborough University London, UK) Sun, P. (University of Manchester, UK), HYBRID GOVERNANCE OF STATE-OWNED ENTERPRISES Oxford University Press, 2021

<sup>21</sup> Ejigayhu.M, The Governance of State-Owned Enterprises in Africa: An Analysis of Selected Cases Journal of Economics and Behavioural Studies (ISSN: 2220-6140) Vol. 12, No. 2, pp. 9-16, April 2020

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manner, without being significantly influenced by political considerations. The ultimate goal is to increase credibility and accountability of these organizations and improve their ability to discharge their core mandates as well as to increase operational efficiency.

### **1.4 Statement of the Research Problem**

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This study is rooted in an exploration of the fundamental issue that plagues state corporations in Kenya, where despite their noble objectives of contributing to nationalistic goals, providing essential services, and contributing to the GDP, many have consistently underperformed. The primary concern lies in the pervasive influence of national politics on the governance of these entities, manifesting as interference by political elites and their agents. The central research problem addressed in this study revolves around devising strategies to mitigate the detrimental impact of political involvement on the governance of state corporations.

Specifically, the research seeks to explore strategies that could bolster the independence of such entities, reducing their vulnerability to political influences. Additionally, it aims to assess prospective policy and legal measures that could delineate a distinct separation between the governance of state corporations and the political dynamics that frequently hinder their operational efficacy. The overarching goal is to safeguard the integrity of these institutions, ensuring their sustainability and fortifying their capacity to fulfill their intended objectives amidst the complexities of the political landscape.



### 1.5 Objectives of the Research

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The overarching objective of the research is to undertake a comprehensive study of the politicization of state corporations with the aim to provide the impetus to transform the corporations to perpetual, non-partisan, effective, profitable, accountable and sustainable organizations that discharge their mandate with the principal goal of improving the quality of life for Kenyans. The study aims to accomplish the following specific objectives;

- a. Firstly, the study shall consider the history of the sector in a bid to establish the impact that of politics on the governance of state corporations.
- b. Secondly, the study will attempt to examine and establish an overview of the current policy, legal and institutional framework with the objective to establish its adequacy to respond to the need to depoliticize these institutions. Additionally, it will critique the framework to establish whether it requires deconstruction and reconstruction as envisaged in the critical legal theory (M.D.A Freeman, 2014) to facilitate the change to an apolitical governance model for state corporations.
- c. The study will thirdly, attempt to examine areas of intersection in the governance practice of state corporations which are prone to political interference, in a bid to establish the pitfalls and their corresponding interventions through reforms in the governance and consolidated practice frameworks that will facilitate the process of depoliticization.
- d. During the research the study will benchmark with experiences in countries in Africa and beyond with regard to the governance practice in state corporations, with the

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objective to draw lessons that can be contextualized to respond to the governance gaps in Kenya.

- e. Finally, based on the findings of the study, the project will attempt to conceptualize recommendations that will provide interventions to curb or mitigate politicization where it is found to have negative impacts.

### **1.6 Research Questions**

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Whereas the study is vast the questions that will be the focus of the enquiry will include:

1. What is the historical background of the development of state corporations and to what extent has it contributed towards the influence of politics in the governance of state corporations.
2. What is the policy, legal and institutional framework within which state corporations operate, and has it been effective in curbing political interference and achieving political neutrality and if there are provisions which tend to enable the politicization of the governance practice.
3. How and to what extent does politics influence the governance of state corporations in Kenya. Is it possible for the governance of state corporations to be done autonomously devoid of political influence? Can depoliticization be achieved wholly or partially? How will a complete or partial depoliticization of the governance of state corporations impact their overall output and performance.

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4. What is the South African and Singaporean experience with regard to governance practice in State Corporations and what challenges and lessons can be drawn from this study to inform strategic re-configuration of the governance practice in this sector.
  
5. To attempt to answer based on the findings of the study, what policy, legal and institutional reforms are necessary to achieve depoliticization in the governance of state corporations.

### **1.7 Hypothesis**

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The study posits a comprehensive hypothesis predicated on the interconnected assertions delineated earlier. Firstly, it contends that politics exerts a substantive influence on the corporate governance of State Corporations (SCs). This influence is posited to be ingrained in the very fabric of policies, legal frameworks, and accepted practices. Secondly, the hypothesis posits that the pervasive politicization has predominantly yielded adverse consequences, with political interference being identified as a substantial factor contributing to the failure or underperformance of SCs. Thirdly, it suggests that given the pivotal roles that SCs play in the country's growth and development, governance reforms are imperative for fostering prosperity. This necessitates the reformulation of governance policies, comprehensive legal reforms, and the restructuring of SCs and their associated institutions. The hypothesis contends that such reforms will act as a catalyst for enhancing the efficacy and resilience of SCs in fulfilling their vital roles within the national development framework.

### 1.8 Justification of the Study

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The justification of this study is based on the fact that SCs play a central and critical role in the discharge of critical Government development agenda, programmes and provision of goods and services to the citizens of our country. In addition, the investment in the SCs is huge and must be preserved and utilized for maximum return on investment. Salvaging of the SCs is of great importance as huge sums of taxpayer funds have been invested in the establishment, development, asset acquisition and operations. The efforts to have a turnaround is necessary to ensure that the public funds invested are not lost and instead are able to realize good returns and benefits for the citizenry. The National Treasury in the consolidated financial statements for the year ended 30<sup>th</sup> June 2018 estimated total assets for State Corporations, Semi-Autonomous Government Agencies and Public Funds at KShs 6,096,319,413,841/- and a net worth of KShs 2,966,769,932, 450/- with the SCs and SAGAs accounting for a large portion of this.<sup>22</sup>

Despite the heavy investment and important role, they play, the political undertones have interfered with the good governance of SCs. It is imperative to identify interventions and solutions to the endemic challenge of poor governance which has stifled their performance, resulting in underperformance or collapse. Their failure is detrimental to the national interest and the socio-cultural-economic welfare of every Kenyan and future generations and is not sustainable.

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<sup>22</sup> [https://www.treasury.go.ke/wp-content/uploads/2021/04/STATE-CORPORATIONS-SAGAs-REVISED-UNAUDITED-CONSOLIDATED-STATEMENT-FOR-FY2017-2018\\_compressed.pdf](https://www.treasury.go.ke/wp-content/uploads/2021/04/STATE-CORPORATIONS-SAGAs-REVISED-UNAUDITED-CONSOLIDATED-STATEMENT-FOR-FY2017-2018_compressed.pdf)

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The justification and purpose for this research is the urgency to establish critical interventions in an overhaul of the governance system. The research will study core issues such as the establishment of the SCs, the hierarchy of management of the corporations and the bureaucracies, as well as the role that independent, professional, well equipped, structured boards can play in the promotion of the viability and success of state corporations.

### 1.9 Literature Review

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The research is premised on the gaps identified in existing scholarly works. There is significant literature on corporate governance, its criticality, challenges and reform. However, there is a gap in the study of national politics and its impact on the performance of SCs particularly in Kenya. Some of the scholarly works allude to the relevance of politics in governance of SCs but few have prioritized it as a research area. There has also been limited focused research as to whether state owned enterprises can be depoliticized to achieve sufficient autonomy.

Perhaps some of the reasons for lack of adequate study in the area may be the sensitivity of research into the intricacies of politics, the risk of offending powerful personas and the deep-rooted culture of silence, secrecy and self-preservation. There may be lethargy arising from the deep-rooted politicization that scholars may opine is unresolvable. Indeed, in one paper,<sup>23</sup> the Polish author upon undertaking a literature review found that the scientific work in this area is insignificant against the number of entities and where it exists it varies significantly from one region to the next.

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<sup>23</sup> Miązek, Radosław. "Corporate governance in state-owned enterprises. A systematic literature review: an international perspective" (2021) 57(4) International Journal of Contemporary Management, pp.1-13. <<https://doi.org/10.2478/ijcm-2021-0011>> accessed on 13th September, 2023.

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### **Depoliticization and Governance:**

Flinders and Wood (2014) provide a comprehensive framework for understanding depoliticization, defining it as a process involving the intentional removal or mitigation of political considerations from the decision-making processes of public institutions.<sup>24</sup> They argue that depoliticization is not merely a neutral administrative process but a deeply political one that shapes the nature and scope of governance practices within a given context.

### **Kenyan State Corporations:**

In the Kenyan context, state corporations play a pivotal role in the execution of public policies and service delivery. The link between politics and the functioning of these entities has been a subject of scholarly inquiry, particularly as the nation grapples with issues of corruption, inefficiency, and politicization of public institutions. Flinders and Wood's conceptualization of depoliticization provides a theoretical lens through which to examine the extent to which governance practices in Kenyan state corporations have undergone processes of depoliticization.

### **Strategic Interventions towards Depoliticization:**

The article by Flinders and Wood identifies several factors influencing depoliticization, including managerialism, technocratization, and the professionalization of public administration. These factors resonate with the Kenyan context, where efforts have been made to professionalize the public sector and enhance managerial efficiency. Indeed, the most

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<sup>24</sup> Matthew V. Flinders & Matt Wood, 'Depoliticisation, governance and the state,' (2014) 42(2) Policy & Politics 135-149.

<[https://www.researchgate.net/publication/263764470\\_Depoliticisation\\_governance\\_and\\_the\\_state](https://www.researchgate.net/publication/263764470_Depoliticisation_governance_and_the_state)>  
accessed on 22nd November, 2023.

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significant effort in this regard has been the consolidation of government owned institutions, including the Kenya Institute of Administration, Kenya Development and Learning Centre (KDLC) and the Government Training Institutes (GTIs in Mombasa, Matuga, Embu and Baringo) to the Kenya School of Government (KSG) vide the KSG Act No. 9 of 2012. The literature on Kenyan state corporations reveals instances where depoliticization measures have been implemented, with a view to insulating these entities from undue political interference.

### **Challenges and Critiques:**

The objective is to achieve depoliticization which has potential benefits; however, the literature also highlights challenges and critiques associated with its application in the Kenyan context. Critics argue that excessive depoliticization may lead to a detachment of state corporations from public accountability and responsiveness, potentially fostering a culture of unbridled bureaucracy. Additionally absolute extraction of politics from the governance practice may erode the oversight over state corporations provided through the National Assembly.

The literature review draws from Flinders and Wood's conceptualization of depoliticization to explore the intricate dynamics of governance practices within state corporations in Kenya. The analysis underscores the relevance of understanding depoliticization as a dynamic and context-specific process, acknowledging both its potential benefits and the challenges it poses to effective governance.

It is also worth noting that the depoliticization of governance practices has emerged as a salient topic within political science and public administration, warranting investigation in diverse contexts. The seminal work by Matthew Flinders and Jim Buller serves as a foundational source

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for understanding the theoretical framework and practical dimensions of depoliticization. Flinders and Buller (2006) delineate the conceptual underpinnings of depoliticization, defining it as a process involving the conscious removal of issues from the political agenda.<sup>25</sup> This entails reframing matters as technical or administrative, sidelining political contestation. Principles of depoliticization include delegating authority to non-political actors, introducing technocratic language, and emphasizing managerial or scientific expertise.<sup>26</sup> Applying this theoretical framework to state corporations in Kenya, it is necessary to address issues of inefficiency, political interference, and patronage networks within these entities. Key strategies involve delegating authority to technocratic bodies, aiming to insulate decision-making from political pressures for more objective governance and providing them with security of tenure. However, concerns arise regarding potential power concentration among technocratic elites and detachment from societal interests.<sup>27</sup>

The examination of governance practices in Kenyan State-Owned Enterprises (SOEs) is integral to understanding the dynamics of their management. Ileri (2013) provides valuable insights into the regulatory aspects shaping the governance of these entities. Ileri critically evaluates the appointment process of boards in SOEs, emphasizing the need for a more stringent regulatory framework.<sup>28</sup> This aligns with the broader discourse on the depoliticization of governance, as an enhanced regulatory framework can contribute to reducing political interference in board appointments.

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<sup>25</sup> Matthew Flinders & Jim Buller, "Depoliticisation: Principles, Tactics and Tools" (2006) *British Politics* 293-318 <<https://link.springer.com/article/10.1057/palgrave.bp.4200016>> accessed on 25th November 2023.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> Elijah Ileri, 'Appointment of Board of Directors to State Owned Enterprises in Kenya: Towards a Stricter Regulatory Framework,' (2013) A Thesis Submitted to the University of Nairobi 1-87. <[http://erepository.uonbi.ac.ke/bitstream/handle/11295/64427/Ileri%20Elijah%20N\\_Appointment%20of%20Board%20of%20Directors%20to%20State%20Owned%20Enterprises%20in%20Kenya.pdf?sequence=4&isAllowed=y](http://erepository.uonbi.ac.ke/bitstream/handle/11295/64427/Ileri%20Elijah%20N_Appointment%20of%20Board%20of%20Directors%20to%20State%20Owned%20Enterprises%20in%20Kenya.pdf?sequence=4&isAllowed=y)> accessed on 24th November, 2023.



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Ileri's exploration of the regulatory framework reflects a growing concern about the influence of political considerations in the governance of Kenyan SOEs. Through the promotion of more stringent regulations, he implicitly confronts the difficulties posed by political intervention, with the objective of guaranteeing that appointments to boards are grounded in merit and expertise rather than political associations.<sup>29</sup> This perspective resonates with the depoliticization discourse, where scholars argue that insulated decision-making processes are crucial for efficient and accountable governance.

Ileri's work contributes a regulatory lens to the broader discussion on the depoliticization of governance practices in Kenyan State-Owned Enterprises. The call for a stricter framework underscores the significance of mitigating political influences in board appointments, thereby fostering transparency, accountability, and ultimately, effective governance within these entities. As the thesis progresses, a synthesis of Ileri's findings with other relevant literature will provide a comprehensive understanding of the depoliticization challenges and opportunities within the context of Kenyan SOEs.

Furthermore, the article by Veronica Herrera and Alison E. Post that explores the intersection of decentralization and depoliticization in the context of urban water services in developing countries provides a valuable perspective that can be utilized in the literature review on the depoliticization of governance practice in state corporations in Kenya. Herrera and Post (2014) delve into the challenges and implications of decentralizing urban water services, particularly

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<sup>29</sup> *Ibid.*

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in the aftermath of the reform wave in the 1990s.<sup>30</sup> The authors argue that decentralization, while intended to enhance efficiency and service delivery, may not necessarily lead to depoliticization. Instead, the decentralization process can be entangled with political dynamics at various levels, potentially influencing decision-making and governance structures.<sup>31</sup>

In the Kenyan context, where state corporations play a crucial role in governance, the insights from Herrera and Post (2014) can be applied to understand the potential tensions between decentralization efforts and the depoliticization of governance practice. By scrutinizing the experiences of developing countries in the realm of urban water services, the article offers a framework to assess the compatibility and challenges associated with simultaneous decentralization and depoliticization initiatives.

The examination of the legacy of the 1990s reform wave in Herrera and Post's work provides a historical context that can be pertinent to the Kenyan state corporations' governance landscape. This historical lens enables a nuanced understanding of the dynamics that may have influenced governance practices in the wake of decentralization efforts. Moreover, the article emphasizes the need for careful evaluation and policymaking to navigate the complexities of decentralization and depoliticization. This perspective aligns with the need for a comprehensive analysis of governance practices in Kenyan state corporations, considering the potential pitfalls and opportunities associated with decentralization initiatives.

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<sup>30</sup> Veronica Herrera and Alison E. Post, titled "Can Developing Countries Both Decentralize and Depoliticize Urban Water Services? Evaluating the Legacy of the 1990s Reform Wave" (2014) 64 *World Development* 621-641. <<https://www.sciencedirect.com/science/article/pii/S0305750X14001922>> accessed on 24th November, 2023.

<sup>31</sup> *Ibid.*

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Another notable literature reviewed in undertaking this research is the work of Prof. Kiarie Mwaura in his article in the *Fordham International Law Journal*<sup>32</sup> in 2007. It provides valuable insights into the prevailing circumstances at the time. The title of the paper alludes to the failed governance, whereas Prof. Kiarie does not reference politics, he does recommend appointment of CEOs through a competitive process, granting of autonomy to them in execution of their terms of reference and the institutionalization of performance contracting with strict enforcement.

It may be that such scholarly papers incentivized the focus on operationalization of the State Corporations (performance Contracting) Regulations of 2004<sup>33</sup>. The efficacy of the performance contracting shows that it has been useful, the contracts are signed between the Boards of the State Corporations and the Cabinet Secretaries, and ought to be cascaded to the management through the CEO. However, with incompetent Boards this process has slowly been made ceremonial focusing on non-core mandate performance indicators.

It is important to observe that Professor Kiarie in this paper writes against the backdrop of the optimism provided by the 2002 change in Government which ignited hope that some Parastatals could be salvaged and achieve commercial success. Indeed, this optimism was coded in the Privatization Act of 2005, and the approval of the plan to privatize some Parastatals. It is unfortunate that none of this privatization has been actualized almost a decade later, owing largely to regional and individual interests advocated through politics.

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<sup>32</sup> Kiarie Mwaura, "The Failure of Corporate Governance in State Owned Enterprises and the Need for Restructured Governance in Fully and Partially Privatized Enterprises: The Case of Kenya," (2007) 34 *Fordham Int'l L.J.* 31.  
<<https://ir.lawnet.fordham.edu/ilj/vol31/iss1/1>> accessed on 13th September, 2023.

<sup>33</sup> State Corporations Act, Cap 446, Laws of Kenya, State Corporations (Performance Contracting) Regulations, 2004 L.N. 93 of 2004

## 1.10 The Theories and Thematic Analysis

The literature review indicates that there are several theories that are a constant theme in the research of governance of state-owned enterprises (SOE). These theories will form the basis of the research as discussed in section 1.8. The common theories are critical legal theory, agency, stewardship theory, contingency theory amongst others.

### 1.10.1 Introduction to the Duality/ Concept of Hybrid Nature of SCs/SOE

The review also revealed an interesting dimension, articulated in the statement "...The governance of state-owned enterprises (SOEs) is hybrid in nature as it combines mechanisms of public administration, informal political interference, and standard corporate governance..."<sup>34</sup> The author alludes to the "informal political interference" which is the focus of this study but by extension notes that a "pure" governance system for SOEs cannot be achieved. This raises the question as to where depoliticization can only be achieved to a certain degree but not in totality. The research will investigate this hypothesis.

### 1.10.2 Corporatization -versus- Privatization -The China Experience

The review also establishes that the improvement of state corporations is evolutionary in nature, in China for example it appears that the Government reformed the sector through a "trial and error" methodology, until it achieved the penultimate of corporatization. Whereas corporatization led to a degree of autonomy the political influence was retained through

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<sup>34</sup> Ilya Okhmatovskiy, Anna Grosman, & Pei Sun, 'Hybrid Governance of State-owned Enterprises,' (2021, Oxford University Press) In Oxford Handbook of State Capitalism and the Firm. <[https://www.researchgate.net/publication/346550612\\_Hybrid\\_governance\\_of\\_state-owned\\_enterprises](https://www.researchgate.net/publication/346550612_Hybrid_governance_of_state-owned_enterprises)> accessed on 14th September, 2023.

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institutions instead of individuals. The politicization of SOEs in China is seen to give legitimacy<sup>35</sup> in contra-distinction to the hypothesis in this research proposal. It is interesting to note that there is a wide array of scholarly works on the Chinese experience, particularly on how it focuses on corporatization distinct from privatization. The study of this work will inform some interventions which can be implemented in Kenya.

### **1.11 Theoretical Framework**

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The theoretical framework of the research shall be based on the pillar theories in this area of study as discussed below. The theories, although different, have in their development established many areas of intersectionality, culminating in the widest theory that focuses on the Stakeholder matrix. Theories in this discipline have been advanced in a bid to resolve the agency problem, in corporate governance where one party (the Ministry/Boards/CEOs) have a conflict of interest in discharging their core mandate of furthering the best interest of their principal (for State-Owned Enterprises the public/citizenry/ “wananchi”)

#### **1.11.1 Stakeholder Theory**

The Stakeholder theory will form the sub-strata theory for this research paper. The theory emerged in the 1960s in response to concerns that the shareholders were not the only category of persons that the management owed a fiduciary duty to and who could impact the trajectory

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<sup>35</sup> Wang Jiangyu, ‘The Political Logic of Corporate Governance in China's State-Owned Enterprises,’ (2014) 47(3) Cornell International Law Journal 632-669.

<<https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1851&context=cilj>> accessed on 16th September, 2023.

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of businesses. The coining of the term “stakeholder” is said to have first been documented in a memorandum by the Stanford Research Institute in 1963<sup>36</sup>.

The advancement of this theory has expanded the scope of management’s accountability to include other groups such as employees, suppliers, creditors, financiers, Governments, and the general population. It is now agreed that other than shareholders other groups may be affected and may also impact organizations. Indeed, the essence of this research is to study how the influence of politics has eclipsed the traditional corporate governance theories. Additionally, the increasing consideration of the universal stakeholder the *mwananchi* in the operations of State Corporations and how even where they are not traditional shareholders their concerns cannot be ignored any longer.

### 1.11.2 Agency and Stewardship theory

In the study of governance studies, the foundational principles are encapsulated in the agency and stewardship theories. These theories aim to elucidate the dynamic between executive management functions and shareholders/stakeholders. Within State Corporations, the execution of executive management functions follows an extensive chain of command, spanning from the President to the Cabinet Secretary, the Board of Directors, Principal Secretaries, CEOs, and lower-tier management. This organizational structure seeks to establish a connection between the governing bodies and the citizenry, who function as shareholders/stakeholders. The theoretical underpinnings of these models draw significantly

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<sup>36</sup> Bidhan L. Parmar et al., ‘Stakeholder Theory: The State of the Art’ (2010) Management Faculty Publications 99. <<https://core.ac.uk/download/pdf/346447581.pdf>> accessed on 16th September, 2023.

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from behavioral sciences, notably integrating McGregor's theory of motivation, particularly his dichotomization into Theory X and Theory Y.<sup>37</sup>

The distinction between the two theories is the motivation of the management. Agency theory postulates that the executive management is motivated to be diligent in the furtherance of the rewards they receive, individualistic gains and is prevalent in the Anglo-Saxon systems. The stewardship model alludes to a more aspirational approach and factors such as trust, collectivism, recognition and a desire to discharge the mandate in the best interest of the stakeholder<sup>38</sup>. The study will attempt to understand if the two theories can be unpacked to provide solutions in the depoliticization of state corporations. If indeed the agency theory is pertinent for example, would a formal lucrative reward system motivate the management of state corporations to desist from the pressures of political influence? Should the Boards and/or management of SCs be eligible for performance-based bonuses similar to those in the private banking sector?

### 1.11.3 Contingency Theory

The contingency theory of leadership<sup>39</sup> states that the style, methodology and outcome of any form of governance will depend on factors that are exogenous. A contingency is defined as an

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<sup>37</sup> Douglas McGregor, 'The Human Side of Enterprise.' (1957) 2(1) In *Adventure in Thought and Action*. Proceedings of the Fifth Anniversary Convocation of the School of Industrial Management, Massachusetts Institute of Technology, Cambridge 6-15.

<<https://bennyclerk.files.wordpress.com/2020/12/mcgregor-theory-x-and-y.pdf>> accessed on 16th September, 2023.

<sup>38</sup> Beata Glinkowska-Krauze & Boguslaw Kaczmarek., 'Classical and modern concepts of corporate governance (Stewardship Theory and Agency Theory),' (2015) 19(2) *Management* 1429-9321.

<[https://www.researchgate.net/publication/290479682\\_Classical\\_and\\_modern\\_concepts\\_of\\_corporate\\_governance\\_Stewardship\\_Theory\\_and\\_Agency\\_Theory\\_Klasyczne\\_i\\_wspolczesne\\_koncepcje\\_nadzoru\\_korporacyjnego\\_o\\_teoria\\_agencji\\_i\\_Stewarda](https://www.researchgate.net/publication/290479682_Classical_and_modern_concepts_of_corporate_governance_Stewardship_Theory_and_Agency_Theory_Klasyczne_i_wspolczesne_koncepcje_nadzoru_korporacyjnego_o_teoria_agencji_i_Stewarda)> accessed on 18th September, 2023.

<sup>39</sup> Peris Koech, 'Determinants of Effectiveness of Corporate Governance in State Corporations in Kenya,' (2018) PhD Thesis, Jomo Kenyatta University of Agriculture and Technology 1-91.

<[http://ir.jkuat.ac.ke/bitstream/handle/123456789/4548/koech,%20Peris%20PhD%20BA%20\(SM\),%202018.pdf?isAllowed=y&sequence=1](http://ir.jkuat.ac.ke/bitstream/handle/123456789/4548/koech,%20Peris%20PhD%20BA%20(SM),%202018.pdf?isAllowed=y&sequence=1)> accessed on 19th September, 2023.

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uncertain<sup>40</sup> occurrence or an unpredictable variable. This theory will be relevant to the study of politics as the focus factor in this proposal is a parameter that affects the corporate governance of state corporations and by extension their performance. The empirical review will reveal situations where the most qualified and experienced professionals have failed to deliver because of the nuances and nuisance of political interference (Lawrence & Lorsch, 1967). The effectiveness of a policy and legal framework is contingent upon the demands imposed by the situation<sup>41</sup>.

Whereas Kenya has made significant efforts in ensuring that the policies in matters governance are aligned to the latest international prescriptions<sup>42</sup>, traits of the ethnic and traditional statehood continue to pervade the Government practices promoting patrimonialism.

### 1.11.4 Critical Legal Theory

This theoretical framework will facilitate a critique of the policy, legal framework and the practice in the governance of state corporations. Akin to the critique envisaged in jurisprudential study of the critical legal theory<sup>43</sup> schools and its offshoots such as the feminist legal theory and the critical race theory. The study will propose a deconstruction of the frameworks in which the *arm of politics* is deeply entrenched in the law and its institutions. to reveal the ways in which the policy and law on governance of state corporations is a reflection of political agendas, interests and bias.

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<sup>40</sup> Collins English Dictionary, International Edition, HarperCollins Publishers, 2005.

<sup>41</sup> Felistus C. Kabiru, 'Influence of Management Functions on The Performance of Agricultural State-Owned Corporations in Kenya, (2019) Thesis Submitted in Fulfillment of the Requirements for the Award of Doctor of Philosophy in Business Administration and Management, Dedan Kimathi University of Technology 1-176. <<http://repository.dkut.ac.ke:8080/xmlui/bitstream/handle/123456789/4646/Felistus%20Kabiru.pdf?sequence=1&isAllowed=y>> accessed on 17th September, 2023.

<sup>42</sup> OECD (2015), G20/OECD Principles of Corporate Governance, OECD Publishing, Paris

<sup>43</sup> Michael D. Freeman, 'Lloyd's introduction to jurisprudence,' (9<sup>th</sup> ed., London: Sweet & Maxwell, 2014).



### 1.12 Research Methodology – The Doctrinal Approach

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The proposed research will be qualitative, some evaluations will be quantitative in nature. The primary research method shall be doctrinal which is suitable due to the sufficiency of the information repository in relevant and credible research in this discipline. The subject of traditional corporate governance is well established and the practice for state-owned enterprises is aligned to the general principles of governance.

The promulgation of the Constitution of Kenya will be a significant marker in the shift in the governance structure of state corporations. The realization of the national values espoused in article (10) and the import of chapter (13) that makes provision for the public service, particularly article 232 which edifies the values and principles of public service will be a thematic consideration throughout this study.

The study will consider the elaborate policy and legal frameworks and content that has been developed since the sessional paper No. I of 1965 that created the first state-owned enterprises in a bid to Africanize the economy, and the subsequent sessional paper No. 1 of 1986 pursuant to which the State Corporations Act was enacted in an attempt to harmonize and consolidate the legal framework. The approach will also consider the body of administrative law developed through executive orders, directive and circulars that have been issued by the Government through its MDAs and its officers.

The body of research with regard to state-owned enterprises, particularly in Africa is an emerging area with more attention due to the evaluation that has shown that these entities have not been successful in realizing the early aspirations set at the onset during the wave of

## **The Depoliticization of Governance Practice in State Corporations in Kenya**

independence in Africa in the 1960s. Consequently, a substantial body of research has covered components of the sector in a bid to address the dire status of the entities and their susceptibility to ruin due to the prevalence of corruption.

The doctrinal approach will also consider the jurisprudence that has been developed by the courts within the jurisdiction of Kenya, in the area of study and will examine the key precedents. The study will also benefit from the wealth of practical experience by the researcher garnered in the course of their work as a legal and governance practitioner within the public sector.

### **1.13 Scope and Limitation of the Study**

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The scope of the study will cover state corporations which are established pursuant to the State Corporations Act and enabling statutes, and which operate as Semi-autonomous Government Agencies (SAGAs). The scope will cover entities which fall within the purview of the Code of Governance of State Corporations, *Mwongozo* and will therefore not extend to State Corporations that are subject to more stringent frameworks under the Companies' Act and the Capital Markets Authority including;

- a. State Corporations by dint of the Government's shareholding.
- b. Entities established pursuant to the Companies' Act, 2015 and/or the Banking Act and are subject to the regulative framework of the Capital Markets Authority.

The study takes cognizance of the plethora of inter-related factors that may influence the governance practice in state corporations. There are several reasons given to explain the dismal performance of state corporations including an underperforming economy, lack of funding, insufficient qualified human resource etc. but the most prominent has been poor corporate

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governance and the persistent interference from political quarters. It is the latter two that will be the focus of this study as it will be impractical to consider all, the scope will therefore be limited to the role of national politics.

Additionally in exploring answers to the research questions in a bid to address the problem the recommendations that will be drawn will focus on those that will be actionable at national level, by state actors with regard to a robust reform agenda for the policy, legal and institutional framework. The role of the judiciary, civil society and citizenry is noted in reducing the influence of politics but will require an expanded research beyond the scope of this paper.

### **1.14 Chapter Outline of the Project Paper**

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The study will be documented in five chapters.

#### **1.14.1 Chapter one (1)**

This chapter will lay the foundation for the study by firstly providing an introduction and contextual definition of critical terms and terminologies. In this chapter the historical background of the state corporations in Kenya will be considered which will provide a root-cause analysis of the research problem. The foundational research will provide the basis for the statement of the research problem, the research questions, objectives, and the hypothesis which will provide the thematic progression throughout the study. The theoretical framework and the research approach will also be elucidated in this Chapter.

#### **1.14.2 Chapter Two (2)**

## **The Depoliticization of Governance Practice in State Corporations in Kenya**

In the second chapter the study will undertake an in-depth research in the policy, legal and institutional framework within which the governance practice of state corporations is currently premised. This will be aimed at a systematic critical evaluation of the efficacy of the framework and identification of the pitfalls which have underpinned the proliferation of political interference in the governance of state corporations. This will inform the architecture of the recommendations and conclusions of the study.

### **1.14.3 Chapter Three (3)**

The study in chapter three (3) will consolidate and rationalize the findings from chapter two (2). It is in this chapter that the study will attempt to draw linkages and demonstrate the multiple areas in the governance practice of state corporations where politics has significant influence. Additionally, the study will delve into the impact of this political influence and the projected outcomes on the sustainability and performance of the institutions.

### **1.14.4 Chapter Four (4)**

In chapter four the research will look to identify lessons from two other jurisdictions one within Africa and another without. South Africa has been selected as it is perceived to be more advanced than Kenya, it will be useful to examine the South African experience and document useful lessons that can be applied in Kenya. Secondly, the study will examine the Singaporean experience. This has been chosen as a worthwhile jurisdiction to consider in view of the milestones for which Singapore has been lauded as one of the most successful economies following their recovery plans that began in earnest from the year..... In this cross-border examination the study will consider challenges and how they can be mitigated against.

**1.14.5 Chapter Five (5)**

Finally in the last chapter five (5) they will provide a synopsis of the study. The recommendations arising from the study will be itemized in this chapter providing a categorization of the short, medium-term, and long-term interventions. In this chapter an attempt will be made to suggest a roadmap towards the actualization of these recommendations and the input and investments to be made. This will culminate in the conclusion of the study.

**CHAPTER TWO**

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**2 THE POLICY, LEGAL AND INSTITUTIONAL FRAMEWORK OF GOVERNANCE OF STATE CORPORATIONS.**

**2.1 Introduction**

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The Policy, Legal and Institutional Framework of Governance of State Corporations comprises a set of policies, directives and laws developed over a period of time, from different perspectives. The vastness and complexity of this framework has created one of the biggest challenges as will be demonstrated in this paper. The framework critique to establish strengths and weaknesses, the study will therefore provide useful findings regarding the adequacy and suitability of the current policy, legal and institutional framework in addressing the governance challenges that may arise. The findings in the study provide a foundation upon which the research can delve and suggest suitable recommendations and interventions.

**2.2 The Legal Framework of Governance of State Corporations**

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The expansive and intricate legal structure governing State Corporations encompasses a range of statutes, commencing with the supreme law embodied in the Constitution of Kenya (2010), extending to the State Corporations Act, entity-specific statutes, and various other legal provisions. This study will concentrate on the primary legal framework. It is imperative to recognize that a crucial intervention for achieving a substantial depoliticization of State Corporations involves the reform of this legal framework. Such reforms become essential to address inherent ambiguities, particularly in relation to the appointment of Boards and the institutionalization of the Code of Good Governance in the legal framework. This research underscores the significance of aligning an effective legal framework with requisite sanctions.

## **The Depoliticization of Governance Practice in State Corporations in Kenya**

A noteworthy revelation of this study advocates for a shift in governance from the current "comply or explain" model to a more stringent "comply or face sanctions" approach.

### **2.2.1 Constitution of Kenya, 2010**

This study in chapter (1) references the public participation comments given during the hearings conducted by the Constitution of Kenya Reform Commission. The aspirations of Kenyans to have institutions that were independent, transparent, and accountable and devoid of political pressures. The sentiments were codified in the CoK, 2010, particularly in Article (10) which stipulates the national values and principles of good governance and the public service values and principles particularized in Article 232 of Chapter thirteen (13).<sup>44</sup>

The study also considers the efficacy of depoliticization against the backdrop of Article (38) of the CoK, 2010 which confers political rights. There is a need to design a depoliticization strategy that allows for a delicate balance that will not tinker with the political rights of state and public officers that serve in the area of governance of state corporations. According to Article 38 (1) of the Constitution of Kenya (2010), every citizen possesses the freedom to make political choices, encompassing the right to establish or engage in the establishment of a political party, engage in the activities of, or enlist members for a political party, or advocate for a political party or cause.<sup>45</sup> Furthermore, Article 38 (3) grants every adult the right, subject to reasonable limitations, to vie for public office or a position within a political party of which the citizen is a member and, if successful, to assume the respective office.

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<sup>44</sup> Constitution of Kenya 2010.

<sup>45</sup> *Ibid*, Article 38(1), Laws of Kenya.

## **The Depoliticization of Governance Practice in State Corporations in Kenya**

These Constitutional provisions safeguard these political rights, whereas the statute law discussed in section 2.2.7 of this study attempts to entrench political neutrality in the public sector. It would appear that statute law cannot negate or diminish Constitutional freedoms and rights, it is likely that the interventions by legislation to limit the influence of politics, may be thwarted insofar as they may be deemed to be unconstitutional.

### **2.2.2 The State Corporations Act (Cap) 446 Of the Laws of Kenya**

The State Corporations Act (cap) 486 was birthed by the first attempt to streamline the parastatals as they were referred to at the time, through the Sessional Paper No. of 1986. The entities were birthed in the early independence years and intended to spur economic growth and Africanize service provision and industries. There were a few wins, but the institutions were quickly relegated to the whims of political honchos. It was against a backdrop of this shortcomings that the consolidation of legislation was found necessary.

The performance of SCs was lackluster *ab initio* from the initial stages they were marred by overreliance on public financing, misuse of funds, lack of streamlined operations and a bludgeoning wage bill. The performance reviews in 1979 in the Report on the Review of Statutory Boards and 1982 in the Report of the Working Party on Government Expenditures<sup>46</sup> indicated that growth in the Parastatal sector had not had the corresponding effect on improvement of the parameters that it was expected to impact. In fact, there was widespread malpractice, financial mismanagement, shifting from the core purpose and infiltration of political influence in their operations.

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<sup>46</sup> Privatization Commission, 'Privatization Programme' <[www.pc.go.ke/privatization-programme](http://www.pc.go.ke/privatization-programme)> accessed on 19th September, 2023.



## The Depoliticization of Governance Practice in State Corporations in Kenya

In response to the findings in the performance reviews the Sessional paper No. 1 of 1986 was adopted and one of the interventions was the enactment of the State Corporations Act (Cap) 446 of the Laws of Kenya in 1986. This legislation was geared towards providing a legal framework to facilitate streamlining of the management of Parastatals, unfortunately whilst this has partially been effective in addressing some of the challenges within the sector, most of the lacunas persist to date. Ironically the lessons have not barred subsequent Governments from establishing additional State Corporations, mostly with the intention to utilize them as “cash cows”. Section 3 (1)<sup>47</sup> of the Act gives the President sweeping powers to establish State Corporations by order. This may of course be seen as an arbitrary power, without any claw backs, requirement for due diligence and public participation.

### **2.2.3 Orders (Legal Notices) Pursuant to Section (3) Of the State Corporations Act (Cap) 446 Of the Laws of Kenya**

Several State Corporations have been established by operationalization of section 3 (1) of Cap 446, by order of the President of the Republic of Kenya. These entities are therefore subject to the order and by extension the provisions of the State Corporations Act. It has been argued that state corporations established in this manner do not rank *pari passu* to those established through substantive legislation as the enabling orders are classified as subsidiary legislation.

There have been thirty-six (36) state corporations established by a Presidential Order since enactment of Cap, 446, operating under the order. Consequently, there have been legislative reforms that have led to the transition of state corporations incorporated by Presidential Order

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<sup>47</sup> State Corporations Act (Cap) 446, Laws of Kenya.

## **The Depoliticization of Governance Practice in State Corporations in Kenya**

to substantive legislation. This has been in a bid to achieve greater autonomy due to the limitations that arise whilst operating as a Semi-Autonomous Government Agency (SAGA). The following have successfully been enacted through a stand-alone or industry specific legislation statute;

It is interesting to note from the list above how regime-change affects the landscape of State Corporations. During the Kibaki Era between 2002-2013, for example, twenty State Corporations were established. Contrary to the perception that State Corporations are a burden on the economy, the Kibaki Era has been lauded as the most robust so far. Unfortunately, some of the entities established in this manner have failed such as the defunct Nyayo Bus Service which was wound up vide a petition by the State Corporations Inspectorate on 7<sup>th</sup> May 1997<sup>48</sup>.

### **2.2.4 State Corporations Established by Specific Statute Laws**

State Corporations may also be established outside of the State Corporations Act (Cap) 446 of the Laws of Kenya. These entities are perceived to be more autonomous, however because the drafting of the provisions on constitution is a replica of the provisions in the State Corporation's Act, the legislative reform has not been successful in limiting political influence. Major State Corporations established under this heading include Micro-Small Enterprises authority, (MSEA), Kenya Institute of Public Policy and Research Analysis (KIPPRA) amongst many others.

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<sup>48</sup> State Corporations Inspectorate -Vs- Nyayo Bus Service Corporation & Anor (2015) eKLR.

## The Depoliticization of Governance Practice in State Corporations in Kenya

### 2.2.5 The Companies Act 2015 of the Laws of Kenya

The incorporation of the Companies Act<sup>49</sup> into the central framework of state corporations is facilitated by the provisions articulated in section (2) of the State Corporations Act. This particular section stipulates that a company, established in accordance with the Companies Act, wherein the government or another state corporation possesses the entirety or a controlling majority of shares, is categorically identified as a state corporation for the specific intents and purposes delineated within the scope of this Act. Illustrative instances of state corporations instituted in accordance with the aforementioned legislative mandate encompass the Kenya Pipeline Company, formally registered on the 6th of September 1973, and the Kenya Electricity Transmission Company, which underwent registration under the same Act on the 2nd of December 2008. This registration was conducted in alignment with the directives articulated in Sessional Paper No. 4 of 2004 on Energy.

The Companies Act is a bulky statute comprising forty-two (42) parts and 1026 sections. The state corporations incorporated in this manner are subject to this statutory provisions as well as the requirements of the Capital Markets Act<sup>50</sup> for those that are publicly listed, and the corresponding codes developed in this regard. The extensive legal requirements and compliance obligations in this category would be reasonably expected to have ensured that political interference is kept at bay, unfortunately this has not been the case. In the research study by Mr. Stanley Kerandi Manduku<sup>51</sup> He delves into the balancing act between enterprise and government in commercial state corporations.

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<sup>49</sup> The Companies Act No. 17 of 2015 [Rev. 2021].

<sup>50</sup> Capital markets Act [Rev. 2012] Cap 485(a), Laws of Kenya.

<sup>51</sup> Stanley K. Manduku, 'Hybrid Governance of Commercial State Corporations in Kenya, A balancing Act between Enterprise and Government,' (2015) A Thesis Submitted in Partial Fulfillment of the Requirement for the Degree of Master of Laws (LLM), University of Nairobi 1-118. <[http://erepository.uonbi.ac.ke/bitstream/handle/11295/95239/Manduku\\_Hybrid%20governance%20of%20c](http://erepository.uonbi.ac.ke/bitstream/handle/11295/95239/Manduku_Hybrid%20governance%20of%20c)

## 2.2.6 The Banking Act (Cap) 488 of the Laws of Kenya

The Banking Act is within the purview of the study of the legal framework, arising from the provisions of section (2) of the State Corporations Act, in the definitions in so far as a bank or financial institution licensed under the Banking Act where the whole or the controlling majority of the shares or stock of are owned by the Government or by another state corporation.

The Central Bank of Kenya<sup>52</sup> categorizes these state corporations as institutions with Government participation. Included in the list are Consolidated Bank of Kenya, Development Bank of Kenya; Housing Finance Limited; Kenya Commercial Bank; National Bank and Stanbic Bank all of which are limited. The evaluation of the performance of these entities presents a mixed bag with Kenya Commercial bank reporting the best performance over the years. Despite a rigorous legal framework with stringent operational compliance requirements these entities have not escaped the political arm and are whispered to be subject to the ruling elite albeit in a more subdued manner. The intrigues of the governance practice in these entities are delimited from the scope of this project as articulated in paragraph 1.2 of this paper.

## 2.2.7 Statute Laws on Political Neutrality

The study of the law with regard to political neutrality within the public sector will provide corroborative value to the hypothesis in this project paper. Political neutrality envisions the need for public/civil servants and State Officers to discharge their duties without the burden of

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[ommercial%20state%20corporations%20in%20Kenya.pdf?sequence=1&isAllowed=y>](#) accessed on 21st September, 2023.

<sup>52</sup> <https://www.centralbank.go.ke/shareholding-information/>

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bias arising from their political affiliations and loyalty and the resulting conflict of interest. The Article 75 (1) (a) and (b) of the CoK, 2010 requires that state officers must conduct their affairs in a manner that avoids any conflict between personal interests, public or official duties or which may cause them to compromise any public or official interest in favour of a personal interest.

The Leadership and Integrity Act<sup>53</sup> which establishes procedures and mechanisms for the effective administration of chapter six of the CoK, 2010, provides for political neutrality in a bid to stem the proliferation of political agendas in the public sector.

Section (23) of the Act explicitly outlines the imperative for political impartiality, a requirement further elucidated when juxtaposed with the content of section (16) addressing conflicts of interest and section (24) mandating impartiality. The crux of the matter is encapsulated in section (23), where it is expressly stipulated, in section 23 (1) (a) and (b), that a state officer, in the execution of their duties, is prohibited from serving as an agent for or advancing the interests of a political party or candidate in an election. Furthermore, they are precluded from displaying support for the opposition or any political party or candidate. Section 23 (2) imposes additional constraints, prohibiting state officers from engaging in political activities that could compromise, or be perceived to compromise, the political neutrality inherent to the office they hold. Analogous restrictions are similarly imposed on public officers as delineated in section 23 (3).

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<sup>53</sup> Leadership and Integrity [Rev 2014] Act No. 19 of 2012, Laws of Kenya.

## **The Depoliticization of Governance Practice in State Corporations in Kenya**

The Public Officer Ethics Act<sup>54</sup> provides for political neutrality at section (16) which mirrors the provisions under the Leadership and Integrity Act. Essentially it prohibits the public officers from acting as agents, furthering the interest of any political party or engaging any political activity which may compromise or be seen to compromise the discharge of their duties. The Political Parties Act also makes similar provisions

It would appear that the lack of political neutrality in state corporations is not for a lack of statutory provision on this matter, but in the enforcement of the provisions. The first complication that may arise is the application of the rules with regard to political neutrality vis-à-vis the chapter four Constitutional fundamental freedoms in Article (33) freedom of expression and Article (36) that confers a freedom of association. It is however the express provisions of Article 38 which may water down the legislative provisions regarding political neutrality.

The Courts have however upheld the requirements for political neutrality, the Honourable Justice, Mathew W. Nduma as he then was delivered a judgment on 9<sup>th</sup> December 2021 in a petition filed in Employment and Labour Relations Court<sup>55</sup> by the petitioner Prof Ben Sihanya. The claimant challenged the decision arising from disciplinary proceedings at the University of Nairobi, which required him to resign from either the University or from the position he was appointed to serve as the chairperson of the Orange Democratic Movement (ODM) disciplinary committee. The option provided by the University was deemed to be lawful and valid and in conformity with the Leadership and Integrity Act.

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<sup>54</sup> Public Officers Ethics Act [ Revised Edition 2016][2012] No. 4 of 2003

<sup>55</sup> Ben Murumbi Sihanya & another v Ethics and Anti-Corruption Commission; Registrar of Political Parties & another (Interested Parties) [2021] eKLR

## 2.3 Policy Framework

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The adopted framework for formulation of legislation in Kenya, is characterized by the development of a sector-specific policy. However, in the area of Governance a Policy in the strict sense itemizing the roadmap to achieve good corporate governance in Government agencies has not been designed in *stricu sensu*. Perhaps this is one of the gaps that should be addressed through streamlined policy statements and itemized policy directions in this sector.

### 2.3.1 Code Of Governance of State Corporations<sup>56</sup> - “Mwongozo”

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The Code of Governance of State Corporations, Mwongozo, 2015 is perhaps the most recent and concerted attempt to politicize Governance, as read with the revised Companies Act and the Capital Markets Authorities regulations and the codes. Indeed, Mwongozo has been a timely and useful benchmark since its issuance in 2015. It has faced the challenge of whether it is law or not with each divergent school a passionate defense for its position. Another challenge has been the adoption of the “comply or explain” structure of the Code, whereas this was necessary at inception to allow for the flexibility necessary for a framework that was intended to guide agencies in varied sectors, it has matured to be an easy excuse for non-compliance. Indeed, whereas other codes suggested have had a result of compliance, Mwongozo has not. One of the important propositions of this paper is to progressively shift State Corporations to Compliance or Consequence.

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<sup>56</sup> Kenya, Executive Order No. 7 of 2015

### 2.3.2 Administrative Law -Government Circulars- Politics of Government Directives

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State Corporations aside from the substantive policies and legislations are also subject to the directives issued by various Government Offices in Ministries, Departments and Agencies. Although the circulars are not legal documents per se they amount to administrative actions that the entities must comply with as they may only be challenged through judicial review proceedings in the High Court.

Government circulars have been useful in management of state corporations and harmonization of the operations and governance practices. There have, however, been instances where they have been misused to infuse political agendas.

## 2.4 Institutional Framework

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The Institutional framework for State Corporations begins at the highest echelons of power. There is abundance of discretion particularly in the upper decks of the framework and this is one of the shortcomings that have a window for politicization and extravagant self-enrichment and aggrandizement.

### 2.4.1 The President

#### a. Constitutional Authority

The office of the President is created under Chapter Nine, Article 130 of the Constitution of Kenya, 2010 as one of the components of the National Executive. Article 131 (a) provides that the President shall be the head of State and Government, consequently, the President by virtue of heading Government is derivatively also the apex authority of State Corporations.



## The Depoliticization of Governance Practice in State Corporations in Kenya

Indeed, upon the conclusion of each Presidential election it is expected that the President will issue an Executive Order at the commencement of his term. The Executive Order is issued in exercise of his prerogative powers vested under Article 132 (3) (b) to direct and coordinate the functions of Ministries and Government departments<sup>57</sup>. The Executive Order categorizes State Corporations within their respective parent Ministries, State Departments and defines their core mandate.

This overarching power of the President, which is political office, has often been perceived to be the genesis of the proliferation of political themes in the architecture and operations of State Corporations. Additionally, there has been mischief in the placement of State Corporations during the reorganization of Government based primarily on these personal interests, political affiliation and loyalty. The principle articulated in Article 129 (2), mandating the exercise of Executive Authority in a manner consistent with the principle of serving the people of Kenya and promoting their well-being and benefit, is seldom a prominent factor.

### **b. Statutory Authority of the President over State Corporations**

The President of the Republic of Kenya enjoys additional powers vested by the provisions of the State Corporations Act (Cap) 446 of the Laws of Kenya. Section (3) empowers the President to establish a State Corporation as a body corporate. This provision was utilized most by the former late President Hon. Mwai Kibaki, who established strategic state corporations to spur growth in sectors such as leather and to spearhead Government Policies in key matters. In

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<sup>57</sup> Executive Order No. 1 of 2023 Organization of the Government of the Republic of Kenya, Issued by the Executive Office of the President, January 2023.

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this instance the powers were used *bona fide*, if exercised as is without the benefit of checks and balances through advisories from relevant Boards and supervision by Parliament. It is easy to envision scenarios where this provision may be privy to abuse.

The State Corporation's Act re-enforces the overbearing role of the President in section (4) of the Act which allows for the President to assign ministerial responsibility for these entities. The unconditional and unfettered discretionary power of the President in this regard is a clear illustration of the engrained weak systems that offer no oversight or strategic alignment to National goals. This has often led to a clamour for State Corporations by Cabinet Secretaries to be assigned within their dockets for personal gain without any consideration for mandate and service delivery to the citizens of Kenya. A study of these unstructured provisions that do not offer claw-backs to safeguard the national interest provide an illustration of the necessary legislative reforms.

The broad powers of the President are thematic with sweeping powers under section 5 (A) 1 for the President to exempt any State corporation from provisions of the Act. Part III, Section (6) of the Act empowers the President to appoint the Chairpersons of the Boards of State Corporations and direct whether the Chairperson shall serve as an executive or non-executive. This has been used to appoint Presidential loyalties and to settle political debts. The appointment of chairpersons under this provision offers no criteria and is replicated in specific legislations. There has been criticism in this as it has been seen to be in contravention of the National Values enshrined in Article (10) of the CoK, 2010.

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The Judiciary in the case *Katiba Institute & Anor. -versus- The Office of the Attorney General*<sup>58</sup> attempted to regulate and require that the appointments be undertaken by the Public Service Commission in accordance with Article 10 and 232 of the CoK, 2010. In this case the Constitutional and Human Rights Division of the High Court made sweeping declarations declaring appointments made null and void on the basis of failure to adhere to Constitution due process. The Court in this case upheld the Constitutional principles of open, transparency, inclusivity and consideration of marginalized and person's living with disabilities. In declaring the appointments made in 2018 null and void the Honourable noted that the 2010 Constitutional dispensation intended to address the tribalistic, nepotistic and corrupt appointments that had characterized State Corporations, the Court referred to the culture of "*jobs for the boys*". Despite a brave judgement by the Honourable Court in this Court the enforcement of the orders therein were declared redundant after an appeal was lodged by the Attorney General which allowed the appointees to complete their terms. The tragedy amidst the attempt by the Courts to restore Constitutionalism in appointments in State Corporations is that the vice-inspired appointments have continued unabated.

Indeed, the framers of the State Corporations Act must have been at wits end to please the Office of the President as in section (7) of the Act they unabashedly bestowed on the President powers to direct Boards and in section (7)(3) to revoke appointments of Board members, appoint replacements without any requirement for due process. Indeed, throughout this legislation the President holds powers to appoint the chairperson of critical organs such as the State Corporations Appeals Tribunal, State Corporations Advisory Committee amongst others. It is evident that a considered review of this Statute to structure the wide powers of the President

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<sup>58</sup> *Katiba Institute & another v Attorney General & another; Julius Waweru Karangi & 128 others (Interested Parties)* [2021]

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are inevitable to allow for structured reforms of Governance of State Corporations in a bid to mitigate against negative politicization of these corporations.

### **2.4.2 State corporations advisory committee (SCAC)**

The State Corporations Advisory Committee (SCAC) is established pursuant to Part V of the State Corporations Act<sup>59</sup>. The Committee's membership comprises Presidential appointees including the Principal Secretary (PS) in the Office of the President, PS, National Treasury, Director of Personnel Management, the Inspector General Corporations and eight (8) other members. The Secretary to the Committee is also an appointee of the President<sup>60</sup> making it an institution serving at the prerogative of the President. Indeed, the Executive Order No. 1 of 2023<sup>61</sup>, organizing Government places SCAC within the purview of the Principal Cabinet Secretary, an office which is not embedded in the Constitution of Kenya. This is a difficult place to start as the public sector Governance whip is larded by an office established without due process and participation of the populace. The implication is that the Committee will often align to the current presidential dispensation and the risk of providing biased advice is significant.

The research into the institutional framework of State Corporations, at this juncture, indicates a high-risk appetite in so far as the legislation confers almost absolute power on the President with few to no checks and balances. SCAC plays an advisory role specified in section 27 of Cap 446, which confers on it powers to

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<sup>59</sup> Cap 446 of the Laws of Kenya

<sup>60</sup> Section 26 (3) of the State Corporations Act Cap 446 of the Laws of Kenya.

<sup>61</sup> Republic of Kenya, Executive Order No. 1 of 2023, The Organization of Government, Issued by H.E. President Dr. William Samoei Ruto on the 6<sup>th</sup> of January 2023.

## **The Depoliticization of Governance Practice in State Corporations in Kenya**

- i. investigate State Corporations and make recommendations to the President;
- ii. in consultation with the Attorney General and National treasury advise on the establishment, reorganization and dissolution of State Corporations;
- iii. Advise on appointment, removal and transfer of officers serving in State Corporations;
- iv. Examine any management or consultancy agreement proposed or made by State Corporations and advise.
- v. Review proposals put forth by State Corporations for the acquisition of interests, joint ventures, or entry into new business endeavors and provide counsel.

An analysis of its legislative functions reveals lack of a singular mandate. The framers of these provisions sought to confer the Committee with wide advisory powers with regard to State Corporations but may have lacked clarity. A reading of its functions would require subsidiary legislation to provide clarity on the scope and the methodology. The powers of SCAC to examine consultant agreements or proposals to acquire interest, joint ventures etc. does not place the Committee and its role in view of other players and processes such as the separate legal personality of the State corporations, the Boards that sit at the apex, the Supply Chain Management rules in the Procurement laws amongst other. By failing to make concise functionary roles for SCAC essentially most of these functions have become redundant.

The Committee as currently constituted in spite of the lack of clarity in its functional legal mandate has become central to promoting good Governance of State corporations. Indeed, the collaborative induction trainings of Board members, the Board self-evaluation, issuance of Governance practice guidelines, Human Resource Policies and Procedures Manuals, Organizational Structure, Career Progression Guidelines are some of the areas where SCAC has made its mark with regard to governance of State Corporations.

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Notably the issuance of the Code of Governance of State Corporations, January 2015<sup>62</sup> jointly by the Public Service Commission and the Committee has offered a resourceful guide and enabled streamlining of governance of State Corporations. Particularly *Mwongozo* offers clarity on the Boards of Directors, its operations, the CEO, it has also entrenched the role of the Corporation Secretary separate from the CEO to champion Governance internally. This code has provided a good illustration of what Policy based governance can offer with the documents reigning in Board's which were prone to turning rogue. With clear, simple guidelines covering key principles of governance the Mwongozo Code has become the most consequential in the furtherance of public sector governance.

**Diagram 2.1 – A compendium of the Mwongozo Code of Governance of State Corporations**



<sup>62</sup> Executive Order No. 7 of 2015

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### *Illustration Two (2) Components of the Code of Governance of State Corporations*

SCAC continues to entrench good governance of State Corporations with the issuance of draft guidelines<sup>63</sup> to enhance the *Mwongozo Code*. These guidelines issued by the Prime Cabinet Secretary have brewed a storm regarding the mandate of SCAC vis-à-vis that of PSC in the management and regulation of State Corporations.

#### **2.4.3 Inspectorate of State Corporations**

The Office of the Inspector General (Corporations) is one of the checks and balance institutions established pursuant to section (18) of the State Corporations Act. Whereas the rationale is well-founded, the politicization of the appointment of the Inspector General is further evidence of the need to dilute political influence by providing security of tenure for critical offices such as this.

The Inspector General (Corporations) has three statutory duties to wit;

- a. Provide guidance to the Government on all issues influencing the efficient operation of State Corporations.
- b. Submit a report to the Minister regarding the management practices within any State Corporation.
- c. Notify the Controller and Auditor General of instances where funds allocated by Parliament are not being utilized by State Corporations for their designated purposes.

In an ideal, objective and goodwill environment the Inspector General would be useful in reigning State Corporations that fall off the bandwagon of good governance and potentially

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<sup>63</sup> Republic of Kenya, Executive Office of the President, Office of the Prime Cabinet Secretary, Guidelines on Management Terms & Conditions of Service for Board Members and Staff of State Corporations.

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safeguard public resources. Despite invoking the provisions of section 18 (2) (c) that empower the Inspector to attend meetings, reason wherefor representatives of the Inspector General now sit on many Boards, the impact is not well documented.

Section 19 of the State Corporations Act gives the Inspector General power to disallow expenditure items and to surcharge offending public officers, however this has not been widely affected as the preceding investigations are often marred by corruption.

### **2.4.4 State Corporations Appeal Tribunal**

The State Corporations Appeal Tribunal was established by section (22)(1) of the State Corporations Act. It was created in anticipation of appeals arising from the decisions of the Inspector General (Corporations) in the exercise of his powers to disallow and to surcharge. The Tribunal is constituted by a chairperson appointed by the President meeting the eligibility criteria of a Judge and a member of the Law Society of Kenya and the Institute of Certified Public Accountants of Kenya appointed by the Minister in charge of Finance. The Secretary shall be a public officer shall be appointed by the Attorney General

The efficacy of the Tribunal in streamlining Governance is not clear, it is worthy to note that the appeals to the High Court pursuant to Section (23) of Cap 446 have offered useful precedents. A notable case was in the matter of *Nathaniel Kipkorir Tum v Inspector of State Corporations*<sup>64</sup> where the Appellant a former CEO of the Kenya Seed Company was surcharged by the Inspector General a sum of KES twenty-one (21) million which was

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<sup>64</sup> Nathaniel Kipkorir Tum v Inspector of State Corporations [2015] eKLR



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allegedly paid to his affiliate company. He lost the appeal at the Tribunal but was successful in the High Court on the *ratio decendi* that the surcharge was time barred as the course of action arose eleven (11) years prior and primarily because the Inspector General had failed to lead sufficient evidence. Unfortunately, currently the Tribunal is redundant as it has not been fully constituted.

### **2.4.5 Public service commission (PSC)**

The establishment of the Public Service Commission is mandated by Chapter thirteen, Article 233 (1) of the Constitution of Kenya. The enabling provisions do not provide a clear definition of the scope and jurisdiction of the PSC, Article 260 defines public service to be “the collectivity of all individuals other than state officers , performing a function within a state organ. Additionally, Article 234 (3) attempts to clarify the reach of the PSC by enumerating offices that do not fall within the functionary PSC purview. These include state offices, diplomatic or consular representatives, offices subject to the Parliamentary Service Commission, the Judicial Service Commission, Teachers Service Commission, National Police Service Commission amongst others. It has therefore been inferred that offices within State Corporations are subject to the functionary mandate of PSC.

Examination of its functions prescribed at Article 234 of the COK, 2010 introduce the discourse on mandate overlaps between the PSC and SCAC. PSC functions include;

- a. Establishing and abolishing offices in the Public Service and to appoint the office holders.
- b. Exercise disciplinary control over the office holders

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- c. Promote the values and principles in Article (10) and 232 of the CoK, 2010 and evaluate and report to the President and Parliament on the level of compliance.
- d. Investigate, monitor and evaluate organization, administration and personnel practices of the Public Service.
- e. Ensure that the public service is efficient and effective.
- f. Develop human resources in the public service.
- g. Review and make recommendations to the national government in respect of conditions of service, code of conduct and qualifications in the public service.
- h. Hear and determine appeals in respect of county governments' public service.

An overview of the above PSC functions vis-à-vis the research findings under the SCAC heading provide the genesis on the tussle between the institutions as they attempt to demarcate their territory. The Attorney General in an advisory issued on 16<sup>th</sup> August 2023<sup>65</sup> upon a request to clarify the mandate of PSC, SCAC and the Salaries and Remuneration Commission (SRC) with regard to management of the human resource in State Corporations, attempted to reign in PSC excesses by encouraging a collaborative approach between the entities. The PSC has not been hesitant to stamp its authority by issuing Guidelines for Development of Human Resource management Instruments for state Corporations and Public Universities vide its communique of 8<sup>th</sup> August 2023, contrary to the advisory from the Attorney General.

The confidence of the PSC in its position as an apex authority of matters establishment and abolition of offices, management of human resource, terms and conditions of service within State Corporations has been bolstered by the decisions made by the Courts. In the case of

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<sup>65</sup> Letter Ref: AG/CONF/2/C/31 Vol V1 dated 16<sup>th</sup> August 2023 to the Secretary/CEO Public Service Commission from the Hon. J.B.N Muturi, EGH.

## The Depoliticization of Governance Practice in State Corporations in Kenya

*Manyara Muchui Anthony v Communications Authority of Kenya & 3 others*<sup>66</sup> the High Court in determining the facts in issue including whether positions in State corporations are within the public service, and if an officer in a State Corporation is a public officer, secondly are they subject to regulation by SCAC or PSC and consequently which entity regulates human resources within the State Corporations. In the judgment the Honourable Court held that officers in State Corporations are public officers and part of the public service, secondly whilst noting the duplicity in roles of SCAC in the State Corporations Act and the role of PSC in the CoK, 2010, the Honourable Court upheld PSC's Constitutional mandate over the statutory mandate of SCAC.

The Office of the Attorney General has appealed<sup>67</sup> against this decision and applied for stay, however it is abundantly clear that PSC enjoys an advantage in view of the fact that it is housed in the CoK, 2010 which may further clip the wings of SCAC.

### 2.4.6 Parent Ministries

All State Corporations are within the ambit of a Ministry, which is often referred to as the parent Ministry. The determination of the categorization and placement of the State Corporations is the prerogative of the President of the Republic exercised through the issuance of Executive Orders. It is commonplace for the placement of State Corporations to be preceded by haggling behind the scenes as Ministers seek to control the most lucrative of the entities.

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<sup>66</sup> *Anthony v Communications Authority of Kenya & 3 others* (Petition E161 of 2021) [2022] KEELRC 1117 (KLR) (25 January 2022) (Judgment)

<sup>67</sup> Nairobi Civil Appeal No. E549 of 2022, Hon AG & Anor – vs- Manyara Muchui Anthony, CAK & Anor

## **The Depoliticization of Governance Practice in State Corporations in Kenya**

The study of the relationship between a State Corporation and the parent Ministry reveals the nexus of politics and governance of State Corporations. In practice it is perceived that the operations of State Corporations are at the “mercy” of their respective PS or CS.

The Ministerial dominance over State Corporations is informed by the power of the Cabinet Secretary with regard to appointment of the Board members. The Board is the apex authority in a State Corporation with powers to hire and fire the CEO, approve budgets, procurement plans, financial statements, human resource policies etc. and the role of the Minister in constituting the Boards gives him agency. Additionally State Corporations must seek concurrence from the parent Ministry on all their critical processes which essentially waters down their independence hence the term Semi-Autonomous Government Agencies (SAGAs)

### **2.4.7 The Institute of Certified Public Secretaries of Kenya**

The Institute which has branded itself as the Institute of Certified Secretaries (ICS) the “Governance Profession” is established pursuant to Section (3) of the Certified Public Secretaries of Kenya Act Cap 534<sup>68</sup> of the Laws of Kenya. The Institute has been at the forefront of promoting good governance through collaborative partnerships with strategic institutions such as SCAC. The Institute has developed a robust induction and training course curriculum designed for the public sector. The impact of this capacity building, particularly for Board members, has been instrumental in making strides towards professionalization of governance which to an extent will be useful in addressing proliferation of political influence.

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<sup>68</sup> Revised Edition 2015 [1992]

## The Depoliticization of Governance Practice in State Corporations in Kenya

The Institute has also been critical in furthering the role of the Corporation Secretary in State Corporations ensuring that the persons who take lead in matters Governance are qualified, receive continuous professional development and are regulated. The Institute is also charged with the accreditation of Governance Auditors and the maintenance of a register. It is expected that State Corporations shall be required to undertake Governance Audits which will enhance accountability and may deter decision making at Board level that is purely influenced by outside forces, in contravention of principles of good governance.

Additionally, the issuance of Governance Guidelines (GG) and Governance Standards (GS) by the Institute has provided an important framework for the conduct of Board business across the sector. It is important that the application of the guidelines and standards be enforced in the public sector and that the ICS proposes to carry out periodic review of the Guidelines and Standards to ensure they respond to the current governance environment.

### *Illustration Three (3) the ICS Governance Guidelines (GG)*

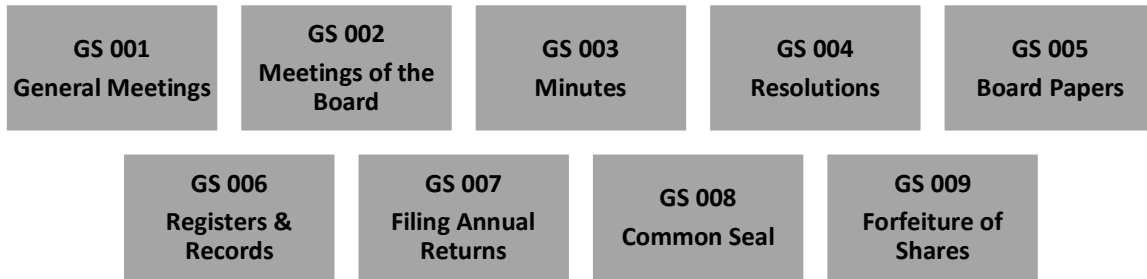
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<b>GG 001</b>	<b>GG 002</b>	<b>GG 003</b>	<b>GG 004</b>	<b>GG 005</b>
<b>Guideline on Professional Ethics</b>	<b>Role of the Certified Secretary</b>	<b>Governance Audit Guidelines</b>	<b>Governance Audit Review Mechanism</b>	<b>Governance Guideline on Virtual Meetings</b>

### *Illustration Four (4) the ICS Governance Standards (GS)*

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## The Depoliticization of Governance Practice in State Corporations in Kenya



### 2.5 Conclusion

The study in chapter two (2) critiqued the policy, legal and institutional framework, the findings indicate a disjointed and fractured framework. It also established that some of the most significant policies such as Mwongozo have not been codified into the legal framework and therefore are not equally ranked, which may affect the prioritization and application of the principles therein.

The study was indicative that the policy, legal and institutional framework was in some instances facilitative to the proliferation of political influence and interference in the governance practice of the state-owned enterprises. Indeed, this is a reasonably anticipated finding in view of the fact that legislative powers through the National Assembly are vested in politicians and it is likely that they would embed their interest in the text of the law. A sound conclusion from the findings of the study is that there exist weaknesses and gaps which ought to be addressed. The fragmentation of the framework also predisposes the state corporations to politicization and presents a case for harmonization, streaming and consolidation.

CHAPTER THREE

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3 THE ROLE OF POLITICS IN THE GOVERNANCE OF STATE CORPORATIONS  
IN KENYA

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**3.1 Introduction**

This study has demonstrated the intricate entanglement between the prevailing political environment in the country and the Governance of State Corporations. This has been achieved by cunningly structuring the legal framework to suit political interests. Indeed, the presumptions on the character of a body corporate emanating from the doctrine of separate legal personality that presupposes that a legal entity ought to be separate from its owners/shareholders is seldom tenable for State Corporations. These entities are subject to the intrigues of the amorphous “hand of the political elite” fiddling with the operations of these organizations. In this chapter the study will consolidate the findings of the study and categorize them into the key areas of Governance that have been politicized in law and practice. The rationalization of the findings will provide the substratum for the recommendations of this research paper.

**3.2 The Establishment and Dissolution of State Corporations**

State Corporations as defined in the State Corporations Act (Cap) 446 are established by specific statute law or pursuant to section (3) of Cap 446. The legislative process by design ought to be a representative process for the citizenry but has been tainted by rogue politicians in their seats as Members of Parliament or Senate serving their own interest. Indeed, the operationalization of Section (3) gives the President an unfettered authority to establish these entities. This research focused on risks that attend to section (3) and the likelihood of unbarred abuse by a tyrannical Presidency.

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Section (3) is one of the provisions of law legislated prior to the adoption of the Constitution of Kenya, 2010 and it therefore does not embed the Article (10) National Values & Principles of Governance, particularly due process, inclusivity, and public participation. The instances of the operationalization of Section (3) were highlighted in Chapter two (2) of this paper where State Corporations or Semi-Autonomous Government Agencies were created despite the bludgeoning operational costs for each against a smaller “national cake”.

Indeed, the challenges that have arisen in the establishment, rationalization, restructuring and dissolution of State Corporations was one of the terms of reference for the Presidential Task Force on Parastatal Reforms<sup>69</sup>. The Taskforce sought to design structures that ensured that the country's Government-Owned Enterprises would be responsive to the “wananchi” needs and focus on the proverbial “Wanjiku”. The recommendations were specific including the scaling down of these entities from the then 262 to 187, which was to be implemented pursuant to two proposed legislations the Government Owned Entities Bill and the National Sovereign Fund Bill, with the later catering for entities in which the Government was a shareholder. The recommendations were to be implemented within three (3) months of submission of the report, unfortunately like many good things in our country this report was condemned to the “cold, dark, forgotten shelves” ten (10) years later it remains gathering dust! The biggest reason? bad politics that promotes the safeguarding of selfish interest to the detriment of the welfare of the people of Kenya.

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<sup>69</sup> Report of the Presidential Taskforce on Parastatal Reforms, Presented to His Excellency, Hon. Uhuru Kenyatta, C.G.H. (as he then was) October 2013.



### **3.3 Funding of State Corporations**

Funding of State Corporations is dependent on the category. Some Corporations which are intended to build on policy and technical capacity in specific sectors will often be financed by the Exchequer. Others that offer services such as Kenya Airports Authority, Kenya Ports Authority, Kenya Power, Kenya Airways ought to be self-sustaining as they adopt a profit-g geared business model. This has not been the case for the latter category with their perpetual existence being sustained by frequent tax-funded bailouts. Unfortunately, the poor viability of the commercial corporations has been affected by the infiltration of individual interests championed by politicians.

It is reasonable to conclude that given the heavy reliance on Exchequer for most State Corporations the common *modus operandi* is “do not bite the hand that feeds you”, this hand is often that of politicians and is controlled by the politics of the day. The long accountability chain in the Medium-Term Expenditure Frameworks (MTEF)<sup>70</sup> which begins at the budget making process subject to the rationalization by the National Treasury, approval by the Budget and Appropriations Parliamentary Committee, up to the passing of the Finance Bill and release of funding to the respective entities is puppeteered by the politics of the day.

The funding model has consequently affected the application of the Principles of Good Governance which require objectivity, independence, inclusivity, fairness and equity. The stewards of these entities will often be required to bend the rules against a promise for funding. The consequences are grave including nepotism, tribalism and corruption in critical

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<sup>70</sup> <https://www.oecd.org/gov/budgeting/medium-term-expenditure-frameworks/>

## **The Depoliticization of Governance Practice in State Corporations in Kenya**

components such as human resource and procurement, which resulted in inept teams and squandering of public resources.

### **3.4 Leadership of State Corporations**

The State Corporations Act Section (4) provides that the President shall assign ministerial responsibility which has been discussed in chapter two (2) of this paper, this provision places state corporations within the purview of the authority of the CS currently responsible. The influence of the CS in governance of State Corporations cannot be gainsaid, whereas the office of the CS was at the inception of the CoK, 2010 expected to be ran by a technocrat increasingly it has become a reward for political loyalists who fail at the ballot. This has further compounded the politicization of State Corporations from the appointment of Board members to that of the CEO.

Part III of the State Corporations Act provides for the Boards and Management of State Corporations, with section six (6) prescribing the composition of the Boards. The interplay of politics in the constitution of Boards through appointment by the President of the Chairperson and appointment of the other members by the CS has been investigated exhaustively in this paper. The efforts of the judiciary to provide precedence for a meritocracy in these appointments has been ignored.

The research however shows that there is compliance regarding the establishment of Boards as the apex authority of the organizations. The board of directors of the SCs are expected to oversee the operations of the organizations and ensure prudent utilization of the public resources as provided in Section 15(1) of the State Corporations Act. Whereas the Boards are

## The Depoliticization of Governance Practice in State Corporations in Kenya

responsible for the proper management of the affairs of a SC and accountable for its finances, many do not have the necessary level of independence to effectively discharge their roles. Most have not been able to satisfactorily discharge the responsibility and oversight envisaged by the law. The Board of Directors have experienced many challenges including lack of capacity building, insufficient skills-sets, inadequate funding, lack of co-operation from management amongst many others, however the influence of politics has a significant effect on the efficacy of the institution of the board, from the onset of their appointment.

The appointment of board members to the SCs has always been silently critiqued and aroused discontentment, but recently the extended violation of the Constitution has been referred to the courts of law. In a petition filed at the constitutional and human rights division by the *Katiba Institute*<sup>71</sup> The three-judge bench gave a landmark judgment quashing the appointment of persons to serve as directors to Boards of state corporations on grounds that their appointments were in violation of Article 10 and 232. The Court in that petition held that.

*“.....The people of Kenya wanted to see appointment processes that are transparent and offices that are not only accountable to the people but also capable of guarding public wealth and resources. There was considerable disquiet about the apparent inability of public officers to exercise powers independent of political pressure.....”*

The appointment of board members is only one aspect in governance of SCs hugely impinged on by politics, there are many more that will be examined in this research. The cognizance of the gap by the courts reiterates the problematic nature of political influence in SCs. So

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<sup>71</sup> *Katiba Institute & another v Attorney General & another; Julius Waweru Karangi & 128 others (Interested Parties)* [2021] eKLR

## **The Depoliticization of Governance Practice in State Corporations in Kenya**

intertwined has politics become that the segregation of it from the governance of SCs initially appears oxymoronic. There is a need for comprehensive research and recommendations for reforms that can address the challenges that arise from the overbearing of politics in this sector. A cure to this vice is central to our value system and constitutionalism as ultimately it is the common *mwananchi*, citizens who are most aggrieved by the failures of SCs.

The role of the Board has also been entrenched in *Mwongozo* which empowers the Board to appoint and remove the CEO. The CEO provides executive leadership for the State Corporations, linking the secretariat to the Board and serving as the Accounting Officer. Unfortunately, the appointment of CEOs of State Corporations is not immune to the political environment and there have been many instances of innuendo that have led this position to be termed as a political appointment.

The intention to vest the authority to appoint and remove the CEO in the Board has in practice suffered a conflict of laws where State Corporations are established by a separate statute which indicate that the CEO shall be appointed by the Cabinet Secretary upon recommendation by the Board. In practice this has resulted in the Boards been rendered redundant with the political elite bulldozing for the appointment of their preferred candidate. This is illustrated in the case of recruitment of the CEO of the Export Processing Zones Authority (EPZA) which suffered setbacks when the CS failed to gazette the top Board nominee and instead extended the term of a ministry staff deployed as the acting CEO. The Court offered some reprieve in the case of **Ezekiel Owour Otieno -Vs- EPZA, CS Industrialization, Trade & Enterprise**

## **The Depoliticization of Governance Practice in State Corporations in Kenya**

**Development, & Anor**<sup>72</sup>, in which Justice Rika in the judgment delivered on 29<sup>th</sup> July 2022 held that the CS cannot overrule the Board on appointment of the CEO.

### **3.5 The Human Capital and Staffing Procedures within State Corporations**

The human Capital of State Corporations is an important component in the efficiency of its operations including its Governance practice rating. Of course, in an increasingly difficult economy employment opportunities in State Corporations have not been spared from the hold of politicians, politicking, and the political environment. Indeed, surveys have shown a direct correlation in the regional representation with the political power distribution at any one time. The impact is that a significant portion of personnel from all cadres are not independent and are mere agents of politicians unlikely to spearhead the principles of good governance, undoubtedly this has negatively impacted the viability of State Corporations and has aided the proliferation of poor governance and grand corruption.

State Corporations are required to develop the human resource instruments which comprise of the Human Resource Policies & Procedures Manuals, the Organizational Structure and the Career Progression Guidelines. These instruments are expected to streamline management of the human resource and provide equity in onboarding new talent. Unfortunately, the undercurrents of nepotism, tribalism and cronyism have been more relevant in the composition of human resources in State Corporations.

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<sup>72</sup> *Okoiti v The Board, Export Processing Zones Authority & 3 others; Otieno (Interested Party) (Petition E133 of 2021) [2022] KEELRC 3771 (KLR) (29 July 2022) (Judgment)*

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The management of the human capital has also been murky as different agencies squabble for control. Previously SCAC was responsible for approval of the Human Resource Instruments however the PSC has recently stamped its authority following the determinations made in the case of *Anthony Muchui Manyara -Vs- Communications Authority of Kenya*<sup>73</sup>.

### **3.6 Operations of State Corporations**

The operations of State Corporations are a product of the preceding components discussed which ultimately impact the core purpose for which State Corporations are formed. A politically appointed Board, CEO or staff, for example will invariably promote their political godfather's agenda often one of self-promotion. However, if there could be a methodology to dilute the political undertones and concentrate on a meritocracy in the appointment of Boards, CEOs, staff and the overarching drive of the CS to further national interest, the State Corporations would make greater strides towards achieving their core mandate.

There is consensus that every sovereign state will require entities which are owned to meet the National Development Agenda. Indeed, the Presidential Task Force on Parastatal Reform, 2013 alluded to the fact that the Government-Owned Entities were essential in a bid to promote economic growth and development; create employment; build technical capacity and capabilities of sector-specific National development goals; improve delivery of public services; and build international partnerships. The Comparative study in chapter four (4) will demonstrate how Singapore rode on the success of Government Lead Corporations to catalyze economic growth and improve the welfare of the citizenry.

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<sup>73</sup> Anthony v Communications Authority of Kenya & 3 others (Petition E161 of 2021) [2022] KEELRC 1117 (KLR) (25 January 2022) (Judgment)

## The Depoliticization of Governance Practice in State Corporations in Kenya

However, in Kenya there is a saturation of politics in the operations of State Corporations, including in the Boards which ought to be the apex authority. This research provides a clear illustration that without depoliticization success of State Corporations will remain a mirage. A recent example is a communique<sup>74</sup> reported in the media apparently from the Head of Public Service purportedly directing the Board of the Athi Water Works Development Agency to suspend its then CEO. This disregard for due process, principles of good governance and authority will continue to negatively impact state agencies to the detriment of national objectives.

### **3.7 Conclusion**

The study has in this section of the project paper considered some of the key areas which provide an intersection between the governance practice in state corporations and the potential for political intrusion. The research indicates that the most vulnerable components in the governance chain are during the establishment and dissolution of state corporations, the public sector budget-funding and accountability chains. Other aspects that are heavily influenced are the leadership structures which is an area that has corroborative studies regarding the constitution of Board members and appointment of CEOs, human capital and staffing and the day-to-day operations. These findings provide a valuable starting point in designing the architecture of the frameworks that will respond to these gaps.

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<sup>74</sup> Executive Office of the President, Office of the State House Spokesperson, Press Release, 23rd September 2023

CHAPTER FOUR

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4 EXAMINATION OF THE EXPERIENCES IN GOVERNANCE PRACTICE IN  
STATE CORPORATIONS IN OTHER JURISDICTIONS

**4.1 Introduction**

The research paints a clear picture of what governance practice in state corporations in Kenya and the manner in which politics has etched itself in every fiber of these entities. Unfortunately, this is the narrative throughout most of Africa, however Singapore offers valuable lessons on how governance can be structured so as to limit the influence of the changing political landscape.

**4.2 Governance of State Corporations – The South Africa Experience**

Governance in state corporations is a critical aspect that shapes their performance and impact on the socio-economic landscape. South Africa provides a useful case-study, it is ranked third in Africa with a GDP estimated at 405.71 billion USD<sup>75</sup>, whereas Nigeria and Egypt precede on this ranking, South Africa offers a more stable political comparative. Additionally, SA has a longer history of the sector with its first major SOE the Electricity Supply Commission (Eskom) established in 1923. It also provides a unique governance model through the consolidated representation of the Government as a shareholder in the critical SOEs through the Department of Public Entities<sup>76</sup>.

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<sup>75</sup> World Bank, World Bank National Accounts Data and OECD national Accounts data files, <<https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=ZG>> accessed on 24th November 2023

<sup>76</sup> United Nations. Economic Commission for Africa; United Nations. Economic Commission for Africa (2021-08). Governance of state-owned enterprises in South Africa: enhancing performance, efficiency and service delivery. Addis Ababa :. © UN. ECA,. <https://hdl.handle.net/10855/45908>”



## **The Depoliticization of Governance Practice in State Corporations in Kenya**

In the South African context, understanding the historical evolution, legal foundations, and contemporary challenges provides valuable insights into the governance framework.

### **4.2.1 Historical Overview of State Corporations in South Africa**

The origins of state involvement in economic activities in South Africa can be traced back to the colonial era. Both British and Dutch colonial powers established state-controlled entities to manage critical sectors such as railways, ports, and utilities.<sup>77</sup> These early initiatives laid the groundwork for the subsequent expansion of state corporations in the post-colonial period. During the apartheid era, the state's role in the economy intensified. State corporations became key instruments for implementing discriminatory policies, particularly in strategically significant sectors like mining, energy, and telecommunications. This period witnessed the consolidation of state control over various industries.<sup>78</sup>

The inauguration of democracy in 1994 marked a pivotal juncture in South Africa's history, precipitating a profound political and economic transformation. The post-apartheid government, under the leadership of Nelson Mandela, embarked on an agenda that included far-reaching economic reforms. This transformative period witnessed a concerted effort to restructure and revamp state corporations, aligning them with the principles of market-oriented policies.<sup>79</sup>

The restructuring process entailed a systematic overhaul of state-owned enterprises (SOEs) to enhance their efficiency, accountability, and competitiveness. Central to this initiative was the infusion of market-driven principles into the operational frameworks of these entities.<sup>80</sup> The

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<sup>77</sup> Britannica, 'Economy of South Africa,' <<https://www.britannica.com/place/South-Africa/Economy>> accessed on 24th November, 2023.

<sup>78</sup> Malan D. Rossouw, 'Corporate Governance in South Africa,' (2002) 37 *Journal of Business Ethics* 289-302.

<sup>79</sup> Saunders R., 'South African Corporations and post-Apartheid Expansion in Africa – creating a new regional space,' (2008) 12(1) *African Sociological Review* 1-19.

<sup>80</sup> *Ibid.*

## The Depoliticization of Governance Practice in State Corporations in Kenya

government, cognizant of the global economic paradigm, sought to create an environment conducive to private sector participation, fostering a more competitive and responsive state-owned enterprise sector.

Market-oriented policies were implemented with the overarching goal of optimizing the performance of state corporations. These policies aimed at streamlining bureaucratic processes, improving governance structures, and fostering a culture of fiscal responsibility within SOEs.<sup>81</sup> Concurrently, measures were taken to enhance transparency and accountability, crucial elements in aligning state corporations with international best practices and investor expectations.

The emphasis on competitiveness was reflected in the strategic positioning of state corporations within the broader economic landscape. Efforts were made to identify and leverage the core strengths of each SOE, fostering specialization and a heightened focus on areas where these entities could excel.<sup>82</sup> This strategic reorientation sought to enhance the overall economic contribution of state corporations, ensuring they played a dynamic and impactful role in South Africa's evolving economic milieu.

In summary, the post-apartheid transition in 1994 marked a watershed moment for South Africa, instigating comprehensive economic reforms, including the restructuring of state corporations. The introduction of market-oriented policies during this period aimed at imbuing state-owned enterprises with greater efficiency, accountability, and competitiveness. This strategic realignment positioned these entities to actively contribute to the economic

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<sup>81</sup> Darlene Miller, 'South African multinational corporations, NEPAD and competing regional claims on Post-Apartheid Southern Africa,' (2004) 8(1) African Sociological Review 176-202.

<sup>82</sup> *Ibid.*

## **The Depoliticization of Governance Practice in State Corporations in Kenya**

development of the nation, aligning them with global economic trends and fostering a more resilient and responsive state-owned enterprise sector.

### **4.2.2 Challenges and Reforms in the 21st Century**

The 21st century presented numerous challenges for South Africa's state corporations. Issues such as corruption, mismanagement, and financial instability prompted comprehensive reforms.<sup>83</sup> The government implemented measures to improve governance, transparency, and address financial sustainability concerns within state-owned enterprises. As of the present, state corporations in South Africa continue to navigate a complex landscape marked by global economic uncertainties and domestic challenges. In summary, the historical overview of state corporations in South Africa underscores their dynamic evolution from the colonial period to the present day. The interplay of political, economic, and social factors has shaped the trajectory of state-owned enterprises, reflecting the broader context of South Africa's historical development. Understanding this evolution is essential for policymakers, scholars, and stakeholders contributing to the ongoing discourse on state-owned enterprises in the nation.

### **4.2.3 Legal Framework for Governance in South Africa**

In South Africa, how companies are run is shaped by a mix of common law, statutory regulations, informal guidelines, and market oversight. Being part of the G20, South Africa collaborates closely with other member countries to bring global best practices into play, especially in financial and market regulations.<sup>84</sup> An interesting note is that South Africa has

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<sup>83</sup> Soma Pillay, 'Corruption – the challenge to good governance: a South African perspective,' (2004) 17(7) *International Journal of Public Sector Management* 586-605.

<sup>84</sup> Ecgi, 'Corporate Governance in South Africa,' <<https://www.ecgi.global/content/corporate-governance-south-africa#:~:text=Corporate%20governance%20in%20South%20Africa%20is%20informed%20by%20common%20law,in%20financial%20and%20market%20regulation.>> accessed on 25th November, 2023.

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been a trailblazer globally in embracing integrated reporting, which has had a significant impact on the way corporate governance is approached in the country.

South Africa adopted a unitary board structure for its company law, modeled after the English system. Although English common law continues to influence the interpretation of company law in South Africa, the Companies Act<sup>85</sup> drew significant inspiration from corporation legislation in Canada, Australia, and New Zealand. This legislative shift reflects a broader move away from reliance on English law, with South Africa embracing a more internationally oriented perspective.

Implemented on May 1, 2011, the Companies Act introduced a statutory statement outlining directors' duties, aligning with common law fiduciary responsibilities and the duty to exercise care, skill, and diligence. Section 76(3)(a) and (b) stress the director's obligation to act in good faith, for a proper purpose, and in the best interests of the company.<sup>86</sup> Section 76(3)(c) further specifies the standard of care, skill, and diligence expected from directors. Despite these statutory duties, common law duties still apply, and directors owe these obligations to the company.<sup>87</sup>

Section 76(4) introduces a statutory business judgment rule, allowing directors or officers to fulfill their duties by demonstrating due diligence in being informed, lacking a personal financial interest, disclosing any such interest appropriately, supporting decisions by the board's committee, and having a rational belief that the decision serves the company's best

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<sup>85</sup> Companies Act 2008, Laws of South Africa.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid* (n82).

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interests. Liability for breaches of these provisions adheres to common law principles for fiduciary duty breaches or torts for breaches of the duty of care, skill, and diligence (Section 77(2)). Directors and officers may also be held liable for losses resulting from breaches of various statutory provisions (Section 77(3)), although concerns about widespread litigation against directors following the introduction of this provision have not materialized significantly in legal practice.

Furthermore, South Africa, among the first countries beyond the UK, introduced a corporate governance code in 1994 through the Institute of Directors of Southern Africa (IoDSA). Led by Mervyn King, a former High Court judge, the committee released the initial Code of Corporate Practices and Conduct, which underwent three subsequent revisions, culminating in the present King IV Report on Corporate Governance for South Africa 2016 (King IV).<sup>88</sup> Applicable to entities with a governing body, King IV extends beyond incorporated company boards to encompass bodies like pension fund trustees and municipal councils. Listed on the Johannesburg Stock Exchange (JSE), entities must report compliance with King IV in their annual reports under JSE Listings Requirements.<sup>89</sup>

While King III comprised 75 principles, King IV streamlined this to sixteen, shifting from an 'apply or explain' to an 'apply and explain' compliance model. King IV assumes that organizations adhering to sound governance have implemented these fundamental principles. The code allows voluntary adoption with significant flexibility in the methods organizations

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<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

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choose to comply with, emphasizing the importance of explaining the specific practices demonstrating adherence to each principle.<sup>90</sup>

### **4.2.4 Challenges in Governance in South Africa and Lessons for Kenya**

Both South Africa and Kenya have faced and continue to grapple with various governance challenges. They both share a colonial past, but their paths to independence and post-colonial governance differ significantly. South Africa's struggle against apartheid and subsequent transition to democracy provides a unique backdrop, while Kenya experienced a different trajectory marked by struggles for independence and post-independence political dynamics.

South Africa has faced several governance challenges. For example, corruption has been a persistent challenge with instances of high-profile corruption scandals impacting political stability and economic development.<sup>91</sup> Secondly, the country has faced periods of political instability, often stemming from internal party dynamics and leadership struggles.<sup>92</sup> An exploration of these instances provides insights into the fragility of political institutions and the importance of stable leadership for effective governance.

Furthermore, it has also faced periods of political instability,<sup>93</sup> often stemming from internal party dynamics and leadership struggles. An exploration of these instances provides insights into the fragility of political institutions and the importance of stable leadership for effective governance. Lastly, persistent socioeconomic disparities in South Africa, particularly along

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<sup>90</sup> KING IV, Report on Corporate Governance for South Africa, 2016.

<sup>91</sup> Chris Tapscott, 'South Africa in the Twenty-First Century: Governance Challenges in the Struggle for Social Equity and Economic Growth,' (2017) 2 Chinese Political Science Review 69-84.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

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racial lines,<sup>94</sup> highlight the complexities of addressing historical injustices. Analyzing the policies implemented to address these disparities and their outcomes can inform Kenya's efforts to promote inclusive development.

South Africa's experiences emphasize the need for Kenya to prioritize institutional strengthening to curb corruption and enhance the effectiveness of governance structures. This involves reinforcing anti-corruption agencies and promoting transparency in public institutions. Secondly, drawing lessons from South Africa's challenges with political instability, Kenya can focus on fostering stable political environments through effective leadership, internal party cohesion, and mechanisms for conflict resolution. Finally, the socioeconomic disparities in South Africa underscore the importance of targeted policies aimed at addressing historical injustices and promoting inclusive development. Kenya can learn from South Africa's successes and failures in this regard to design and implement effective strategies aimed at improving corporate governance.

### **4.3 Governance of State Corporations - The Singapore Experience**

Singapore is revered as one of the best case-studies on a Country's turn around. It is the example to be emulated by many developing countries and Kenya is not an exception. Whereas the success of Singapore can only be studied through a multi-sectoral, multi-component approach in this comparative review the research will examine its State Corporations, the operations and the mechanisms in place to ensure that the institutions are not destroyed by over politicization.

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<sup>94</sup> Zamokuhle Mbandlwa, 'Socioeconomic Impact of Policy-Making in South Africa,' (2023) 11(10) Journal of Law and Sustainable Development 1-15.

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The success of Singapore despite being a small country with few of its own resources is a worthy case study. It is obvious that the turn-round that was initiated in the 1980s - 1990s included a strategy on enhancing corporate governance practices<sup>95</sup>. As a country dependent on foreign direct investment to spur growth a sound corporate governance strategy was non-negotiable to boost investor confidence.

In the OECD paper on the early economic success of Singapore it was observed that its economic landscape was characterized by the dominance of Government linked corporations<sup>96</sup> GLCs. The operational module of Singapore's GLCs has become a case study even for China which has proposed to replicate the model. The methodology has gone against the grain as it has countered the theory that private -owned enterprises are more efficient, with Singapore posting impressive results in its Gross Domestic Product (GDP) and per capita incomes.

This case study nudges the question as why the state-owned enterprises in Kenya have not been successful? The comparative study with Singapore dispenses the perception that an economy that is driven by State-owned entities cannot thrive! It has been observed that the historical background and the Country ethos and value system may contribute significantly to the varied results of their state-owned enterprises. This factor is Governance.

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<sup>95</sup> M YTeen, P H. Phan, Corporate Governance in Singapore: Current Practice and Future Developments, Organization for Economic Co-operation and Development © Seoul, March 3-5, 1999

<sup>96</sup> M YTeen, P H. Phan, Corporate Governance in Singapore: Current Practice and Future Developments, Organization for Economic Co-operation and Development © Seoul, March 3-5, 1999



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It has been noted that the success of the Singaporean GLC has been due to the fact that the competent economic management of enterprises results in political gains and growth. This highlights that politics and its mechanisms can have a positive or negative effect. Unfortunately, in Kenya the political trajectory measure remains in the outdated tribal lines and the electorate has not shifted to a performance-based politburo and the transformation of day-to-day life.

### **4.3.1 Challenges & Lessons from Singapore**

Ensuring effective governance in corporate entities remains a considerable challenge even for countries like Singapore. One challenge faced by Singaporean state corporations is bureaucratic inertia,<sup>97</sup> characterized by rigid organizational structures and slow decision-making processes. The bureaucratic nature of these entities may impede responsiveness to market dynamics. Additionally, innovation within state corporations in Singapore is often stifled by risk aversion and a conservative approach to change.<sup>98</sup> This challenge hampers adaptability to technological advancements and market shifts.

Thirdly, while Singapore has made significant strides in corporate governance, ensuring accountability in state corporations remains an ongoing challenge.<sup>99</sup> Ensuring transparency and accountability in decision-making processes is imperative for fostering public trust. Kenya can learn from Singapore's experience in overcoming bureaucratic inertia by implementing more

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<sup>97</sup> Thomas Sprimont, 'Challenges to Bureaucratic Organizations in the Modern Business World,' (2005) 1(1) *International Journal of Applied Management of Change* 1-13.

<sup>98</sup> Kim-Song Tan & Sock-Yong Phang, 'From Efficiency-driven to Innovation-driven Economic Growth: Perspective from Singapore,' (1st ed., World Bank Publications, 2005) 1.

<sup>99</sup> Curtis J. Milhaupt & Mariana Pargendler, 'Governance Challenges of Listed State-Owned Enterprises Around the World: National Experiences and a Framework for Reform,' (2017) 50 *Cornell Int'l L.J.* 473.

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agile organizational structures. This involves streamlining decision-making processes and fostering a culture of responsiveness to market changes.

To address the challenge of innovation stagnation, Kenya can implement policies that encourage a more dynamic and innovative approach within state corporations. This includes fostering a culture that embraces calculated risk-taking and incentivizing research and development initiatives. Lastly, Kenya can benefit from Singapore's commitment to accountability by enhancing transparency in state corporations. Implementing robust mechanisms for oversight, such as independent audits and public disclosure requirements, can bolster accountability.

### **4.4 Conclusion**

The examination of governance practices in state corporations in South Africa and Singapore has provided valuable insights that can significantly inform the governance landscape in Kenya. The comparative analysis undertaken in this chapter has illuminated distinct governance frameworks, organizational structures, and regulatory mechanisms in the examined jurisdictions, thereby affording an understanding of the contextual factors that shape governance practices.

Drawing from the experiences of South Africa and Singapore, it is evident that successful governance practices in state corporations hinge on a delicate balance between autonomy and oversight. Striking this equilibrium is imperative for cultivating an environment that encourages innovation, fiscal responsibility, and public trust. Kenya, with its distinct socio-

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economic context, stands to benefit from a judicious adaptation of governance best practices, considering the unique challenges and opportunities inherent in its state corporations.

Moreover, the lessons gleaned from the comparative analysis underscore the importance of a robust regulatory framework, coupled with mechanisms to ensure the independence and competence of oversight bodies. The implementation of effective governance practices necessitates a comprehensive understanding of the institutional, cultural, and legal contexts within which state corporations operate. Consequently, any reform initiatives in Kenya should be underpinned by a thorough contextual analysis, ensuring alignment with the country's developmental goals and aspirations.

In light of the foregoing, this chapter serves as a foundational platform for the following chapter of the thesis. The insights garnered from the examination of governance practices in South Africa and Singapore provide a conceptual framework that informs the formulation of recommendations for enhancing governance in state corporations in Kenya. As the thesis progresses, an understanding of the implications of governance structures and practices will be crucial in proposing context-specific strategies for fostering effective governance in Kenyan state corporations

CHAPTER FIVE

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5 SUMMARY OF FINDINGS, RECOMMENDATIONS & CONCLUSION

**5.1 Introduction**

In the final chapter of the study the project paper, section 5.2 will attempt to summarize the findings by providing a synopsis that supports the research hypothesis. It will also provide a summary of the root-cause, effect/impact of the politicization of governance practice in State Corporations and the resultant case for interventions that will support depoliticization. The study will attempt to identify recommendations that can be applied at national level as components of a wider methodology in a bid to begin to address the challenges and negative outcomes of politicization which have been documented in the previous chapters.

**5.2 Summary of Findings**

The research has responded satisfactorily to the hypothesis made at the start of the paper. Firstly, it has demonstrated that in Kenya national politics has a significant influence on the corporate governance of SCs. It has also shown that politicization is systemic and deeply rooted in the fabric of the policies and legal frameworks as well as the generally accepted governance practice.

Since the impact of politics is a significant contributor towards the governance of State Corporations, a conclusion well-founded made on the findings of the study regarding the historical background of development of this sector, the policy and legal framework and the governance institutions relevant to state corporations. The study has established that politics, politicking, and politicians are deeply infused into the architecture of these entities.

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Consequently, a reasonable conclusion is that the performance of these entities may be directly correlated to the prevailing political environment. Thirdly, it is clear that the influence of politics has had a negative impact on the ability of these entities to discharge their core-mandates and to do so effectively with due regard to prudent and efficient utilization of the public resources.

In chapter three (3) the study was able to demonstrate that state corporations or state-owned enterprises remain critical special purpose vehicles through which Governments deliver their strategic plans and development goals in a bid to meet the needs of the people. An examination of the Singaporean experience suggests that state-owned enterprises can be a critical component towards the achievement of a nation's socio-economic growth and development, which lends to the proposition that it may not be prudent to discard them. Instead, what appears to be the preferred approach is to undertake a structured reform agenda in the policy and legal framework of their governance to address the myriad of challenges including the politicization which is the focus of this project paper in a bid to transform them to value-adding sustainable institutions.

The recommendations that the study will suggest will encompass reformulation of the policies of governance of SCs; consolidated reforms of the law; restructuring of the SCs and related institutions. These interventions as particularized in the later parts of this chapter may catalyze a paradigm shift in the governance practice and more specifically contribute towards a systematic reduction in the political interference resulting in improvement in the effectiveness and efficiency of the corporations

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Nevertheless, the research by clearly highly the nexus points between governance of State Corporations and the politics, politicians and political agenda of the day has been useful in identifying and articulating the gaps. The recommendations highlighted herein after will offer proposals that may provide important interventions to achieve an enhanced degree of autonomy for State Corporations, allow them to focus on their core-mandate, enable continuity during Government transitions and focus on the national interest goals.

Indeed, it is clear that a severance between politics and governance may not be achieved in totality, but a level of objectivity, integrity, transparency, accountability and inclusivity can be embedded into critical processes that influence the governance of State Corporations. The core objective being the viability and sustainability of the State Corporations in a bid to maximize value addition to the citizens from the investment of public funding.

### **5.3 Recommendations**

The recommendations proposed are not a panacea for all the challenges in governance of state corporations; an overhaul of the sector will require a comprehensive plan implemented through the Whole of Government Approach (WOGA). They do, however, contribute to the larger strategy as they are geared towards mitigation of the root causes of the political pitfalls that have become characteristic in this sector. The application of the recommendations will require policy and legal reforms.

The recommendations are defined as short-term, which will consist of interventions that can be implemented immediately or within the first two (2) years; medium term which require between three (3) – five (5) years; and the long-term interventions that will require at least

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five (5) years to be realized. However, the recommendations will be discussed sequentially, in the order of the recommendation that will precede or be a precursor to the application of subsequent recommendations and not on the realization period. This is due to the fact that whereas a recommendation may be long-term it may be a core need that provides the foundation for other interventions, for example the requirement for a consolidated policy in this area of study.

### **5.3.1 Formulation of a National Policy on Governance Practice of State Corporations in Kenya**

The study has established that the multiplicity of policies, laws and issuance of government directives from time to time has resulted in a legal quagmire in some instances pitting government MDAs against each other, for example the ongoing PSC and SCAC debacle discussed in chapter two (2). The resultant ambiguity provides a gap that has often been misused to justify politically inclined interference and interest. The study has established that there is therefore an urgent need for the consolidation of the applicable frameworks on governance and to do so the first milestone shall be the formulation of a national policy on governance practice in state corporations.

The value of policy formulation prior to undertaking legal reforms has been demonstrated, it provides a blue-print and defines the roadmap to achieve well-defined policy aspirations. A well formulated policy will assist to streamline the drafting of the proposed legislations and sub-policies so as to respond accurately to the national needs in that sector. Consequently, it may help to eliminate the furtherance of non-nationalistic objectives which may be sneaked in during the legislative process.

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The development of the national policy on governance practice in state corporations will provide an opportunity to build consensus amongst the stakeholders on what the altruistic objectives are. Additionally, it will provide a confluence of the best practices espoused in the current policy, legal and institutional frameworks discussed in chapter two (2), rationalize this, and consolidate to provide singularity in the national practice in this sector. The consummation of the proposed policy through approval by Cabinet and adoption by the National Assembly will provide a national posturing which will be a useful platform to spearhead championing of good governance in state corporations devoid of the political nuisance.

Indeed, this recommendation is aligned to the current practice in the public sector requiring policy formulation encompassing a situational analysis, policy objectives and statements, political, economic, social, technological, environmental, and legal (PESTEL) analysis as a precursor to any legislative review proposals.

### **5.3.2 Alignment of Policies with International Guidelines, Codes and Best Practice**

Governance practice in state corporations in Kenya has been based on antiquated policy and legal frameworks. The issuance of the *Mwongozo* code in 2015 was an attempt to streamline the practice as discussed in chapter two (2). One of the early gains that can be made in streamlining governance is the review of policy documents to embed and adopt international codes and standards.



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Resources developed by organizations such as the OECD such as the Guidelines on Corporate Governance of State-owned Enterprises, 2015<sup>100</sup> provide a useful blueprint on how the Kenyan Government can exercise the state ownership function. The adoption of the methodology in these guidelines in the policy directives, may be done in the short-term and respond to the pitfalls of passive ownership or excessive state intervention. The internationally prescribed standards will guide on the centralization of ownership rights in a single ownership entity, facilitate operational autonomy for state corporations, empower the Board of Directors to maintain independence, transparency and meritocracy in appointments.

The best practices with regard to human resource management to align to the national value of fairness, public participation and transparency espoused in Article (10) of the CoK, 2010 may require short-term intervention. The study has established that political interference may be done through the personnel in the entities. It is suggested that in a bid to ensure equity and due regard to meritocracy, recruitments in this sector and at all cadres ought to be declared of national interest. Consequently, the recruitment process must be seen to comply with the tenets of full disclosure, allowing for public access to information in line with Article 35 of the CoK, 2010. This may be actualized through compulsory advertisement in publications in circulation country-wide, publication of all applicants, shortlisted candidates, public interviews and vetting. This series of interventions will professionalize recruitment and mitigate against political influence in this aspect.

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<sup>100</sup> OECD (2015), OECD Guidelines on Corporate Governance of State-Owned Enterprises, 2015 Edition, OECD Publishing, Paris, <https://doi.org/10.1787/9789264244160-en>.

### 5.3.3 Establishment, Re-organization, and Dissolution of State Corporations

The State Corporations Act was conceptualized in order to streamline and harmonize the management of State Corporations which had been created to allow for Africanization of the businesses and to spur economic growth. Upon an analysis of this Statute, it clear that it is ripe for an overhaul akin to that adopted in review of the Companies Act, 2015<sup>101</sup> to address some of the antiquated provisions.

Since the enactment of Cap 446 of the Laws of Kenya several statutes have been enacted by the National Assembly thereby establishing state corporations outside the scope of the State Corporations Act. This has limited its applicability where inconsistencies arise between the State Corporation specific entity law and the State Corporations Act as they all rank *pari passu*. There must be a reform agenda that returns all State corporations under the Statutory Umbrella of the State Corporation Act to streamline and harmonize their establishment, re-organization and management of these institutions.

Indeed, the discourse has also intimated that the principal law of State Corporations ought to be enriched by embedding the Code of Governance of State Corporations, *Mwongozo* into its fabric. The baseline survey of the efficacy of the *Mwongozo* code in achieving its desired or intended result is evident by the knowledge awareness and its uptake in the conduct of Board business in State Corporations across the country. Despite its usefulness, its ranking in the legal framework below Statute and subsidiary legislation has been used to water down its applicability and usefulness.

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<sup>101</sup> The Companies Act No. 17 of 2015 Revised Edition 2021 (2015)

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The impact of inculcating the *Mwongozo* principles in law will ensure the compliance with key principles such as meritocracy, regular Board evaluations, Governance Audit, training and development and regulated Board practices.

### **5.3.4 Constitution of Boards of Directors in State Corporations**

The pursuit of good governance is premised on the caliber of Boards of Directors that are appointed to steer the State Corporations. The constitution of Boards varies based on the provisions of the enabling law. However, the majority of the Boards are currently established by appointment of the Chairperson by the President; the PS or a representative from the National Treasury; the PS or his alternate representative of the parent Ministry; any other related Ministry and six-seven other independent Board members.

Indeed, the *Mwongozo* Code in Clause 1.1 attempts to outline the preferred Governance practice with regard to the appointment, size and composition of the Board. There has been a general alignment to the prescription with regard to size, recommended to be nine (9) members and composition. However, all considerations as to appointment have been disregarded and placed in the back burner. The appointments of Board members are expected to align with Article (10) on National Values and Principles and Article (27) which confers the right of equality and freedom from discrimination. The concerns raised by the citizenry in the Constitutional review process remain unresolved;

***“... the fact that appointment procedures, even where clearly set out in the law, were often subordinated to demands of patronage. The clear impression being projected was that public service appointments were often based on criteria other than merit, competence or relevant***

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*experience to restore public confidence in the service, demands were justifiably being made for security of tenure, adequate remuneration, and strict neutrality...<sup>102</sup>*

*Mwongozo* requires that appointments ought to be transparent, through a formal process, governed by the overriding principle of merit, taking into consideration relevant skills and competencies necessary to achieve organizational goals. It also requires that at least one member should be a financial expert who is a member of a professional body regulating the Accountancy profession. Indeed, the architects of the *Mwongozo* code were committed to improvement of the quality of Boards in so far as they propositioned minimum requirements including having a relevant degree, proven business management and other relevant professional experience, service in a senior management position in the past six (6) years, to meet the threshold of Chapter six and the fit and proper test. The comparative analysis between the provisions of *Mwongozo* and the actual practice are indeed laughable, a true “tongue in cheek” moment.

The recommendation is in addition to entrenching the *Mwongozo* provisions into the State Corporation’s Act is that the appointment of Board members must firstly be placed within the ambit of a singular entity such as the Public Service Commission. It is not tenable to speak of good governance where appointment of the apex body remains secret, ad-hoc, impromptu and the preserve of a few, it must be institutionalized and undertaken through a formal, transparent and participatory process. To achieve equity, it is necessary that it is centralized as per the *ratio decindi* in the case of *Katiba Institute & another v Attorney General & another; Julius*

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<sup>102</sup> ©Constitution of Kenya Review Commission(CKRC) 2005, The Final Report of the Constitution of Kenya Review Commission, approved for issue at the 9<sup>th</sup> Plenary Meeting of the Constitution of Kenya Review Commission held on 10<sup>th</sup> February 2005.

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*Waweru Karangi & 128 others (Interested Parties) [2021] eKLR* in which the Courts upheld the need for due process.

### **5.3.5 Institutional Reforms and Strengthening**

The discussions in this research paper have highlighted some of the Institutional weakness that have pervaded the governance of State Corporations. Whereas the contribution of SCAC to the observance of the principles of good governance in the public sector is uncontroverted it is imperative that there is a need for reform to its enabling legislation. Indeed, the ongoing impasse arising from the territorial mandate disagreements between the PSC, SCAC and the Office of the Attorney General are indicative that the role of SCAC may be progressively whittled down.

The PSC enjoys Constitutional mandate status which provides it a superior mandate role to SCAC, the advisory Committee must be empowered through Statute to have an overarching advisory and supervisory role with respect to the State Corporations, so that it does not become *functus officio*. Consequently, there is need to also strengthen the composite Institutions created by the State Corporation's Act to wit the Inspectorate of State Corporations and the State Corporations Appeal Tribunal. Indeed, robust institutions will be useful in installing stop-gap measures so as to avoid the catastrophic scenarios many State Corporations end at.

### **5.3.6 Establishment of the Office of The Governance Secretary**

The Mwongozo Code of Governance at Clause 1.20 domesticates the requirement for engagement of a Corporation Secretary. The role of the Corporation Secretary is articulated in Clause 1.21 and includes providing guidance to the Board on their duties and responsibilities

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on matters governance, sensitization on relevant laws affecting the organization, custodial duty of the seal and its account, assisting the Board in undertaking induction, training, evaluations, Governance audits and support with regard to preparation for meetings.

Clause 1.22 recommends that the office of the Corporation Secretary and that of the CEO should be held by different persons, in the Kenyan context this has been one of the most polarizing positions as CEOs of some State Corporations who previously held both titles are reluctant to advocate for alignment with the *Mwongozo* Stipulations. It is proposed that the requirement for each State Corporation to have a Secretary ought to be legislated akin to the requirements for a Public Company under section 243 of the Companies Act<sup>103</sup>. The placement of the institution's governance champion in the text of the law may address instances where attempts may be made to diminish stature of the Corporation Secretary as envisioned in the Code of Governance. Indeed, the advisories by SCAC recommending placing the office of corporation secretary at level two (2) within organizational structures ought to be formalized.

It is against this backdrop that the study proposes the creation of the “*Office of the Governance Secretary*”. In order to ensure the effectiveness of this office, it is recommended that it ought to be a constitutional office, so as to signal the prioritization of good governance in Kenya, alongside key Chapter fifteen Constitutional Commissions and Independent Offices (CCIOs) such as the Office of the Attorney General and the Office of Auditor General. The Governance Secretary shall be the chief advisor of Government with regard to all matters governance and shall superintend over the corporation secretaries serving in the public sector, this intervention shall offer the independence necessary for the corporation secretaries to champion Governance.

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<sup>103</sup> The Companies Act No. 17 of 2015, Revised Edition 2021 (2015), Laws of Kenya.

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The Governance Secretary shall undertake annual governance audits which shall be presented to the relevant committees of the National Assembly, additionally the corporation secretaries shall be accountable to the independent office reporting on a quarterly basis.

### 5.4 Conclusion

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At the tail-end of the project the conclusion of the study was that the governance reform agenda must be comprehensive and responsive to the challenges identified. It must be preceded by a candid national conversation on the root-cause of the maladies during the policy formulation process.

The study also established that there have been significant milestones achieved in embedding the conversation of principles of good governance in public sector boardrooms across the Country. Through the operationalization of the *Mwongozo* code, the clarity provided by distinguishing the roles of the board, chairperson, board members, CEO and cementing of the office of the corporation secretary as the governance champion, robust induction and capacity building programs for board members has elucidated the know-what and know-how to achieve good governance.

Despite the gains the study has demonstrated that although there is lack of consolidation a fair system of checks and balances exists, nevertheless the politics have continued to invade the governance practice space within the state corporations. It is a reasonable conclusion that politicization is deeply entrenched and if not purposefully addressed the infiltration and political nuances will continue to affect the performance of state corporations and to aid the

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grand corruption schemes that result in the immoral misappropriation of public funds that have been invested in these entities.

The recommendations developed pursuant to the finalization of this study will provide useful platforms to expand the national discourse on the suggested policy and legal reforms that will be necessary to commence extraction of the political interference from governance of State Corporations and rationalization the role of politics so that the political input will be vested in institutions and not in the hands of the individuals within the ruling elite. The ultimate objective being transformation of these entities to *bona fide* independent agencies, with an autonomous character and cushioned from significant disruption during the transition of Governments that may arise from the country's general elections. It is projected that this will allow the entities to refocus on effectively and efficiently delivering the tenets of their core mandates in the earlier years and in the long-term, perhaps, to morph to self-sustaining corporations that shall not require funding through the Exchequer and penultimately contribute towards the country's gross domestic product.



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