

**UNIVERSITY OF NAIROBI**

**SCHOOL OF LAW**

**MASTER OF LAWS**

**FAILURE OF GOOD CORPORATE GOVERNANCE IN STATE OWNED  
CORPORATIONS IN KENYA: TOWARDS A MORE EFFECTIVE PARLIAMENTARY  
MONITORING ROLE**

**A THESIS SUBMITTED TO THE SCHOOL OF LAW IN PARTIAL FULFILLMENT  
OF THE REQUIREMENTS FOR THE AWARD DEGREE OF MASTER OF LAWS  
(LLM) OF THE UNIVERSITY OF NAIROBI.**

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## **DEDICATION**

The project work is dedicated to God Almighty for His infinite mercy towards my academics.

Also, to my beloved wife and children, my mother and father, for their love, care, understanding and support, may good Lord continue to bless all of them.

## **ACKNOWLEDGEMENT**

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## **LIST OF ACRONYMS**

CEO	Chief Executive Officer
CIPFA	Chartered Institute of Public Finance and Accountancy
IMF	International Monetary Fund
CGD	Centre for Governance and Development
CPAs	Certified Public Accountants
DFID UK	Department for International Development
DTI	South African Department of Trade and Industry
ECSAFA	Eastern, Central and Southern African Federation of Accountants
EC	European Community
EU	European Union
ICESCR	International Covenant on Economic, Social and Cultural Rights
IP	Intellectual Property
KACC	Kenya Anti Corruption Commission
SACU	South African Customs Union
SOC	State Owned Corporations
UK	United Kingdom
UN	United Nations



UNDHR	Universal Declaration of Human Rights
UNESCO	United Nations, Educational, Scientific and Cultural Organization
US / USA	United States of America
USAID	U.S. Agency for International Development
WTO	World Trade Organization

## **LIST OF STATUTES**

The State Corporations Act 1987, Cap 446 Laws of Kenya

Sessional Paper No. 10 of 1965,

The Constitution of Kenya 2010

The Kenya Constitution 1963

The Public Appointments (Parliamentary Approval) Act. No. 33 of 2011

Kenya Non-Governmental Organizations Co-Ordination Act 1990.

## **ABSTRACT**

This thesis critically examines the effectiveness of the oversight role of Parliament in the management of state corporations in Kenya and how the same can be enhanced in the course of implementing the Constitution of Kenya 2010. This thesis argues that state corporations in Kenya have experienced mismanagement, bureaucracy, wastage, incompetence and irresponsibility by directors and management leading to failure of the state owned corporations to achieve good performance. A case will be made for the establishment of Parliamentary mechanisms to ensure accountability in the management of state corporations. Because of Parliament's power to approve executive expenditure, the budget vote process is among the most direct avenues through which Parliamentary decisions can be enforced. Other avenues are the power to summon members of the executive, and the public to appear before Parliamentary committees to explain their actions during Parliamentary question-time. It is further recommended that when Parliament has received reports from its committees, the House must demand response from the relevant state owned corporations within a reasonable period. This thesis attempts to show that the present practice where reports are presented and debated, but then left to gather dust without being implemented should come to an end. Parliament must closely monitor implementation of its recommendations and question non-implementation of agreed ones. The thesis advocates for a more effective Parliament and not one that will simply go through the motions without mechanisms of enforcement. On a comparative analysis, the South African Parliament model is considered an ideal model and it is recommended that the Kenyan parliament can borrow from the South African Parliament model.

## CHAPTER ONE

### INTRODUCTION AND STATEMENT OF THE PROBLEM

#### 1.0 Introduction and Background:

One of the most widely accepted roles of a Government is to provide services to citizens so as to improve their socio economic welfare. To carry out these functions effectively, the Government establishes institutions such as state corporations which are specialized institutions that carry out special tasks as assigned under the constituting instruments which may be Acts of Parliament or Gazette Notices.<sup>1</sup> For proper management of these corporations, they are placed under a line Ministry which oversees the activities of the corporation. Also, budgets of such corporations are forwarded through the parent Ministry to Parliament. Parliament, as a representative of the people, is expected to have an oversight role in monitoring and ensuring that state corporations operate transparently and carry out their mandate without wasting public resources.

In the global context, state owned corporations are of utmost importance to the economic and social development of states.<sup>2</sup> As the world economy grows, there is increased demand for sustainable businesses, improved transparency, increased performance and prudent risk management, enhanced business governance, and assistance of state owned corporations to promote performance by developing competitive strategic plans and establishment of robust institutions for oversight purposes.

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<sup>1</sup>The State Corporations Act 1987, Cap 446 Laws of Kenya. The Preamble to the Act states that it is an Act of Parliament to make provision for the establishment of State Corporation, for control and regulation of State Corporation and for connected purposes.

<sup>2</sup>Eastern, Central and Southern African Federation of Accountants (ECSAFA), *Reflections on South Africa's Restructuring of State- Owned Corporations*, [library.fes.de/pdf-files/bueros/suedafrika/07164.pdf](http://library.fes.de/pdf-files/bueros/suedafrika/07164.pdf), (accessed 29th September 201).

The Constitution of Kenya 2010 provides a new window of opportunity to reform the management of state corporations. Cabinet ministers who had been playing a major role in the appointment of directors of state corporations shall no longer be members of Parliament. Ministries shall be headed by Cabinet Secretaries who shall be professionals nominated by the President and approved by the national assembly before being appointed by the President.<sup>3</sup> This thesis aims to assess the effectiveness of oversight role of Parliament before the Constitution of Kenya 2010, and the role it shall play in the management of state corporations under the Constitution of Kenya 2010 with a view to assessing the extent to which the new role shall enhance corporate governance in state owned corporations.

State owned corporations were first established in Kenya by the colonial government to provide essential services such as food, transport, water and housing to the white settlers. Indigenous Africans participation in economic activities, such as trade and cash crop farming, was, generally, discouraged.<sup>4</sup> The black Kenyans had been excluded by the colonial government from national development and indigenous (Africans) were virtually excluded from commerce and industry so as to avoid being empowered economically. Thus, Africans were not supposed to purchase shares in companies.<sup>5</sup> State owned corporations were operated with the objective of excluding Africans from the economy and in sectors, such as trade, finance and banking. Following independence in 1963, the independent government devised strategies to achieve three goals that were considered imperative for economic development: a fast overall economic growth rate, equitable distribution of development benefits and Kenyanization of the economy.

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<sup>3</sup>The Constitution of Kenya 2010, s 156.

<sup>4</sup>Centre for Governance and Development, *A Decade of Parastatal Waste, A Study of the Audited Accounts of State Corporations over the Period from 1993 to 2002*, [www.cgd.or.ke/documents/Parastatal%20Waste.pdf](http://www.cgd.or.ke/documents/Parastatal%20Waste.pdf) (accessed on 5<sup>th</sup> September 2012).

<sup>5</sup>David Himbara, *Kenyan Capitalist, the State and Development*, 1994, East African Publishers, p 75.

The means of achieving these goals were clearly defined that, under African Socialism, the power to control resource use resides with the State.<sup>6</sup>

In 1965, two years after independence, Kenya's first strategy paper for development (Sessional Paper No. 10) realizing that markets were inefficient as they could not meet the Kenyan economic needs, proposed that the only way to achieve growth would be through a self-sufficient and state controlled economy. Hence, the creation of state owned corporations was presented as one of the first steps toward economically empowering Kenyans. Tom Mboya, a leading politician and a Cabinet Minister for labour in the year 1965, encouraged the government to intervene directly and create a command economy in which state owned corporations took over complete sectors of the economy and became the biggest employer and investor in the domestic economic sphere.<sup>7</sup> Many corporations are major employers of the populations such as Kenya Railways, Mombasa port or the Pyrethrum Board, and the electricity parastatals.<sup>8</sup> Tourism and agriculture have gained momentum and contributed to better growth rates. While the social situation is worsening, Kenya has experienced economic growth of 1.8% in 2003 and 2.6% in 2004, with real GDP growth for 2014 expected to exceed 3.5% according to figures published by the Kenya National Bureau of Statistics in 2012.<sup>9</sup> The government expects further growth due to tourism, higher revenues in key sectors like tea, horticulture and textiles, investment in infrastructure such as roads and telecommunications, benefits from the East African regional

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<sup>6</sup>Sessional Paper No. 10 of 1965, *African Socialism and its Application to Planning in Kenya*. [www.statehousekenya.go.ke/commentary/commentary081105.htm](http://www.statehousekenya.go.ke/commentary/commentary081105.htm) (accessed on 10th September 2012).

<sup>7</sup>Shah A and Mati M, "Economic Liberalization and the People," *The People Daily*, 26<sup>th</sup> January 2001.

<sup>8</sup>Agriculture accounts for 80% of rural employment, 45% of government revenue and 60% of export earnings.<sup>8</sup> In the last two years, Kenya's economy has demonstrated its potential for development.

<sup>9</sup> Kenya National Bureau of Statistics Economic Survey, 2012.

integration, the African Growth and Opportunity Act (AGOA) and development in neighboring southern Sudan after the Sudan Peace Agreement in January 2005.<sup>10</sup>

There has been creation of several state owned corporations, to handle various sectors of the economy. The Kenya government forms state owned corporations to meet both commercial and social goals. They exist for various reasons including: to correct market failure, to exploit social and political objectives, provide education, health, redistribute income or develop marginal areas. At independence in 1963, state owned corporations were defined by Sessional Paper No. 10 of 1965 as vehicles for the indigenization of the economy. Thus majority of key state owned corporations that exist today were established in the 1960s and 1970s. By 1995 there were 240 state owned corporations. The main economic activities of state owned corporations are manufacturing, agriculture and mining, distribution, finance transport and electricity.<sup>11</sup>

Several state corporations established are governed by a board of directors appointed under the constituting instruments.<sup>12</sup> There are also other bodies and / or institutions and other legislations that are taken into consideration while managing state owned corporations.<sup>13</sup> Under the Constitution of Kenya 2010, Parliament is required to approve the appointment of some board members, chief officers and scrutinize the accounts of state owned corporations.<sup>14</sup> State owned corporations in Kenya, partly from a lack of expertise and endemic corruption, have largely

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<sup>10</sup>UNDP: Human Development Report 2005. Figures for 2003, Annual growth between 1975 and 2003. Available at <http://2006.bertelsmann-transformation-index.de/73.0.html?L=1> (accessed on 26<sup>th</sup> January 2013)

<sup>11</sup>Ibid

<sup>12</sup>Kenya Government, Office of Public Communication of Kenya, can provide a list of all state corporations. There are currently over 160 Corporations. [www.communication.go.ke](http://www.communication.go.ke) (accessed on 4<sup>th</sup> July 2012).

<sup>13</sup>These other institutions and legislation include: Office of President, Constitution of Kenya 2010, State Corporations Advisory Committee, Inspectorate of State Corporations, Ministry of Finance, Public Investment Committee and Parliament.

<sup>14</sup>Constitution of Kenya 2010, Article 95.

inhibited economic development. In 1979, a presidential commission recommended that constituted a serious threat to the economy, and, by 1989, they had still not furthered industrialization or fostered the development of a Black business class.<sup>15</sup>

### **1.1 Problem Statement**

In the past 20 years, major state owned corporations have been inefficiently managed and have underperformed, needing numerous government interventions and bailouts.<sup>16</sup>The height of mismanagement in these state owned corporations include actions such as misuse of funds, writing off loans and acquiring parastatal land irregularly has been very common.<sup>17</sup> It is becoming increasingly difficult to ignore the concern which surrounds the sustainability of these state owned corporations, to remain afloat and ensure effective operations, managed efficiently as to be self-sustaining and viable in their operations.

Despite receiving funding assistance from the state and the commitments made to cost cutting, the level of performance of these state owned corporations demands stricter public scrutiny.<sup>18</sup>There have been complaints touching on misuse of resources allocated to the State corporations.<sup>19</sup> Other issues of concern relate to the appointment of chief executives and board members of these corporations. Some corporations have made losses while some have been

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<sup>15</sup>Himbara, David (1993). "Myths and Realities of Kenyan Capitalism" *Journal of Modern African Studies* 31 (1): 93–107. [books.google.com/books/about/State\\_owned\\_corporations\\_in\\_Kenya.html?id.](http://books.google.com/books/about/State_owned_corporations_in_Kenya.html?id.) (accessed on 4<sup>th</sup> July 2012).

<sup>16</sup>Examples of corporations that were / are poorly managed include Kenya Railways Corporation, Lake Victoria South Water Services Board (LVSWSB), Kenya Tea Zones, Nyayo Bus Corporation Kenya National Assurance Corporation and Kenya Cooperative Creameries.

<sup>17</sup>Musikali Lois, "The Law Affecting Corporate Governance in Kenya: A Need for Review," (2008) *19 International Company and Commercial Law Review*, 213, 217, <http://ssrn.com/abstract=1275308> (accessed on 29<sup>th</sup> September 2012).

<sup>18</sup> David Himbara, "Myths and Realities in Kenyan Capitalism," (1993) 31 *Journal of Modern African Studies* 97.

<sup>19</sup> Kenya Anti-Corruption Commission, *Annual Report and Accounts Financial Year 2005/2006*, pp 45-50.



declared insolvent.<sup>20</sup> In an attempt to change this trend, the government introduced the performance contracting<sup>21</sup> system as a means to ensure the chief officers perform. Consequently, the demonstrable ability and capacity of a state to deliver quality goods and services to the people in a cost effective, efficient and timely manner has been eroded. Parliament in the same vein, is unable to provide expected leadership and oversight, hence people have arguably lost confidence and trust in the state owned corporations. To date, there is agreement that inspite of the enormous role played by corporations;there is evidence that state corporations in Kenya have had a non performing record.<sup>22</sup>

When state owned corporations cannot account properly for usage of public revenue, Parliament has a responsibility to demand greater accountability and transparency from the relevant state owned corporation. This window provides a useful platform for policy dialogue and increasing accessible information to all stakeholders. There is a need for government expenditure of state funds through public entities to be properly monitored through initiatives, such as departmental budget tracking in order for public service delivery to improve and become more transparent. Hence, Government accountability in terms of financial spending and budget disclosure is an important means of protecting the poor and addressing sectorial barriers to investment. The purpose of all these approaches is to ensure the corporations are well managed. However, despite the existence of these mechanisms, waste of enormous resources has been

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<sup>20</sup>Mulei Paul, "Corruption Allegations on the Management of National Water Conservation and Pipeline Corporation (NWCP)," *The Daily Nation*, 26<sup>th</sup> January 2011, p12. Another example is the collapse of Kenya National Assurance Company Limited.

<sup>21</sup>Kiarie M, "The Failure of Corporate Governance in State Owned Corporations and the Need for Restructured Governance in Fully and Partially Privatized Corporations: The Case of Kenya,"(2007) 31 *Fordham International Law Journal*. 34, 42, <http://ir.lawnet.fordham.edu/ilj/vol31/iss1/1> (accessed on 10th September 2012).

<sup>22</sup>Centre for Governance and Development (CGD) *op. cit*, p 6. It highlights the Performance of state owned corporations such National Bank of Kenya and Telkom Kenya.

experienced and as a result many state corporations have performed dismally.<sup>23</sup> It should be pointed out that there is sufficient richness of experience in the state corporations sector in Kenya that it should be possible, through a careful comparative study, to demonstrate the effectiveness or lack thereof, of various types of controls exercised by Parliament to improve governance in the state owned corporations which could contribute significantly to economic transformation.

## **1.2 Justification**

This research is important because state owned corporations are the investments of the government. If well managed, state owned corporations can not only make profits but also improve services to the citizens. Proper management of state corporations shall lead to growth of the economy which growth shall in turn lead to creation of employment. Poor management of corporations shall lead to their collapse.<sup>24</sup>

Kenya promulgated a new constitution in the year 2010 which constitution is a departure from the 1963 and 1969 constitutions. It has proposals on the management of public institutions, state corporations included. There is now an opportunity for state corporations to be managed effectively once the Constitution of Kenya 2010 is implemented fully.

This research shall seek to recommend that Parliament has a big role to play in corporate governance. Privatization alone cannot reform the state owned corporations. Privatizing some of the services may lead to exploitation of the citizens hence the need for government to continue to have a stake in the corporations.

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<sup>23</sup>Centre for Governance and Development, *op. cit*, n 4.

<sup>24</sup>In a liberalized market setting, state owned corporations must reduce their inefficiency. TelKom, the State telecommunications institution that used to be the sole telephone services provider in Kenya as the Kenya Post and Telecommunications (KPTC), faced difficulties with the arrival of cellular phone networks, and had to take into consideration the losses it could face with competition.

### **1.3 Objectives**

This thesis seeks to consider failure of good corporate governance of state owned corporations in Kenya with a view to enhancing the oversight role of Parliament. Specifically the following are the objectives:

1. To discuss the failure of and causes of failure of corporate governance in state owned corporations
2. To assess the role that Parliament played in the oversight of state owned corporations before and after the implementation of the Constitution of Kenya 2010 with a view to assessing the effectiveness or otherwise of Parliament's oversight role in the management of state owned corporations.
3. To make recommendations that could help Parliament play a more effective role in oversight of state owned corporations.

### **1.4 Research Questions**

1. What are the causes of poor corporate governance in the management of state owned corporations
2. How has Parliament carried out its role of oversight and how effective have been the parliamentary oversight in the management of state owned corporations before the promulgation of the Constitution of Kenya 2010?
3. How are the past weaknesses of Parliament as an oversight body likely to change and how can they be enhanced during implementation of the Constitution of Kenya 2010?

## 1.5 Theoretical and Conceptual Framework

The ultimate theories in corporate governance started with the agency theory, extended into stewardship theory and stakeholder theory and evolved to resource dependency theory, political theory, legitimacy theory and social contract theory.<sup>25</sup>

The debate about corporate governance is typically traced way back to the early 1930s and the publication of **Adolf Berle and Gardiner Means**<sup>26</sup> noted that with the separation of ownership and control, and the wide dispersion of ownership, there was effectively no check upon the executive autonomy of corporate managers. In the 1970s these ideas were further refined in what has come to be known as Agency Theory. Agency theory is concerned with resolving problems that can exist in agency relationships; that is, between principals and agents. The theory addresses the problems that arise when the desires or goals of the principal and agent are in conflict, and the principal is unable to verify what the agent is actually doing; and the problems that arise when the principal and agent have different attitudes towards risk. Because of different risk tolerance, the principal and agent may each be inclined to take different actions. Agency theory is a concept that explains why behavior or decisions vary when exhibited by members of a group. Specifically, it describes the relationship between one party, called the principal that delegates work to another, called the agent. It explains their differences in behavior or decisions by noting that the two parties often have different goals and, independent of their respective goals, may have different attitudes toward risk.<sup>27</sup>

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<sup>25</sup>Abdallah, H., & Valentine, B. (2009). Fundamentals and Ethics Theories of Corporate Governance. *Middle Eastern Finance and Economics*, 4, 88-96

<sup>26</sup>Berle and Means' *The Modern Corporation and Private Property* (1932) Amsterdam and London: North Holland publishing company. Chapters 1&2.

<sup>27</sup>Gerald F. Davis, *New Directions in Corporate Governance*, *Annual Review of Sociology* Vol. 31: 143-162 (2005) University of Michigan Business School, Ann Arbor.

The relationship between the participants in a corporation is usually characterized by conflicts of interests.<sup>28</sup> For instance, conflicts may arise while disbursing dividends or financial losses, allocating responsibility for the performance of tasks, and determining the level of care and skill expected from directors. The principal may opt to incur monitoring costs with a view to ensuring that the agent acts in the best interests of the principal.<sup>29</sup> The poor performance of the board of directors of state owned corporations has been attributed to the existence of multiple agents.<sup>30</sup> Unlike a private company, which has a single principal (share-holders) and agent (managers), a parastatal is governed by multiple agents, namely managers and the state or public officials. Voters who elect public officials are considered to be the principals of both the board of directors and the State. Inefficiency of the boards of state owned corporations arises because the agents (public officials) who have the powers to appoint board members and issue managerial directives do not always act in the best interest of state owned corporations, but in the interest of voters who can vote them out.<sup>31</sup>

Under **the standard agency theory** applied to corporate governance, active monitoring of manager-agents by empowered shareholder-principals will reduce agency costs created by management shirking and expropriation of private benefits. Managers are agents not only of shareholders but also to all various stake holders of the corporations including employees, suppliers and creditors. The stakeholders have different interests but the managers act as a common agent for the divergent interests. But while shareholder power may result in reduced managerial expropriation, an analysis of how that power is often exercised in public corporation

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<sup>28</sup>George Stigher, "The Economics of Conflict of Interests," in Kiarie Mwaura, *The Failure of Corporate Governance in State Owned Corporations and the Need For Restructured Governance in Fully and Partially Privatized Corporations: op cit n 6 p 39.*

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

governance reveals that it can also produce significant costs: influential shareholders, may extract private benefits from the corporation, incur and impose lobbying expenses, and pressure corporations to adopt inapt corporate governance structures. These costs strain the simple principal-agent model on which shareholder empowerment is based.<sup>32</sup>

Another relevant **theory is that of public interest**. Public interest theory is an economic theory first developed by **Arthur Cecil Pigou**<sup>33</sup> that holds that regulation is supplied in response to the demand of the public for the correction of inefficient or inequitable market practices. Regulation is assumed initially to benefit society as whole rather than particular vested interests. The regulatory body is considered to represent the interest of the society in which it operates rather than the private interests of the regulators.<sup>34</sup> The public interest view holds that governments regulate state owned corporations to facilitate the efficient functioning of state owned corporations by ameliorating market failures, for the benefit of broader society in essential services, the public interest would be served if the public resources are allocated in a socially efficient manner that is maximizing output and minimizing variance.<sup>35</sup>

This theory of public interest regulation is rooted in perception that government must step in to regulate markets in instances when markets are unable to regulate themselves.<sup>36</sup> Public utilities like the delivery of electricity or water/wastewater services to homes usually require so much money to build the necessary infrastructure (erect utility poles and lay pipelines) that no company would take on the task without confidence that it would control a sizeable portion of

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<sup>32</sup>Ibid

<sup>33</sup>Pigou, A. C. (1932) *The Economics of Welfare*. London: Macmillan and Co.p6.

<sup>34</sup>Richard A. Posner, *Theories of Economic Regulation*, *The Bell Journal of Economics and Management Science*, Vol. 5, No. 2 (Autumn, 1974), pp. 335-358

<sup>35</sup>Misham, E. J. (1969) *Welfare Economics: An assessment* (Amsterdam and London: North Holland publishing company).

<sup>36</sup>Stigler George J. "Theory of Economic Regulation," (1971) 2 *Bell Journal of Economics and Management Science* 3, 21. [www.laits.utexas.edu/txp\\_media/html/bur/features/.../slide2.html](http://www.laits.utexas.edu/txp_media/html/bur/features/.../slide2.html)(accessed on 21<sup>st</sup> September 2013).

the market. The problem is that the monopoly businesses that arise from this situation tend to use their market power in ways that can be highly detrimental to the community at large. This is where governmental regulation becomes important and the government may take up provision of these services by creation of parastatal. These sorts of market failures, along with the general need for mechanisms of regular public disclosure by business, make regulation critical if the public interest is to be protected. Thus regulation results from the need to protect the public from the negative impacts of such market failures and other harmful business behavior.<sup>37</sup>

**Resource dependency theory**<sup>38</sup> underscores the importance of board as a resource and envisages a role beyond their traditional control responsibility considered from the agency theory perspective, **legitimacy theory is based**<sup>39</sup> upon the notion that there is a social contract between the society and an organization and political theory brings the approach of developing voting support from shareholders, rather by purchasing voting power.

Among various theories discussed, the agency theory perspective was the most popular and has received a great deal and numerous attentions from academics<sup>40</sup> as well as practitioners. It provided the basis for governance standards, codes and principles developed by many institutions. Boards are appointed by the shareholders to monitor and control managerial decision making to protect the shareholders' interest. In particular, this monitoring role was expected to

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<sup>37</sup>James O., *Public Interest Theory of the Regulation of Business in Conventional Welfare Economics*, people.exeter.ac.uk/ojames/jamesregulationinsidegovtpublicadmin.pdf (accessed on 21<sup>st</sup> September 2013).

<sup>38</sup>Ibid

<sup>39</sup>Ibid

<sup>40</sup>Jensen, M. C., & Meckling, W. H. (1976). Theory of the Firm: Managerial Behaviour, Agency Costs, and Ownership Structure. *Journal of Financial Economics*, 3(4), 305 - 350

be effectively performed through independent non-executive directors and that the positions of Chairman and Chief Executive Officer should be held by different persons.<sup>41</sup>

However, other alternative theories **of stewardship theory** and **resource dependency theory** scholars have seemingly opposing perspectives that both can be correct, but under different environmental conditions, by using a contingency approach.<sup>42</sup> Each board has board capital and it affects both board monitoring (agency perspective) and the provision of resources (resources dependency perspective) and that board incentives moderate these relationships.

Review of different perspectives clarifies that there is need to take an integrated approach rather than a single perspective to understand the effect of good corporate governance. To gain a greater understanding of board process and dynamics, as discussed in this section, there is a need to integrate different theories rather than consider any single theory. It is proposed that a mixture of various theories is best to describe an effective and efficient good governance practice rather than hypothesizing corporate governance based on a sole theory.

This thesis shall consider two theories namely agency theory and public interest theory as the rationale for parliament carrying out its monitoring role in the management of state owned corporations effectively. This thesis argues that agency theory and public interest theory for public corporations are the ideal ones and justify the fact that parliament as a watch dog of public interest should have a say in governance of state corporations.

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<sup>41</sup>Cadbury Code. (1992). *Report of the Committee on Financial Aspect of Corporate Governance* (pp. 15). London: Gee Publishing.

<sup>42</sup>Hillman, A. J., & Dalziel, T. (2003). Boards of Directors and Firm Performance: Integrating Agency and Resource Dependency Perspectives. *Academy of Management Review*, 28 (3), 383–396



On the **conceptual framework**, “corporate governance is the system by which companies are directed and controlled,”<sup>43</sup>“corporate governance refers to that blend of law, regulation and appropriate voluntary private sector practices which enables the corporation to attract financial and human capital, perform efficiently and thereby perpetuate itself by generating long term economic value for its shareholders, while respecting the interests of stakeholders and society as a whole.”<sup>44</sup>Corporate governance is a wide subject and like any other field, definition and effective practices of good corporate governance is largely affected by the size of the economy, differences in the legal, regulatory, institutional, financial and political framework, status of the capital market, and stakeholder’s perception.

“Corporate governance” is also defined as the system by which business corporations are directed and controlled. The corporate governance structure specifies the distribution of rights and responsibilities among different participants in the corporation, such as the board, managers, shareholders and other stakeholders, and spells out the rules and procedures for making decisions on corporate affairs. By doing this, it also provides the structure through which the company objectives are set and the means of attaining those objectives and monitoring performance”,<sup>45</sup>

The elements of good corporate governance include: a balanced board with proper educations, skills and competency, experiences, independent judgment and effective oversight, strong commitment from the board and the senior management, effective control environment and process, high level of transparency and disclosure of financial and non-financial information,

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<sup>43</sup>Sir Adrian Cadbury Report of the Committee on the Financial Aspects of Corporate Governance (London: Gee and Co. Ltd., 1992), p. 14.

<sup>44</sup>Ira M. Millstein, 2003 (Adapted from Developing Corporate Governance Codes of Best Practices, Volume I, Global Corporate Governance Toolkit 2)

<sup>45</sup>Organisation for Economic Co-operation and Development, [www.oecd.org](http://www.oecd.org), 2004

well defined shareholders rights including the mechanism for the protection of shareholders rights, effective monitoring of the client's corporate governance practices and long term commitment to good corporate governance practice.<sup>46</sup>

This thesis outlines a conceptual framework of the relationship between parliamentary oversight and good corporate governance. The framework assumes that good corporate governance is simultaneously determined by a good parliamentary oversight system. Whilst the boards of corporations play a crucial role in enhancing corporate governance standards, the effectiveness and credibility of such effort might be constrained by poor parliamentary oversight. The framework is primarily based on the agency and public interest theories to corporate governance,<sup>47</sup> although it recognizes part of the assumptions of the stakeholder theory and the political economy aspects of corporate governance.

## **1.6 Limitations/ Scope of the Study**

This research shall not discuss the financial limitations of the state corporations. Other challenges that face corporations such as staffing levels, adverse weather conditions in case of agricultural corporations shall not be considered. All state corporations are assumed to have enough resources and capacity.

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<sup>46</sup> Ibid

<sup>47</sup> Claessens, S. (2003) Corporate Governance and Development: Review of the Literatures and Outstanding Research Issues. *Proceedings of the Global Corporate Governance Forum Donors Meeting*, March 13, The Hague, The Netherlands.

## **1.7 Literature Review**

A considerable amount of literature has been published on corporate governance. Studies undertaken internationally indicate that adopting good corporate governance practices in public corporations usually results in measurable economic benefits. Various scholars have written on the subject of corporate governance and state owned corporations. This literature review is limited to what various scholars have said as per the themes of this thesis, namely: what are the causes of poor corporate governance in state owned corporations, how can parliament improve its oversight role in the governance of state owned corporations and how can constitutions improve governance in state owned corporations. The literature is considered herein below:

### **1.7.1 Causes of Poor Corporate Governance in State owned corporations**

The Centre for Governance and Development, in their book,<sup>48</sup> identify several root causes of the decline in the performance of state owned corporations: poor corporate governance structures, weak legal systems, excessive executive control and contempt of parliamentary recommendations. It is an analysis on how laws governing state owned corporations have provided loopholes for mismanagement and wastage of public resources. This report creates awareness on the level of waste of public resources and advocates for legal reform.

**Vagliasindi M**, in her article,<sup>49</sup> examines the issue of ownership and control of state owned corporations. She observes that multiple objectives of the owners of state owned corporations are the main causes of failure of the state owned corporations. Multiple objectives arise either because they are mandated by legislation or because a number of ministries are in a position to exert influence on state owned corporations. She gives an example of a situation where shares

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<sup>48</sup> Centre for Governance and Development, *op. cit.* n.4.

<sup>49</sup>Vagliasindi M, "Governance Arrangements for State owned Corporations," *Policy Research Working Paper 4542*, Sustainable Development Network, The World Bank, p 4.

are held jointly by the ministry of finance and line ministry, the treasury may be concerned principally with the impact of the state owned corporations on the government's budget, while the line ministry may focus on increasing the quality of service with less regard to costs.<sup>50</sup>

**Aitan Szlapak** in his dissertation<sup>51</sup> explores the magnitude and impact of mismanagement of state corporations on Kenya's development as well as the effectiveness of strategies for reducing it significantly. It supports the view and the effectiveness of the approach of the international donor community, headed by the World Bank, to combat corruption by reducing the scope of the State and thereby the "space" available for administrative corruption. His emphasis is on reform of the government and public sector in general and generally reduction of the role of government in management of state owned corporations.

**Kiarie Mwaura** in his article<sup>52</sup> has pointed out that the initiatives adopted in order to make state owned corporations more effective are inadequate and will not realize the intended objectives unless the chief executives of state owned corporations are hired on a competitive basis, given more autonomy and the government is committed not only to designing performance contracts that set realistic standards, but also enforcing them strictly. The article argues that there is need to streamline the multiple regulations that govern state owned corporations and reform the corporate regulatory frame work of private sector in order to raise standards of corporate governance and as a result ensure that the privatized services are managed prudently. **Wei, Yuwa**

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<sup>50</sup>Vagliasindi M, *ibid* p.22.

<sup>51</sup>Aitan Szlapak, "Will Corruption Ever Stop Developing in Kenya?" ( MSc thesis, University of Bristol 2002). [www.123people.co.uk/s/aitan+szlapak](http://www.123people.co.uk/s/aitan+szlapak) (accessed on 10<sup>th</sup> September 2012.)

<sup>52</sup>Kiarie M, "The Failure of Corporate Governance in State Owned Corporations and the Need for Restructured Governance in Fully and Partially Privatized Corporations: The Case of Kenya" (n16).

in his article<sup>53</sup> argues that a corporation must have internal organs to form and express its will, to organize business and to supervise the implementation of its will. He calls this kind of internal management corporate governance which is a new and challenging area to the Chinese. This is because the concept and structure of the modern corporation are so different from those of classical corporations or state owned corporations in a planned economy. The structural differences between various economic organizations are determined by distinct property rights. It mainly addresses internal issues on corporate governance.

**Andrew Moirore Rori**, in his thesis,<sup>54</sup> argues that efforts to improve corporate governance in the public and private sectors are gaining growing support from both outside and inside Kenya. The thesis was to identify the corporate governance challenges facing state owned corporations and how they are meeting them through various policy options, existing or new. The study considered the National Social Security Fund of Kenya. The study's specific objectives were to establish if state owned corporations in Kenya are subject to a binding legal system, identify the main corporate governance challenges facing state owned corporations in Kenya and also to find out structural reforms being made by state owned corporations in Kenya to effectively abide by the principles of corporate governance. The study concluded that effective corporate governance in state owned corporations is affected and depends on whether the state owned corporation has clearly defined roles for directors and management, board members who are appointed based on considerations of merit and the necessary skills, qualifications and experience for the position. The study recommends that there should be separation of management functions from ownership

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<sup>53</sup>Wei Yuwa, "A Chinese Perspective on Corporate Governance," (1998) 10 *Bond Law Review*: 10, 19. Available at: <http://epublications.bond.edu.au/blr/vol10/iss2/10>. (accessed on 10th September 2012).

<sup>54</sup>Andrew Moirore Rori, "An Analysis of the challenges affecting corporate governance in State Owned Corporations (SOEs) in Kenya"(2011) KDI School: Master of Public Policy, available at [library.kdischool.ac.kr/search/detail/CATSAT000013314177](http://library.kdischool.ac.kr/search/detail/CATSAT000013314177)(accessed on 10<sup>th</sup> September 2012).

interests, clear guidelines when procuring goods and services, proper succession plans, promotion of transparency, internal controls and the management of state owned corporations should strive to always act responsibly.

**Garratt**<sup>55</sup> has written that failure in corporate governance occurs because the roles, tasks and accountability of the board of directors are not clearly understood by politicians, business executives themselves or the public. Garratt argues that until the boards of directors are professionalized and supremacy of the board is reasserted, there will not be restoration of full confidence in the business, public leaders or the markets.

The Report on a Governance Policy Framework for state owned corporations in Namibia<sup>56</sup> identifies multiple and conflicting interests as the causes of poor corporate governance. Governments require that state owned corporations operate in a commercially efficient and profitable manner. At the same time, they are required to provide goods and services at prices below cost, serve as generators of employment, receive inputs from state sanctioned suppliers and choose plant locations based on political rather than commercial criteria. The report notes further that the combination of social with commercial objectives, inevitably leads to political interference in operational decisions to the detriment of economic efficiency.

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<sup>55</sup>Garratt K, *Corporate Governance and Compliance Law*  
[www.bryancave.com/awards/AwardDetail.aspx?award=3162](http://www.bryancave.com/awards/AwardDetail.aspx?award=3162) (accessed on 10<sup>th</sup> September 2012).

<sup>56</sup>Kavena Shaleyfu, *Report on a Governance Policy Framework for State owned corporations in Namibia*,  
[www.osisa.org/sites/default/files/Namibia\\_yale\\_final.pdf](http://www.osisa.org/sites/default/files/Namibia_yale_final.pdf), (accessed on 21st September 2012).

### **1.7.2 How Parliament can improve its Oversight Role in the Governance of State owned corporations.**

Members of Parliament are the lawmakers and it is their duty to have oversight of the Executive function. Finance is provided to the executive only after the Parliament passes relevant Bills. Various Parliamentary tools and forum provide scope for Members to check the activities of the Executive and ensure these are as permitted by law. During question hour, different kind of motions, detailed examinations in the committees provide ample scope for Member to verify the works done by the Executive and interrogate the reports tabled before Parliament.

Various authors, such as **McDonough, Darryl D.**, in his article<sup>57</sup> attempts to review the legal structure, constitution and regulation, both internal and external, of government owned corporations in Queensland and to identify the principles of corporate governance applicable to such organizations. He advances the case for corporatization whereby conditions under which governments owned corporations operate are as far as possible on a commercial basis while allowing the government as the owner to provide broad policy directions. That there should be promotion in each government department of the clear objectives means to measure performance results, well defined responsibilities for use of resources and training and access to expert advice to enable proper exercise of responsibilities. Parliament can act by putting the relevant legislation in place. This is a broad approach on how to improve corporate governance in government owned state owned corporations in Queensland.

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<sup>57</sup>McDonough Darryl D, *Corporate Governance and Government Owned Corporations in Queensland*, (1998) 10 *Bond Law Review*: 1, 12. <http://epublications.bond.edu.au/blr/vol10/iss2/7>. (accessed on 21st September 2013).

The **UNDP**, in its Final Report on Evaluation of the Three Year Rolling Multi Donor, Parliamentary Support Programme for Zimbabwe<sup>58</sup> explains that while it may appear to be an obvious point, it is worth stressing that in the field of democratic governance, institutions matter. They matter because they invariably shape political outcomes, which are at the heart of democratic governance assistance. The paper posits that Parliament plays a significant role in shaping political outcomes in many ways. First, legislatures make laws and, as such, shape political outcomes. Secondly, legislators play an important oversight role in monitoring their government's policies and development programs and in holding the government to account by monitoring implementation of the budget. In so doing, legislators can play a significant role in working with the executive branch to set policy priorities. Thirdly, legislatures are an important center for public information and debate. As elected representatives of the people, legislators play a pivotal role in ensuring that the voices of the people are heard in the major policy debates, and in helping forge consensus on issues where there are differing views. Thus Parliament can monitor performance of state owned corporations while approving their budgets but in many instances it has let the public down as it lacks the capacity to scrutinize the budget. This thesis shall build and examine these recommendations further.

A study by **Botha**<sup>59</sup> states that government ministries and independent regulators, including Parliament, that are responsible for actively monitoring state owned corporations do not fulfill their roles as overseers. Many of the independent regulators, parliament included, are generally weak and subject to external influence such as by politicians. On the other hand, community

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<sup>58</sup>UNDP, *Final Report on Evaluation of the Three Year Rolling Multi Donor, Parliamentary Support Programme for Zimbabwe, January 2005 – December 2007*, unpublished report available at [aterc.undp.org/evaluationadmin/downloaddocument.html?docid=2168](http://aterc.undp.org/evaluationadmin/downloaddocument.html?docid=2168) (accessed on 21st September 2012).

<sup>59</sup>Botha D, "A Study on the Effectiveness of Legal Corporate Governance Mechanisms that Exist in Zimbabwe to Ensure Corporation Sustainability," (2001). [www.governance.usb.ac.za/.../No.6\\_Zimbabwe\\_case%20study%20](http://www.governance.usb.ac.za/.../No.6_Zimbabwe_case%20study%20) (accessed on 21st September 2013).



watchdog organizations are not well developed in Africa, resulting in relaxed state owned corporations operations without public pressure.

**Frederick Stapenhurst** and **Rasheed Draman**<sup>60</sup> writing on reforms in African Parliament explain that what comes out clearly from the Public Accounts Committee (PAC) of Parliament reports is that public officials have not been held to account for their actions. In fact, it is business as usual in state owned corporations, judging by the recurrence of the same issues in the various Auditor General's reports. Internal controls in state corporations and state owned corporations are very weak or non-existent. The primary reason cited for poor financial management in state owned corporations is the continued breakdown of the public finance management system. Parliament through the Public Accounts Committee must recommend strong measures to bring sanity in the public sector. Heads should roll in those state owned corporations singled out by the Auditor General for mismanaging public resources. The PAC must fully acquaint itself with provisions of the Public Finance Management Act and demand that the necessary penalties be invoked for non-compliance.<sup>61</sup>

### **1.7.3 How Constitutions Can Improve Governance in State owned corporations**

There is little literature on how constitutions can improve governance in state owned corporations especially in the African continent and Kenya in particular. **Austin Ouko** in his article<sup>62</sup> explores the likely causes why state owned corporations perform poorly. In his view, many problems facing state owned corporations can be resolved by having more effective boards and quality management. It recommends that the government should only fund state owned corporations it can pay for or those that can pay for themselves.

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<sup>60</sup>Frederick Stapenhurst & Rasheed Draman, *African Parliamentary Reform*, books.google.com/books?isbn=0415677238, (accessed on 29<sup>th</sup> September 2013).

<sup>61</sup>Frederick Stapenhurst & Rasheed Draman, *Ibid*.

<sup>62</sup>Austin Ouko, *op cit*, n. 20 at p.47.

**Ronald Gilson**<sup>63</sup> discusses issues of transparency and corporate governance. The paper emphasizes equity, fairness and transparency as virtues that can lead to economic development. The paper emphasizes internal control mechanisms. It has been argued that the state should privatize the corporations that it has stakes in so as to ensure efficiency.<sup>64</sup>

**Babra Grosh** in his book,<sup>65</sup> emphasizes the importance of public corporations in Africa. Unlike other literature that advances the theory that state owned corporations are inefficient because they are owned by the government and that their problems can be solved by early privatization, the book emphasizes the importance of public corporations especially their contribution to Gross Domestic Product. A strong legal regime of regulation backed by the constitution is recommended. While not entirely mistaken, the popularization by the Bretton Woods institutions of the notion that state-owned corporations were partly responsible for the mounting African fiscal deficit and internal price distortions comes in handy to those with preconceived biases. In a financial analysis of 32 Kenya public corporations, covering agriculture, finance, energy and infrastructure, and accounting for 90 percent of all government-funded corporations in Kenya, **Barbara Grosh**<sup>66</sup> revealed the wide variation in their performance between 1963 and 1988. **Grosh** found that half the companies passed the test of 'efficiency and profitability' while the remaining half of the firms, problems of undercapitalization accounted for more losses than did the much-touted African corruption and mismanagement. Grosh's work on a broad perspective proposes a strong regulatory regime.

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<sup>63</sup>Ronald J Gilson, "Globalsing Global Governance, Convergence of Form or Function", (2011) *The American Journal of Comparative Law*; <http://www.comparativelaw.org>, (accessed on 20<sup>th</sup> February 2013).

<sup>64</sup>Bayliss K, "When Does Privatization Work -A Comparative Review of Privatisation Strategies in Four Former Socialist Countries," [www.icaew.com/en/technical/corporate-governance](http://www.icaew.com/en/technical/corporate-governance) as at 20<sup>th</sup> February 2010.

<sup>65</sup>Barbara Grosh, *Public Corporations in Kenya: what works, what doesn't and why*, (1991), Boulder Co and London Lynne Rienner, p 43.

<sup>66</sup>Barbara Grosh, "Performance of Agricultural Public Corporations: lessons from the first two decades of independence," (1987) 3 *Eastern African Economic Review*, (new series), 40, 43.

**Ferrel, Fraedrich and Ferrel**<sup>67</sup> in their book discuss the idea of shareholder model of corporate governance which they claim is founded in classic economic precepts including the goal of maximizing wealth for investors and owners. The ultimate goal therefore is to act in the best interests of shareholders. This theory of maximizing wealth for investors and owners can be applicable to public corporations once the public interest is elevated to the national constitution.

**Adamolekun, L** in his book<sup>68</sup> it has been posited that the capacity to support the implementation of good corporate governance in many African countries is usually undermined by the existence of weak monitoring organizations. These monitoring bodies may fail to ensure certain principles of good corporate governance such as transparency and accountability are implemented or enforced. Recommended was that monitoring bodies of public corporations be set up, and we propose elevated to constitutional bodies, with enough regulatory power to ensure that the monitoring system is effective.

In the book **African Public Administration**<sup>69</sup> the following issues are proposed as major challenges confronting public administration in Africa, the crisis of institutions continued domination of the colonial logic in public administration, poor regulation, persistent and endemic corruption; the articulation of structural adjustment programmes with privatization and civil service reform. In the above book some of the solutions to the grand problem, including the above items, suggested by the various contributors entail the following: creation of a "Public", legitimizing the state and transforming it alongside African politics, the move away from a conservationist orientation on the part of African institutions, toward renovation and change in

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<sup>67</sup>Ferrell O Fraedrich J & Ferrel L, *Business Ethical decision making and cases*, 7<sup>th</sup> Edition Houghton Mifflin Company Boston New York, 2008, p 43.

<sup>68</sup>Charles et al, *The Review of Corporate Governance in Africa: Literature, Issues and Challenges*, [www.emeraldinsight.com/journals.htm?articleid=1523838](http://www.emeraldinsight.com/journals.htm?articleid=1523838) (accessed on 10<sup>th</sup> September 2012).

<sup>69</sup> Mukandala R, *African Public Administration: A Reader*, (2000) AAPS Books, Harare. p 22.

the "logic" that drives African bureaucracies. He calls for the subordination of bureaucracy to society's cultural and political institutions, to become an instrument of governance, not a governing instrument. In the Preface to the second sequel to his book *Public Administration: A Nigerian and Comparative Perspective*,<sup>70</sup> he has focused on the main issues in public administration as reflected in the contemporary literature on the subject.

The author considers corporation management, decentralization, public financial management, human resource management, and accountability, governance, new public management, information technology, and partnerships, involving the public, private and voluntary sectors. The author does not address the issue of how all the issues articulate to provide for either efficient and effective management or governance, or the lack of these, is not adequately addressed. It appears that there is a need for the problematique of public administration, governance, public sector reform and public management to be posed in a comprehensive macro manner within which the micro technical issues pertaining to the various issues identified as traditional preoccupations are located and discussed. It is clear that for Africa there are deeper problems at stake than can be dealt with solely by tinkling with each issue separately.

While we acknowledge the preceding scholars for the analysis they have done, one criticism of much of the literature is that the oversight role of Parliament has not been fully addressed. This thesis shall seek to expound on the bigger role that Parliament ought to play in management of state owned corporations. The present thesis shall go further to examine the role of Parliament in state owned corporations generally, deal mainly with the oversight role of parliament and recommend how it can be enhanced. Thus there is left a chance for further investigation on the

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<sup>70</sup>Adamolekun L, *Public Administration in Africa: Main Issues and Selected Country Studies*, (1999) Westview Press, Oxford, p 3.

question whether Parliament has a role to play in governance of state owned corporations. Is Parliament really in control of strategic decision making in the governance of state corporations? This is one issue that stands out for further investigation by this thesis in the Kenyan context.

## **1.8 Hypothesis**

This study assumes that all corporations have an impact on the welfare of citizens hence development of the country. The corporations mainly offer services that are considered key as their actions impact on population and affect lives of many people.

Apart from Parliament, there are other institutions that impact on governance of state corporations. These other institutions are not the concern of this research. This research has picked on Parliament as it is assumed to be the custodian of public interests in these corporations.

Parliament has failed in its oversight role in the management of state corporations. The reasons for such failure are varied. Parliament needs to be more pro-active in its oversight role in the management of state owned corporations. The committees of Parliament need to be strengthened and their reports be acted upon.<sup>71</sup> As the protector of public interest in these corporations, Parliament must rise to debate accounts and reports obtained from these corporations in good time before the corporations become insolvent. It can also initiate amendments to the constituting instruments so as to cure any management loopholes in the instruments.

## **1.9 Methodology**

This research was library based and considered reports mainly from Parliament, Kenya Anti-Corruption Commission and from the Inspectorate of state Corporations. Reports on performance

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<sup>71</sup> Such Committees include Public Accounts Committee & Public Investments Committee of Parliament.

of state corporations were considered. This information was readily available in the libraries such as Law School Library at Parklands, Parliament Library and the Kenya National Bureau of Statistics Library at Herufi House. Internet searches especially on how Parliament has played its role in other jurisdictions were considered for comparative purposes.

### **1.10 Chapter Breakdown**

Chapter one is mainly the introduction which has the proposal. It traces the growth and development of the State's role in the state owned corporations.

Chapter two discusses the causes of poor corporate governance in state corporations, considers how state corporations are managed, procedure for appointment of Board of directors, preparation of Annual Reports and Annual Accounts and reports generated by auditors. The main problems and challenges facing the state corporations are discussed.

Chapter three shall examine the role of Parliament in the governance of state corporations before implementation of the Constitution of Kenya 2010. The role of Parliament during implementation of the Constitution of Kenya 2010 as relates to oversight of state corporations is considered.

Chapter four shall discuss the South African Parliament as a model in Corporate Governance with options and new thinking on what the Kenyan Parliament can borrow from the South African Parliament.

Chapter five of this thesis is the summary, conclusion and recommendations.

## CHAPTER TWO

### CORPORATE GOVERNANCE IN STATE OWNED CORPORATIONS: THE KENYAN EXPERIENCE

#### 2.0 Introduction

This chapter discusses the failure of corporate governance and challenges facing the management of state owned corporations. It is divided into four parts: the first part defines a state owned corporation in historical perspective and distinguishes it from other bodies. The second part discusses the pillars of good corporate governance and the hallmarks of an effective Board of Directors that is critical for good corporate governance in any state owned corporations. The third part identifies the challenges facing state owned corporations with explanations on how the challenges affect the performance of state corporations. The fourth part is a summary of the findings of this chapter.

#### 2.1 Definition of state owned corporations

For a proper understanding of a state owned corporation, one must consider the historical context of the evolution of a corporation which has impacted on its definition. According to *The New Palgrave: A Dictionary of Economics*<sup>72</sup>

“The concept ‘corporation’ has two distinct usages that cannot be subsumed under a single definition. The original meaning dating back to medieval England, was a group that received a franchise (a special privilege or immunity) evidenced by a royal charter conveying a grant to them and their successors in perpetuity. The modern meaning dating from the 17<sup>th</sup> century is a legal and contractual mechanism for owning a business, using capital from investors that will be managed on their behalf by directors and officers.”

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<sup>72</sup> Robert Hensen, *State Owned Corporations in the New Palgrave: A Dictionary of Economics*, (1987), Peter Newman press, p. 675.

The medieval state owned corporations were largely churches and charities.<sup>73</sup> They faced a problem of succession because every time the trustees died they had to obtain a new conveyance from the state which problem was made critical by the fact that the land would escheat to the state if not vested in any owner.<sup>74</sup> They therefore petitioned the Crown and obtained respective royal charter mostly conferring perpetuity to the office.<sup>75</sup> This marked the origin of ‘corporation sole’ and ‘corporation aggregate’.

The modern concept of a state owned corporations or government business corporation is a legal entity created by a Government to undertake commercial activities or offer services on behalf of an owner, Government, and is usually considered to be an element or part of the state. Their legal status varies from being a part of government into stock companies with a state as a regular stockholder. For purposes of this essay, we shall adopt the definition of a state owned corporation as provided for under the State Corporations Act<sup>76</sup>.

The said Act defines state owned corporations as provided below:

A “state owned corporations” means a state owned corporations established under section 3; a body corporate established before or after the commencement of this Act by or under an Act of Parliament or other written law but not -

- (i) the Permanent Secretary to Treasury incorporated under the Permanent Secretary to Treasury (Incorporation) Act
- (ii) a local authority established under the Local Government Act

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<sup>73</sup> Ibid.

<sup>74</sup> Robert Hensen, *ibid* p 687.

<sup>75</sup> The church office was known as a ‘corporation sole,’ the others were ‘corporation aggregate’. None of them created any patterns or established any precedents relevant to voluntary business activity or to investment for profit. See *op cit* n 40.

<sup>76</sup> The State Corporations Act 1987, Chapter 466, Laws of Kenya.



(iii) a co-operative society established under the Cooperative Society Act

(iv) a building society established in accordance with the Building Societies Act

(v) a company incorporated under the Companies Act which is not wholly owned or controlled by the Government or by a state owned corporations;

(vi) the Central Bank of Kenya established under the Central Bank of Kenya Act

(vii) any other body corporate established by or under any written law declared by the President by notice in the Gazette not to be for the purposes of this Act;

(c) a bank or a financial institution licensed under the Banking Act or other company incorporated under the Companies Act the whole or the controlling majority of the shares or stock of which is owned by the Government or by another State Owned Corporations;

Section 3 of the said Act provides that the President may, by order, establish a State Owned Corporations as a body corporate to perform the functions specified in the order.”<sup>77</sup>

From the foregoing, it is clear that a state owned corporations is any body corporate created by a state and the government has a majority ownership or control of the same. It need not be profit making but may be created for purposes of offering service to the citizens.

## **2.2 Other Regulatory Framework Enacted by Parliament on State Owned Corporations**

From a regulatory framework, most state owned corporations are governed by the Companies Act 1948 chapter 486 (Companies Act) laws of Kenya. Kenya adopted the Act almost entirely

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<sup>77</sup> The State Corporations Act 1987, s 3.

from the England's Companies Act of 1948 after the attainment of independence in 1963<sup>78</sup>. The Act has only been subjected to minor amendments and is ripe for repeal. The Companies Act should be amended and consolidate all laws governing the incorporation, regulation and winding up of companies and other associations. In terms of disclosure requirements, the Act addresses annual returns, accounts and audits, general meetings, disclosure to be made in prospectus, registers and inspections.<sup>79</sup>

All state owned corporations in which the government has controlling equity interest directly or via public institutions are however governed by the State Corporations Act (SCA) chapter 446 (1986). Under the SCA, state owned corporations can be established as either statutory State Owned Corporations or companies. State Owned Corporations which are established as ordinary companies are governed by the Companies Act. State Owned Corporations have all the powers and privileges of a natural person subject to the SCA.<sup>80</sup> For this reason, the SCA is a statute of general application and it therefore provides that in the event between its provision and other statutes and the Companies Act, the SCA prevails. The statute confers significant powers to the executive especially the President. The portfolio or parent Ministry who can issue directives of general nature on the running of state owned corporations, the treasury, and the Permanent Secretary of the parent Ministry who is the accounting officer.<sup>81</sup> The SCA just like the Companies Act is in dire need of revision to improve governance of state owned corporations.

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<sup>78</sup> Musikali, Mwendwa L, "The Law affecting corporate Governance in Kenya: A need for Review," *Social Science Research Network* 19(2008)7, pp213-227. [www.gbv.de/dms/buls/631006060.pdf](http://www.gbv.de/dms/buls/631006060.pdf) (accessed on 10th September 2012).

<sup>79</sup> Trade and Development Board, *The United Nations Conference on Trade and Development (UNCTAD): Case Study on corporate governance disclosures in Kenya*, [unctad.org/en/docs/c2isar19a2\\_en.pdf](http://unctad.org/en/docs/c2isar19a2_en.pdf) (accessed on 10th September 2012).

<sup>80</sup> Mwaura K, "The Failure of corporate Governance in State Owned Corporations and The need for restructured governance in fully and partially privatized corporations: The case of Kenya," *Fordham International Law Journal* 31 (2007)34, pp 1-31.

<sup>81</sup> State Owned Corporations Act 1986, s 3 (1).

Professional associations such as the Institute of Certified Public Secretaries of Kenya (ICPSK), and the Law Society of Kenya (LSK) are equally important given that they continue to enhance good governance practices. Traditionally, professional associations in Kenya have continued to play a vital role in ensuring high professional standards are adhered to for by their members. By inculcating high standards of professional knowledge in their members, these associations increase productivity in both the public and the private sector.<sup>82</sup> Section 2.5.3 of the CMA guidelines (Capital Markets Authority) requires Company Secretaries of public listed companies to be members of the ICPSK. This requirement has also found substantial application in some state owned corporations. The development must be hailed given the important role played by the Company Secretary. The core duties of the Company Secretary include organizing board committee meetings such as audit and administration committees. The Company Secretary is also responsible for formulating agenda of board meetings with the CEO or the board chairman. The Company Secretary is equally responsible for ensuring that all board committees are properly constituted and provided with clear terms of reference. The chairman and the board look to the company secretary for guidance on what their responsibilities are under the rules and regulations as to which they are subject to and on how those responsibilities should be discharged.<sup>83</sup> In fact in Australia it is commonplace that the company secretary is also a director of the company.

The ICPAK (Institute of Certified Public Accountants of Kenya) is another professional statutory body established under the Accountants Act, 2008 to regulate the accountancy profession in Kenya. The body has achieved recognition for its achievements in the fields of education,

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<sup>82</sup>Du Plessis et al, *Principles of contemporary Corporate Governance*, (1st edn, Cambridge University Press 2005) p 82.

<sup>83</sup>Ibid, p83.

professional development, maintenance of high accounting; auditing and ethical standards as expected by the Section 2.5.2 of the Capital Markets Authority guidelines that require the Chief Finance Office to be a member of the Institute. It also acts as the profession “mouthpiece” in Kenya and in this respect holds membership in the International Accountancy Organization.<sup>84</sup> The Institute is also credited for enabling the adoption of international accounting and audit standards which were in Kenya with effect from 1999.<sup>85</sup>

Although the Center for Governance and Development (CGD) has proposed that the societies should incorporate themselves under the Companies Act, the advantage being that they will be subject to usual corporate disclosures such as tax compliance, annual returns and proper minutes, it is doubtful whether such a proposal will yield the desired results. In the pursuit of strengthening corporate governance practices in China, Linn argued that if existing laws and regulations were complied with, governance practices would be significantly improved.<sup>86</sup> An analogy can also be made to the Cooperatives Act which could yield reasonable results if properly enforced. Rural farmers do not require sophisticated solutions to their problems. Indeed initiatives such as raising awareness amongst farmers on their rights given that illiteracy is a problem most farmers are faced with through public campaigns could be a more formidable option.

### **2.3 Aims and Pillars of Good Corporate Governance**

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<sup>84</sup> International Accountancy Organization, <http://www.icpak.com/>. ICPAK oversees the activities of qualified and registered Certified Public Accountants (CPAs).

<sup>85</sup> International Accountancy Organization, *ibid* .

<sup>86</sup> Lin C, *Private vices in Public Places: challenges in Corporate Governance Development in China*, OECD Development Centre Research Project on corporate Governance in Developing and Emerging Economies, Paris Draft 28 March 2000.

This essay examines the challenges facing state owned corporations but as a background to the challenges, it is crucial to state why good corporate governance is essential for the management of state owned corporations.

Good corporate governance aims at achieving various objectives. The main broad objectives and benefits realized from good governance include, increased profitability and efficiency of business corporations as losses are minimized and profits maximized, enhanced ability to create profits for shareholders by the creation of wealth and hence high divided returns and increased employment opportunities with better terms for workers as the corporation is able to meet its obligations. Other benefits include enhanced separation of ownership from control, clear separation of duties between management and the shareholders, viability in State Owned Corporations for investment in a competitive global market, enhanced legitimacy, responsibility and responsiveness of the business corporation and transparency, accountability and probity of business corporations as all stake holders and communities have focus of improving the corporation.<sup>87</sup>

State Owned Corporations are normally manned by Board of Directors who are deemed to be agents of the principal. In state owned corporations, directors are agents of the public who are the shareholders. Under the agency theory, directors have full authority from the principal to run the corporation. Thus the Board of Directors must be effective. The hallmarks of an effective Board of Directors that supports good corporate governance principles include the following. It has clearly defined roles and duties between the Board and Management, there is Board independence and separation of duties of the chief executive officers and the Board, there are set

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<sup>87</sup>Kiarie M, "Key Pillars of Corporate Governance" Unpublished materials for lecture sessions, 2<sup>nd</sup> Semester for LLM 2010/2011.

clear board systems and procedures, the board provides leadership and strategic management to the management, Board members exercise transparency and disclosure of any conflicts of interest, the Board adheres to laws and regulations/ compliance with statutory obligations, Board members attend and participate diligently at board meetings that are properly convened on schedule, the Board provides effective human resource, financial management, communication and public education policies.<sup>88</sup>

The above objectives and pillars of corporate governance apply to both companies and state owned corporations. For state owned corporations that are not profit making but offer services, it must be noted that they use public funds that must be well utilized to ensure that they are optimally used. The shareholders of a state owned corporation are the public and provision of good service is the dividend.

#### **2.4. Attributes of Successful State Owned Corporations**

There are various characteristics that define a corporation that is successful<sup>89</sup>. Firstly, such a corporation maintains a workforce that is competent and qualified comprising of professionals who are then able to carry out their responsibilities with the highest attainable standard of skill and care. This is reflected through a culture of instilling discipline in the employees of a corporation and in turn, the corporation offers great incentives to its employees for purposes of motivation through training and retraining to ensure the staff remains relevant. This is usually in the long run reflected in customer satisfaction which in turn enhances economic growth of the corporation.

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<sup>88</sup> Kiarie M, Ibid.

<sup>89</sup>Ron Finklestein, "What Successful Businesses have in Common," [www.entrepreneur.com/article/83764](http://www.entrepreneur.com/article/83764) (accessed on 1st September 2013).

Successful businesses usually have a good business plan which defines and drives the activities and behaviors of the entire organization. This includes a financial plan, marketing differentiators and product strategy as well as a plan for employee retention. A corporation must always have a financial plan whereby it creates a budget and adheres to it which in the long run helps it to measure its progress or shortfalls. A sound financial plan is the cornerstone of a great business plan.<sup>90</sup> Successful state owned corporations are usually ready to take calculated risks with clear outcomes in mind especially with respect to adapting to changes.<sup>91</sup>

Every company usually has processes some of which are clearly defined while others are implicit which help to increase productivity and reduce costs while generating the same or better outcomes. Successful businesses understand the need to continuously improve their business processes to become more efficient and productive and to respond to market changes faster while providing better service to customers.

Marketing strategies are the means through which a corporation is able to advertise and sell its products by convincing the consumers that it has the best products amongst its competitors. This is a strategy that has successfully been used by Safaricom Limited<sup>92</sup> which is one of the reasons that it remains ahead of the other market players. This, however, can only be achieved through immense research on the consumer needs so as to ensure that goods produced are fit for their purpose. A corporation has to be aggressive in the market so as to ensure that it maximizes on the sales.

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<sup>90</sup>Ron Finklestein, *ibid* p 20.

<sup>91</sup> *Ibid*

<sup>92</sup> Safaricom limited is a mobile services provider in Kenya.

Every successful business has trusted advisors who manage it to success. They look for independent people who will advise them on various issues concerning the management and activities of the corporation so as to point out issues that may have been overlooked by the corporation and to enhance accountability.

In the emerging market trends, successful businesses integrate their social lives into their business lives: the client who purchases a product today gets invited to the company party at the end of the year. Clients become friends, co-workers and a business family. These entrepreneurs build their lives around their business, and it's almost impossible to distinguish between their social lives and their business lives.<sup>93</sup> This has over time proved to be useful especially in enhancing productivity of the employees.

Michael Porter<sup>94</sup> pioneered the concept of competitive advantage and broke it down into two forms: differentiation advantage and cost advantage. Differentiation advantage is when a company provides a superior service or product for the same price charged by the market. Cost advantage is when a company provides the same service or product as the market, but at a lower price.<sup>95</sup>

A successful corporation always has a management team that is above average. This means that the management must comprise of people who are not only competent but also prides in diversity in terms of profession, gender, experience and age amongst other factors. This ensures that there

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<sup>93</sup>Ron Finklestein, *ibid* p 56.

<sup>94</sup>For more ideas on picking good companies to invest in, read *Find Investment Quality In The Income Statement, Measuring Company Efficiency and the Industry Handbook* available at <http://www.investopedia.com/articles/stocks/08/secrets-success-company-stock.asp#ixzz1WfTEPLaI> (accessed on 1<sup>st</sup> September 2011).

<sup>95</sup> *Ibid*



is growth and also mentorship amongst the individuals which then helps in the overall growth of the corporation.<sup>96</sup>

One of the most important characteristics in becoming a good company is market leadership.<sup>97</sup>

Leadership can come in many forms, but the reputation that comes along with this tag is priceless. Examples include leading the market in quality, innovation or customer service.

## **2.5 Corporate Failure**

Corporate failure occurs when a corporation fails to satisfy or meet all the needs of all its stakeholders. This occurs when a Board for instance fails to successfully implement some of their primary tasks such as to oversee management and monitor and evaluate risk controls.

Corporate failure may be caused by internal or external factors or in some instances a combination of both. The former is where the organization's management of internal affairs is marred by incompetence such as poor managerial skills amongst other poor governance issues.

The latter on the other hand involves market factors that are usually beyond the control of the state owned corporations such as unfair competition. These factors have led to the collapse or failure of even large corporations.

### **2.5.1. Internal Factors**

A corporation is usually reliant on the managerial competencies in ensuring that they are successful. A good manager almost always gives rise to a good corporation. The questions of concern are usually whether the Board and also the managers are people qualified in terms of their experience in the industry or have the education background to manage the corporation at

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<sup>96</sup>Ron Finklestein Ibid p 59.

<sup>97</sup>Ron Finklestein Ibid p 69.

such a high level.<sup>98</sup> For a corporation to be successful it must be led by a Board that is knowledgeable in the activities that the corporation engages in and is therefore able to question actions of the management in ensuring that they remain accountable and act within their mandate. However, it is unfortunate that in the case of private companies such as Nyagah Stockbrockers or Francis Thuo Partners Limited, they were run as family businesses such that the competence of the directors and managers was not taken into consideration as all that mattered was that the family was in control.<sup>99</sup>

There are fiduciary duties that a director has in respect to the company and they are expected to exercise a standard of skill and care when managing the affairs of the company. This means that the director must act in the best interest of the company and is prohibited from doing anything that will adversely affect the corporation whether directly or indirectly. They should also act in good faith and not make secret profits. In most of the state owned corporations that failed, this standard of care and skill was not exercised since the directors were either the owners or they were accountable to no one or just engaged in fraudulent activities without any checks or balances.<sup>100</sup>

There is also a problem of lack of transformational leadership. This means a leadership that is capable of adapting to changes in the market and growing in respect to emerging trends. This also includes training and retraining of the employees so that they are also well acquainted to the new trends thereby being able to effectively compete in the market and also have a satisfied clientele.

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<sup>98</sup> Barbara Grosh, Ibid

<sup>99</sup> [www.businessdailyafrica.com/.../Nyaga-Stockbrockers.../-/index.html](http://www.businessdailyafrica.com/.../Nyaga-Stockbrockers.../-/index.html) Oct 4, 2010 -

<sup>100</sup> Cameron, K.A, Sutton, R.I and Whetten, A.D. (1988). *Readings in Organizational Decline: Frameworks, Research, and Prescriptions*. Ballinger, Cambridge, Massachusetts. pp16

Most state owned corporations end up failing as they do not effectively manage changes and they do not move with the changing trends. They tend to be rigid and fail to manage a fast changing market and employ advanced market strategies which then mean that they are not able to effectively compete in the market and they eventually succumb to stiff competition.

The structures of the corporation also determine the success or failure of the state owned corporations. Those that have failed have had rigid structures that are incapable of coping with emerging trends thus leading to their collapse.

The overall governance of a corporation is the key determinant of its success. Lack of a formal system of accountability, oversight and control which aims at removing the opportunity of employees to make unethical decisions ultimately leads to the collapse of a corporation. All decisions made in a corporation ought to always align to the firm's strategic direction and also adhere to the ethical and legal considerations. There must always be checks and balances that limit the opportunities available to the directors, management and employees to deviate from those policies and strategies.<sup>101</sup>

Lack of incentives to motivate the employees has also been identified as a reason as to why state owned corporations fail to learn. Employees are the face of a corporation and if they are not satisfied, then the end product tends to be below the standard. Cumulatively, the employees either perform poorly or form syndicate that then slowly lead to the collapse of the company.

### **2.5.2 External Factors**

Firstly, a corporation may venture into an investment or new product that fails due to various issues such as lack of a responsive market which is beyond the control of the corporation. When

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<sup>101</sup>Mukhisa Kituyi 'The Inside Story of Uchumi Supermarket's Turn around' <http://allafrica.com/stories/201106060148.html> (accessed on 1<sup>st</sup> September 2011).

a corporation heavily invests in a project, it anticipates that the market will overwhelmingly enjoy the product but sometimes the market fails to do so. This means that the corporation will not be able to reap the fruits of its investments and therefore it will not be able to recover from the investments which may eventually lead to its collapse.<sup>102</sup>

Unfair competition has also been identified as a major external factor that leads to the collapse of a corporation. This is usually beyond the control of the corporation that can only be corrected or controlled by the regulators. There are also changes in government regulations which lead to failure of State Owned Corporations.<sup>103</sup> For instance, there could be rules or standards that are placed by the government without giving the State Owned Corporations time within which to effect the regulations which then means that they will not be able to comply with the said rules thus leading failure.

There is also the issue of the regulatory framework of State Owned Corporations in Kenya and whether the regulators are indeed empowered to effectively govern State Owned Corporations in manner that is sufficient to prevent malpractices in the market or within the State Owned Corporations that then lead to failure of these State Owned Corporations. Some have argued that sometimes the regulators have been lax in carrying out their mandate and end coming in a little too late in an attempt to save a corporation from collapse. Scarcity of input in a corporation is also identified as a factor that has immensely or highly contributed to the collapse of a corporation. This is also usually beyond the control of the corporation.<sup>104</sup>

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<sup>102</sup> Ibid

<sup>103</sup> Ibid

<sup>104</sup> Argenti, J. (1976). *Corporate collapse: The causes and symptoms*. New York. John-Wiley, pp 5

The Decline Theory<sup>105</sup> propounds that every corporation must grow, mature and die. This means that every corporation has a lifespan and once all its objectives are met then it slowly starts to decline until it is wound up or it just collapses. This theory has however been criticized for the main reason that there are state owned corporations that have been long in existence and have no signs of collapse hence the theory lacks basis.<sup>106</sup>

## **2.6 Challenges Facing State Owned Corporations in Kenya**

There are numerous challenges facing state owned corporations. For purposes of this write up, I have attempted to adopt a typology or classification of the challenges into a few categories on the basis of their causes or effects. However, this classification is not in any way exhaustive.

The main challenges facing state owned corporations can be classified into five broad categories and will explain the others that are not specifically in these categories under other causes of corporate failure:

- a) Politicization and poor corporate governance
- b) Weak regulatory regime
- c) Weak supervisory mechanisms
- d) Lack of adequate finances, misuse of the allocated funds and corruption
- e) Nepotism and tribalism
- f) Other causes of corporate failure.

### **2.6.1 Politicization and Poor Corporate Governance**

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<sup>105</sup>Makridakis S, "What can we learn from Organizational Failures?" Madhukar Shukla *Corporate Failures: Why Organizations' Fail to Learn*, (2000) Jamshedpur (India) / ESADE, Barcelona (Spain).

<sup>106</sup> Ibid

State Owned Corporations have been defined as anybody corporate owned by the Government or any corporation where the Government owns majority shares. Thus, unlike private companies, Directors of state owned corporations are mostly not elected but appointed by the Government. In most cases, there is a political angle to such appointments. The management of State Owned Corporations has, at times, become a political issue, as a result of deliberate action or otherwise, whereby politicians become politically active over the issues touching on the State Owned Corporations.<sup>107</sup>

Corporate governance has been defined above as the accumulated rules, policies, procedures and laws affecting the way in which a corporation operates, makes decisions and develops its relationships with shareholders and the public at large. Accountability is a major facet of corporate governance with executives and other decision-makers bound by the agreed-upon policies of the corporate governance plan to always act in the best interests of the company and its shareholders or stakeholders.<sup>108</sup>

All state owned corporations are deemed to be independent, but their directors are politically appointed by ministers and at times the head of state. This compromises their independence. Some of the Board members appointed are at times non-professional yet they assume oversight roles that are highly technical such as budgeting and then members succumbing to political pressure from external forces to implement activities that may not be in the interest of the state

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<sup>107</sup>Centre for Governance and Development (CGD), *A decade of State Owned Corporations Waste: A Study of the Audited Accounts from 1993-2002*, *ibid*, p 6.

<sup>108</sup>For a definition of Corporate Governance | eHow.com [http://www.ehow.com/info\\_7742922\\_definition-corporate-governance.html#ixzz1Mbjax1U](http://www.ehow.com/info_7742922_definition-corporate-governance.html#ixzz1Mbjax1U) accessed on 17.5.2011.

owned corporations There is constant lobbying and canvassing for appointment of board members who may be relatives, friends or appear to favored by the political class.<sup>109</sup>

At times this may lead to conflict of interest and leadership wrangles and endless litigations due to conflicts that end up leading to wastage of resources and loss of focus in terms of the sound development of the state owned corporations.<sup>110</sup>

Once directors fail to observe corporate governance and their duties are politicized, they may find it difficult to make independent decisions as they are expected. The policies that they make may be coated with favourism depending on which side of the political persuasion one subscribes to.

One practical example of politicization is the handling of the Audit of the Arid Lands Natural Resource Management project to establish the extent of financial irregularities.<sup>111</sup> The World Bank forensic audit revealed fraudulent expenditures in the second phase of the project. The audit covered expenditures in seven districts over the 2006-2007 and 2007-2008 financial years and found possible sham spending in up to 29 per cent of the districts covered, totaling more than Sh300 million (\$4 million).<sup>112</sup> The revelations led to the suspension of the project in July last year, after the World Bank received the results. The government, in collaboration with the World Bank, resolved to review the integrity report and use it to target areas with the greatest risk. This

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<sup>109</sup>Romano Kiome, "The Most Far-Reaching Reforms in the Agricultural Sector," [www.kenyacentral.com/.../23127-20-state-owned-corporations-face-the-axe.html](http://www.kenyacentral.com/.../23127-20-state-owned-corporations-face-the-axe.html) (accessed on 21st September 2013).

<sup>110</sup>Conflicts in Kenya have been witnessed in the appointment of Board Members of State Owned Corporations such as Kenya Reinsurance Corporation and Kenya Bureau of Standards and Communication Commission of Kenya Boards.

<sup>111</sup>News from around Kenya, Mr. Odinga (Kenya Prime Minister) has warned that any fraud noted in the review process would be referred to the Kenya Anti-Corruption Commission for investigation while Finance Minister Uhuru Kenyatta is deliberating with the World Bank on how to go on with "deep forensic audit" into claims of fraud and misappropriation of funds, though investigations into the arid lands project are ongoing. [www.propertykenya.com](http://www.propertykenya.com) (accessed on 20<sup>th</sup> June 2014).

<sup>112</sup> Kenya Anti Corruption Commission, *Annual Report for Financial Year 2009/2010*. p. 60.

is meant to make the government aware of the impact of the findings on potential future work in arid and semi-arid lands. The problems in the project require purposeful and convincing actions by Government of Kenya'.<sup>113</sup>

The pulling in different directions of senior Government officials only shows vested political interests that were intended to influence the outcome of the audit.<sup>114</sup>

Another example is the row that surrounded the search for a new Moi Teaching and Referral Hospital Chief Executive Officer, (CEO). "The row took another twist when councillors and residents demonstrated in Eldoret led by Wareng County Council chairman Paul Kiprop and his Nandi County Council counterpart Ezekiel Ruto, the demonstrators demanded the reinstatement of Prof Harun Mengech, whose term expired. They marched to the Regional PC's office where they handed over a memorandum before proceeding to a rally at Nandi Gardens. They accused Medical Services Minister Anyang' Nyong'o of allegedly intending to install a CEO who did not sit or pass a recent board interview. Mengech led during the interview and the board forwarded his name to the minister for re-appointment. But Nyong'o demanded the exercise be conducted afresh," Kiprop said."<sup>115</sup>

This is the climate under which most Board Members operate. Such demands will obviously compromise performance of not only the directors but also the state owned corporations.

## **2.6.2 Weak Regulatory Regime**

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<sup>113</sup>News from around Kenya, Ibid.

<sup>114</sup>Miringu Alice N, "An Analysis of the Effect of Corporate Governance and Public Management," (2001) 1 *International Journal of Business and Public Management*, 38, 40 [www.mku.ac.ke/journals/](http://www.mku.ac.ke/journals/) (accessed on 21<sup>st</sup> September 2014).

<sup>115</sup>Iraki X N, "Moi Teaching Referral Hospital, the Real Story" *Standard Newspaper*, 31<sup>st</sup> May 2011, p 4.



A regulatory regime is a system of regulations and the means to enforce them, usually established by a government to regulate a specific activity. The purpose of such a regime is to provide uniform standard and or procedures in carrying out a given activity.

As alluded to herein above state owned corporations are established under an Act of Parliament, Gazette Notice or by Presidential decree. There is also the State Corporations Act that governs in general terms the management of State Owned Corporations. Some of these establishing instruments are not comprehensive enough. The instruments to govern a given corporation may thus be scattered in many documents that may not be accessed at once. Thus, directors at times are forced to rely on *ad hoc* circulars from the Treasury and the Parent Ministry. There are no clear guidelines on what a corporation can do but the Board is left to borrow from the experiences of other state owned corporations.<sup>116</sup>

Section 7(1) provides that the President may give directions of a general or specific nature to a Board with regard to the better exercise and performance of the functions of the State Owned Corporations and the Board shall give effect to those directions<sup>117</sup>.

At times there is failure to comply with statutory obligations such as payments to National Social Security Fund, National Hospital Insurance Fund and Kenya Revenue Authority.<sup>118</sup> The failure to have comprehensive instruments makes directors to wallow in darkness. The directors are not sure which obligations fall within their mandate and they are always consulting the Parent Ministry before implementing decisions.

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<sup>116</sup>Owino, W and Munga, S (1997) *Decentralization of Financial Management Systems; Its Implications and Impact on Kenya's Health Care Delivery*; IPAR; Nairobi

<sup>117</sup> State Corporations Act 1987, s 7 (1).

<sup>118</sup>Austin Ouko, "Management of State owned corporations in Kenya, a Critique in the Light of new Constitution," (2011) 7 *The Law Society of Kenya Journal*, Law Africa Publishers (K) Ltd, 40, 47.

### 2.6.3 Weak Supervisory Mechanisms

In most state owned corporations, there is lack of clear guidelines on where, for example the Board authority ends and where the Chief Executive Officer's begins, and where the staff members authority begins hence delayed decision making. At times there is over-reliance on guidelines or circulars from the Inspector General's Office that are obsolete or may not apply across the board for all types of state owned corporations. The Board oversight and management operational responsibilities are inadequately defined in the enabling statute.

There is also failure to convene Board meetings when due in some state owned corporations are a common occurrence.<sup>119</sup> This may be deliberate or caused by circumstances beyond the control of the board such as the appointing authorities may take long before inaugurating a new board into office or appointing a chairman. This may lead to management operating even when there is no board in place. Some boardmembers office tenure that ends almost at the same period for all board members which becomes costly in terms of governance interventions in respect of training, instilling professionalism and institutional memory for the newly appointed board members.<sup>120</sup>

Most state owned corporations lack appropriate personnel<sup>121</sup> and administration policies, accounting procedures manuals, job descriptions and specifications and performance appraisal tools which compound the problems of Board Members as they are not able to assess the performance of management. Implementation of information systems in state owned corporations so as to improve transparency, efficiency and effectiveness in service delivery is wanting. Many state owned corporations are reluctant to implement corporation resource programme management systems which will reduce the paper trail. Computerized system

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<sup>119</sup> David Himbara, *Kenyan Capitalists, the State, and Development*, (1994) Lynne Rienner, Boulder CO, 30, 35.

<sup>120</sup> Ibid

<sup>121</sup> Ibid

reduces corruption greatly and management of some state owned corporations that are beneficiaries of corrupt practices would not want to computerize systems within the corporation.

#### **2.6.4 Lack of Adequate Finances, Misuse of the Allocated Funds and Corruption**

There have been various reports of misuse of funds allocated to state owned corporations<sup>122</sup>. The reports range from theft, award of tenders irregularly, irregular sale and distribution of corporate assets, irregular re-bag and selling of corporation assets such as fertilizer and poor investment of allocated resources.<sup>123</sup> Kenya Anticorruption Commission (KACC) has recommended for prosecution of officials of Kenya Broadcasting Corporation (KBC) and National Water and Sewerage Pipeline Company Limited (NWSPC Ltd).<sup>124</sup> Officials of some state owned corporations are under investigation by KACC for gross mismanagement and misappropriation of funds by some Board Members who abuse the trust of the appointing authority.<sup>125</sup>

Lack of adequate system controls that provides a fertile ground for fraud in some of the state owned corporations. At times putting funds in illegal and unauthorized investments.<sup>126</sup> Board members at times collude to protect one another's interests, such as insider loans and high

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<sup>122</sup> Centre for Governance and Development, *A Decade of Parastatal Waste, A Study of the Audited Accounts of State Corporations over the Period from 1993 to 2002*, *op cit*, n 4.

<sup>123</sup> Government of Kenya, *Kenya Anti Corruption Commission Annual Report 2009/2010* pp 12, 19-25. For an examination of the serious malpractices experienced in State Owned Corporations It explains the various investigations undertaken or pending in respect of officers of various State Owned Corporations.

<sup>124</sup> Government of Kenya, *ibid* p 22.

<sup>125</sup> Kenya Anti Corruption Commission, *op cit* n 17 p 25.

<sup>126</sup> *Republic Vs Rebeca Nabutola & 2 others*, Nairobi Anti Corruption Case No 12 of 2008/, (unreported).[eacc.go.ke/default.asp?pageid=14](http://eacc.go.ke/default.asp?pageid=14) (accessed On 29<sup>th</sup> September 2012). Mrs. Rebecca Mwikali Nabutola former Permanent Secretary in the Ministry for Tourism and Wildlife was jailed for four years without an option of a fine while Dr. Ongong'a Achieng', former Managing Director of the Kenya Tourist Board, Duncan Muriuki Karuuru a former member of the Board of Directors of the Kenya Tourist Board were jailed for three years without an option of a fine for conspiracy to defraud the Ministry of Tourism and Wildlife of a sum of Ksh.8.9million. The former PS was also charged with willful failure to comply with the law relating to procurement procedures. The former member of the Board of Directors was convicted also on Abuse of Office, Wilful failure to comply with the law relating to procurement procedures and fraudulently acquisition of public property.

managers' salaries. There have been claims of misuse of funds in drilling of boreholes by the National Water Conservation and Pipeline Conservation Company in different parts of the country. The theft of taxpayer money was hatched in extensive schemes right from the tendering, where in one instance, the cost of a dam was increased by Sh1 billion before the tender was awarded to a rookie contractor, who according to the law, should not handle works valued at more than Sh150 million. The extent of misuse of public funds could not be unraveled as evidence was allegedly destroyed by a fire that razed the corporation's offices in Industrial Area.<sup>127</sup>

Bribery is a major issue in the state owned corporations. Bribery makes directors not to lead the corporation independently and hence make it competitive. Directors may also find it difficult to resist corruption demands.

“According to a report of the former ethics permanent secretary in the office of the President, John Githongo, senior officials in the Kibaki regime were linked to graft. This constituted a clear case of political corruption because although low-level officials may have been involved, it was driven by high-level politicians who were siphoning off the profits. According to Githongo, who is now residing in exile in the UK following a series of death threats, his report contains "incontrovertible evidence that most senior members of our government" were involved in a series of fraudulent contracts with the non-existent Anglo Leasing Company. Not only were Ministers involved in approving these payments, they also actively attempted to cover up this and many other fraudulent transactions once it became clear that they were the subject of ongoing investigations. The scandal resulted in the resignation of the Finance Minister in January

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<sup>127</sup>Francis Ayieko, “Extent of Colossal Swindling of Public Funds in Ministry of Water exposed in two State Audit reports” *Daily Nation Newspaper*, 21st March, 2011, p 16.

2006 and a number of other high-level Ministers have received summons from the Kenyan Anti-Corruption Commission who are investigating the Githongo report”.<sup>128</sup>

Corruption has many costs.<sup>129</sup> One such cost involves direct financial payments between those with discretionary power to change or apply rules and those seeking to circumvent or misapply them. These transactions amount to bribery and occur in a context analogous to the market setting; private citizens are the buyers of the services rendered illegally and the public officials are the sellers. The buyers pay the bribe to get the service and, the sellers render the service after receiving the bribe or in anticipation of it. The Anglo Leasing Scandal, described earlier as an example of mega corruption, illustrates how many people at all levels of the government, banking and law enforcement can, and have been, bribed.<sup>130</sup>

Bribery has the following main features;<sup>131</sup> first, the existence of direct financial payments (bribery) is commonplace and deeply embedded in Kenya’s economy. Second, larger corporations continue to have the means of buying their way into markets. Third, many firms will seek to gain an advantage over competitors through illicit non-market methods, especially where those in power are prepared to accommodate them. Fourth, “there has been hardly any action taken to punish those involved, and this has tended to encourage people involved in corruption and, fifth, direct financial payments have become a fixed cost of production in all sectors and lowered the profitability of national investment. Corporations, paying a proportion of

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<sup>128</sup>Anti-Corruption Resource Centre, <http://www.U4>, (accessed on 20<sup>th</sup> May 2013).

<sup>129</sup> Ibid

<sup>130</sup>Mullei A., “The Link Between Corruption and Poverty: Lessons From Kenya Case Studies,” (2000) *African Centre for Economic Growth Nairobi*, [www.propertykenya.com](http://www.propertykenya.com) > (accessed on 20<sup>th</sup> June 2011).

<sup>131</sup> Ibid

their revenue to obtain licenses or cover 'extra costs' have found the climate of economies such as Kenya's costly and non-enticing.<sup>132</sup>

### **2.6.5 Nepotism and Tribalism**

Both post-election violence and tribal discrimination in the workplace have had a negative effect on Kenya's economy. There is always the threat of discrimination when applying for a job and many admit that they would hire based on family or tribe instead of academic qualifications or experience.

Titus Naikuni when describing the potential damage tribalism poses to Kenya's economic prospects he stated,

"When people start looking at each other from a tribal point of view, and you are not employed because of your own credentials, then it starts affecting productivity." "...the results could be disastrous for an organization".<sup>133</sup>

Some organizations such as the Kenyan branch of Transparency International, an anti-corruption organization is monitoring the effects of tribalism in the public sector. The chair of this branch reveals that it is coming to a rather dangerous situation in which tribalism takes center stage and there is no meritocracy.<sup>134</sup>

Generally speaking there is nothing wrong with tribe, as it remains part of our social diversity.

There are nearly 42 tribes comprising Kenyan nation. Tribe, however, has become a factor in

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<sup>132</sup>Mullei A., Ibid

<sup>133</sup>Tribalism 'Rampant' in Kenya Workplace"<http://news.bbc.co.uk/2/hi/africa/4624698.stm> at [wikia.com/wiki/Tribalism\\_in\\_Kenya](http://wikia.com/wiki/Tribalism_in_Kenya) (accessed on 20th June 2012).

<sup>134</sup>Evelyn Mungai, "Corruption Rampant in Kenyan Workplace" <http://news.bbc.co.uk/2/hi/africa/4624698.stm> at [wikia.com/wiki/Tribalism\\_in\\_Kenya](http://wikia.com/wiki/Tribalism_in_Kenya) (accessed on 20th June 2011).

influencing decision-making, appointments, deployment of resources and promotion in public state owned corporations<sup>135</sup>.

Many state owned corporations lack a clear consideration of regional balance in appointments or promotions leading to a growing disproportionate distribution of personnel. It is this malaise that is a major source of corruption with the benefiting tribe being increasingly seen to be associated to the person exercising authority and or political power. There exists unprofessional process of recruitment that encourages, favourism, tribalism, and nepotism sometimes leading to hiring of incompetent personnel. There have also been instances of illegal dismissal of employed staff and at times over employment.

Many directors exhibit the reluctance to acknowledge need for change and such directors have competencies that are unsuited to strategic challenges and leadership roles to transform state owned corporations. And to preserve their status, the said directors would at all costs strive to maintain the status quo.

## **2.7 Conclusion**

This chapter has considered the state of corporate governance in state owned corporations in Kenya. The attributes of a good corporation and pillars of the same have been discussed. The challenges facing state corporations in Kenya have been considered. Failure to implement good corporate governance principles such as: accountability, integrity, efficiency, and transparency can cause failure of corporate governance. It is incumbent upon corporate governors to ensure that they do not create fertile ground for fraudulent dealings to take place. The next chapter considers the parliamentary oversight role on state owned corporations. The provisions of the Constitution Kenyan 2010 as relates to oversight of state owned corporations are considered.

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<sup>135</sup>Kenya National Assembly Official Record (Hansard), (1994) Vol. 5, No. 22, p 344.

## CHAPTER THREE

### THE CONSTITUTIONAL OVERSIGHT ROLE OF PARLIAMENT IN STATE OWNED CORPORATIONS IN KENYA

#### 3.0 Introduction

The preceding two chapters have laid the background by defining state owned corporations and explaining the main challenges facing the state owned corporations in Kenya. It has been shown that state owned corporations play an important role in economic development of a nation. The chapters have posited that the biggest stakeholder in the state owned corporations is the public, as they are financed from the tax payers' money. On this basis, the public can be deemed as the major shareholder. The public can only exercise its will and monitor the activities of the corporations through Parliament. This chapter shall consider how Parliament plays its oversight role in the governance of state owned corporations. Parliamentary oversight and accountability shall be defined. The Parliamentary oversight role shall be considered in historical perspective starting from the 1963 Constitution of Kenya with a view to considering how the same role has been enhanced under the Constitution Kenya2010. The shortcomings of Parliament in exercising its oversight role as well as the achievements shall be considered.

#### 3.1 Parliamentary Oversight and Accountability

Parliamentary oversight function is important as it scrutinizes expenditure of public resources which in effect promotes good governance. In this context, oversight means holding the Executive institutions (including corporations) accountable for their actions and ensuring that they implement policies in an effective manner.<sup>136</sup> The term refers to a large number of activities carried out by legislatures in relation to executive decisions including those of corporations. Oversight refers to the crucial role of legislatures in monitoring and reviewing the actions of the

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<sup>136</sup>Ronald J Gilson, "Globalsing Global Governance, Convergence of Form or Function", (2011) *The American Journal of Comparative Law*; <http://www.comparativelaw.org>, (accessed on 20<sup>th</sup> February 2013).



executive institutions.<sup>137</sup> Oversight ideally serves a number of objectives and purposes such as; improve the efficiency, monitor operations of state corporations, evaluate performance, detect and prevent poor administration, or illegal and unconstitutional conduct.<sup>138</sup> When oversight does take place, it covers a much broader range of categories than simply financial management. These categories include policy development, structural issues, and current issues or events. Policy reports cover a broad range of activities that involve policy development and implementation, including the presentation plans for the forthcoming year and statements of objectives or priorities.

On the other hand, accountability means to give an account of actions or policies, or to account for spending.<sup>139</sup> Accountability can be said to require a person to explain and justify - against criteria of some kind - their decisions or actions. It also requires that the person goes on to make amends for any fault or error and takes steps to prevent its recurrence in the future. In other words, oversight traverses a far wider range of activity than does the concept of accountability.

The oversight role of a legislature entitles it to hold a corporation accountable. In the process of carrying out its oversight function, a legislature may need to hold officers of corporations accountable. Thus, at a minimum, Parliament must take steps to see that state owned corporations in the national sphere can be held accountable and the monitoring of the

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<sup>137</sup>Ibid

<sup>138</sup>Mills, I. S. 1861 *Representative Government* as cited in Barnett (2009) *Constitutional and Administrative Law*, Cavendish Publishing Company, London.

<sup>139</sup>C Harlow, 'European Governance and Accountability' in *Public Law in a Multi-Layered Constitution* edited by N Bamforth and P Leyland, Hart Publishing 2003, p 79. For a discussion of the terminology see – G Drewry, 'The Executive: Towards Accountable Government and Elective Governance?' in J Jowell and D Oliver eds, *The Changing Constitution*, 5th edition, Oxford University Press 2004, p 285.

implementation of their mandate goes.<sup>140</sup> The manner in which the oversight function is carried out will vary according to the circumstances. This flexibility is important in ensuring that Parliament is not overwhelmed or overburdened by its oversight role.

Parliamentarians conduct oversight in order to ensure transparency and openness in the conduct of the affairs of state owned corporations. Parliament sheds light on the operations of State owned corporations by providing a public arena in which the policies and actions of state owned corporations are debated, scrutinized, and subjected to public opinion. Parliamentary oversight is aimed at scrutinizing whether the government's policies have been implemented and whether they are having the desired impact. It provides financial accountability. Parliament approves and scrutinizes state owned corporations spending by highlighting waste within the publicly funded services. The aim of the oversight role of Parliament is to improve the economy, efficiency, effectiveness of public expenditure and uphold the rule of law. Parliament protects the rights of citizens by monitoring policies and examining potential abuses of power, arbitrary behavior, and illegal or unconstitutional conduct by public institutions.<sup>141</sup>

Given the importance of state owned corporations, Parliament is given the power to oversee the corporations through a number of tools and mechanisms. Typically, these tools and mechanisms are mainly outlined in the constitution and other regulatory texts such as the parliamentary bylaws and/or internal procedures. The specifics of how a Parliament can manipulate its oversight prerogative depend upon the existence of a legal framework, which consolidates the position of the Parliament as an oversight institution and guarantees its powers and independence within the political system.

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<sup>140</sup>Wong and Simon C Y, *op cit* n 105.

<sup>141</sup>Mills, I. S. 1861 *Representative Government as cited in* Barnett (2009) *Constitutional and Administrative Law*, Cavendish Publishing Company, London.

The importance of state owned corporations need not to be over emphasized. For example in Kenya, by the 1980s, the Kenyan government held interests in 250 state owned corporations and held majority interest in at least half of them. They represented about a tenth of Gross Domestic Product (GDP), but contributed little to economic growth.<sup>142</sup> Indeed, productivity growth among state owned corporations was negative in the period. Taxed by economic inefficiency, they imposed a heavy burden on the budget and on public banks, which held the majority of their debt. They also contributed 28 percent to the trade deficit.<sup>143</sup>

By 1991, the Kenyan government announced its intention to rationalize the state owned corporations sector. At that time the Kenyan government held stake in 240 state owned corporations. Of these, 33 were deemed strategic and five of them earmarked for restructuring.<sup>144</sup> The government would divest from the remaining 207 corporations.<sup>145</sup> The medium term target was modest, with only 10 firms set for privatization and only 5 actually privatized by 1995. But privatization continued through the 1990s with a total of 165 corporations being sold or liquidated. The economic impact of divestment was small because, with the exception of Kenya Airways sold in 1996, the remaining were small or medium corporations.<sup>146</sup> Furthermore, transactions lacked transparency, political support was weak, strategy unclear and institutional and administrative arrangements inadequate.<sup>147</sup>

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<sup>142</sup>Kenya National Bureau of Statistics, Economic Survey, 2012, p 8

<sup>143</sup>Glenday Graham and David Ndi, "Export Platforms in Kenya" EAGER, African Economic Policy, Discussion Paper Number 43, July 2000.

<sup>144</sup>Kenya Government: *Office of Public Communication of Kenya can provide a list of all State Owned Corporations. There are currently over 160 Corporations.* www.communication.go.ke( accessed on 4<sup>th</sup> July 2013).

<sup>145</sup> Kenya National Bureau of Statistics, Economic Survey, 2012, p8.

<sup>146</sup> Kenya National Bureau of Statistics, Economic Survey, 2012, p8.

<sup>147</sup> International Monetary Fund, Kenya: *Selected Issues and Statistical Appendix*, (2002) Country Report No. 02/84.

In the year 2000, the Kenyan government announced a renewed privatization strategy, which took into account previous experience and focused on increasing private sector participation in the corporations previously deemed strategic.<sup>148</sup> After a good start and progress made on preparing for privatization, the program stalled. The most salient example is that of Telkom Kenya, which had even been earmarked as a priority. As part of a successful bidding process, the Mount Kenya consortium won a 49 percent stake in Telkom Kenya with a 325 million dollar bid in 2001. But the process was derailed in mid-course, when the government announced the breaking off of negotiations on the basis of political reasons.<sup>149</sup>

Reforming the structure of the political system to increase a parliament's constitutionally given oversight capacities may not always be feasible. In some instances, parliament can improve their oversight capacities by reforming their own rules. For example, a good practice for committee systems is to assign a single committee to each government ministry. The parliamentary budget scrutiny and approval are usually within the powers of Parliament to implement.<sup>150</sup>

Besides Parliament's legislative function, it is through oversight that the parliament can ensure that state owned corporations good service is accorded to the people and asserts its role as the defender of people's interests. A condition of the exercise of power in a constitutional democracy is that the administration or executive is checked by parliament.<sup>151</sup>

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<sup>148</sup>Thus, the government approved the privatization of telecommunications (Telkom Kenya), energy, the Kenya Power and Lightening Company, (KPLC), and Kengen), transports (Mombasa Port and Kenya Railways), banking (Kenya Commercial Bank and Kenya Reinsurance), sugar and water.

<sup>149</sup> Economist Intelligence Unit, *Country Profile. Kenya*, (1998)The Unit: London, pp.19-20.

<sup>150</sup> Jungmann C, "The effectiveness of Corporate Governance in One-Tier and Two-tier Board Systems-Evidence from the UK and Germany," *European Company Financial Review* 3(2006) 4,pp.426-474.

<sup>151</sup>Hugh Corder & Saras Jagwanth, Report on Parliamentary Oversight and Accountability Faculty of Law, University of Cape Town, July 1999 available at [unn.edu.ng/news/legislative-oversight-and-public-accountability](http://unn.edu.ng/news/legislative-oversight-and-public-accountability)

The scrutiny and oversight of public institutions by Parliament are, like the passing of expenditure and approval of nominations to such bodies. Parliament ought to provide mechanisms to ensure that all state owned corporations in the national sphere of government are accountable to it; and to maintain oversight of the exercise of public authority, including the implementation of its mandate as per the provisions of the enabling statute.<sup>152</sup>

Thus, it is important that Parliament puts in place mechanisms (in the form of committees and procedures for the passing of budgets), to ensure accountability of all state owned corporations in the national sphere of government, and to maintain oversight of the exercise of state owned corporations. Mechanisms for accountability are required for certain state owned corporations, such as those which are executive and additionally operate in the national sphere.<sup>153</sup>

The duty to answer or explain requires the giving of reasons and the explanation by state owned corporations for action taken. It includes the duty to provide financial accounts demonstrating the regularity of state owned corporations expenditure. Accountability hinges on the receipt of information financial information. Power over expenditure is vital for the system of representative and responsible government. However, financial information - if it is to be used for purposes beyond checking over-spending - must be presented in such a manner or coupled with additional information about the objectives of government spending, so that Parliament can make judgments about whether funds are being spent efficiently and in accordance with stated objectives.<sup>154</sup>

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<sup>152</sup>Khouza, Reuel J., Adam, M. *The Power of Governance*, (2005) 2nd ed, Palgrave MacMillan.

<sup>153</sup>Ghezzi, F and Malberti C, "The Two-tier Model and the One-Tier Model of Corporate Governance," *The European Company & Financial Review*, 5(2008) 1, pp 46-47.

<sup>154</sup>Hugh Corder, et al *op cit* n 109.

The obligation to explain and account implies the further duty to submit to scrutiny and to provide an opportunity for Parliament to probe and criticize budgets of state owned corporations. Parliament or any of its committees may have powers to summon officers of state owned corporations to appear before it or report to it. The obligation to redress grievances by taking steps to remedy defects in policy or legislation can be termed ‘amendatory accountability.’<sup>155</sup> It requires an acceptance by Ministers that something has gone wrong, whether or not they are personally culpable.

In the systems which are based on the Westminster model of responsible government ministerial responsibility is the cornerstone of accountability.<sup>156</sup> Since it is based on departmental hierarchy and lines of responsibility culminating in the Ministers, it proves far less useful when the element of the executive in question or corporation consists of statutory bodies or agencies which are outside the departmental sphere of control. The Constitution is broadly worded, including not only state departments and the administration, but also bodies which exercise a public power or perform a public function under legislation. This category presents the bulk of the oversight work to be performed by Parliament.

As the next sections will show, in practice, the constitutional obligation for the parliament to oversee organs of state at times gives rise to a number challenges and issues such as the following:<sup>157</sup> There is no clarity on the precise meaning and coverage of the term especially because the requirement of ‘exercising a public power or performing a public function’ does not lend itself to easy definition. The term ‘public body’ has been the subject of judicial decisions in

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<sup>155</sup>Hugh Corder, et al *ibid*.

<sup>156</sup>One of the most outstanding characteristics of the *Westminster model* is the way in which it consciously lifts the limits on power. For details see [www.dadalos.org/int/parteien/grundkurs4/gb/westminster.htm](http://www.dadalos.org/int/parteien/grundkurs4/gb/westminster.htm) (accessed on 10<sup>th</sup> September 2013).

<sup>157</sup>Austin Zvoma, “The Challenges Parliamentary Committees Face In Exercising Oversight Functions on the Executive” (2010)[www.asgp.info/](http://www.asgp.info/). Parliamentary Committees../do. (accessed on 10<sup>th</sup> September 2012).

the past in the context of the applicability of administrative law principles. Different considerations may well apply in the context of accountability and oversight; it may be neither desirable nor feasible for Parliament to attempt to exercise oversight power over all the institutions that may fall within the definition, which as suggested earlier, is likely to be broadly interpreted.<sup>158</sup>

### **3.2 Parliamentary Oversight under the 1963 Constitution of Kenya**

Under the 1963 constitution, the Republic of Kenya had a unicameral assembly. The National Assembly, pursuant to section 31 of the Constitution, consisted of elected and nominated members; they were 210 and 12 respectively.<sup>159</sup> The president appointed the Vice President and Cabinet Ministers from among those elected to the assembly. The Attorney General and the Speaker were ex-officio members of the National Assembly.

Pursuant to section 30 of the 1963 Constitution of Kenya, the Parliament of Kenya consisted of the President and the National Assembly. In the exercise of the legislative power of the Republic of Kenya, bills are passed by the National Assembly and become law on the President giving his assent, thus becoming styled, Acts of Parliament. Similarly in its deliberative role and oversight of the Executive, resolutions adopted by the National Assembly were implemented by the Executive, headed by the President. Thus, use of the term Parliament referred to an institution larger than the National Assembly and the President in their separate entities.

Article 42(3) 1963 the Constitution Kenya 2010 summed up the essential functions of the National Assembly. The essential functions of the Parliament were that it is elected to represent the people. It did this by providing a national forum for public consideration of issues, by passing

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<sup>158</sup> Ibid

<sup>159</sup> The Constitution of Kenya 1963.

legislation and by scrutinizing, and approving budgets of government that state owned corporations, among others. Although the 1963 Constitution of Kenya demanded for Parliamentary oversight of state corporations and all organs of state, there were some challenges experienced.<sup>160</sup>

The power of appointing directors of corporations was left to the discretion and whim of politicians and ministers. The Cabinet Ministers (who were members of parliament) normally took advantage of the law to appoint board members. For example, Cabinet Ministers after losing the elections remained in office until the next Cabinet was sworn in. The ministers sometimes acted in an opportunistic manner by taking advantage of the period they remain in office to fill boards of corporations under their respective ministries with their own appointees.<sup>161</sup> The State Corporations Act gave politicians wide powers to meddle in the affairs of corporations. Indeed, the whole idea of parent ministry allowed cabinet ministers to interfere on affairs of corporations. Hence controversies surrounded changes of board members of various corporations. Ministers through a gazette notices used to replace the board members of corporations under their ministries alleging that such change is meant to streamline the delivery of services. There was normally no consultation with stakeholders before making of these board appointments.<sup>162</sup>

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<sup>160</sup> See section 128, The Constitution of Kenya 1963

<sup>161</sup> Kenya gazette, February 25<sup>th</sup> 2013, appointments of board members by the then Minister for Finance to the following boards: Kenya Post Office Savings Bank, Kenya Revenue Authority, Retirement Benefits Authority, appointed four directors of the Capital Markets Authority, four directors of the Consolidated Bank of Kenya, and a member of the Competition Tribunal.

<sup>162</sup> Some of the affected corporations were the Kenya Tourist Board, Kenya Utalii College, Bomas of Kenya, Kenyatta International Conference Centre (KICC), Kenya Tourism Development Corporation (KTDC), Catering and Tourist Development Levy Trustee (CTDLT) and Hotels and Restaurant Authority (HRA). (KTF) website, Friday, August 3 2014 at 21:28.



Indeed, in many instances ministers had been allowed to get way with nepotism- stuffing boards with their cronies, and literally micro-managing these institutions.<sup>163</sup> Most Ministers were only accepting recommendations of boards when the directors do what the ministers want. Whenever ministers found that they were confronted by directors inclined to defy a ministerial directive, the ministers would hurriedly replace the directors with a set of compliant directors.

Members of Parliament have occasionally been forced to call for the revoking of appointments to corporations on grounds of failing to take into account the issue of regional balance in government appointments. Parliament's Equal Opportunities Committee has at times questioned the criteria used to appoint people to plum posts in the corporations. It has argued the President has at times breached Article 232 of the Kenyan constitution 2010, since most appointment are informed by factors other than merit.<sup>164</sup>

The credibility of the Public Investments Committee (PIC) had at times been put into question when its members comprise members of Parliament who had been censured by the same committee in the past. For example, the Law Society of Kenya (LSK) has at times pointed out the contradiction and been forced to call on the affected members of Parliament to quit the watchdog committee that investigates details of public investments. The LSK had said there was a likelihood of a conflict of interest if the legislators continued sitting in the PIC. LSK said it was

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<sup>163</sup>For example, there were major controversies surrounding appointments of Dr Kioko Mang'eli's term as chief executive of the Kenya Bureau of Standards. Similarly there were allegations of nepotism in appointing managing directors of the Kenya Industrial Research Development Institute (Kirdi) and the Kenya Industrial Estates. (See [www.businessdailyafrica.com/Corporate.../Keps...CEO.../-/index.html](http://www.businessdailyafrica.com/Corporate.../Keps...CEO.../-/index.html) Aug 18, 2010 - *Kebs*)

<sup>164</sup>There were calls to revoke the appointment of Geoffrey Wahungu as director general of National Environmental Management Authority

not possible for such MPs to effectively discharge their duties in the committee.<sup>165</sup> They could interfere with investigation if cases touching on their companies are brought into focus.

### **3.3. Structure of Parliamentary Oversight under the Constitution of Kenya 2010**

Kenya has had two major constitutional reforms involving wholly new texts since gaining independence: in 1969 and in 2010. In 1969, the 1963 independence constitution was replaced with a new text that entrenched amendments to the system of government that the independence constitution had contemplated.<sup>166</sup> The Constitution of Kenya 2010 differs fundamentally from the Constitution of Kenya 1963. Chapters eight, nine, ten, and eleven establish the structure of the Kenyan government as consisting of the Legislature, the Executive, the Judiciary, and the Devolved Governments. The key changes proposed by the new constitution are in the following areas: separation of powers between the three arms of government that is: Executive, Legislature and Judiciary. The Legislature's primary function is representation of the people.

Kenya's parliament consists of two-houses: the National Assembly and the Senate. The National Assembly shall consist of members from each of the 290 constituencies. Majority of the Members of National Assembly will be directly elected by voters. There will be a Women's Representative MP elected from each county – therefore guaranteeing a minimum of 47 women MPs in the National Assembly. Tentative total number of MPs will be 347. The National Assembly also Votes to investigate and impeach the president (Article 145). The Legislative branch will constitute of the following: the Senate and the National Assembly. Each of the 47 counties will have a Senator be elected by the voters. The tentative total number of Senators will

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<sup>165</sup>Mike Mwaniki, "MPs under scrutiny over House team," *The Standard*, May 5, 2008.

<sup>166</sup>"New Kenyan Constitution Ratified". Voice of America. 6 August 2010. Retrieved 6 August 2013.

be 60. The senate shall among other duties, Preside over presidential impeachment hearings (Article 145).

The National Assembly controls national expenditure and revenue allocation between the two levels of government. The National Assembly also reviews the conduct of the President and other state officers, and initiates the process of removing them from office if necessary<sup>167</sup>. The Senate on the other hand serves the interests of counties and the county governments by debating and approving bills concerning the counties. The senate also determines the outcome of any resolution of the National Assembly to impeach the President or the Deputy President.<sup>168</sup>

However, some of the provisions of the Kenyan Constitution 2010 are yet to take effect. Parliament is supposed to enact legislation within five years to support its full implementation. As a result, some sections of the 1963 constitution continue to operate. The devolved governments and the Senate are some of the institutions that have just been created.

### **3.3.1 Salient Oversight Provisions under the Constitution of Kenya 2010**

The main oversight provisions provided for under the Constitution of Kenya 2010 can be summarized as below:<sup>169</sup>

Right to recall legislators (Senators and Members of the National Assembly)<sup>170</sup>. This article gives the electors powers to recall legislators who abrogate their duties. This will put pressure on the members of Parliament to carry out their oversight duties diligently. Representation in

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<sup>167</sup>Article 145 The Constitution of Kenya 2010

<sup>168</sup> Article 147 The Constitution of Kenya 2010

<sup>169</sup>Preston Chitere, Ludeki Chweya, Japhet Masya, Arne Tostensen and Kamotho Waiganjo, "Kenya Constitutional Documents: A Comparative Analysis" Chr. Michelsen Institute, 2006, for a chronology of constitutional negotiations.

<sup>170</sup>Article 104, The Constitution of Kenya 2010.

elective bodies has to effectively (and by extension to State Owned Corporations) meet a gender equity constitutional requirement, namely that no more than two-thirds of members shall be from either gender in its makeup.<sup>171</sup> Chapter 7, Article 81(b). Enforcement of this requirement will ensure appointments; of officers to head corporations are gender sensitive. Integrity Chapter, (Chapter Six) requires an Independent Ethics Commission to monitor compliance with Integrity in all government institutions and make investigations, recommendations to the necessary authorities, that is, Attorney General and any other relevant authority. If enforced to the letter, it shall weed out corrupt officers out of corporations.

The constitution establishes an advanced Human Rights and Equality Commission<sup>172</sup> that will also have power to investigate and summon people involved in Human Rights abuses within the government and with the public. On wide interpretation, this section shall apply to audit actions of state owned corporations. Any member of the Public has a right to bring up a case against the government on the basis of infringement of Human Rights and the Bill of Rights.<sup>173</sup> The courts, government institution and state owned corporations are bound to the Bill of Rights as per the constitution.<sup>174</sup>

The Salaries and Remuneration Commission that is an independent entity and has the power of regularly reviewing salaries of all State officers to ensure the Compensation bill is fiscally sustainable (Article 230(5)).<sup>175</sup> Once the Salaries and Remuneration Commission, sets salaries of staff of state owned corporations, most avenues of corruption and wasteful spending shall be limited. Article 152 of the Kenyan Constitution 2010, provides that Ministers must provide

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<sup>171</sup>Article 142, The Constitution of Kenya 2010.

<sup>172</sup>Article 252, The Constitution of Kenya 2010.

<sup>173</sup>Article 23(1)(2) Ibid

<sup>174</sup>Article 2(1), Article 10(1) Ibid

<sup>175</sup>"Institutional Reform in the New Constitution of Kenya", *International Center for Transitional Justice (ICTJ)*.

Parliament with full and regular reports concerning matters under their control. The flow of information from the executive to the legislature about its activities is crucial and goes to the core of oversight and accountability. Ministerial responsibility can be said to demand that ministers answer or give an account and submit to scrutiny, and make redress for wrongs and correct errors of state owned corporations under their ministry. In the first place ministers (the executive) must provide Parliament with information about their policies and the activities of corporations under their ministry. Particular ministers are individually responsible for the conduct of state owned corporations which fall under their ministry. The collective responsibility of the Cabinet implies that Ministers are in the end jointly responsible for the conduct of state owned corporations in the sense that they are obliged to support government policy. In the Commonwealth jurisdictions that share this feature of government, ministerial responsibility takes the form of a constitutional convention which is only politically and not legally binding. Effectively this means that the executive cannot respond to Parliament by saying that it does not have the right to demand accountability from state owned corporations. However, the right of Parliament, while entrenched in constitutional law, forms part of a political framework and it can sometimes be directly enforceable through the courts.

In terms of Article 248<sup>176</sup> of the Constitution, state corporations supporting constitutional democracy ‘are accountable to the National Assembly and must report on their activities and the performance of their functions to the Assembly at least once a year’. This requires reporting to Parliament on the performance of their functions and how their budgets were spent. This is one of the ways in which these bodies are held accountable to Parliament.

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<sup>176</sup> Article 248, Kenyan Constitution, 2010.

It is common practice that state institutions supporting constitutional democracy report to Parliament. Such institutions include the Human Rights Commission that must submit quarterly reports to Parliament on findings in respect of functions and investigations of a serious nature which were performed or conducted by it, and may do so at any other time it deems it necessary. The Auditor-General also must submit audit reports to the legislature on any audit.<sup>177</sup> These practices can be applied to all State Owned Corporations.

### **3.3.2 Oversight as relates to issues of the Budget**

The Kenyan Parliament is supposed to play an oversight role over the budgetary process to ensure that the nation's priorities are adequately catered for. After years of playing a largely rubber-stamp role in the budget process, MPs agitated for a more active role and as a result passed the Fiscal Management Act in 2009, which required the Minister of Finance to publish detailed expenditure and revenue details prior to asking Parliament to fund the budget. Every public entity must prepare its budget and submit to its parent Ministry by the 28th of February of each year. These budgets must be annexed by Treasury to the Annual Estimates of Recurrent and Development Expenditure to be laid before the National Assembly on 10<sup>th</sup> June of each year. By 21<sup>st</sup> March of every year, the Minister must present a Budget Policy Statement in the National Assembly. The 2013/14 Budget Policy Statement is available on the Ministry of Finance's website. Parliament has the power to withhold money for budget line items and emoluments for failure by the National Treasury to satisfy prior audit queries such as those of the Controller and Auditor General.

The House Budget Committee appears to be asserting its role, for instance, by querying discrepancies between the budget policy statement presented in March 2010 and the final budget

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<sup>177</sup> Kenyan Constitution 2010, Article 248.

presented in June 2010.<sup>178</sup> The government has, however, the launched the Social Budgeting Framework as a first step in building a more participatory process.

### **3.3.3 Parliamentary Approval of Appointments to some State Owned Corporations**

The Constitution of Kenya 2010 provides for appointment of Cabinet Secretaries from outside members of parliament (Article 152). Once nominated by the president, parliament has to approve the same before appointment. This provision was meant to de-politicize public service and ensure that the Cabinet Secretaries are not politicians. By extension, the Cabinet Secretaries who have powers to appoint board members of some corporations are required to submit the names to parliament for vetting and approval. The requirements of vetting and approvals are as per the Public Appointments Act.<sup>179</sup> Review and confirmation of executive appointees is a power that allows some parliaments to scrutinize executive appointees to high public office, the judiciary, state owned corporations and constitutional offices. This if implemented to the letter shall ensure that competent officers are appointed to head corporations.

### **3.3.4 Tools for Parliamentary Oversight**

The most common tools that Parliament uses for oversight include: questions to ministers (oral and written), and votes of no confidence. Other tools include mechanisms related to budgetary

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<sup>178</sup>However, the budget process is still opaque to the average Kenyan citizen. It has been left to civil society nongovernmental organizations like the Institute for Economic Affairs and Mars group Kenya to play both the oversight and education role. see <http://budget.marsgroupkenya.org/nationalbudget/programmes/expenditure> (accessed 20th may 2014)

<sup>179</sup>The Public Appointments (ParliamentaryApproval) Act. No. 33 of 2011.

oversight, impeachment, and the possibility for the Parliament to establish ad-hoc committees and commissions of enquiry. Several of these tools are described herein below.<sup>180</sup>

Hearings, either in plenary or committee meetings, are a primary tool of parliaments for obtaining information related to specific policies or issues. The Kenya parliament has occasionally conducted hearings. However, parliament has lacked the capacity to compel individuals to give testimonies.<sup>181</sup>

The vote of no confidence, or motion of censure, is a motion presented by parliamentarians which results in either the withdrawal or the confirmation of the Parliament's confidence in the government or one of its ministers. When a parliament withdraws its confidence in the government, the cabinet usually resigns or seeks a parliamentary dissolution. In some countries,<sup>182</sup> withdrawals of confidence lead to a process in which the head of state either calls for the resignation of the government or the dissolution of the parliament. When a parliament withdraws its confidence in a single minister, that individual typically resigns. This has not been a common practice in Kenya.

Committees of inquiry are usually ad-hoc parliamentary committees or commissions formed to carry out in-depth investigations on specific issues of public importance. These commissions usually benefit from a greater degree of access to information than normal committees. Their powers may include summoning witnesses to testify under oath, confronting one witness with another, requesting or seizing documents, ordering searches, organizing field visits, and more. In some countries, they may possess the same powers as a magistrate making a judicial inquiry.

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<sup>180</sup> Article 94 , Constitution of Kenya 2010

<sup>181</sup> Ibid

<sup>182</sup> Ibid



Committees of inquiry are a commonly used oversight instrument in parliaments around the world and may be used to investigate important cases of corruption or abuse of power.<sup>183</sup>

Audit institutions, such as the Auditor General<sup>184</sup> facilitate ex-post budget oversight by playing a “watchdog” role and reporting its findings either publically or directly to parliament. Supreme audit institutions monitor how the government uses the public purse and informs the Parliament of its observations. In some democracies, the auditor general reports to the Public Accounts Committee (PAC), this scrutinizes the findings of the audit and makes recommendations

Special standing committees are provided for in the internal rules of some parliaments to systematically oversee the government with regards to highly sensitive issues such as national security, defence, and military procurement policies.

Some committees are quite active in exercising their oversight functions,<sup>185</sup> while others receive reports from a department or organ of state only in the context of the annual budget vote, or even not at all. Notably active committees include the portfolio committees on Constitutional Development, Defence, Foreign Affairs, Justice, and Mineral & Energy Affairs, and the Select Committee on Land, Agriculture, and Environmental Affairs. Notably inactive committees include the portfolio committees on Education, Health, Home Affairs, and Sport and Recreation. Committees that do not correspond directly to a government department or other organ of state, such as the portfolio and select committees on Private Members’ Legislation, obviously have

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<sup>183</sup> Article 95 , Constitution of Kenya 2010

<sup>184</sup> Ibid

<sup>185</sup> Institute of Economic Affairs, 2009, The Parliamentary Budget Oversight In Kenya: Analysis of the Framework and Practices since 1963 to Date, Series No. 19 April 2010.

little opportunity or need to exercise an oversight function, and for this reason the committees have been excluded from this analysis.<sup>186</sup>

In parliamentary democracy, the committee system assumes great importance since Parliament, by its very nature cannot have complete oversight over State Owned Corporations and all its activities. Modern legislatures have therefore created among other devices, committee through which they strive to achieve effective surveillance over the other Corporations of the government.<sup>187</sup> Committees enable members of the public to participate in the budget and expenditure processes by either appearing before the committees or sending memoranda to air their views on the budget and give suggestions on how expenditures of corporations could be improved. Again, and not unexpectedly, different committees have varying levels of activity. A greater number of committees receive reports on budget or policy issues than on structural or current issues.<sup>188</sup>

The Kenya National assembly recognizes the important contribution that committees make to the role and functions of Parliament in the scrutiny of Public Corporations and activities of state owned corporations. The principal purpose of Parliamentary committees is to perform functions for which Parliament in its corporate form is not well fitted; that is finding out facts of the case, examining witnesses, sifting information and drawing up reasonable conclusions. Committees in a way take Parliament to the people and allow direct contact with members of the public by a section of the House when engaged in investigating actions of corporations. In respect of their formal proceedings, committee are an extension of the House, emitted in their inquiry by the

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<sup>186</sup> Article 98 , Constitution of Kenya 2010

<sup>187</sup> Ibid

<sup>188</sup>Waweru N and Riro Kamau, “ Committees and Governance in a Developing Country,” ( 2007) [www.yorku.ca/laps/people/working.../SAS-ACC2008-05-Waweru.pdf](http://www.yorku.ca/laps/people/working.../SAS-ACC2008-05-Waweru.pdf)(*accessed on 22nd October 2012*).

extent of the authority delegated to them but governed to a large extent in their proceedings by the same procedures and practices as those that prevail in the House, by which they are appointed.<sup>189</sup>

The National Assembly (Powers and Privileges) Act<sup>190</sup> confers similar and adequate powers, privileges and immunities as those that prevail for the House. Such powers and privileges are also conferred by the Standing Orders of the House. Consequently, committees have the legal empowerment to order the attendance of witnesses, the production of papers and records. Where any person is ordered to attend to give evidence declines to answer any question put to him on the pretext that it is of a private nature and not affecting the subject of inquiry, the chairman of such committee reports such refusal to the Speaker who would decide on the action to be taken.

The procedures of the House provide for the formation of four kinds of Committees; Committees of the Whole House; Standing Committees; Ad hoc Select Committees; and Departmental Committees;<sup>191</sup> We shall hereunder proceed to examine the committees.

Committees of the Whole House are of three types.<sup>192</sup> Committee of the Whole House on Committee stage of a Bill. On a bill being given a Second Reading, it stands committed to the Committee of the Whole House, unless the House resolves to commit it to an Ad hoc Select Committee. Committee of the Whole House on the Budget. Following the laying of annual or supplementary estimates of government expenditure before the House, and the budget speech by the Minister for Finance, the Committees of Ways and Means; and of Supply deliberate on them

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<sup>189</sup>Institute of Economic Affairs, 2009, The Parliamentary Budget Oversight In Kenya: Analysis of the Framework and Practices since 1963 to Date, Series No. 19 April 2010.

<sup>190</sup> Chapter 6, Laws of Kenya.

<sup>191</sup>Source:<http://bunge.gov.ke> for examination of Parliamentary Committees.

<sup>192</sup> Ibid

in sequence. Both Committees are of the Whole House. These expenditures include some from state owned corporations forwarded through the parent ministry.

The Committee of Ways and Means<sup>193</sup> confines itself to deliberation on the processes suggested by the Minister for Finance to raise funds to foot the budget for the particular Fiscal Year. These deliberations are supposed to last three days.

Committee of Supply<sup>194</sup> confines itself to deliberation on the distribution of funds to be raised in the Committee of Ways and Means to the various Ministries and Departments; this Committee does the distributions within the twenty allotted days before October 31, each Calendar year.

The Committee on Delegated Legislation<sup>195</sup> was established in the year 2007 and is charged with the mandate of ensuring that statutory instruments are laid before the House as may be provided under any written law and to scrutinize such instruments to ensure that they are consistent with parent statutes.<sup>196</sup> The Committee thus scrutinizes any regulations that state owned corporations may want to make to ensure that they are in line with the constituting act.

In the year 2011, the committee and other stakeholders (including NCLR) concluded a consultative workshop that saw stakeholders' recommendations on scrutiny of statutory instruments culminate into a draft Statutory Instruments Bill. The Bill was published mid October 2011.<sup>197</sup> The Bill seeks to streamline the process in which statutory instruments are made, the publications, operation and scrutiny of statutory instruments so as to foster transparency, accountability and public participation in the process.

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<sup>193</sup> Ibid

<sup>194</sup> Ibid

<sup>195</sup> Is a parliamentary Select Committee established by Standing Order 197 of the Standing Orders of the National Assembly.

<sup>196</sup> Standing Orders of the National Assembly; Order No. 197(2).

<sup>197</sup> Kenya Gazette Supplement No. 134, Bill No. 54.

Standing Committees also known as Sessional Committees,<sup>198</sup> consist of a minimum of five and a maximum of twenty Members nominated by the House Business Committee and appointed by the House, on a motion moved by the Leader of Government Business. The business carried out by the current eight Standing Committees is either routine and/or in-house. The lifespan of the membership of these Committees coincides with that of a Session.

The Committees falling under this category are:- House Business Committee:- prepares and manages the programme of the business of the House on a weekly basis, Public Accounts Committee:- examines reports by the Controller and Auditor-General<sup>199</sup> on Central Government expenditure and fund accounts; Public Investments Committee:- examines reports by the Auditor-General (Corporations) on accounts of state owned corporations; Speaker's Committee:- examines matters relating to the welfare of Members and staff of the National Assembly; Standing Orders Committee:- examines matters relating to and makes periodic reviews of the Standing Orders as necessary, Liaison Committee:<sup>200</sup>- examines and co-ordinates matters relating to operations of the Departmental Committees; and Powers and Privileges Committee:- is established under the National Assembly (Powers and Privileges) Act, (Cap 6, Laws of Kenya), and deals with issues regarding privileges of the house, members and staff.

Ad Hoc Select Committees<sup>201</sup> are those appointed by the House as and whenever the need arises to investigate, study and make recommendations on certain specific matters and issues for consideration by the House.

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<sup>198</sup> Standing Orders of the National Assembly; Order No. 200

<sup>199</sup> Article 229 , Constitution of Kenya 2010

<sup>200</sup> Standing Orders of the National Assembly; Order No. 202

<sup>201</sup> Standing Orders of the National Assembly; Order No. 197(2).

Public Accounts committee,<sup>202</sup> like other Financial committees, namely the Public Investments Committee and the Departmental committee on Finance, planning and Trade are mandated by the House to examine the accounts voted by the House to meet public expenditure and of such other accounts laid before the House as the particular committee may think fit. They also in the case of Public Investments committee examine reports if any, of the controller and Auditor-General and the Auditor-General (corporations) on public investments. The report and recommendations of the committee are expected to be supported by evidence adduced. Their verdict should not be contrary to the weight of evidence. The committee is not at liberty to entertain any proposition or go into any inquiry which does not come within the direct mandate for which they were appointed.

Parliamentary scrutiny of Government expenditure<sup>203</sup> by the committee is always done on past events rather than current issues. This does not help much in the prevention of possible embezzlement of public funds by those public officers entrusted with the custody of such funds.

### 3.3.5 Specific Failures by Parliament in its Oversight Role on State Owned Corporations.

The annual budget approval has become a ritual in the Kenya parliament. The Kenyan Parliament lacks the capacity for effective scrutiny of the budget. The budget process is the principal mechanism by Parliament to hold the executive accountable as it is periodic in nature and encompasses all government activities. In spite of the many shortcomings of the executive and its institutions, there has been no single occasion that the Kenyan Parliament has refused to approve the budget. Thus the executive has taken parliament for a ride and the executive has no

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<sup>202</sup> Standing Orders of the National Assembly; Order No. 198

<sup>203</sup>Frederick Staphenurst & Rasheed Draman, *African Parliamentary Reform*, books.google.com/books?isbn=0415677238,( accessed on 29<sup>th</sup> September 2013).

incentive take Parliamentary scrutiny seriously.<sup>204</sup> The key power of Parliament to cut budgets in response to poor financial management and the power to adjust spending during budget execution is also rarely exercised.

The parliamentary control of public finance shall not be complete without an assurance that the budget was implemented as authorized. Audit reports are not produced and tabled in the legislature as soon as possible to ensure their relevance. Long delays have undermined accountability. The relationship between Parliament and audit institutions is symbiotic. While parliament depends on highly quality audit reporting to exercise effective scrutiny, the auditor general in turn requires an effective parliament to ensure that departments take audit outcomes seriously.<sup>205</sup> The common practice across countries is that once parliamentary Public Accounts Committee (PAC) receives an audit report from the auditor general, hearings are the principal mechanisms by which officials from departments, agencies or other relevant bodies answer the committee. In Kenya the summoned officials appear in front of the PAC for interrogation. The interrogation normally focuses on the accounting officer who is a civil servant who is accountable to the legislature. The PAC then prepares a report and gives recommendations to parliament. However, in most of the instances, the recommendations of the committees are rarely acted on. In most situations, there are no mechanisms to assure Parliament's recommendations have been implemented.<sup>206</sup>

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<sup>204</sup>Barkan Joel and Njunguna N, "Kenya tries again, African Ambiguities" 1998. <https://pipl.com/directory/name/Ng'Ethe/Njunguna/>(*accessed on 22<sup>nd</sup> October 2013*).

<sup>205</sup>SIGMA (Support for Improvement in Governance and Management in Transition Countries, *Relationship Between Supreme Audit and Parliamentary Committees*, (2002) Organization of Economic Cooperation and Development, Paris.

<sup>206</sup> SIGMA, *Ibid*.

The Kenyan parliament is composed of several parties without one of them having an outright majority. The executive has thus on several occasions assembled a number of parties to have committee reports that are considered unpopular defeated. This has also been the common practice in most other African countries.<sup>207</sup> The overall political environment, suppressing democratic fundamentals such as access to information has highly hampered parliament's role to act as an effective overseer on government state owned corporations. There has been little access to high quality information and parliament lacks the analytical capacity, sufficient constitutional powers over state owned corporations. Lack of a well-developed legislative infrastructure that gives a strong role to committees and allows sufficient time for scrutiny of accounts of state owned corporations has been common main short coming of parliament.<sup>208</sup>

In Kenya financial scrutiny has been a daunting challenge. The parliament is poorly equipped to independently assess budget data. The political environment within which the legislature operates is not always conducive for oversight. For example the manner, in which the parliament votes on key issues, has had sharp criticism from the opposition parties,<sup>209</sup> regretting how the majority, over time, had endorsed in an omnibus manner whatever was presented by the executive. Parliamentary committees set up to investigate corruption scandals have sometimes been simply pacifist with no intention of addressing root causes or following through with findings.

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<sup>207</sup> Burnell, P "Financial Indiscipline in Zambia's Third Republic: The Role of Parliamentary Scrutiny" *Journal of Legislative Studies* 7 (3): 2001, pp 34-64.

<sup>208</sup> McGee, D.G. *The Overseers: Public Accounts Committees and Public Spending*, (2002) Commonwealth Parliamentary Association and Pluto Press, p 89.

<sup>209</sup> Public Hearings of the *Public Accounts Committee of Parliament in Kenya*. Available at [www.modernkenya.com/.../commentary-on-public-accounts-committee](http://www.modernkenya.com/.../commentary-on-public-accounts-committee) (accessed on 10th September 2012).



Reports of Public Investment Committee (PIC)<sup>210</sup> on appointments to state owned corporations need to be mentioned. Despite several recommendations made by the PIC that the people it adversely mentions should be charged in court, surcharged and barred from holding public offices, such individuals continue to serve in high positions both in government and private sector.<sup>211</sup>

### 3.4 Conclusion

The chapter has offered perspective and outline some of the issues related to improving corporate governance in Kenya. The thesis begun by noting areas of concern: regulatory and bureaucratic strangling, lack of capacity, lack of respect and trust, corruption and the threat of tribalism. On the other hand it is suggested that we have good constitution, potential and resources to counter these concerns. Initial decisions must be made to decide what to include and what to exclude before thinking strategically about improving standards of corporate governance in Kenya. It is suggested that the question of how best to improve standards of corporate governance is inextricably linked to governmental policies and behaviours. To stimulate strategic thinking along these lines, questions for consideration have been highlighted throughout the thesis. The importance of sound good quality corporate governance is not fully understood by many boards and board members, many of whom are inexperienced and not well educated or trained. There is no doubt that development of better standards of corporate governance could significantly improve Kenya's chances of success.

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<sup>210</sup> Eleventh report of the Public Investment Committee on the accounts of State Owned Corporations at p. XV. This is a select committee established under Standing Order No 188. The functions of the committee, are, among others, to examine reports and accounts of public investments, examine in the context of autonomy and efficiency of the public investments.

<sup>211</sup> Kiarie M, "Disqualification of Directors In Kenya," (2003) 54 *Northern Ireland Legal Quarterly*, pp 118-135

This chapter has broadly examined the oversight role of parliament in the governance of state owned corporations. From the above, it is evident that parliamentary oversight and practice do not grant Parliament powers to direct the corporations on how to carry out their mandate. Many state owned corporations have operated without parliamentary oversight. It is also clear that in the execution of its oversight function, Parliament encounters many challenges and these can best be resolved by a proactive Parliament setting tough monitoring laws. The next chapter explores how the governance of state owned corporations can be improved through an enhanced role of Parliament and by action of other stakeholders. The South African parliamentary system of oversight shall be considered as a as an example hat Kenya can borrow from.

## CHAPTER FOUR

### ENHANCING PARLIAMENT'S OVERSIGHT ROLE IN THE GOVERNANCE OF STATE OWNED CORPORATIONS: LESSONS FROM SOUTH AFRICAN PARLIAMENT

#### 4.0 Introduction

This chapter seeks to consider how to improve mechanisms of Parliament to facilitate its carrying out of an effective oversight role on state owned corporations. This can be achieved by enhancing the oversight role of parliament and other stake holders. Emphasis shall be put on comparative analysis to show how other jurisdictions have empowered Parliament to carry out its oversight role. Global lessons on transforming state owned corporations and the approaches that have been used shall be considered. The chapter borrows heavily from the practices in the South Africa Parliament in carrying out oversight on state owned corporations.

According to the South African model, successful state owned corporations should have a business culture with a mix of features from private and public institutions. The state owned corporations should have a clearly defined, consistent and communicated strategy that includes role, function and purpose. Appropriate legal framework that defines the governance and management of the state owned corporation should be put in place. The establishment of standards and monitoring criterion that is clearly based on the purpose of the corporation is crucial to its success.<sup>212</sup>

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<sup>212</sup>Report on the presidential task force on Parastatal reforms, October 2013  
[www.cofek.co.ke/Report%20of%20The%20Presidential%20Task%20force](http://www.cofek.co.ke/Report%20of%20The%20Presidential%20Task%20force)(*accessed on 21<sup>st</sup> November 2014*)

The South African definition of corporate governance is a system by which corporations are directed and controlled;<sup>213</sup> it focuses on the functions of a corporation's board as well as the role of the auditors. The King Report on Corporate Governance<sup>214</sup> provided guidance in respect of directors.' In South African context it is provided by external audit, internal audit and management. All these three have distinctively different roles in providing assurance. Audit committees coordinate the nature, extent and focus of the assurance to ensure that sufficient levels of assurance are provided to the board of directors and ultimately to all directors.

The responsibility of the Board is not only to ensure that the corporation operates within the frameworks set by law and regulations, but that it also takes into account its environmental and social impacts as well. In South Africa in 1994, a committee headed by Judge Mervyn King issued the King Report on Corporate Governance.<sup>215</sup> This report incorporated a code of conduct that went beyond the corporation and its financial matters, taking into account the corporations impact on the larger community. Almost a decade later, the King Committee released another report known as King II, which took the inclusive approach to managing of corporations even further.<sup>216</sup>

The premise of the King Report is that there are increasing expectations for corporations to operate as good citizens, due in part to the influence corporations have on the lives of stakeholders such as customers, employees, suppliers and communities and on the environment.

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<sup>213</sup> Stefan Andreasson. "Understanding corporate governance reform in South Africa: Anglo-American divergence, the King Reports and hybridization", *Business & Society* Available at: [http://works.bepress.com/stefan\\_andreasson/8/](http://works.bepress.com/stefan_andreasson/8/) (accessed on 10<sup>th</sup> October 2014).

<sup>214</sup> King Report on Corporate Governance for South Africa - 2002 (King II Report) (accessed on 10<sup>th</sup> October 2014).

<sup>215</sup> *The King Report on Corporate Governance*. King 1 Report (1994) and King 2 Report (2002) available from <http://www.iodsa.co.za/king.asp?ShowWhat=CodeBlock>. King 3 Report, January 2009

<sup>216</sup> Ibid

Corporations depend on these stakeholders, individually and collectively, for the goodwill required to sustain their operations and for maintaining their license to operate. All corporations operate within the broader society and the natural environment. What a corporation can and cannot do in terms of strategy is not only to be constrained by legislation, government policies and regulatory requirements but also by what is considered ethical and in accordance with the expectations of stakeholders and societal standards. As such the inclusive approach requires that the purpose of the corporation be defined, the values by which the corporation will carry out its activities be identified and it be communicated to all stake holders.<sup>217</sup> It is for these reasons that the South African approach to governance of state owned corporations was considered a role model for Kenya to borrow from.

#### 4.1 Oversight role of Parliament in Management of State Owned Corporations: the South African Perspective

Since 2001, corporate governance has received renewed interest internationally due to high-profile collapses. Enron and WorldCom in the US and Saambou Bank and Fidentia in South Africa are examples of prominent corporate collapses. Directors are expected to act in a socially responsible manner. Corporate social responsible conduct relates to important social, safety, health and environmental factors to which company management must have adequate regard.<sup>218</sup>

In the 2007 ASX's Principles of Good Corporate Governance and Best Practice Recommendations, corporate governance is defined as 'the framework of rules, relationships, systems and processes within and by which authority is exercised and controlled in

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<sup>217</sup>Ibid

<sup>218</sup>Dominic Barton, 'Capitalism for the Long Term', *Harvard Business Review*, March 2011, pp3-9

corporations.<sup>219</sup> Although South Africa is not a member state, the Organisation for Economic Co-Operation and Development's Principles of Corporate Governance are pertinent when interpreting principles of corporate governance. The aim of these principles is to assist governments in their efforts to evaluate and improve the legal, institutional and regulatory framework concerning corporate governance.<sup>220</sup>

In South Africa Principles of good governance are not only regulated in terms of legislation and the common law. Important recommendations are contained in Codes of Best Practice. The King III Report<sup>221</sup> deals with more or less the same issues as dealt with in King II. It provides general principles regarding ethical leadership and corporate governance (chapter 1), as well as principles of good governance relating to the board and directors (chapter 2), audit committees (chapter 3), the governance of risk and information technology (chapter 4 and 5), compliance with laws, codes, rules and standards (chapter 6), internal audit (chapter 7), governing stakeholder relationships (chapter 8) and integrated reporting and disclosure (chapter 9). The King III Report applies to all entities regardless of the manner and form of incorporation or establishment and whether in the public, private or non-profit sectors (para 13 of the introduction and background part in the report).

Sustainability is also very important as nature, society and business are interrelated and directors need to understand this. Sustainability reporting is one of the core aspects of good corporate governance, but has to be cost effective (6). Corporate citizenship (para 8.3 of the introduction and background part in the report) refers to the fact that a company is a person that has to operate

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<sup>219</sup>These principles (with the 2010 amendments) are available at [www.asxgroup.com.au/media/PDFs/cg\\_principles\\_recommendations\\_with\\_2010\\_amendments.pdf](http://www.asxgroup.com.au/media/PDFs/cg_principles_recommendations_with_2010_amendments.pdf) and issued by the Australian Securities Exchange

<sup>220</sup>See [www.frc.org.uk/Our-Work/Codes-Standards/Corporate-governance.aspx](http://www.frc.org.uk/Our-Work/Codes-Standards/Corporate-governance.aspx)

<sup>221</sup>Andreasson, S. (2011). Understanding corporate governance reform in South Africa: Anglo-American divergence, the King Reports, and hybridization. *Business & Society*, 50, 647-673.

in a sustainable manner. The responsibilities placed on individuals and juristic persons in terms of the constitution are relevant in this regard<sup>222</sup>

The report once again opted for the inclusive stakeholder value approach. The board should consider the interests of all legitimate stakeholders and not just those of the shareholders. Two approaches are referred to – namely the enlightened shareholder value approach, where stakeholders are only considered in so far as it would benefit the shareholders collectively, and the stakeholder inclusive approach, where the board would consider the interest of the stakeholders on the basis that it is in the best interests of the company. In the stakeholder inclusive model, recognised in the report, the legitimate interests of all stakeholders are considered when determining what is in the best interest of the company. The various interests of different stakeholders are determined on a case-by-case basis to act in the best interests of the company. A certain stakeholder may receive preferential treatment if that serves the interests of the company best.

Integrated sustainability performance and integrated reporting is also recommended in the report to enable stakeholders to make informed assessments on the economic value of a company. Emerging governance trends like alternative dispute resolutions, risk-based internal auditing and policies on remuneration were also included in the report. In short, the board should ensure that disputes are resolved effectively, efficiently and expeditiously as possible.<sup>223</sup> Internal audit should be risk-based and the auditors should provide the board with an assessment on an annual basis regarding the systems of internal control and also to the audit committee on the

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<sup>222</sup> See [www.iodsa.co.za](http://www.iodsa.co.za). Copyright of the code and the report rests with the Institute of Directors in Southern Africa. The report is also available at [www.iodsa.co.za](http://www.iodsa.co.za).

<sup>223</sup> See principle 8.6 for alternative dispute resolutions, principle 3.5 regarding internal auditing, as well as chapter 7 in general and principle 2.25 regarding remuneration policies.

effectiveness of internal financial controls.<sup>224</sup> Companies should remunerate directors and executives fairly and responsibly

The Parliament of South African is South Africa's legislature. Under the county's constitution, Parliament is composed of the National Assembly and the National Council of Provinces. Parliament has undergone many transformations as a result of the country history. From 1910 to 1994, Parliament was elected mainly by South Africa's white minority, before the first elections with universal suffrage were held in 1994.<sup>225</sup>

The South African government recognizes that well-managed and efficient state owned corporations that deliver on their developmental are crucial if South Africa is going to meet its agenda of building an effective democratic state.<sup>226</sup> In South Africa, effective state owned corporations spearheaded economic development and growth.<sup>227</sup> South African government used State Owned Corporations to expand the key infrastructure industries, such as rail, air, sea transport, telecommunications, water, coal-based synthetic fuels, and nuclear energy also the iron and steel.<sup>228</sup> Furthermore, the apartheid state also viewed these industries as key instruments for industrialization, employment creation and economic development, albeit based on racial segregation lines.<sup>229</sup>

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<sup>224</sup>Naidoo R, Corporate Governance: An Essential Guide for South African Companies (2nd ed), (2009), LexisNexis Publishers.

<sup>225</sup>Andreasson, S. (2011).Ibid

<sup>226</sup> Zuma, Jacob (2010) Presidency Budget Vote Debate. National Assembly, May, 12, Cape Town

<sup>227</sup>In the period after the Second World War many developed and developing countries created state owned corporations either by nationalizing existing companies or creating new state-owned companies. These were done either for ideological reasons, based on the argument that only state-owned corporations can serve the broader public interests; or for pragmatic reasons of market failure or to provide essential public goods, such as electricity provisions or telecommunications, that are too costly for the private sector to roll out.

<sup>228</sup> "The Failure of Rural Segregation Land Policies In South Africa: Black Land Ownership after the Natives Land Act, 1913-1936," by Harvey M. Feinberg, Department of History, Southern Connecticut State University. October 2000. 11 p.

<sup>229</sup>Thabethe, Elizabeth (2010) Speech by the Chairperson Of The Portfolio Committee Energy During The Occasion Of The Debate Of The State Of The Nation Address, National Assembly, Cape Town, February 15.



The South African Parliament's strategic vision is to build an effective people's Parliament that is responsive to the needs of the people, and that is driven by the ideal of realizing a better quality of life for all the people of South Africa and its mission is to represent and act as a voice of the people in fulfilling Parliament's constitutional functions of passing laws and oversight over State owned corporations.<sup>230</sup> Based on the vision and mission of Parliament and the constitutional requirements Parliament develops mechanisms to guide its work on oversight in the form of an oversight model.

The mandate of Parliament is enshrined in the 1996 South African Constitution Chapter 4 Section 42 to Section 82. Parliament achieves its mandate through passing legislation, overseeing government action, and facilitating public and international participation. The role of Parliament includes the promotion of the values of human dignity, equality, non-racialism, non-sexism, the supremacy of the Constitution, universal adult suffrage and a multi-party system of democratic government. It upholds citizens' political rights, the basic values and principles governing public administration, and oversees the implementation of constitutional imperatives.<sup>231</sup> Such wide mandate of South African Parliament is not provided in the Kenyan constitution. The Kenyan constitution limits its Parliament to mainly legislative functions and the vision of Kenyan parliament is limited to providing a just government for men.

#### 4.2 South Africa's Constitutional Mechanisms on Oversight

The South African Parliament consists of two Houses, namely the National Assembly (NA) and the National Council of Provinces (NCOP). Section 42(3) of the South African Constitution

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<sup>230</sup>Our parliament available at [http://www.parliament.gov.za/live/content.php?Category\\_ID=3](http://www.parliament.gov.za/live/content.php?Category_ID=3) accessed on 10<sup>th</sup> October 2013).

<sup>231</sup>Our Parliament › What Parliament does [www.parliament.gov.za](http://www.parliament.gov.za) › accessed on 10<sup>th</sup> October 2014).

provides that the National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the president, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive and state corporations' actions. The Assembly is further required in terms of section 55(2) the South African Constitution to provide mechanisms to ensure that all executive organs of state ( including state corporations) in the national sphere of government are accountable to it; and to maintain oversight of the exercise of national executive authority, including that of legislation, and any organ of state.<sup>232</sup>

The National Council of Provinces represents the provinces to ensure that the provincial interests are taken into account in the national sphere of government as stated in section 42(4) of the South African Constitution. The Council does this mainly by participating in the national legislative process and by providing national forum for public consideration of issues affecting the provinces. The Council's role is to exercise oversight over the national aspects of provincial and local government. It contributes to effective government by ensuring that provincial and local concerns are recognized in national policy making and that provincial, local and national governments work together effectively. In addition, Parliament facilitates public participation, involvement and transparency; facilitates co-operative government; facilitates international participation; and represents the interests of the people.<sup>233</sup>

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<sup>232</sup>Arya, B., & Bassi, B. (2011). Corporate social responsibility and broad-based Black economic empowerment legislation in South Africa: *Codes of Good Practice. Business & Society*, 50, 674-695

<sup>233</sup>A. Vaughn and L. Ryan *Corporate Governance in South Africa: A Bellwether for the Continent*. *Corporate Governance: An International Review*, Vol. 14, No. 5, pp. 504-512, September 2006

Sections 42(3) and 55(2)(b) of the South African Constitution that are the basis for Parliamentary oversight provide as follows:

Section 42(3) *“The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action.”*

Section 55(2) (b) *“to maintain oversight of the exercise of national executive authority, including the implementation of legislation; and any organ of state.”*<sup>234</sup>

In order to carry out its mandate as well as the oversight functions of the National Council of Provinces, the South African Parliament established three focus groups, that of, the Projects Focus Group, the Budget Focus Group and the Committees Focus Group.<sup>235</sup> Each of the focus group was given specific terms of reference as shown below.

The terms of reference for the Projects Focus Group were to conduct constitutional landscaping, conduct an audit of bodies performing public functions; analyze the oversight role of institutions supporting democracy; and review rules on oversight.

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<sup>234</sup>See sections 42 and 55 of the Constitution of South Africa

<sup>235</sup>Parliamentary committees were established to facilitate the National Assembly’s oversight role, since it would be difficult for the National Assembly to interrogate all public departments and entities. [National Treasury (2005) Governance Oversight Role over State-Owned Entities. Pretoria, Government Printer, p.3.

The terms of reference for the Committees Focus Group<sup>236</sup> were to draft the best practice guide in respect of oversight practices of committees; draft guidelines for portfolio and select committees to allow for joint planning and oversight work, draft guidelines on joint planning on protocols for structured communication between the two Houses of Parliament, draft recommendations for capacity development of committees; and draft recommendations on appropriate record-keeping systems and monitoring mechanisms in the Committee Section.

The terms of reference for the Budget Focus Group were to develop procedure for the amendment of money bills and draft legislation on the amendment of money bills.

The objective was to develop an oversight model for Parliament in line with the Constitution and Parliament's strategic vision, together with their alignment of resources to fulfill its mandate with greater efficiency.<sup>237</sup> The focus groups objective was to provide the framework that describes how Parliament conducts oversight. It sought to improve existing tools of parliamentary oversight, streamline components of the new focus groups with existing components, and enhance Parliament's capacity to fulfill its oversight function in line with Parliament's strategic direction. Furthermore, the rationale for the oversight and accountability scrutinized existing practices and thereafter offered alternatives that could be utilized in the future. An oversight and accountability model comprised the, features, which include: the values and principles by which Parliament conducts oversight; the mechanism or framework to conduct oversight; and the processes and resources required for conducting oversight.

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<sup>236</sup> Article 62, Constitution Of South Africa

<sup>237</sup>The Economics of Public Enterprise. London, Routledge; Holmstrom, Bengt and Milgrom, Paul (1991) Multi-task Principal Agent Analysis. *Journal of Law, Economics and Organization* 7, pp. 24-51

In the Kenyan constitution no role is given to the Senate<sup>238</sup> in oversight of state owned corporations. Oversight committees do not have clear and wide mandates as those of South African focus group. Kenya needs to have clear mandates for its committees as is the case in South Africa.

#### 4.3 Institutional Characteristics of Oversight and Accountability and Existing Mechanisms Utilized by the South African Parliament

##### 4.3.1 Practices of Committees to Effect Oversight and Accountability

Parliamentary committees are established as instruments of the Houses in terms of the Constitution, to facilitate oversight and the monitoring both of the Executive and state owned corporations, and for this purpose they are provided with procedural, administrative and logistical support.<sup>239</sup> Parliamentary committees have various tools of oversight such as, including departmental briefing sessions, annual and departmental budget analyses, calls for submissions and petitions from the public, the consideration of strategic plans and annual reports, and public hearings. Whilst committees have established ways of conducting their oversight functions, their business generally runs parallel to government's political cycle, unless there are specific "ad hoc" oversight functions that are required. In programming their oversight activities, they would thus act in a responsive/reactive manner.<sup>240</sup>

Committees in South Africa, unlike Kenya, can interact with civil society organizations, organized business, experts and professional bodies as a way of enhancing accountability and

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<sup>238</sup> Article 95 , Constitution of Kenya 2010

<sup>239</sup> Black, B.; Kraakman, R.;Tarassava, A.:Russian Privatization and Corporate Governance:What went wrong? In: *Stanford Law Review*, 52(200) 4,P.1731-1808.

<sup>240</sup> Committees Overview <http://www.parliament.sa.gov.au/committees/Pages/.aspx> accessed on 10<sup>th</sup> October 2013)

can call Ministers and corporation heads to account on any issue relating to any matter over which they are effecting oversight as per the provisions of sections 56 and 69 of the South African Constitution. Current practices and oversight mechanisms include the committees of Parliament and plenary processes.<sup>241</sup>

The mandates of the committees are provided for in the rules of each House and the Joint Rules Committee.<sup>242</sup> The Rules offer a setting which facilitates detailed scrutiny of legislation, oversight of government and corporations activities and interaction with the public and external factors. Consideration of committee reports is necessary because committees work as intermediary bodies between interest groups and government.<sup>243</sup> In addition, the work of committees include study visits that entail physical inspections, conversing with people, assessing the impact of delivery and developing reports for adoption by committees which contain recommendations for the Houses to consider. In exercising oversight, committees often obtain first-hand knowledge from people engaged in the direct implementation of specific programmes and/or who are directly responsible for service delivery in the corporations. In order to evaluate the work of state owned corporations from a broader perspective, committees may invite experts from outside government to provide background knowledge and analysis on relevant issues.<sup>244</sup>

Committees in South Africa conduct their business on behalf of the House and must therefore report back to the House on matters referred to it for consideration and report. When a committee

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<sup>241</sup> Ibid

<sup>242</sup> Ibid

<sup>243</sup> The Role and functions of Committees in Parliament, [http://www.parliament.gov.za/live/content.php?Category\\_ID=28](http://www.parliament.gov.za/live/content.php?Category_ID=28) accessed on 10<sup>th</sup> October 2014).

<sup>244</sup> Ibid

reports its recommendations to the House for formal consideration and the House adopts the Committee report, it gives the recommendations the force of a formal House resolution pursuant to its constitutional function of conducting oversight. The House then also monitors executive compliance with these recommendations.<sup>245</sup>

Portfolio committees of the NA and select committees of the NCOP<sup>246</sup> are established by the NA. Portfolio committees mirror portfolios in government whilst select committees mirror the clusters in government. Due to the fact that committees conduct their business on behalf of their respective Houses, they report to the relevant House individually and separately on matters referred to them to ensure that each House may make any decisions as it deems necessary.

Joint committees are committees that are established in terms of the Joint Rules and have specific mandates relating to transversal issues, such as women, children, youth and disability. When necessary, Parliament establishes ad hoc committees to assist in its investigation of transversal issues. Parliament, in accordance with the Constitution, legislation and the rules, can also establish standing committees. Two joint standing committees currently exist in Parliament through legislation, namely the Joint Standing Committee on Intelligence and the Joint Standing Committee on Defence.<sup>247</sup>

The NA Rules and the Public Audit Act (No 25 of 2004) establish the Committee on the Auditor-General with a mandate to maintain oversight over the Auditor-General and perform

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<sup>245</sup> Andrew West. *Theorizing South Africa's Corporate Governance* in Journal of Business Ethics ISSN 0167-4544, 2006, vol.68, no4, pp.433-448[16 page

<sup>246</sup> Ibid

<sup>247</sup> Article 69, Constitution of South Africa

functions in terms of the Public Audit Act. The Joint Committee on Ethics and Members' Interests is established by the Joint Rules<sup>248</sup> (Rule 121) to implement the Code of Conduct for Assembly and permanent Council members and develop standards of ethical conduct for Assembly and Council members. The Committee on Public Accounts is established by the NA Rules (Rule 204) and is tasked with considering financial statements of all executive organs of state, constitutional institutions, and state corporations any audit reports issued on those statements as well as any reports issued by the Auditor-General on the affairs of any executive organ of state or other public bodies or any other financial statement referred to the committee in terms of the rules.

In identifying mechanisms for Parliament to effect its oversight role, a gap was identified which necessitated the establishment of a Joint Parliamentary Oversight and Government Assurance Committee.<sup>249</sup> The committee has some powers governing the work and function of committees of Parliament. Its main purpose and mandate is to consider and deal with broader, transversal and cross-cutting issues. It pursues all assurances, undertakings and commitments given by Ministers on the floor of the House(s) and the extent to which these assurances have been fulfilled. The Inter-Parliamentary Union presented a study which was a compendium of parliamentary practice as it applies to oversight. It elaborated on a broad range of tools that parliaments have at their disposal or may want to develop. An oversight committee can recommend that other permanent committees investigate specific problems that it has identified. Other permanent committees can also bring matters before the general oversight committee. Rules were developed to accommodate and furthermore express the functions, powers and objectives of the proposed

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<sup>248</sup> Article 71, Constitution of South Africa

<sup>249</sup> Article 90, Constitution of South Africa



committee. The committee is one of the subcommittees of the Joint Rules Committee chaired jointly by designated House Chairpersons and its membership is based on the issues before it within the cluster or multi-cluster group of portfolio and select committees, and therefore it will have a rotational membership. Secretarial support will be provided by the Oversight Advisory Section and the Table staff of both Houses.<sup>250</sup>

The Kenyan Parliament Committees face challenges such as; limited resources in terms of funds to facilitate smooth running of committee, there are not enough staff to service all the committees of parliament, membership turnover- new members tend to come with changing sessions of parliament thus missing out the experience the previous team had acquired and committee work is constrained by time. Committee proceedings are not recorded verbatim as is the case with House procedure, this affects the details. Most committees are faced with certain challenges/constraints that impede their achieving their jurisdictional mandates. Further, Kenya does not have a Joint Parliamentary Oversight and Government Assurance Committee. This leaves the Kenyan committees to operate without monitoring and evaluation.<sup>251</sup>

#### 4.3.2 Oversight Advisory Section

In developing the oversight model,<sup>252</sup> there was a need for support services relating to the monitoring and tracking of issues between Parliament and the Executive, and on all other related matters within Parliament's broader mandate. An Oversight and Advisory Section was created in response to the need identified. Its main functions are to provide advice, technical support, co-

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<sup>250</sup> Ibid

<sup>251</sup> Standing Orders of the National Assembly; Order No. 192

<sup>252</sup> Du Plessis, Jean J., Mc Convill, B., Bagric, M: Principles of contemporary Corporate Governance. I. Edition, Cambridge University Press 2005.

ordination, and tracking and monitoring mechanisms on issues arising from oversight and accountability activities of members of Parliament and the committees to which they belong. The work of this section includes the archiving of relevant information to facilitate the retention of institutional memory.

The objectives of the Oversight Advisory Section<sup>253</sup> is that it provides information and advisory support to parliamentary oversight activities as an information management section and the reporting cycle which involves the reporting by state corporations through reports. This assists the committees responsible for Finance and the portfolio committees to enhance their oversight activities and tracking of issues that are addressed in monthly reports to Parliament and those that would have been raised by the Committee on Public Accounts. Tracking and Monitoring Unit, which addresses decisions in the House(s) and at committee level, as well as issues from emanating from the floor of the House(s) and from committee reports that set tabled in the House(s). We do not have such a committee in the Kenyan parliament and is proposed for creation in the next chapter.

#### 4.4 Evaluating Annual Reports by Committees of the Houses

There is a mechanism for evaluating annual reports from government corporations. This is one of the procedures through which corporations are held to account. Ministers, have to table annual reports of departments and corporations for which they are responsible within six months after the end of the financial year (30 September). The Speaker immediately refers all annual reports to the relevant portfolio committee and the Committee on Public Accounts for consideration and

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<sup>253</sup> Ibid

report. Late submission requires a written explanation by the Minister providing reasons for the delay. The Committee on Public Accounts reviews the audited financial statements and the audit reports of the Auditor-General and indicates to the relevant portfolio committee which specific issues they should be aware of with regard to oversight. The committee has to evaluate thoroughly the technical quality and the performance information presented in annual report of any state corporations. Members should have a clear understanding of the portfolio over which they are conducting oversight and what it is they want to achieve (improve service delivery).

#### 4.5 Developing Specialization for Parliamentary Committees

The committee system in South Africa has drawn much guidance from the Westminster system, as has other jurisdictions. However, many jurisdictions have adopted the Westminster approach to accommodate variations in the structure of committees based on their specific needs and the need for specialization. The need for fundamental change in the manner in which committees exercise oversight is necessary because South Africa has pioneered mandatory oversight by Parliament through the Constitution. The existence of specialized committees adds value to parliamentary work because these committees can work simultaneously to address problems from different angles.<sup>254</sup>

The South African Parliament considers strongly resourcing, capacitating and developing the specialization of committees that are dealing with broad issues that cut across departments and ministries in all spheres as this has an impact on society and the nurturing of our democratic objectives. This consideration is motivated by the type, quantity and duration of work,

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<sup>254</sup> Ibid

complexity of issues and the need for the development of specialization as is the case in other parliaments in the world.<sup>255</sup>

The programming of Parliament prioritize reports for tabling which arise from the work done and conducted by these committees on all areas of their focus for consideration and decision-making within the ambit of enhancing oversight. These committees are to be given the right to consider and initiate debate on some of the issues they find to be of national consideration, as identified in the process of their oversight work. Furthermore, these committees must provide annual reports which must be published as well as tabled in Parliament to allow other committees to identify issues that will help them in enhancing oversight and effecting accountability. Parliament prioritizes the development of criteria to identify on an ongoing basis which committees qualify for strengthened resourcing, capacity and development based on the broadness of their mandates.<sup>256</sup>

#### 4.5.1 Appointment of ad hoc Committees

The current system in Parliament of appointing ad hoc committees to investigate a matter of public interest is effective. Issues of public interest, as they arise and are made known to Parliament, are investigated through the appointment of ad hoc committees. This enhances Parliament's role on oversight and ensure compliance with the Constitution by becoming responsive to the needs of the people as outlined in the vision and mission statement of

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<sup>255</sup> Ibid

<sup>256</sup> Ibid

Parliament. In addition, Parliament should, when it deems it necessary, be proactive in appointing ad hoc committees to address issues of public interest.<sup>257</sup>

#### 4.5.2 Accountability and Oversight in Relation to the Executive

NA Rule 117 and NCOP Rule 249 provide for the Executive to reply to a question for written reply within 10 working days of the day for which the question was set down for written reply. Should the Executive fail to do so, the question may, upon request of the member of Parliament in whose name the question stands, be put to the Cabinet member in the House for oral reply on the relevant question day. NA Rule 115 (3) provides that a question for oral reply may not stand over more than once. This is generally assumed to be a period of 14 days. It is still a moot point as to what happens to a question standing over more than once as there are such instances, and no sanctions in this regard exist. There is a constitutional obligation on the Executive to account to Parliament (section 92(2) and (3) of the South African Constitution). In March 2003, the NA Rules Committee decided that the Speaker should write to Cabinet members and the Leader of Government Business with regard to members of the Cabinet not complying with their constitutional obligations as there is no compulsion on a member of the Cabinet to respond to a question other than the option of members' statements, motions or a request for a debate on errant members of the Cabinet.

#### 4.6 Individual Member Oversight

Amidst the multifaceted and multidimensional work of members of Parliament lies the role of members to effect individual oversight.<sup>258</sup> This role is performed through questions, members' statements, motions without notice, notices of motion, motions on the Order Paper, debates in the

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<sup>257</sup> Standing Orders of the National Assembly; Order No. 195

<sup>258</sup> Standing Orders of the National Assembly; Order No. 197

Houses, member- initiated debates, constituency work, interventions made by members, private members' legislative proposals and the processing of bills. Political parties have constituency offices from which the public can obtain information on new Bills or discuss issues of concern with members of Parliament. Each party represented in Parliament is allocated funds to develop its own method of constituent outreach. Each Member of Parliament is assigned by their political party to perform constituency work. Notwithstanding this, members are not precluded from performing work in other constituencies. Constituency work affords members the opportunity to conduct individual oversight. It constitutes the closest level of interaction between members and the public, and provides a platform from which members can familiarize themselves with the issues confronting their constituents. Through this interaction, a member may address matters of local, provincial and national concern. However, it is important that, in exercising their oversight role, members take care not to encroach on the jurisdiction of provincial and local political representatives but rather adhere to the principles of co-operative government. Interventions made by individual members is one of the more effective forms of individual oversight as it empowers members to interact directly with departments and other organs of state at national, provincial and local government level. Members have a duty to alert Parliament to any issue of concern identified during such oversight interventions.<sup>259</sup>

In practice, departments establish structures to process concerns raised by members of Parliament, such as departmental parliamentary liaison officers. These liaison officers are accountable to the Director: Ministerial Services within each department. Their key function is to facilitate communication between the ministry, the department and members of Parliament. Concerns raised by members are referred to senior officials within departments, with the veiled

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<sup>259</sup>Ibid

threat that should the department not respond in a satisfactory manner; the matter will be brought to the House formally at the risk of great embarrassment to the department, and ultimately the Minister. If the member's informal communication with a department does not yield satisfactory results, he or she has discretion to communicate formally with the relevant Minister to provide him or her with the opportunity to rectify the matter before placing it formally before the House. The observance of this protocol allows for the services not to be disrupted. To ensure greater communication on issues arising from members' individual oversight work ministries have developed guidelines for members' interaction and engagement with Ministers on issues of public concern.<sup>260</sup>

Kenyan members of parliament experience many barriers while carrying out their individual oversight responsibilities. The first barrier is the enforceability of Parliamentary Oversight Reports. Parliamentary Committees or commissions of inquiry set up to investigate corruption scandals in corporations have sometimes been simply pacifist with little intention of addressing root causes. Secondly, resource constraints are a major obstruction to oversight. The government over the years has not invested sufficiently in strengthening the technical capacity of parliament to undertake oversight. Thirdly, lack of transparency from the executive further compounds the challenges faced by parliament in performing its oversight role. The executive especially in procurement does not give parliament enough information to track expenditure. Fourthly, lack of commitment and discipline on the part of parliamentarians has constantly undermined their oversight role. It is common practice in Kenya that legislators devote little time to oversight due to constituent service activities and legislation that are more visible and oriented towards their re-election. Finally, there is limited oversight capacity and individual members' incompetence as a

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<sup>260</sup>Kenya National Assembly Official Record (Hansard) 24 Oct 1996, [books.google.com/books?id=FTHpVzjfCHwC](https://books.google.com/books?id=FTHpVzjfCHwC)(accessed on 21<sup>st</sup> September 2013).

key challenge. Members of parliament lack adequate expertise on key development issues. This has impacted negatively on Parliament's ability to discharge its oversight mandate.<sup>261</sup>

#### 4.7 Factors that make South African parliament more effective on oversight of State Owned Corporations

##### 4.7.1 Parliamentary facilities and self-organization.

The well-resourced Parliament of South Africa, such as is typical of developed economies, has, inter alia: sufficient expert staff to provide impartial support to members across parliament's whole range of work; a comprehensive library and information service; office facilities for individual members, with their own secretarial and research support and dedicated facilities for the main opposition party or parties.<sup>262</sup>

In Kenya these facilities are insufficient, due to lack of resources and staff with the appropriate expertise. When parliaments lack capacity through limited resources, this affects oversight of state corporations. Parliament's oversight work is less rigorous; members become dependent upon the expertise of government staff whose first allegiance is to the executive; governments may simply bypass parliament altogether in the development of policy and legislation. If parliament is consequently seen to be less relevant by the public, or its role is not understood, this may in turn affect its capacity to claim additional resources from a restricted national budget.<sup>263</sup>

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<sup>261</sup>Ibid

<sup>262</sup>Association of Secretaries General of Parliaments (1991). The Parliamentary Budget, in *Constitutional and parliamentary information*, N° 161 accessed on 10<sup>th</sup> October 2013)  
<<http://www.asgp.info/Resources/Data/Documents/UUELRQYYICJCPTBSGBJTOTYJDIVHON.pdf> accessed on 10<sup>th</sup> October 2013)

<sup>263</sup>Ibid



#### 4.7.2 Parliamentary autonomy

A report by the Association of Secretary Generals of Parliament (ASGP) in 1998 defines autonomy in this context as ‘on the one hand non-dependence and non-subordination of Assemblies in relation to the Executive, and, on the other, the possibility of the Assembly freeing itself at least partially from the rules of ordinary law so as to follow instead its own regulations.’<sup>264</sup> It notes that ‘in almost all states, the principle of the autonomy of Parliament is formally recognized in the constitutional texts dealing with the separation of powers.’ And it concludes that the general trend is to make this principle increasingly effective in practice.<sup>265</sup>

Whatever the level of resources and staffing available, it is now becoming widely accepted that parliaments should be independent of the executive in the way they organize themselves, including control over their own timetable and the ability to recall themselves outside normal session if circumstances so require. This model of a professional parliamentary service with its own organization and career structure is now becoming widely accepted, in parliamentary and presidential systems alike. It recognizes that serving parliament is a distinctive activity where, given the nature of party competition, the norms of non-partisanship and professional discretion are at a special premium. Parliamentary autonomy here also includes the development of independent legal counsel to advise parliament on the legal dimensions of government policy, as well as on legislative drafting.<sup>266</sup>

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<sup>264</sup>Ibid

<sup>265</sup>Michel Couderc, ‘The principle of parliamentary autonomy’, *Constitutional and Parliamentary Information*, No. 176, 1998

<sup>266</sup>Ibid

#### 4.7.3 Control over Business of Parliament

Equally relevant to a parliament's autonomy is control over its own business, and over the allocation of time between different types of business and between different parliamentary groups. In the South African Parliament there is a Programme Committee for each House, meeting weekly, and a joint Programme Committee for both Houses which have the responsibility for preparing the annual programme for Parliament, including the legislative programme. This Committee allocates time for the Executive's legislative and other business, and sets deadlines by which the Executive must introduce bills in Parliament, subject to fast-tracking in exceptional circumstances according to predetermined criteria.<sup>267</sup> Within this agreed allocation, the Leader of Government Business, who is 'responsible for the affairs of the national executive in Parliament', takes responsibility for programming all parliamentary business initiated by the executive and for the attendance of relevant Cabinet members. These Programme Committees typically take decisions by consensus.<sup>268</sup> The Parliament of Kenya lacks autonomy the South African Parliament enjoys.<sup>269</sup>

#### 4.8. The Oversight and Accountability Model (OVAC) for the South African Parliament

Since 1999, the South African Parliament conducted extensive research and investigation into what exactly oversight means democracy in terms of our Constitution and the values of a democratic state and how it can improve the efficiency and effectiveness of parliamentary oversight. The outcome of this study was the development of an Oversight and Accountability Model (OVAC) which was adopted by both Houses of Parliament in early 2009. Some of the more salient features of the recommendations for the OVAC were contained in proposed new

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<sup>267</sup>Ibid

<sup>268</sup>Commonwealth Parliamentary Association (2005). *Administration and financing of parliament: a study group report* <[http://www.cpahq.org/uploadedFiles/Information\\_Services/Publications/CPA\\_Electronic\\_Publications/AdministrationandFinancingofParliamentStudyGroupReport.pdf](http://www.cpahq.org/uploadedFiles/Information_Services/Publications/CPA_Electronic_Publications/AdministrationandFinancingofParliamentStudyGroupReport.pdf)> accessed on 10<sup>th</sup> October 2013)

<sup>269</sup> Ibid

mechanisms for conducting oversight and accountability. I will attempt to summarise these new mechanisms briefly.<sup>270</sup>

#### 4.8.1 Joint Parliamentary Oversight and Government Assurance Committee

In identifying mechanisms for Parliament to effect its oversight role, a gap was identified which necessitated that consideration be given to the establishment of a Joint Parliamentary Oversight and Government Assurance Committee. The committee should have some powers governing the work and function of committees of Parliament. Its main purpose and mandate would be to consider and deal with broader, transversal and cross-cutting issues. It would furthermore pursue all assurances, undertakings and commitments given by Ministers on the floor of the House(s) and the extent to which these assurances etc. have been fulfilled.<sup>271</sup>

#### 4.9 Conclusion

This chapter has discussed various approaches that can be applied to enhance corporate governance in State Owned Corporations. The experience from South African Parliament has been considered, with a comparative analysis of the situation obtaining in the Kenyan Parliament. It is save to conclude that it is not only one mechanism that can work, but by applying most of them while considering the special circumstances of a specific State Owned Corporation. Some of the recommendations are the subject of the next chapter that is the conclusion of this thesis.

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<sup>270</sup> Ibid

<sup>271</sup> Ibid

## CHAPTER FIVE

### SUMMARY, CONCLUSION AND RECOMMENDATIONS

#### 5.1 Summary

Based on the foregoing, the role of state owned corporation is to: develop and maintain physical infrastructure for rapid and sustainable economic growth, assist in poverty reduction, create an enabling environment for development, provision of high quality products and services. Corporations as the backbone of economic development must adhere to the legal provisions in existence at any particular time and the ethical standards.

The main challenges facing state owned corporations are: wastage of resources, at times inadequate financial resource, unfavorable contractual commitments; lengthy procurement procedures leading to protracted court cases; fragmented institutional framework, inefficient regulatory frameworks and increasing demand for services.

Kenyan parliamentary oversight has not been effective. However, one of the changes introduced by the Constitution of Kenya 2010 is the enhanced role of Parliament in governance generally and in oversight of state owned corporations. There are specific provisions mandating openness and public inclusion in the preamble to the constitution, explicit affirmation of the constituent power of the public in the sovereignty clause and requirements for involvement and consultations. In Kenya, the new constitution mandates openness, transparency and public involvement. The achievement of this depends on effective implementing legislation; proper administrative structures; powers and capacities of Parliamentary committees. Hence Parliament must take its rightful place in society and uphold the Kenyan Constitution 2010.

In order to improve performance of the state owned corporations and ensure efficient management, the Kenya government has initiated reform programs, which target state owned corporations and public service in general. The reforms have recommended the re-organization and restructuring of some state owned corporations, to make them more efficient.<sup>272</sup> These reforms are yet to be implemented. It is imperative therefore, for the state owned corporations to design strategic responses, to address the problems of poor service delivery.

## **5.2 Conclusion**

The true test of democracy is the extent to which Parliament can ensure that government remains accountable to the people by maintaining oversight of Executive's actions. Whether Parliament is indeed successful in effectively holding the Executive accountable will ultimately depend on the extent to which committees and individual members of Parliament actively exercise their oversight role. Whilst an appropriate legal framework and adequate resources constitute critical elements for effective Parliamentary oversight and accountability, it is equally important that individual members, as well as members of the Executive, understand the rationale for government and the purpose it serves.

Effective oversight requires the political will on the part of the individual members of Parliament to utilize the oversight mechanisms. This thesis has presented a framework within which Parliament's oversight role can be structured, so as to enhance Parliament's oversight capacity. Proper and efficient oversight of corporations is and will always be crucial to the economy of the world in the same manner as that of governance of countries. Good governance will effectively

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<sup>272</sup> Report on the Presidential Task Force on Parastatal Reforms, October 2013, Ibid.

promote responsive and accountable corporations that are legitimate and managed with integrity, probity, transparency, recognition and protection of stakeholder rights.

### 5.3 Recommendations

#### 5.3.1 Law Reform (Statutes)

There is no doubt that the constitutional provisions are adequate, but the multiplicity and inadequacy of others laws regulatestate owned corporations is now obvious. Parliament must come up with appropriate legislation to regulating state owned corporations. Parliament should endeavor to consolidate and harmonize the laws that currently regulate state owned corporations. There is need for Parliament to establish and codify clear legislation on the establishment of state owned corporations.Parliament should consider amending and aligning the State Corporations Act (CAP 446) with the Constitution of Kenya 2010. For example under the State corporations Act, the President has power to give directions of a general or specific nature to members of the Board. This provision should be amended as this is inconsistent with the principle of independence.

It is recommended that Kenyan parliament should ensure that the findings and recommendations of parliamentary committees are implemented. This would ensure that the effectiveness of the committees is not compromised. This can be done by Parliament having the power enforce implementation of the reports.Parliament must as well share its oversight role with other agencies. The key is to establish a proper working relationship between Parliament and the extra-parliamentary institutions of accountability such as independent investigatory bodies.

### 5.3.2 Reforms in the Appointment Process of Board Members

There is a need to integrate the current practices in board appointments, and have a transparent process, with a high degree of independence, supported by a legal regime that ensures merit-based appointments. There is need for parliamentary participation and/or independent party involvement in the selection and nomination processes.

It is time an Oversight Authority is established consisting of stakeholders and professional bodies to provide general oversight and vet the appointment of board members for allstate owned corporations. The proposed Oversight Authority should ensure strict observance of corporate governance and ensure that those appointed to manage State corporations are compliant with Chapter 6 and Article 201 of the Constitution of Kenya 2010. The state should act as an informed and active owner and establish a clear and consistent ownership policy, ensuring that the governance of state owned corporations is carried out in a transparent and accountable manner.

### 5.3.3 Training and Continuous Capacity Building

There is immediate need to increase the research and capacity of Parliamentary committees. Continuous capacity development for members of Parliament and support staff in terms of information and communications technology, budgeting practices and other skills are required to enhance their oversight capacity. Offices of members of Parliament should also be afforded additional human resources and upgraded in terms of technology. There is need to integrate Parliament's public participation with its overall oversight mechanism and provide the appropriate capacity, especially human resources to committees. It is vital that all public participation processes become inputs to the work of appropriate committees. Parliament should adopt a policy requiring each new parliament to assess and review its oversight capabilities, including its oversight model, at least once during its five-year lifespan.

Within the state owned corporation, there should be timely and accurate dissemination of important information to ensure that there is an update system that promotes efficiency in the day to day running of the corporation. The Board members must have all relevant information availed to them prior to their meetings to ensure that all arising matters are dealt with amicably.

Performance evaluation of boards should be institutionalized across all state owned corporations to monitor efficiency and effectiveness of boards. Parliament should set the right governance structures in place such as Board Charters, Board manual and Strategic plan, for the all state owned corporations.



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