AN ASSESSMENT OF CORPORATE GOVERNANCE LAWS IN KENYA: A CASE FOR INSTITUTIONAL AWARDS TOWARDS GREATER COMPLIANCE FOR PRIVATE COMPANIES

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I. DECLARATION

I, **ANNE NELIMA OTUNGA**, declare this thesis as original to me and submitted in partial fulfilment for the award of a degree in Master of Laws (LL.M) at the University of Nairobi, School of Law and has not been submitted for the award of credit in any other Institution. Where reference was made to other works, proper citation was given.

Signature………………………………………Date………..9.12.2022………………

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This thesis has been done under my supervision and submitted to the University of Nairobi School of Law for examination with my approval as the University supervisor.

Signature……………………………………. Date………9/12/2022……………………..…

DR. WYNE KENNETH MUTUMA

II. DEDICATION

To all who believe in positive change in a world full of opportunities.

III. ACKNOWLEDGEMENT

I thank God for my well-being and good health which were crucial in the completion of the thesis. I am indebted to my mother Prof. Ruth Otunga, my dear husband Stanley, and my children for the love, unlimited support, and constant encouragement during my academic venture. I sincerely thank the staff members at the Institute of Certified Secretaries of Kenya for facilitating my research. I also appreciate the guidance and insightful discussions of my supervisor Dr. Wyne Kenneth Mutuma.

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V. LIST OF ABBREVIATIONS

AGMs	*Annual General Meetings*
BOD	*Board of Directors*
CBK	*Central Bank of Kenya*
CEO	*Chief Executive Officer*
CG	*Corporate Governance*
CMA	*Capital Markets Authority*
COG	*Champions of Governance*
COVID-19	*Corona Virus Disease 2019*
CPS	*Certified Public Secretary*
CS	*Company Secretary*
CSR	*Corporate Social Responsibility*
DPA	*Data Protection Act*
KDIC	*Kenya Deposit Insurance Corporation*
FY	*Fiscal Year*
ICSK	*Institute of Certified Secretaries in Kenya*
ICT	*Information Communication Technology*
IMF	*International Monetary Fund*
NCA	*National Construction Authority*
NCK	*Nursing Council of Kenya*
NQA	*National Quality Award*
OECD	*The Organisation for Economic Cooperation and Development*
PDCAR	*Plan Do Check Act Review*
SACCO	*Savings and Credit Corporative Society*
SC	*State Corporation*

VI. LIST OF STATUTES AND OTHER LEGAL INSTRUMENTS

Capital Markets Act No. 3 of 2000

Certified Public Secretaries of Kenya Act CAP 534 of 1988

Code of Corporate Governance Practices for Issuers of Securities to the Public 2015 Stewardship Code for Institutional Investors 2017

Code of Corporate Governance Practices for Issuers of Securities to the Public 2015

Companies Act No. 17 of 2015

Constitution of Kenya 2010

Data Protection Act 2019

Guidelines on Corporate Governance Practices by Public Listed Companies in Kenya 2002

Insolvency Act No. 18 of 2015

Institute of Certified Secretaries of Kenya Code of Governance for Private Organisations in Kenya 2014

OECD Principles of Corporate Governance

VII. LIST OF CASES

George Bala v Attorney General [2017] eKLR

Imperial Bank Kenya Limited v Janco Investments Limited & 10 Others [2018] eKLR

Katiba Institute v Presidents Delivery Unit & 3 Others [2017] eKLR

Republic v Chief Magistrates Milimani & Another ex-parte Tusker Mattresses Limited & 3 Others (2013) eKLR.

VIII. ABSTRACT

In the last few decades, corporate governance has become a matter of concern, discussion, and efforts by governments and organisations locally and internationally. Ostensibly, this increased focus has been occasioned by scandals rocking corporations and causing their collapse, prompting a need to gradually regulate the inner running of even private organisations. Despite an overhaul of legal regimes over time, issues of effective and compliant governance still loom over corporations and cause systemic collapses affecting industries and the health of national and international economies. This persistent problem calls for new and inventive approaches to corporate governance laws, regulations, and best practices especially for private entities.

The current study is anchored on two main hypotheses. The first hypothesis is that whereas Kenya has a positive corporate governance compliance outlook for the public sector, the private sector has an unclear compliance status due to the limited legal and institutional framework governing CG for private companies. The second assumption is that Champions of Governance award as an institutional award system has observed high standards in their assessing and awarding process which translates to shaping a robust corporate governance compliance culture in the country. The research seeks to prove the foregoing hypotheses by addressing four many research objectives namely: to analyse the status of CG compliance in Kenya; to review the various laws and institutions governing CG in Kenya; to define and analyse the legal status and practice of COG Award as part of corporate governance compliance and oversight in Kenya; and to examine the place of institutional awards in realising a corporate governance compliance culture in Kenya. Achieving the above objectives involved outlining and responding to the key research questions: what is the status of CG compliance in Kenya? What are the various laws and institutions governing CG in Kenya? What is the legal status and practice of COG Award as part of corporate governance compliance and oversight in Kenya? And what is the place of institutional awards in realising a corporate governance compliance culture in Kenya? The research took mixed primary and secondary qualitative research. The research's main finding is that whereas the country appreciates the relevance of corporate governance compliance as captured in its practices and robust legal and legislative framework, the private sector is disproportionately unrepresented in such compliance. Secondly, the research has recognised the institutional efforts by the ICSK to establish a legal and institutional oversight for corporate governance among private companies, including the enactment of the model corporate governance code for the private sector and the COG Award. Regardless of the success of the COG Award in shaping compliance among its participants, limited private sector engagement calls for a realignment of the laws and institutions to provide for a clear compliance framework. The study recommends more stakeholder engagement on the issue of corporate governance compliance for private companies in Kenya. Parliament should grant ICSK or other institution mandate to regulate corporate governance practices in the private sector. Finally, the study recommends for institutionalization of COG Award as an institutional compliance mechanism for private entities.

Key words: Corporate Governance, Champions of Governance Award, Corporate Audit, Audit Committee, Stakeholders, Institute of Certified Secretaries

1 CHAPTER ONE: INTRODUCTION AND BACKGROUND TO THE STUDY

1.1 Background to the Study

Kenya has prospects of transforming into an industrialising, middle-income economy whose citizens enjoy quality life within a clean and secure environment under the Vision 2030 flagship programme.[1] To this end, the country has embarked on several projects, including infrastructure development,[2] streamlining and digitising its ICT systems,[3] and aligning its legislative and institutional frameworks to the realities of the 21st century market. There has been a proliferation of small to medium-size enterprises that seek to provide the needed goods and services in the new economy.[4] However, these prospects and developments exist within a backdrop of a market characterised by systematic corporate failures for public and private institutions, evidenced by the constant bailouts and liquidation of most companies. The World Bank has reported that while the country experiences continued economic growth, economic activities are softening owing to weak private-sector investment.[5]

While there have been efforts to address the challenge through several legislative and policy measures, the private sector continues to bleed from the tribulations of poor corporate governance. Consequently, stakeholders have proposed the need to rationalise CG measures. This is envisaged in the amendments to the existing laws, such as the Companies Act,[6] the

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[1] 'Kenya Vision 2030 | Kenya Vision 2030' <https://vision2030.go.ke/> accessed 8 September 2022.

[2] Gediminas Lesutis, 'Infrastructural Territorialisations: Mega-Infrastructures and the (Re) Making of Kenya' (2021) 90 Political Geography 102459.

[3] Suzanna ElMassah and Mahmoud Mohieldin, 'Digital Transformation and Localizing the Sustainable Development Goals (SDGs)' (2020) 169 Ecological Economics 106490.

[4] Alice Njeri Mugo, Julius Kahuthia and Godfrey Kinyua, 'Effects of Infrastructure on Growth of Small and Medium Enterprises in Kenya: A Case of Clothing and Textile Businesses in Nairobi Central Business District' (2019) 3 International Academic Journal of Human Resource and Business Administration 133.

[5] 'Kenya Economic Update (KEU)' (*WorldBank*) <https://www.worldbank.org/en/country/kenya/publication/kenya-economic-update-keu> accessed 8 September 2022.

[6] Companies Act No. 17 of 2015.

Insolvency Act,[7] and the enactment of a corporate governance code for listed companies.[8] However, these changes are developed in a system whose corporate environment is characterised by familial ownership of property, corruption, tribalism, and nepotism. The corporate leadership is further composed of individuals whose interests are personal before relational and who cannot be trusted to guarantee sufficient protection of investor property while balancing fundamental interests, including the consumer, the environment, the suppliers, the government and other social players, especially as it relates to the private sector where there is limited government oversight.

Working on the same framework as the norm poses the risk of repeating the same errors that have seen the collapse of major private companies such as Nakumatt Holdings Limited and Chase Bank. Additionally, while public companies may be mediocre in enforcing corporate governance principles as they continuously rely on government bailouts from public coffers, the private sector cannot attempt such laxity due to the stakeholder interests at stake.

Notwithstanding the foregoing reality, private companies continue to lag in enforcing corporate governance principles due to a lack of a clear legislative framework tailored for them. Indeed, investors rely on the equitable and legal duties of the directors to trust that their investment will be well cared for by the board of directors. However, the latter position is not guaranteed. The lack of guarantee can be attributed to Adam Smith, considered the pioneer of modern economics who acknowledged that there was a danger in separating corporate ownership and control in the management of capital. Smith noted that directors were mere agents of the shareholders and could not therefore be expected to employ the same vigilance as the owners would. It is for the latter reason that he proposed for owners of capital to be directly involved

[7] Insolvency Act No. 18 of 2015.
[8] Code of Corporate Governance Practices for Issuers of Securities to the Public 2015.

in the business of the company to minimise institutional negligence and profusion.[9] Smith cited the ineffectiveness of corporate governance in Uganda.

The sentiments represent most investors' fears about their financial investments. However, current realities reveal that the fear is not limited to the investor in the company. It extends to the supplier whose goods and services are yet to be settled, the consumer dependent on the product and risks facing a price hike following the company's liquidation, and the environmentalist who fears that the aggressive management policies affect flora and fauna.

These realities pose a crucial problem to Kenya's private sector corporate culture and call for a practical approach to address the existing gaps. The quest for a framework began with enacting the various laws and policy frameworks within the different organisations. Nevertheless, as evidence from the previous series of liquidations and misappropriation of investor funds has shown, there is a need for greater engagement beyond the conventional legislation on the dos and don'ts. The engagement should especially consider the place of alternative methods of promoting corporate governance and how these methods can reveal and demonstrate ways of filling systemic gaps to bring about meaningful change.

Tan appreciates the place of CG award process in fostering and rewarding of the performance excellence of different corporations while ensuring institutional compliance with established principles and market practices.[10] Where a CG award process is accredited, the participating firms benefits from the perks of quality standards coupled with increased national economic productivity and growth with more firm participation. Notably, organisations that score highest following the institutional award process have similarly high performance in the wider range of metrics such as profitability and financial stability. As companies continue to seek sustainability and CG compliance in a dynamic and versatile global business environment, they

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[9] Adam Smith, *The Wealth of Nations* (Bantam Classic 2003).

[10] Tan, K.C. (2002), "A comparative study of 16 national quality awards", *The TQM Magazine*, Vol. 14 No. 3, pp. 165-171.

are cognisant of these changes and constantly seek to align and adapt to changes brought about by technology, regulations, emerging global challenges such as climate change that call for new adaptive corporate measures, regional conflict that affect their supply chain management processes, disruptions brought about by pandemics, the need for work-life balance, inclusivity and emerging human rights concerns, and competition. The institutionalisation of CG award processes can be the basis for enhanced institutional compliance.[11]

The goal of an institutionalised CG award process is to develop a strategic quality assessment system to be maintained through benchmarking and internal measurement using specific progress metrics developed from both international and local best practices and expert-developed principles and theoretical frameworks. A review of these metrics can help illuminate areas of corporate governance in which even the most lauded corporations grapple, providing a guiding light for policy making.

This case study analyses the Champions of Governance Awards (COG), which existed during a similar timeframe as the new corporate governance legal regime. Further, through partnerships with other institutions, the Institute of Certified Secretaries of Kenya (ICSK) has sought to deliver its legislative mandate of developing robust CG adherence practices that stimulate good governance for the local industry players. The Institute is developing "the governance index" that employs the data findings from the previous COG winners which will provide a good track record from which companies can draw from in implementing or reviewing their CG practices. This thesis is therefore an apt academic endeavour to fill the scholarship gap that evaluates the effectiveness of the process so far in line with the legal and regulatory standards, core theoretical frameworks and available literature.

[11] Akinkoye, E. Y., & Olasanmi, O. O. (2014). Corporate governance practice and level of compliance among firms in Nigeria: An analysis. Journal of Business and Retail Management Research, 9(1), 13-25.

1.2 Statement of the Problem

Kenya is experiencing a surge in the growth of private corporations due to a rise in Small and Medium Enterprises (SMEs) and the innovation sector, including areas such as Information Communication Technology (ICT). At the same time, the country continues to grapple with local and global business environment changes resulting in corporate governance being a strategic priority. Meanwhile, companies that observe corporate governance face a new set of unprecedented market challenges. Key among the governance challenges that businesses face in the present decade include pandemic-related supply chain issues, changing regulatory environment (such as the development of data protection laws that mandates companies to follow particular regulatory requirements while dealing with personal data and global stakeholder oversight on company operations), privacy and cyber security compliance issues, climate change, novel developments in human resource practices such as work-life balance, mental health and organisational diversity beyond the conventional social categories. These developments continue to affect organisational performance in terms of customer acquisition and retention, employee retention, or general profitability.

The 2019 corona virus pandemic (COVID-19) changed the nature of corporate risks and preparedness for most boards. On the other hand, changes in the regulatory frameworks, such as the enactment of the Data Protection Act 2019, have tested corporations' capacity for swift response. At the same time, reputational management is at stake, considering the development of social media and the ability for company operations to be scrutinised by the members of the public. The latter reality continues to thin the line between negative public sentiments and regulatory enforcement of corporate governance practices and compliance. The post-COVID-19 uncertainty similarly shrank the budgets for most departments tasked with corporate governance compliance, making the practice increasingly demanding yet much more difficult to realise. This continues to be the case despite recent legal amendments to various legislation, including the Companies Act.

Furthermore, private companies have no specific corporate governance regime, as the existing Code is geared toward public companies, while those dealing with private entities remain recommendations. The foregoing realities illustrate that mere drafting of corporate governance principles may not realise the desired corporate goals but lead to more stress, burnout, human error, missed deadlines, and corporate failure. Coping with emerging challenges requires stakeholders to urgently adopt new approaches, technology, and tools to grapple with the ever-changing corporate governance landscape. Consequently, companies need solutions that address these challenges without unnecessarily burdening their operational and management budgeting. The identified corporate challenges, emerging trends, and the limited legal and institutional framework governing CG for private companies in the country presents a critical challenge to Kenya's private sector landscape. This challenge necessitates interrogatory scholarship on the existing frameworks, identifying the strengths and gaps in the efforts towards the robust legal and institutional protection of the market. The current thesis engages in the quest to analyse the legal and social environment and provide recommendations for filling in the gaps in the current practice.

1.3 Justification of the Study

Effective CG is essential to sustainable and flourishing corporations, which aid the progress of commerce and the country's general development. This study comes in the wake of several scandals and failures of CG in Kenya, necessitating a review of the relevant laws to identify reform areas. Corporate governance is central to corporations' ability to develop and positively impact society, making it an essential aspect of legal research and development.

Expansion in commerce in Kenya, characterised by increased consumer demands and the industry efforts to realise these needs has necessitated the need to focus on CG laws and policy frameworks for Kenyan private sector, particularly among SMEs. Indeed, this need has been enhanced by the developments in ICT and financial service sector, where the country is a continental and global giant. Therefore, there is a need to protect this reputation by creating a reputable corporate governance regime to guide private companies. The lack of proper corporate governance measures in the private sector could affect investments, encourage malpractice and corruption and catch shareholders blindsided.

Institutional awards offer insight into the state of CG standards in the country. The self-imposed nature of awards coupled with assessments by statutory bodies such as the ICSK offers a balanced and insightful look into the successes and weaknesses of corporate governance laws, particularly for private companies that lack direct statutory oversight compared to their public counterparts. Therefore, this study's approach of adopting a case study in the COG awards aims to illuminate gaps that could benefit policy and lawmakers.

1.4 Research Questions

The addresses the foregoing research questions:

i. What are the corporate governance principles, objectives and practices in Kenya?

ii. What is the legal and institutional framework for corporate governance in Kenya?

iii. What is the legal status and practice of COG Award as part of corporate governance compliance and oversight in Kenya?

iv. What is the place of institutional awards in realising corporate governance compliance culture in Kenya?

1.5 Hypothesis

The following hypotheses will guide the study:

Hypothesis 1: That whereas Kenya has a positive corporate governance compliance outlook for the public sector, the private sector has an unclear compliance status due to the limited legal and institutional framework governing CG compliance for private companies.

Hypothesis 2: That Champions of Governance award as an institutional award system has observed high standards in their assessing and awarding process which translates to shaping a robust corporate governance compliance culture in the country.

1.6 Statement of Objectives

The paper seeks to achieve four research objectives, namely:

i. To analyse the corporate governance principles, objectives and practices in Kenya.
ii. To review the various laws and institutions governing CG in Kenya.
iii. To define and analyse the legal status and practice of COG Award as part of corporate governance compliance and oversight in Kenya.
iv. To examine the place of institutional awards in realising a corporate governance compliance culture in Kenya.

1.7 Theoretical Framework

The study employs the conventional theoretical frameworks in corporate governance to discuss the concept of institutional award as a corporate compliance and oversight mechanism. Notably, most corporate governance theories seek to enhance CG's primary objective, maximising shareholder value through good social and environmental performances. The absence of a clear legal and regulatory oversight framework for CG compliance for private companies requires the establishment of mechanisms that achieve those objectives. Literature underpins that the institutional award system seeks to achieve the same objective as the process rooted in legislation (such as the CMA oversight for listed companies). Consequently, an effective institutional award process should be anchored in law, best practices, and theory. This is because theory shapes policy, and policy develops legislation. The study will employ agency, stakeholder, organisational compliance, stewardship and sociological theories. It shall define the different principles, matrixes tools, and outcomes of the various CG principles and practices adopted by the market players in the Kenyan economy. It should be noted that effective CG or related compliance measures and innovations should apply a combination of various theories rather than applying a single theory.

1.7.1 Agency Theory

Alchian and Demsetz developed the Agency Theory in 1972 which Jensen and Meckling further enhanced in 1976. The theory is founded on economics and argues that for the executive management of a company to maximise shareholders value, they (executive) establish clear governance structures, values and practices that will protect the interests of the investor.[12] Consequently, an organisational leadership works as agents of the owners of the company and should lay down key principles and structures (in this case CG principles) that assures the investors that distant or absent their presence, and upon paying the practitioners to act in their best interest, their investment is secure and profitable.

The philosophy calls on the directors and other corporate managers to set up CG systems, policies and values that will protect investor interests.[13] Notably, while one may assume that the principle applies to the relationship between the director and the owner of the company, it extends, though indirectly, to the relationship between the director and other stakeholders. For instance, the use of CG principles to meet the tenets of Agency Theory would imply that workers apply a code that enhances investor trust, openness, corporate responsibility and accountability. An organization can remain institutionally compliant when it follows these set standards and procedures.[14]As a result, the CG measures should be robust and comprehensive enough in its approach to governance so as to realise the agent's obligation, and in turn the principal's right and expectation.

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[12] Jensen, J., & Meckling, W. (1976). Theory of the firm: Managerial behaviour, agency costs, and ownership structure. Journal of Financial Economics, 3(2), 305-360.

[13] Archibald, G. C. (2008). Firm theory of the new palgrave. Dictionary of Economics, 2(4), 357-423.

[14] Donaldson, L., & Davis, J. (1991). Stewardship theory or agency theory: CEO governance and shareholder returns. Academy of Management Review, 16(1), 49-64.

1.7.2 Stakeholder Theory

Fransisco (1983) developed the Stakeholder Theory in an effort to explain corporate management.[15]The theory postulates that beyond the owner of the company, there are other categories of people and institutions interested in the operations of the company. These categories, known as stakeholders, range from government bodies, consumers, workers, society, unions and organisations, financiers and distributors. In some instances, the company's competitors within the industry are included as stakeholders. Indeed, Mwangi postulates that the theory as it relates to CG is a reflection of the effect of corporate activities of all investors defined as affecting corporate action.[16] Accordingly, the theory posits that individuals in management position should protect the interests of all the relevant stakeholders within the organisation.

According to Donaldson and Preston, Stakeholder Theory guarantees each stakeholder's internal and external needs.[17] It ensures that all investors are equally treated which translates to the long term success of the corporation. The company success is achieved through identification of everyone's role in CG, ensuring reporting and accountability, outlines the duties of the various leaders. The latter is necessary for corporates for its ability to minimise institutional conflict of interest.[18] Consequently, Stakeholder Theory is significant for this study as it provides the theoretical checklist of the various stakeholders that an effective CG framework seeks to protect and the scope of such protection.

[15] Jensen, M. C. (2010). Value maximization, stakeholder theory, and the corporate objective function. Journal of Applied Corporate Finance, 22(1), 32-42.
[16] Mwangi, M.W. (2013). The Effect of Corporate Governance on Financial Performance of companies listed at Nairobi security exchange, A Master of Business Administration Research Project. University of Nairobi, Nairobi, Kenya.
[17] Donaldson, T., & Preston, L. E. (1995). The stakeholder theory of the corporation: Concepts, evidence, and implications. Academy of Management Review, 20(1), 65-91.
[18] Jensen, M. C. (2010). Value maximization, stakeholder theory, and the corporate objective function. Journal of Applied Corporate Finance, 22(1), 32-42.

1.7.3 Organizational Compliance Theory

The theory of compliance defines organisational structures by integrating various perspectives from classical and participatory management models.[19] Etzioni, a proponent of the theory, contends that extrinsic reward allocation is a driver of organisational compliance. The reward may vary from interesting work, contribution to society or identification with goals.[20] The management utilises symbolic rewards, allocation of symbols of prestige and esteem while influencing acceptance and positive organisational response.

Therefore, the organisational compliance theory contends that institutional compliance is dependent not only on the need to fulfil a regulatory duty but also on a pre-existing motivation to comply.[21] It follows that no single approach to the implementation of the legal rules in this case. A proper approach will engage the organisation's readiness to comply with the rules and regulations. The theory aligns with the position that the institutional award system can be an effective incentive in realising private-sector compliance with corporate governance principles owing to the perks arising from participation in the award system. The theory is relevant in the current study to the extent that the award process provides organisations with the extrinsic reward in the form of winning the award or providing market confidence in its procedures and processes. The significant of the theory for the present study lies in its engagement with the process and outcomes of the COG award and whether the process nudges organisations to comply with CG principles.

1.7.4 Stewardship Theory

Donaldson and Davis (1989) developed the Stewardship theory within the sphere of CG.[22] The theory postulates that individuals have an intrinsic motivation to work for others or institutions

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[19] Joseph E Champoux, *Organizational Behavior: Integrating Individuals, Groups, and Organizations* (Routledge 2010).
[20] Amitai Etzioni, *Comparative Analysis of Complex Organizations, Rev. Ed.* (Simon and Schuster 1975).
[21] Ibid, Note 20
[22] S Subramanian, 'Stewardship Theory of Corporate Governance and Value System: The Case of a Family-Owned Business Group in India' (2018) 11 Indian Journal of Corporate Governance 88.

in the effort to accomplish the work they are trusted with. The theory posits that individuals are collective and pro-organisation rather than individualistic. Therefore, they work towards attaining organisational goals due to their higher level of satisfaction deriving from such an approach.[23] It, therefore, constitutes a framework that characterises managerial motivation in various organisations.

Within the framework of institutional award, stewardship theory is presented in various aspects. First, participation in an award system aligns with the satisfaction of winning an award or demonstrating compliance with the different stakeholders. Secondly, effective participation in any award system follows the actual implementation of the corporate governance frameworks. Boards and management that consider themselves stewards of the company are at the forefront of implementing corporate governance principles and reaping their benefits. Thirdly, the final (and perhaps the most crucial) aspect of the COG Award, the implementation of the proposals and recommendations, requires committed stewards who desire change. The theory, therefore, sums the various processes, matrices, compliance and outcomes of the award process, including its impact on the participating and prospective organisation.

1.8 Research Methodology

The study relies on both primary and secondary qualitative legal research methodology to discuss the legal framework and gaps around corporate governance compliance in Kenya. Secondary research involved comprehensive desk analysis of the various statutory provisions, regulations, policies, books, journals, internet sources, opinion editorials, and past research on the COG awards and institutional compliance. The library and internet sources were searched for material information on corporate governance. The legal framework was derived from the various pieces of legislation presented on Kenya Law Website.

[23] Kojo Menyah, 'Stewardship Theory' in Samuel O Idowu and others (eds), *Encyclopedia of Corporate Social Responsibility* (Springer 2013) <https://doi.org/10.1007/978-3-642-28036-8_107> accessed 8 November 2022.

On the other hand, primary qualitative research was done on the COG award process with a focus on institutional uptake and impact of COG Award among the participants. The essence of primary research was because this thesis is the first scholarly material on COG Award in Kenya. With no prior research on the same, it is essential to connect secondary research with the experiences of the practitioners for whom the study seeks to investigate. This approach, presumably, is meant to realise the depth of the research and give recommendations anchored on actual practice rather than speculation and incomplete data. The voices of the respondents that have participated in the COG Award reflects on the award as homegrown practice in research where scholarship in support of the same is mainly foreign. As social foundations of law would dictate, direct evaluation of corporate practices helps identify the strengths and limitations of the existing legal frameworks thereby shaping governance and social change for the nation.

Questionnaires were sent to random participants in the award to solicit their views and level of incorporation of corporate governance principles following their participation. A total of ten participants were engaged in the survey. Six of them provided the feedback included in this study. Additionally, the research interviewed the participants regarding the feedback given in the questionnaire. The process involves an interactive session with the governance and management structures of the organizations – physical, virtual and hybrid sessions with the Board Chairman, CEO and selected top management members (Finance, HR, Internal Auditors, and Marketing Managers). The reliance on mixed research guarantees that the material relied on in this study is verifiable and can be cross-referenced as reliable.

1.9 Literature Review

While there exist numerous studies on CG practices across the globe and in Kenya, many of them focus on the nexus between CG and performance, with only a limited number dealing with compliance. The research noted that few, if any scholars have addressed the issue of CG audits and oversight for private companies in Kenya. The available research addresses the general concepts of corporate governance and as such, their findings are instrumental for only a small portion of the current research. Notably, the few scholarly works specifically directed at corporate governance compliance practices for the private sector may be attributed to limited stakeholder engagement on the issue. For instance, whereas the COG Award system has been in existence for more than ten years, no single scholar piece has discussed its relevance in legal academy. The foregoing reality sharply contrasts with practices in other jurisdictions where institutional awards are subjected to the theories, concepts and principles of academic discourse.

1.9.1 Literature on CG Audits and Oversight for Enhanced Compliance

Corporate Governance compliance audits and oversight are an integral part of corporate governance practices across different jurisdictions. *Dzomira*[24]examined CG, the performance of internal audits and audit committees for public sectors in emerging economies. The study noted that CG compliance audits and oversight were part of an imperative corporate governance aspects, with their effective performance ensuring better service delivery by public sector agencies. The research findings indicated good corporate governance policies characterised by the existence of audit committees and internal audit functions in South Africa. However, the research found these internal audits and committees to be ineffective. Among the notable factors that have affected the effectiveness of the committees include the absence of advice, failure to act on the recommendations and insufficient resources. The paper recommended that company leadership elevate the audit committee and internal audit findings and exercise their proposals. The research, therefore, underpinned the subsistence of audit

[24] Shewangu Dzomira, 'Corporate Governance and Performance of Audit Committee and Internal Audit Functions in an Emerging Economy's Public Sector' (2020) 13 Indian Journal of Corporate Governance 85.

committees and public sector inhouse audit components as certifying maximum resource exploitation for various stakeholder benefits.

Although the author restricted internal corporate governance practices for the public sector, it raises critical issues relating to corporate governance audits and oversight, which are likely to be exacerbated for private entities. Through the lenses of Dzomira, this paper underpins the challenges associated with internal mechanisms of corporate governance compliance. This becomes the foundation for the discourse for an external audit and oversight mechanism for the private sector, such as through an institutionalised COG Award process.

Also, a study by *Akinkoye* and *Olasanmi* evaluated practices in CG among select non-financial quoted firms and their levels of compliance with the Nigerian code of best practices. The study found that firms generally observed CG practices with an average compliance level of 72.15 per cent.[25] The findings further revealed evolution in CG initiatives and reflected compliance with both national and international standards as recommended by the various regulators. However, Akinkoye and Olasanmi come short in extending their research to CG compliance mechanisms in the country.[26] The current study addresses the latter gap through an analysis of the lessons from institutional awards toward better legislation and regulation for private companies, with a specific focus on Kenya.

In the same breath, *Mwangi M*.[27] states that CG entails reducing the dispute between the director and the investor by delineating corporate leadership as an entity for both the director and investor. As part of this research's hypothesis, implementing CG principles among the COG awards winners, contribute to organisational efforts at enhanced efficiency as part of its duties and rights. The index following award is evidence-based blueprint for best CG practices

[25] Ebenezer Y Akinkoye and Omoneye O Olasanmi, 'Corporate Governance Practice and Level of Compliance among Firms in Nigeria: Industry Analysis' (2014) 9 Journal of Business and Retail Management Research.
[26] ibid 13–25.
[27] Mary W Mwangi, 'The Effect of Corporate Governance on Financial Performance of Companies Listed at Nairobi Security Exchange' (Thesis, University of Nairobi 2013) <http://erepository.uonbi.ac.ke/handle/11295/63431> accessed 14 November 2022.

that other organisations can make part of their CG practices.[28] COG Award is therefore a framework for corporate leadership and the findings by Mwangi forms part of the foundational literature in support of institutionalising COG Award in Kenya.

Lasrado[29] contends that where institutional compliance is active and the enforcement plan is part of a larger initiative for corporate regulation officers a myriad benefit to society. A myriad organisation with clear institutional compliance and enforcement plan benefits both public and private interests. As he aptly put, institutional compliance results to "public value" in its promotion of the rule of law, fair and credible governance practices and protected delivery system for goods and services in well-functioning ecosystem, and protecting among other interests. Compliance can also result to "private value" through an increase in investor's confidence following the reduction, which boost innovation and enhances competitiveness and the creation of new jobs.[30] Consequently, the study of COG award aligns with the findings of the research.

Davies[31]underpins the various parties involved in institutional compliance as a theme. Among these parties are scholars, the regulator, businesses, investors, human rights watchdog, the press and the international community. There has been increased interest in evidence-based research on corporate compliance mechanisms.[32] Nonetheless, the issues leading to corporate failure for both developed and developing economies are a result of compliance failure. Consequently, many organisations seek to address and enhance institutional compliance issues, such as by introducing a Code of best practices.[33]

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[28] Ioan-Ovidiu Spătăcean, 'Compliance Assessment Regarding Corporate Governance Requirements Applied for Romanian Investment Firms' (2015) 32 Procedia economics and finance 471, 471–78.
[29] Flevy Lasrado, 'Perceived Benefits of National Quality Awards: A Study of UAE's Award-Winning Organizations' [2017] Measuring Business Excellence.
[30] ibid.
[31] Adrian Davies, *Best Practice in Corporate Governance: Building Reputation and Sustainable Success* (Routledge 2016).
[32] Flevy Lasrado and Christopher Uzbeck, 'The Excellence Quest: A Study of Business Excellence Award-Winning Organizations in UAE' (2017) 24 Benchmarking: An International Journal 716, 716–734.
[33] Pankaj M Madhani, 'Corporate Governance from Compliance to Competitive Advantage' (17 November 2009) <https://papers.ssrn.com/abstract=1507644> accessed 8 November 2022.

While the current literature does not specifically address the issue of corporate governance compliance and audits in Kenya, it underpins its global relevance and provides the basis for further research. The current thesis picks from where other scholars fell short and develops a novel approach to gauging legal practice from the lenses of societal practice.

1.9.2 Literature on Institutional Awards and Corporate Compliance

A few studies have focused on institutional award systems as a tool for audit and oversight. However, these studies are from the foregoing jurisdictions. According to *Cauchick Miquel*[34] governance awards ensure quality for the participating companies while also raising overall productivity and corporate compliance. Participating companies are encouraged to pursue excellence which is why most global organisations have taken a similar route on evaluation and recognition. Various indicators are deployed to measure the overall excellence of the different companies including productivity, employee satisfaction and financial success. Firms employ these indices to determine their market rating and performance. Cauchick's proposition then aligns with the core of this thesis to the extent that it correlates governance award and institutional compliance with CG principles.

Moon et al.[35] have analysed the effectiveness of the Korean National Quality Award (NQA) for companies that have realised remarkable performance to enhance its competitive advantage while facilitating communication and best practices. The authors acknowledge that most OECD countries have developed NQA. The research acknowledges the different models that the various quality award models developed by states. They propose that states should be cautious in adopting quality measurement models from other countries owing to the variation in cultural and industrial backgrounds. These findings align with the proposition of developing national-specific assessment models that reflect the market's peculiarities.

[34] Paulo A Cauchick Miguel, 'Receiving a National Quality Award Three Times: Recognition of Excellence in Quality and Performance' (2015) 27 The TQM Journal 63, 63–78.
[35] Jae-Young Moon and others, 'A Study on the Causal Relationships in the Korean National Quality Award Model' (2011) 22 Total Quality Management & Business Excellence 705.

Whereas scholarly works support the relevance of corporate governance in organisational success and the place of institutional award systems to realise compliance, the research has limited reference to the use of institutional award systems in Kenya. The study has identified lacuna in scholarly works linking the COG award system to private sector implementation and compliance with corporate governance principles. The study will fill the foregoing research gap and be the basis for further legal and scholarly engagement on the nexus between the institutional award system and prudent corporate governance practices and compliance in Kenya.

1.10 Limitations of the Study

The following were identified limitations to the study:

First, the respondents were not readily available since the interviews were limited to a sample select population of previous participants in the COG award. Interviews consume a lot of time and therefore some respondents limited their availability for the same. However, to counter the time limitation the researcher scheduled the interviews with the respondents according to both schedules and included virtual and remote meeting.

Secondly, the responses were subjective owing to the various sectors the respondents operate in. Additionally, the subjectivity can be attributed to hesitation by most respondents to provide sensitive information on their CG practices that would be in violation of their data privacy policies. To address the challenge, the researchers undertook on maintaining privacy and confidentiality of the reviewed documents throughout the exercise and during the writing of the thesis.

Thirdly, previous COG Awards have seen limited participation from private companies. Without prior engagement, the researcher may not effectively gauge the success of otherwise of the award process in realising corporate governance compliance for private companies. However, findings from the other participating organisations and institutions, coupled with the report from the CMA on listed companies, will mitigate the challenge as the market landscape in Kenya is crosscutting. Where insufficient data is obtained, the researcher will identify the gaps, which will inform the basis for further scholarly engagement.

Due to financial constraints brought about by covid-19 pandemic, some organizations did not participate. There were also slow responses from participants with most organizations showing interest citing delays in approval from management to participate in the award. Also, changes in management characterized by transition in top management with new managers sceptical about participation in COG affected the outcomes of the study.

Finally, while the study successfully provides insights on the nexus between institutional award and corporate governance compliance through the COG Award system, it suffers from selection bias as there may exist other factors and explanatory variables affecting corporate governance compliance beyond the award system that has not been part of the study.

1.11 Chapter Breakdown

This study shall be organized into five interrelated chapters, as discussed below.

Chapter One: Introduction and Background to the Study

The first chapter introduces the study and sets out the background against which it is premised. Furthermore, it outlines the problem statement, objectives and research questions, hypothesis, significance and justifications, literature review, and limitations.

Chapter Two: Corporate Governance; Principles, Objectives, and Practices

This chapter examines the concept of CG in detail. It analyses and highlights what it means for a company to have good CG and whether this differs in private and public companies.

Chapter Three: Legal and Institutional Framework Underpinning CG in Kenya

This chapter discusses the relevant laws, regulations, and regulatory bodies overseeing corporate governance in Kenya to highlight the gaps applicable to private companies.

Chapter Four: Case Study of the Champions of Governance Award

The chapter conducts a case study of the COG awards to identify the metrics used in selecting various awardees. This is to determine areas of strengths and weaknesses in the corporate governance of private companies.

Chapter Five: Conclusions and Recommendations

The chapter summarises the findings and makes recommendations on the place of institutional awards in realising corporate governance compliance culture for Kenya’s private sector.

2 CHAPTER TWO: CORPORATE GOVERNANCE; PRINCIPLES, OBJECTIVES, AND PRACTICES

2.1 Introduction

The corporate sector, comprising financial and non-financial institutions, is a vital contributor to the economic development and sustainability of any State. The non-financial corporate sector encompasses the public and private businesses and enterprises producing goods or providing non-financial services to markets.[36] As a result, the sector is crucial for any economy in the provision of requisite consumer goods and services while boosting the overall economy. However, over the years, Kenya has experienced unprecedented corporate insolvency and liquidation for private and public companies.[37] Wairange has argued that;

> Although the government has held training and several campaigns aimed at having major organisations embrace the concept of corporate governance, nevertheless, major companies in the private sector are still collapsing because implementation and practice of corporate governance is much more emphasised on state corporations and public listed companies and rarely in the private sector.[38]

The preceding argument is consistent with documented evidence of Kenyan private companies on a downward spiral throughout the years. The Office of the Official Receiver reported 34 petitions for court-sanctioned company liquidations, 12 under voluntary liquidation, and 14 under administration for the fiscal year (FY) 2021/2022.[39] Previously, reports of the collapse of retail behemoths such as Nakumatt Holdings Limited,[40] Tuskys Supermarket, and Uchumi[41]

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[36]OECD, 'Corporate Sector' (*OECD iLibrary*, 2022) para 1 <https://www.oecd-ilibrary.org/economics/corporate-sector/indicator-group/english_a68c33e9-en> accessed 4 September 2022.
[37] Mike Mutonyi, 'Tackling the Problem of Corporate Fraud in the Kenyan Corporations through the Lens of Corporate Governance' (University of Nairobi 2019).
[38] Loise R Wairange, 'The Link Between Corporate Governance Failure and the Collapse of Major Private Companies in Kenya' (Thesis, University of Nairobi 2019) viii <http://erepository.uonbi.ac.ke/handle/11295/108832> accessed 7 September 2022.
[39] Office of the Official Receiver, 'Official Receiver Statistics 2021/2022' (BRS 2022) <https://brs.go.ke/or-statistics-2022.php> accessed 7 September 2022.
[40] Felix Adamu Nandonde, 'In the Desire of Conquering East African Supermarket Business: What Went Wrong in Nakumatt Supermarket' (2020) 2 Emerging Economies Cases Journal 126, 123–33.
[41] Vanessa Gathoni Mungai, 'Implementation of Directors' Duties in the Strive for Sound Corporate Governance in Kenya: Lessons from Uchumi Supermarkets Limited' (Strathmore University 2017).

sent chills down Kenyan markets.[42] For instance, poor management after the death of Tuskys founder, Joram Kamau, has been noted as the reason for its corporate troubles. The poor management of Tuskys was characterised by ineffective management structures, aggressive expansion ambitions, and employee theft.[43]

In *Republic v Chief Magistrates Milimani & Another ex-parte Tusker Mattresses Limited*, the applicants were accused of swindling Ksh. 1.6 billion from the retail giant from 2002 to 2012.[44] The funds were reportedly moved to a different bank account owned by the Tuskys directors. While the accused successfully quashed the crucial investigations, the mystery of the Ksh. 1.6 billion remained unsolved. However, the case reveals an environment of corporate malpractices and failure to adhere to good corporate governance.

These instances point to a severely malnourished CG culture and practices in the Kenyan private sector requiring immediate reform. The discussion on corporate governance must continue to preserve the many stakeholder interests until the fundamentals of efficient corporate governance and management are realised within the Kenyan corporate sector. This chapter conceptualises corporate governance with a specific focus on the principles and practices in Kenya. It goes further to underpin the challenges that wrought proper implementation of CG culture among Kenya's private companies and the ongoing stakeholder measures to cure the situation.

2.2 Conceptualising Corporate Governance and Underpinning its Relevance in Institutional Success

Like any similar legal phraseology, no universal definition exists for CG. The term merges two terminologies, 'corporate' and 'governance.' Corporate is a company or a similar enterprise.

[42] Noel Mwende Kitonga, 'The Promise and Reality: Winning Ways for Retail Companies in Kenya through Corporate Governance' (Strathmore University 2021) v.

[43] | *Tragedy of Tuskys | Late Joram Kamau Started the Supermarket 30 Years Ago [Part 1]* (Directed by Citizen TV Kenya, 2020) <https://www.youtube.com/watch?v=We79HZKhfTc> accessed 7 September 2022.

[44] *Republic v Chief Magistrates Milimani & Another ex-parte Tusker Mattresses Limited & 3 Others* (2013) eKLR.

Under the Companies Act of 2015, a company is defined as a company formed and registered under the Act.[45] While the latter definition does not offer much detail, the Black's Law Dictionary defines a company as a corporation undertaking a commercial or industrial enterprise.[46] Companies have separate legal personalities, leaving their management and governance to the directors.[47]

Governance is the mode of power exercise involving resource management for a sustained human development.[48] Within the corporate environment, governance plays the crucial role of maintaining the balance between equity and social order, efficiency in trade in goods and services, accountable use of authority and power, protection of critical rights and freedoms, and maintenance of organised corporate culture where none of the stakeholders is disenfranchised.[49] Effective governance of corporations becomes a central theme for a market characterised by corporate insolvency, fraud, corruption, and misappropriation of funds. Governance of corporate entities is the mandate of the BOD, considered the most critical institution in CG.[50]

The CMA CG in absolute terms as "the process and structure used to direct and manage the business and affairs of a company towards enhancing business prosperity and corporate accountability with the ultimate objective of realising long-term shareholder value while taking account of the interests of other stakeholders."[51] From the definition, CG is a process that involves activities and implementations. Additionally, the definition captures the purpose of corporate governance as entailing direction and business management and affairs of the company towards the realisation of the different stakeholder interests.

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[45] Companies Act No. 17 of 2015 s 3.1.
[46] Bryan A Garner, *Black's Law Dictionary, Abridged, 9th* (9th edn, West 2010) 318.
[47] Stanley M Kiima, 'Codification of Duties of Directors Under the Companies Act, 2015: An Analysis of Their Clarity, Accessibility and Certainty' (University of Nairobi 2020).
[48] World Bank (ed), *Governance and Development* (World Bank 1992).
[49] Private Sector Initiative for Corporate Governance, 'Principles of Corporate Governance in Kenya and a Sample Code of Best Practices for Corporate Governance' <file:///C:/Users/user/Downloads/principles_2.pdf>.
[50] Code of Corporate Governance Practices for Issuers of Securities to the Public 2015 ch 2.
[51] ibid 1.1.2.

Therefore, CG involves exercising power or authority over corporate establishments. It includes the different board activities and its relationship with the company management, shareholders, among other stakeholders.[52] Tricker considers corporate governance to be the primary focus of the 21st century, with most economies having introduced CG codes and others updating their company laws to include CG principles.[53] Therefore, a discussion of corporate governance involves the principles, practices, and stakeholders engaged in company operations and management.

2.3 Principles of Corporate Governance

Corporate governance principles are the broad concepts that underpin good corporate governance that companies apply in exercising power or authority over their corporate entities.[54]Since 1999, the Organisation for Economic Development and Cooperation (OECD) Principles of CG are the benchmark for CG among companies, legislators, investors, and other stakeholders across the globe.[55] The OECD appreciates that the principles guide policy-makers when evaluating and improving CG legal environment. The principles seek to ensure that the economy for which they are implemented are efficient, sustainable and financially stable.[56]The principles are; underpinning the foundations of CG frameworks, equitable shareholder treatment, essential ownership functions, and other intermediaries, stakeholder roles, disclosure and transparency, and responsibility of the board.[57]These principles, however, relate to listed companies.

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[52] Bob Tricker, *Corporate Governance: Principles, Policies, and Practices* (Oxford University Press 2019) 4.
[53] ibid.
[54] Code of Corporate Governance 2015 ch 1.1.3.
[55] OECD (ed), *G20/OECD Principles of Corporate Governance* (OECD 2015) 3.
[56] ibid.
[57] ibid 5.

In Kenya, the Companies Act mandate companies listed on the securities exchange to establish principles of CG, their adoption policies and strategies and commit to yearly audits.[58] Subsequently, pursuant to section 11(3)(v) of the Capital Markets Act,[59] the CMA published a Code of CG for listed companies,[60] as the substantive standalone Code establishing the corporate governance principles that apply to companies trading on the securities market. The Code, which replaced the 2002 guidelines on CG,[61] outlines the principles and recommendations on what companies can adopt in ensuring that effective CG is a parcel of the organisational culture and dealings.[62]

Unlike the 2002 guidelines that focused on the 'Comply or Explain' CG approach, the 2015 Code shifted to a 'Apply or Explain' strategy.[63] The 'Apply or Explain' is based on principles as contrasted to the rules-based system in comply or explain. Nakpodia and others distinguish between principle-based and rules-based approaches to corporate governance by noting that "principle-based corporate governance codes are voluntary/non-binding set of recommendations, standards, and best practices, issued by a collective body, in relation to the governance of a corporation within a country."[64]

On the other hand, rules-based codes create more channels for government oversight through stricter legislation to be adhered to.[65] While many stakeholders prefer the principled-based approach as it allows entities breathing space to gear their corporate governance structures to fit their organisational realities, Black notes that the 2008 economic crisis exposed some of its limitations.[66] However, the choice of whether to adopt a rules-based or principle-based

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[58] Companies Act s 770.
[59] Capital Markets Act No. 3 of 2000.
[60] Code of Corporate Governance 2015.
[61] Guidelines on Corporate Governance Practices by Public Listed Companies in Kenya 2002.
[62] Code of Corporate Governance 2015 ch 1.1.1.
[63] ibid.
[64] Franklin Nakpodia and others, 'Neither Principles nor Rules: Making Corporate Governance Work in Sub-Saharan Africa' (2018) 151 Journal of Business Ethics 391, 392.
[65] ibid.
[66] Julia Black, 'Forms and Paradoxes of Principles-Based Regulation' (2008) 3 Capital Markets Law Journal 425, 425–57.

approach to CG is determined by a country's institutional environment.[67] While in the Kenyan context, the 2015 Code provides mandatory provisions that companies must follow, a listed company is allowed to give a satisfactory explanation for non-compliance with the set principles. As will be noted in the subsequent discussions, the principled-based approach is more favourable for the private sector, whose government oversight is limited compared to oversight of public companies.

2.3.1 Principles of CG under 2015 Code

The Code establishes seven broad categories that underpin the main principles of corporate governance. On the principle of Board operations and control, the Code identifies the BOD as the most critical in CG.[68] A board that reflects effective corporate governance should comprise individuals qualified and capable of independent and objective judgement.[69] Every stakeholder should comprehend the board's duties while underpinning the need for the board's autonomy, authority, and accountability to its stakeholders.[70] The principle calls for formal and transparent procedures for board appointments.[71] The board's structure should be such that it realises effectiveness and value addition to the company.

Additionally, the BOD should offer strategic guidance while leading and controlling the company. Other critical principles under this category include continuous board induction coupled with regular updates of skills, annual Board members' evaluation, fair and responsible remuneration of the members, and legal compliance. The principle underpins the board's centrality in ensuring the company's successful operation.

[67] Nakpodia and others (n 65) 392.
[68] Code of Corporate Governance 2015 ch 2.
[69] ibid.
[70] ibid.
[71] ibid 2.1.

The second category of principles appreciates the centrality of shareholder rights in determining the institutional ability to raise capital. A legal and governance framework that fails to protect the shareholder interests limits investors' willingness to invest in them.[72]

The Code, therefore, proposes the need to recognise, respect, and protect the rights of shareholders through relevant information dissemination and participation in the general activities of the institution.[73] The said shareholders should also be equitably treated. Equitable treatment extends to protection of minority shareholder from majority overreach during decision-making.[74] Institutional investors are to be stewards of their clients by being in direct contact with the management of the company on performance and CG affairs.[75] Finally, the Code requires the board to be proactive in their engagement with the media in terms of information sharing and issues of CG to effect inform and protect key stakeholders.[76]

Stakeholder relations is another significant category of corporate governance. Stakeholders constitute the different categories of those affected or likely to be affected by the decision and trajectory of the company. Therefore, effective company management of stakeholders translates to achieving strategy and long-term growth.[77] They range from customers, suppliers, media, auditors, and potential investors. The board is therefore required to effectively manage stakeholder relations through a stakeholder-inclusive approach to corporate governance.[78] Transparent and effective communication with the identified stakeholders is crucial in this regard.[79] The company should provide formal processes for resolving stakeholder engagement disputes, both internal and external.[80]

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[72] ibid 3.
[73] ibid 3.1.
[74] ibid 3.2.
[75] ibid 3.3.
[76] ibid 3.4.
[77] ibid 4.
[78] ibid 4.1.
[79] ibid 4.2.
[80] ibid 4.3.

Corporate Ethics and social responsibility entail institutional compliance with legal obligations and shareholders' reasonable expectations.[81] It further involves awareness of a company's immediate environment and the moral and legal obligation to preserve its social and natural environments. The board should therefore ensure ethical leadership by setting standards of ethical behaviour applicable to the company's internal management.[82] The latter requires adherence to corporate governance's core values, including responsibility, accountability, fairness, and transparency. The company must establish effective mechanisms for managing its ethical issues through such measures as ethical risk profiles and the relevant Code of Ethics and Conduct.[83] Furthermore, the board should ensure that the company remains a corporate citizen as perceived by internal operations and external reviews.[84] It should also develop different strategies and policies that guide its operations toward becoming prudent corporate citizens.

Additionally, the company should ensure adequate accountability risk management and internal control systems.[85] Accountability requires establishing systems and measures that realise true and accurate financial reports. Also, the knowledge that risk is parcel of a rewarding process should guide the board to undertake a considered and systematic approach to risk by identifying and analysing the possible risks and addressing them.[86] On the other hand, internal control mechanisms constitute the company process that provides reasonable assurance of operational effectiveness and efficiencies, financial reporting reliability, and legal compliance. The corporate governance-compliant company should establish independent structures for verification and safeguarding the integrity of the financial reporting systems. The company should also have adequate risk management frameworks and an appropriate internal control

[81] ibid 5.
[82] ibid 5.1.
[83] ibid 5.2.
[84] ibid 5.3.
[85] ibid 6.
[86] ibid.

system that aligns with the organization's vision, mission, and corporate governance framework.

Finally, the company should put in place mechanisms for transparency and disclosure. The Code appreciates that disclosures are critical for capital attraction while maintaining market-based monitoring, which is essential for shareholder exercise of ownership rights.[87] The disclosures must be timely and balanced through an internal corporate disclosure policy and procedure.[88] The disclosures are crucial as they shape transparency and stakeholder trust in the management and operations of the company.

The CMA recognises that implementing the above corporate governance improves company efficiency and reduces unnecessary operational risks while enabling companies to achieve their strategies.[89] This position aligns with the international contention that corporate governance principles enabled stakeholders to evaluate and improve the CG legal framework. The measures seek to ensure that the economy is efficient, growth sustainable, and the stability of finances.[90]Indeed the OECD has underpinned that "the principles do not intend to second-guess the business judgement of individual market participants, board members, and company officials. What works in one company or for one group of investors may not necessarily be generally applicable to all of the business or of systematic economic importance."[91] Therefore, the Codes are, for the greater part, recommendations and guidelines that institutions, including private companies, may adopt or align with their specific needs.

[87] ibid 7.
[88] ibid.
[89] Capital Markets Authority, 'Report of the State of Corporate Governance of Issuers of Securities to the Public in Kenya' (Capital Markets Authority 2022) 4 at 5 available at<file:///C:/Users/user/Downloads/The%20Report%20On%20The%20State%20Of%20Corporate%20Governance%20Of%20Issuers%20Of%20Securities%20To%20The%20Public%20In%20Kenya%202021.pdf>.
[90] OECD (n 56) 9.
[91] ibid.

2.4 Corporate Governance Compliance Practices for Listed Companies under the 2015 Corporate Governance Code

2.4.1 Conceptualising CMA Governance Compliance Practises through Governance Audits

Since 2017, the CMA has traced the progress that listed companies have made in embedding the principles of good governance in their institutional systems and operations. Governance audits are independent assessments of an organisation to opine on the adequacy or otherwise of its systems, policies, processes and practices within the given legal framework and in line with international standards of best practice.[92]The BOD for listed institutions must ensure an annual governance audit to determine compliance with sound governance practices.[93]

The 2021 report was a result of an assessment of the CG practices of 49 listed institutions.[94] Two organisations shared the governance structure; the assessment considers them as one, which brought the number of institutions down to 48. The CMA reports that the weighted average score was a 'good rating' with a slight decrease from 72% to 70.15% compared with the previous period.[95] Twenty-five issuers were in the leadership category, a constant with the previous year. Ten were in the good rating category, which increased from 8 in the previous year. The fair-rating category also improved from 4 to 5. The report acknowledged the centrality of the board in realising CG for their companies. Notably, boards of issuers exercised their mandate with much clarity, assurance and effectiveness as stipulated under the Code.

The report further underpinned the place of the rules of governance in the post-COVID-19 era. Citing the OECD, the report highlighted vital evidence-based policy responses for sustainable recovery following the pandemic, including governance and risk management. Consequently,

[92] CMA Circular 1 of 2020.
[93] CMA Code of Corporate Governance for Listed Companies Clause 2.11.
[94] Capital Markets Authority (n 90) 5.
[95] ibid.

the report called on issuers to enhance compliance within the highlighted framework as CMA continues realising its policy and regulatory role.

The overall findings revealed positive compliance outcomes following CMA oversight. Issuers continue to make incremental steps in embedding good governance in their business operations and culture. Among the key developments are integrated risk management and enhanced disclosure spectrum as necessitated by the Code. The findings show that the banking sector won the leadership rating while the agricultural sector tailed the ratings with 'fair.'[96] Additionally, on performance per principle, the report noted that the rights of the shareholders were the best performing while commitment to good governance was the least. These findings reveal two critical issues; first, institutions with tighter regulatory frameworks, like the banks, are likely to be compliant compared to those with less regulation, such as agriculture.

Secondly, the findings demonstrate that shareholder interests remain at the core of corporate governance culture even where there is no necessary reference to adherence to the principles. In other words, an institution may not commit to good corporate governance but still consider stakeholder interest. This approach's danger is that such an institution will likely undermine or ignore critical principles inherent in corporate governance, such as ethical and social responsibility. The situation even becomes dire for private companies whose first obligation is to satisfy the interests of the shareholders. This issue further relates to the need for private institutions not only to require that institutions adhere to a set of corporate governance rules but also to tailor policies that align with the full incorporation of universally recognised rules.

2.4.2 CMA Audits, Assessment Tools and Methodology

CMA has developed different assessment tools and methodologies for gauging corporate governance compliance for listed companies. The main tools for reporting, measuring and measuring compliance include the CG Reporting Template, CG Scorecard and Assessment

[96] ibid.

Methodology. The participating issuers fill out and submit the reporting template to the regulator. The template seeks to enhance corporate compliance status while disclosing the application status for the different requirements. On the other hand, the authority uses the Scorecard internally to determine the implementational level for the Code.

As part of the continuous reporting requirements, all listed companies submit completed reporting templates and annual reports. The submissions are to be made in four months following a fiscal year. The issuer must also upload a copy of their submission to their website. The latter move seeks to ensure that corporate governance compliance and oversight are not limited to the issuer and the regulator. Instead, all other stakeholders can access the submitted information for transparency and accountability.

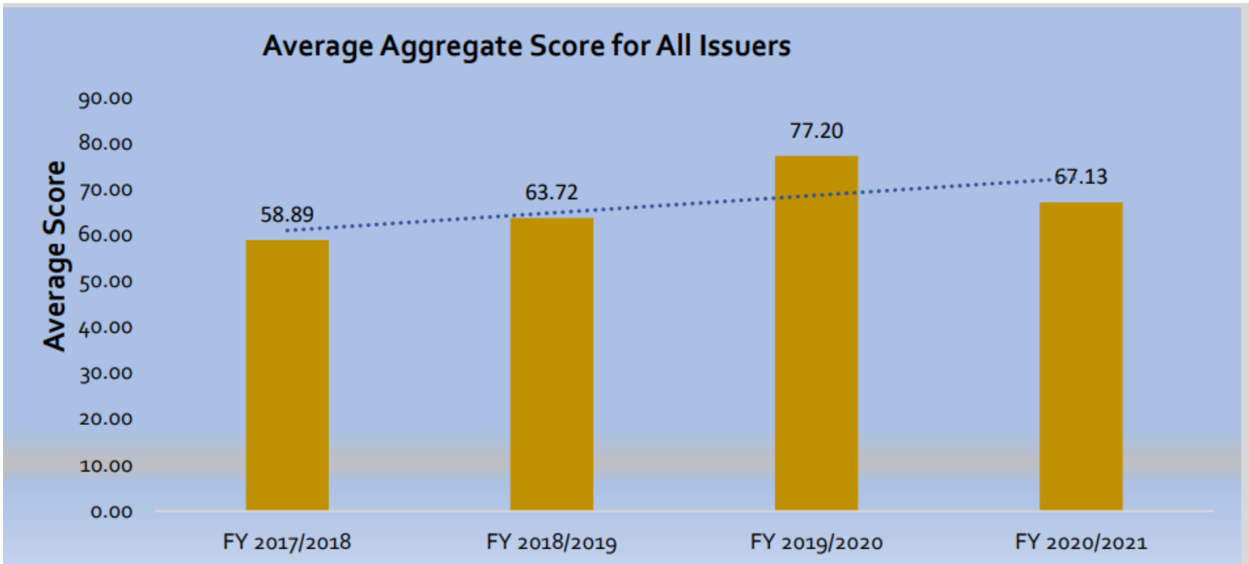
The CMA assesses compliance based on publicly available information and material and includes annual reports, issuer websites, notices, circulars, articles of association, resolutions of shareholders' meetings, media publications, Board Charters, codes of conduct, sustainability reports, among other sources of public information as may be available. The audit process involves the issuer submitting their self-reporting template to the Authority. The issuer indicates on the matrix their level of compliance with the Code. The submission is followed by a CMA review for each issuer based on the public information and any other information that the issuer may avail. The third step involves a peer review of the submitted information by a review team member but not a party to the first review. The peer-review seeks to ensure consistency and accuracy of the process.

Each issuer receives a draft governance report. The Authority then elicits issuer comments through their respective Cs or a meeting between the CMA and the issuing institution. The Authority amends the draft findings and recommendations following the discussions and recommendations. The final report is then developed and formally shared with the issuer for action. The Authority then undertakes a comprehensive report on the compliance level for each year. The following were the findings on the development in practice per principle over the years.

2.4.2.1 Commitment to Good Corporate Governance Practices

The CMA reviews publicly available sources and materials, including annual reports, websites and notices, media publications, and resolutions during shareholder's meetings.[97] In determining a commitment to good governance as an issuer's practice, the Authority considers where the organisation has developed, implemented and regularly reviews its Board Charter, whether there is differentiation of management from directorship, and commitment to sustainability, among others.[98] The Authority noted that the entities assessed over the last four years have consistently improved in this area. The figure below shows the overall performance for commitment to CG governance between 2018 and 2021.

Figure 2.1: Trend analysis of the overall performance on the commitment to good corporate governance between 2018 and 2021.



Source: CMA.[99]

[97] ibid 9.
[98] ibid.
[99] ibid 10.

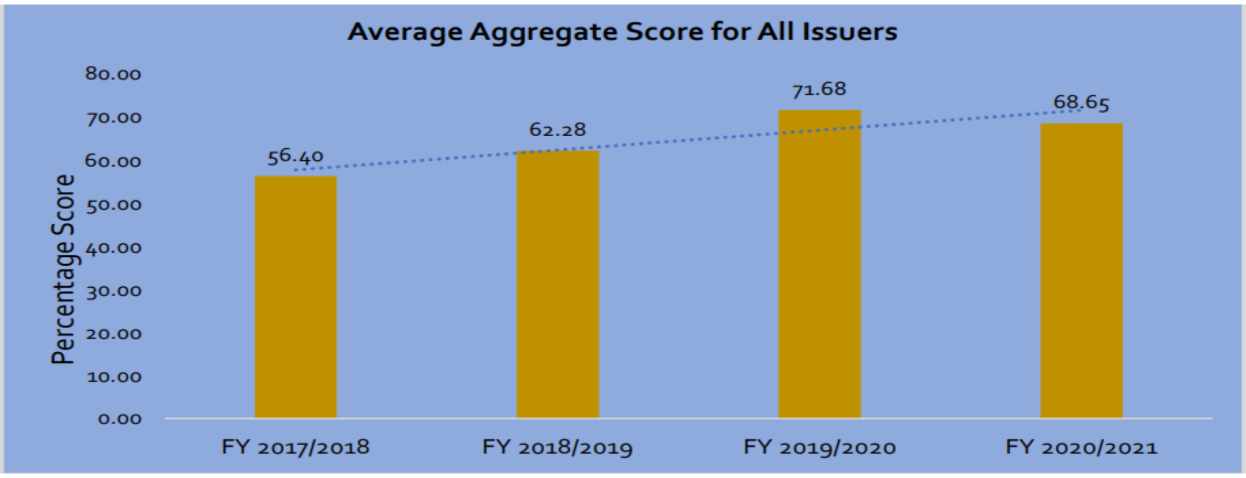
While there was continuous improvement between 2017 and 2020, FY 2020/2021 saw a drop in the rating as some of the issuers did not submit the required documents to the reviewer within the set timelines.[100] Delays affected the responsiveness rating, which further affected the overall compliance rating. Considering the significance of responsiveness in ensuring commitment to good governance, the Authority had to drop the scores for some issuers, given the delay in reviewing preliminary reports and sharing the findings. Therefore, the Authority recommended that issuers submit necessary stakeholder documents, including those to the Authority, whenever required and promptly. Issuers are further encouraged to embed sustainability practices within their operations.

2.4.2.2 Board Operations and Control

Most Codes of CG agree that the board is a critical strategic, visionary, and influential player in corporate governance success. Their role is more pronounced for companies that issue securities due to their stewardship on behalf of the investors. Effective governance that aligns with the market demands rests on a responsible, fair, transparent and accountable board. In determining whether an issuer complies with the foregoing principle, the CMA analyses the structure, appointment, composition, and diversity of the Board members.[101] It also reviews the functions and independence of these members. For the 2021 period, Authority awarded 21 institutions a leadership rating, nine a good rating, and ten a fair rating, with the rest required to improve. The Authority noted a consistent improvement for the first three periods but a slight decrease in the FY 2020/2021, as shown in the second figure below.

[100] ibid.
[101] ibid 11.

Figure 2.2: Trend analysis on the overall performance of issuers on board operations and control between 2017 and 2021



Source: CMA

The Authority attributed the decrease in the score in the last FY to the failure of some institutions to explain whether they had implemented the previous audit recommendations after being exempted from subsequent reporting.[102] The drop in rating was further attributed to some of the issuers failing to explain how they determine the independence of independent board members. This stringent measure was necessary to illustrate that the Authority is not merely interested in the measures in place but also in implementing the different proposals and recommendations it provides to the issuers following such reviews.

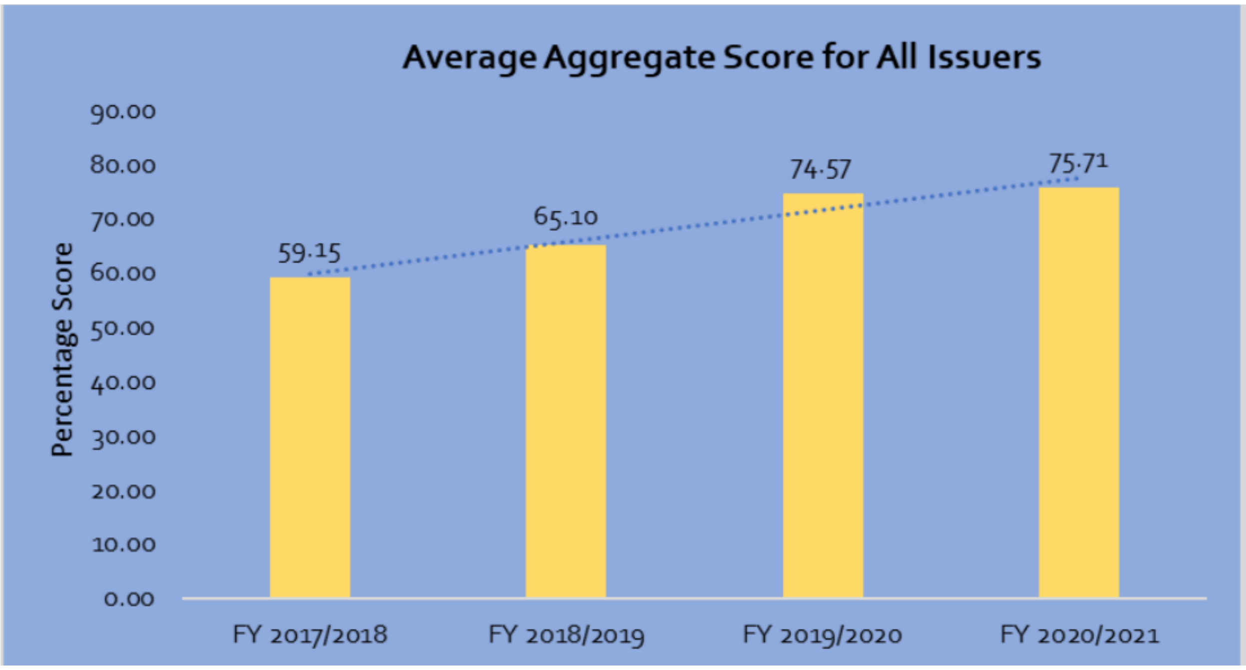
The critical areas that the Authority highlighted for improvement under the principle included the need for each board to establish precise plans on organisational succession. There is also need for metrics on director and senior management remuneration that factors in the long-term company interest. Additionally, the Authority proposed that issuers update it on the implementation status for recommendations for periods where an issuer does not participate in governance audit. Finally, the Authority required the issuers to establish measures for annual assessment of the independence of the directors.

[102] ibid 12.

2.4.2.3 Rights of Shareholders

In determining whether an issuer protects, respects, and enhances the rights of shareholders, the CMA reviews the articles of association, the Board Charter, and annual reports, among other documents.[103] The 2021 report noted rights of shareholders to be the best performing principle, with 26 and 17 issuers acing the leadership and good rating categories, respectively. Two issuers rated fairly, while the remaining required improvement. The figure below shows the overall performance of the rights of shareholders since 2017.

Figure 2.3: Trend analysis on the overall performance of issuers on rights of shareholders between 2017 and 2021.



Source: CMA

The figure indicates that the shareholder rights rating has been consistent over the years, with 2021 garnering a leadership rating of 75.71. The CMA has attributed this improved shareholder rights score to issuers' proactive engagement with the shareholders during the covid 19 period.[104]The report proposed that issuers should ensure limited technical hitches during virtual

[103] ibid 13.
[104] ibid 14.

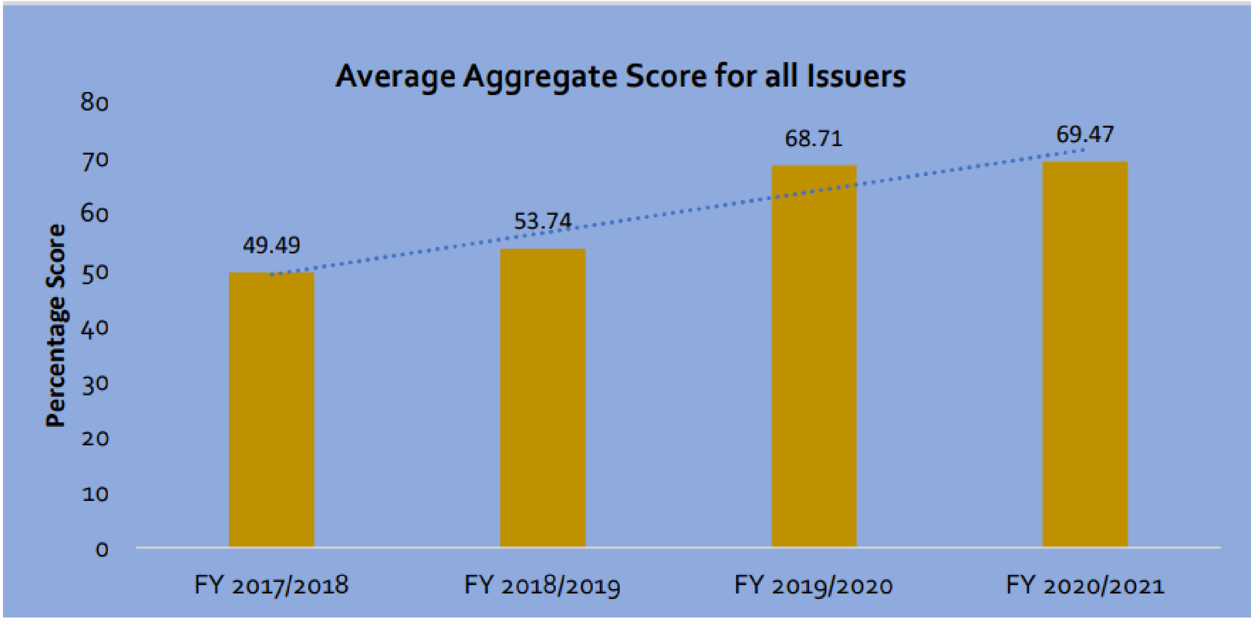
Annual General Meetings (AGMs) to enable seamless shareholder engagement during the meeting. This would require more deployment of technology and support to all the shareholders, as may be required for effective participation in the AGM and other meetings. Additionally, issuers should provide for more investor-time for registration and questions on the online AGM. Finally, the report proposed that be their clients' stewards, including through asking questions and voting during AGMs.

2.4.2.4 Stakeholder Relations

Owing to society's dynamic and interconnected structure, the CMA analyses alignment with the principle of stakeholder relations and whether the issuer engages the various interested parties in their operations, decisions, and strategies. The 2021 analysis of the practice revealed that 26, 7, and 6 issuers had leadership, good and fair ratings, respectively, while the rest rated as needing improvement.[105] The figure below summarises the trend in shareholder relations over the previous years. The report showed that 26 issuers had a leadership rating, 6 had a good rating, 7 were fair, and the rest needed improvement.

Figure 2.4: Trend analysis of the overall performance of issuers on stakeholder relations between 2017 and 2021.

[105] ibid.



Source: CMA

The trend analysis shows a general improvement in the principle over the years. The Authority reported that the consistent rating improvement is attributed to issuers' adoption of a stakeholder-inclusive approach while establishing the necessary policies to identify and realize stakeholder needs.[106]

The Authority recommended that issuers continue tailoring their engagement practices to company and stakeholder needs and interests. The issuer should also determine the required stakeholder input and how the said input can be utilised in the decision-making process. Secondly, the report called on issuers to adopt a long-term approach to intrinsic issues relating to corporate strategy. Notably, continuous engagement is more important than a one-time, ad-hoc engagement. Also, the report considered that public disclosure of stakeholder-relevant information would ensure continuous dialogue benefits all the involved parties.

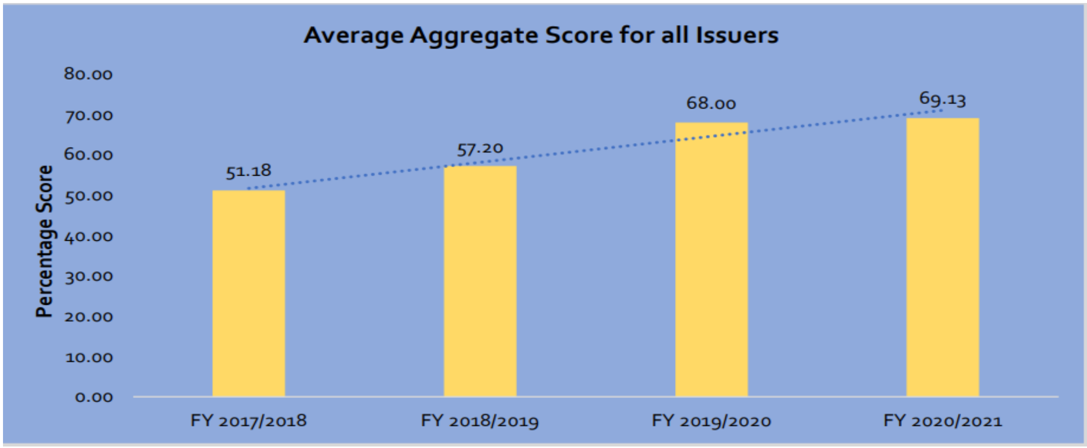
2.4.2.5 Ethics and Social Responsibility

Ethics and social responsibility are crucial for business success and sustainability. An issuer must therefore how their decisions impact society and the environment. The Authority

[106] ibid 16.

evaluates adherence to ethics and social responsibility by reviewing how issuers have established and implemented ethical standards and their annual measure of performance. [107] Compliance entails business conduct that positively contributes to social welfare and sustainable development. The CMA determines the extent of corporate citizenship for issuers as manifest in establishing and implementing ethical standards and whether such standards undergo annual standards measures. The analysis showed that 20, 12, and 9 issuers had a leadership, good and fair rating, respectively. The Authority placed the rest under the 'needs improvement' category.

Figure 2.5: Trend analysis on the overall performance of issuers on ethics and social responsibility between 2017 and 2021.



Source: CMA

The analysis shows a continuous improvement in performance from the first review until 2021. The Authority attributes the continued improvement in ethics and social responsibility to issuer development and disclosure of codes of ethics and conduct while establishing the necessary corporate citizenship policies and developing and implementing whistle-blower policies. However, the Authority called for continued incorporation of ethical and sustainability risks in the risk management framework. The report further encouraged companies to continue their

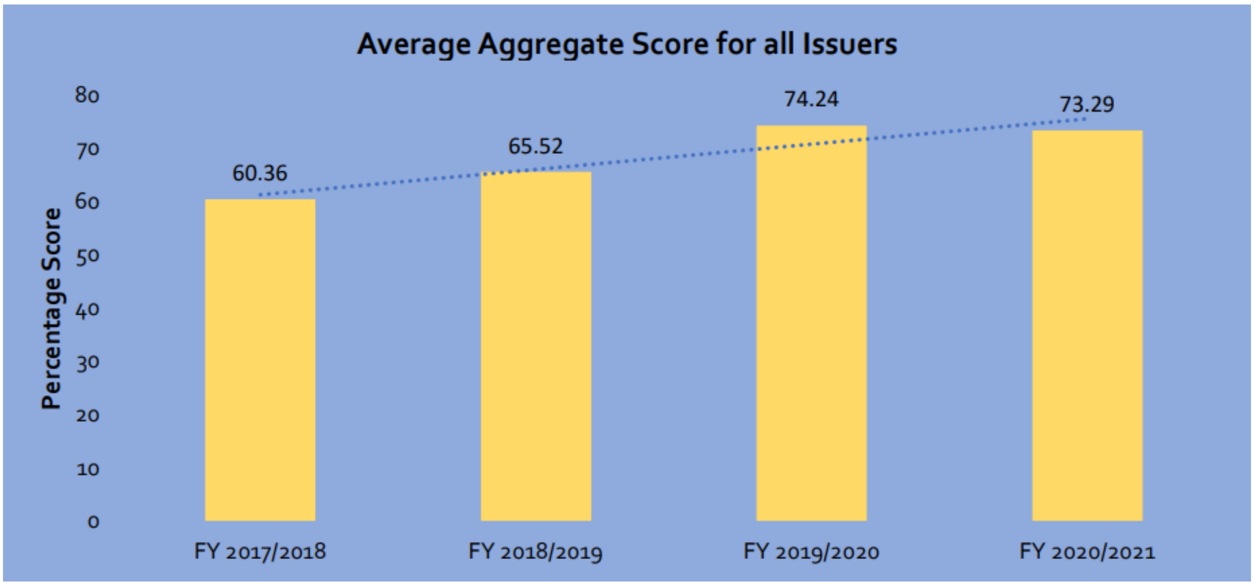
[107] ibid 16.

engagement and monitoring ethical practice. The outcomes of ethical performance and review should be disclosed to all relevant stakeholders.

2.4.2.6 Accountability, Risk Management, and Internal Control

While auditing accountability, risk management and internal control, the CMA determines whether an issuer safeguards company and stakeholder interests. The Authority inquires whether the institution under review safeguards company and shareholder interests through prudential resource exploitation that realises optimum investment returns, reduced wastage, effective investment strategies, and minimal adverse effect on risks the business encounters during its operational period.[108] The Authority will therefore consider whether the board for complete and accurate information, independence of external auditors, proper functioning of audit committees, and effective risk management systems and internal audit. For the FY 2020/2021, the report revealed that nine issuers had a good rating, 7 had a fair rating, and the rest received a needs-improvement status. The figure below summarises the performance of the principle across the years.

Figure 2.6: Trend analysis on the overall performance of issuers on accountability, risk management, and internal control between 2018 and 2021



[108] ibid 18.

Source: CMA

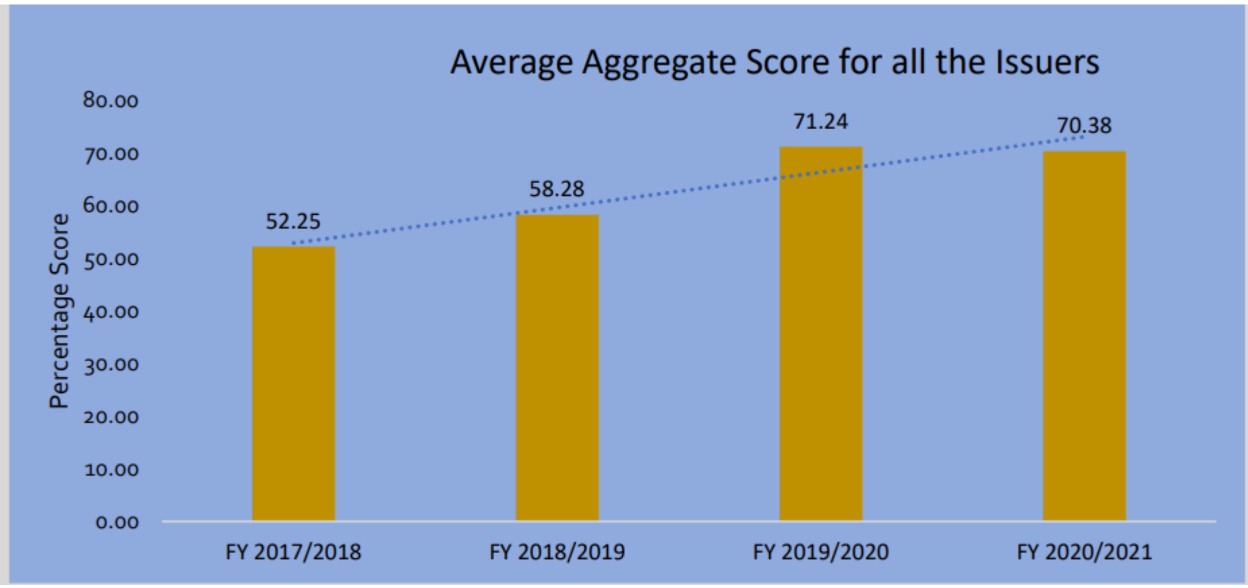
The performance improved from FY 2017/2018 to 2019/2020. However, there was a decrease in the practice for FY 2020/2021.[109] The Authority attributes the decrease in performance to the failure of some issuers to indicate whether they reviewed their risk management practice and control systems annually as stipulated under the Code. Consequently, the Authority proposed for governance oversight and risk management to be a collective stakeholder responsibility including the boards, the auditors, investors, trainers, the media and the regulator. Additionally, issuers should consider ethical, social and environmental risks when developing risk management frameworks.

2.4.2.7 Transparency and Disclosure

The Authority considers whether an issuer undertakes there are timely and balanced disclosures of information as required by various legal and regulatory requirements. The CMA reviews whether there are disclosures on top management remuneration, the status of the board charter, and whether there is a whistleblowing policy and ethical leadership, among others.[110] Other considerations include information on insider dealings, procurement policies, ICT policy, and the status of the application of the Code. Twenty-seven issuers had a leadership rating under the category, while 6 and 8 had a good and fair rating, respectively, with the rest securing a needs-improvement rating. The figure below shows the trend in transparency and disclosure from 2017 to 2021.

[109] ibid 19.
[110] ibid 20.

Figure 2.7: Trend analysis of the overall performance of issuers on transparency and disclosure between 2017 and 2021.



The analysis reveals an overall improvement in performance over the years, save for 2020/2021, where there was a slight drop in practice. The Authority attributes the last drop to non-disclosure of relevant policies such conflict of interest and stakeholder relations, as the Code mandates. Among the recommended areas of improvement was the call on issuers to disclose senior management and directors' shareholding in the company in their annual reports. Secondly, issuers are encouraged to report their related party transactions and policies in the annual reports. Finally, although most issuers disclosed having conducted legal and governance audits, the same should be published in the annual reports.

Generally, the authority noted no significant change in the issuers in the leadership rating. Those with the 'good rating' dropped to 8 while the 'fair rating' increased to ten, and those who needed improvement increased to five. These findings show that the participants generally comply with the Code. This compliance reflects a market ready to incorporate corporate governance principles in their daily operations and management. However, the findings reveal the key challenges affecting effective implementation of CG principles, especially when viewed from a private-entity perspective.

2.4.3 Challenges Affecting Effective Implementation of the Current Corporate Governance Principles

Regardless of the existing robust framework, there still exist challenges in implementing the established corporate governance principles. The CMA has noted a tendency of several listed companies to refrain from submitting their reporting templates or their annual reports for CG compliance.[111]Indeed, the Authority is currently considering appropriate actions for institutions that continuously violate the reporting requirement.[112] Regardless of the appropriate measures that the Authority will take in the future, the non-compliance remains a lacuna that needs to be addressed especially following the adoption of the 'Apply or Explain' approach.

The latter findings emerge when scholars continue to question whether formal national institutions are effective; the latter being a prerequisite for adequate company-level corporate governance adherence. Kimani et al. contend that institutions, such as a robust remedial system and strong legislation to protect investors, are necessary for effective firm-level CG practices.[113]The scholars note that Kenya ranked poorly in country-level governance measures including on transparency and governance.[114]The poor ranking manifests across various accountability-related indices such as political stability and government effectiveness, reflecting the need to go beyond the rules and sanction-based system of enforcing non-compliance with corporate governance system. It is absurd to implement Bentham's stick approach to corporate governance compliance when the stick target recognises the

[111] ibid 5.
[112] ibid.
[113] Danson Kimani and others, 'Analysing Corporate Governance and Accountability Practices from an African Neo-Patrimonialism Perspective: Insights from Kenya' (2021) 78 Critical Perspectives on Accounting 102260, 7.
[114] ibid.

inefficiencies surrounding the stick holder. Therefore, alternative approaches must be adopted, especially in novel corporate governance areas such as the private sector.

2.5 Corporate Governance Practices in Kenya's Private Companies

In recent years, many developed states have established CG codes for private companies. These states include Switzerland, Finland, Lebanon, and Belgium.[115] For instance, in 2019, the UK published the Wates CG Principles requiring private companies to adopt the 'apply and explain' approach.[116] The latter approach entails large private companies, upon applying the CG principles that they adopt, publish them. These contrasts reflect the sentiments from different stakeholders, including the Capital Markets Authority, that CG principles should be tailored to the specific realities of the institutions and organizations. Indeed, the position is echoed in such jurisdictions as the UK, where the Wates Principles do not insist on specific modalities. However, a nationally recognised CG Code or model for private companies is still lacking in Kenya.

2.6 Challenges Facing Successful Establishment and Implementation of CG Principles for the Kenyan Private Companies

Regardless of the continued recognition of the relevance of CG principles and policies in the different organisations, evidence shows little effort towards the development of CG principle for the private sector. The OECD Principles and the Principles under the Corporate Governance Code 2015 limit their application to publicly listed entities, leaving the private entities to establish their *modus operandi*. Scholarship has attributed different reasons for the limited success in the realisation of the CG prospects in Kenya. Some consider the CG reforms too

[115] Michel Keiser, 'The Wates Corporate Governance Principles for Large Private Companies: A Weak Compromise at the Expense of Employees?' (15 June 2020) 7 <https://papers.ssrn.com/abstract=3627536> accessed 7 September 2022.
[116] Financial Reporting Council, *The Wates Corporate Governance Principles for Large Private Companies* (June 2018).

western-centric, neoliberal, or non-appropriate for the context of developing States.[117] The adoption of foreign CG models has resulted in limited success in implementing a home-grown framework that works. For instance, the private sector in Kenya is concentrated with familial corporate ownership.[118] This requires a CG system that suits these corporate structures that recognise the uniqueness of African businesses.

Secondly, the conventional understanding on the advantages of a private company is that they restrict public disclosure of their internal affairs. As such, not much is known about these organisations' internal operations or governance structure. Confidentiality is a breeding ground for poor corporate governance systems. Where a company does not disclose its affairs to the public, it becomes difficult to critique its operation or advise on areas of development.[119] Even this thesis' proposal for an awards system cannot succeed where companies operate in secrecy. The Capital Markets Authority review of CG practices under the 2015 Codes noted that most of the determinants of compliance are documents and other information obtained publicly. However, company law does not mandate private companies to publish their documents unless such documents are part of the annual reports. This fact limits the extension of the principles to private companies, as the institution charged with pursuing compliance may have limited information at its disposal. This is especially the case where the said private companies do not wish to expose their documents and other sensitive materials to public scrutiny.

Finally, the poor governance challenges are another impediment to the effective implementation of CG systems. The ICSK notes that among the critical governance challenges that the private sector continues to face include a lack of clear Board recruitment, selection, appointment, and induction; non-uniformity in the application of the procedures for appointments; inadequacy in induction processes for Board members; limited skill-mix; lack

[117] Kimani and others (n 114) 2.
[118] ibid.
[119] Alex Cobham, Petr Janský and Markus Meinzer, 'A Half-Century of Resistance to Corporate Disclosure' (2018) 25 Transnational Corporations 1.

of Board Members understanding of their roles; and failure to engage qualified Board secretaries.[120]These challenges cascade to efforts at stakeholder engagement toward developing a corporate governance system for the private sector.

2.7 Current Efforts Towards Effective Implementation of CG Principles and Practices within the Context of Kenya's Private Companies

Regardless of the foregoing challenges, there have been efforts by the ICSK to develop model principles for the private sector. The ICSK is established under the Certified Public Secretaries of Kenya Act**.**[121]The organization has a statutory duty to promote good corporate governance, with its mission being "to promote the practice of good governance and leadership through competent development of members and dissemination of knowledge and best practice to stakeholders."[122]In line with the foregoing mandate and mission, In 2014, the Institute's Council developed a Code that it considered necessary for a firm foundation for good private-sector corporate governance. The Code seeks to apply across the different private sector organisations and strengthen the duties of the Board, Board audit committees, and internal audit functions.[123]

Concerning the Board of Directors, the Institute appreciates the relevance of an effective Board in achieving the organisation's strategic objective. Such a Board should consist of competent, diverse, and qualified individuals capable of objectivity and independence in judgement. For instance, the Institute proposes that each board should have appointment measures that allow for transparency and formal processes anchored on the overriding principle of merit.[124]The

[120] Institute of Certified Public Secretaries of Kenya, Code of Governance for Private Organisations in Kenya 2014 i.
[121] The Certified Public Secretaries of Kenya Act, Cap. 534 of 1988.
[122] ICSK Code of Governance for Private Companies 2014.
[123] ICS, 'About Us' (2022) <https://www.ics.ke/about-us> accessed 7 September 2022.
[124] ICSK Code of Governance for Private Companies ch 1.

Institute further proposes that such Board membership should include both executive and non-executive members, with non-executive members being not less than two-thirds.

Additionally, the board should effectively set out organisation's mission and purpose. Other proposals include explicit provisions for members' duties, the chair's role, the non-executive Board members' term limits and induction, and continuous skill development, among others.[125] There should also be clear frameworks for board evaluation, audit, succession planning, independence, and liability. The Code provides specific suggestions relating to each of these aspects of the board and recommends some of the best practices to adopt for effective management.

Regarding the principle of ethical leadership and corporate citizenship, the Institute provides that organisational operations must adhere to ethical practices that foster CG citizenship.[126] An ethically sound organisation commits to ethical operation and promoting corporate social responsibility (CSR) and investment. As a result, Boards should ensure that their operations and staff are based on high ethical standards and integrity. Such standards include the development of an ethical culture anchored on core institutional values and that the company's corporate strategy incorporates measurable improvement targets for ethical behaviour. The board should also ensure that there is a Code of Conduct and Ethics that commands adherence from all the members.[127] Other critical areas of ethical leadership and corporate citizenship include policies governing conflict of interests between the interests of the board members and the organization, maintaining corporate image and reputation, corporate social responsibility and investment, and whistleblowing measures.

Thirdly, the Institute recognises the board's responsibility to ensure the company facilitate accountability, risk management, and control systems processes.[128] The latter would include

[125] ibid.
[126] ibid ch 2
[127] ibid.
[128] ibid ch 3.

the timely preparation of accurate financial statements, the establishment of effective processes and systems of risk management and control, and the established of procurement processes that are both cost-effective and deliver value for money. The Institute proposes that the board ensure its procurement policy promotes sustainability, high ethical standards, and best practice. Competent professionals should further manage the procurement function with unquestionable integrity. Also, the Institute proposes establishing an ICT system that guarantees business integrity and continuity.

The Institute further acknowledges the place of transparency and disclosure as critical to corporate leadership and management while creating and sustaining the different stakeholders' confidence while providing continuous improvement for business structure.[129] To this end, the board should develop effective, accurate, timely, and transparent disclosures of necessary information pertaining to company operations. Among the key areas underpinning this principle include establishing an organisational vision, mission, and values; policy on corporate governance; governance structure; remuneration structures; whistleblowing policy; and compliance with laws and regulations. The board must disclose its compliance with relevant laws, regulations, and standards. Where one materially departs from the requisite compliance, the reasons for such non-compliance should be disclosed, and the appropriate measures taken to remedy the same.[130]

The fifth principle calls on the board to recognise the shareholder rights and keep with the principles guaranteeing equitable treatment.[131] To realise the principle, the Institute calls on the board to ensure shareholders have access to the necessary, timely, and regular information pertaining to the organisation. There should also be effective shareholder-dispute resolution mechanisms; shareholders receive their dividends when approved, and facilitated shareholder

[129] ibid ch 4.
[130] ibid.
[131] ibid ch 5.

participation in crucial decision-making. The board should also recognise and respect the shareholder obligation in the appointment and monitor the Board performance in line with the relevant laws, the constitutive organisational documents, and general good corporate governance. Equally important is the board's responsibility to ensure that the needs and interests of the minority shareholders are protected. Minority participation under the Code includes involvement in material and corporate decision-making, and where appropriate, such shareholders should be encouraged to form shareholder associations that champion their rights. The Institute further appreciates that effective management of stakeholder interests is a precursor for goodwill, positive organizational image, and achievement of organizational goals.[132] Stakeholder relations are realised through effective engagement through stakeholder mapping, management policies, and effective communication channels. Stakeholder rights and effective dispute resolutions should be outlined.

The seventh principle calls upon the board to conduct its operations in full compliance with the relevant legal systems.[133]These systems include compliance with the laws, rules, and regulations applicable to the organisation and documentation of the codes and standards relating to the organisation. The board should further establish a compliance policy strategy by developing internal procedures and monitoring systems that foster adherence to the relevant laws. Additionally, the board should have annual legal compliance audits that assess compliance with relevant laws and regulations.

Finally, the Institute proposes that organisations embrace policies that realise the present needs without compromising the sustainability of future development needs. Sustainability and performance management, therefore, entails putting in place sustainability goals by putting in place such measures as a balance between economic, social, and environmental concerns in

[132] ibid ch 6.
[133] ibid ch 7.

organisational performance.[134] The organisation should also focus on long-term talent development and continuous innovation of the relevant processes, products, and services. The organisation should also establish a system for performance management that links with the organisational strategy. Companies are further required to set performance targets that form the basis for performance evaluation. Notably, most of the principles that the ICSK establishes substantially align with those under the CMA and generally speak to prudent management and stakeholder relations within the organisation. However, the Code leaves the implementation to individual companies without establishing any specific oversight. This lack of oversight is a precursor for failed implementation and the inability to review their effectiveness.

2.8 Conclusion

Because of corporate governance's relevance in ensuring the company's success and general economic sustainability, Kenya has made strides in implementing corporate governance principles for publicly listed companies. However, the country needs to leap further into the private sector and advocate for a relatable corporate governance system that guarantees corporate success. Now is also not the time to reproduce foreign practices from other jurisdictions but rather to develop existing frameworks and efforts, such as the outcomes of CMA annual reporting on the state of corporate governance compliance for the public sector to guide the private sector.

Local stakeholders, including the key players in the private sector such as the companies, the institute of certified secretaries and institutions for higher learning, should develop a model framework that aligns with the Kenyan realities. Such a model should first engage the legal and regulatory landscape to identify the opportunities and challenges of the private sector corporate governance framework before developing a model code and an implementation

[134] ibid ch 8.

strategy, which, in this case, includes the award system. The third chapter discusses the various laws and institutions that govern corporate governance in Kenya.

3 CHAPTER THREE: LEGAL AND INSTITUTIONAL FRAMEWORK UNDERPINNING CG IN KENYA

3.1 Introduction

The second chapter has underpinned the country's steps towards the institutionalisation of CG in Kenya. These established principles for corporate governance emanate from key legislation that provides for the establishment of such principles within different sectors. To implement CG principles in the private sector, it is crucial to interrogate these laws for their adequacy for such protection. This chapter analyses the various laws and institutions that govern corporate governance in Kenya. The chapter will therefore seek to identify the capacity of these laws to provide for private-sector corporate governance and the nexus created with the COG Award.

3.2 Conceptualising the Place of Legal and Institutional Frameworks in Effective Corporate Governance System

A State's laws and institutions are fundamental in establishing an effective governance system. Indeed, the second chapter highlighted that the choice between a rules-based and principle-based approach to CG depends on the particularities of the legal environment in which an organisation exists.[135] Kimani and others grounded this position in the Kenyan context when they that such institutions as a robust judiciary and investor-protection frameworks, are critical to practical firm-level corporate governance principles.[136] As the institutions in question derive their authority and mandate from the various legislation, it is critical to understand these legislations in detail. The fundamental laws governing corporate governance in Kenya include; the Constitution of Kenya (CoK) 2010, the Companies Act, the Certified Public Secretaries of Kenya Act of 1988, and the Capital Markets Act No 3 of 2000. Others are the Code of

[135] See the argument by Nakpodia and others (n 29) 392.
[136] Danson Kimani and others, 'Analysing Corporate Governance and Accountability Practices from an African Neo-Patrimonialism Perspective: Insights from Kenya' (2021) 78 Critical Perspectives on Accounting 102260, 7.

Corporate Governance Practices for Issuers of Securities to the Public 2015 and the Mwongozo Code of Governance for State Corporations 2017.

3.3 The Constitution of Kenya 2010

The CoK is transformative and contains various provisions that align with the call for effective corporate governance structures. Its article 2 underpins its supremacy, binding everyone in the country. Pursuant to the Article, a person cannot claim or exercise authority without Constitutional authorisation.[137] Additionally, laws enacted in violation of the Constitution are considered invalid to the extent of inconsistency.[138] Article 2 envisages that constitutional supremacy binds all corporates, whose legal personalities are a creature of the law.[139]Therefore, corporate governance principles and institutions align with the Supremacy principle and the rule of law to be effective. Reference to all persons includes the Board of Directors mandated by public and private corporations to oversee effective corporate governance.

The foregoing position is further echoed in Article 10, stipulating the national values and principles of governance. The national values are binding to all persons when dealing in any manner that involve constitutional interpretation, enactment, application and interpretation of the law and implementing policy decisions.

The Court in *George Bala v Attorney General,* while appreciating the significance of national values in a constitutional democracy, noted that constitutional interpretation should align with the Constitution's spirit and soul as engrained in the national values and principles of governance.[140] The court further asserted that the value-oriented approach to constitutional

[137] Constitution of Kenya 2010 art.2(2).
[138] ibid art. 2(4).
[139] Boaz Nyakeri, 'The Law on Corporate Governance and Shareholder Protection in Kenya: A Case for Reduction of Corporate Scandals within Private Companies' (Thesis, University of Nairobi 2020) 53 <http://erepository.uonbi.ac.ke/handle/11295/153815> accessed 15 September 2022.
[140] George Bala v Attorney General [2017] eKLR

interpretation and application relates to humanity's core aspirations, including conscience and freedom.[141]

> Our Constitution embodies the values of the Kenyan Society and the aspirations, dreams, and fears of our nation, as espoused in Article 10. It is not focused on presenting an organisation of Government, but rather is a value system itself hence not concerned only with defining human rights and duties of individuals and state organs, but goes further to find values and goals in the Constitution and to transform them into reality.[142]

The foregoing remarks put the national values and principles of governance beyond the confines of public systems, human rights, and individual duties to the State to include the operations of private entities such as private companies whose actions directly affect Kenyan citizens. The national values and principles of governance apply to all individuals, including corporations, and their daily organisational management and operations. They are the basis for effective corporate governance legislation and principles in the country.[143] For instance, principles such as integrity, transparency, and accountability are echoed in some of the principles of governance developed by such institutions as the CMA. Additionally, the principle of sustainability speaks to the need to establish corporate governance structures that protect companies from systemic insolvency and corporate failures. "These principles and values, if faithfully implemented, would no doubt change how board appointments are made… how overlapping legislation should be dealt with."[144] The values and principles are key in establishing CG frameworks for both public and private companies.

Notably, sound corporate governance systems are anchored on openness and transparency of corporate affairs and operations. Article 35 of the Constitution protects the right to information

[141] Constitution of Kenya art. 10(2);
[142] George Bala v Attorney General para. 58.
[143] Mutonyi (n 38) 14.
[144] Ibrahim Kitoo, 'Corporate Governance Situation in Kenya: An Appraisal in the Lens of the Constitution of Kenya, 2010' (2022) 6 Journal of Public Policy & Governance 97 <https://stratfordjournals.org/journals/index.php/journal-of-public-policy-governa/article/view/1147> accessed 15 September 2022.

where such information is critical for exercising or protecting a right or fundamental freedom. In *Katiba Institute v Presidents Delivery Unit*, the High Court determined that the right to access information is a basis for accountability, responsiveness, and openness.[145] Giving effect to the values above requires the public to access information. The right to information guarantees the exercise of fundamental rights under the constitution. It is the foundation for exercising the values and principles of governance under the Constitution.

According to Wairange, the importance of information is ensuring that public investors are updated regarding on the company's financial status. Information appraises the company's important decisions such as financial status, the meetings, and other essential facts.[146]It follows that critical CG principles relating to board operations and control, and rights of shareholders require that information is availed to key stakeholders whenever required to implement the principles. For instance, transparency in appointments to the board requires openness in the appointment processes and procedures, which can only be assured where there is access to information. Consequently, establishing a corporate governance code and principles and monitoring the implementation process through such mechanisms as the COG Award system for private corporations requires the establishment of frameworks providing access to the necessary information to facilitate such action.

These constitutional provisions and their relevance in corporate governance align with the sentiments of Lumumba, who, citing Johnson, notes that "a constitution is a corset for those seeking power. (…) But constitutional principles are not corsets for the political discourse of a free society; they are the necessary condition for having any discourse at all about how purposes are to be fulfilled in that society."[147]That said, the constitutional principles of the Supremacy of the Constitution, the national values and principles of governance, and other

[145] *Katiba Institute v Presidents Delivery Unit & 3 Others [2017] eKLR*, para. 38.
[146] Wairange (n 39) 34.
[147] PLO Lumumba and John Osogo Ambani, *The Constitution of Kenya: Contemporary Readings* (LawAfrica 2011)

similar provisions relating to CG remain a necessary condition for having discourses on fulfilling effective corporate cultures, including the establishment and implementation of the requisite CG principles and practices for the private sector in the country.

3.4 Companies Act No. 17 of 2015

Companies Laws in Kenya were overhauled in when the Companies Act came into effect. The Act seeks to facilitate commerce and industry, among other socio-economic activities. To achieve the latter objective, the Act has provisions enabling natural person(s) to incorporate entities and provide for their regulation in the interest of the public, which include the interests of members and creditors.[148]The foregoing objective is the basis for which the Act provides for the different regulations governing the formation, management, and oversight of corporate entities in the country.

Among the provisions in the Act are those relating to board operations and control, rights of shareholders, stakeholder relations, ethical and social responsibility, accountability, risk management and internal control, and transparency and disclosure—part IX of the Act details the directors of companies formed under the Act. For example, section 128 requires a company to have at least one or two directors for private and public companies respectively. The section underpins the centrality of directors in the daily management and governance of companies. Under section 129, at least one of the directors for both private and public companies should be a natural person. The section outlines the need to have a natural person answerable to the different stakeholders. Other provisions on the appointment and operations of directors under the Act include section 131, limiting the minimum age for appointment to the director position to 18 years. Notably, 18 years is the age of majority in Kenya, [149] and presumably, at this age,

[148] Companies Act s2.
[149] Constitution of Kenya art. 260.

individuals can make sound decisions for the company and be held accountable for their acts or omissions.

Furthermore, section 133 recognises directors' actions as valid even where the appointment of such directors was defective, or the said director had no right to be in office by virtue of disqualification, ceased to hold the office, or had no capacity to vote. The company must also keep a record of its directors, which register can be inspected at a location to be determined by either the registered office of other place as may be prescribed by the regulations.[150] The particulars captured in the register include their name, service address, country of residence, nationality, business, or occupation.[151]

A significant aspect of the Act is the codification of the general duties of the directors. These duties are established under sections 142 to 147 of the Act and are based on the common law rules and equitable principles and their interpretation and application must be similar to the rules and principles under common law.[152] Among these duties are; acting within their directorship powers,[153] promoting the company's success,[154]exercising independent judgement,[155] exercising reasonable care, skill, and diligence,[156] avoiding conflict of interest,[157] and not accepting benefits from third parties.[158]Failure to observe these duties results to fraud and other forms of malpractice within the organisation.[159]

Acting within the director's powers calls on the directors to align their actions with the company constitution and limit the function of their power to its legal scope.[160]When

[150] Companies Act s134.
[151] ibid s135.
[152] Olive N Muasya, 'Personal Liability of Directors and The Collapse of Private Companies in Kenya' (University of Nairobi 2019).
[153] Companies Act s142.
[154] ibid s143.
[155] Companies Act s144.
[156] ibid s145.
[157] ibid s146.
[158] ibid s147.
[159] Nancy M Kanyiri, 'Fraud and Board Failures in Kenya' (Thesis, University of Nairobi 2019) <http://erepository.uonbi.ac.ke/handle/11295/108183> accessed 14 November 2022.
[160] Companies Act s42(a), (b).

promoting the company's success, the Act calls upon the directors to act in a manner they consider to benefit the company members when acting in good faith.[161] Key considerations that align with company success which also speak to effective corporate governance include the future impact of their decision,[162] employee interests,[163] the need to foster the relationship between the company and the key stakeholders, including suppliers and customers,[164] and the community and environmental impact of the company decision.[165]For instance, in *Imperial Bank v Janco Investments*, the defendants were accused of illegal undertakings shortly after the passing of the bank CEO.[166] The Central Bank of Kenya (CBK) placed the bank Kenya Deposit Insurance Corporation (KDIC) as the official receiver. The role of the receiver was to perform the function that the directors had reneged on, manage, control and conduct the bank affairs and safeguard stakeholder interests. Other considerations under this duty are the desirability to maintain high-standard business conduct[167] and the need for fairness when acting between the directors and members.[168]

On the other hand, exercise of reasonable care, skill and diligence is pegged on the subjective exercise of the said duty by a reasonably diligent person. A person is considered reasonably diligent if have the same level of knowledge as a director in a similar position.[169]Furthermore, the Act calls on the director to avoid situations that may conflict with their personal and company interests. The said conflict may be related to such aspects as property, the company's confidential information, the director's position, or the opportunities in or for the

[161] See also Kiima (n 48).
[162] Companies Act s143(1)(a).
[163] ibid s143(1)(b).
[164] ibid s143(1)(c).
[165] ibid s143(1)(d).
[166] Civil Case No. 523 of 2015 [2018] eKLR.
[167] ibid s143(1)(e).
[168] ibid s143(1)(f).
[169] ibid s145 (a), (b).

company.[170]The seriousness for which the Act requires directors to observe the duties is underpinned under section 148, which provides civil consequences for their breach.

Secondly, the Act recognises and protects the various rights of shareholders within a company. These rights are provided for under Part VIII of the Act and include; proposed written resolutions, the circulation of written resolutions, for directors to call a general meeting, receive notices of general meetings, require circulation of a statement, appoint a proxy to act at a meeting, to be sent a copy of the financial statements and reports.[171] These rights recognise the centrality of shareholders in effective corporate management. Indeed, Corporate governance codes that recognise the rights of shareholders derive their authority from the legislative need to recognise, respect and protect these rights through the dissemination of relevant information and participation in general institutional activities.

The Act further provides for accountability and disclosures by requiring companies to file financial reports with the Registrar of Companies. Documents filed with the Registrar are public documents, making them accessible to any stakeholder interested in understanding the company's financial status. Section 770 of the Act mandates listed companies to establish principles of CG, the policies and strategies for adopting them, and a yearly assessment of their adoption. Pursuant to the foregoing section, as read with the provisions of the Capital Markets Act, the Capital Markets Authority enacted the principles of corporate governance for listed companies. These provisions have contributed to the existing CG codes and practices for different institutions and organisations. Firms with individualised corporate governance principles derive them from the said legislative provisions.

[170] ibid s146(2) (a-d).
[171] ibid s114 (3).

3.5 The Capital Markets Act

The Capital Markets Act is "an Act of Parliament to establish a Capital Markets Authority to promote, regulate, and facilitate the development of orderly, fair and efficient capital markets in Kenya…"[172] Orderly, fair. Efficient capital markets can be realised through the development of prudent CG policies and guidelines. Notably, pursuant to the foregoing purpose of the Act, section 5 establishes the Capital Markets Authority, a body corporate to, among other objectives; streamline securities markets and strive towards the removal of impediments to and ensuring the creation of incentives for long-term investments in the production, and create, maintain and regulate of a market for both security issuance and trade efficiently. The Authority has a further mandate to protect investor interests.

Section 11(3) of the Act bestows the Authority with certain powers, duties, and functions to effectively discharge its mandate, including implementation of Government policies and programmes relating to capital markets. It also has the authority to sanction those in breach of the Act or its regulations, or non-compliance with its requirements or directions. Additionally, the Act authorises the Authority to issue such guidelines and notices on matters falling within its jurisdiction. Finally, and especially significant for this discussion, is the power of the authority to "prescribe notices and guidelines on corporate governance of a company whose securities have been issued to the public section of the public."[173]

From the foregoing provisions of the Act, the Authority derived its oversight authority for quoted companies on matters of CG. The Authority has since been instrumental in shaping corporate governance compliance for the publicly traded companies, first through the enactment of the 2015 CG Code and then through annual market reviews and reporting on the state of CG for listed companies.

[172] The Capital Markets Act No 3 of 2000.
[173] Capital Markets Act s5.

The Authority has since developed a Stewardship Code to encourage institutional investors to be responsible stewards and promote good CG and sustainable success of listed companies.[174] With regard to the 2017 Code, the role of the Authority includes; championing and promoting the Code within the Capital Market, encouraging institutional investors to be signatories to the Code while encouraging engagement between the investors and issuers as part of effective stewardship. Additionally, the Authority has to build support for the Code from the various stakeholders in the capital markets including investors and the public sector. Other duties include monitoring the Code's adoption from signatory institutional investors, reporting on the outcome of the said monitoring with the assessment of its effectiveness, and the effectiveness of the 'apply or explain' framework. It should also undertake periodic reviews of the language of the Stewardship Code to ensure that the Code remains relevant in the market.

Finally, it is the responsibility of the Authority to conduct periodic meetings and worships with the signatories to the Code to note whether they are effective, relevant and up to date.[175] The CMA has since become the overarching institution that oversees the implementation of CG principles in Kenya. It has also ensured the successful implementation of the Code while following up on issues of noncompliance. Additionally, the Authority has ensured continued stakeholder engagement on the same.

3.6 Code of Corporate Governance Practices for Issuers of Securities to the Public 2015

The 2015 Code of CG Practice is a standalone Code anchored on section 11 (3)(v) of the Capital Markets Act. While the second chapter engaged in a detailed discussion on the principles of CG under the Code, it is crucial to underpin its benchmark status in Kenya's CG as it is the single most substantive Code on CG following the enactment of the 2010 Constitution. Indeed, the function of the Code is to "establish the minimum threshold of standards expected of the

[174] Stewardship Code for Institutional Investors, 2017.
[175] ibid.

various stakeholders such as directors, shareholders, chief executive officers and top tier management of listed or unlisted companies as long as such companies issue securities to members of the public, or a section of the Public…"[176] The minimum threshold is captured in the various chapters in the Act providing for principles, guidelines, and recommendations based on the seven key categories of CG.

While the principles of governance are the broad concepts of good CG that companies are to apply in their implementation of the recommendations. On the other hand, the recommendations are the established standards flowing from the principles. Companies must adopt the recommendations as part of their governance structure and principles. Companies must explain their application of these recommendations in their annual reports. The guidelines assist the companies in understanding the recommendations while guiding companies in the implementation of the said recommendations. The Code, therefore, operationalises the principles in the various laws governing CG in Kenya.

3.7 Certified Public Secretaries of Kenya Act 1988

The Certified Public Secretaries Act establishes the Institute of Certified Secretaries of Kenya. The Institute is a corporate body whose functions include promoting professional competence standards and practices among its members. The Institute is further mandated to promote research on secretarial practice and finance matters, including the publication of books, periodicals, journals, and articles. Pursuant to the foregoing functions and duties, the Institute has promoted good governance practices for private and public institutions.[177]In 2010, the Institute inaugurated the Champions of Governance (COG) Award to institutions that demonstrate high standards of good governance. The COG Award seeks to promote good governance by recognising the practices and application of good governance for public and

[176] Code of Corporate Governance Practices for Issuers of Securities to the Public 2015
[177] Institute of Certified Secretaries, 'The Champions of Governance (COG) Award Information Brochure' 2021 available at https://www.ics.ke/downloads-center-2?task=download.send&id=53&catid=11&m=0

private entities, innovations within organisations supporting good governance, and encouraging organisations to invest in good governance. The Award system also promotes and recognises research in good governance practices.[178]

Twenty-four categories for the Award run across different sectors: agriculture, finance and investment, commercial and services, industrial and allied sector, insurance, small and medium enterprises, co-operative, retirement benefits, faith-based organisations, and most improved organizations.[179]The categories are evaluated across various parameters, including the board, ethical leadership and corporate citizenship, and accountability, risk management and internal control. Through the Award, the ICSK has promoted governance practices while stimulating competition, innovation, and sustainability of the participating institutions.

The advantages of participating in the Award process are numerous. They include the detection of governance gaps and weaknesses and recommending corrective measures for them.[180] It also enhances accountability and sustainability for participating institutions, boosts their reputation and brand value, and increases investor and creditor confidence in participating and awarded organisations.[181] The system is, therefore, an incentive for the company and stakeholders to adopt effective corporate governance practices. Besides the COG Award system, the Institute developed a private sector CG.[182] The second chapter analysed the corporate governance principles under the latter Code. However, as previously noted, the principles under the Code are merely persuasive and do not bear any obligation on companies to implement them.

3.8 Mwongozo Code of Governance for State Corporations 2015.

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[178] ibid.
[179] ibid.
[180] Institute of Certified Secretaries, 'Champion of Governance (COG) Award 2022' available at https://www.ics.ke/downloads-center-2?task=download.send&id=166&catid=11&m=0.
[181] ibid.
[182] Institute of Certified Public Secretaries of Kenya, Code of Governance for Private Organisations in Kenya 2014.

The Mwongozo Code is anchored on Articles 10 and 73 of the CoK. The Code was developed through the joint initiatives of the State Corporations Advisory Committee and the Institute of Certified Public Secretaries. It seeks to "improve the governance of SCs by addressing the challenges identified by the Taskforce, and pro-act to international best practice in corporate governance**."[183]**While the Code is tailored to fit the realities of State Corporations, the principles underpin corporate governance under the Act align with those in other instruments, as the corporate governance code for listed companies.

The Code addresses such areas of corporate governance as the board of directors, transparency and disclosures, and accountability, risk management, internal control, ethical leadership and corporate citizenship.[184] The implementation of the principles not only ensures SC is sustainable but also accelerates national development for the common good of the citizens. Mutonyi notes that among the strengths of the Mwongozo Code is that it has professionalised how state corporations are run and managed.[185]The Code, therefore, remains one of the critical benchmarks for effective corporate governance in Kenya and can be used as a guide for private-sector corporate governance.

3.9 The Data Protection Act 2019

The Data Protection Act 2019 gives effects to the provisions of Article 31(c) and (d) of the Constitution of Kenya. The Act regulates the processing of personal data, provides for the rights of data subjects and the duties of data controllers and processors.[186]The key objectives of the Act include the regulation of processing of personal data, ensure process of personal data is governed by set principles, protect individual privacy, establish the legal and regulatory

[183]Mwongozo Code of Governance for State Corporations 2015, available at https://wasreb.go.ke/downloads/MWONGOZOCODEOFGOVERNANCE.pdf.
[184] Ibid.
[185] Mutonyi (n 38) 28.
[186] Data Protection Act No. 24 of 2019.

framework for personal data protection and provide data subject with rights and remedies for the protection of personal data for processing beyond the Act.

A critical aspect of the Act are the principles of data protection as enumerated under section 25 are the principles of data protection. The section calls on data controllers and or processor to ensure that data is processed in line with the data subject's right to privacy; lawfully fairly and transparently; collected for explicit, specified and legitimate purpose and not any further in a manner incompatible with the said purpose; adequate, relevant, limited to the necessary purpose of its processing; and be accurate and up to date where the nature of the collection so requires.

The objects and principles of data protection under the Act scopes the entire spectrum of corporate governance as all private institutions interact with stakeholder data in their dealings. Data governance, the management process of the availability, usability, integrity and security of the data on the basis of internal data control standards and policies that also provide for data usage is essential for effective realisation of corporate governance.[187] First, corporate governance compliance is a relational process that involves engaging with the various stakeholders, from customers to suppliers and creditors. These interactions invite data processing and control. Consequently, each organisation must align its internal control measures to ensure that stakeholder data processing aligns with the tenets of the DPA.

The second limb of the correlation between data protection and corporate governance rests on the compliance and audit process. The use of external audits such as the CMA or ICSK Award process involves processing and control of personal data (for the company and its staff). Some of the said data may be sensitive and confidential to the organisation breach of which may lead to legal claims for liability. It is therefore prudent for oversight institutions to align its

[187] Benedikt Erforth and Charles Martin-Shields, ': EU–Kenya Cooperation in Data Protection', *Africa–Europe Cooperation and Digital Transformation* (Routledge 2022) 145.

compliance audit processes with the DPA and its regulations. This will not only ensure legal compliance but assure the data subjects (the private companies) of privacy and security of the data.

3.10 OECD Code of Corporate Governance

The G20/OECD Principles of CG were first published in 1999 to improve CG's legal, regulatory, and institutional framework so as to enhance efficiency in the economy, growth sustainability and financial stability. The principles are global standards of CG. Kenya, like other OECD states borrows from the OECD principles when developing its local principles. However, owing to the continuous engagement with the local market, the country has developed its own framework to govern corporate governance as captured in the foregoing sections. A detailed discussion of the principles will be mute as it will consist of repetition of the principles already captured in the previous section.

3.11Limitations of the Existing Legal and Institutional Framework in Enhancing Corporate Governance Compliance for Private Companies in Kenya

3.11.1 Lack of Clear Requirement for Private Companies to Develop Corporate Governance Principles for their Businesses

Private companies have no similar requirements as listed companies to develop and implement CG principles in various legislation. These companies are therefore left at the behest of their internal management regime and the key stakeholders to develop prudential governance practices. As most companies are family-run, the absence of a corporate governance code becomes a recipe for fraud, mismanagement of funds, and insolvency. Indeed, Said argues that lack of clear corporate governance compliance oversight and audit has led to a series of human rights violations by private entities.[188] He therefore advocates for human rights principles

[188] Madiha Fofeek Said, 'Examining the Role of Human Rights in Enhancing Corporate Governance in Private Sector Corporations in Kenya' (Strathmore University 2021).

within corporate governance practices for private companies. These measures are not to be limited to human rights alone but rather across the whole private sector spectrum.

3.11.2 Lack of an Implementation and Oversight Body

The discussion has underpinned the place of the CMA in overseeing the implementation of CG principles for public institutions. However, no similar body is charged with implementing corporate governance for private entities. The efforts by such institutions as the ICSK are mere recommendations with no enforcement mechanisms. With such a gap, private entities can choose to implement the corporate governance principles enshrined in the different legislation or fail to do so.

While private companies may have internal corporate governance mechanisms in place, a lack external oversight and audit mechanisms affects the success of such mechanisms in realising their objectives. For instance, a private company may fail to gauge the effectiveness of their corporate governance principles against international best practices and market developments. Such a company may find itself operating under the auspices of the previous corporate governance regimes which do not align with industry developments. An implementation and oversight body therefore helps to align practices and ensure that institutions align their governance principles with the law and market requirements.

3.11.3 Limited Oversight, Transparency, and Disclosure Measures for Private Companies

The second chapter reiterated that confidentiality and failure to disclose private companies' internal affairs and operations had been critical contributors to the sector's failed corporate governance. The latter can be attributed to Kenya's corporate governance framework, which does not have clear oversight, transparency, and disclosure framework. For instance, the Companies Act establishes the small companies regime that seeks to reduce the cost of operations for companies whose net turnover is less than fifty million Kenya shillings or whose net asset value is below twenty million Kenya shillings.[189] The small companies regime is composed of primarily private small and medium enterprises. These enterprises are exempted from several reporting requirements. These companies are excluded from concise financial reporting and audits. The companies may therefore provide abbreviated financial statements without necessarily including the auditor's report in those statements. As a result, they may not fully disclose their corporate governance practices to key stakeholders such as the ICSPK, impeding oversight and compliance.

For example, on August 15, 2022, the CBK approved the liquidation of Chase Bank Limited after five years under receivership. An audit conducted by Deloitte following its receivership status five years ago showed that the Bank had falsified its financial books, which affected complete disclosures and transparency. These findings crosscut many private companies facing governance challenges and speak to a culture of limited oversight, non-disclosure, and opaqueness.

3.12Conclusion

The legal and institutional framework for corporate governance in Kenya has tremendously developed over the years to ensure that the country adopts a robust corporate governance culture. This is manifest in the CoK, the Companies Act, the Capital Markets Act, ICSK Act, and the Codes established under the foregoing laws. Corporate Governance culture has significantly been enhanced for publicly listed companies and State Corporations through the 2015 Code for Public Entities and the 2017 Mwongozo Code. However, the discussion notes a lacuna in corporate governance tailored to the private sector. The efforts by the ICPSK at developing a private sector CG Code are merely persuasive and require further grounding on

[189] Companies Act s 624.

the law. The fourth chapter details the nature and scope of COG award system, its methodology and impact in Kenya.

4 CHAPTER FOUR: CASE STUDY OF THE CHAMPIONS OF GOVERNANCE AWARD

4.1 Introduction

The previous chapters have traced the place and significance of implementing corporate governance principles within the Kenyan markets for both public and private entities. Having identified the centrality of corporate governance in protecting the different interests that companies safeguard, the discussion noted a lacuna in the implementation of these principles for the private sector. Whereas institutions such as the Institute of Certified Public Secretaries have made efforts towards more CG compliance for the private sector through the Code of Governance for Private Organisations in Kenya 2014, there is still limited uptake of the Code among private entities. The Institute has since established the Champions of Governance Awards system to encourage more adherence to corporate governance principles. This chapter conducts a case study of the COG awards to identify the metrics used in selecting various awardees and underlie the strengths and weaknesses of the Award system as an incentive for corporate governance compliance. The discussion further delves into the need to institutionalize the Award system to ensure more private-sector participation.

4.2 Contextualising Governance Audit Manuals, Standards and Guidelines Corporate Governance Compliance

Governance audit entails the independent assessment of an organisation to determine whether the organisation adequately and effectively adheres to its policies, systems, practices, and processes in line with the law and international metrics.[190]It is an objective assurance intended to add institutional value through a systematic, disciplined approach to evaluating and

[190] Riadh Manita and others, 'The Digital Transformation of External Audit and Its Impact on Corporate Governance' (2020) 150 Technological Forecasting and Social Change 119751.

improving effectiveness in risk management and control.[191] The audit manuals outline the significance of audits, the types of audits and the responsibilities of different stakeholders in the audit process. It also outlines the scope of the audit, documents, evidence, and post-governance audit. The audit manual may also prescribe the standards and systems necessary for effective CG compliance among organisations. Systems and standards are, therefore, a significant aspect of governance audits.

In Kenya, the ICSK has developed various governance practices aimed at convening and executing General meetings in an organisation, board and committee meetings, preparation, passing, recording and maintaining resolutions. The standards are therefore meant to enhance good corporate governance compliance. It is critical to distinguish governance audit and legal audit. The latter audit seeks to underpin compliance with the various laws and regulations of the land and is a subset of the overall governance audit.

4.3 Concept and Legal Basis of the Champions of Governance Awards

The ICPSK COG Award is an initiative of ICSK Council. It is defined as 'an award for excellence in corporate governance seeks to recognise those that exhibit the highest CG practice standards.'[192]The Award seeks to promote good governance awarding champions in good governance in Kenya.[193]The award system further recognises innovations within organisations supporting good corporate governance, encourages organisations to implement good corporate governance practices, and promotes good corporate governance-related research.[194]

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[191] Christina Vadasi, Michalis Bekiaris and Andreas Andrikopoulos, 'Corporate Governance and Internal Audit: An Institutional Theory Perspective' [2019] Corporate Governance: The International Journal of Business in Society.

[192] Code of Corporate Governance for Private Organisations in Kenya 2014, iv.

[193] Institute of Certified Secretaries, 'The Champions of Governance (COG) Award Information Brochure' <https://www.ics.ke/downloads-center-2?task=download.send&id=198&catid=11&m=0>.

[194] ibid.

The ranking of corporate governance practices varies with the organisation and sector. Notwithstanding the foregoing, best practice in corporate governance requires each organisation to determine its own CG compliance mechanisms. Industries adopt different corporate governance frameworks, making the practice and compliance vary depending on the institution. Cognisant of the foregoing, the COG award is split into 24 different categories, each awarding the best performer, the first and second runners-up.[195] The categories related to private sector organisations include agricultural, finance and investment, commercial and service, industrial and allied sector, insurance, small and medium enterprises, water service, education, chairman of the year, COG CEO of the year, company secretary of the year, Campion of Governance Award, and most improved organisation awards.

The parameters for evaluation under the Award include run across the broad CG principles and include ; the board, ethical leadership and corporate citizenship, accountability, risk management and internal control, among others.[196] As noted in the second chapter, these parameters substantially align with the international and local standards captured in various instruments, including the CoK, the Vision 2030 and Second Medium Term Plan, the Companies Act and other relevant Acts of Parliament, OECD Principles of CG, 2004, and the King Code of Governance for South Africa 2009.

4.4 Champion of Governance Procedures and Metrics

4.4.1 Champion of Governance Procedure

The Institute calls on interested organizations each year to participate in the Award through various awareness campaigns. The awareness campaigns include letters to relevant organizations inviting their participation in the Award. A participating organisation pays the nominal registration fee that covers participation and dinner for three participants during the

[195] Institute of Certified Secretaries (n 191) 2.
[196] ibid 3.

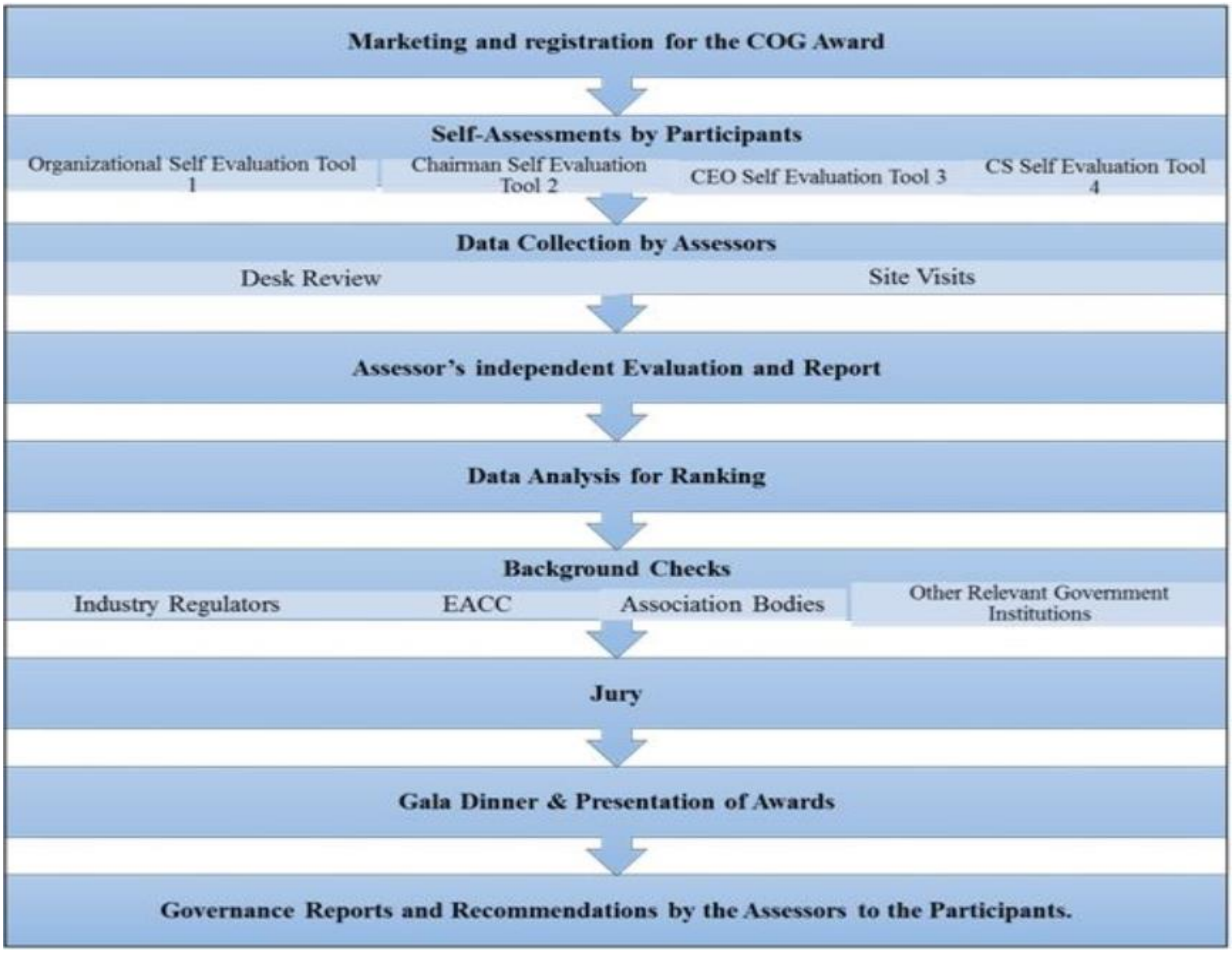
Gala Night. The registration fee is Ksh. 96000.[197]An organisation wishing to participate registers by submitting the form together with the fees to ICSK.[198] The completed form assures the participants that the information gathered in the process will be given strict confidential treatment and be used for the sole purpose of the award.[199] Upon registration and payment of the fees, the Institute sends the participating organisations the self-assessment form, which the organisation fills out and returns to the Institute within seven days of receipt. The completed form is accompanied by all the necessary supporting documentation as stipulated in the form. Among the documents that the organisation is to submit together with the form are the audited accounts for the last three years, annual report, board minutes, policies for inducting independent directors, and Code of CG. Others are the organisation's human resource policy for recruitment, training, remuneration, and staff welfare known to employees, whistle-blower policy, corporate disclosure policy, policy on corporate social responsibility (CSR), and environmental regulations. Owing to the sensitivity of some documents, the Institute limits the Assessment Consultant to observe the documents, take notes and return them to the organisation. By submitting the form with the required fees and documentation, a participating organisation enters four awards; organisation COG award, chairman of the year, company secretary of the year, and COG CEO of the year awards.

Each participating organization is then assigned a team of at least two COG Award Governance Audit Consultants to evaluate their compliance with the required corporate governance standards. The Institute then analyses the data collected appropriately before classifying the results. Result classification is done according to sector ranking, chairman ranking, COG CEO ranking, and CS ranking. The Institute also undertakes background checks on all participants,

[197] ibid 4.
[198]'Champion of Governance (COG) Award, Year 2022' <https://forms.office.com/pages/responsepage.aspx?id=WU_P-Fjyik-ShoTXFoKNzoeVoL_zivdGvY2g2i5NEjtUMFZJUzRJWU5CVzZTWTk5UkxPNjJHTDk2OS4u> accessed 28 October 2022.
[199] ibid.

including soliciting and obtaining relevant information from the various industry regulators, the Ethics and Anti-Corruption Commission, and other relevant stakeholders that may hold information necessary for decision-making.[200] The results are then submitted to a jury to decide on the winners. According to the Institute, the jury's decision is final. The Gala Night is held following the jury's decision, where the Institute announces the winners of the various awards.

The figure below sums up the Award Process



Source: ICSK eBooks

[200] 'ICPSK Champions of Governance (Cog) Award – EBooksKenya' <https://ebookskenya.co.ke/icpsk-champions-of-governance-cog-award/> accessed 28 October 2022.

4.4.2 Champion of Governance Metrics and Evaluation Tools

4.4.2.1 Champion of Governance Main Assessment Tool

The COG award's main assessment tool requires the assessor to consider whether: there was the implementation of policies or given criteria; there are policies, plans, and guidelines supporting the criteria; and whether the maturity of the policies or guidelines is four years or greater. Each stage is given a score of either High (3), Medium (2), or Low (1), depending on the adoption or implementation level. Each parameter is assessed as Plan Do Check Act Review/Improved (PDCAR). All the points for each of the parameters are reduced to 100. The details of the parameters are provided in *Appendix I*.

The self-assessor completes the self-assessment tool on behalf of the organisation. The tool comprises eight parts, with each providing details of the corporate governance standard required of the organisation from the broad principles.[201] Each of the eight parts is divided into two broad columns, with the first column providing the characteristics specific to the principle under review. The second column provides the findings, observations, and evidence (See *Appendix I*). The column is divided into sub-columns on execution or implementation, policy or plan, and maturity. The self-assessor completes each box, space, or question with a precise statement of 5 to 7 words.

The self-assessor must read the performance statement, make observations, and provide adequate evidence supporting the observations. They are also to write notes (evidence) supporting their observations. This evidence is then weighed on a scale of 1 to 3. For instance, when responding to the execution/implementation column, the self-assessor acknowledges the existence of evidence supporting the practice being implemented. The evidence varies from records, reports, meetings/minutes, reviews, and learning from success and failure. The

[201] Institute of Certified Secretaries, 'Champions of Governance (COG) Award, 2022 Main Tool Self-Assessment by Client'.

requirement for supporting evidence is crucial to avoid making boilerplate statements that do not align with organisational practices.

On the other hand, policy/plan requires evidence to support the claim that the practice is available and supported by the organisational philosophy, policy, plans, guidelines, documented structures, systems, and resources, among others. Finally, on maturity, the self-assessor must show evidence of an entrenched habit of excellence with provable impact, benefits, sustainable results, and growth. See *Appendix I* for more details. Notably, the tool reflects CG best practices in the country and globally.

Board of Directors

The metrics recognize the Board's centrality in the firm's strategic direction, the exercise of control, and accountability to the shareholder. The board members must receive induction with the continuous development of their skills and knowledge to enhance their effectiveness. Annual evaluation of the Board, committees and directors should also be followed. The Board is therefore assessed under such governance practices as appointment, composition, size, roles, and board functions term-limits for non-executive members, board committees, meetings, work plans, induction and continuous skill development, board charter, and governance audit. The self-assessor reviews, based on actual performance observed and evidence collected, and rates the extent to which their organisation exceeds the best practices under each category above.

Ethical Leadership and Corporate Citizenship

Secondly, the organization should adopt ethical leadership that promotes corporate citizenship. The governance practices that the metrics look for include ethics and integrity, conflict of interest, corporate reputation and image, corporate social responsibility and investment, and whistleblowing policy. The self-assessor must review, make observations and provide evidence that the company adheres to ethical leadership and corporate citizenship by supporting the Board’s commitment to the existence of a Code of Conduct and Ethics promoting ethical behaviour in the organisation. On conflict of interest, there should be evidence of conflict management policies that are followed.

Accountability, Risk Management and Internal Control

Thirdly, the metrics appreciate the board's role in ensuring effective accountability, risk management, and internal control practices. In determining adherence to the latter standard, the self-assessor must provide evidence that supports financial reporting, risk management measures, internal control, and the availability of audit committees and external auditors. Regarding auditors, there must be evidence of independent Audit Committees to oversee internal functions and internal auditors. Most of the Committee members must be non-executive, and at least one must have an accounting background. The Board must also have an internal audit function.

Transparency and Disclosure

Fourth, the metrics recognise that transparency and disclosure are crucial for sustained confidence from the various stakeholders and are an opportunity for improved business. The Board should ensure that pertinent information on the organisation is disclosed effectively, accurately, timely, and transparently. Transparency and disclosure are measured through analysis of the organisational vision and mission, corporate governance policy, key stakeholder groups, Board performance, remuneration structure, Code of Ethics and Conduct, and whistleblowing policy. Others include critical organisational risks, financial reporting, information communication technology, procurement, and legal compliance.

Rights of Shareholders

Additionally, the metrics require the Board to ensure that the organisation recognises the rights of the shareholders and ensures their equitable treatment. Adherence to shareholder rights and obligations is assessed through observation of ownership rights and interests of the shareholders and recognition of shareholder obligations. When determining compliance with shareholder obligations, the self-assessor should note whether the shareholders monitor the Board performance and whether the shareholders appoint or determine the appointment process for the external auditor. The participating organisation should show evidence of the specific board members' engagement with the different shareholders, including the outcomes of votes on resolutions.

Stakeholder Relations

The metrics identify that stakeholder relations ought to be proactively managed to realise stakeholders' legitimate interests and expectations and to realise company objectives. Stakeholder engagement and rights are the essential practice measures under this umbrella. Stakeholder engagement involves regular stakeholder mapping, stakeholder relations management policy, and stakeholder satisfaction surveys. The self-assessor must indicate whether customer or stakeholder satisfaction survey was undertaken. They should also indicate whether there are any pending complaints in the beginning of the FY, those resolved and those pending at the end of FY. The self-assessor must also indicate their assessment of the level of organisational commitment to realising stakeholder rights and legitimate interests in decision-making.

Compliance with Laws and Regulations

A COG must also comply with laws and regulations and that the operations of company affairs align with relevant laws, rules, and regulations. The key determinants of such compliance include applicable laws, regulations, and standards. A compliance strategy and legal compliance audit should also be carried out annually to determine compliance levels with the different laws and regulations put in place. Legal compliance is the cornerstone of governance compliance and is very essential in the wake of evolving regulatory requirements across the different institutional spectra.

Sustainability and Performance Management

Finally, the metrics measure whether the organisation embraces sustainability and performance management through developing policies that meet present needs without compromising future needs and objectives. The company should have sustainability goals and strategy, a performance management policy, and a policy on information communication technology. The ICT policy must align with the organisation's objectives. The board should show evidence of commitment to future organisational sustainability, balance of economic, social and environmental concerns and long-term talent development. There should also be evidence of continuous innovation of the company processes, products and services.

4.4.2.2 Chairperson of the Board Evaluation

Peers evaluate the chair of the board. The composition of the peers must be at least two Board Directors from each gender. The peers feel the form in *Appendix II* by evaluating the level of excellence of the chair's performance in the last three years. The peer reads the performance statement, makes observations, and writes down the evaluation evidence by scoring between 1-10 for each area under assessment. The completed evaluation tool is sealed under 'CONFIDENTIAL' cover and transmitted to the COG Secretariat seven days prior to the day the consultant assessor visits the organisation. The assessment Too is then subjected to desk review whereby two assessors engage in a face-to-face interview with the chair before the peer score is reduced to 60 per cent while the assessors score the chair out of 40 per cent.

The peers must give their score on the chair's awareness and understanding of their role under the terms of reference, whether they have worked with the necessary stakeholders and have assisted the Board and Company officers to assure compliance with and implementation of the CG guidelines; where appropriate worked with the Corporate Governance Committee to recommend revisions to the Governance Guidelines among others. These performance criteria reinforce the chair's centrality in ensuring the company's corporate governance guidelines and principles are realised. They reiterate the place of the chair as the pacesetter in corporate governance in the company. Participation ensures that a chair is appreciated for their contribution to the organization's corporate governance and identifies areas of weakness and strength that the chair can improve to realise the company's corporate governance and related objectives.

4.4.2.3 Chief Executive Officer and Company Secretary Evaluation

Chief Executive Officer (CEO) and the Company Secretary (CS) are significant contributors to any organization's CG framework as they sit at the top of the organisational decision-making and management. Their evaluation involves various processes, including self-assessment, desk review, and face interviews (which include virtual interviews where necessary). The CS self-assessment is done by the Company Secretary of the Year Self-Assessment tool provided under *Appendix III*. The assessment tool determines the CS's level of excellence that they evaluate their performance by tracking their 3-year track record using a scale of either high achievement (3), medium achievement (2), low achievement (1), or not started/achieved (0). They have to provide evidence to support the observations they make.

The discussion criteria include the performance of their tasks and responsibilities, such as how they live up to the expectations of the best practices in the organisation, at professional, national, and international best governance practices as a critical accounting officer in governance. They also describe their role in ensuring professional preparations for AGMs, members' service and feedback systems, communication with stakeholders, and continuity of policies and practices. The other areas under self-evaluation include their beliefs, values, and vision; work dynamics; intra-departmental shared roles; and life outside the office.

A similar self-assessment tool is provided for the CEO, as captured in *Appendix IV*. The CEO is to read the performance statement, make observations, and provide evidence supporting their observations. They must indicate that the characteristic or attribute exists (yes=1, no=0). Where the characteristic exists, they will indicate for how long it has existed (1 year=1 point, two years=2 points, three years=3 points, and four points if it exists for more than three years). However, where they indicate a score of either 3 or 4, they must show that the best practice has existed/been applied and that the results are visible.

The key areas that the CEO must respond to include their understanding and compliance with their legal duties, obligations, powers, and liabilities; whether they have put in place measures that ensure that Senior Management exhibit best leadership practices; understands and complies with the laws, legislation, and complies and enforces compliance with the Corporate Governance Guidelines. They should also indicate whether they have in place systems to provide a practical internal audit compliance function and operational systems for internal control in finance, security, operations, and a variety of internal and external transactions; whether they have in place efficient systems providing for timely and useful management information for internal use and the Board and its organs of Corporate Governance; and provide regular reviews of the information to satisfy the stakeholder requirements.

Both the CS and CEO self-assessment tool shapes their place in the governance of the company and reinforces their centrality in ensuring the success of corporate governance. Notably, the self-assessment tool is based on evidence to support the observations made. As a result, the process evaluates adherence to corporate governance principles from the CS and CEO perspective and enables the company to trace its milestones in the years under evaluation.

4.4.3 Findings of the Survey on Participation in the COG Award

The research surveyed the impact of the COG Award on institutional compliance. The survey sought to elicit information on the nature and scope of institutional participation in the award system. Additionally, the survey inquired about the reasons for engagement in the award process, the benefits of the process and notable corporate governance changes following institutional participation. Finally, the survey wanted to identify the gaps in the award process that could be addressed for further institutional engagement in effective corporate governance practices. The questionnaire feedback is provided in appendix *V*. The following were among the critical responses from the participants.

4.4.3.1 Nursing Council of Kenya

The Nursing Council of Kenya (NCK) is one of the organizations surveyed on their participation in the COG Award and the effect of the Award on their Corporate Governance Practices. The NCK is a public body established under Cap 257 that regulates nursing and midwifery. NCK recognised the ICSK as the regulatory body for Kenya's corporate governance and has participated twice in the COG Award under the public sector entities category. The addition of the public sector category into the award system, the need to benchmark with other organisations, and the independent assessment of the organisation's practices were among the reasons NCK gave for its participation in the Award.

Following its participation in the Award, NCK recognised improved performance in corporate governance. Additionally, the organisation adopts the recommendations from the assessors and, together with the report, develops additional policies to strengthen its internal procedures, which has translated to smooth council operations. Additionally, NCK appreciates the confidence in the management, the Board, and the CEO, who work together to maintain high corporate governance standards. It also noted that participation in the Award had enhanced the need to comply with set laws and regulations.

The organisation has established a legal department headed by a company secretary to oversee corporate governance compliance. Additionally, the organisation undertakes regular Board and management training on governance, laws, and regulations. Its participation in the Award has further seen the establishment of a legal department, developing key policies such as whistle-blower, preventing corruption, and reviewing the board charter.

NCK refers to the Mwongozo Code of Corporate Governance as a public sector entity. However, this has not prevented it from referring to the ICSK Code of Corporate Governance from time to time. NCK does not consider the COG Award to stir participating institutions to comply with set laws and regulations. The institution does not follow up on implementing the recommendations made following the Award. Therefore, it proposed a mechanism for monitoring the recommendations after the Award. They further proposed management and leadership training and stakeholder participation in implementing the recommendations. These measures are meant to encourage institutional compliance.

4.4.3.2 National Construction Authority

The National Construction Authority (NCA) is a parastatal under the State department of public works. NCA does not recognise ICSK as the body regulating the corporate governance sector in Kenya. However, the organisation has participated in the COG Award out of courtesy to the government agency. NCA reported to have raised concerns with ICSK concerning the report, and as such, the organisation is yet to implement any feedback from the Institute. The Authority proposed clarity of criteria and thorough reporting as additional measures that would be put in place to ensure compliance.

The NCA feedback speaks to the need for more engagement between the participating organisations and the COG organisers. Organisational participation should be anchored on the principles of collaboration rather than confrontation. Notably, each organisation must be satisfied with the process leading to the award for it to adopt the recommendations made, whether it wins an award or not. Additionally, NCA has revealed the need for better clarity of the processes and metrics used in the award process. It proposed the use of sector-specific metrics for the award. This will be relevant for SMEs that may not have legal departments to interpret the jargons and other terminologies used in the various metrics.

4.4.3.3 Kenya National Commission on Human Rights

The Kenya National Commission on Human Rights (KNCHR) is an independent human rights monitoring government institution that investigates and reports on human rights violations. While the Commission recognises the role that ICSK plays in the regulation of CG in Kenya, the role is limited to guidelines on good CG practices. Its participation in the Award was an opportunity for an independent comparison of CG practices. The Commission also acknowledged its participation in the Award in 2017. Following the assessment report, the Commission implemented the recommendations and is yet to participate in another award.

The Commission reported that the Award helped identify good practices and areas worth improving. The Award further elucidated the governing body and commissioners' role in running institutions. It also provided confidence for institutional participation in peer assessment processes. Among the recommendations to the Commission following its participation was undertaking regular legal and compliance audits. It has since adopted these audits in its annual work plans and commenced the implementation of an institutional risk management policy that identifies and addresses compliance risks. Notably, the Commission reported accelerated implementation of risk management policy and consideration of supplier business practices in line with key business and human rights principles, as fair labour practices were among the organization's immediate changes after participating in the award process.

Regarding legal compliance, the Commission noted that the award system stirs participation due to its voluntariness. Institutions align with the governance oversight captured in the award process rather than mandatory compliance requiring annual audits and the Auditor General, with organisations inclined to do the bare minimum in the latter approach. The organisation proposed the availability of capacity-building opportunities for the Board and the management.

4.4.3.4 Ndege Chai Sacco Limited

Ndege Chai is a savings and credit corporate society (SACCO) established under the laws of Kenya. Ndege Chai recognises ICSK as the regulatory body for CG in Kenya and has participated in the COG Award since 2017. Its participation was informed by the need for an external review of its governance processes to improve on the weak areas. It also sought to benchmark with other players in the industry.

Ndege Chai reported improving its policies and procedures and stakeholder disclosures after participating. The organisation has also achieved milestones in risk management, smoothened board meetings, clarity in role between the Board and the management, respected the customer and members' rights and improved compliance with the law. The organisation has established monthly reporting by management on the state of compliance to the Board to enhance compliance. There is also the independent confirmation by internal audit on the state of compliance with the statutory and other regulatory requirements.

Ndege Chai further reported that following its participation in the Award, it has developed a calendar of events for the Board and the key areas of compliance oversight. The participation has therefore strengthened management reporting to the Board. Additionally, the SACCO developed several policies: ICT, disaster management and recovery, business continuity, cyber security, data protection, and internal control.

On the significance of the COG award to the participating organisations, Ndege Chai noted that it opens up an institution for scrutiny and the final report provides areas of improvement which enhance further compliance. Therefore, it proposed a continuous assessment process where a portal is created for participating institutions to file documents to allow for more assessments in a given year.

4.4.3.5 Invest & Grow SACCO Limited

Invest and Grow (IG) is a savings and credit corporation registered under the laws of Kenya. It recognises ICSK as the body regulating corporate governance in Kenya and has participated in the COG Award to enhance governance practices at the SACCO level. The organisation received the CEO of the year award in 2015, which has enhanced SACCO's prudent leadership and management. The Award has also enabled the SACCO to formulate its guiding governance policies. To enhance compliance, the SACCO undergoes board-level governance evaluation. The SACCO did not recognise any compliance changes that it effected based on participation in the award process. It has developed compliance policies following its participation in the award process. The study further revealed that I&G is governed by the ICSK Code and recognises the role of the Award in ensuring participating institutions comply with the set laws. It proposed an enhanced institutional assessment during the evaluation of the Award.

4.4.3.6 ABC Bank

ABC Bank is a private Commercial Bank in Kenya. The institution reported that it recognises the ICSK as the body regulating corporate governance in Kenya. It has participated in the COG award and won several awards. It appreciates the appraisal/audit process as being transparent with the knowledge team. The bank was informed by the need to assess its corporate governance in the industry and improve where necessary in line with the industry's best practices. Among the categories for which the institution received an award were; champion in financial and investment and the most improved organisation. Following its participation, the bank has repositioned itself in the industry through increased efficiency. Notably, the bank underpinned its understanding of the importance of legal compliance. It appreciates the role of corporate governance in creating stakeholder confidence.

As a consequence, the bank has instituted regular training and awareness for its leadership and staff. It has also implemented various recommendations following the Award process. However, the bank is governed by the Central Bank’s Code of Corporate Governance. Nevertheless, the bank recognised that the COG Award stirs participating institutions to comply with set laws and regulations. It recommended more awareness of the importance of the award.

4.4.4 Discussion

Good CG reporting entails clear and consistent explanations supported by evidence-based case studies of applications and cross-referencing between related initiatives and sections.[202]The

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[202]Financial Reporting Council, ‘Review of Corporate Governance Reporting’ (2022) <https://www.frc.org.uk/getattachment/6a896f6b-8f4a-4a19-8662-f87a269ffce3/Review-of-Corporate-Governance-Reporting_-2022.pdf>.

COG Award system has an elaborate procedural framework for monitoring, evaluating, reviewing, and analysing CG implementation and compliance within the Kenyan corporate sector. The various stakeholders engaged in the process; organisations and their leadership, experts in the various fields of practice, regulators, and other interest groups, illustrate the depth and richness of the process in satisfying the necessary benchmarks for corporate governance compliance and audits.

Additionally, the comparative and cross-jurisdictional approach that ICPSK has taken in developing the metrics and tools for identifying what constitutes compliance speaks to its ability to align the corporate governance landscape of private companies with that of listed companies currently under CMA oversight. Specifically, the eight major categories are cross-cutting among the different corporate governance frameworks globally but with a specific focus on the Kenyan market landscape. The recommendations that ICPSK makes to the participating institutions become another opportunity to further fill in the gaps recognised following the previous participation in the award. The award, therefore, offers the participants the opportunity to freely exercise and measure their corporate governance practice compliance without the undue burden of excessive government oversight of the internal management affairs of the institutions.

The survey and findings from previous participations on compliance have further grounded the above position. The participants report their engagement with the award process as a result of the need to have an independent oversight or benchmark with the other players in the market. Most institutions have also reported positive changes in corporate governance practices following participation in the award. Their participation further helped key organisations enhance their practices in several areas. The organisations have implemented clear practices aligning with corporate governance standards at the institutional and market levels. Overall, the Kenyan corporate governance market holds a body of evidence on the areas where companies report well and areas where improvement could be welcome.

However, the findings noted a lack of general recognition of ICPSK as a regulator of the CG sector in Kenya. This challenge can be attributed to the limited private sector participation. While ICPSK has and continues to play a crucial role in implementing effective CG, this function does not bind private entities. As such, its activities remain recommendations, contrasted with the CMA, whose oversight mandate emanates from the legislation. Without a legal basis to be bound by any legislative oversight by ICPSK, private companies will avoid the application of the Code of Corporate Governance or any Corporate Governance Practice. This position is exacerbated by limited government oversight of the internal operations of private companies.

4.5 Challenges Facing Private Company Participation in the Champions of Governance Awards

4.5.1 Not anchored in binding legislation

The current discussion is cognisant that ICSPK is a professional organization without any legislative mandate that binds persons beyond its members' scope. As such, CG Principles for Private Companies are recommendations with no binding effects on those companies. Also, the COG Award is not a mandatory exercise. As such, no private organisation has to participate in them or review and incorporate expert proposals on effective CG systems into their corporate processes. It, therefore, follows that private companies have no obligation to engage with them other than through their volition, regardless of the elaborate nature of the Principles under the Code or the effectiveness of the Award System in monitoring the country's CG environment. This reality limits their application as most organisations consider the principles and Award system a preserve of Certified Secretaries.

4.5.2 Cost of the Award

President William Ruto's political campaign was anchored on a bottom-up economic model. The realisation of this model will involve more engagement with small-to-medium-size enterprises. These entities work on strict budgets and may not consider it financially prudent to set aside Ksh. 96 000 to participate in an award. It becomes necessary to devise a cost-sharing mechanism where the small business is not entirely prevented from participating.

The cost-sharing could derive from partner-contributions towards the exercise. The national treasury should also be engaged in the process. Donor funding should however be stated to avoid conflict of interest. To this end, participants in the award during a given year should not be donors. However, this should not be the case for non-participating institutions that seek to assist with the financing. Disclosures of the relevant financiers is critical for transparency and accountability to the shareholders.

4.5.3 Need for Corporate Privacy

Companies do not love when the government or any other entity snoops around on their business affairs unless it is necessary and has followed the relevant legislative processes and approvals. Therefore, corporate privacy is one reason organisations may demonstrate restraint in their participation in the award process. Most of the documents presented as evidence in the award are sensitive corporate documents that the ICPSK acknowledges may require extra confidentiality. However, a word-of-mouth assurance that confidentiality will be maintained may not be enough for some institutions. This then limits their participation in the award. Indeed, the latter position is evident in the absence of private company feedback on the current survey, regardless of whether it is an academic exercise. ICPSK should register as a data processor in this regard and guarantee participating organisations of their data privacy. Where there are data breaches, ICPSK should have a clear remedial policy measure in place.

4.5.4 Time Factor

As noted, the award process involves days of engagements through interviews, documentation, and filling forms. This may be tedious for some organisations, while others may lack the resources to engage in the process. As a result, organisations may be locked out due to late submissions or lack of submission due to time constraints. This calls for the need to review the timing of the process through stakeholder engagement that guarantees effective engagement and feedback from the process.

5 CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

As the Kenyan corporate environment respond to the changing market dynamics, corporate governance remains central in shaping organisational success in realising investor objectives while aligning with key stakeholder interests. Engagement with the private sector is especially crucial due to limited CG compliance oversight. This paper has underpinned the significance of developing novel forms of governance audit and oversight that will enhance compliance by private sector. Developing from agency, stakeholder, organisational compliance and stewardship theories and literature on institutional awards, the paper notes the high standards of CG audit and oversight mechanism that the COG Award utilises to determine champions of governance. The metrics that ICSK employs derive from the established laws of the land, coupled with practices over the past years and international best practice, these tools could be utilised to shape the corporate governance compliance and appraisal for private companies. Regardless of the foregoing, the research noted limited private-sector engagement in the process.

The research's main finding is that whereas the country appreciates the relevance of corporate governance compliance as captured in its practices and robust legal and legislative framework, the private sector is disproportionately unrepresented in such compliance. Secondly, the research has recognised the institutional efforts by the ICSK to establish a legal and institutional oversight for corporate governance among private companies, including the enactment of the model corporate governance code for the private sector and the COG Award. Regardless of the success of the COG Award in shaping the compliance among its participants, limited private sector engagement calls for a realignment of the laws and institutions to provide for a clear compliance framework. The following subsections provide a detailed breakdown of the findings and recommendations.

5.1 Research Findings on the Corporate Governance Principles, Objectives and Practices in Kenya

The study revealed that the CG landscape in Kenya is robust with clear governance principles that span the countries various sectors. The CMA has been charged to effect the institutionalisation of corporate governance compliance for listed companies. The CMA's oversight and audit and annual assessment of compliance reports illustrate the ability and willingness of the charged institutions to discharge their mandate. Through CMA, many listed companies have gauged the effectiveness of CG principles in line with the market trends. The compliance success in this sector may be attributed to the 'apply or explain' approach to corporate governance.

Regardless of these findings, there was evidence of unclear compliance for the private sector. Private corporations do not have an external oversight body like the CMA to monitor and review their compliance practices. These companies majorly rely on their internal audits for compliance reports. Cognisant of this lacuna, the ICSK developed a model code for private companies. The code aligns with the other principles of corporate governance under listed companies and OECD. Nevertheless, without an external oversight body (the private sector in Kenya is based on a hybrid regulatory framework with a leaning towards self-regulation), and with the role of ICSK being merely persuasive, the private sector corporate governance compliance remains in the dark.

5.2 Research Findings on the Legal and Institutional Framework Governing Corporate Governance in Kenya

The study revealed the existence of various legislation and institutions governing corporate governance in Kenya. Laws such as the Constitution of Kenya, the Companies Act, the Capital Markets Act and delegated legislation including the Code of Corporate Governance for Listed Companies have helped define and shape the legal framework for CG. Notably however, the laws on private sector corporate governance are limited with the findings showing that corporate governance for the sector being regulated by generalised legislation such as the Companies Act with no specific requirement for compliance reporting. The overly self-regulatory framework has crippled efforts by such institutions as ICSK to regulate the industry as most of its CG policies and practices are recommendations with no binding effect on the actors. Private companies have remained the foster children of corporate governance legislation.

5.3 Research Findings on the Overall Corporate Governance Compliance and Market Trends Following COG Award Process

The following findings on corporate governance compliance derived from engagement with the different reports submitted to the individual organisations following their participation in the award. The individual reports are specific to the organization and provide the details on the findings of the organization and recommendations for improvement. Due to the confidentiality of the report, this section of the discussion reviewed some of the reports, made the following findings before returning them to the individual companies.

5.3.1 Champions in the Board of Directors' Category

A review of reports following the COG award demonstrates that organisations employ most of the CG requirements under the BOD's parameter. The reports note that organisations are appointing competent board, are sensitive to diversity and mix of skills. Champions under this category have demonstrated knowledge and experience in governance practices. These companies have developed annual strategic plans offering guidance on achieving key projects and goals within a given timeframe. There was also evidence of the organisations having a Board Charter setting out the roles, responsibilities, structures and board processes, and undertaking board of directors' annual self-assessment to score its performance and results. The winners under this category were also hailed for instituting processes guiding sectional and departmental management within the organisation. The winning boards have also established mandatory committees in specific sectors as required by corporate governance principles. The institutions have also ensured functional independence between the management and the BOD.

The findings further revealed that directors are cognisant of the uncertainty that characterises the business environment. Directors noted expanding roles following the lessons they learned from the previous awards as they continue to address emerging obstacles in the corporate market. They reported facing various financial, operational, and regulatory pressures as the stakeholders expanded their expectations of their role.

Other than the foregoing issues, directors noted that they continue to grapple with the developments in the external environment, including regulatory changes, globalisation and digital acceleration, and the increased call to adhere to environmental, social and governance factors that link to corporate performance. These factors are relevant for current and future championships in effective board governance. Participants acknowledge that absent a framework for continuous external evaluation and monitoring of market trends such as the COG Award; they face the challenge of missing out on the shifting corporate climate. Participation in the award has enabled Board committed to corporate governance to devote significant time to addressing the long-term objectives of the organisation to ensure sustainability for the organisation.

5.3.2 Champions under Ethical Leadership and Corporate Citizenship

Champions under ethical leadership and corporate citizenship demonstrated that they were guided by ethical conduct that aligns with corporate citizenship. Their board established a core-value based ethical culture and code that promotes organisational reputation. Additionally, the top performance under this category demonstrated commitment to policies on conflict of interest, whistle-blowing, and corporate reputation and image. They also appreciated the place of corporate gifts and social media while upholding a sustainable environment.

In realising the foregoing principle, participants showed budget allocation evidence and distribution towards corporate social responsibility initiatives. Their major areas included youth, financial literacy, education and economic empowerment. There was also evidence of clear corporate values incorporated into the company culture like dedication, teamwork, customer-centricity, professionalism, integrity, collaboration and efficiency, and an organisational ethical code to guide the staff in fulfilling their crucial mandate.

Additionally, compliant companies were noted to have established conflict of interest policies. The policies guide third-party transactions with the organisation and help resolve conflicts among various stakeholders. These winners further employed communication strategies that stipulated the communication plans for the company to preserve corporate credibility and image. Notably, there is renewed interest in their environment, with many international agencies and groups calling upon corporates to develop climate impact statements and policies. Therefore, participating organisations need to engage more in this area and report.

5.3.3 Champions under Accountability, Risk Management and Internal Control, and Transparency and Disclosures

The champions under accountability, risk management and internal control aligned their practices to the recommended standards. They complied with the internal audit requirements and allowed their internal control measures to be subjected to external audit. Participating organisations were noted to have recruited an internal auditor, risk management, or compliance manager to directly report to the board committee tasked with handling the organisation's audit, risk, and compliance function. Direct reporting ensures that the manager is free and independent of management influence. The successful organisations were further noted to have implemented risk management strategies in the overall organisational strategy.

Participants that demonstrated excellence under this category developed different procedures and processes to ensure business transparency and disclosures. Notable measures included ensuring reliable, accurate, timely and open information disclosure on organisational performance. These organisations’ annual reports set the corporate governance statement, vision and values. The companies further identified third-party transactions and revealed all material trends likely to impact their financial operations and positions. They also undertook annual stakeholder surveys and engagement plans.

5.3.4 Champions under Shareholder Rights and Obligations, and Stakeholder Relations

Winning organisations were noted to have set out various measures to guarantee shareholder engagement. There are in place various shareholder agreements with specific dispute settlement processes. The companies also demonstrated their boards' commitment to regular investor briefings, shareholder forums and AGMs to discuss organisational performance. The shareholders receive timely information on financial statements and are informed of their right to accept them and select external auditors. The winners in COG value AGM as an opportunity for board consultation and receipt of shareholder consent on such issues as allocation of equity capital and property acquisition.

In realising stakeholder relations, the champions aligned their practices with best practices under the principles. They developed stakeholder engagement policies and strategies. Among the policies and strategies were customer service platforms through which the organisation receives customer feedback. They further demonstrated the existence of clear timelines for management and resolution of customer concerns. Many organisations were noted to achieve the latter process within 12 hours. Past winners have also integrated conflict resolution protocols with different stakeholders.

Additionally, champions under this category have implemented various communication policies, providing appropriate communication means between the company and its stakeholders. These communication channels include the office telephone numbers, company emails, and key personnel to reach out to in case of any concerns. Overall, the Award system noted a generally good standard for stakeholder relations. However, there is a need for more evidence of the entrenched habit of excellence with provable impact, benefits, and sustainable results and growth to be declared champion. More documentation should be availed on outcomes of the different stakeholder engagement processes, including the received feedback or commentary on whether the board addressed the raised issues and how the decision aligned with the culture, strategy, purpose, and values of the organisation.

5.3.5 Champions under Compliance with Laws and Regulations

Winners under legal compliance demonstrated high standard observance of the relevant laws and regulations governing their various sectors. Champions of governance developed and implemented corporate risk management policies to address emerging legal and regulatory compliance issues. They showed evidence of complete legal enforcement, and risk function and there are also internal audits reviewing the inhouse affairs of the company. Additionally, participants communicated board resolutions to the heads of departments for the CEO and CS to implement in time.

Most of the participants also undertook legal audits. Legal audits entailed having a legal team review the various company documents, policies and records for their compliance with the various laws and regulations. The companies reported annual review of existing legal frameworks as well as the legal issues that may be triggered by changes in their operations such as strategies, goals and objectives of the company.

5.3.6 Champions under Sustainability Performance Management

Participating organisations appreciated the centrality of sustainability and performance management in daily business operations. The past champions have developed Board Charters and human resource policies clearly outlining the succession planning for the respective directors and senior management. Owing to the changing business environment, these organisations are demonstrating developing ICT policies to guide them into the future of tech. They have also developed new operational strategies such as mobile and internet banking. Additionally, the board review business continuity plans while developing approaches that have seen a steady increase in their competitive advantage**.** In place are also training and talent development committees spearheaded by the human resource department.

Participants noted that climate-related issues were a concern under sustainability. Most of the companies noted engaging with key partners including their suppliers to embed climate-compliant measures in their processes.

5.4 Recommendations

5.4.1 Recommendations on Corporate Governance Principles and Practices in Kenya

There is need for more engagement on the issue of corporate governance compliance for private companies in Kenya. The engagement should span the various stakeholders including the private sector organisations, companies, the investor community, academia, customers and suppliers and the government. These stakeholders should develop mechanisms to ensure that companies are aware of their corporate governance compliance obligations.

5.4.2 Recommendations on Corporate Governance Legal and Institutional Framework in Kenya

Parliament should grant ICSK or other institution mandate to regulate corporate governance practices in the private sector. The said mandate, which should follow stakeholder engagement and participation, will give the legal imprimatur to the model code of corporate governance for private companies. The compliance and oversight framework should follow the ‘apply or explain’ approach, while leaving room for companies to deviate from the model code. However, where such deviation occurs, companies should clearly justify that the adopted practices are in line with international best practices and in the best interest of all company stakeholders.

5.4.3 Recommendations on CG Compliance through the COG Award

5.4.3.1 Ground the COG Award in Law through a Hybrid Regulatory Model

A hybrid regulatory framework is a model where various regulatory models, such as direct government regulation, independent agency regulation, and internal regulations, coexist. The Kenyan private sector mirrors this regulatory framework. The CMA has also developed this approach in regulating corporate governance for listed entities through the 'apply or explain' approach.

Parliament should pass a legislative amendment to recognise the Award system's contribution to shaping effective implementation, audit, and oversight of corporate governance compliance for private companies. An amendment may be made to the Companies Act to require private companies to develop the 'apply or explain' approach to corporate governance compliance. Such an amendment should appreciate the place of institutional award systems such as the COG Award in corporate governance compliance and call on private companies to apply corporate governance principles as may be established by such entities as the ICPSK, KEPSA, or other relevant institutions. Based on the 'apply or explain' principle, the law would require each private company to implement codes of corporate governance practice that align with established principles and standards in Kenya (which principles and standards include the COG Award metrics and tools).

Secondly, the legislative amendment should mandate a specialised institution to oversee the implementation, audits, and compliance to ensure that private companies that do not apply any codes explain the reasons for such failure. The institution may be ICPSK considering its contribution in the process as it relates to a private company. However, this must also be grounded in legislation following public participation.

5.4.3.2 Stakeholder Engagement and Cross-Industry Participation

The vast nature of private sector actors and interest groups requires stakeholder engagement and cross-industry participation. Owing to the constantly fluctuating nature of the market economies, engaging with experts, regulators, scholars, and industry players in the proper framework and institution to oversee corporate governance compliance is crucial. Whereas the COG Award process incorporates partnerships from these key sectors (key ICPSK partners in the COG Award are KASNEB, the National Treasury, the Insurance Regulatory Authority, Central Depository & Settlement Corporation, and CMA), the engagement needs to be anchored in policy and law. For instance, the participation of the Treasury is critical in shaping the financial support needed for oversight and implementation. Additionally, the development of a clear corporate governance framework for each sector will shape compliance and reporting tools to avoid the challenges of duplicity and differences in Governance Codes within the same sector.

5.4.3.3 Enhance Transparency and Confidentiality Considering the Data Protection Laws of 2019

As data privacy concerns limit the participation of most companies, there is a need to amend the law, award managers must enhance the privacy and confidentiality of the information received in the award process. The assurance can be in writing and line with the data protection laws, including the Data Protection Act 2019. Their violation should attract legal and other remedies from the injured party. Companies should be encouraged to increase transparency in areas where their practices depart from the established Codes or metrics.

5.4.3.4 Review the Cost of the Award

Assure all Stakeholders of Transparency and Independence of the Process: Address issues that are likely to cause a conflict of interest-separate between participation in the Award and corporate sponsorship; provide redress mechanisms for those disenfranchised by the process

Assure Privacy and Confidentiality through measures in place.

5.4.3.5 Commit to Annual Publication of Corporate Governance Compliance Audit Outcomes

Reporting on the outcome of the award process further enriches corporate governance practices. It also presents evidence of good governance and sustainability for participants. Additionally, it is an assurance for investors and competitors that the market is vibrant in business ethics and the law.

While reporting on the developments made since a previous award, ICPSK and partners should thoroughly engage participants on the Changes in trends and best practices. For instance, the CMA has considered that market participants should consider the International Financial Reporting Standards (IFRS) in their governance practices. The IFRS is currently establishing an International Sustainability Standards Board (ISSB) that will provide the baseline for sustainability-oriented disclosures that align with investor interests.

Additionally, the United Nations Conference of the Parties (COP 26) in 2021 committed to accelerating Paris Agreement goals and the United Nations Framework Convention on Climate Change on managing climate change. The award should review these changes and consider the extent to which they can provide for evaluation under these criteria.

Another emerging corporate governance practice area worth incorporating into the award process is the link between business and human rights. As the proliferation of human rights issues continues to emerge, there is a need for future tools to incorporate evaluation criteria on how an institution has incorporated and implemented human rights policies in their internal processes.

The publications would further ensure that the ICPSK and partners are continually sensitive and build capacity with participants, especially from the private sector. Their continuous engagement should seek to discuss and enhance government practices with a focus on filling the existing market gaps.

5.4.3.6 Enhance Reporting through Award Process Automation and Virtual Reporting

As noted, many institutions lack the luxury to engage in the award due to time or resource constraints. It is crucial to develop a convenient framework that favours all those that may be interested in participation. ICPSK and partners should engage with system providers to automate CG reporting templates, tools and documentation. The automation will increase accuracy, efficiency, and effectiveness, and accelerate the assessment process. The system can be configured with inbuilt prompts, alerts, reminders and guidelines to the participants. The system should, be safe and protected from third-party infringement or data misuse.

5.4.3.7 Participating Entities Should Improve their Reporting

There is a need for participating entities to improve the quality of their reporting. Improved reporting is essential for the COG Award to reflect market practices from a vast pool of participants. The reporting should be tailored to demonstrate that the companies are critical of corporate governance practices. In their reporting, companies should avoid using declaratory statements and provide the specific disclosures that may be needed. The reporting should be clear and specific, with limited repetitions, ambiguity, and boilerplate statements. For instance, establishing a document management system within an organisation for easy retrieval of necessary documents during the review process will contribute to better compliance reporting. Reporting follows the development and implementation of corporate governance practices. Institutions that desire to participate and win the award should appraise themselves with the previous reports to understand the regulatory requirements before they can participate in the process. Indeed, non-participating organisations are encouraged to review different tools and metrices that ICS provides to establish internal or related compliance oversight mechanisms.

REFERENCES

Books

Garner BA, *Black's Law Dictionary, Abridged, 9th* (9th edn, West 2010)
Lumumba PLO and Ambani JO, *The Constitution of Kenya: Contemporary Readings* (LawAfrica 2011)

Menyah K, 'Stewardship Theory' in Samuel O Idowu and others (eds), *Encyclopedia of Corporate Social Responsibility* (Springer 2013)

Tricker B, *Corporate Governance: Principles, Policies, and Practices* (Oxford University Press 2019)

World Bank (ed), *Governance and Development* (World Bank 1992)

Journal Articles and Publications

Akinkoye EY and Olasanmi OO, 'Corporate Governance Practice and Level of Compliance among Firms in Nigeria: Industry Analysis' (2014) 9 Journal of Business and Retail Management Research

AlSudany AMS and Al-Musawi YH, 'Evaluating Institutional Performance According to European Excellence Model (EFQM 2013) and Its Impact on the Intellectual Capital Investment' (2020) 19 Ilkogretim Online 1348

Black J, 'Forms and Paradoxes of Principles-Based Regulation' (2008) 3 Capital Markets Law Journal 425

Capital Markets Authority, 'Report of the State of Corporate Governance of Issuers of Securities to the Public in Kenya' (Capital Markets Authority 2022) 4<file:///C:/Users/user/Downloads/The%20Report%20On%20The%20State%20Of%20Corporate%20Governance%20Of%20Issuers%20Of%20Securities%20To%20The%20Public%20In%20Kenya%202021.pdf>

Cobham A, Janský P and Meinzer M, 'A Half-Century of Resistance to Corporate Disclosure' (2018) 25 Transnational Corporations 1

ElMassah S and Mohieldin M, 'Digital Transformation and Localizing the Sustainable Development Goals (SDGs)' (2020) 169 Ecological Economics 106490

Grace K, Vincent M and Evans A, 'Corporate Governance and Performance of Financial Institutions in Kenya' (2018) 17 Academy of Strategic Management Journal 1

Institute of Certified Secretaries, 'Champions of Governance (COG) Award, 2022 Main Tool Self-Assessment by Client'

Keiser M, 'The Wates Corporate Governance Principles for Large Private Companies: A Weak Compromise at the Expense of Employees?' (15 June 2020) <https://papers.ssrn.com/abstract=3627536> accessed 7 September 2022

Kiima SM, 'Codification of Duties of Directors Under the Companies Act, 2015: An Analysis of Their Clarity, Accessibility and Certainty' (University of Nairobi 2020)

Kimani D and others, 'Analysing Corporate Governance and Accountability Practices from an African Neo-Patrimonialism Perspective: Insights from Kenya' (2021) 78 Critical Perspectives on Accounting 102260

Kitonga NM, 'The Promise and Reality: Winning Ways for Retail Companies in Kenya through Corporate Governance' (Strathmore University 2021)

Kitoo I, 'Corporate Governance Situation in Kenya: An Appraisal in the Lens of the Constitution of Kenya, 2010' (2022) 6 Journal of Public Policy & Governance <https://stratfordjournals.org/journals/index.php/journal-of-public-policy-governa/article/view/1147> accessed 15 September 2022

Lesutis G, 'Infrastructural Territorialisations: Mega-Infrastructures and the (Re) Making of Kenya' (2021) 90 Political Geography 102459

Limijaya A, Hutagaol-Martowidjojo Y and Annisa S, 'Corporate Governance Award and Performance of Indonesian LQ45 Firms', *IOP Conference Series: Earth and Environmental Science* (IOP Publishing 2021)

Madhani PM, 'Corporate Governance from Compliance to Competitive Advantage' (17 November 2009) <https://papers.ssrn.com/abstract=1507644> accessed 8 November 2022

Magalla A, 'Corporate Governance and Corporate Social Responsibility Principles as Incorporated in Tanzania, Kenya, and Uganda Corporate Laws' [2018] Kenya, and Uganda Corporate Laws (June 29, 2018)

Moon J-Y and others, 'A Study on the Causal Relationships in the Korean National Quality Award Model' (2011) 22 Total Quality Management & Business Excellence 705

Mugo AN, Kahuthia J and Kinyua G, 'Effects of Infrastructure on Growth of Small and Medium Enterprises in Kenya: A Case of Clothing and Textile Businesses in Nairobi Central Business District' (2019) 3 International Academic Journal of Human Resource and Business Administration 133

Mungai VG, 'Implementation of Directors' Duties in the Strive for Sound Corporate Governance in Kenya: Lessons from Uchumi Supermarkets Limited' (Strathmore University 2017)

Mutonyi M, 'Tackling the Problem of Corporate Fraud in the Kenyan Corporations through the Lens of Corporate Governance' (University of Nairobi 2019)

Mwangi MW, 'The Effect of Corporate Governance on Financial Performance of Companies Listed at Nairobi Security Exchange' (University of Nairobi 2013)

Nakpodia F and others, 'Neither Principles nor Rules: Making Corporate Governance Work in Sub-Saharan Africa' (2018) 151 Journal of Business Ethics 391

Nandonde FA, 'In the Desire of Conquering East African Supermarket Business: What Went Wrong in Nakumatt Supermarket' (2020) 2 Emerging Economies Cases Journal 126

Nyakeri B, 'The Law on Corporate Governance and Shareholder Protection in Kenya: A Case for Reduction of Corporate Scandals within Private Companies' (Thesis, University of Nairobi 2020) <http://erepository.uonbi.ac.ke/handle/11295/153815> accessed 15 September 2022

Office of the Official Receiver, 'Official Receiver Statistics 2021/2022' (BRS 2022) <https://brs.go.ke/or-statistics-2022.php> accessed 7 September 2022

Private Sector Initiative for Corporate Governance, 'Principles of Corporate Governance in Kenya and a Sample Code of Best Practices for Corporate Governance' <file:///C:/Users/user/Downloads/principles_2.pdf>

Riitho JK, 'Protection of Privately-Owned Companies A Look into the Legal Framework Governing Corporate Governance Regulations for Private Companies in Kenya' (LLM, Strathmore University 2020)

Subramanian S, 'Stewardship Theory of Corporate Governance and Value System: The Case of a Family-Owned Business Group in India' (2018) 11 Indian Journal of Corporate Governance 88

Wairange LR, 'The Link Between Corporate Governance Failure and the Collapse of Major Private Companies in Kenya' (Thesis, University of Nairobi 2019) <http://erepository.uonbi.ac.ke/handle/11295/108832> accessed 7 September 2022

Wangui M, 'Relief for Depositors as CBK Approves Chase Bank's Liquidation - Kenyan Wallstreet' (16 April 2021) <https://kenyanwallstreet.com/relief-for-depositors-as-cbk-approves-chase-banks-liquidation/> accessed 18 September 2022

Websites and Other Sources

| *Tragedy of Tuskys | Late Joram Kamau Started the Supermarket 30 Years Ago [Part 1]* (Directed by Citizen TV Kenya, 2020)

<https://www.youtube.com/watch?v=We79HZKhfTc> accessed 7 September 2022
'CHAMPIONS OF GOVERNANCE (COG) AWARD, the YEAR 2022'
<https://forms.office.com/pages/responsepage.aspx?id=WU_P-Fjyik-

ShoTXFoKNzoeVoL_zivdGvY2g2i5NEjtUMFZJUzRJWU5CVzZTWTk5UkxPNjJHTDk2OS4____u> accessed 28 October 2022

'Icpsk Champions of Governance (Cog) Award – EBooksKenya' <https://ebookskenya.co.ke/icpsk-champions-of-governance-cog-award/> accessed 28 October 2022

ICS, 'About Us (2022) <https://www.ics.ke/about-us> accessed 7 September 2022
Institute of Certified Secretaries, 'Champions of Governance (COG) Award, 2022 Main Tool Self-Assessment by Client'
——, 'COG Award 2022-Registration Invite' <https://www.ics.ke/downloads-center-2?task=download.send&id=166&catid=11&m=0>

'Kenya Vision 2030 | Kenya Vision 2030' <https://vision2030.go.ke/> accessed 8 September 2022

Menyah K, 'Stewardship Theory' in Samuel O Idowu and others (eds), *Encyclopedia of Corporate Social Responsibility* (Springer 2013) <https://doi.org/10.1007/978-3-642-28036-8_107> accessed 8 November 2022

OECD, 'Corporate Sector' (*OECD iLibrary*, 2022) <https://www.oecd-ilibrary.org/economics/corporate-sector/indicator-group/english_a68c33e9-en> accessed 4 September 2022

APPENDIXES

Appendix I: COG Main Assessment Tool

CHAMPIONS OF GOVERNANCE (COG) AWARD, 2022 MAIN TOOL -SELF ASSESSMENT BY CLIENT		
NAME OF ORGANIZATION	**DATE**	**NAME OF RESPONDENT** **POSITION OF RESPONDENT**
ADDRESS[P.O.BOX]	**TELEPHONE**	**E-MAIL**
PHYSICAL ADDRESS[STREET/TOWN/BUILDING]	**OTHERS:**	

Dear Participant - **INSTRUCTIONS ON COMPLETING THE TOOL**

1. As a self Assessor-on behalf of your organization- You are required to complete each and every box/space/question with a short precise statement of 5-7 words. There are no exceptions to this rule. Complete a full statement that makes complete sense in not less than five 5 words.
2. Read the performance statement, make observations and provide ADEQUATE evidence to support your observations. Write down notes to record and indicate status of the evidence. Now, rate this evidence on the scale provided in the OBSERVATION column –PUT YOUR scores of the criteria column— High =3, medium=2, Low=1; Max=3
3. For you to score a 4 in **MATURITY** – you must show evidence of an entrenched habit of excellence with provable **impact, benefits, sustainable results, growth** .This practice has been successfully implemented for **4yrs+=4; 2-3yrs=3, 1-2yrs=2, <1yr=1.**

1

Note: Double-click on the document for the full version view.

Appendix II: Chairperson Peer Evaluation Tool

CHAMPIONS OF GOVERNANCE (COG) AWARD, 2022
EVALUATION OF THE CHAIRMAN OF THE BOARD
PEER EVALUATION TOOL

INSTRUCTION

PEER ASSESSMENT

Step 1: This tool is to be completed, by the Chair's Peers i.e. at least two Directors of the Board (one for each gender).

Step 2: ASSESSMENT: The Peer Directors should evaluate by employing this common question- "TO what level of excellence do you evaluate the performance of the CHAIR by tracking his/her 3 year track record.?'

Step 3: PEER assessment: Read the performance statement, make observations and Write down Evidence to record and indicate status of the evidence. Give a score of between 1-10 at the end of the column

Step 4: Upon the completion of the Peer evaluation the completed tool shall be sealed under CONFIDENTIAL cover and send to COG secretariat 7 days before the COG consultant assessor visits the client

NAME OF ORGANIZATION	DATE	NAME OF CHAIRMAN
ADDRESS[P.O.BOX]	TELEPHONE	E-MAIL
PHYSICAL ADDRESS[STREET/TOWN/BUILDING]		

1

Appendix III: Company Secretary Self-Assessment Tool

CHAMPIONS OF GOVERNANCE (COG) AWARD, 2022
COMPANY SECRETARY OF THE YEAR
Self Assessment

INSTRUCTIONS

COMPANY SECRETARY (OR EQUIVALENT) SELF ASSESSMENT, ASSESS BY EMPLOYING THIS COMMON QUESTION-

1. **To what level of excellence do you evaluate your Individual performance by tracking your 3 year track record.**
2. **Read the performance statement, make observations and ask for evidence to support the observations.**
3. **Using the scale given below, rate this evidence on the scale provided; Write down the evidence to prove that you have achieved this requirement—**
    1. **Score 3=high achievement-(3 is given for high achievement that has been achieved for more than 3 years consistently)**
    2. **2=medium achievement,**
    3. **1=low achievement,**
    4. **0= not started/not achieved.**

5. **Write down notes to record and indicate status of the evidence.**

COMPANY NAME	CURRENT POSITION/TITLE		SINCE?
NOMINEE NAME TO CERTIFIED COMPANY SECRETARY OF THE YEAR AWARD			
EDUCATION LEVEL	PREVIOUS JOBS HELD-LAST 5 YEARS		
PROFESSIONAL QUALIFICATION			

1

Appendix IV: CEO Self-Assessment Tool

CHAMPIONS OF GOVERNANCE (COG) AWARD 2022
COG CHIEF EXECUTIVE OFFICER SELF ASSESSMENT TOOL (CEO)

CEO SELF ASSESSMENT: INSTRUCTION

1. ASSESS BY EMPLOYING THIS COMMON QUESTION- "TO what level of excellence do you evaluate your Individual performance by tracking your 3 year track record.
2. Read the performance statement, make observations and provide evidence to support the observations.
3. Using the scale given below, rate this evidence as:
   a. The characteristic/attribute exists-yes=1, no=0
   b. If the characteristic exists; for how long has it existed? 1 year=1 point; 2 years=2 points; 3 years=3 points and above 3 years=4 points – **a score of 3 or 4 you must observe that the best practice has existed/ been applied & is producing results**
   c. This gives a maximum total of 5 points per question

NAME OF ORGANIZATION	DATE	NAME OF CEO
ADDRESS[P.O.BOX]	TELEPHONE	E-MAIL
PHYSICAL ADDFRESS[STREET/TOWN/BUILDING]		

1

Appendix V: Questionnaire Feedback from the Previous COG Participants

COMPANY INFORMATION

Company Name ... NDEGE CHAI SACCO LTD ...

Company Address ... P.O. Box 857 KERICHO 20200 ...

Contact ... 052-2030121 / 0722518622 ...

Corporate Sector Category ... SACCO. ...

QUESTIONNAIRE

1. Under which Corporate Sector does the company fall?

Savings and Credit Co-operative Society

2. Does the institution recognize the Institute of Certified Secretaries of Kenya (ICSK) as the body regulating the corporate governance sector in Kenya?

YES