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**REGULATING NON-GOVERNMENTAL ORGANISATIONS IN KENYA: A
CRITICAL ANALYSIS OF THE CORPORATE GOVERNANCE SYSTEM**

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DECLARATION

I, Miss **Dorine Kalii David**, do declare that this is my original work and has not been submitted and is not currently being submitted for a degree in any other institution.

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DEDICATION

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Trustee Act (Chapter 167, Laws of Kenya)

Trustees (Perpetual Succession) Act (Chapter 164, Laws of Kenya)

Labour Relations Act (Act No. 14 of 2007)

Political Parties Act (Chapter 7B Laws of Kenya)

Societies Act (Chapter 108 Laws of Kenya)

LIST OF ABBREVIATIONS

CS	Cabinet Secretary
CSR	Corporate Social Responsibility
EIA	Environmental Impact Assessment
ICCPR	International Covenant on Civil and Political Rights
INED	Independent and Non-Executive Director
KNDR	Kenya National Dialogue and Reconciliation
MYWO	Maendeleo Ya Wanawake Organization
NGO(s)	Non-governmental Organization(s)
NNGOs	Northern Non-Governmental Organizations
PBOA	Public Benefit Organizations Act
PBOs	Public Benefit Organizations
SAP	Structural Adjustment Programmes
SOEs	State-Owned Enterprises
UDHR	Universal Declaration of Human Rights
WWF	World Wildlife Fund
YWCA	Young Women Christian Association
YMCA	Young Men Christian Association
IFAD	International Fund for Agricultural Development

CHAPTER ONE: INTRODUCTION

1.1 Introduction

“Who are these people accountable to? They set themselves up as specialists and experts on problems that they define themselves, live entirely on foreign money, and can do what they want provided they keep their funders happy. They claim to speak on behalf of the poor, the disadvantaged, women, the disabled, AIDS victims or whatever, but how do we know that they are in any way representing or serving their clients?”¹

This study analyses the relationship between three phenomena, namely, corporate governance, non-governmental organizations (NGOs) and the regulatory framework. It is premised on the fact that existing literature suggests that there is a failure on the part of NGO management to engage in good corporate governance and that this failure is partly contributed to by weaknesses within the management structures and practices of NGOs and partly by the existence of weak or inadequate regulation.

The impact to social life by is not only dependent on voluntary contributions from private developments but also from governments a bid to push the NGO’s development agendas.² The trend in the rapid growth of NGOs in many countries is associated with greater expansion in size and the projects undertaken.³ This has had the effect of attracting the attention of governments and international organizations.⁴ The attention has focused on the governance of NGOs out of a realization that good corporate governance is essential for proper functioning of NGOs.

According to the Global Corporate Governance Forum, corporate governance is central to the promotion of economic and social development and is the engine for international growth and the provision of private and public services, goods and infrastructure.⁵ As a result, efficiency and accountability not just of private and public interest, but of international interest as well.⁶ Accordingly, the nature of relationships in the work place, the processes, the practices, the systems, the procedures and the formal and informal rules are a function of the governance in

¹Mick Moore and Sheelagh Stewart, ‘Corporate governance for NGOs?’(1998) 8 (3) *Development in Practice* 81.

² Michael Edwards and David Hulme (eds), *NGOs, States and Donors: Too Close for Comfort?* (London: Save the Children, 1997) 12.

³ Lewis David (ed.), *International Perspectives on Voluntary Action: Reshaping the Third Sector* (London: Earthscan 1999) 22.

⁴ Abey Hailu Senbeta, ‘Organizations and Development with Reference to the Benelux Countries’ (2003) 19 *Document de Travail* 12.

⁵ Global Corporate Governance Forum, *First Review 2003: Promoting Corporate Governance for Sustainable Development* (World Bank: Washington, 2003) 4.

⁶ Ibid.

a work place. Institutions rely on these rules and the manner of their applications to determine and mould special relationships and conditions necessary for formation of an institutional framework.⁷ The aspect of leadership role in an institution is a function of governance addresses the leadership role in the institutional framework.⁸

While identifying the challenges facing NGOs in Kenya, this study focuses on the extent to which NGOs engage in good corporate governance under the current regulatory framework and the extent to which the Public Benefits Organisation Act, 2013 and the Constitution 2010 enhance good corporate governance.

1.2 Background

1.2.1 Corporate governance

The success of an organisation in reference to assets, resources and maintenance of an increasing shareholder value and interests is a directly proportional to corporate governance. The leadership process chooses the manner in which to apply such powers legally to deliver as per the corporate mission.⁹ Consequently, the process involves multiple players in any organisation from the management, to the staff as well as the supportive staff in a mix that seeks to act on decisions that affect corporate affairs.¹⁰

1.2.2 Non-governmental Organizations

The PBO Act has not come into operation almost five years after the Presidential assent in January 2013. . The Act is still not operational and it is a proposed legislation. This study aimed to establish whether when the PBOA Act becomes operational, it will improve the NGOC Act.

NGOs are voluntary organizations that are registered under the NGOC Act.¹¹ According to the statutory definition, NGOs are established solely for non-profit and non-commercial work either at a national or international level. In their mandates, NGOs are focused on creating benefits whose focus is the public rather than private individual entities. Markedly, the NGOs

⁷Private Sector Corporate Governance, *Principles for Corporate Governance in Kenya and a Sample Code of Best Practice for Corporate Governance* (Nairobi: Private Sector Initiative for Corporate Governance 1999) 3.

⁸ Ibid.

⁹ Ibid.

¹⁰Omosa Josiah Morara Mauithi, 'Failure of Good Corporate Governance in State Owned Corporations in Kenya: Towards a More Effective Parliamentary Monitoring Role' (Master of Laws (LLM), University of Nairobi 2014)25.

¹¹Section 2, NGO Coordination Act (as amended by Legal Notice 11 of 1992).

interests' lies in promotion of research, social welfare, or development in a number of fields ranging from health, education to agriculture as well as other industries.¹² NGOs are also often referred to as 'non-profit organizations'. The PBO Act has introduced a new terminology which covers the traditional NGOs – the 'public benefit organizations (PBOs)'.

'Non-profit organizations' is a general term that has been coined to refer to either companies, NGOs, Public Benefit Organisations (PBOs) or societies and trusts. Further, the Act recommends voluntary membership where necessary, with the inclusion of groups and individuals whose focus is autonomous, not for profit and non-partisan approach to the activities outlined. Similarly, the Act is cognizant of the fundamental meaning of public benefit activity as one where the public benefits either economically, socially, environmental or developmental wise. Consequently, this can be in the form of lobbying, advocating or protecting such various issues whose interests, functions, concern and benefits are for the public.¹³

In the realisation of the PBO Act it must be noted that Trade Unions are not included as referred in the Labour Relations Act of 2007 just as political parties in the Political Party Act meaning of 2007. Similarly, the Act does not include religious organizations whose functions are steeped in religious worship or promotion of religious beliefs. Consequently, this study is focused on NGOs and no other PBOs such as CBOs. .

The modern concept of NGO began during the colonial period.¹⁴ Although the colonial government did not encourage freedom of association, a few religious and philanthropic associations or peoples organizations were allowed.¹⁵

Before the 1980s, the state was the major actor in the provision of social services to its citizens.¹⁶ The early history presence and formation of NGOs is easily unearthed in three sources: From the African culture and its traditions, a closer scrutiny of the Early Christendom missionary forays and finally Colonial rule starting in the 19th Century.¹⁷ Kenya, like other African countries, is traditionally a communal society where philanthropy

¹²Ibid

¹³Ibid

¹⁴Mbote Patricia Kameri, *The Operational Environment and Constraints for NGOs in Kenya: Strategy for Good Policy and Practice*. IELRC Working Paper (Geneva: International Environmental Law Research Centre, 2002) at 2.

¹⁵ Ibid.

¹⁶Sellah Nasimiyu Kingoro and Abdalla Bujra, *Social Policy, Development and Governance in Kenya: The Contribution of Non-State Actors to Development in Kenya* (Development Policy Management Forum (DPMF): Nairobi, 2009) vii.

¹⁷Manuel Manrique, 'Supporting Africa's new civil society: the case of Kenya' (2011) 83 *Policy Brief* 99.

comes out almost automatically. The voluntary streak was complemented by the introduction of education and social welfare institutions.¹⁸ This was in addition to social clubs that served the interests of the colonialists. Much later, opposition to the colonial administration also played a part when political and social groups came out to oppose the oppressive rule of the British colonial administrators.

Voluntariness was also associated with the emergence of church organizations during the colonial period.¹⁹ The sole purpose of these formations was to help the colonial government in administering relief and welfare aspects. The earliest established voluntary organizations were the Young Men Christian Association (YMCA), which was formed in 1910 as a branch of the British YMCA²⁰ and the Young Women Christian Association (YWCA), earliest records point to the year 1912 as one of the earliest women organization although it collapsed in 1932 due to poor availability of funds. Missionary organizations established structures through which social needs could be met but often without demands for accountability.²¹

After the 2nd World War, indigenous organizations and self-help groups came up to fill the void left by associations and institutions in provision of social services during the war. These included social welfare organizations created by migrant workers in urban centres. Examples are the Kavirondo Taxpayers Association, the Kenya Association of Youth Clubs, interested in youthful war veterans and Maendeleo Ya Wanawake Organization (MYWO), founded in 1952 with a goal to promote healthy homes either by improving the health, education or income generating skills of women led households.²²

After independence, the operations of NGOs were further diversified to include the provision of relief food, social services such as health, education and advocacy for human rights. The realisation of structural adjustment programmes (SAP), 1980, forced the Kenyan government to cut funding for social services to the citizens. The withdrawal led to the rapid increase of NGOs from 478 in 1980 to 1840 in 1990.²³ Currently, there are about 7,000 registered NGOs in Kenya.²⁴

¹⁸Kingoro and Bujra (n 16) 6.

¹⁹Ibid at 1.

²⁰ Ibid.

²¹ Ibid.

²² Ibid.

²³Kingoro and Bujra (n 16) 16.

²⁴Ibid.

1.2.3 Regulation of NGOs

Before the 1990s, operations of NGOs were regulated through mechanisms that included either an arrangement with the Kenyan government through the Ministry of Culture and Social Services,²⁵ individual legislation such as the Kenya Red Cross Society Act,²⁶ registration with and supervision as provided for by the then program for Social Services in the Ministry of Gender and Youth as well as the Attorney General's Office, or using the societies route under the Societies Act,²⁷ as a limited liability company that could be guaranteed under the Companies Act,²⁸ or as a trust under the Trustees Act.²⁹

The registration framework required to track consistency in regulations faces various hurdles since in Kenya, there is a proliferation of NGOs acquisition of legality in reference to operation and structures. At best this has caused it difficult to keep on checks and balances as required for effective accountability.³⁰ The problem was however solved in the 1990s when the government made a move to regulate the NGO sector through the formulation of NGO Coordination Act. The effect of this new Act would have far reaching ramifications on international and national NGOs regulations.³¹ However, the Act was passed without a policy framework to inform the legislation. Sessional Paper of 2006 recognized NGOs as providing a plat form for social and economic development. The policy paper set up a framework for regulation of NGOs in Kenya.

Changes in the NGO legal framework have occurred with the passage of the Public Benefit Organizations Act,³² that obviously changes NGO Act. . The PBO Act is focused at bringing novel approaches to legal and institutional framework in the hope to achieve improved accountability for non-profit organizations focused on delivering public benefit activities in Kenya. Since the Presidential Assent, in January 2013, almost 5 years ago, it remains unimplemented up to date.

²⁵ Before the registration of Plan Kenya (an NGO) with the NGOs Coordination Board, it was registered as an agreement filed at the Bureau's registry, File No. OP/218/051/9242.

²⁶ CAP 256 of the Laws of Kenya

²⁷ CAP 108 of the Laws of Kenya.

²⁸ CAP 486 of the Laws of Kenya.

²⁹ CAP 167 of the Laws of Kenya.

³⁰ Rahma Adan Jillo and Faith Kisinga, "NGO Law in Kenya" (2009) 11 (4) *The International Journal of Not-for-Profit Law*.

³¹ No 19 of 1990.

³² Act No. 18 of 2013.

1.3 Statement of the Problem

NGOs are crucial partners in promoting socio-economic development in developing countries like Kenya. The services they provide include health, education, relief food and help in times of disasters.³³ They step in when the government is either unwilling or unable to provide these services. As a result, they have attracted a lot of attention from (especially, international) funding agencies driven by their closeness to the grassroots communities, especially the marginalized,³⁴ their level of efficiency and cost-effectiveness relative to governments and the ability to promote sustainable development.³⁵ The rapid growth of NGOs is also an indication of the inability of developing countries to reduce poverty, corruption and accountability in the governance regime.³⁶ Some scholars, for example, Kameri-Mbote,³⁷ are suspicious of this growth, pointing out that information on the performance of NGOs is scanty. Others have accused NGOs of financial impropriety and abandoning their original mission.³⁸

This underscores a genuine concern that managers and promoters of NGOs are only using this form as a cover for the advancement of personal interests.³⁹ Yet, accountability is not only a legal, but also a constitutional,⁴⁰ requirement.

The stated poor corporate governance of NGOs is attributed, partly, to the multiplicity of registration regimes of NGOs which has resulted in the proliferation of accountability regimes.⁴¹

The need for NGOs to embrace good corporate governance principles cannot be over-emphasized as corporate governance is a growing phenomenon throughout the world.⁴² This

³³Zahir Uddin Ahmed, *Accountability and Control in Non-Governmental Organisations (NGOs): A Case of Bangladesh* (PhD Thesis: University of Manchester, 2004) at 1.

³⁴ M M Haque, "Micro credit and the poor women in Grameen Bangladesh", Paper circulated at *Microfinance and Women's empowerment Workshop*, April 9-11, 1997, Bangalore, India, Organised by ACTION AID, India and UK, 1997.

³⁵ I Smillie, *The Almas Bazar: Altruism under Fire – Non-Profit Organisations* (London: Intermediate Technology Publications, 1995) 19.

³⁶ D Lewis, *The Management of Non-Governmental Development Organisations*, (Routledge: London, 2001) at 3.

³⁷Mbote *supra* note 14 at 13.

³⁸Hellinger S, Hellinger D, and O'Regan F M, *Aid for Just Development: Report on the Future of Foreign Assistance* (London: Lynne Rienner, 1988) 7.

³⁹ B Kenety, *Development – EU/ACP: study criticises past criteria for allocating EU aid*, Inter-Press Service: Brussels, 2000): "In the Philippines, substantial Western aid was channelled to brutal military rulers of various developing industries, including NGOs. Recently it has been found that at least 30 percent of the funds cannot be traced."

⁴⁰Articles 10 (1) (c), 232 (1) (e), Constitution of Kenya 2010.

⁴¹Jem Bendell, *Debating NGO Accountability* (United Nations: New York, 2006) 20.

would enable NGOs to be more effective, efficient, productive, and transparent, have integrity and, above all, be accountable to the various stakeholders.⁴³ The effectiveness of an NGO board, it is argued, would translate into proper management of the organization and better understanding by the stakeholders of the activities of the NGO. Board balance is an effective ingredient of corporate governance whose effectiveness can be guaranteed by fulfilling the one third independent and non-executive directors (INED) rule. As a result, diverse skills or expertise are at work in the board to prevent any individual or group from dominating the board's decision. The INED are tasked with the responsibility of steering various committees necessary for effective performance. This ensures that the functions of the said committees are overseen by independent individuals.⁴⁴

While the management is responsible of provision of the right information in relation to the organisation's activities, the INED section is responsible of providing objectivity and expertise when evaluating management decisions. As a result, the corporate board, wields immense power over governance due to its independence, legal power and mix of expertise.⁴⁵

Balanced boards would also bring in a far clearer understanding of the organizational structure of NGOs as well as assist in distribution of responsibilities among the various members of the NGO.⁴⁶ Greater accountability to funders⁴⁷ would enable NGOs improve decision-making as well as meet requirements of the regulators.⁴⁸ NGOs that have adopted having boards as a measure of good corporate governance are more likely to flourish as compared to those that have not. Boards are required by law⁴⁹ as they often provide oversight functions, promote the organisations' mission, and also help raise funds for the organization.⁵⁰

⁴² HariSrinivas, Constituting an NGO Board: Creating a Strong Baseline for an NGO's Activities, available at <http://www.boardsource.org/>, accessed on 4 April 2015.

⁴³ D Mitlin, S Hickey, and A Bebbington, 'Reclaiming Development?' NGOs and the Challenge of Alternatives' (2007) 35 (10) *World Development* 1699.

⁴⁴ Janet Morrison, 'Legislating for Good Corporate Governance: Do We Expect Too Much?' (2004) 15 *Journal of Corporate Governance* 122.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ P K Brace, R Elkin, D D Robinson, and H I Steinberg (1980), 'Reporting of Service Effort and Accomplishment', *Financial Accounting Standards Board*.

⁴⁸ American Accounting Association, "Measuring the Performance of Non-profit Organizations: The State of the American Accounting Association Government and Non-profit Section's Committee on Non-profit Entities' Performance Measurement" (1989) *American Accounting Association, USA*.

⁴⁹ Companies Act Cap 486 Laws of Kenya.

⁵⁰ United States Agency for International Development, Governance and NGOs strengthening the board (USAID: Boston, 2011) at 5

A lot of challenges have been experienced in the NGO sector in terms of good corporate governance. Some NGOs do not have governing boards⁵¹ and where such boards are in place, do not provide the required strategic leadership important for proper utilization of available resources.⁵²

They also exhibit poor communication skills: NGOs in Kenya and most other African countries have failed to communicate their agenda clearly in relation to their identity, functions, achievements and value to the society.⁵³ Their inability to communicate effectively affects internal functioning of the organization as well as the relationship it has with the public and stakeholders.⁵⁴

Questions have been asked about the credibility and accountability of NGOs in Kenya since many are known to be brief case organizations.⁵⁵ Often, the major stakeholders (beneficiaries), who are poor, do not participate either in the formulation of policy or development planning.⁵⁶ Good corporate governance specifies that NGOs must be accountable to the all stakeholders including donors to the public receiving benefits much as the government.

The passage of the PBO Act in 2012 by Parliament and the subsequent presidential assent in 2012 was intended to herald a new dawn in the regulation of NGOs. This was an Act of Parliament that was meant to ensure transparency, accountability and integrity in NGOs.⁵⁷ NGOs were envisaged to have a single legislative framework that would provide a conducive environment for the formation, operations growth and supervision of, and a dispute resolution mechanism for, NGOs in Kenya.⁵⁸

Taking into account the documented weaknesses that exist in NGO governance systems and practice, and those of the existing regulatory framework, the issue that arises is whether the new regulatory regime under the Constitution 2010 and the PBO Act offers a better platform for the improvement of corporate governance in NGOs.

⁵¹P Shiras, 'The New Realities of Non Profit Accountability' (2001) 8(4) *Alliance* 23.

⁵² *Ibid.*

⁵³ *Ibid.* at 24.

⁵⁴ *Ibid.* at 25.

⁵⁵ Kingoro and Bujra *supra* note 16 at 16.

⁵⁶ Good speed R, *Public participation in urban planning* (Columbia: Dream-Host, 2008) at 34.

⁵⁷ See the Preamble to the PBO Act, para 6.

⁵⁸ PBOA, section 6.

1.4 Research Objectives

The main objective of this study was to analyse the extent to which the PBO Act provides a better regulatory framework and addresses problems of weak corporate governance in NGOs.

- i. Analysing if the new regulatory framework is effective
- ii. Analysing if the new regulatory framework has solved the problems of corporate governance in NGOs

1.5 Research Questions

The main research question in this study was: To what extent does the PBO Act provide better regulatory framework and address problems of weak corporate governance in NGOs?

- i. If the new regulatory framework is effective?
- ii. Has the new regulatory framework solved the problems of poor corporate governance in NGOs in Kenya?

1.6 Hypothesis

This study tested the following hypothesis: The new law is adequate in addressing the problems of weak corporate governance in NGOs.

1.7 Justification

NGOs in Kenya play a crucial role in the provision of services that the government has not been able to adequately provide such as health-care, education and relief and emergency responses, among others. These services are often lacking in the poor and marginalized regions of the country. The funds used by NGOs as donations come from taxpayers from Kenya or other countries from which international NGOs originate. Therefore, it is in public interest that these funds are properly utilized. Good corporate governance becomes critical because when the NGOs are mismanaged or misgoverned or collapse, groups which rely on the NGOs for services are adversely affected: they do not get the kind of effective support that they would otherwise get from an effectively and efficiently managed NGO.

Good corporate governance has the objective of ensuring that the right checks and balances are adhered to in the operations of the NGOs. This way, resources are equitably allocated, and properly utilized to achieve the intended objectives of the NGOs. Good corporate

governance ensures that the objectives of both the NGOs, the government, funding agencies and the groups benefiting from the NGOs' services are equally achieved. A regulatory framework that ensures good corporate governance, is therefore, essential to the achievement of the declared objectives. Thus, any regulatory framework put in place to govern the activities of NGOs should be tested against its ability to secure good corporate governance. This, in essence, is what this study sought to do which would in the long run contribute to the advancement of knowledge in the field of corporate governance in NGOs.

1.8 Theoretical Framework

The theoretical foundation of this study was provided by two politico-economic theories (the third sector and the third system) and the overarching theory of democratic governance. The two theories give an analysis of the economic and political basis of NGOs and why they particularly find it difficult to attain good corporate governance. Democracy, on the other hand, provides a framework for demanding accountability and transparency in relation to those who are intended to benefit from the services of NGOs and, through them, to those who provide support to NGOs in terms of resources.

1.8.1 The Third Sector Theory

According to the third sector theory, NGOs have organized themselves as rent-seekers whose motivation is to access donor funding rather than speak for the issues on the ground concerning the public in the area of their interest.⁵⁹ The theory was used to explain the overdependence of NGOs on foreign funding. It was found that local NGOs have limited sources of funding due to poverty as the projects contemplated require large amounts of financial and human resources. Thus, most of these NGOs depend entirely on the donor funding which they are unable to acquire from domestic sources. The study indicated that overreliance on foreign funding feeds onto a field of uncertainty on NGO autonomy and accountability.⁶⁰

The study further found that the PBO Act has important provisions on the collaboration between PBOs and the Government, which are likely to increase local funding of PBOs. For

⁵⁹Lester M Salamon and Helmut K Anheier, *Defining the Non-profit Sector: A Cross-National Analysis*, (Manchester University Press: Manchester, 1997) at 153; Helmut K. Anheier and Wolfgang Seibel (eds.) *The Third Sector: Comparative Studies of Non-profit Organizations* (New York: 199) at 20.

⁶⁰ Marina Ottaway, Thomas Carothers, (eds), *Funding Virtue: Civil Society Aid and Democracy Promotion*, (Carnegie Endowment book: Washington, 2000) at 18.

instance, section 2 of the Second Schedule to the Act provides for direct government funding. This follows special processes like subsidies from the government budget, provision of contract work or even through grants. The Act further provides for preferential treatment of PBOs in procurement procedures and bidding contracts.⁶¹ These legal provisions are likely to reduce the overreliance on donor funding and therefore improve NGO autonomy and sustainability. There are no similar provisions under the NGO Coordination Act.

This theory therefore provided a positive framework for this study. When NGOs over rely on foreign funding then their autonomy is affected, this is because they will tend to focus more on fulfilling the wishes of their donors rather than those of their benefactors. This then ends up defeating the whole purpose of having the NGO in place in the first instance. If the provisions of the PBO Act are fully implemented, and there is direct funding of NGOs by the government then there would be increased performance of NGOs. This is because the government the NGOs should be accountable to is right here and therefore monitoring operations of NGOs would be easier as compared to its operations being monitored by a foreign state. This would in return lead to increased accountability of these organisations.

1.8.2 Third System Theory

The third system theory views NGOs more as political rather than economic institutions whose mandate is to suit the needs and aspirations of oppressed people.⁶² The gist of the theory is that there is often a strong linkage between global and local communities where the NGOs play a critical role.⁶³ NGOs have enabled the local populations to participate in shaping their lives by helping them gain voices with which to express their needs and interests. This theory was meant to explain the concept of corporate social responsibility. However, the theory does not serve that purpose since the findings of the study were strictly based on the understanding of the NGO Coordination Act and the PBO Act. In addition, the study only discussed how corporate social responsibility is entrenched in the PBO Act, and not as a challenge.

⁶¹PBO Act, Second Schedule, section 3.

⁶²Noreena Hertz, *The Silent Take Over: Global Capitalism and the Death of Democracy* (Earthscan: London, 2001) at 17.

⁶³ Andrew Clayton, (ed), *NGOs, Civil Society and the State* (London: Intrac, 1996) 55.

1.8.3 The Theory of Democracy

The theory was used to explain the question of public participation in the governance of NGOs as a means of enhancing downward accountability.⁶⁴ It was also used to support the argument that NGOs should be democratically-governed, meaning that the ‘boards’ that run them should be democratically established, and decision-making as representative as possible. From the theory, it is evident that people take control of their issues in life and hence must decide what is best for their use or not. As a result thus, the collective power in determining decisions based on interests can be derived from the self –determination principle. .⁶⁵ According to Bentham, local communities are the major clients and beneficiaries of NGO services, but their participation in the leadership and management of the NGOs is minimal.⁶⁶

This assertion contributes to NGOs being seen as lacking in transparency and accountability.⁶⁷ This is worsened by the absence of an explicit legal provision in the NGO Coordination Act requiring NGOs to be open for stakeholder or public participation. In contrast, Section 25(5) of the PBO Act requires PBOs to welcome any scrutiny by its respective stakeholders. In a nutshell, the theory of democracy contributed positively in the analysis of public participation in relation to the two statutes.

1.9 Literature Review

The passage of the Constitution of Kenya, 2010, and the presidential assent to the PBO Act presented opportunities for improvement in the overall governance of institutions in Kenya, and NGOs in particular. For the first time, the Constitution provides for accountability, transparency, integrity and good governance as guidelines for management of public affairs. The PBO Act has also come up with guidelines on how public benefit organisations should operate. As recipients of public and private funding, NGOs have a duty to practice good corporate governance if they have any hope of being financially sustainable. The literature for this study is reviewed under the following thematic areas: environmental operations and constraints for NGOs, and regulatory framework for NGOs.

⁶⁴See Jem Bendell, *Debating NGO Accountability* (United Nations: New York, 2006) at 20.

⁶⁵Ibid. at 7.

⁶⁶D Beetham, *Auditing Democracy in Britain. Democratic Audit Paper No. 1.* (Human Rights Centre, University of Essex, Colchester/Charter 88 Trust: London, 1993) at 4.

⁶⁷Mbote *supra* note 14 at 16.

1.9.1 Operational Environment and Constraints for NGOs

According to Mbote,⁶⁸ NGOs in Kenya operate under very challenging conditions. These include lack of autonomy, political interference and inadequate financing. In the opinion of Mbote, NGOs face administrative inefficiencies demonstrated in accountability challenges: corruption, ethnicity, tribalism and fraud. She notes that NGO management is not able to account on delivery of goals espoused in relation to the huge salaries drawn, a fact made serious by the fact that managers are only accountable to their funding sources. The level of accountability to other stakeholders such as the government and beneficiaries is minimal. In addition, most NGOs in Kenya have limited financial resources which lead many of them to downscale their services, thus weakening the impact on the poor and marginalized. Mbote's work provides useful information to this study on the challenges facing the NGO sector in Kenya. However, this study focuses on the challenges emanating from the current legal framework and how the PBO Act bridges the gap to promote good corporate governance.

According to Kisinga, the NGO Council has been faced with leadership wrangles and warring factions which have suppressed the NGO sector.⁶⁹ Besides, the presence of mistrust and suspicion between the NGO Coordination Board and the NGO Council has been straining leading to a failed common ground approach in respect to joint agendas and common interests. Kisinga further argues that NGOs depend on various sources of foreign funding.

This together with the absence of new ways in local resource mobilisation as well as inadequate awareness on the interests available for individual and corporate philanthropy, has reduced the sustainability of many NGO initiatives. Most NGOs also lack the necessary technical prowess required for legal and policy evaluation and engagement processes. . The author's work contributes positively to this study on the operational constraints affecting the performance and accountability of NGOs. The scope of this study is however limited to the constraints which have a nexus to corporate governance of NGOs.

1.9.2 Regulatory Framework for NGOs

A number of scholars⁷⁰ who have written on the NGO sector are of the view that NGO legislative framework in Africa and Kenya in particular is inconvenient and, at best, meant to

⁶⁸ Mbote *supra* note 14 at 7.

⁶⁹ Faith Kisinga, 'The Process of Reviewing the NGO Coordination Act, 1990: A Step-by-Step Road Map' (2009) 11 (4) *International Journal of Not-for-Profit Law* 55, 60. Available at <http://www.icnl.org/research/journal/vol11iss4/vol11iss4/pdf> accessed 06 December 2015.

⁷⁰ Kingoro and Bujra *supra* note 16 at 5; Mbote *supra* note 14 at 12.

incapacitate their operations. Part of the problem is the inadequate definition of and distinguishing features of the various types of organizations that can truly be called NGOs. This is caused largely by the existing flaws in the NGO Act. In their assessment, NGO regulation in Kenya is vested in government officials under a myriad of legislative frameworks that make it impossible for accountability to take place.

Kanyinga *et al* argue that there lacks a coherent national policy despite the presence of various regulations and laws meant to make work easy for non-profit operations.⁷¹ According to the authors, the best policy that has ever evolved in Kenya is the Sessional Paper No. 7 of 1971. In this paper, the roles of charity were given breadth through definition of what service and kind of partnership would be expected between the government and such organisations. Lack of a coherent policy means a frail sector in response to effective coordination of the NGO sector versus the public sector.

Kanyinga *et al* argue further that although the government formed initiatives of developing a national policy in consultation with the National Council of NGOs in 2002. However, these approaches could only be applied to the NGOs as opined in the law. Although Kanyinga's work has no deep linkage to corporate governance issues, it provides useful literature on policy shortfalls affecting the NGO sector. This study however focuses on the legal framework in relation to corporate governance.

According to Jillo, the NGO Coordination Act gives the Board and the Minister arbitrary powers.⁷² Additionally, the Act provides no special conditions on certificate of registration. Accordingly, thus the Constitution's provision on the freedom of association is curtailed and placed on a difficult path of restraint in the process of registration or deregistration in the NGO sector. Using the South African best practice as a yardstick, Jillo recommends that integrity, transparency and accountability, financial sustainability, and the protection of freedom of association should be the substratum of good corporate governance in NGOs.⁷³ The author further recommends removal of acquisition of legal identity in regard to

⁷¹Karuti Kanyinga, Winnie Mitullah, and Sebastian Njagi, *The Non Profit Sector in Kenya: Size, Scope and Financing* (The Institute for Development Studies (IDS): University of Nairobi, 2007) 11; Karuti Kanyinga, and Winnie Mitullah, *The Non Profit Sector in Kenya; What we Know and What We Do Not Know* (The Institute for Development Studies (IDS): University of Nairobi, 2007) 15.

⁷²Rahma Adan Jillo, 'NGO Law Reform in Kenya: Incorporating Best Practices' (August 2009) 11 (4) *The International Journal of Not-for-Profit Law* 39, 52. Available at

<<http://www.icnl.org/research/journal/vol11iss4/vol11iss4/pdf>> accessed 06 December 2015.

⁷³ *Ibid* 53.

associations for informal groups with mutual interests.⁷⁴ Although the Jillo's findings add value to the instant study, the researcher unearths more challenges arising from the current legal framework and how they affect corporate governance.

According to Kingoro and Bujra,⁷⁵ in Kenya, NGOs can be registered under various names and legal forms: Non-Governmental Organizations (NGOs) or Public Benefit Organizations (PBOs), companies Limited by Guarantee, societies, and trusts. These forms are equally registered under different legal regimes as enumerated below. Kingoro and Bujra further argue that, of other laws meant for registering non-profit organisations are characteristic on the legality and supervision which lacks in the NGO Coordination Act.⁷⁶ This evidence in absence of clarity is a function of the processes involved in of self-regulation through the NGO code of conduct under Part IV of the NGO Coordination Act. Kingoro and Bujra posit that, notwithstanding the governance structure, a single body is needed that has the power to check on oversight and decision-making aspects of the members as well as performance governance duties between member meetings. In addition, a higher authority body is important as an mediator and manager of meetings between the general membership.⁷⁷

Kingoro and Bujra further notes that the NGO constitution fails miserably in enforcing accountability from the laid down mechanisms. In respect, thus the three names found during application are the only ones recognised and liable under the law irrespective of any others therein. Similarly, the individuals cited during application have not been limited whatsoever by the Act from taking up other roles in the management of the NGO besides an absence of liability upon their directorship. . It is therefore clear that in the absence of clear transparent mechanism to assess the accountability of benefits to the public, NGOs can become immune to any public criticism. .⁷⁸ The authors argue that most NGOs under the current legal regime are donor-centric instead of being people-centric. This is a very serious problem, which requires legal redress.

As discussed above, a few scholars who have written on NGOs have concentrated on the constraints (Mbote)⁷⁹ and excesses of the NGOs. Many scholars, such as Kingoro and Bujra,

⁷⁴ Ibid 52.

⁷⁵ Kingoro and Bujra *supra* note 16 at 5.

⁷⁶ Sellah Nasimiyu Kingoro and Abdalla Bujra, *Social Policy, Development and Governance in Kenya: The Contribution of Non-State Actors to Development in Kenya* (Development Policy Management Forum (DPMF): Nairobi, 2009) 7.

⁷⁷ Ibid 8.

⁷⁸ Ibid 9.

⁷⁹ Mbote *supra* note 14 at 29.

Jillo, Kasinga, Mbote, and Kanyinga who have addressed these challenges of good corporate governance in NGOs did so before the implementation of the new Constitution and the enactment of the PBO Act. This study will endeavour to add onto that body of knowledge by focusing on the extent to which the new law has tried to solve such challenges of good corporate governance in NGOs.

From these reviews, it is clear that the theme of good corporate governance in NGOs has been dealt with minimally. The issues of the PBO Act which came into force in 2013 and how it improves on the NGOC Act has not been extensively dealt with, largely because most of the scholars published their works before 2013.

1.10 Research Methodology

The study research used secondary and primary data. Data was, first, collected through a review of literature. This literature yielded important information on the findings generated by different scholars in relation to the challenges facing the NGO sector and the adequacy or otherwise of the regulatory framework. The purpose of this analysis was to justify the need for the implementation of the PBO Act as it offers solutions to the inadequacies of the current legal regime.

Primary data was collected through the analysis of various statutes and case law. This was used to assess various aspects of the NGO governance in Kenya, such as arbitrary powers accorded to the NGO Coordination Board, the problem of accountability and internal governance, public participation, gender equality and registration of NGOs.

1.11 Summary

This study report is divided into three chapters apart from this introduction. **Chapter two** presents a critique of the current regulatory framework. This includes an in-depth discussion of the challenges affecting the implementation of good corporate governance in NGOs. The challenges include arbitrary powers of the NGO Coordination Board; the gender question; and taxation. The purpose of this chapter is to unpack the challenges in order to gauge the improvements brought about under the PBO Act.

Chapter three assesses the extent to which the PBO Act provides a better regulatory framework for good corporate governance (in terms of principles and oversight). It basically looks at the provisions of the PBO Act on good corporate governance of NGOs. The

researcher argues that the PBO Act contains important pillars such as leadership and integrity, self-regulation and corporate social responsibility, accountability and transparency, which may provide a frame work that would lead NGOs on the path to good corporate governance. The Constitution of Kenya 2010 is discussed as a framework within which the PBO Act operates.

Chapter Four summarises conclusions and recommendations arising from the analyses in the preceding chapters.

CHAPTER TWO

CRITIQUE OF THE REGULATORY FRAMEWORK FOR NGOs

2.1 Introduction

NGOs encounter a number of challenges in their endeavour to implement good corporate governance. The challenges are based partly on the weaknesses within the management systems of NGOs and partly on the inadequate or weak regulatory regime. This chapter evaluates these challenges through a perspective critical analysis. The primary objective of this chapter is to establish a yardstick upon which the study will assess whether the PBO Act, as a regulatory framework, adequately addresses the challenges of corporate governance in NGOs. The Chapter, therefore, discusses: impediments of good corporate governance; lack of autonomy of NGOs; self-regulation under the NGOC Act; accountability and inadequate internal democracy; multiple not for profit forms and registration regimes; community participation in governance and accountability of stakeholders; the gender question.

2.2 Impediments to Good Corporate Governance

2.2.1 Excessive Powers of the NGO Coordination Board

Under the current legal regime, the NGO Coordination Board, the Bureau and the Cabinet Secretary are given wide discretionary powers. Such arbitrary powers are found in sections 12 (certificate of registration), 14 (refusal of registration), 19 (appeals) and 32 (Ministerial rules on Regulation) of the NGO Coordination Act, which place undue pressure of restraint on the implementation of the freedoms of association as provided under Article 36(1) of the Constitution. Further, section 12(4) of the NGO Coordination Act provides that the Board may wish to include any specifications they deem fit in the request of a certificate of registration. ⁸⁰ Since there are not guidelines laid down on terms and conditions of certificate of operation according to Section 12 (4) the subjectivity of the Board, arising thereof, may result to abuse in the processes of refusal in registration.⁸¹ This is a sharp contradiction to what is provided for in Section 14 of the NGO Coordination Act.⁸²

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Mbote *supra* note 14 at 17.

Besides, the NGO Coordination Board forms part of the government as interpreted in the NGO Co-ordination Act.⁸³ As the body charged with overseeing matters pertaining to NGOs, it is staffed by state workers who are mainly political appointees.⁸⁴ The officials exercise arbitrary powers as demonstrated when they deregistered fifteen (15) NGOs for allegedly funding terrorism and another 510 charitable organizations for failing to file their audited reports.⁸⁵ The Government's negative perception towards PBOs is partly borne out of suspicion that some PBOs are an accomplice in terrorist activities. After the 1998 terrorist bombing of the American Embassy, 6 NGOs were deregistered.⁸⁶ Likewise, after the Garissa terrorist attack in 2015, the government closed all NGOs and forex bureaus suspected to be used by Al-Shabaab sympathizers.⁸⁷ In both cases, the government failed to link the NGOs with the terrorist activities.⁸⁸

The NGO Coordination Board has been sued on several occasions for failing to give sufficient reason as to why it declined an NGO registration application. For example, in the case of **Republic versus NGO Coordination Board & another ex-parte Transgender Education and Advocacy**, the Applicant, through its chairperson moved court to compel the NGO Coordination board to register it as an NGO. The Applicant had met all the requirements; provided the necessary information for an application for registration and paid the prescribed fee. The Applicant therefore had legitimate expectation the NGO Coordination Board would consider and process its application. The Board went ahead and declined the application without giving valid sufficient reason as to why. In this matter court went ahead and ordered that the NGO Coordination board registers the Applicant as an NGO.⁸⁹

⁸³Non-Governmental Organizations Co-ordination Act, section 3.

⁸⁴ Ibid. Section 4: "The Board shall consist of—(a) a chairman appointed by the President; (b) three members appointed by the Minister by virtue of their knowledge or experience in development and welfare management;(c) the Permanent Secretary in the Ministry for the time being responsible for matters relating to Non-Governmental Organizations;(d) the Permanent Secretary in the Ministry for the time being responsible for foreign affairs; (e) the Permanent Secretary to the Treasury;(f) the Permanent Secretary in the Ministry for the time being responsible for economic planning;(g) the Permanent Secretary in the Ministry for the time being responsible for social services;(h) the Attorney-General; (i) seven members appointed by the Minister on the recommendation of the Council to represent the diverse areas of Non-Governmental Organizations' interests within the Board; (j) the executive director appointed under section 5(1);(k) the chairman of the Council."

⁸⁵Samuel Karanja, '15 NGOs deregistered over terrorism funding claims' Daily Nation *Tuesday, 16 December 16, 2014.*

⁸⁶ Ibid.

⁸⁷ Mark Anderson, "Kenya criticized for closure of money transfer firms following Garissa attack" (10 April 2015), available at www.theguardian.com/global-development/2015apr/10/kenya-closure-money-transfer-firms-garissa-attack-al-shabaab accessed on 17 January 2016. In this incident over 148 students of Garissa University were killed by alleged Al-Shabaab terrorists.

⁸⁸Supra

⁸⁹ Republic v Non-Governmental Organizations Co-ordination Board & another ex-parte Transgender Education and Advocacy & 3 others [2014] eKLR

Moreover, by empowering the Coordination Board to establish the regulations meant for guiding the conduct of NGOs and their activities.⁹⁰ The Act imposes regulations on NGOs, which may not subscribe to the dictates of the code. This provision means that the government-dominated Board has overstretched powers to determine NGOs' thematic and geographic areas of operation. This is contrary to the fundamental freedom of expression, assembly and association as the Board may take advantage of the situation to control the activities of the NGOs. The upshot of this is interference with the independence of NGOs.

2.2.2 NGOs' Lack of Autonomy

Corporations are able to be autonomous because they are able to constitute boards of directors with the right mix of both independent and executive directors.⁹¹ The effect of creating a board is to provide leadership to the corporation⁹² by separating the ownership and control of the corporation.⁹³ The composition of the Coordination Board is government-dominated,⁹⁴ which could have serious depressing effects on the independence of the NGO sector. Virtually all the members of the Board are government appointees, with the chairman as an appointee from the Office of the President. The Board is also composed of the Attorney General and members from the Executive arm of Government.

Given this composition, the functioning of the NGO Coordination Board becomes challenging in various ways. First, the function of advising on the appropriate approaches suitable for efficient planning and coordination of NGOs by a "Government"-constituted Board treats NGOs as subsidiaries of the Government as opposed to independent actors free to formulate and execute their action plans. Second, the Act empowers the Board to provide NGOs with up to date guidelines on policy framework meant to guide and support harmony in line with national development plans. This function co-opts NGOs into assisting in the execution of political priorities of the Government espoused in the plan. This has the potential of affecting the autonomy of the NGO sector. It also violates the right of NGOs to operate free from unwarranted government interference.

Third, NGOs need resources if they have to continue providing services to the communities' they serve. There is no legal provision under the NGOC Act specifying the sources of funds

⁹⁰Section 7(h).

⁹¹Adolfe Berle and Gardiner Means, *The Modern Corporation and Private Property* (Macmillan: New York, 1932) at 5.

⁹²Ibid.

⁹³Ibid.

⁹⁴Section 4

for NGOs. Thus, NGOs in Kenya have not been able to cut off their close links with their major funders from the north.⁹⁵ This is exacerbated by the fact that NGOs, for a long time, did not view local donors as possible sources of support for projects and activities.⁹⁶ In 1988 for example, 10% of all NGO funding came through domestic funding, while 90% was from the northern NGOs (NNGO).⁹⁷

The executive arm of government has on various occasions interfered with the operations of NGOs, a clear instance is when the president assented the PBO Act on the 14th of January 2014 and almost three years down the line the same had not been operationalized. In the cases of **Trusted Society of Human Rights Alliance V, The Cabinet Secretary Devolution and Planning**, the Applicant moved court seeking orders to compel the cabinet secretary for devolution and planning to operationalise the said act. The court went ahead and ordered that the CS should within 14 days appoint and gazette a date for the coming in to operation of the PBO Act.⁹⁸ Instances like these ones clearly show that the government is not so concerned with the wellbeing of the affairs of NGOs, if the government must be compelled through a court order to do what it ought to have done.

The fact that is then CS who has powers to operationalise the act also poses as a challenge.

As Mbote points out, foreign funding is a threat not only to the autonomy of NGOs but their accountability as well.⁹⁹ According to Kaliba, overreliance on foreign donors places serious restraints on home-grown development strategies.¹⁰⁰ It also affects which projects are to be funded, where and at what level, in most cases, without the community participating. This contradicts the claim by most NGOs through their vision and mission statements that they are independent in their operations. It is clear that donor influence is a critical issue when considering the autonomy of NGOs. The dependency relationship acquits the saying “whoever pays the piper calls the tune” reasoning. With this dependency, NGOs have limited choices with regard to the projects they undertake.

⁹⁵Rehema C Batti, ‘Challenges Facing Local NGOs in Resource Mobilization’ (2014) 2 (3) *Humanities and Social Sciences* 57.

⁹⁶Elkanah Odembo, ‘Credibility, Image and Identity: A Crisis in the NGO Sector in Kenya,’ available at <www.odevportali.com/ara/kenya-list/DOC>accessed on 23 September 2015.

⁹⁷ Fowler A and Rick J, *The Role of Southern NGOs in Development Co-operation* (INTRAC: UK, 2000) at 8.

⁹⁸ *Trusted Society of Human Rights Alliance v Cabinet Secretary Devolution and Planning & 3 others* [2016] eKLR.

⁹⁹Mbote, *supra* note 14 at 13; Kanyinga and Mitullah *supra* note 94 at 17.

¹⁰⁰Matildah Kaliba, “Towards an Autonomous Civil Society: Rethinking State-Civil Society Relations in Zambia” (2014) 16 (2) *International Journal of Not-for-Profit Law* 12.

2.2.3 Self-regulation under the NGO Coordination Act

The Government recognizes that the effectiveness of NGOs lies in the principle of self-regulation. Section 23(1) of the NGO Coordination Act is focused on creating a forum where all NGOs can derive their directions and determine their relationships in respect to the Code of Conduct. Characteristically, the Council thus serves to advise the Board as well as help in determination of the processes involved in self-regulation. The Council and the Board are in turn regulated by the code of conduct. A question that arises is why the Board should approve what it has developed and published as a code.

The Council plays a limited role in developing the code of conduct, leaving the Board with wide discretionary powers to determine the contents of the code. The NGO Council is only required to advise the Board under section 24(1) of the NGO Coordination Act. These provisions raise serious concerns as to which body is indeed required to develop the code of conduct. Regulation 26(2) of the NGO Coordination Regulations requires the Interim Council, within six months of its formation, to formulate and submit a draft of the code of conduct to the Board for approval provided that where no such draft is submitted within the period specified, the Board shall refer the matter to the Minister for appropriate measures. From the wording of this provision, the Board only has approval functions in respect of the code of conduct. There is need to clearly demarcate the different functions of the NGO Council and the Board in line with self-regulation.

The foregoing framework of self-regulation is inadequate in a number of ways. First, the framework relies on the voluntary submission of NGOs to self-regulation. Second, there is no independent review body under the Act to determine disputes between the Council and its members and between the Council and the Board, and any appeals from the decision of the Board. Appeals on deregistration and other complaints must be lodged with the Minister and any party aggrieved by the Minister's decision has twenty-eight days to appeal to the High Court. A question then arises as to whether the Minister will make a reasonable and fair decision in accordance with Article 47 of the 2010 Constitution. Third, there is no provision under the Act requiring NGOs to form umbrella organisations or forums which can promote self-regulation and ethical standards. Fourth, there are no procedural rules or guidelines for the determination of any complaints lodged with the Minister under section 19 of the Act. The Act only gives timelines within which the Minister should make a decision.

2.2.4 The Problem of Accountability and Inadequate Internal Democracy

Some of the constraints experienced by NGOs are self-inflicted. Few NGOs have structures that would ensure internal democracy as others have been accused of embezzlement of funds. Good corporate governance demands that public organizations be run on principles of accountability, transparency and sustainability. Adopting such principles should guard against excessive regulation which would have the effect of reducing NGO efficiency, capability and cost effectiveness.¹⁰¹ The need to balance excessive regulation and good corporate governance can, therefore, not be over-emphasized. However, the short-term goals and output-oriented project mechanisms favoured by donors would have to be contended with for any management structure that is put in place.

According to Bendell, accountability refers to the obligation or willingness to take and be responsible of one's actions.¹⁰² Although, NGOs are needed to open and welcome scrutiny from the beneficiaries of their services the absence of elaborate mechanisms to enforce accountability may lead to immunity from criticisms emanating from the public..¹⁰³ Most NGOs are donor-centric instead of being people-centric. The upshot of this trend is that it prioritises the needs of donors over those of stakeholders.

Compared to other laws under which NGOs are registered in Kenya, the NGOC Act fails to place legality on who should be held accountable in the governance of NGOs. ¹⁰⁴ Section 10(5) of the NGOC Act requires that an application for registration be accompanied by an authenticated true and certified copy of the constitution meant to govern the proposed NGO. However, as Kingoro and Bujra note, evidence indicates that such a constitution often has no inbuilt mechanism of accountability of officials.¹⁰⁵ As a result, other officials are not held liable in law except the original three names found in the registration certificate. ¹⁰⁶ In addition, Regulation 4 of the NGO Coordination Regulations requires NGOs to deposit their annual return files to the Board's offices upon the third month after a financial year. NGO should consequently reveal their sources of funding as well as present clear purposes intended of use for the funds. Although the NGO Coordination Board can cause NGOs to

¹⁰¹S Kamat, 'NGOs and the New Democracy' (2003) 25 (1) *Harvard International Review* 67.

¹⁰²Jem Bendell, *Debating NGO Accountability* (New York and Geneva: UN Non-Governmental Liaison (NGLS), 2006) 1.

¹⁰³Kingoro and Bujra (n 16) 9.

¹⁰⁴Ibid, 7.

¹⁰⁵Ibid.

¹⁰⁶Section 10(3) (a).

file their annual returns under section 7(c) of the Act, it falls below the needed robust technicalities necessary to conduct audits and implementation of directives

In addition, the Act has no provision stipulating the legal liability of NGO directors or other governance bodies. There is also no restriction on the original subscribers in their quest to assume directorship or any other roles in the staff.

Although Regulation 31 of the NGO Coordination Regulations provides that the registry of NGOs maintained by the NGO Board should be open for public inspection, the location of the Board and the fact that not all beneficiaries are able to access its website to inspect the register frustrates any efforts by the public to hold the NGOs and the Board accountable. The head office of the Board is located on the 15th Floor of the Cooperative Bank House along Haile Selassie Avenue and a regional office has been established in Kisumu. There are no guidelines on the Board's website indicating where and how the public can access the registry.

2.2.5 Multiple Not-for-Profit Forms and Registration Regimes

NGOs are by definition not-for-profit organizations and appear in various forms and are registered under different registration regimes. The different forms are: Non-Governmental Organizations (NGOs) (soon to be Public Benefit Organizations, or PBOs), companies limited by guarantee, societies, and trusts. Other non-for-profit organisations include churches and trade unions. All these forms can be registered under various registration regimes.

Although the NGO Coordination Act is clear on what defines an NGO, this definition fails to include all civil society organisations that are focused on public benefits.¹⁰⁷ Consequently, the other organisations which do not fit the definition are registered under other registration regimes. This has led to multiple and sometimes overlapping registrations systems that are an impediment to the regulation of PBOs. The diverse systems also make it difficult for the Government to develop harmonised, systematic and coordinated policies for the NGO sector. It is, therefore, important to provide a definition that encompasses all PBOs under a single legislation as this will simplify the registration process and the general regulation regime.

The overall effect of having numerous registrations mechanisms is to complicate the system of accountability.

¹⁰⁷Jillo and Kisinga, *supra* note 114 above, 49.

2.2.6 Community Participation in Governance and Accountability of Stakeholders

Some NGOs in Kenya implement projects without public participation. Yet studies by Ochuodho¹⁰⁸ in Kenya and IFAD¹⁰⁹ in Asia suggest that public participation enables the public voice to gain a stake in controlling and shaping power relationships as a political process whose outcome is to promote accountability and transparency. The concept of public participation has become one of the most important aspects of governance in democratic countries.¹¹⁰ Accordingly, joint decision-making is an outcome that has its prerequisites on participation as a process of shared understanding and empowerment. The process involves decision making after thorough negotiations and consultations. .¹¹¹ Participation is not the exclusive domain of the beneficiary; the process embraces all stakeholders in order to arrive at the best solution, as participation is seen as efficient and empowering if these factors work in synergy.¹¹²

The principle of public participation was first encapsulated in Principle 10 of the Rio Declaration on Development.¹¹³ The Convention on the Rights of Persons with Disabilities of 2006 makes it clear that because disabled persons are unable to participate in formulation of policy that affects them, they have remained marginalized.¹¹⁴ Public participation is an important pillar of Kenya's Constitution. It is recognized as a major right in various articles of the Constitution.¹¹⁵ Public participation in the reform processes is a vital ingredient in

¹⁰⁸Samuel Ochuodho, 'Influence of Non-Governmental Organizations' Participatory Level of Governance on Accountability to Stakeholders in Kisumu Municipality, Kenya', (2013) 3 (8)*International Journal of Academic Research in Business and Social Sciences* 455: "The objective of the study was to establish the level at which participation as an element of governance influence accountability to stakeholders by NGOs in Kisumu Municipality. The research question was, at what level does participation as an element of governance influence accountability to stakeholders by NGOs in Kisumu Municipality."

¹⁰⁹ IFAD, *Participatory approach for an impact-oriented project cycle* (2001), retrieved from <<http://www.ifad.org>>.

¹¹⁰ Rowe G and Frewer L J, 'Public Participation Methods: A Framework for Evaluation' (2000) 25 (1) *Science, Technology, and Human Values*, 3-29.

¹¹¹ IFAD, *supra* note 121 above.

¹¹² F Cleaver, 'Paradoxes of Participation: Questioning Participatory Approaches to Development' in Edwards M and Fowler A (eds.), *NGO Management* (London: Earthscan Publications Limited, 2006) 13.

¹¹³United Nations Environmental Programme (UNEP), *Rio Declaration on Environment and Development*, 1992.

¹¹⁴Pellizzoni L, 'Uncertainty and Participatory Democracy' 2003) 12 (2) *Environmental Values* 195-224.

¹¹⁵ Article (10) (2) (a), Constitution of Kenya 2010: provides for key values and purpose of good governance is patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; Article 10 (2) (b) provides for human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized; Article 159 of the constitution envisages the opening up of the judiciary to public scrutiny through the declaration that the source of judicial power is 'derived from and vests in the people'.

restoring confidence in public institutions and NGOs are not an exception.¹¹⁶ Public participation is important because it is considered as the best weapon against graft and poor governance for various reasons.¹¹⁷ For starters it creates a balance between governing for people and governing by people.¹¹⁸

The promotion of participatory methods of assessing development projects is, an appropriate response to the challenge of accountability from top down approach in development work.¹¹⁹ The process is not without challenges. For instance, it poses problems for the upward accountability since it is not easy to analyse large amounts of information coming from the process.¹²⁰ Other issues include the quality of the participation process which depends on those who are in-charge. In a large part, public participation has been given a bad name where it has been practiced in NGOs before as an exercise of pre-determined consent. As a result, it does not create accountability for the beneficiaries.

“Young men and women who look good and talk good are now seen in five star lobbies talking participation with donors. Lengthy consulting reports at highly inflated rates are prepared for NGOs by NGOs. The upper class has shown its alacrity yet again. They are taking full advantage of the new and generous opportunity being offered...”¹²¹

NGOs have also been criticized for focusing on specific projects where despite lacking in political power, expertise, mandate and interest to handle effectively poverty and inequality across the globe. ¹²²A majority of the NGOs are viewed as allied to anti-state agents making it difficult to properly rally the public around a project for purposes of accountability.¹²³ In addition, there exists no legal options available in the NGO Coordination Act requiring NGOs to be open for stakeholder or public participation.

¹¹⁶Debra Gichio ‘Public Participation in the Judicial Reform Process a Vital Ingredient in Restoring Public Confidence in the Judiciary’ (2012) 135 *ADILI* 5.

¹¹⁷Francis Kairu and Mary Maneno, ‘Public Participation: Kenya’s Best Weapon against Graft and Poor Governance’ (2012) 135 *ADILI* 1.

¹¹⁸ Ibid.

¹¹⁹Jem Bendell, *Debating NGO Accountability* (United Nations: New York, 2006) at 20.

¹²⁰ Davies R, “Monitoring and Evaluation NGO Achievements” in R B Potter and V Desaid (eds.), *Arnold Companion to Development Studies* (Hodder Arnold Publishers, London 2001).

¹²¹S Akbar Zaidi, ‘NGO Failure and the Need to Bring Back the State’ (1999) 11 *Journal of International Development* 267.

¹²² Ibid.

¹²³S Kamat, ‘NGOs and the New Democracy’ (2003) 25 (1) *Harvard International Review* 67.

2.2.7 The Gender Question

Gender inequality is rife in both private and public institutions.¹²⁴ Fewer women have been employed as compared to men and, similarly, very few NGOs are run by women. It may be argued that there are very many women running NGOs in Kenya, but the term “many” is relative until comparative evidence is provided showing the number of NGOs managed by women and men. According to Mbote, recent statistics indicate that women only head 12-14% of the largest NGOs in the US and 27% in the UK.¹²⁵ Marston continues that, in 2013, only one of the top NGOs in the UK was headed by a woman.¹²⁶ Kenya is a developing state and the rate of gender disparity is likely to be higher than in the UK or USA. Undoubtedly, many of those NGOs managed by women exclusively deal with gender equality.

In the context of this study, there lacks a no provision in the NGO Coordination Act requiring the appointment of women as members of the NGO Coordination Board. In addition, there is no provision on equality except as regards the equality of votes under section 6(6) of the Act. While it may not be a challenge to corporate governance of NGOs, the contribution of women and other minority groups in the boards of NGOs is important in ensuring a representative management system in the NGO sector. The government through the Ministry of Trade and Industry in 2007 is quoted to have emphasized on the importance of gender equality in order to avert serious economic issues that would lead to negative outcomes, for the country and women.¹²⁷ The argument is that where the board is dominated by men, there is a high risk of ‘group-think’ as well as decisions that are lacking in variety.¹²⁸ Inclusion of women would eliminate group think as women and men often have different approaches to issues.

2. 2. 8. Tax Exemption for NGOS

The process of applying for tax exemption is long and cumbersome which has proven to be one of the challenges for NGOs. Tax exemption for NGOs is also not automatic as it depends solely on the discretion of the Minister of Government at the National Treasury and

¹²⁴Mbote *supra* note 14 at 16.

¹²⁵Ama Marston, “Women in leadership: ‘It’s not going to work the way we’re doing it’” (1 August 2013) *Global development professionals network*, available at <<http://www.theguardian.com/global-development-professionals-network/2013/aug/01/women-in-leadership-international-ngos>> accessed on 8 March 2016.

¹²⁶ *Ibid.*

¹²⁷http://www.embassy-of-kenya.de/E3_THE-PERMANENT-SECRETARY-MI.111.0.html

¹²⁸Boserup Ester, *Women's Role in Economic Development* (New York: St. Martins Press, 1970) at 11.

the Commissioner of Domestic Taxes.¹²⁹ In application for tax exemption, an NGO must attach a referral letter from the NGO Board which should include evidence of projects undertaken by the NGO in the last three years of operation.¹³⁰ This will only be interpreted to mean that Tax exemption is only available to NGOs that have been in operation for more than three years. This is a challenge as NGOs that have been in operation for less than three years do not qualify the benefit of tax exemption.

For an NGO to be exempted from Income Tax, then it must be steeped purely in the process of relieving poverty and distress from the public besides being focused on either religion or education.¹³¹ This means that exemption of income Tax does not apply to all NGOs. Value Added Tax exemption for NGOs must be required of a go ahead only from the commissioner responsible for Social Services.¹³² Customs duty exemption must be through a special application made to the Cabinet Secretary of the National Treasury through the NGO Board. Any duty exemption that exceed Kshs. 500,000/= must be approved by the treasury in writing¹³³. As demonstrated above, tax exemptions for NGOs is not automatic as the same is under the direction of the NGO board, the commissioner of taxes and the cabinet secretary of the National Treasury.

2.3 Conclusion

It is clear that the NGO sector in Kenya has faced many challenges under the current legal framework. As demonstrated above, NGOs are still regulated under the NGOC Act which has weak provisions on good corporate governance. The implication is that the weaknesses inherent in the Act, such as multiple registration regimes, wide discretionary powers of the NGO Board, political interference, laxity in registration of NGOs, limited monitoring capacity, and the creation of the NGO Board and Council that are controlled by state functionaries, are still at play. Since the two institutions are controlled by government, the last thing on their mind is to be accountable to the various stakeholders other than the appointing authority.

¹²⁹ <https://www.icpak.com/wp-content/uploads/2015/09/Tax-Laws-Affecting-NPOS.pdf>

¹³⁰ Ibid

¹³¹ Income Tax Act, Cap. 470 Laws of Kenya, First Schedule Paragraph 10.

¹³² Value Added Tax Act, Cap 35 of 2013 Laws of Kenya, First Schedule, Part II, Paragraph 11.

¹³³ Customs and Excise Act, Cap 472 Laws of Kenya, Third Schedule, Paragraph 12

It is evident that, without a clear political good will in establishing the NGO legal framework, NGOs will continue to be embedded in poor corporate culture and governance and, in the process fail, to deliver the intended services to the beneficiaries.

The next chapter discusses the extent to which the PBO Act addresses the weaknesses of the regulatory framework of the NGOC.

CHAPTER THREE

ASSESSMENT OF THE REGULATORY FRAMEWORK IN THE PBO ACT AND OPERATIONS

3.1 Introduction

The amendment to the NGOC Act and the subsequent passage of the Public Benefit Organizations Act in 2013 changed the legal and regulatory environment of PBOs in a number of ways. The goal of the PBO Act is to advance a new way in legal, regulatory and institutional approach to the framework surrounding NGOs in Kenya in line with a new constitutional dispensation.¹³⁴ Against this backdrop, this chapter examines how the PBO Act has addressed the challenges to internal governance and legal regulatory framework as discussed in chapter two of this study and how this may facilitate good corporate governance of NGOs.

3.2 The NGO Regulatory Framework under the PBO Act

The PBO Act was established with a focus to provide a conducive environment for the PBO sector and for the operation of registered PBOs.¹³⁵ The Act establishes a regulatory framework that supports PBOs in the solutions need to change lives of the Kenyan people. Unlike the current NGO regulatory framework, the Act introduces significant improvements in terms of NGO accountability and transparency, autonomy, public participation, NGO registration, tax exemption, and self-regulation. These are discussed under the following thematic areas and in relation to corporate governance: freedom of association; registration of PBOs; internal governance of PBOs; public participation, communication and disclosure; corporate social responsibility; self-regulation; institutional framework; and gender mainstreaming and diversity of board appointments.

3.2.1 Freedom of Association

To give useful realisation of the PBO Act under section 3 (b), one of the objectives safeguards on the freedom of expression, the right to association and peaceful assembly. This

¹³⁴ “Quest for an enabling environment for civil society organizations in Kenya,” available at <www.pboact.or.ke/the-pbo-act/about-pbo-act> accessed on 22 September 2015.

¹³⁵ Section 3 of the PBO Act.

is consistent with Article 36 of the Constitution of Kenya, 2010, which protects the right to freedom of association. The PBO Act has further elaborated on the right of association. Under section 20 thereof, every organisation is free to join others in association *as it may desire* and also to participate in forming a PBO platform under the Act. Every organisation also has the freedom to join or exit a forum of PBOs.¹³⁶ The phrase “as it may desire” connotes a voluntary process. There is no compulsion to join an association under the PBO Act. Participation in and membership of a PBO is also voluntary. The importance of the freedom of association to corporate governance is that it allows PBOs to form umbrella associations, which will establish codes of conduct applicable that could be useful among the PBO membership and other stakeholders.¹³⁷ There is no provision under the NGO Coordination Act requiring the formation of umbrella associations to promote self-regulation of NGOs.

3.2.2 Registration of PBOs under the PBO Act

The Act has introduced a new registration regime for PBOs that ensures that organizations registered under any other legal regime comply with the new legislation.¹³⁸ Unlike the Non-governmental Organizations Coordination (NGOC) Act, the PBO Act leaves no doubt in the directions and time placed towards the process of registration and application. For instance, the PBO Authority is required to issue a registration certificate within 60 days of receiving an application for registration.¹³⁹ Section 11 of the PBO Act also provides for clear and comprehensive criteria for registration of international NGOs. Further, away from the NGOC Act, the PBO Act fails to provide enough caution to the Authority when administering judgment on registration of an application.

The Act requires all organizations registered under any other legal regime, such as the Non-Governmental Organizations Coordination (NGOC) Act, 1990, the Companies Act, the Societies Act, and the Trustees Act before the initiation of the Act to apply for registration under the PBO Act. The PBO Act has replaced the Non-Governmental Organisations Coordination Board with the Public Benefits Organizations Regulatory Authority (PBORA).¹⁴⁰

¹³⁶Section 20.

¹³⁷Section 28(1).

¹³⁸Section 6 (2) (4).

¹³⁹Sections 9(1) and 10(1).

¹⁴⁰Section 34.

The Authority has discretion in the registration of PBOs and may decline to register an organization as a PBO. This may occur in circumstances where interests for registration fails to satisfy the threshold of the requirements of the PBO Act and the objectives of the proposed PBO are directly opposite of the written law, or the applicant is in violation of the Act, other laws or regulations. Other grounds for refusal include where the applicant gives false and misleading information or the characteristics of the targeted PBO fit another institution in operation or an entity in a manner likely to misrepresent the true identity. ¹⁴¹ In instances where the Authority has refused to register an organization as a PBO, it is required to notify the applicant within fourteen (14) days together with the grounds for refusal.¹⁴² However, an applicant dissatisfied with the decision of the Authority can appeal to the Public Benefit Organizations Dispute Tribunal.¹⁴³

One of the benefits of registration under the PBO Act is the assurance of income tax exemption on such income from grants or donors or from any other income accrued as a result of an activity.¹⁴⁴ The PBO is also exempted from tax on accrued dividends or interests realised from assets or their disposal of as well as stamp duty and court fees. Similarly, PBOs benefit from special treatment in relation to VAT and custom duties as pertains the import of goods and services. . Although it is not expressly stated, tax exemptions provide an incentive for PBOs currently registered under the Companies Act and the Societies Act to migrate to the PBO Act. Tax incentives are generally a motivational tool for NGOs to perform their charitable functions effectively. Strict tax laws may make funding of NGOs unviable and financially impractical as much of the foreign grants are eaten up in tax, straining the financial strength of charitable organisations. This explains why tax incentives were introduced under the PBO Act.

Other benefits of registration guaranteed under the Second Schedule of the PBO Act include preferential treatment on PBOs in public procurement capacities and bidding work for contracts; access to training courses for PBOs in government institutions; provision of direct funding from the Government; provision of information to enable PBOs contribute in designing government policies; enticement for donations either from a legal or natural person; exemption from court fees; and employment tax preferences. These benefits are not provided for under the NGO Coordination Act.

¹⁴¹Section 16 PBO Act.

¹⁴² Ibid. Section 16 (2)

¹⁴³ Ibid. Section 17 (1)

¹⁴⁴Second Schedule.

3.2.3 Internal Governance of PBOs

The PBO Act prescribes the least of provisions meant to be part of the governance documents of PBOs, and for financial transparency and reporting standards for NGOs. In promoting good governance, the PBO Act has created provisions on good stewardship of resources [sic].¹⁴⁵ These provisions require PBOs to ensure there is proper care, use and allocation of material, human and financial resources at all times.¹⁴⁶ Government and PBO sectors are required to demonstrate sufficiently on the presence of appropriate resources and effort necessary to finish a project successfully apart from presenting the normal financial and technical competent capacities. .¹⁴⁷

PBOs must also uphold transparency and accountability in complete trust of all stakeholders for their activities as well as in the use of resources in their collaboration exercises. This is in line with what is required by Section 25(2) of the Act when dealing with all stakeholders and participants like the government, donors or PBOs. The PBOs are required to be fully accountable in all outcomes of their joint efforts.¹⁴⁸ Their activities must welcome all to scrutiny by their respective stakeholders upon request.¹⁴⁹ The governing bodies of PBOs should be distinct from the normal daily administration and management of organisations.¹⁵⁰ Further, simple and clear guidelines could be used to prevent conflict within areas of interest in reference to conduct and operations of PBOs.¹⁵¹

Other good governance values promoted by the Act are enhancement of integrity, equity and equality in partnerships, promotion of trust and a conducive environment for collaboration through the promotion of inclusive acceptance, appreciation and understanding through mutual respect.¹⁵²

However, what is not clearly addressed is the issue of who the NGOs are to be accountable to. At the centre of this question is finding a balance in NGOs' accountability towards many stakeholders. PBO accountability is classified into upward accountability, downward

¹⁴⁵First Schedule, Part 1, Section 10 (a).

¹⁴⁶Section 9.

¹⁴⁷1st Schedule, Section 9.

¹⁴⁸ First Schedule, Part. 11, Section 10.

¹⁴⁹Section 25(5).

¹⁵⁰Section 25(1).

¹⁵¹Section 25(3).

¹⁵²Section 12.

accountability and horizontal accountability.¹⁵³ An accountability model that disregards one of these forms will not suffice. The stipulation of direct financing for PBOs that partner with the Government under section 2 of the Second Schedule to the Act can, make NGOs become accountable to the Government. The Act envisages that appropriate and sufficient resources will be made available in order to optimise success and growth for PBOs.¹⁵⁴ Fiscal transparency of PBOs is emphasized in sections 29-31 of the Act. Section 10(b) of the First Schedule allows sectors to focus on displaying trust and credibility in the activities and use of resources during collaboration.¹⁵⁵

Transparency is an indispensable aspect of accountability.¹⁵⁶ It also requires honesty when reporting on use of resources and achievements. The emphasis is on effectiveness and impact of the resources used for the work.¹⁵⁷ Similarly, access to relevant and timely information about PBO activities is needful in creating trust for internal and external stakeholders towards the organization.¹⁵⁸

In line with these provisions, PBOs are advised to create and implement sound internal practises meant to foster trustworthy processes in the uses of finance and resources. Besides, they are meant to utilize their financial and other resources to accomplish their mandate. All PBOs registered under the Act are required to keep proper books of accounts in line with generally accepted accounting standards that apply to PBOs. The final books of account are required to have an opinion from an independent auditor to the effect that the financial statement represents the organization's position for the period in question.¹⁵⁹ These reports are then submitted to the Public Benefit Organizations Regulatory Authority within six months.¹⁶⁰

The implementation of transparency provisions in the Board's activities will have one major benefit: it will ensure the building of trust and confidence on the part of stakeholders and the

¹⁵³Kumi Nadoo, *The End of Blind Faith? Civil Society and the Challenge of Accountability, Legitimacy and Transparency. Accountability Forum 2. Special Issue on NGO Accountability and Performance* (Greenleaf Publishers Ltd: Sheffield, UK, 2004) at 23.

¹⁵⁴ Part II of the First Schedule, section 9.

¹⁵⁵ First Schedule, Part 1 at section 10 (b).

¹⁵⁶ Group of 22, *The Report of the Working Group on Transparency and Accountability* (International Monetary Fund: Washington, D.C, 1998) at 8.

¹⁵⁷ Ramesh Janeki, "NGO performance and Accountability in the Post-Cold War World" in Edwards and Hulme, *Strategies for monitoring and accountability: Beyond the Magic Bullet* (Kumarian Press: Connecticut 1996) at 13.

¹⁵⁸ Ibid.

¹⁵⁹ Section 30 (3), PBO Act.

¹⁶⁰ Section 31, PBO Act.

public in general.¹⁶¹ Transparency is key to greater PBO effectiveness and is vital to enabling PBOs to be accountable to their stakeholders, funders, supporters, the public, governments, partners and beneficiaries. It will also enable PBOs to better demonstrate how they are improving their practice and performance.¹⁶²

3.2.4 Gender Mainstreaming and Diversity in Board Appointments

Unlike the NGOC Act, the PBO Act contains provisions which promote gender equality in the management of PBOs. Section 22 of the Act requires the Federation to observe the principles of equality, equity, non-discrimination, integrity and leadership, as well as consultation and public participation in the appointment or nomination of members to any public body. Similarly, PBOs are required under section 27 (1) (f) to be guided by the principles advocating social justice as well as all gender inclusions in the pursuit of their objectives and activities. Section 35(1) (b) and (i) envisage the one-third gender principle in the selection of members to the Board of the Authority. Under section 46 (2), the Board is required to have a complete balance in gender and social aspects especially in the promotion of a Deputy Director and other persons of staff the safe execution of Authority's mandate. Further, no particular gender should go beyond the two thirds threshold as opined in the PBO Disputes Tribunal. .¹⁶³ Section 10 of the Third Schedule to the Act also requires the National Assembly to observe gender equity and regional balance in the appointment or nomination of the members of the Board of the Authority.

Case studies from other jurisdictions where gender equality has been implemented in law have suggested that women are a new denominator for growth and development as noted by the UK government as said below:

“Inclusive and diverse boards benefit from fresh perspectives, new ideas and broad experience. A company with a board that reflects the people it serves is better able to understand its customers, and there is growing evidence that companies with more women on their boards outperform their male-dominated rivals.”

¹⁶¹ Ramesh *supra* note 173 at 12.

¹⁶² *Ibid.*

¹⁶³ PBO Act, section 50(2).

A new study as prepared by Ontario's Richard Ivey School of Business¹⁶⁴ and the Wellesley Centre for Women¹⁶⁵ opines that corporations stand to gain more when women are included as board of directors. An article by them states that:

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

Putting more women on the board gives a corporation a competitive advantage, improves performance especially during financial crises since women take far fewer risks than men and are more prudent in decision making.¹⁶⁶ Boards that have more women pay greater attention to dealing with issues of conflict of interest, closely monitor risks, financial control and strive to maintain good working relationship with stakeholders.¹⁶⁷

3.2.5 Public Participation, Communication and Disclosure

Corporate governance codes have rated communication as a key element in good corporate governance.¹⁶⁸ Open communication makes it possible for disclosure of financial information, conflicts of interest and contributes to accountability and transparency. NGOs have, for a long time, been accused of failing to communicate their programmes to the community and, in certain instances been viewed as being aloof. This partly happened because NGOs did not allow sufficient participation by the communities where the projects were implemented. It also contributed to NGOs being seen as lacking in transparency and accountability.¹⁶⁹ Under section 22 of the PBO Act, the PBO Federation is required to observe the principle of public participation and consultation in the appointment or nomination of members. Section 3 of the PBO Act also sets out as an objective the need to provide enabling avenues that enhance access to information easily by the public as concerns registered PBOs.

¹⁶⁴Mies Maria, *Patriarchy and Accumulation on a World Scale: Women in the International Division of Labour* (Zed Books: London, 2003) at 2.

¹⁶⁵ Ibid.

¹⁶⁶ Victoria Pynchon, ‘Note to Board of Directors: Women Make a Positive Difference’, available at <www.mediate.com/articles/PynchonVbL20080211A.cfm> 18 September 2015.

¹⁶⁷ Ibid.

¹⁶⁸ Cadbury Committee Report, ‘The Combined Code: Principles of Good Corporate Governance and Code of Best Practice’ (1992) at 2.

¹⁶⁹ Mbote *supra* note 14 at 16.

The PBO Act views communication between the various actors as an important aspect of good governance. Section 1 of the First Schedule to the Act states of the importance in maintaining active communication channels that are based on respect, informed, sustained and welcomes diversity. They are also required to make it clear on platforms to be used for meetings, and discussions as well as consultations and consensus building.¹⁷⁰ Section 2 of the First Schedule further provides for free flow of information amongst every participant and stakeholder on any collaborative initiative to promote comprehension and to facilitate efficiency. The actors thus have an obligation to communicate clearly and openly to foster problem solving techniques in processes that are enabling and open.¹⁷¹

In more specific terms, open communication is viewed as the surest way for success in the PBO sector, to the extent that it has been elevated to a guiding principle, demonstrating the seriousness of its benefit to the sector. In the researcher's view, the opening up of communication channels under the PBO Act will ensure that the government and PBOs see each other as partners in development and not competitors. That would help in reducing the conflicts that have sometimes arisen between the government and PBOs. Other than conflict management, communication would be helpful in managing expectations of various actors; it would facilitate sharing of information between the actors.¹⁷² This would be in addition to enhancing sustainability and capacity development across the board and joint initiatives that would clarify the roles of each stakeholder.¹⁷³

3.2.6 Corporate Social Responsibility

CSR has become an important component of good corporate governance that aims to raise the voice on various issues that involve social responsibilities of organisations. ¹⁷⁴The value of CSR is that it aligns corporate values and actions with the expectations and needs of stakeholders. CSR is so critical for PBOs that failure to achieve it may lead to loss of

¹⁷⁰ First Schedule, Section 1, PBO Act.

¹⁷¹ PBO Act, section 2 of the First Schedule.

¹⁷² PBO Act, First Schedule.

¹⁷³ Ibid

¹⁷⁴ Jonathan P Doh and Terrence R Guay, 'Corporate Social Responsibility, Public Policy, and NGO Activism in Europe and the United States: An Institutional-Stakeholder Perspective', (43) 1 *Journal of Management Studies* 47.

reputation.¹⁷⁵ From an ethical perspective, PBOs have an obligation to act for the benefit of society in general. PBO boards are viewed as the conscience of the corporate entity.¹⁷⁶

PBOs have a responsibility that goes beyond obeying the law since their activities have an overall impact on society. Unlike the NGO Coordination Act, the PBO Act provides for principles that will guide PBOs in meeting their objectives. Section 27 of the PBO Act commits PBOs to the protection of the inviolability of humanity and the sanctity that emanates from peaceful engagement in all activities. The Act sets out a clear agenda in setting up guidelines on conflict of interest, gender equality, dignity of all people, social justice and intolerance to political, ethical, religious, ethnic and cultural issues. In the same spirit it vouches for gender equality and social inclusion.¹⁷⁷ In addition, PBOs are required to maintain a culture of transparency and accountability, especially in the management of funds. They should also maintain high standards of governance and management by optimising on those policies and operational requirements relevant for the organization's framework and execution of activities.¹⁷⁸ There are no similar provisions under the NGO Coordination Act.

3.2.7 Self-Regulation under the PBO Act

Regulation of PBOs becomes necessary because they operate in a political environment where honest intentions and values are not necessary sufficient basis for PBO legitimacy.¹⁷⁹ PBOs are now required to provide proof of the impact they are having on society. With a lot of financial resources channelled into the sector together with national and international visibility, PBOs are required to demonstrate accountability to all stakeholders.¹⁸⁰

Self-regulation is established by sections 23 and 24 of the PBO Act as the answer to accountability in PBOs. Self-regulation allows PBOs to determine standards, certifications and adherence to professional codes of conduct. In contrast to the provisions of the NGOCA, organizations registered under the PBO Act can voluntarily control membership in a self-regulation forum¹⁸¹ of registered PBOs in addition to being members of the National Federation of PBOs.¹⁸² The forum enters a recognition agreement with the Authority as proof

¹⁷⁵Tricker, *supra* note 192 at 225.

¹⁷⁶*Ibid* at 226.

¹⁷⁷ Section 27 (1) (a-f), PBO Act.

¹⁷⁸Section 27(h).

¹⁷⁹Gugerty Kay Mary, 'Models of NGO Self-Regulation: Theory and Evidence from Africa' Working Paper No4. Daniel Evans, School of Public Affairs University of Washington, USA at 22.

¹⁸⁰ *Ibid*.

¹⁸¹ A 'self-regulation forum' is a network of PBOs.

¹⁸² Section 23 (1), PBO Act.

that it stands for a sizable number of organizations that are registered by the Authority.¹⁸³ Members of the forum have the duty of establishing and maintaining a code of conduct which binds all members.¹⁸⁴ For the enhancement of self-regulation, forums may further organize themselves in a federation of forums.¹⁸⁵ In doing so, they must ensure that the code of conduct adopted is in line with international and domestic laws and policies.¹⁸⁶ The National Federation of PBOs is, among others, required to coordinate the self-regulation forums, monitor their performance, and advise the Authority in keeping check and balances in regard to compliance by the forums and their respective PBOs with the provisions of the PBO Act and the general code of conduct.¹⁸⁷

Another improvement is the establishment of a consultative relationship between the Cabinet Secretary, the Authority and the Federation. For purposes of harmony and policy coordination, the three are required to have regular meetings and updates for the benefit of the PBO sector.¹⁸⁸ The Authority is required to plan and implement on learning and implementation of self-regulation such that PBOs are able to strengthen their capacity and knowledge for self-regulation.¹⁸⁹

Section 50 of the PBO Act establishes the PBO Organisations Dispute Tribunal. The tribunal is organised in that members are proposed by the office of the Chief Justice and later nominated in the Parliament. To ensure that the Tribunal is independent from political interference, section 50(3) maintains that no members of the Authority can serve in the Tribunal. The structure and jurisdiction of the Tribunal are discussed below under institutional framework. In the context of self-regulation, the Tribunal has jurisdiction to hear and determine disputes amongst members of the Federation, the authority.¹⁹⁰ The Tribunal is also responsible for determining all appeals based on a decision of the Ministry in regard to the Federation.¹⁹¹

¹⁸³Section 23(2).

¹⁸⁴Section 24 (1).

¹⁸⁵Section 24 (2).

¹⁸⁶Section 24 (3).

¹⁸⁷PBO Act, section 21(9) (c) and (d).

¹⁸⁸Section 21(10), PBO Act.

¹⁸⁹Section 28(2), PBO Act.

¹⁹⁰Section 21(12), PBO Act.

¹⁹¹Section 21(13), PBO Act.

3.2.8 Institutional Framework

The PBO Act creates a number of institutions whose mandate is to implement the PBO regulatory framework. The institutions are: the Public Benefit Organizations Regulatory Authority,¹⁹² the National Federation of Public Benefits Organizations¹⁹³ and the Public Benefit Organizations Dispute Tribunal.¹⁹⁴

The Public Benefit Organizations Regulatory Authority (PBORA) is created by Section 34 of the PBO Act while its functions are articulated in section 42 of the PBO Act.¹⁹⁵ The Authority will take over the roles and powers of the Non-Governmental Organizations Coordination Board.¹⁹⁶ The Authority is required to exercise independence in the performance of its functions.¹⁹⁷ However, the fact that nine (9) out of fifteen (15) members of the Authority are government appointees may undermine its independence. This is despite the fact that many PBOs are unjustifiably being accused of facilitating terrorism and may face cancellation of their certificates through the influence of the government appointees.

The National Federation of Public Benefit Organizations¹⁹⁸ replaces the NGO Council established under the NGOC Act¹⁹⁹ as higher body that encompasses all other PBOs duly registered and recognized by the Authority.²⁰⁰ The Federation structured to as a nine member body with a secretariat supervised by a Chief Executive Officer who functions as the secretary to the Board.²⁰¹ The Act has set basic minimum standards of governance but the Federation is empowered to reach higher in terms of performance and conduct either from internal or voluntary reorganizational structuring. Effectively these should deliver on standard governance and integrity in financial, human, communication and other management resources.²⁰² Section 21(9) of the Act outlines the objectives of the Federation. In relation to self-regulation, the Federation is required to promote self-regulation by the

¹⁹²Section 34, PBO Act.

¹⁹³Section 21, PBO Act.

¹⁹⁴Section 50, PBO Act.

¹⁹⁵ Registration and de-registration of public benefit organizations, maintenance of a register, interpret the national policy, receive and review annual reports, advise the Government, issue forms, instructions, and model documents, facilitate information sharing and networking, provide advice and training and generally do anything that would enable it perform its functions. In the performance of its functions in section 42, the Authority shall exercise independence.

¹⁹⁶Section 3 (1), Non-Governmental Organizations Coordination Act of 1990.

¹⁹⁷ Ibid. Section 42 (2)

¹⁹⁸Section 21, PBO Act.

¹⁹⁹Section 23, NGO Act.

²⁰⁰ Section 21 (1), PBO Act.

²⁰¹Section 21(4).

²⁰² Irish Leon, Kushen Robert and Simon Karla, *Guidelines for Laws Affecting Civic Organizations 2nd Ed.* (Open Society Institute: New York. 2004) at 95.

forums of PBOs, coordinate the self-regulation forums registered under the Act and provide checks and audits on performance of the self-regulation forums in a bid to advise the Authority appropriately in respect to enforcement of compliance. This should be follow provisions of the Act and the codes of conduct adopted by the self-regulation forums.

The Public Benefit Organizations Dispute Tribunal is geared towards solving disputes and conflicts among PBOs. In its processes, any wrong party is required to lodge a complaint in an attempt to seek redress from an injury, view or occurrence.²⁰³ The tribunal consists of members vetted by the Parliament after a proposal from the office of the Chief Justice. Section 50 (2) provides for diversity in gender balance by ensuring that not more than two thirds of those appointed belong to one gender. The diversity approach in relation to social justice and gender offers a fresh outlook meant to deliver creatively on issues that touch on women as well as new areas that require innovative solutions.

3.3 Conclusion

In a nutshell, the enactment of the PBO Act in 2013 represents a paradigm shift in the governance system of NGOs. Consistent with the provisions of the Constitution 2010, the Act provides a legal framework that has the potential to lead NGOs on the route to good corporate governance. Recognizing the poor governance of NGOs, the Act contains a number of key pillars of good governance, which are also envisaged under the Constitution. Such pillars include leadership, integrity, accountability, and transparency. The mandate of public participation has been broadened to include oversight by the citizens (public), the judiciary and the National Assembly. However, these opportunities are only possible if the Act can be fully implemented.

²⁰³Section 50.

CHAPTER FOUR

CONCLUSIONS AND RECOMMENDATIONS

4.1 Conclusions

This study set out to analyse the extent to which the PBO Act provides a better regulatory framework and addresses problems of weak corporate governance emanating from the current legal framework largely in the NGO sector.

This chapter will basically look at the extent which the challenges raised in chapter two of this study have been solved by a review of the regulatory framework done in chapter three. Recommendations will also be provided on how to resolve challenges that have not been adequately addressed.

Despite the existence of the NGOC Act for over a decade, NGOs in Kenya operate under very challenging conditions. The study highlights these challenges as including lack of autonomy of NGOs; self-regulation under the NGOC Act; accountability and inadequate internal democracy; multiple not for profit forms and registration regimes; community participation in governance and accountability of stakeholders; the gender question.

The implication of these legal weaknesses is a failed system of governance of the NGO sector. The NGO Coordination Act does not establish explicit mechanisms of accountability and transparency, stakeholder participation, sustainability ,and financial autonomy and dependence.

After the passage of the Constitution in August 2010, all laws that were not in line with the Constitution were meant to be amended. The PBO Act was subsequently enacted in 2013 repealing the NGO Coordination Act, 1990 under section 70. However, as indicated above, there has been failure on the part of government to publish a commencement date for the PBO Act.

The findings realised from the present study vividly indicate that the enactment of the PBO Act in 2013 represents a paradigm shift in the corporate governance of NGOs. The PBO Act has responded to the provisions of the Constitution of Kenya, 2010, which entrench a number of key pillars of good governance. The pillars include public participation, leadership and

integrity, and transparency and accountability. The PBO Act contains comprehensive provisions on registration of NGOs without unnecessary restrictions on the freedom of association. It also establishes a Tribunal, which shall hear and determine any disputes arising. These provisions are not in the NGO Coordination Act.

Other important improvements include a provision requiring PBOs to maintain an open communication platform with the beneficiaries or stakeholders; to observe certain ethical principles, including respect for gender equality to the rule of law and democracy, as well as preservation of human rights, and good governance meant to promote justice for all peoples of Kenya; and to establish a federation of self-regulatory forums in addition to their membership with the Federation.

It is, therefore, clear from these findings that good corporate governance of PBOs will only be possible if the PBO Act is implemented to address the challenges that have be devilled the NGO sector under the current legal regime. This requires political good will in the implementation process.

4.2 Recommendations

4.2.1 Implementation of the PBO Act

This study recommends that the Government should expedite the process of implementation of the Act to harmonise the registration systems and also promote good corporate governance of PBOs. This will also help in setting an important plat form under which the activities of PBOs will be audited to identify those engaged in funding of terrorism.

Implementing the PBO Act will in turn achieve the following goals among others;

4.2.1.1. Make NGO Sector More Sustainable and Autonomous

As indicated in this study, NGOs in Kenya depend on funding of their local operations on international non-governmental organizations and other development partners. This relationship ensures that NGOs would be keen on pleasing those who fund them rather than being accountable to the government or their beneficiaries. What it means is that anytime the development partners withdraw funding, the NGO operation will suffer since the operations of NGOs will be unsustainable without the funding. This study recommends that, while

waiting for the commencement of the PBO Act which expands the sources of funds, NGOs should begin spreading their sources of funding preferably from local sources. This will also reduce overreliance on foreign aid, thus improving NGO autonomy.

In addition, overreliance on foreign donors may be reduced by the process of merging PBOs with duplication of roles in regard to public benefits. In turn it would lead to lesser costs in terms of reduced salaries hence improved efficiency in proper execution of funds available. Apart from that, there is need for diversification in the search for alternative sources of funding if NGOs will become successful in provision of benefits to the public. . The PBO Act provides for direct government funding for NGOs registered under the Act and its implementation will increase domestic funding of NGOs.

As indicated, the membership of the NGO Coordination Board is dominated by government officials, leading to undue interference from the Executive arm of government and other government departments. To ensure independence, the study recommends that the majority of the Board members be drawn from the NGO sector. Financial autonomy of the Board maybe ensured by funding the Board from the Consolidated Fund.

4.2.1.2 Promoting Self- Regulation

To promote self-regulation at the NGO level, the NGO Coordination Board should allow registered NGOs to form independent umbrella associations, which will design and enforce codes of conduct and standards applicable to the NGO governing bodies and staff. The codes of conduct adopted should be consistent with what is provided for in the NGO Council as well as the national and international laws and policies. The NGO Coordination Board should maintain a cooperation relationship with the umbrella forums and the NGO Council to ensure continuing monitoring of NGO activities and support efforts towards self- regulation. The Board should also facilitate training of new NGOs on self-regulation to deepen their knowledge and capacity in terms of internal governance. This programme may also be extended to the existing NGOs to enhance their internal self-regulatory mechanisms. NGOs should also maintain a high standard of governance and management by implementing policies and norms that will govern their management and staff. Further, as revealed in the study, there is no independent review body to hear and determine complaints. Section 19 of the NGOC Act requires that all complaints should be lodged with the Minister and any

appeals should be to the High Court, which shall give a final decision. To ensure impartiality and independence as states in Article 50(1) of the Constitution of Kenya, the study recommends that an NGO Dispute Tribunal is created to address disputes concerning NGOs. The PBO Act provides for the establishment of such a tribunal but the fact that the Act has not been implemented thwarts the possibility of having a fair dispute resolution mechanism in the NGO sector. It is hoped the implementation of the PBO Act will solve this uncertainty. This will ensure that stakeholders who are aggrieved or oppressed by decisions of NGO boards are able to find redress before an impartial and independent tribunal.

4.2.1.3. Need for Decentralization as a Means of Promoting Public Participation

NGOs should also maintain an open platform of communication with the local communities. This will lead to an improvement on governance as there will be coordination of a number of economic and develop related activities propelled by the agenda of harmony between NGOs and other agencies meant for public benefit. This will also ensure that collaboration between NGOs and the local communities enhances the process of local participation in development projects.

4.2.2 Proposed amendments of the PBO Act

Some of the suggested amendments in relation to the PBO Act can be projected to provide a positive impetus on their operations. Such proposals include one that stated external funding for PBOs not to be more than 15% of their total funding. Research has shown that overreliance of PBOs on foreign funding has had a negative effect on their operations in Kenya. This is because PBOs have been forced to carry out projects in line with the donors and funders as opposed to benefit of the beneficiaries despite an awareness of their acuteness and immediacy at display. This would in the end improve the autonomy of PBOs.

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