

Kenya's Legal and Regulatory Framework on the Appointment of Board of Directors (BOD) for State Owned Enterprises (SOE) and Its Effectiveness

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Abstract

This article evaluates the legal and regulatory framework for the appointment of BOD for SOE in Kenya. In addition to that the composition and factors that influence the appointment of boards other than legal provisions such as politics, gender and diversity will be investigated. This will be done against the background that the provisions of the Constitution of Kenya 2010, if fully implemented would reshape the existing framework on the directors' appointments. This is pursuant to its provisions on the values and principles of public service articulated in chapter 6 on leadership and integrity, Articles 10 on national values and principles of governance and Article 232 on values and principles of public service. SOE have performed dismally in Kenya over the last few decades and this is attributed to poor corporate governance and especially the poor appointment procedure of BOD. Measured against some of the well performing SOE, the calibre of those appointed to steer the BOD determines the success or otherwise of SOEs. Although SOE play a very significant role in the economic development of the country, they have become fertile ground for political patronage, tribalism, cronyism and a place where retired, rejected and non performing civil servants find soft landing. "The tragedy in Kenya is that those who have mismanaged the Government, the developmental finance institutions, and even state corporations are those who continue to circulate in and out of Government as Ministers, Assistant Ministers, and advisers and so on." However the appointment procedure of BOD for SOE was characterised by political considerations, controlled by the Office of the President, regulated by various laws that were not harmonized and the absence of clear guidelines on determining the experience, integrity or academic qualifications for those to be appointed.

Introduction

State owned enterprises have performed dismally in Kenya over the last few decades that is attributed to poor corporate governance and especially the poor appointment procedure of board.¹ Measured against some of the well performing SOE, the calibre of those appointed to steer the BOD determines the success or otherwise of a SOE.² Although SOE play a very significant role in the economic development of the country, SOE have become fertile ground for political patronage, tribalism, cronyism and a place where rejected and non performing civil servants find a soft landing.³ "The tragedy in Kenya is that those who have mismanaged the Government, the development, finance institutions, and even state corporations are those who continue to circulate in and out of Government as Ministers, Assistant Ministers, and advisers and so on."⁴ However the appointment procedure of BOD to SOE was characterised by political considerations, controlled by the Office of the President, regulated by various laws that were not harmonized and the absence of clear guidelines to determine the experience, integrity or academic qualifications for one to be appointed. All SOE have a BOD that should ideally be equipped with complementary skills and oversight duties which should lead to better business outcomes.

¹ John Nellis, Public Enterprises in Sub-Saharan Africa, in Barbara, Grosh. *Public Sector Enterprises in Kenya: What Works, What doesn't Work and Why* 7 (London: Boulder and Company, 1991) at 11.

² Republic of Kenya, *African Socialism and its Application to Planning in Kenya. Sessional Paper No. 10 of 1965* (Nairobi: Government Printer, 1965) at 18.

³ Ibid.

⁴ Centre for Corporate Governance Development, 'A Decade of Parastatal Waste: A Study of the Audited Accounts of State Corporations over the Period from 1993 to 2002' at 25 available at <<http://www.cgd.or.ke/publications.asp>> (accessed 3 January 2017) at 25.

Most corporate governance guidelines recognize the fact that the board is the focal point of corporate governance.⁵ The board is ultimately accountable and responsible for the affairs and performance of the SOE.⁶ As such, the composition and structure of the board and methods of appointment have a direct bearing on performance of a company.⁷ This chapter evaluates the legal and regulatory framework for the appointment of BOD in SOE in Kenya. In addition to that the composition and factors that influence the appointment of boards other than legal provisions such as politics, gender and diversity will be investigated. This will be done against the background that the provisions of the Constitution of Kenya 2010, articulated in chapter 6 on leadership and integrity, Articles 10 on national values and principles of governance and Article 232 on values and principles of public service if fully implemented would reshape the existing framework on the directors' appointments. This is pursuant to its provisions on the values and principles of public service.

Forming the BOD in SOEs

The boards of SOE are formed in three principle ways: the first one consists of those formed by line ministries.⁸ Directors in this class are appointed pursuant to the provisions of the enabling legislation (parent statute). That notwithstanding, appointments under this rubric are done on grounds of political patronage, tribalism and cronyism without consideration of one's qualifications or experience.⁹ This is because such appointments are procured through lobbying of Ministers and their close associates.¹⁰

The second category of boards comprises those boards where the government has controlling shareholding (commercial and financial institutions). Boards here are chosen according to the provisions of the company's Act.¹¹ Here the selection of the board members is regulated by the memorandum of association (MOA) and articles of association (AOA) of the firms during the annual general meeting. Corporations in this category have adopted good corporate governance practices as they have shown to be efficient and effective. In this category are SOE like, Safaricom that has been benchmarked against the best on the market. The Government's power to appoint board members in these corporations is only proportional to the number of shares held.

In the third category are boards where directors are elected by the stakeholders, such as line ministries especially those established under the various crops Acts and regulatory agencies like the Electricity Regulatory Board (ERB). The government appoints the boards in this category as part of its constitutional mandate to protect the public interest.¹² However the office of the President plays the most important in the appointment of BOD.

The poor performance of SOE illustrates that the powers of the President to appoint and remove directors is not only bad but unsustainable as well, because it leads to poor corporate governance. The office of the President has oversight over SOE, a function it is ill equipped to perform owing to conflict of interest.¹³ The powers of the President to exempt SOE from the provisions of the SCA and Exchequer and Audit Act, creates a loophole that denies the PIC the mandate to examine the accounts of the exempted corporations.¹⁴ SOE exempted from SCA have shown evidence of fraudulent dealings, delay in the preparation of financial and audit reports and poor expenditure controls.¹⁵

⁵ Examples of corporate governance guidelines recognizing the fact include; the OECD principles on corporate governance (2004), principles of corporate governance in Kenya prepared by the private sector initiative for corporate governance (1999), the Capital Markets Act, guidelines on corporate governance practices by public listed companies in Kenya (2002), the South African King's Committee report on corporate governance (1994).

⁶ Guideline 2.1.1, King Committee Report on Corporate Governance, 1994 (South Africa).

⁷ Ibid.

⁸ Section 6 (e), State Corporations Act, 1987.

⁹ Danstan Omari Mogaka, *Public Enterprises and the New Constitution: Towards a Better System of Corporate Governance* (Unpublished LLM Thesis: University of Nairobi, 2011) at 38.

¹⁰ Ibid.

¹¹ Section 9 and 14, Companies Act (Chapter 486 of the Laws of Kenya).

¹² Centre for Corporate Governance Development, op cit 4 at 25.

¹³ Mogaka op cit 9 at 40.

¹⁴ Ibid. at 41

¹⁵ Ibid.

Legal Framework Governing appointment of BoD

The appointment of BOD to a SOE should ideally be done through a properly managed and effective process to ensure that a balanced mix of proficient individuals is selected and who should add value and bring independent judgment to bear on the decision-making processes.¹⁶ The Ndegwa Committee recommended the criteria for appointments to the board should be based on ability, judgment, experience and integrity.¹⁷

In Kenya, SOEs are primarily governed pursuant to the State Corporations Act¹⁸ and the Exchequer and Audit Act.¹⁹ However, there are a plethora of other statutes that establish state corporations and that seek to regulate the respective state corporations such as Kenya Anti-Corruption and Economic Crimes Act, Cap 65 of the Laws of Kenya (2003), Companies Act 1962 (Cap 484), Government Financial Management Act, Cap 412B of the Laws of Kenya 2004, Public Audit Act number 12 of 2002, Public Officer Ethics Act, Act Number 4 of 2003, Public Procurement and Disposal Act, Act Number 3 of 2005.

The current legal and policy framework for the appointment of BOD shows a number of characteristics that fly in the face of good corporate governance. For example the entire process was controlled by the President, who would either appoint board members directly or indirectly through the power vested on him by the Constitution (Permanent Secretaries). In that regime all public servants held office at the pleasure of the President. The office of the President also controlled other oversight institutions (SCAC, ISC, PIC, PAC, Auditor General and the Attorney General), whose effect was to remove the element of accountability from SOE.

The Office of the President

The Office of the President was vested with wide powers under the State Corporations Act²⁰ (SCA) and the Exchequer and Audit Act²¹ to supervise all matters relating to SOE. Under the SCA, the holder of the office of the President could establish a SOE,²² assign ministerial responsibility,²³ appoint chairpersons of BOD²⁴ and give directions of a specific or general nature²⁵ to the board. In addition the President had powers to revoke the appointments earlier made and constitute new boards if the need arose.²⁶

State Corporation Advisory Committee (SCAC)

Section 3(1) of the SCA, gives the President power to establish state corporations.²⁷ The Act also envisages the BOD performing key functions in the management of corporations.²⁸ The SCA further provides that the State Corporations Advisory Committee (SCAC) may advise the President or Minister on the appointment, removal or transfer of officers and staff of SOEs. Similarly the SCA determines the terms and conditions of the service for public officers in SOE.²⁹ This in effect creates an opportunity for the executive to control SOEs. The SCAC is an advisory committee with no real legal oversight authority.

¹⁶Private Sector Initiative for Corporate Governance, 'The Principles of Corporate Governance in Kenya and Sample Code of Best Practices for Corporate Governance' available at www.ecgi.org accessed on August 12, 2011.

¹⁷Ndegwa Committee Report. The committee was a commission of inquiry on public service structure and remuneration. The commission was constituted January 15, 1970 by the former president H.E. Jomo Kenyatta to investigate the organization and structure of the public services and to recommend reforms whichever desirable. It published its report in May 1971 and presented the same to the president.

¹⁸Chapter 446, of the Laws of Kenya.

¹⁹Chapter 412 (Revised Edition 2009) of the Laws of Kenya 1987.

²⁰Chapter 446 of the Laws of Kenya.

²¹Chapter 412 of the Laws of Kenya.

²²Section 3, State Corporations Act.

²³Ibid. Section 4.

²⁴Ibid. Section 5.

²⁵Ibid. Section 6.

²⁶Ibid. Section 7.

²⁷This section provides that, 'The President may, by order, establish a state corporation as a body corporate to perform the functions specified in the order.'

²⁸Section 15, SCA which provides that: A board shall be responsible for the proper management of affairs of a state corporation and shall be accountable for the moneys, the financial business and the management of state corporations.'

²⁹Ibid. Section 27.

However, although the principal statute governing the process of appointment of Heads and Board members of state corporations is the SCA, a multitude of other Acts of Parliament, Orders, Regulation, and Circulars regulate the process of appointment of board members to various SOEs. For instance, there is a conflict where some statutes creating SOEs provide that the appointment of CEO should be the preserve of the line Minister. This negates the power given to the board to steer SOEs whereas the SCA is clear that the CEO should be appointed by the board.³⁰ State Corporations (Performance Contracting) Regulations on their part empower boards of SOEs to recruit chief executives of SOEs. The line Minister's role is to choose the chief executive of an SOE from a list of three names recommended by the board. The BOD is allowed to consult with the State Corporations Advisory Committee³¹ in making recommendations on persons to be appointed as chief executive of any SOE. The Public Officers Ethics Act (2003), on its part requires SOE directors and employees to be politically neutral.³²

When not appointing the directors directly, the office of the President also controlled all institutions that gave oversight, advisory and inspectorate services to SOE. Members of State Corporation Advisory Committee (SCAC),³³ whose role is to review and investigate SOE and make recommendations to the office of the President were appointed by the President.³⁴ This amounted to conflict of interest and no wonder the body lacked the requisite autonomy and independence to play an oversight role since they were presidential appointees.

The Inspectorate of State Corporations (ISC)

The Inspectorate of State Corporations is a body created under Section 18 of the State Corporations Act. The members of the ISC are appointed by the President. The role of this agency is to advise the government on all matters affecting the effective running of the Public Enterprises.³⁵ This is done through the compilation of periodic reports to the Minister and the Auditor General (Corporations).

Ministry of Finance

The Ministry of Finance has the overall mandate of implementing recommendations of the Parliamentary watchdog committees (Public Investment Committee (PIC) and Public Accounts Committee (PAC)).³⁶ The Permanent Secretary (PS) in charge of treasury is represented in every SOE's board. His recommendations to the Attorney General to prosecute directors involved in misappropriation of funds went unheeded. This is partly because, to do so, it would appear the Government would be admitting failure. To that extend the failure to implement watchdog recommendations by the ministry is not surprising.³⁷

The oversight role of the Treasury is compromised by a number of factors. Firstly, the Permanent Secretary (PS) who is the accounting officer of the Ministry of Finance is a civil servant was an appointee of the President pursuant to Section 111 of the Constitution. He therefore serves at the pleasure of the President³⁸ and thus lacks the independence to supervise the BOD. Secondly the PS at Treasury represents the ministry on boards of SOE and is a party to the board's decision making process and thus the Treasury cannot escape blame for the abuse of office, wastage and misappropriation of public funds that is so often blamed on boards of SOE.³⁹

³⁰Ibid. Section 5(3).

³¹SCAC falls under the office of the President and is established under section 26 of the SCA. It consists of a chairman, permanent secretary to the treasury, Director of personnel management, Inspector –General (Corporations) and eight other members appointed by the president. Its mandate includes advising on the matters and performing any functions it is required to perform under the Act including to review and investigate the affairs of state corporations and make such recommendations to the President as it may deem necessary, to advise the President on the establishment, reorganization or dissolution of state corporations amongst other functions.

³²Section 16, Chapter 183 of the Laws of Kenya.

³³Section 27, State Corporation Act 1987.

³⁴ Ibid.

³⁵Section 19, State Corporations Act 1987.

³⁶ Centre for Corporate Governance and Development op cit note 4 at 43.

³⁷ Ibid.

³⁸ Section 25(1), Constitution of Kenya 1992 (Amended).

³⁹Barbara Grosh, *Public Enterprise in Kenya: What Works, What does not, and Why?* (Lynne Rienner Publishers: Boulder, 1991) at 34.

The effectiveness of the PS in attending too many board meetings is in question since some of the boards are regulatory in nature such as Electricity Regulatory Commission (ERC). This creates potential for conflict of interest.

Gaps and Weaknesses in the Legal and Regulatory Framework

There is increasing evidence that a country's legal system plays a significant role in determining the success of its corporate governance system.⁴⁰ The findings of this research have shown that good corporate governance is associated with countries with a strong legal system. In Kenya, the appointment, removal and oversight over SOEs is controlled by the executive who use it to reward political cronies.⁴¹ This is at odds with good corporate governance guidelines which envisage merit based appointment process that is accountable and transparent. Although the country is making efforts to train its directors, it remains questionable whether Kenya can achieve good corporate governance.

Politicization of appointment processes exposes SOE to financial scandals since directors are at variance with market forces. Corporations have often been used as instruments of personal aggrandizement, fraud, bringing the Kenyan economy to its knees⁴² as the examples of NSSF and CMC illustrated. As if that is not bad enough, owing to the inefficiency of the legal system corruption and political interference, investigations into the solvency of SOEs have not borne much fruit. As a result, the perpetrators of fraud and mismanagement of public resources have not been prosecuted.⁴³

Politicization of the Appointment Process

Although the SCA is the principal statute regulating appointments, discipline and removal of the BOD, it does not give clear guidelines on the qualifications, selection and appointment processes of members to the respective boards. This ambiguity has created an avenue for possible abuses in appointments based on political considerations at the expense of merit. It would be expected that all public appointments should be governed by the overriding principle of meritocracy, by a deliberate and well informed choice of individuals who through their abilities, experience and qualities match the need of the public body in question.⁴⁴ Failure to do so leads to an erosion of good corporate governance and performance of the corporations in question.

Despite the provisions of the SCA and regulations regarding board appointments, line Ministers have at times used tribalism in appointing directors even where they do not possess the requisite academic qualifications and experience.⁴⁵ Unfortunately, there is no statutory provision requiring directors to have expertise and experience in the management of SOEs.⁴⁶ Directors appointed in this manner lack the objectivity and independence of judgment when making critical decisions pertaining to SOEs as they are answerable to the appointing authority and not the BOD.⁴⁷ They are more likely to act as individual representatives of the appointing authority, a task which is often at odds with bringing efficiency and effectiveness in the management of SOE. The majority of serving BOD in SOEs is composed of ex-civil servants with little or no business experience and therefore do not add value to the board.⁴⁸

⁴⁰Jensen, M C and W H Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure', (1976) 3 *Journal of Financial Economics*

⁴¹Kiarie Mwaura, 'The Failure of Corporate Governance in State Owned Enterprises and the Need for Restructured Governance in Fully and Partially Privatized Enterprises: The Case of Kenya', (2007) 31 (1) *Fordham International Law Journal* 34.

⁴² An example is the Golden-berg scandal which cost Kenya approximately \$4 billion, roughly 10% of its gross domestic product (GDP).

⁴³ Centre for Corporate Governance Development, 'A Decade of Parastatal Waste: A Study of the Audited Accounts of State Corporations over the Period from 1993 to 2002' at 27 available at <<http://www.cgd.or.ke/publications.asp>> accessed 30 April 2016.

⁴⁴ Office of the Commissioner for Public Appointments, (UK) Code of Practice for Ministerial Appointments in Public Bodies, August 2005, at 9.

⁴⁵ Samuel Siringi, 'Ministers Disregard Rules Over Key Jobs', *Daily Nation* (Kenya May 19, 2009) at 4.

⁴⁶Kiarie Mwaura, 'Regulation of Directors in Kenya: An Empirical Study', (2002) 13(12) *I.C.C.L.R* at 470.

⁴⁷Ibid.

⁴⁸King Committee Report on (1994) (South Africa) at 25.

The push for appointments made to the BOD is made on ethnic grounds; as an illustration Members of Parliament from the Coast region clamoured for the appointment of a Managing Director for Kenya Ports Authority from the coastal communities.⁴⁹

Additionally, the powers given to the President and the line Ministers to appoint SOE directors have heavily politicized the boards,⁵⁰ in total violation of the provisions of the Public Officers and Ethics Act 2003. The excessive powers accorded to the President and line Ministers (executive influence) in making appointments have led to the erosion of efficiency in the running of SOEs owing to the appointment of incompetent directors to sit in SOE boards. As such, there is evidence that links directors who were responsible for the collapse of some state corporations not only being appointed to other directorships but being appointed cabinet ministers as well.⁵¹

The involvement of stakeholders in board appointment seems not to have added much value. For example, the Secretary General of the Central Organization of Trade Unions (COTU) represents workers' interests' in all SOEs boards where the organization has been allotted a slot to appoint a representative. It is not practically possible for one person to attend so many board meetings and provide value in this enterprise. As such, the director of the workers' representative is forced to make technical appearances in the meetings since he/she does not have time to be effective other than a casual glance at the papers and soon is off to another board meeting.⁵² This raises questions of whether stakeholders' participation will effectively add value to SOE boards as they were intended. Political interference can be regulated in the nomination of SOE boards and increasing their independence and professionalism by putting in place a structured nomination process, making sure that the ultimate selection criteria is based on competence.

Diversity in Appointment of BOD

The concept of diversity in appointing board members has not been well articulated in Kenya's legal system. The Guidelines on Workplace Diversity in Australia,⁵³ define diversity to include gender, age, language, ethnicity, cultural background, sexual orientation, socio-economic background, personality, religious beliefs, family responsibilities and cognitive style. When discussing diversity, it is important to move beyond race and gender and put emphasis on the unique talents, experience, knowledge, skills and insights that a person possesses and brings to bear on the management style. Diversity can also be viewed as a focus on the influence of different cultures, educational levels, ages, gender, regional backgrounds, sexual orientation and ethnicity on quality, product development and other core business issues.⁵⁴ Workplace diversity therefore, involves recognizing the value of individual differences and managing them in the workplace for productive use. It also involves how people perceive themselves and for others how those perceptions affect their interactions. The diversity of the board mentioned in Section 2.1.4 of the CMA Guidelines is a matter of interest to Kenya's corporate governance strategy.

Diversity is important in the appointment of BOD because of the influence it has on work relations.⁵⁵ For example it would offer a SOE greater perspective on business issues and opportunities as well as a wider range of ideas and solutions. The benefits of incorporating diversity in making appointments to SOE boards cannot be overemphasized. Eshiwani points out that a typical dysfunctional board will denote a lack of corporate culture and given its broad regional composition, a lack of national values such as hard work and integrity in the doing of business.⁵⁶ As discussed in the foregoing section, if the President and line Ministers are responsible for appointing directors to SOE boards, they should embrace diversity in appointments and avoid nepotism and political expediency.

⁴⁹*Daily Nation*, (Kenya September 3, 2008) at 7.

⁵⁰ *Ibid.*

⁵¹ Centre for Corporate Governance Development op. cit note 4.

⁵² Sunny Bindra, 'Before Joining Any Board of Directors, Ask Yourself Why?' *Business Daily* (Kenya April 12, 2010).

⁵³ Part of a series titled "Working Together" issued by the Public Service and Merit Protection Commission of Australia following the passage of the Public Service Commission Act 1999.

⁵⁴ Thomas, R Roosevelt, *Beyond Race and Gender: Unleashing the Power of Your Total Work Force by Managing Diversity*, (New York: AMACOM, 1991) at 35.

⁵⁵ *Ibid.*

⁵⁶ Eshiwani, 'Director Liability in the Wake of Uchumi (Collapse)', *Institute of Directors* (Kenya), July 14, 2006.

The benefits that are attendant to diversity would include: greater improvement in the performance of SOE,⁵⁷ reduced cases of mismanagement,⁵⁸ increased levels of innovation since a diverse BOD has a broader range of different backgrounds and perspectives. Diversity also gives the board a wider range of ideas and insights to draw on in decision making and policy formulation. In addition it would offer a deep understanding of the needs of a wider spectrum of people as a consequence of broader representation.⁵⁹

Additionally, where diversity is incorporated in BOD, it would build the relationship of the SOEs' with the community; enhance the contribution of board and lead to improvement in the quality of programs, products and services of SOE.⁶⁰

There is a sense in which SOEs can borrow from some of the most successful organizations in the private sector that truly value diversity and recognize its way of doing business.⁶¹ They focus on inculcating and embedding the principles of diversity in their culture and management systems. Competitive management practice is also another benefit that would be realized if diversity in board appointments would be considered.⁶² This is due to the fact that such SOEs would have productive and fulfilling workplaces which would help them attract and retain employees. In turn, this would lead to savings in recruitment and training costs, as well as maintaining corporate knowledge and expertise.

Diversity will provide opportunities for different viewpoints since diversity would bring in a larger pool of ideas and experiences from which an SOE can draw from to meet its objectives and goals effectively. It is important to note that in embracing diversity in board appointments, the appointing authority will be reflecting on the expectations of the new Constitution and the community about a fair, inclusive, and productive public service.⁶³

The new Constitution⁶⁴ addresses the issue of diversity by prohibiting the state from discriminating against anyone either directly or indirectly on any ground⁶⁵ and further prohibits any person from directly or indirectly discriminating against another person on the grounds specified beforehand.⁶⁶ Further, Article 27 (6) obliges the State to take legislative and other measures including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination. The Employment Act of 2007⁶⁷ also prohibits against discrimination on any grounds in employment. Pursuant to these provisions, it is clear that the new Constitution embraces diversity to effect the true spirit of the Constitution, the President and line Ministers should in their future appointments of persons to the board to be well guided and incorporate diversity and shun making appointments as a reward to friends⁶⁸ or political allies and nepotism.

Kenya can borrow from the Australian Public Service Act of 1999 (APS)⁶⁹ and the Public Service Commissioners Directions on how to develop and incorporate diversity programs in board appointments. The Act lays down the Australian Public Service values that are aimed at achieving diversity in appointments and employment. However, it is crucial to note that perceptual, cultural and language barriers need to be overcome for diversity in boards of SOE to be effective. Incorporating diversity in board composition would also in the long run enhance the independence of SOE boards because it would prevent the appointment of cronies who are allied to politicians and who lack the requisite expertise.

⁵⁷ Centre for Governance and Development op. citnote 4 at 6.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Thomas, op. cit note 54 at 35.

⁶¹ Loden, Marilyn, *Implementing Diversity: Best Practices for Making Diversity Work in Your Organization*, (St. Louis: McGraw-Hill, 1995) at 21.

⁶² Ibid

⁶³ Article 232, Constitution of Kenya 2010.

⁶⁴ Article 27 of the Constitution (2010) on Equality & Freedom from discrimination.

⁶⁵ Article 27(4) of the Constitution (2010) prohibits discrimination on the grounds of race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

⁶⁶ Article 27 (4), Constitution (2010).

⁶⁷ Cap 226 of the Laws of Kenya.

⁶⁸ Najib Balala's appointment of his friend and political adviser to head the Kenya Utalii College.

⁶⁹ The APS provides a workplace that is free from discrimination and recognizes and utilizes the diversity of the Australian Community it serves (s. 10(1) (c).

Gender Mainstreaming in Appointment of BoD in Kenya: Women on BoD

Gender mainstreaming is part of diversity but receives special mention because it has a substantial effect on board performance. Gender does not just mean women, but due to a history of gender discrimination in favor of men that is fuelled by a patriarchal society, a discussion of women on BOD becomes critical as a component of diversity.⁷⁰ Although Article 27 of the Constitution provides for the equality of both genders, this has not always been the case. However, it is necessary to address this issue own since diversity encompasses so much more than gender as has been outlined beforehand.

Throughout the world, women are recognized as a powerful force for growth and development. The current Home Secretary and Minister for Women and Equality in the United Kingdom, Theresa May once said that: “Inclusive and diverse boards benefit from fresh perspectives, new ideas and broad experience. A company with a board that reflects the people it serves is better able to understand its customers, and there is growing evidence that companies with more women on their boards outperform their male-dominated rivals.”

A new study prepared by Ontario's Richard Ivey School of Business⁷¹ and the Wellesley Center for Women⁷² concludes that corporations benefit from the presence of women on the board of directors. The Wellesley Center for Women in part has stated that:

We find that women do make a difference in the boardroom. Women bring a collaborative leadership style that benefits boardroom dynamics by increasing the amount of listening, social support, and win-win problem-solving. Although women are often collaborative leaders, they do not shy away from controversial issues. Many of our informants believe that women are more likely than men to ask tough questions and demand direct and detailed answers. Women also bring new issues and perspectives to the table, broadening the content of boardroom discussions to include the perspectives of multiple stakeholders. Women of color add perspectives that broaden boardroom discussions even further.⁷³

The drawback however, is that there is gender inequality in employment both in the private and public sector. In both instances, women employees are fewer as compared to their male counterparts. The composition of women and men in BOD is not an exception and follows that pattern. The Permanent Secretary in the Ministry of Trade and Industry David Nalo, noted in 2007 that, gender inequality is a serious economic issue in Kenya and addressing it would lead to improved outcomes not only for women, but for families and the society as a whole. It has been argued that where a BOD is male dominated, there is a risk of group think which eliminates a diverse approach to issues in decision making as well as lack of variety. It is therefore necessary for line Ministers and the President to consider having a gender balance in appointments to SOE boards. This would assist in eliminating group think as it has been proven that men and women often have a different way of approaching various issues. Fortunately, the new Constitution in Article 27 (8) provides that the state shall put in place legislative measures to implement the gender mainstreaming which envisages that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender. This provision provides an avenue for women to be appointed to sit on boards of SOEs. However at the time of publication this constitutional provision had not been fulfilled as the envisaged legislation had not yet been passed.

Various studies have established that competitive advantages is the rationale for companies both in the private and the public sector to consider increasing the number of women sitting on the board:⁷⁴ First, there is better performance during financial crises, more so if the crises is linked to excessive risk taking. This is backed by studies that have demonstrated that women are more cautious, and, choose less risky orientations and more prudent options.⁷⁵ Secondly, women are better at governance and according to a Conference Board study, boards hosting more women pay more attention to regulating conflicts of interest, monitoring risk and financial control, and maintaining good relationships with investors and other stakeholders of the corporation.⁷⁶

⁷⁰Loden, op. cit note 61 at 21.

⁷¹ Available at <<http://www.bis.gov.uk/news/topstories/2011/Feb/women-on-boards>> (accessed on 19/12/2016).

⁷² Available at <<http://www.negotiationlawblog.com/wellesleyStudy.pdf>> (accessed on 19/12/2016).

⁷³ Wellesley Center for Women, Available at <<http://www.negotiationlawblog.com/wellesleyStudy.pdf>> (accessed on 3 January 2017).

⁷⁴ Available at <<http://www.proposal/board-of-directors/1571>> (accessed on 19/12/2016).

⁷⁵ Victoria Pynchon, ‘Note to Board of Directors: *Women Make a Positive Difference*’, available at <www.mediate.com/articles/PynchonVbL20080211A.cfm> (accessed on 19/12/2016).

⁷⁶ Ibid.

Thirdly, women on boards present a better decision-making process since they are receptive to different viewpoints and more emphasis on the long term, which generates enriched debates and sound decision making which leads to better financial performance.⁷⁷ This is great departure from the male perspective who tend to put more weight on short term impact of decisions. Fourth and much more importantly, a study by the McKinsey Consulting Group shows that corporations with more women on their board report a better return on equity.⁷⁸

Lastly, having women on boards creates a better image for investors, that is why the number of women on the board is an important criteria used in evaluating the performance of corporations and the assessment of corporate social responsibility.⁷⁹

Effect of the New Constitution (2010) on Appointment of Directors to SOE Boards

The new Constitution heralds a new dawn that if implemented envisage reshaping the legal and regulatory framework governing the appointment of SOE and chief executives.

The president's excessive powers over SOE have been removed, together with the power to issue directives to boards of SOEs and appoint chief executives. The new Constitution requires all appointments to SOE's boards to be based on fair competition and merit.⁸⁰ The Constitution of Kenya contemplates transparency, accountability and participation of Kenyan citizens in governance as the guiding national principles and values that have to bind public officers and state organs, in making and implementing decisions.⁸¹ The cabinet ministers will now be accountable to the public in all the appointments they make. Chapter six of the new Constitution has been wholly dedicated to leadership and integrity of state officers to which all SOEs subjected to. Article 73(2) lays down the guiding principles of leadership and integrity as: Selection on the basis of personal integrity, competence and suitability, or election in free and fair elections; objectivity and impartiality in decision making and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices; selfless service based solely on the public interest demonstrated by honesty in the execution of public duties; the declaration of any personal interest that may conflict with public duties; accountability to the public for decisions and actions and discipline and commitment in service to the people. Further, the conduct of State Officers is clearly laid down by the provisions of Article 75 of the Constitution (2010). Article 79 obliges Parliament to enact legislation to establish an independent Ethics and Anti-corruption Commission for purposes of ensuring compliance with, and enforcement of the provisions of Chapter Six. This has already been done and if this commission takes its job description seriously, then arbitrary appointments as has been previously observed will be a thing of the past.

Going by these specific and clear provisions of the Constitution, if fully implemented, appointments to SOE's boards would be carried out in a transparent and fair process than was previously the case. Moreover, as the Constitution is the supreme law of the land, its provisions must be adhered to strictly. Contraventions of these provisions can lead to any interested or affected party to challenge such appointments that are done without due regard to the laid down legal provisions. Parliament has been given the mandate to vet all appointments to key state organs.⁸² However, although the new Constitution marks a good starting point in reforming the institutions, it is doubtful whether these provisions will comprehensively overhaul the current system of appointments to directorships due to the deep vested political and financial interests. This in a large part will be possible if there are guarantees that the appointment and vetting will not be based on political expediency characterized with horse trading among and between political parties.

There is a danger of ending up with the same people being re-appointed to directorships on the basis of their ethnicity, political connections, tribalism, nepotism or any other criteria other than competence. However, Article 118 of the Constitution could provide a safeguard to horse trading as it requires Parliament to conduct its business in an open manner and facilitate participation and involvement in its legislative and other business.

⁷⁷ Aleks and Shkolnikov, 'Women and Corporate Governance', available at www.cipe.org/blog/2011/01/27/women-and-corporate-governance/#-T55Aj7P/rSk (accessed on 19/12/2016).

⁷⁸ McKinsey Consulting Group. Available at www.bis.gov.uk/assets/biscore/business-law/docs/w/11-75-Women-on-Boards accessed on 19/12/2016)

⁷⁹ Available at www.bis.gov.uk/assets/biscore/business-law/docs/w/11-75-Women-on-Boards accessed on 19/12/2012).

⁸⁰ See Article 232 (g) of the Constitution (2010).

⁸¹ Ibid. Article 10.

⁸² Article 132 (2), the Constitution of Kenya 2010.

This study holds the view that, the substance of Article 165 of the Constitution gives the High Court of Kenya jurisdiction to hear and determine any matter relating to interpretation or contravention of any of the provisions of the Constitution. The lack of fair competition and merit could constitute sufficient grounds for the public to challenge irregular appointments of BOD in the constitutional court. Kisero aptly sums up these new constitutional provisions when he notes:

I support the provision of the Constitution that stipulates that all future political appointments will be vetted by Parliament. This is a good starting point. We must rid boards of state owned enterprises of individuals with nothing to offer in skills and experience. We must replace these people, who are usually cronies of ministers with well –functioning professionals in these boards. Nominations of boards should be transparent, clearly structured and based appraisal of skills and competences.⁸³

In order to curb politicization of appointments to BOD in SOE, directors are barred from holding office in political parties under the new Constitution. Additionally, retired civil servants cannot hold more than two concurrent remunerative positions as chairman or directorship of SOE as has been the case previously.⁸⁴ The impunity witnessed in the past where directors responsible for the collapse of SOE were not only appointed to other directorships but to cabinet as well, will be a thing of the past. This is pursuant to Article 75 of the Constitution which bars them from holding any public or state office.

Conclusion

As demonstrated by the foregoing, board composition and independence are important indicators of good corporate governance. The inefficient and ineffective management of SOEs in Kenya can be attributed to among other things, poor appointment criteria caused by a weak legal framework, politicization of the appointment process, lack of diversity, The performance of SOE can be measured against the manner of appointment of its directors. The composition of the BOD of Public Enterprises consists of the Chairman, the Chief Executive Officer (CEO), the Permanent Secretary (PS) of the parent ministry, the Permanent Secretary of Treasury⁸⁵ and seven other members not employees of the corporation, three of whom are 38 appointed by the line Minister.⁸⁶ Under Section 6(1A and B) of the State Corporations Act (SCA), the President is vested with the powers to appoint the Chairman and CEO of the Public Enterprises. The Permanent Secretary of Treasury and the line Ministers are appointed by the President under the Constitution.⁸⁷ Ministers being important players in Public Enterprises management are also appointed by the President.⁸⁸ As public servants they do not enjoy security of tenure since they serve at the pleasure of the President⁸⁹ Executive interference is so extensive that: the President may also 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 corporation and the board shall give effect to these directions.⁹⁰ Where the President and line Ministers select persons without the required qualifications and expertise, SOE end up with board members who are lacking the requisite education, training, job experience and professional relevance end up pursuing narrow personal and political interests. This has had a detrimental effect on the managerial capacity of the boards and morale of competent staff.

In the appointment of the BOD, the President and line Ministers are not guided by issues of diversity. This is true especially with regard to gender mainstreaming which is currently a constitutional requirement, Article 27 (8) of the Constitution is illustrative: "...not more than two thirds of members of elective or appointive bodies shall be of the same gender." The effect of this is that the BOD have been denied the skills that would have improved performance of SOEs, reduced cases of mismanagement and increased levels of innovation since a diverse BOD has a broader range different backgrounds and perspectives. The following chapter shows practically how politicization of the appointment process caused by a poor legal framework, disregard for the law in gender mainstreaming has contributed to poor corporate governance and hence performance of SOE

⁸³JaindiKisero, 'Government should learn a lesson from Kenya Re fiasco', *Daily Nation* (Kenya April 21, 2010) at 12.

⁸⁴ Article 77(3), Constitution of Kenya 2010, provides that: a retired state officer who is receiving a pension from public funds shall not hold more than two concurrent remunerative positions as chairperson, director or employee of a company owned or controlled by the state or state organ.

⁸⁵ Centre for Corporate Governance Development op cit note 4 at 25.

⁸⁶Section 6(1), State Corporations Act 1987.

⁸⁷Section 22, the Constitution of Kenya 1992.

⁸⁸Ibid. Section 16 (2).

⁸⁹Ibid. Section 25(1).

⁹⁰Section 7(1), State Corporation Act 1987.

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