UNIVERSITY OF NAIROBI
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REINVENTING CORPORATE SOCIAL RESPONSIBILITY IN KENYA THROUGH GOVERNMENT REGULATION

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DECLARATION

I, Mary Makena Gituma, do hereby declare that this is my original work and has not been submitted for the award of a degree in any other University.

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DEDICATION

This thesis is dedicated to my parents, Mr. & Mrs Gituma, for believing in me even when I doubted myself, for their encouragement and never ending support. I love you.

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First, I thank and praise God for his guidance and protection and for granting me wisdom and the strength to complete this thesis.

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LIST OF ACRONYMS AND ABBREVIATIONS

BEE	Black Economic Empowerment
CEO	Chief Executive Officer
CMA	Capital Markets Authority
CSR	Corporate Social Responsibility
EA	East Africa
ELR	Environment and Labour Relations
EMCA	Environmental Management and Coordination Act
JSE SRI	Johannesburg Stock Exchange Social Responsibility Index
NGO	Non-Governmental Organization
NHIF	National Hospital Insurance Fund
NSE	Nairobi Stock Exchange
RSA	The Republic of South Africa
SEBI	Securities Exchange Board of India
SOEs	State Owned “Enterprises
SRI	Socially Responsible Investment
UN	The United Nations
UNEP	The United Nations Environmental Programme
US	The United States of America
WRUA	Water Resources Users Association
VCCI	Vietnamese Chamber of Commerce and Industry

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Valsquez Rodriquez V. Honduras (1988) InterAm Court HR (Ser C) No. 4

LIST OF LEGISLATION AND OTHER TREATIES

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- The Global Sullivan Principles on CSR
- Kyoto Protocol

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- *The Constitution of Kenya*, Kenya Gazette Supplement No. 55 of 2010, Nairobi, Kenya.
- *Companies Act*, 2015, Laws of Kenya, Nairobi, Kenya.
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- *The Environmental Management and Coordination Act (EMCA),* 1999, The Laws of Kenya, Nairobi, Kenya.
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- Capital Markets Act (Cap 485A), *The Code of Corporate Governance Practices for Issuers of Securities to the Public,* 2015, Gazette Notice No.1420 of 2015.
- *The Mwongozo Code for Governance for State Corporations,* 2015.

b) The Republic of South Africa

- The Companies Act 61 of 1973
- King Reports I, II and III
- Black Economic Empowerment Act, 2003

c) India

- The Companies Act, 2013

d) The Republic of Nigeria

- The Companies and Allied Matters Act
- National Environment Standards and Regulations Enforcement Agency (Establishment) Act, 2007
- Harmful Waste Act

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ABSTRACT

Corporate Social Responsibility (CSR) a Corporate Governance principle has been adopted across the globe. However, individual countries have embraced this concept in their own unique ways. In Kenya, Corporate Social Responsibility has taken the shape of philanthropic acts by corporations. While this is commendable, corporations in Kenya are yet to fully appreciate Corporate Social Responsibility and use it to address some of the problems that plaque corporations. While philanthropy is one dimension, Corporate Social Responsibility embodies other important facets that corporations need to incorporate. This paper examines the need to move away from philanthropic Corporate Social Responsibility and address other aspects of social responsibility in Kenya. It looks into various Corporate Social Responsibility strategies such as anti-corruption measures, recognition and enforcement of human rights, environmental stewardship, stakeholder engagement and sustainability reporting that corporations can pay attention to in the long run for their own benefit and their stakeholders at large. Further, it examines how lack of proper regulation has led to neglect of important aspects of Corporate Social Responsibility by corporations and how government regulation can come in to improve uptake of Corporate Social Responsibility in Kenya. This study concludes that Kenya as a developing nation needs to embed the concept of CSR among its businesses if it is to attract investments from around the world; investors are not only looking to invest in highly profitable businesses but also in businesses that have regard for humanity and act in socially responsible ways.

"Today, Corporate Social Responsibility goes far beyond the old philanthropy of the past- donating money to good causes at the end of the year- and is instead an all year round responsibility that companies accept for the environment around them, to the best working practices, for their engagement in the local communities and for their recognition that brand names depend not only on quality, price and uniqueness, but on how, cumulatively, they interact with the company's workforce, community and the environment. Now, we need to move forward towards a challenging measure of Corporate Social Responsibility, where we judge results not just by input but by its outcomes; the difference we make to the world in which we live and the contribution we make towards the alleviation of poverty" **(Gordon Brown, (2006))**

<u>CHAPTER ONE</u>

INTRODUCTION: UNDERSTANDING CORPORATE SOCIAL RESPONSIBILITY IN KENYA

1.1 Background to the Study

Corporate Social Responsibility (CSR) is an evolving notion.[1] Its interchanging and intersecting trait is revealed in its various definitions. To some scholars, this concept is viewed as competitive advantage tool meaning that it can be used for public relations to enhance the image of a corporation. Other scholars perceive it as a way to meet the needs of a corporation's stakeholders who include employees, investors, consumers and environmentalists.[2] The perception of Corporate Social Responsibility is said to evolve with each generation and its traits may vary according to the society in question. Therefore, no standard definition has been adopted across board for the term "Corporate Social Responsibility". However, it is generally agreed that Corporate Social Responsibility relates to the economic, social and environmental impact or effect of operations of businesses.[3]

[1] Michael Hopkins, *"Corporate Social Responsibility: An Issue Paper"* (2004) Working Paper Policy Integration Department, World Commission on Social Globalisation 105. Available at http://www.ilo.org/intergration/resources/papers/lang-en/docName-WCMS_079130/index.htm, last accessed on 17/05/2016

[2] Mia Mahmudur Rahim, *Legal Regulation of Corporate Social Responsibility; A Meta-Regulation Approach of Law for Raising Corporate Social Responsibility in a Weak Economy* 15(Springer 2013)

[3] Ibid.17

This study adopts the definition that Corporate Social Responsibility (CSR) is generally the relationship of a corporation with all its stakeholders. These stakeholders include customers, employees, communities, owners/investors, government, suppliers and competitors. Elements of maintenance of these relationships include investment in community outreach, employee relations, creation and maintenance of employee, environmental stewardship and financial responsibility.[4]

Despite various definitions offered for the term Corporate Social Responsibility, the misconception is that Corporate Social Responsibility refers to corporate philanthropy[5]. Corporate Philanthropy is just one dimension of Corporate Social Responsibility.[6] It should not be the focus of Corporate Social Responsibility. This misconception is derived from the use of philanthropy as the common business strategy to do good over the years.[7] Additionally, many of the basic Corporate Social Responsibility approaches looked more like acts of philanthropy.

In Kenya, most companies develop their Corporate Social Responsibility policies or activities around corporate philanthropy. For instance Kenya Institute of Management states that their Corporate Social Responsibility programs include blood donations, book donations, school prize giving, and student leadership forums.[8] The current Corporate Social Responsibility activities in Kenya include sponsoring the Mater heart run, supporting Sarakasi Trust hospital project, donations to support sporting activities and donations to children's homes.[9] Communications Authority of Kenya states that its Corporate Social Responsibility activities revolve around

[4] Khoury G, Rostami J, Turnbull PP, *Corporate Social Responsibility: Turning Words into Action*, Conference Board of Canada: Ottawa (1999). Available at fse.tibiscus.rdsnale/lucrari2010/146.GherhesVasile.pdf, last accessed on 21/11/2015.

[5] The charitable donations of profits and resources given by corporations to nonprofit organizations. Corporate philanthropy generally consists of cash donations but can also be in the form of use of
their facilities or volunteer time offered by the company's employees. Donations are generally handled directly by the corporation or by a foundation created by the firm.
Business Dictionary, "Corporate Philanthropy" (2016) <http://www.businessdictionary.com/definition/corporate-philanthropy.html#ixzz4KhRERCRP> accessed on 17/05/2016.

[6] Raz Godelink, " Philanthropy, CSR and Social Responsibility of Business" (*Triple Pundit, People, Planet, Profit* Wednesday 22nd 2012) available at www.triplepundit.com/2012/08/philanthropy_csr_social_responsibility_of_business accessed on 17/05/2016

[7] Ibid.

[8] Kenya Institute of Management, "Corporate Social Responsibility" (2016) <www.kim.ac.ke/kim_corporate_social_respionsibility> accessed on 17/05/2016.

[9] Toyota Kenya, "Corporate Social Responsibility" (2016) <https://www.toyotakenya.com/csr.php> accessed on 17/05/2016.

sponsorship of sporting events, donations to the community and mitigation of national disasters.[10]

Corporate Social Responsibility is more than just giving back to the society. The World Economic Forum identifies aspects that identify a socially responsible business as follows:

> *"…To do business in a manner that obeys the law, produces safe and cost effective products and services, creates jobs and wealth, supports training and technology co-operation and reflects international standards and values in areas such as the environment, ethics, labour and human rights. To make every effort to enhance the positive multipliers of our activities and minimize any negative impacts on people and the environment, everywhere we invest and operate. A key element of this is recognizing that frameworks we adopt for being a responsible business must move beyond philanthropy and integrated into core business strategy and practice".*[11]

By moving beyond philanthropy, corporations focus on other aspects of Corporate Social Responsibility which include environmental, stakeholder and economic approaches.[12] Each one aspect entails different responsibilities for the company. The societal approach requires companies to contribute to building better societies by incorporating societal concerns as part of their core strategies and considering impact of their activities on the societies. This would include remuneration policies, enforcement of human rights, fair trade ethical issues, philanthropy and networking with communities.[13] The economic approach emphasizes efficiency in producing goods or services without compromising social and environmental values while companies concentrate on the well-being of the society or community as whole and not just financial expectations of shareholders.[14] The environmental approach requires companies not to harm the environment in pursuit of profits and to repair the environment in case they cause damage due to their irresponsible behavior.[15] The stakeholder approach calls on companies to

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[10] Communications Authority of Kenya, "Corporate Social Responsibility" (2016) www.ca.go.ke/index.php/csr accessed on 17/05/2016.

[11] World Economic Forum, *"Global Corporate Citizen: The Leadership for CEOs and Boards"* (2002) available at http://www.wereforum.org/pdf/GCC-CEOstatement.pdf accessed on 17/05/2016

[12] Mahmudur (n2) 19

[13] Archie B Carroll, *"Corporate Social Responsibility"* (1999) 38 (3), Business and Society 268 and E Garriga and D. Mele, *" Corporate Social Responsibility Theories: Mapping the Territory*" (2004) 53 (1) Journal of Business Ethics 51

[14] Mia Mahmudur Rahim, *Legal Regulation of Corporate Social Responsibility; A Meta-Regulation Approach of Law for Raising Corporate Social Responsibility in a Weak Economy* 15(Springer 2013)

[15] Ibid.

take into account the legitimate stakeholders' interests and to incorporate these interests in their strategies and decisions.[16]

Corporate Social Responsibility is relevant because we are in an era where some companies are richer than some countries and control much of the world's wealth.[17] One can therefore rationalize that since corporations intervene in many areas of social life, they must be responsible towards society and the environment. There is a growing realization that corporations are creations of society and must serve it and not merely profit from it.[18] The need for Corporate Social Responsibility is mostly attributed to the negative effects of corporations. For example, corporations may have enormous adverse effects on their surroundings. Oil spills are a good example[19], but industries as varied as manufacturing, extraction and agriculture can have permanent damage to local ecologies.[20] Climate change has also largely been attributed to companies.[21] It may also be said that consumers partly contribute to this as they are the ones who demand for goods and services. However, it cannot be denied that numerous companies have benefited from their degradation of the environment.[22] Corporate Social Responsibility is thus no longer a favor to the public but mandatory for the success of any business.[23] This is principally because a company needs to position itself with reference to other companies. Also it has been shown that companies that practice Corporate Social Responsibility attract and retain more customers. It can therefore be said that profit maximization has been a major motivation for companies to undertake ethical and sustainable social practices.[24]

1.2 Statement of the Problem

[16] Ibid.

[17] John Samuel and Anil Saari, "Corporate Responsibility: Background & Perspective". Available at www.infochangeindia.org/corporate_responsibility/back_grounder.html, last accessed on 4/12/2015.

[18] Ibid.

[19] Drea Knufken, "The World's Worst Environmental Disasters Caused by Companies" (*BusinessPundit*, June 21st 2010).Available at http://www.businesspundit.com/the-worlds-worst-environmental-disasters-caused-by-companies/ accessed on 4/12/2015

Some of the oil spills include the BP oil spill in the Gulf, Texaco run-off system in the Amazon and the Pipeline explosion in the Niger Delta.

[20] Ibid. An example would be the Union Cardibe pesticide plant accident in Bhopal. India in 1984.

[21] Information obtained from www.investopedia.com, last accessed on 4/12/2015.

[22] Ibid.

[23] Supra note 5

[24] Ibid.

A survey was conducted in Kenya between May and September 2008 of a sample of 70 companies, inclusive of all 54 companies listed at the Nairobi stock exchange at the time and other companies regarded as the "leaders" in Corporate Social Responsibility, on Corporate Social Responsibility processes and activities.[25] The survey found that in terms of Corporate Social Responsibility processes, 87.7% of the companies engaged in philanthropy, 37.0% of the companies engaged in stakeholder engagement, 35.2% engaged in environmental management and 42.6% engaged in partnerships. This survey is a clear indication that majority of the companies in Kenya view philanthropy as the focus of Corporate Social Responsibility while neglecting other approaches that are critical.

There have been various instances when companies in Kenya have been on the spotlight for corporate abuses that could have been dealt with if the companies had appropriate Corporate Social Responsibility strategies. For example, The Worker's Rights Alert launched a movement against worker's rights in Cirio Delmonte. The adverse publicity led to boycott of Cirio Delmote's produces abroad especially in Italy.[26] Such issues would have easily been dealt with if employee welfare was part of the company's Corporate Social Responsibility strategy. Not too long ago in 2013, directors of NHIF were charged with corruption for payment of ghost clinics, un-procedural selection of clinics and creation of an unapproved unit at NHIF.[27] A Corporate Social Responsibility strategy on anti-corruption would have preempted this problem.

The research problem addressed by this study is how to move towards meaningful or significant Corporate Social Responsibility by redefining Corporate Social Responsibility strategies to include other strategies other than philanthropy. Companies in Kenya are free to develop their Corporate Social Responsibility policies or strategies and shape them to suit their specific industries. It is this freedom that has led to non-commitment to Corporate Social Responsibility in Kenya and as a result Corporate Social Responsibility has not taken any meaningful sense.

[25] Judy N Muthuri and Victoria Gilbert, *'An Institutional Analysis of Corporate Social Responsibility in Kenya'* (2011) 98 Journal of Business Ethics 471. Available at http://dx.doi.org/10.1007/10551-010-0588-9 , last accessed on 30/10/2015

[26] Maggie Opondo, *"Emerging Corporate Social Responsibility in Kenya's Cut Flower Industry"* University of Nairobi, Department of Geography and Environmental studies, available at https://www.unisa.ac.za/contents/colleges/co/-econ-man-science/cc/docs/opondo.pdf accessed on 23/04/2016

[27] Roselyne Obala, "Officials named in the NHIF scandal to be prosecuted says anti-corruption body" *Standardmedia* (Kenya, October 16th 2013) available at www.standardmedia.co.ke accessed on 17/05/2016.

The general *laissez-faire*[28] attitude toward CSR by businesses indicates that it is mainly used as a label rather than a substantive guide for responsible practices. Corporate philanthropy does not entail corporate responsible practice unless it is undertaken together with other strategies. This study questions whether Kenya can achieve meaningful Corporate Social Responsibility through government regulation that will control corporate behavior.

1.3 Justification of the Study

The examples discussed in the statement of the problem reveal that philanthropy by companies is largely considered as companies behaving in socially responsible ways. This is because Corporate Social Responsibility has been left to be regulated by companies themselves or the industry within which the company belongs or operates. Through self-regulation companies individually define Corporate Social Responsibility and the activities that comprise Corporate Social Responsibility. Consequently, a majority of companies will lean towards philanthropy, not because they truly want to give back to the community and improve society's welfare but because other Corporate Social Responsibility strategies could be expensive and these strategies would not necessary be for the benefit of the company as philanthropy would be. This freedom that comes in the form of self-regulation and has not improved Corporate Social Responsibility in Kenya. For instance, the Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015[29] states that the regulations therein have moved away from the "Comply or Explain" approach to the "Apply or Explain", this approach is principle based rather than rule based. Listed companies which are the subject of the Code only have to provide an explanation for non-compliance. The Code provides for stakeholder relations, ethics and social responsibility, however, if applied on the principle basis the Code is not mandatory and public listed companies can simply offer an explanation when they do not comply and the explanation will be sufficient.

The major problem with allowing companies to regulate themselves on matters concerning Corporate Social Responsibility is that they will only undertake actions that are in their self-interest and corporate behavior will not change.[30] Second, self-regulation is only effective when

[28] Non-interference by the government in the working of the free market.
[29] The Capital Markets Act (Cap 485A) *Code of Corporate Governance Practices for Issuers of Securities to the Public 2015*, Gazette Notice No.1420, Government Printers, Nairobi, Kenya.
[30] David Graham and Ngaire, *" Making Corporate Self Regulation Effective in Developing Countries"* (2006) Vol 34 No. 5 World Development 870. Available at www.uio.no/studier/emner/annet/sum4022/h08/Grahem.pdf accessed on 18/05/2016

there are incentives for compliance and when there is transparency, monitoring and enforcement.[31] Third, self-regulation requires good will from those being regulated. All these factors that lead to effectiveness of self-regulation of Corporate Social Responsibility are not present in Kenya and it would therefore be absurd to expect more from companies under the self-regulation regime. As Joel Bakan puts it;

> *"no one would seriously suggest that individuals should regulate themselves, that laws against murder, assault and theft are unnecessary because people are socially responsible. Yet oddly we are asked to believe that corporate persons, institutional psychopaths who lack any sense of moral conviction and who have the power and motivation to cause harm and devastation in the world should be left free to govern themselves."*[32]

This study proposes government regulation of Corporate Social Responsibility carried out by companies both public and private limited companies and State Owned Enterprises (SOEs). This will make Corporate Social Responsibility mandatory and redefine Corporate Social Responsibility strategies. The approach will enable Corporate Social Responsibility to begin within the corporation and Corporate Social Responsibility activities will be used to improve the company's responsible behavior from inside moving outside. For instance, a company would be forced to first ensure its employees are well taken care of before engaging the rest of the community.

This study is important as it reflects on the current legislation to find out whether it is adequate or sufficient or whether there should be a single legislation pertaining to Corporate Social Responsibility. The Companies Act 2015[33] is the principle legislation that governs companies, Section 143(3)[34] provides for Corporate Social Responsibility but does not make it mandatory to invest in Corporate Social Responsibility activities. Section 655 of the Act requires directors to include in their report a business review report details on the impact of the company's activities

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[31] Ibid.

[32] Joel Bakan, "The Corporation: The Pathological Pursuit of Profit and Power" (2004), available at *http://www.joelnakan.com/index.htm* accessed on 18/05/2016

[33] The Companies Act, 2015, *Government Printers*, Nairobi.

[34] Section 143 (1) of the Act provides that a director is to act in good faith to promote success of the company and shall have regard to "the long term consequences of any decision of the directors; the interests of the employees of the company; the need to foster the company's business relationships with suppliers, customers and others; the impact of the operations of the company on the community and the environment; the desirability of the company to maintain a reputation for high standards of business conduct; and the need to act fairly as between the directors and the members of the company."

on the environment, employees and the community. However, if the directors do not report on these matters they simply have to explain which information is lacking.

This study will contribute valuable knowledge to the field of Corporate Social Responsibility in general. It is expected that the study will contribute vital information to the subject of regulation of Corporate Social Responsibility. It should therefore form useful material for reference to other researchers and other readers in general.

1.4 Research Objectives

The specific objectives of this study are:

a) To determine the various Corporate Social Responsibility strategies.
b) To examine the different forms of regulation of Corporate Social Responsibility.
c) To question whether government regulation is the most appropriate form of regulation of Corporate Social Responsibility.
d) To determine whether Corporate Social Responsibility in Kenya will improve if there is government regulation in place.
e) To determine the various approaches taken by different countries to promote Corporate Social Responsibility through regulation among its corporations.

1.5 Research Questions

This study strives to answer the following research questions

a) What are the various Corporate Social Responsibility strategies/activities?
b) What are the forms of regulation of Corporate Social Responsibility?
c) Is government regulation the most appropriate form of regulation?
d) Will Corporate Social Responsibility in Kenya be enhanced through government regulation?
e) What approaches have been taken by different countries to promote Corporate Social Responsibility through regulation?

1.6 Research Methodology

This study utilized both primary and secondary sources of data. The primary data involved interviews that were conducted across a sample population of one (1) public listed company, four (4) private limited companies, three (3) parastatals/SOEs and the Capital Markets Authority obtained through purposive sampling. Interviews were the preferred research instrument for this study because they gave detailed in-depth information that was highly reliable and comprehensive. The aim was to elicit qualitative data from these entities by analyzing the different opinions that were obtained.

The rationale for picking these entities was varied; for the public listed company, Safaricom Limited was picked as it is a leader in corporate governance issues including Corporate Social Responsibility. It was thus deemed relevant to determine whether such a large entity was of the view that government regulation of Corporate Social Responsibility would promote Corporate Social Responsibility among corporations. The four private companies bring in the perspective of private companies which are mostly regarded to have their own internal or self-regulatory mechanisms which may be different from those of public entities. It was therefore imperative to find out whether there are any self-regulatory mechanisms in place for Corporate Social Responsibility for these private entities or whether government regulation should come in.

The three SOEs bring in the perspective of government owned entities. These entities are regulated by the state thus it was important to find out whether they engage in any Corporate Social Responsibility and whether there is any regulation in place. In relation to the Capital Markets Authority, this is the body that regulates public listed companies. As a regulator it was relevant to seek its view on whether Corporate Social Responsibility should be regulated by the government.

This study also utilized secondary sources of data to provide an in-depth understanding of Corporate Social Responsibility. These sources included the Constitution of Kenya, relevant local statutes and international treaties, judicial precedents, books, journal articles, dissertations, reported studies, reports and working papers. In utilizing these sources, this thesis adopted a descriptive and explanatory approach in assessing the existing data. Various websites were also used.

The comparative method of research was utilized in one of the chapters. The comparative method involves the comparison of two or more societies to investigate whether they are similar or different in certain aspects.[35] In context of this study, comparative study is considered significant to evaluate Corporate Social Responsibility practices in other jurisdictions and more so the legal framework for its existence in different countries.

In conducting the comparative study, two countries were chosen. First, the Republic of South Africa (RSA) because it is within the continent and is considered the economic power of Africa. RSA is also regarded as the "to go to" country in Africa for best practices on economic and social development. Second, the Republic of India because it shares a history with Kenya, being a former British colony but rising to be among the world's largest economies. India is also the only country in the world that has enacted legislation that makes Corporate Social Responsibility a mandatory requirement. It was concluded that Kenya can borrow some good practices from these jurisdictions. A few other countries such as Nigeria and Vietnam were also briefly highlighted as part of the comparative study. The comparative study was carried out through analysis of literary materials.

1.7 Hypotheses

The study will test the following hypotheses;

a) There is an assumption that Corporate Social Responsibility refers to corporate philanthropy in Kenya and therefore other important aspects of Corporate Social Responsibility are not fully appreciated.

b) There is a relationship between achieving meaningful Corporate Social Responsibility (by redefining Corporate Social Responsibility strategies) and regulation of Corporate Social Responsibility in Kenya.

1.8 Theoretical Framework

1.8.1 Stakeholder theory

The Stakeholder theory is an organizational management theory that addresses the relationship between a corporation and its stakeholders. This theory was propounded by R. Edward Freeman in his book *Strategic Management* in 1984.[36]

[35] Adapted from *Comparative Method In Sociological Research*, available at http://www.oppapers.com/essays/Comparative-Method-Sociological-Research/188433,accessed on 29/08/2016

This theory suggests that other than shareholders there are several other groups of persons (stakeholders) that have an interest in the actions and decisions of the companies.[37] Stakeholders are shareholders, employees, customers, suppliers, government and the community at large. They can benefit from or can be injured by the actions of corporations.[38]

Stakeholder theory asserts that companies have a responsibility that requires them to consider the interests of all the parties affected by their actions. Management should not only consider its shareholders in decision making process but also anyone who is affected by business decisions.[39]

It is the mirror image of corporate social responsibility. This is explained in terms of the corporation viewing itself from outside looking inward. Instead of looking out into the world to see what ethical obligations a corporation has, this theory starts in the world. An example, when a factory produces industrial waste, a Corporate Social Responsibility perspective attaches a responsibility to factory owners to dispose of the waste safely. The Stakeholder theory begins with those living in the surrounding community who may find their environment polluted. It insists on the community's right to clean air and water.[40] True, stakeholders may not own stock or shares but they have a moral claim to participate in decision making of the corporation.

A competing theory to this theory is the ***Shareholder Theory***. The Shareholder Theory was advanced by Milton Friedman who claimed that a business does not have any obligations or social responsibilities other than to maximize its profits. He argues that managers and other officers of the corporation are hired by shareholders of the corporation and as such their responsibility is only to serve their interests. When the business does well so do the shareholders but any instance of the corporation promoting the common good in society will be seen as the corporation utilizing the corporation's profits. The profits rightfully belong to the corporation not the society.

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[36] Freeman R Edward, *Strategic Management: A Stakeholder Approach* (1984) Boston, Pitman.

[37] Manuel Castelo Branco and Lucia Lima Rodrigues, *Positioning Stakeholder Theory within the Debate on Corporate Social Responsibility*, Electronic Journal of Business Ethics and Organizational Studies, Vol 12,No.1 (2007)6, available at ejbo.jyu.fi/pdf/ejbo_vol12_no1_pags5-15.pdf, last accessed on 18/12/2015.

[38] Freeman R Edward, *Strategic Management: A Stakeholder Approach* (1984) Boston, Pitman.

[39] Ibid.

[40] James Brusseau, *Three Theories of Corporate Social Responsibility*, The Ethics Workshop, Vol 1.0, available at catalog.flatworldknowledge.com/bookhub/reader/1685?e=brussea0_ch13-02, last accessed on 18/12/2015 .

The Stakeholder Theory is utilized in this thesis to show the importance of government regulation. The Corporation is not bound to meet its stakeholder's interest it does this voluntarily. This gives room to the corporation to decide which interests to serve and which and which can be neglected because they are deemed "less important". The government through legislation or subsidiary regulation can bind corporations to meet all their stakeholders' interests.

The Stakeholder theory although utilized to advance propositions in this thesis has its weaknesses. There is no criterion for the prioritization of stakeholder's interests. Critics of the theory argue that it is very difficult for a corporation to come up with a hierarchy of stakeholders so as to enable it decide which stakeholder's interests to meet first.[41] It has also been argued that the Stakeholder theory does not clearly define who is a stakeholder.

1.8.2 Legitimacy Theory.

The Legitimacy Theory was developed was developed by Suchman.[42] He defines legitimacy as "*a generalized perception or assumption that the actions of an entity are desirable, proper or appropriate within some socially constructed system of norms, values, beliefs and definitions*"[43].

The Legitimacy Theory explains that companies continually seek to ensure they operate within the bounds and norms of their respective societies. For example, a company would voluntarily report on activities if it perceived that is expected to do so by the community within which it operates.[44]

It is dependent on the assumption that there is a "social contract" between a corporation and the society within which it operates. A business will then operate within a society vide a social contract that is express or implied where the survival of a business is determined by:

a) The delivery of some socially desirable ends to society in general and;
b) The distribution of economic, social or political benefits to society.[45]

[41] Andrew R Weiss "Cracks in the Foundation of Stakeholder Theory", available at www.management .ac.nz/ejrot/vol1.1/Weiss.pdf, last accessed on 18/12/2015.
[42] Suchman M.C, *Managing Legitimacy; Strategic and Institutional Approaches,* Academy of Management Journal, Vol 20, No. 3,571-610, last accessed on 18/12/2015.
[43] Ibid.
[44] James Guthrie, Leanne Ward and Coca-Cola Amatil, *Legitimacy Theory: A Story of Reporting Social and Environmental Matters within the Australian Food and Beverage Industry (2006)4, available at* http://ssnr.com/abstract=1360518*, last accessed on 18/12/2015*
[45] ibid

An organization's survival will be threatened if society believes that the business has not adhered to the social contract. If this happens, the society could terminate the contract by discontinuing the operations of the business. This may be done by consumers/clients reducing the demand for organization's product or service, the community may withdraw its labour or financial capital injected into the business and the government may increase taxes for the business in a bid to discourage actions of the business that are not in line with the expectations of the community.[46]

The social contract may be explicit or implicit. Explicit terms may be provided by legal requirements while implicit terms are non-legislated societal expectations.[47] Social expectations change over time. Therefore conditions of the social contract are also amenable to change. This requires organizations to change with the environment and the organization needs to make changes to show that it is also changing.[48]

The Legitimacy Theory is relevant to this thesis as it brings in the idea of a "social contract". The community within which a corporation is established provides resources to the corporation. It can thus be said that the community sustains the corporation; it is therefore only fair that the corporation in turn meets the needs/welfare of the community. Government regulation comes in to ensure that the corporation honors/fulfills its end of the "social contract".

1.9 Conceptual Framework

1.9.1 An Evolutionary Definition

The conceptual framework focuses on understanding Corporate Social Responsibility by analyzing some of its definitions that have evolved over time. As established in the background to this study, Corporate Social Responsibility varies in terms of its definition and issues that it addresses.[49]

One of the earliest definitions of Corporate Social Responsibility dates back to Howard R Bowen in 1953 in his book *"Social Responsibilities of a Businessman"* where he defines responsibilities

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[46] Ibid.5

[47] Dregan, *The Legitimizing Effect of Social and Environmental Discourses;* A Theoretical Foundation, Accounting, Auditing and Accountability Journal, Vol 15 No.3 (282311).

[48] Ibid.

[49] Dirk Matten and Jeremy Moon, *"Implicit" and "Explicit" CSR:A Conceptual Framework for a Comparative Understanding of Corporate Social Responsibility*" (2008) Vol 33 No.2 Academy of Management Review at p.405. [Available at Carleton.ca/cues/wp-content/uploads/mattenmoon-in-AMR.2008.pdf] accessed on 24/05/2016

of businessmen as "*referring to the obligations of businessmen to pursue those policies, to make those decisions or to follow those lines of actions which are desirable in terms of objectives and values of the society*[50]". At the time the term that was used was "social responsibility" and not "Corporate Social Responsibility".

The definition evolved with each century and in the 1960s, Keith Davis referred to social responsibility as the "*businessmen's decisions and actions taken for reasons at least partially beyond the firm's direct economic or technical interest*[51]". He suggested that businessmen should continually consider the needs and interests of others who may be affected by the actions of the business.[52] This definition was significant as it brought into perspective the need to consider person's affected by the activities of a business. These persons would later be referred to as stakeholders.

The Committee for Economic Development in 1971 defined Corporate Social Responsibility in terms of three concentric circles;

> The inner circle includes the clear-cut basic responsibilities for the efficient execution of the economic function-products, jobs and economic growth. The intermediate circle encompasses responsibility to exercise the economic function with a sensitive awareness of changing social values and priorities, for example, with respect to environmental conservation, hiring and relations with employees; and more rigorous expectations with customers for information, fair treatment and protection from injury. The outer circle outlines the emerging and amorphous responsibilities that business should assume to become more broadly involved in actively improving the social environment.[53]

This definition focused on the different responsibilities that a business may have. Later, an interesting definition was offered by Jules Backman[54] who defined Corporate Social Responsibility using examples. He stated that Corporate Social Responsibility involved employment of minority groups or diverse representation of people in employment, management

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[50] Archie B Carroll, *"Corporate Social Responsibility: Evolution of a Definitional Construct"* (1999) 38,3, Business and Society at p.270. [Available at www.kantakji.com/media/3253/e16.pdf] accessed on 24/05/2016

[51] Chapter 1-CSR-A *Conceptual Framework* at p.1. [Available at shodhganga.inflibnet.ac.in/bitstream/10603/4480/9/09_Chapter%201.pdf] accessed on 24/06/2016

[52] Ibid.

[53] Archie B Carroll, *"Corporate Social Responsibility: Evolution of a Definitional Construct"* (1999) 38,3, Business and Society at p.274. [Available at www.kantakji.com/media/3253/e16.pdf] accessed on 24/05/2016

[54] An economics lecture at New York University.

of pollution and improvement of community welfare.[55] This definition can be said to have provided an array of activities that businesses can engage in order to be considered socially responsible.

A simpler definition of Corporate Social Responsibility is that of thinking of social responsibility as "good neighborliness". This would involve avoiding activities that spoil the neighbor and having an obligation to solve neighbor problems.[56] This definition offers a religious perspective to Corporate Social Responsibility based on the holy books of different religions. These holy books promote the welfare of human beings and the concern for the suffering of others.

A more wholesome definition is offered by Archie B Carroll who states that;

> For CSR to be accepted by the conscientious person, it should be framed in such a way that the entire range of business responsibilities is embraced. It is suggested here that four kinds of social responsibilities constitute CSR; economic, legal, ethical and philanthropic. Business should not fulfill these in a sequential fashion but each should be fulfilled at all times.[57]

These are some of the definitions developed for the term Corporate Social Responsibility that will greatly influence this study.

1.10 Literature Review

Numerous scholars have written about Corporate Social Responsibility and a few on regulation of CSR. Most scholars interrogate the basis of Corporate Social Responsibility and its significance to society. However, what comes up in most readings is there is no meaningful Corporate Social Responsibility in developing countries and that would be attributed to the lack of regulation.

Most people misconceive Corporate Social Responsibility as philanthropic acts of companies. Archie B. Carroll in *"Corporate Social Responsibility: Evolution of Definitional Construct"* [58]explores different definitions of Corporate Social Responsibility from its conception 1950s to

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[55] Ibid at p.279

[56] Elibert and Parket in Archie B Carroll, *"Corporate Social Responsibility: Evolution of a Definitional Construct"* (1999) 38,3, Business and Society at p.278. [Available at www.kantakji.com/media/3253/e16.pdf] accessed on 24/05/2016

[57] Archie B Carroll, *"Corporate Social Responsibility: Evolution of a Definitional Construct"* (1999) 38,3, Business and Society at p.274. [Available at www.kantakji.com/media/3253/e16.pdf] accessed on 24/05/2016

[58] Archie B Carroll, *'Corporate Social Responsibility Evolution of a Definitional Construct'* (1999) 38 Business & society 268.

the 1990s. He ends up with his own definition and description of Corporate Social Responsibility as, *"that which embraces a range of business responsibilities. It is made up of four kinds of business responsibilities; economic, legal, ethical and philanthropic."*[59]

The economic responsibility is the responsibility to act in the best interest of shareholders by maximizing their wealth. Legal responsibility involves a company being able to meet its legal obligations while ethical responsibility requires companies to act ethically by doing what is right while philanthropy requires companies to consider the well-being of society.

Keith Davis in his book *"Can Businesses Afford to Ignore Social Responsibility"*[60] defines social responsibility as the actions of businessmen that are beyond the business' financial interest.[61] Businesses should recognize that they are operating in a society and therefore they have an obligation to at least sustain the welfare of the community. An appreciation of Corporate Social Responsibility helps in underscoring the significance of government regulation as it would be careless to leave all these aspects to be regulated by the corporations themselves.

Judy N. Muthuri and Victoria Gilbert in their article *"An Institutional Analysis of Corporate Social Responsibility in Kenya"*[62] focus on regulation as a determinant that can influence the form of Corporate Social Responsibility practice in Kenya.[63] They distinguish between "hard regulation" which is in the form of rules and regulations established by the state which act as a coercive mechanism for corporations to implement Corporate Social Responsibility and "soft regulation" which are established by corporations or industry members and members voluntarily adhere to them.[64]

The article goes on to state that the reason why the government of Kenya has been hesitant to impose regulations is because it has been afraid of discouraging domestic investment. This has led corporations to prefer self- regulation as they are able to bend the regulators to suit their

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Available at http:bas.sagepub.com/content, last accessed on 18th October 2015

[59] ibid.22

[60] Keith Davis, *'Can Business Afford to Ignore Social Responsibilities'*, (1986) California Management Review (1986)

[61] Ibid.70

[62] Judy N Muthuri and Victoria Gilbert, *'An Institutional Analysis of Corporate Social Responsibility in Kenya'* (2011) 98 Journal of Business Ethics 467. Available at http://dx.doi.org/10.1007/10551-010-0588-9 , last accessed on 30/10/2015

[63] Muthuri and Gilbert(n62)

[64] ibid.469

needs.[65] However, arguments can be raised against the proposition that regulation would discourage investment because currently most enlightened investors want to be associated with businesses that act in socially responsible ways. The article also exposes the challenges of government regulation that have made it unappealing to corporations. Regulation through Acts of Parliament (these Acts do not deal directly with Corporate Social Responsibility but are seen to touch on some CSR activities) which could be deemed to have some impact on Corporate Social Responsibility have not provided any rewards or incentives that will motivate corporations to take part in Corporate Social Responsibility. The legal system has not been quick either to punish corporate malpractices.[66] The authors cite the National Environment Management Authority (NEMA)[67] as among the few governmental institutions that actually oversee implementation of government policies on the environment and therefore would be applied in Corporate Social Responsibility to require companies to practice environmental conservation.[68]

The article in advocating for enactment of a more robust legal framework for Corporate Social Responsibility in Kenya criticizes The Corporate Governance Guidelines[69] as being unenforceable. The said guidelines have recently been replaced by the Code of Corporate Governance Practices for Issuers of Securities to the public 2015[70]. The new Code is yet to be publicized and few are aware of its contents. The Code is also to be implemented under the "Apply or Explain" approach therefore the Code is not mandatory and only serves as a reminder on the best corporate governance practices that companies should incorporate even on the issue of Corporate Social Responsibility. The absence of a proper legal framework for Corporate Social Responsibility and the non-enforcement of the few regulations in place has led many corporations to look across the border for regulations. Domestic corporations are now carrying out their Corporate Social Responsibility activities along international regulations in order to

[65] ibid.
[66] ibid.
[67] The National Environment Management Authority is a government parastatal established under the Environmental Management and Co-ordination Act (EMCA) to exercise general supervision and co-ordination over all matters relating to the environment.
[68] Muthuri and Gilbert (n62).
[69] Guidelines on Corporate Governance Practices by Public Limited Companies in Kenya (2002) enacted vide Gazette Notice No. 3362.
[70] The Capital Markets Act (Cap 485A), *Code of Corporate Governance Practices for Issuers of Securities to the Public 2015*, enacted through Gazette Notice No. 1420, *Government Printers*, Nairobi, Kenya.

protect their image among the international community. This is especially the case for multinational corporations which strive to meet the Corporate Social Responsibility standards set by the parent company's country.

It is evident that government regulation as a system of regulating Corporate Social Responsibility can be effective if its challenges are addressed and corporations embrace it. Corporate Social Responsibility regulation by the government ensures that the society benefits from corporations. This is analyzed by Geoffrey P. Lantos in *"The boundaries of Strategic Corporate Social Responsibility"*[71]. He explains that laws regulating business conduct are passed because the society is distrustful businesses. Society believes that businesses cannot, by their own volition do what is right.[72] He looks at the societal benefit as a product of the "corporate social contract"[73]. In this contract, the society provides resources to corporations to ensure they survive and thrive; the corporation in turn assists in solving societal problems.[74] The "corporate social contract" can only be enforced by the government as corporations will only want to manipulate society so as to serve their own needs.

Jean- Pascal Gond, Nahee Kang & Jeremy Moon in *"The government of self-regulation: on the comparative dynamics of corporate social responsibility"*[75] explain that the government is interested in Corporate Social Responsibility for various reasons. These reasons include the welfare of the society, proper governance of corporations, need to meet social demands and need to enhance sustainable development.[76] They go further to attribute the lack of government regulation to two assumptions, first, that Corporate Social Responsibility is a smoke screen for deregulation and possibly a window-dressing for irresponsible behavior.[77] Second, that

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[71] Geoffrey P Lantos, *'The Boundaries of Strategic Corporate Social Responsibility'* (2001) 18 Journal of Consumer Marketing 595. Available on http://dx.doi.org/10.1108/07363760110410281, last accessed on 30/10/2015
[72] ibid.
[73] ibid.
[74] ibid.
[75] Jean-Pascal Gond, Nahee Kang and Jeremy Moon, *'The Government of Self-Regulation: On the Comparative Dynamics of Corporate Social Responsibility'* (2011) 40 Economy and Society 640. Available at http://dx.doi.org/1080/03085147.2011.607364, last accessed on 30/10/2015
[76] ibid.
[77] Corporations get support or create "market friendly" NGOs that frame the notion of CSR in ways that are amenable to business interests. It involves a commodification process whereby social responsibilities are addressed only to the extent to which they support the development of new market opportunities.

Corporate Social Responsibility is that which goes beyond the requirements of the law.[78] In both assumptions the government does not play any role in Corporate Social Responsibility and as such corporations take advantage to establish regulations that are not necessarily coercive.

The authors look at five modes through which corporations and the government may be involved in Corporate Social Responsibility.[79] These are:

- "**Corporate Social Responsibility as self-government/Self-regulation-** Corporations operate independently of the government and conform to traditional, philanthropic view of Corporate Social Responsibility in which business makes discretionary contribution to society. There is no co-ordination between corporations and government.[80]
- **Corporate Social Responsibility as facilitated by the government-** Governments facilitate Corporate Social Responsibility through endorsements in the form of speeches and other means of lending their support to business contributions to society. Such modes of facilitation do not necessarily rely on any form of legal development.[81]
- Corporate Social Responsibility **as a partnership with the government-** Governments partner with corporations to promote Corporate Social Responsibility.[82] Partnership can occur with individual companies or with business associations. Governments bring fiscal and regulatory capacity whereas companies bring their networks, employees and knowledge to bear in addressing problems. This partnership also involves civil society that brings their understanding of social expectations and of social problems.[83]
- **Corporate Social Responsibility as mandated by the government-** This obviates corporate discretion. First governments use "soft law[84]" to encourage Corporate Social Responsibility. Regulation is used in various ways which falls short of coercion and

[78] Gond, Kang and Moon (n75). This assumption is underpinned by neo-liberalism and is central to many definitions of CSR influenced by the US experience. In this corporations undertake social responsibilities entirely on a voluntary basis and government administer public policy. CSR is considered to be either a form of philanthropy that has ethical and normative dimensions or business strategy that has instrumental dimension.
[79] ibid.
[80] ibid.
[81] ibid.
[82]This is especially the case with developing countries and often in the extractive process such as the oil industry in Angola or the mining industry in the Philippines.
[83] Gond, Kang and Mond (n75)
[84]Soft law refers rules that are neither strictly binding in nature nor completely lacking legal significance. Definition available at https//www.definitions.uslegal.com

punishment.[85] Second, a number of governments have underpinned various regulations with the rhetoric of Corporate Social Responsibility in order to legitimize these regulations. Third, legal frameworks have been mobilized proactively by NGOs in ways that turn initially "voluntary" Corporate Social Responsibility initiatives or codes of conduct into legally binding obligations. Here, control of Corporate Social Responsibility lies principally with the government although co-operation with the law and NGOs can also be a factor.[86]

- **Corporate Social Responsibility as a form of government**- In this mode business initiatives do not necessarily complement government's action but are a substitute for this action. Corporations substitute for government in terms of both societal roles and over the definition and control of their own initiatives".[87]

This thesis adopted the fourth mode of regulation-Corporate Social Responsibility as mandated by government. John L Campbell in *"Why Corporations Behave in Socially Responsible ways? An Institutional Theory of Corporate Social Responsibility"*[88] explains that corporations are socially responsible because of economic conditions and institutional conditions. Institutional conditions focus on sanctions imposed on corporations through state regulation.[89] He looks at how regulations by institutions and the government would be made more effective. He recommends participation of corporations, government and other relevant stakeholders in negotiations and consensus building when developing regulations.[90] He also addresses reasons why corporations prefer self-regulation to state/ government regulation. These reasons include, that corporations are afraid that state regulation would not adequately protect the industry from itself and that self-regulation acts to prevent the government from interfering with the affairs of the corporations.[91]

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[85] For example, a number of governments have required companies to report their social, environmental and ethical impact without specifying the particular behaviour they deem responsible.
[86] Gond, Kang and Moon (n75)
[87] ibid
[88] John L Campbell, *'Why Would Corporations Behave in Socially Responsible Ways? An Institutional Theory of Corporate Social Responsibility'* (2007) 32 Academy of management Review 946. Available at http://www.amr.aom.org/content/32/3/946.short, last accessed on 6/11/2015
[89] Ibid.
[90] Ibid.
[91] ibid.10
An example would be the air pollution regulations that were devised and deployed in Sweden and the U.S during the late 1960s and 1970s, but in very different ways and with different outcomes. In Sweden the process involved

Subhabrata Bobby Banerjee in *"Corporate Social Responsibility: The Good, the Bad and the Ugly"*[92], links lack of government regulation to the overall erosion of government regulation of companies over the years. He takes an example of America in the 19th Century when the legislature was tasked with granting "special charters of incorporation"[93]. An exercise of any corporate function without the authority of the legislature was deemed to be an *"invasion of sovereign prerogative"*. In the early 1900s, the state revoked charters of incorporation if corporations failed to act in the interest of the public. However, around the 19th Century limits around incorporation had all but disappeared.[94] He interestingly notes that 170 years after corporations were freed from state control, around the 1960s and 1970s various stakeholders of corporations campaigned for a system of federal charter to "reign in the power of large corporations"[95]. It can be said that modern corporations do not have restrictions on corporate activity. Since there are little or no legislative measures to regulate corporate conduct then there is no official obligation for corporations to serve public interest.[96]

K.C Chepkwony, *"CSR: Insights from Kenya"*[97], explains the context of Corporate Social Responsibility in Kenya. She states that Corporate Social Responsibility has become popular in Kenya although it is only associated with philanthropy. There are other aspects of Corporate Social Responsibility, for example "sustainable development"[98], which need to be given as much importance as philanthropy. One way through which these other aspects can be realized is

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extensive and inclusive consultation and negotiation with business, environmentalists, scientists, government agencies and political parties. The result was a set of practical regulations that did not exceed the available technologies and that took seriously economic as well as environmental consequences. Business and other parties to the negotiations were satisfied and the implementation turned out to be quite effective. In the U.S, however, the process was much less inclusive with respect to business, the regulations that were passed were rather impractical because they set standards that were nearly impossible to achieve given the available technologies. Hence, corporations fought implementation at every turn; in part because they did not feel they had been given chance to voice their concerns. In the end, regulation was much less effective than it was in Sweden.

[92] SB Banerjee, *'Corporate Social Responsibility: The Good, the Bad and the Ugly'* (2008) 34 Critical Sociology 51. Available at http://crs.sagepub.com, last accessed on 18/11/2015

[93] The charters of incorporation specified what a corporation could or could not do, how long it would exist and how it was obliged to serve the public interest.

[94] Banerjee (n 92).3

[95] Giving an example of a congressional hearing on the issue, Raplh Nader (1976) declared, *"the corporation is and must be a creature of the state, into its nostrils the state must breathe the breath of a fictitious life"*.

[96] Banerjee (n92).4

[97] K.C Chepkwony, *"CSR: Insights from Kenya",* a project submitted in part fulfillment of the requirements for the award of the Degree in Masters of Laws, LLM, University of Bologna (2008)

[98] Development that meets the needs of the present without compromising the ability of future generations to meet its needs (World Commission on Environment and Development's Report 1987)

through a comprehensive legal framework. She argues that civil society can also play a major role in policing corporations to ensure that these other aspects are realized.[99]

Constantina Bichta, "*Corporate Social Responsibility: A role in government policy and regulation"*[100] explains that the government should encourage Corporate Social Responsibility. One of the critical roles is to act as an advocate of business responsibility in the society. The government is also to establish regulation and minimum standards to prevent the society from being oppressed by corporations. She argues that the role of the government comes about because Corporate Social Responsibility falls within the arena of public policy which is the primary task of the government.[101]

In the report *"Shaping Corporate Social Responsibility in Sub-Saharan Africa"*[102], it was reported that companies in Kenya actively participate in Corporate Social Responsibility but their undertakings are not governed or prompted by local regulations. Most local companies engage in Corporate Social Responsibility as a response to requirements set by their parent company especially on issues of labour principles and protection of the environment[103]. This is mostly the case for multinational companies in Kenya.

Dick Matten and Jeremy Moon in "*Implicit and Explicit CSR: A Conceptual Framework for a Comparative Understanding of Corporate Social Responsibility*"[104] address why and how Corporate Social Responsibility differs among countries. They look at Corporate Social Responsibility in the context of developed and developing countries. They explain that while countries such as the US and Britain were quick to respond and appreciate Corporate Social Responsibility, other countries such as the developing countries are still struggling to adopt Corporate Social Responsibility.[105] Companies in developed countries have easily formulated individual corporate codes on Corporate Social Responsibility which they abide by and even go a step further and report on their Corporate Social Responsibility activities while in developing

[99] Ibid.8
[100] Constantina Bichta, *'Corporate Social Responsibility: A Role in Government Policy and Regulation?'* <http://www.bath.ac.uk/management/cri/pubpdf/Research_Reports/16_Bichta.pdf> accessed 26 November 2015.
[101] ibid.
[102] *Shaping Corporate Social Responsibility in Sub-Saharan Africa*, Guidance Notes from a Mapping Survey by 9iz. Available at https://www.giz.de, accessed on 17/10/1025
[103] ibid.
[104] Dick Matten and Jeremy Moon, *'"Implicit" and "explicit" CSR: A Conceptual Framework for a Comparative Understanding of Corporate Social Responsibility'* (2008) 33 Academy of management Review 404.
[105] Matten and Moon (n104)

countries, companies may have individual Corporate Social Responsibility policies but still struggle to abide by them and implement them. It can therefore be concluded that developing countries require assistance in Corporate Social Responsibility issues especially in regards to implementation and this can be achieved through government regulation.

Peter Fleming, John Roberts and Christina Garsten, *"In Search of Corporate Social Responsibility: Introduction to Special Issue"*[106] enumerate that business entities are selfish and only want to maximize their financial gain.[107] Owing to this fact, regulation in the form of laws is crucial to the success of Corporate Social Responsibility. There are, however, instances when there may be resistance to the laws. The authors give an example of Australia in 2010 when the Australian government attempted to introduce the Resources Super Profit Tax to curb destruction of the environment by the mining industry. The proposed scheme by the then Prime Minister Kevin Rudd[108] was aggressively protested by the mining industry which made immense contributions towards growth of the country's revenue. The contention came to an end with the resignation of Rudd as the Prime Minister and the withdrawal of the tax proposal.[109]

Archie B. Carroll in *"The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders"*[110], argues that corporations have always struggled with the issue of a firm's responsibility to its society. This is because it has always been emphasized that a corporation's paramount responsibility is to increase returns for shareholders. However, even with financial pursuit as the paramount goal, it has become apparent that this needs to be done within the law. Giving an example of the U.S the author shows how government institutions have been created to protect the interests of employees and consumers and also to conserve the environment.[111]

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[106] Peter Fleming, John Roberts and Christina Garsten, *'In Search of Corporate Social Responsibility: Introduction to Special Issue'* (2013) 20 Organization 337. Available at http://www.crs.sagepub.com, accessed on 18th October 2015.

[107] Ibid.

[108] Kevin Rudd was the Prime Minister of Australia from 3rd December 2007-24th June 2010 and from 27th June 2013 to 18th September 2013.

[109] Fleming, Roberts and Garsten (n106).

[110] Archie B Carroll, *'The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders'* (1991) 34 Business Horizons 39. Available at https://www.researchgate.net/publication/4883660_pdf.

[111] Ibid.

Though social activist groups and others throughout the 1960s advocated a broader notion of corporate responsibility, it was not until the significant social legislation of the early 1970s that this message became clear as

Howard R. Bowen in this book *"Social Responsibility of the Businessman"*[112] presents Corporate Social Responsibility as an institutional tools which together with the law can support corporate regulation. He elaborates that corporate activities can be aligned with public interest if there is a proper mix of voluntary initiatives and coercive pressure.[113] He attempts to illustrate the need for government intervention in order to solve the problems of "laissez-faire[114]" and enhance satisfaction from economic life. He explains that society is now requiring more of corporation than it did in the past necessitating various economic reforms through ad-hoc legislation and other specific measures.[115] The purpose of this would be for the government to retain general control in economic activities while encouraging individual initiatives. It should not be perceived that the government wants to control business. On the contrary, the government has no intention of interfering with the specific decisions of businessmen, consumers, workers and investors.[116]

Different scholars have addressed the concept of Corporate Social Responsibility and from their views a majority of them agree that there is need for corporations to undertake meaning or comprehensive Corporate Social Responsibility. Some of the scholars look at regulation of Corporate Social Responsibility in general but none of them focuses specifically on government regulation and whether it could promote the uptake of Corporate Social Responsibility by corporations.

1.11 Limitations of the Study

This study analyzed Corporate Social Responsibility in Kenya with reference to a few public listed companies, private limited companies and SOEs. Important to note is that NGOs and the Civil Society also engage in Corporate Social Responsibility. The bias for public listed

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result of the creation of the Environmental Protection Agency (EPA), the Equal Employment Opportunity Commission (EEOC), the Occupational Safety and Health Administration (OSHA) and the Consumer Product Safety Commission (CPSC) These new governmental bodies established that national policy now officially recognized the environment, employees and consumers to be significant and legitimate stakeholders of business.

[112] Howard R. Bowen, *'Social Responsibilities of a Businessman"* (2013) University of Iowa Press.

[113] Ibid.

[114] The Law Dictionary, "What is Laissez-Faire" https://thelawdictionary.org/laissez-faire/> accessed on 31/08/2018

[115] Ibid.

In the U.S in an effort to overcome the subtle problems of deception, fraud and financial manipulation, "blue sky" laws were enacted, the Federal Trade Commission and the Securities and Exchange Commission was established. To combat or control monopoly, collusion and undue concentration of economic power, regulation of railroads and public utilities was instituted, anti-trust and "free trade" laws were enacted and special aids to small business were provided.

[116] Ibid.

companies, private limited companies and SOEs is because it is easy to access information on them and also majority of the public listed companies and SOEs can be termed as the “big” companies in Kenya therefore their actions or inactions have the greatest impact. Second, the interviews that were conducted did not all involve interviewees whose job description involved issues of Corporate Social Responsibility. Due to time constraints and corporate bureaucracy some of the designated officers could not be reached.

1.12 Chapter Breakdown

Chapter One

This Chapter encompasses the introduction to this thesis which lays a foundation to the research by examining the relevance of the study. It puts forward the objectives of the study and the research questions that the subsequent chapters will answer. Further, this chapter makes a justification for the study while also providing the theoretical framework for the study.

Chapter Two

This Chapter examines the different Corporate Social Responsibility strategies. The word “strategy” is used loosely in this chapter to mean the various forms that Corporate Social Responsibility could take. I explored various Corporate Social Responsibility strategies including anti-corruption measures, stakeholder engagement and enforcement of human rights, which are not generally considered to be part of Corporate Social Responsibility with the aim of establishing that Corporate Social Responsibility can be more than just philanthropy.

The second part of this chapter briefly addresses the need to make Corporate Social Responsibility strategic. It presumes that while a corporation may embrace various Corporate Social Responsibility activities, these activities may not be meaningful if they are not part of a corporation’s overall strategic plan. It tries to create a balance between economic value and stakeholder value for a corporation.

Chapter Three

This Chapter will determine whether regulation will bring about redefinition of Corporate Social Responsibility strategies and thus promote Corporate Social Responsibility among corporations. It also explains the factors that make government regulation the most effective form of regulation of Corporate Social Responsibility. Lastly, it questions whether all Corporate Social Responsibility activities should be regulated.

Chapter Four

This Chapter entails the comparative study. It examines by way of comparison how South Africa and India have incorporated Corporate Social Responsibility in their jurisdictions by way of regulation. The comparative study sought best practices relating to Corporate Social Responsibility that Kenya can borrow from these jurisdictions.

Chapter Five

This is the final Chapter. It sums up the findings made in the previous chapters. It also discusses the lessons that have been drawn from the comparative study conducted in Chapter four and from this it draws recommendations that can promote meaningful Corporate Social Responsibility in Kenya.

CHAPTER TWO

REINVENTING CORPORATE SOCIAL RESPONSIBILITY IN KENYA

This Chapter will explore how Corporate Social Responsibility can be made meaningful and constitute a company's strategic plan by considering some of the initiatives that enhance a corporation's responsibility to its stakeholders in the long-term. It will also seek to expand Corporate Social Responsibility strategies and move from the notion that Corporate Social Responsibility is basically corporate philanthropy. To achieve this, this Chapter will first discuss some selected Corporate Social Responsibility activities that many corporations do not consider in their Corporate Social Responsibility policies but are important if any corporation is to truly claim that it is socially responsible. Later, it will address how corporations can make Corporate Social Responsibility more strategic and part of the objectives that corporations need to achieve.

2.1 Corporate Social Responsibility Strategies

2.1.1 Anti-Corruption measures

Corruption is a major issue in Kenya. It has recently been stated that corruption in Kenya is "worse than ever".[117] According to Transparency International's annual corruption index, Kenya is position 146 out of 174 nations.[118] Corruption can be defined as "including many illegal acts though mostly it involves an individual abusing their authority for their own benefit or for the benefit of their friends or family; it may involve officials using public money for their own personal use or corporate executive's improperly awarding contracts or taking decisions in exchange for bribes".[119]

The Anti-Corruption and Economic Crimes Act defines corruption as "*including bribery, fraud, embezzlement or misappropriation of public funds, abuse of office, breach of trust, dishonesty relating to elections of persons to public office and dishonesty in connection with any tax, rate or impost levied under any Act*"[120]. In Kenya corruption is considered to be prevalent within the public sector and not the private sector. This is the perceived notion because corruption within

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[117] Tristan McConnell, AFP, "Corruption in Kenya", *Business Insider* (August 2nd 2015). [Available at www.businessinsider.com] Accessed on 28/05/2016.

[118] Information available at www.tikenya.org. Accessed on 28/05/2016

[119] *The Facts About Corruption in Kenya* available at www.kenya-advisor-in-Kenya.html accessed on 28/05/2016

[120] Section 2 of the Anti-Corruption and Economic Crimes Act Cap 65, Laws of Kenya, *Government Printers*, Nairobi.

the private sector is considered to be normal as it facilitates business. This has led to initiatives of curbing corruption focusing on public institutions or public officials and the result has been the collapse of various companies which collapse would have been prevented if there were appropriate anti-corruption measures.[121]

State Owned Enterprises (SOEs) are also not spared in corruption matters. For instance in August 2001, directors of NSSF while acting outside the scope of their duties awarded themselves what they termed as "executive treats" and as a result, the SOE lost US$55million.[122] Also the board of directors of National Housing Corporation authorized projects worth Kshs.319 million without any competitive bidding.[123] Despite the development of the Mwongozo (Code for Governance for State Corporations)[124] to address the challenges of governance in State Corporations it does not expressly address the issue of corruption.

Corruption has many disadvantages to businesses. It distorts markets and competition; it weakens the rule of law; and the integrity of business.[125] It is argued that the costs of corruption are added into a firm's overall costs and the entire business process becomes expensive.[126] It distorts competition by not leveling the playing field for all competitors and enables others to secure undue advantage.[127] Corruption also increases agency costs as shareholders have to spend more on monitoring actions of managers. Managers are expected to act in the best interest of the principals. When they maximize their own benefits over those of the company through acts such as embezzlement the principals lose.[128]

Article 10 (2) (c) of the Constitution of Kenya, 2010 states that all persons including state and public officers shall abide by national values and principles of governance enshrined therein.

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[121] Such collapses include Imperial Bank and recently Chase Bank though it is currently operating with the assistance of Kenya Commercial Bank.

[122]Kiarie Mwaura, *"The Failure of Corporate Governance in State Owned Enterprises and the Need for Restructured Governance in Fully and Partially Privatized Enterprises: The Case for Kenya"* (2007) 31 FDMILJ 34 at p.11.

[123] Ibid.

[124] The Mwongozo (Code for Governance for State Corporations) January 2015

[125] Sharon Eicher, *"What Corruption Is and Why It Matters"* in Corporate Social Responsibility Series, *Corruption in International Business: The Challenge of Cultural and Legal Business* (Gower Applied Research 2009)12

[126] Ibid.

[127] Ibid.

[128] Sharon Eicher, *"When Shareholders Lose (or Win) Through Corruption"* in Corporate Social Responsibility Series, *Corruption in International Business: The Challenge of Cultural and Legal Business* (Gower Applied Research 2009)34

These principles include good governance, integrity, transparency and accountability.[129] Corporations and SOEs can uphold this provision by developing internal controls as part of their Corporate Social Responsibility strategy to help curb corruption within the firm. For instance, a firm may develop a code of ethics that all directors and employees are required to uphold, stringent procurement guidelines, punitive measures for those found engaging in corruption practices, sensitization within the organization on corruption this would include provisions of the Constitution and those of the Anti-corruption and Economic Crimes Act[130] and other relevant Acts. Additionally, a corporation may establish an Ethics Committee at the Board level to develop policies and strategies on ethics and monitor compliance. Having an Ethics Committee sets the tone for the corporation's zero tolerance towards corruption. Internal controls will generally enable the business to act ethically and thus be seen as being socially responsible.

Internal controls may however only be effective in curbing corruption within a firm and not in the setting of relations between the organization and the outside world. A corporation as part of its social responsibility is expected to deal ethically with its stakeholders. To this end, a corporation may develop a handbook[131] that communicates the corporation's ethical and integrity principles in relation to its stakeholders. Such a handbook would detail the corporation's transparency measures when dealing with its stakeholders. For instance, a corporation may require its suppliers to provide information on any gifts or money given to the corporation or the corporation may state that it does not receive any gifts or donations from its suppliers.

Interesting to note is that of the nine (9) interviews that were conducted in this study none of the respondents indicated that fighting corruption was part of their organization's Corporate Social

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[129] The Constitution of Kenya, *Government Printers*, Nairobi.

[130] Cap 65, Laws of Kenya, Government Printers, Nairobi, Kenya.

[131] Office of the Comptroller General (CGU), Ethos Institute for Business and Social Responsibility and Working Group of the Business Pact for Integrity and against Corruption, "Business Social Responsibility in Combating Corruption" (2009) UNODC. {Available at https://www.unodc.org/documents/lpo-brazil/Topics_corruption/Publicacoes/English-Guide-Business-Social-Responsibility.pdf,] accessed on 27/08/2018.
Shell Group issues a handbook intended to curb corruption in its relations with governments. One of the measures adopted involves charitable donations where the company states that it is committed to contributing to the welfare of the communities in which it maintains operations. The initiative enables companies affiliated to the Shell Group to contribute to charitable actions in local communities through, for example, investments in social programs. To ensure none of the contributions violate the applicable anti-bribery laws, a full description of the proposal and charitable organization, in addition to other information, must be submitted for approval before any donation (irrespective of the amount) can be made. Moreover, in high-risk countries, the recipient must complete and sign a certificate guaranteeing that no government official will act as the depositary, executor or beneficiary of the charitable contribution.

Responsibility strategy. This clearly shows that corruption is a neglected aspect of Corporate Social Responsibility. This can change if corporations begin to view acting ethically as part of their social responsibility and incorporate some of the strategies suggested above.

2.1.2 Recognition and Enforcement of Human Rights

An organization does not function on its own. It has "hands" that carry out the day-day functions of the organization. These hands are the various employees in an organization. Employees are important stakeholders in an organization without them no organization would exist. It is for this reason that they should be treated with respect, dignity by their employers.

Human rights are rights that guaranteed to all persons irrespective of their nationality, place of residence, sex, ethnic origin, religion and language. [132]They are entitled to all human beings equally and without discrimination and can be said to be inalienable, interdependent and indivisible.[133] The question then is whose responsibility it is to guard against violation of human rights by corporations. It has been regarded under principles of International Law that the state primarily has the onus to shield its citizens from such violations and a duty to ensure that private persons such as corporations do not violate these rights under the Doctrine of State Responsibility.[134] The state is deemed to be in violation of its duty when it allows private actors to act in ways that do not promote enjoyment of these rights. [135]

The burden of protection of human rights even for violations committed by private actors has been borne by the state for too long allowing corporations to get away with such violations. However, in 2008 a report by the UN sought to hold corporations liable by imposing the responsibility to respect human rights and mandate to ensure availability of mechanisms to

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[132] OHCHR, "What are human rights" (1996) https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx accessed on 28/04/2016.

[133] https://www/umn.edu/humanarts/edumat/hreduseries/hereandnow/part-1/whatarehtm accessed on 28/04/2016 They are alienable because you cannot lose these rights any more than you can cease being a human being, they are indivisible because you cannot be denied a right because it is less important or non-essential and finally they are interdependent because all human rights are part of a complementary framework.

[134] R.Rosenstock, *"The ILC and State Responsibility"* (2002) Vol 96 792 in Olufemi O Amao, *"The African Regional Human Rights System and Multinational Corporations: Strengthening Host State Responsibility for Control of Multinational Corporations"* (2008) The International Journal of Human Rights available at https://dx.doi.org/10.1080/13642980802396887 accessed on 28/04/2016.

[135] Valsquez Rodriquez V. Honduras (1988) InterAm Court HR (Ser C) No.4

address alleged violations.[136] The report came up with the guiding principles on Business and Human Rights that were adopted by the UN.[137] The principles were the first global attempt to mitigate human rights violations by businesses.[138] The principles espouse rights recognized under various international laws and those that are considered as the bare minimum that require to be respected and enforced.

Corporations are therefore encouraged to incorporate the principles as part of their Corporate Social Responsibility even though the principles are not legally binding. In the alternative, host countries where corporations operate can adopt the principles as part of their laws thus compelling corporations to adhere to them failure to which the host country can take measures against the corporations. It is noted that adoption of the principles and other international laws on human rights will increase the degree of fault required for a company to be held responsible for violations. Normally, the standard of liability of corporations could be that of negligence or strict liability, however, the principles impose due diligence on the corporations.[139] Due diligence requires corporations and states to take all considerable and rational steps to prevent and address human rights violations. The state can do this by enacting legislation and carrying out investigations in serious cases of alleged violations to identify those responsible and subsequently impose an appropriate punishment.

In Kenya, most corporations seem not to be aware of their duty to uphold human rights and if they are aware, they neglect this duty. This has resulted in the relationship between corporations and their employees being constantly strained, workers are unfairly dismissed, constant boycotts/strikes due to poor remuneration, poor working conditions, health and safety. For

[136] John Ruggie, *"Protect, Respect and Remedy: A Framework for Business and Human Rights",* Report of the Special Representative of the Secretary General, UN GAOR Hum Rts, Council 8th Sess Agenda Item 3 UN Doc A/HRC/8/5 (2008)

[137] Adopted on 16 June 2011 vide resolution 17/4. Guiding Principle 11- Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.
Guiding Principle 12- The responsibility of business enterprises to protect human rights refers to internationally recognized human rights understood as a minimum as those expressed in the International Bill of Human Rights.

[138] The Guiding principles were based on the Global Compact Principles specifically Principle 1 and Principle 2. Principle 1 provides that businesses should support and respect the protection of internationally proclaimed human rights within their sphere of influence while Principle 2 provides that businesses should make sure that they are not complicit in human rights abuses. See OHCHR, Business and Human Rights: A Progress Report, Geneva 2000. Available at <http://www.unhcr.ch/business.html> accessed on 23/07/2016

[139] Helga Hejny, "Corporate Social Responsibility: A critical review of the guiding principles on Business and Human Rights for Implementing the UN "Protect, Respect and Remedy" Framework*"* (International Law Blog 2015) Available at <https://aninternationallawblog.wordpress.com/2015/03/03> accessed on 22/07/2016

instance many drivers were sacked after joining the ITF-affiliated Kenya Long Distance Truck Drivers Union. Also, several workers were terminated from employment by Rivatex Textile Company under the pretense of a restructuring exercise while the real concern was the workers joining a trade union.[140] Further, the Workers' Rights Alert launched a movement against workers' rights abuse in Cirio Delmonte. The negative publicity led to the boycott of Cirio Delmonte's products in Italy and not in Kenya – the place where the workers' rights were being abused. The campaign caused the signing of an agreement between the Del Monte management and the trade union on behalf of the aggrieved workers.[141]

Incidents such as those highlighted above have led to the increase in litigation over labour issues over the years. . In 2010, an estimated 500 cases were filed at the Employment and Labour Relations (ELR) Court while in 2014 the number rose to 2000 cases.[142] This number can be significantly reduced if corporations address employee relations as part of their Corporate Social Responsibility. Corporations can come up with internal human resource employee manuals and policies to provide guidance on fair treatment of employees.[143] The policies would also entail providing a conducive environment for the workers in terms of health and safety, medical covers for the employees, unionization of employees, fair termination processes and pension benefits. Such policies would be in line with the Constitution and labour laws and would constantly be reviewed in consultation with the employees. Corporations can also go a step further by conducting human rights audits within them to check whether they are upholding or violating human rights. The human rights audits would provide a mechanism for corporations to monitor compliance with both domestic and international laws on human rights and where violations are encountered, the audits could suggest a mechanism to deal with the violations, further strengthening ability of corporations to uphold human rights.

It is important to note that corporations can violate not only employee rights but also those of the

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[140] International Trade Union Confederation, "Annual Survey of Violations of Trade Union Rights, Kenya" (6th June 2012) <Available at https://www.refworld.org/docid/4fd8894232.html>. Accessed on 29/05/2016

[141] Maggie Opondo, *'Emerging Corporate Social Responsibility in Kenya's Cut Flower* Industry' University of Nairobi, Department of Geography and Environmental Studies, http://www.unisa.ac.za/contents/colleges/col_econ_man_science/ccc/docs/opondo.pdf accessed 23 April 2016

[142] MMAN Advocates, "Emerging Trends in Employment and Labour Law Practices", available at www.mman.co.ke/emerging-trends-in-employment-labour-practices/ accessed on 29/05/2016

[143] Ibid.

community. The focus in this study has been on employees because it is perceived that they may be the main victims of such violations.

Protection of human rights is however not only exclusive to labour rights. It also extends to freedom from discrimination. Corporations have a duty to prohibit all forms of discrimination within the work place. Internal policy within the company should clearly express its non-tolerance for discrimination. No person should be discriminated upon on the basis of their ethnicity, gender, colour, sexuality, language, social or national origin, religion, race, political, economic status or conscientiously held beliefs. A corporation should make sure that the non-discrimination policy is employed within all its spheres; recruitment, marketing, customer relations, working conditions, procurement and partnerships.

Kenya is currently dealing with the issue of ethnicity and corporations are also bedeviled with the same problem. Corporations in Kenya can therefore focus their Corporate Social Responsibility in stemming out this form of discrimination by ensuring that their recruitment policies give equal opportunities to all persons who are qualified and its personnel reflects a "mix" of individuals and geographical diversity.

In implementing human rights into its Corporate Social Responsibility, a business can begin by identifying the human rights issues that confront it. These should be issues that go over and above the Constitutional protections.[144] The issues will vary depending on the business of the corporation. For instance, the extractive industry may have complex human rights issues than the telecommunications industry. Second, the corporation should analyze the various international instruments that deal with human rights. The basis of this is globalization, businesses are now trading internationally and are expected to take into account international laws. Third, the corporation can consult with the various actors to ensure that it captures all the relevant issues. Fourth, the corporation can come up with an implementation strategy that includes training its staff on the various human rights issues. Implementation should also involve devoting the necessary resources to the promotion and monitoring of human rights within the corporation. Finally, the corporation can review its performance in relation to human rights annually by

[144] See Chapter Four of the Constitution of Kenya, 2010.

carrying out human rights audits.

2.1.3 Environmental Stewardship

Environment stewardship is the responsibility for environmental management shared by all persons whose actions or decisions have an impact on the environment.[145] The rationale for this is to create a sustainable environment for future generations. This is exemplified under Article 42 of the Constitution of Kenya[146] states that every person has the right to a clean and healthy environment which includes the right to have the environment protected for the benefit of present and future generations and to enforce such rights through the court system. This Constitutional provision is reinforced by the Environmental Management and Coordination Act[147] (EMCA) which provides a legal framework for the management of the environment.

Corporations have a duty to protect the environment within which they operate.[148] The rationale for this obligation is that corporations acquire most of their resources from their environment in the form of raw materials. They can therefore not be allowed to deplete all the resources without acquiring any responsibility to the environment. This would lead to a situation where the environment cannot be sustained for future generations. Protection of the environment does not only benefit the community around which the corporation operates but the entire society at large. A clean environment provides a healthy habitat for both the corporation and other occupants.

In a survey conducted between May and September 2008 on 54 companies in Kenya, it was reported that 19 of the 54 companies are engaged in environmental management activities as part of their Corporate Social Responsibility.[149] Most of these companies are concerned with water management and issues of biodiversity.[150] The number of organizations engaging in environmental stewardship in Kenya seems to be on the rise. Of the 9 interviews conducted in this study, 6 of the respondents stated that their organizations were involved in some form of

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[145] United States Environmental Protection Agency, "Environmental Stewardship" (2016) < https:www.epa.gov>stewardship> accessed on 29/05/2016.

[146] Constitution of Kenya, 2010, *Government Printers*, Nairobi.

[147] Environmental Management and Coordination Act of 1999, Laws of Kenya, *Government Printers*, Nairobi.

[148] Article 42 of the Constitution of Kenya, Every person has the right to a clean and healthy environment.
See also Article 70 of the Constitution of Kenya on Enforcement of environmental rights.

[149] Judy N Muthuri and Victoria Gilbert, *'An Institutional Analysis of Corporate Social Responsibility in Kenya'* (2011) 98 Journal of Business Ethics 474. Available at http://dx.doi.org/10.1007/10551-010-0588-9 , last accessed on 30/10/2015

[150] Ibid.

environment management as part of their Corporate Social Responsibility. For instance, Henry Kamau Nyaga from VAELL Ltd (private company) indicated that 40% of their CSR activities were centered on "environmental efforts"[151],Nadiya Aziz from Safaricom (public listed company) revealed that the company had 6 projects dedicated to environmental conservation as part of their Corporate Social Responsibility for the year[152]and David Mwania from Upper Kalundu (WRUA) indicated that they were involved in soil and water conservation projects.[153]

The UNEP in May 2002 released a report that stated that "there was a growing gap between the efforts to reduce the impact of business and industry on nature and the worsening state of the planet". The existence of the gap is attributed to the fact that only a small number of companies in each industry are proactively integrating environmental factors into business decisions.[154] The flower industry in Kenya, for instance, contributes largely to environmental damage. This is especially due to greenhouse emissions, high use of pesticides and huge water consumption.[155] The flower farms are now engaging in water recycling, reduction of greenhouse emissions and use of organic pesticides as part of their contribution to management of the environment.[156]

As part of Corporate Social Responsibility, companies can contribute to environmental management by ensuring they comply with environmental laws. This includes national legislations and international treaties on the environment to which Kenya is a party and also industry specific regulations developed by the industry to which a corporation belongs.[157] A corporation should also conduct regular review to check for non-compliance. Corporations can also come up with their own internal environmental policies such recycling of waste materials,

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[151] Interview with Henry Kamau Nyaga in Nairobi, Kenya (20th August 2016)
[152]Interview with Nadiya Aziz in Nairobi, Kenya (25th August 2016)
[153] Interview with David Mwania in Nairobi, Kenya (20th August 2016)
[154] Anup Shah, "Corporations and the Environment" [available at www.globalissues.org/article/55/corporations-and-the-environment] accessed on 29/05/2016
[155] Bruno Leipold and Francesca Margante, *"The Impact of the Flower Industry on Kenya's Sustainable Development"* (2013) Vol , No.2, International Public Policy Review at p.4. [Available At http://www.uc/.ac.uk/ippr/] accessed on 29/05/2016.
[156] Ibid.
[157] Includes International Treaties such as the Kyoto Protocol which become part of Kenya's law by virtue of Article 2(6) of the Constitution of Kenya.

producing environmental safe products, reduction of pollution and safe disposal of waste materials.[158]

Businesses can also use natural resources responsibly by conserving resources and utilizing them efficiently and recycling where necessary. [159]Avoidance of use of toxic materials in the production process also reduces the amount of hazardous waste produced. Corporations can also participate in community environmental projects such as tree planting and regular clean ups.

2.1.4 Corporate Philanthropy

Corporate philanthropy is described as the charitable and non-reciprocal efforts by a firm aimed at improving the welfare of the society without any benefit for the firm. [160]An assumption by most companies is that corporate philanthropy revolves around charitable acts; however, it has been argued that philanthropy should focus the root of the problem as opposed to what may be termed as the symptoms.[161] For instance, in supporting the elimination of cancer, corporate philanthropy can involve partnering with organization to fund research for a cure as opposed to donating medication to a hospital.

Corporate philanthropy as the act of giving to the less privileged can be traced back to religion. Almost all religions preach the welfare of human beings through giving; among the Christians it takes the form of a tithe, in Islam it is regarded as Zakat (a form of obligatory alms-giving and religious tax in Islam)[162] and among the Hindu and Buddhist it is a form of Danna (meaning the virtue of kindness, charity or giving of alms in Indian philosophies)[163] It is therefore understandable why philanthropy is the most prevalent form of Corporate Social Responsibility practiced around the world. Studies reveal that in Kenya philanthropy is the most practiced

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[158] Illinois Environmental Protection Agency, "What Environmental Stewardship Activities can my Business Participate in" (2016) <www.epa.illinois.gov/topics/small-business/publications/environmental-stewarship/index> accessed on 29/05/2016.
[159] Ibid.
[160] Klaus M Leisinger and Karin Schmitt, *"Corporate Responsibility and Corporate Philanthropy"* at p.4[available at http://www.un.org/en/ecosoc/newfunct/pdf] accessed on 30/05/2016
[161] Ibid.
[162] Mahdi Salehi, *"A Study on the Influence of Islamic Values on Iranian Accounting Practice and Development"* (2014) 10 (2) Journal of Islamic Economics, Banking and Finance 154-182.
[163] Christopher Key Chapple, *The Bhagavad Gita: The Twenty- Fifth Anniversary* Edition (State University of New York Press 2010)

Corporate Social Responsibility process.[164] Some of the philanthropic acts include book donations to support education, blood donations, and donations to children's home, donations to hospitals in form of equipment, medicine and funds, education sponsorships. According to the interviews conducted corporate philanthropy was very popular. Out of the 9 interviews conducted in this study all the respondents were quick to mention some of the charitable acts that were part of their Corporate Social Responsibility, for instance Pauline Njeru from Kenya Railways mentioned student sponsorships, donations to hospitals and children homes[165], Martin Njeru from Standard Group Ltd mentioned food donations, donations to hospitals and education projects[166].

Despite the intention to improve the welfare of the community, corporate philanthropy may be subject to manipulation by directors who may want to direct the company's funds to benefit their own charitable courses for their self-interests. As part of Corporate Social Responsibility strategies, corporate philanthropy should go beyond charity and demonstrate the values the company embodies which should include making a difference even where profits of a business are not increased. To achieve this, a firm's top management should be aware and sensitive to the concerns of others.[167] This will generate moral capital[168] among the community and stakeholders and motivate employees by making them part of the firm.[169]

The Global Blueprint for Corporate Sustainability Leadership urges companies as part of their corporate to support the wider UN Goals and Issues such as achieving the Millennium Development Goals by pursuing philanthropic acts that are related to a company's competencies without unnecessarily duplicating what other companies are doing.[170] This can be done by

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[164] Judy N Muthuri and Victoria Gilbert, *'An Institutional Analysis of Corporate Social Responsibility in Kenya'* (2011) 98 Journal of Business Ethics 474. Available at http://dx.doi.org/10.1007/10551-010-0588-9 , last accessed on 30/10/2015.
In the Survey of 54 companies, 47 of the companies reported that they engaged in philanthropy as part of their CSR and philanthropy was the most common CSR issue at 90.7%.
[165] Interview with Pauline Njeru in Nairobi, Kenya (20th August 2016)
[166] Interview with Martin Njeru in Nairobi, Kenya (25th August 2016)
[167] Choi J Wang H, *"The Promise of a Managerial Values Approach to Corporate Philanthropy*" (2007) Vol 75 Journal of Business Ethics 345-359 at p.350.
[168] The accumulated outcome of the process of assessment, evaluation and imputation by stakeholders and communities of a firm's philanthropic activities.
See Godfrey P.C, *"The Relationship Between Corporate Philanthropy and Shareholder Wealth: A Risk Management Perspective"* (2005) Vol 30 Academy of Management Review 777-798
[169] Ibid.782
[170] Ibid.779

having regard for pertinent individuals or groups around the business' environment and understanding what the business can do to improve their welfare. For instance, a corporation that operates in an area prone to famine. Such a corporation can have regard to the community's issue of food security. As part of its social responsibility, such a corporation can educate the community on farming drought resistant crops; train them better ways to preserve their surplus food and equip them with technical skills such as modern farming methods. This approach will better sustain the community in the long term unlike where such a corporation donates food every time there is a famine.

Kenya is currently facing various social problems including poverty, lack of quality health care, lack of proper housing and food security. While it is considered the role of the government to improve social welfare of its citizens, corporations can also make a contribution. Recently, the government launched its agenda for the next five years. The government intends to focus on four main areas: creation of employment through manufacturing; universal healthcare; affordable housing; and food security.[171] Corporations, while considering their competencies may tailor their social responsibility towards achievement of any of the four issues.

Corporate philanthropy can only be meaningful if corporations move away from donations and charitable acts and focus on initiatives that improve social welfare in the long term. This can be achieved by a corporation identifying the social issues plaguing the community around it and setting aside resources to continually assist the community.

2.1.5 Stakeholder Engagement

Sunny Misser, CEO of Accountability states that;

> Companies in the foreseeable future will find themselves dealing with different business realities; more sophisticated, informed and engaged stakeholders, collaborative models of governance and decision making among stakeholder networks and their expectations that companies have the technological competence to be instantly responsive to each of their concerns.[172]

[171] Policy Monitor, "Realizing the "Big Four" Agenda through Energy as an Enabler" (2018) Issue 9 No. 3 KIPPRA. [Available at http://kippra.or.ke/wp-content/uploads/2018/04/KIPPRA-Policy-Monitor-Issue-9-No.-3.pdf] accessed on 27/08/2018.

[172] Kim Hismann, "Why Stakeholder Engagement is Key to Successful CSR Programs" *Green Biz (*Thursday October 23 2014) . [Available at https;//www.greenbiz.com/blog/2014/10/23/stakeholder-engagement-key-csr-online-communities] accessed on 29/05/2016

This statement emphasizes the importance of stakeholder[173] engagement to any firm. It includes ways a company can stay connected to its stakeholders. The objective of stakeholder engagement is to establish concrete relationships with stakeholders so as to understand their concerns on various issues and incorporate such concerns into a company's corporate strategy.[174] Stakeholder engagement could include disclosure and transparency by companies to their stakeholders and direct involvement, consultation and partnership with stakeholders.[175] The obligations of the business to its stakeholders can be categorized into:

"*Employees:* *Provide a family friendly work environment.*

Engage in responsible human resource management.
Provide an equitable reward and wage system for employees.
Engage in open and flexible communication with employees.
Invest in employee development.
Encourage freedom of speech and promotes employee rights to speak up and report their concerns at work.
Provide child care support/paternity/maternity leave in addition to what is expected by law.
Engage in employment diversity in hiring and promoting women, ethnic minorities and physically handicapped.
Promote dignified and fair treatment of all employees.

Consumers: *Respect the rights of consumers.*
Offer quality products and services.
Provide information that is truthful, honest and useful.
Produce products and services provided they are safe and fit for their intended use.
Avoid false and misleading advertising.

[173] A stakeholder is any individual or group of individuals that affect or are affected by the activities of a company.
[174] Noam Noked, *"The Corporate Social Report and Effective Stakeholder Engagement*", Harvard Law School Forum on Corporate Governance and Financial Regulation, December 28th 2013. [Available at https:/corpgov/aw.harvard.edu/2013/12/28/the-corporate-social-report-and-effective-stakeholder-engagement/] accessed on 29/05/2016
[175] The ISO and Corporate Social Responsibility*, "Issue Briefing Note: Stakeholder Engagement ISO and Corporate Social Responsibility"* 2004. [Available at https://www.iisd.org/pdf/2004/] accessed on 29/05/2016

Disclose all substantial risks associated with product or service.

Avoid sales promotions that are deceptive/manipulative.

Avoid manipulating the availability of a product for purpose of exploitation.

Avoid engagement in price fixing.

Community: Foster reciprocal relationships between the corporation and community.

Invest in communities in which corporation operates.

Launch community development activities.

Encourage employee participation in community projects.

Investor strives for a competitive return on investment.

Engage in fair and honest business practices in relationships with shareholders.

Suppliers: Engage fair trading transactions with suppliers

Environment: Demonstrate a commitment to sustainable development

Demonstrate a commitment to the environment"[176]

Obligations of a corporation to its stakeholders can only be met through engagement. For instance, it is only by having consultations with employees that a corporation can meet their needs. Despite the general obligations that a corporation may owe its employees by virtue of the law there are other employee needs that may be unique to each and every corporation requiring consultation between employees and the corporation. In the same way rather than a corporation internally coming up with initiatives to help the community around it, it would be more prudent if the corporation actually consulted the community members on what would improve their welfare in the long term. It can therefore be said that continuous consultation fosters better and stronger relationships between stakeholders and corporations. There seems to be a disconnect between corporations and their stakeholders in Kenya as was revealed in the interviews conducted in this study. Majority of the interviewees indicated that they were not aware of any efforts made by their organizations to directly engage their stakeholders. However, some organizations have made an effort towards stakeholder engagement. David Mwania from Upper Kalundu WRUA indicated that;

> It is a common practice to engage with the stakeholder to come up with a common goal of what should be done in a specific area and also so as to show justification for a proposed activity.[177]

[176] Dima Jamali, *"A Stakeholder Approach to Corporate Social Responsibility: A Fresh Perspective into Theory and Practice"* 2008 82 Journal of Business Ethics at p.219

At the same time a company can utilize stakeholder engagement to assess the social responsibility of its stakeholders. If stakeholders are able to probe into the responsibility the company owes to them then it is only fair that the company in turn does the same. A company should be able to ask who its stakeholders are and whether they are also acting in socially responsible ways. In doing so, corporations can include Corporate Social Responsibility assurances in their formal relations with stakeholders, for instance, contracts with their suppliers.[178] It is becoming increasingly popular for businesses especially multinationals across the world to have their suppliers adhere to their Corporate Social Responsibility policies. In Kenya, Safaricom Limited now requires its suppliers to adhere to its sustainability policies failure to which it will not take them up as part of their suppliers.[179]

The rationale for this type of engagement is that most companies whose reputation has been tarnished due to adverse Corporate Social Responsibility reports have found themselves in such positions because of their suppliers who may not legally be their responsibility, but whose actions they are nonetheless held accountable for. A good example of this is the NIKE scandal in which the company was accused of violating child labour practices in Asian.[180] This was as a result of its suppliers in that region. A corporation can also include Corporate Social Responsibility audits as part of its procurement process. Suppliers whose audits do not reflect positively on Corporate Social Responsibility can be rejected.

2.1.6 Sustainability Reporting

Sustainability reporting otherwise known as corporate reporting involves disclosing how a business has utilized its human capital and natural resources. The rationale for sustainability reporting is that corporations may be involved in elevating social problems and by reporting various stakeholders are able to verify how the company's resources are being utilized. Previously, companies were required by law to report on financial issues only by publishing annual reports that comprised of a financial statement for the financial year. This was a fulfillment of the company's obligation to its shareholders who had invested their money and

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[177] Interview with David Mwania in Nairobi, Kenya (20th August 2016)

[178] Doreen McBarnet, *"Corporate Social Responsibility; Beyond the Law, Through the Law, for Law; the Corporate Accountability"* (2009) University of Edinburgh School of Law, Working Paper No. 2009/03 at p. 42. [Available at SSRN:http://ssrn.com/abstract=1369305 or http://dx.doi.org/10.2139/ssrn.1369305] accessed in 7/06/2016.

[179] Interview with Nadiya Aziz in Nairobi, Kenya (25th August 2016)

[180] McBarnet n178

needed the company to account on how it had spent it. With the introduction and acceptance of stakeholders as the wide group of persons that corporations are accountable to, it has become evident that financial reporting alone will not suffice.

Stakeholders require companies to reveal the extent to which they have conducted business in a responsible way.[181] The sustainability report should involve corporate considerations of human rights, environmental issues and country specific issues such as combatting corruption. The reports may be used assess corporate performance and improve business practices and make prudent investment decisions. For instance, in South Africa, the Johannesberg Stock Exchange (JSE) has required sustainability reporting by all listed companies since 2010. The disclosure is mandatory and is implemented on an "apply or explain" basis permitting firms that have failed to report room to explain the failure to do so.[182]

In Kenya, directors are required under the Companies Act, 2015 to include in their report a business report.[183] The directors shall specify in their business review "*the main trends and factors likely to affect the future development and position of the business of the company*[184]*; information about environmental matters*[185] *the employees of the company*[186] *and social and community issues*[187]*; and information persons with whom the company has contractual or other arrangements that are essential to the business of the company*[188]." It is hoped that this provision will push corporations to consider sustainable reporting as part of their Corporate Social Responsibility.

Some corporations are already reporting on issues that relate to their stakeholders, an example is Safaricom Limited that has for the past four years published its sustainability reports detailing how it has increased value for each of its stakeholders.[189] While unveiling the sustainability

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[181] James J Spillane, S.J, *"Corporate Social Responsibility in the Southeast Asian context"* p.61
[182] Ioannis Ioannou and George Serafeim, *The Consequences of Mandatory Corporate Sustainability Reporting: Evidence from Four Countries* (Working Paper 11-100 August 2014)
[183] Section 655 of the Companies Act, 2015
[184] Section 655 (4) (a) Companies Act, 2015
[185] Section 655 (4) (b) (i) Companies Act, 2015
[186] Section 655 (4) (b) (ii) Companies Act 2015
[187] Section 655 (4) (b) (iii) Companies Act, 2015
[188] Section 655 (4) (c) Companies Act, 2015
[189] Safaricom, "Sustainability Report 2015/2016" (2016) www.safaricom.co.ke/sustainabilityreport-2015/public/uploads/SC%20sustain%20Report%20%20Mon%2023rd%20Sept%202015.pdf accessed on 23/07/2016.

Report for 2015/2016, the CEO of Safaricom Limited, Bob Collymore, indicated that *"the corporation was becoming increasingly aware of the importance of operating in a sustainable manner and the dangers of continuing to carry out business as usual and the need to focus on resources consumption, management and leadership"*. [190]While this is commendable, the pertinent provisions of the Companies Act that advocate for sustainability reporting can only be viewed as soft regulation. This is because the provisions do not provide any consequences for non-compliance. Corporations that fail to make disclosures on utilization of their resources are neither penalized nor are they reprimanded. Further, the provisions only target quoted or listed companies. The provisions are not applicable to other categories of corporations. Non-listed companies are only obliged to file their annual reports.

In order to ensure that corporations are operating sustainably and are having due regard of all their stakeholders there is need for hard regulation. This can be achieved by including mandatory provisions in the Companies Act that will be applicable to all firms. The provisions should provide a definition for sustainable reporting, the information to be included in the sustainability report and the period within which the report should be prepared. Additionally, there ought to be a provision detailing consequences for non-compliance. Consequences could take the form of fines, which amount should be punitive in nature so as deter other companies from non-compliance. For listed companies, the consequence for non-compliance could include delisting of the company from the Nairobi Stock Exchange for a given period of time.

While hard regulation may force corporations to disclose how its resources are utilized and how the company is managed, corporations may go further a step further and come up with internal measures to ensure they are acting in a sustainable manner. For instance, a corporation may carry out a sustainability audit at the end of every financial year. The audit may focus on whether the corporation has complied with legal provisions on sustainability reporting, the extent to which the business has operated in a responsible manner and how the operations of the business have impacted its stakeholders. The audit may also highlight how the corporation can improve its business practices to ensure that its resources are used in the best interest of all its stakeholders.

2.2 Why make Corporate Social Responsibility Strategic?

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[190] Ibid.

A strategic approach enables companies to determine the activities they should devote resources to in order to be socially responsible while still retaining their business value. Integrating Corporate Social Responsibility into a company's overall plan ensures that profit making-increasing shareholder value do not overthrow the need to behave ethically towards stakeholders.[191] According to Todd Ballowe[192] strategic Corporate Social Responsibility provides companies the following solutions: "*balancing creating economic value and societal value; managing stakeholder relationships; identifying and responding to threats and opportunities facing stakeholders; and developing sustainable business practices*".

When a corporation makes Corporate Social Responsibility strategic it is able to make well-informed choices on what Corporate Social Responsibility activities to pursue. A corporation can therefore tailor its Corporate Social Responsibility activities to reflect its values and beliefs and further to be in line with the overall objective of the corporation. By doing so a corporation avoids duplicating Corporate Social Responsibility activities that are being undertaken by other companies and develops its own. For instance, various Corporate Social Responsibility advocates argue that pharmaceutical companies should not just donate medicines or money to hospital as part of their Corporate Social Responsibility but a better strategic approach would be to invest in research or partner with research firms to find cures for the various diseases. Banking institutions are encouraged not just to involve themselves in philanthropic activities but to strategically utilize their expertise to create financial literacy among the communities within which they operate.

The study tried to find out whether Corporate Social Responsibility was part of the strategic plan for various categories of corporations. When asked whether Corporate Social Responsibility was part of their corporations' strategic plan, five (5) out of the (9) interviewees responded in the affirmative, however, three of these respondents could not explain how Corporate Social Responsibility fitted into their strategic plan. Nadiya Aziz from Safaricom Limited explained that the company has a strategic plan for the years 2014-2017 which is inclusive of Corporate Social Responsibility.[193] Kaari Kinyua from Weetabix EA Ltd stated that Corporate Social

[191] Todd Ballowe, "Strategic Corporate Social Responsibility", (*On Strategy*, 22nd January 2009) Available at <strategyhq.com/resources/strategic_corporate_social_responsibility> accessed on 21/07/2016
[192] Ibid.
[193] Interview with Nadiya Aziz in Nairobi, Kenya (25th August 2016)
See also _http://safaricomfoundation.org/uploads/media/Safaricom_foundation_strategy_2014-2017.pdf

Responsibility was part of their strategic plan but in her opinion it is included in the strategic plan only because it helps to market their products.[194]

Strategic Corporate Social Responsibility benefits the company by supporting its objectives. However, corporations should not lay too much emphasize on the monetary benefits that Corporate Social Responsibility brings to the corporation as this will lead to Corporate Social Responsibility being considered a public relations instrument. Corporate Social Responsibility should only be seen to compliment the purposes of the business and any other benefits should be viewed as indirect benefits.

Corporate Social Responsibility that is not strategic can lead to wasted and misdirected resources or worse carrying out activities that are a personal endeavor of the person controlling the funds or planning the activities.[195] Importantly, Corporate Social Responsibility should be a continuous process conducted throughout the financial year of a business and not only at the end a financial year when profits are declared. It is therefore prudent to plan and effectively configure Corporate Social Responsibility with other business operations.

2.3 Analysis of data from the Interviews

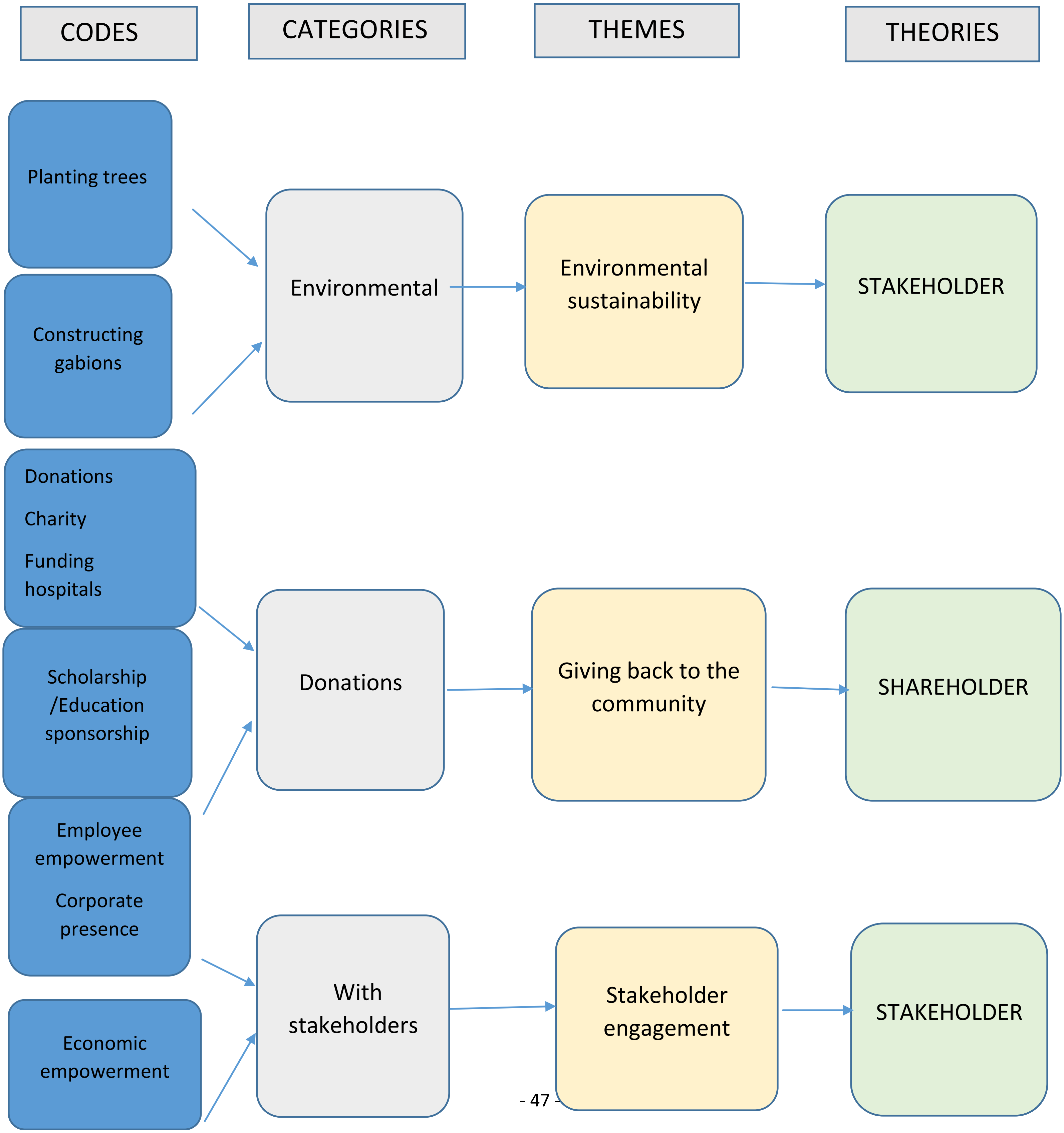
The study sought to find out activities that comprise Corporate Social Responsibility in various corporations. Data was collected by way of interviews from nine (9) persons; one from a public listed company; four from private limited companies; three from SOEs; and one from a regulator, CMA. The data collected is divided into codes. The codes are then reduced into categories which are used to create themes. The themes are linked to the theories in support of this study.

The codes were generated from the responses given as relates to the activities that are part of the corporation's Corporate Social Responsibility. The codes developed are planting trees, constructing gabions, donations, charity, funding hospitals, scholarship/education sponsorship, employee empowerment, corporate presence an economic empowerment. The codes can be summarized into three categories: environmental; donations; and interacting with stakeholders. These categories fall into three themes of Corporate Social Responsibility, that of environmental

[194] Interview with Kaari Kinyua in Nairobi, Kenya (26th August 2016)
[195] ACCA Global, "CSR Strategy and Strategic CSR" (2016) <www.accaglobal.com> Accessed on 21/07/2016.

sustainability, giving back to community and stakeholder engagement. The environmental and stakeholder engagement fall into the stakeholder theory while giving back to community fall under the shareholder theory.

The above analysis can be illustrated as follows:


CODES
CATEGORIES
THEMES
THEORIES
Planting trees
Constructing gabions
Environmental
Environmental sustainability
STAKEHOLDER
Donations
Charity
Funding hospitals
Scholarship /Education sponsorship
Donations
Giving back to the community
SHAREHOLDER
Employee empowerment
Corporate presence
Economic empowerment
With stakeholders
Stakeholder engagement
STAKEHOLDER

2.4 Conclusion

This Chapter has analyzed some of the Corporate Social Responsibility strategies businesses can adopt to become more socially responsible. The highlighted strategies should not be seen as the best a company can do and companies are encouraged to be innovative and creative in expanding their Corporate Social Responsibility strategies. Corporations are also encouraged not to belittle Corporate Social Responsibility (by considering it only as philanthropy) but consider making it part of their strategic plan that can help realize its objectives.

CHAPTER THREE

REGULATION OF CORPORATE SOCIAL RESPONSIBILITY

Having discussed various Corporate Social Responsibility strategies in the previous chapter, this chapter will look at how these strategies can be achieved. It will address the need for regulation of Corporate Social Responsibility activities to achieve meaning Corporate Social Responsibility by addressing the two forms of regulation of Corporate Social Responsibility; self-regulation and government regulation and explaining why government regulation is regarded as the most appropriate. This Chapter will also analyze the responses in favor of or against government regulation gathered from the fieldwork.

3.1 Contextual Background

Adoption of Corporate Social Responsibility is characterized as voluntary, business going beyond what law requires.[196] This theme of voluntariness of Corporate Social Responsibility is retained by majority of the countries. Therefore, it is argued that regulation of Corporate Social Responsibility by making it compulsory would remove the voluntary aspect of Corporate Social Responsibility making it less meaningful.[197]

The voluntary adoption of Corporate Social Responsibility by companies is paradoxical in context of companies that are seen to be stronger in many ways than nation states therefore demanding effective government control over their activities.[198] The question then becomes, why would businesses commit themselves voluntarily to going beyond the requirements of the law? It has been argued that business will only do so if Corporate Social Responsibility is economically driven and feeds into the company's profits and Corporate Social Responsibility is rewarded by

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[196] Doreen McBarnet, *"Corporate Social Responsibility; Beyond the Law, Through the Law, for Law; the Corporate Accountability*" (2009) University of Edinburgh School of Law, Working Paper No. 2009/03 at p. 11. [Available at SSRN:http://ssrn.com/abstract=1369305 or http://dx.doi.org/10.2139/ssrn.1369305] accessed in 7/06/2016.

[197] Ibid.

The UK government had a major review of its Company Law in 2001, in its review it underlined this approach by opting to retain CSR as a voluntary matter rather than making it a direct legal obligation and the theme has since been reiterated with the Minister of Energy and Corporate Responsibility, Stephen Timms, describing CSR as "going beyond legal requirements".

[198] Anderson and Cavanagh in Brian Poach, *"Corporate Power in a Global Economy"* (2007) Global Development and Environment Institute, Tufts University, at p. 7. [Available at www.ase.tufts.edu] accessed on 8/04/2016.

Of the world's 100 largest economies, 51 are companies while only 49 are countries. General Motors is now bigger than Denmark, Daimer Chrysler is bigger than Poland, Royal Dutch Shell is bigger than Venezuela, IBM is bigger than Singapore and Sony is bigger than Pakistan.

financial markets.[199] Companies will also not engage in voluntary Corporate Social Responsibility if it means prioritizing the interests of the stakeholders over those of the shareholders, spending the shareholder's money without a guarantee of return of the investment.[200] Corporate Social Responsibility in this context is seen as management acting "ultra vires" by going beyond its duties to shareholders.[201] It is therefore misleading to describe Corporate Social Responsibility as voluntary.[202]

3.2 Forms of Regulation of Corporate Social Responsibility

3.2.1 Self-Regulation

Self-regulation is referred to as "*the rules which govern behavior in the market that are developed, administered and enforced by the people or their direct representatives whose behavior is governed*"[203]. It involves participants of a particular market sector or industry who decide to voluntarily honor rules set for benefit of the participants.[204] There is limited government involvement in market mechanisms in this form of regulation.

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[199] Peter Franketal, *"Corporate Social Responsibility- a PR invention?"* (2001) Corporate Communications: An International Journal Vol 6, No.1 at p.19. [Available at http://www.emerald.library.com/ft] accessed on 6/06/2016
Most of CSR is motivated by a desire for an eventual return, a more compliant workforce, the smoother granting of planning permission, more amenable customers, or in the jargon of today's corporate affairs manager "granting a license to operate" or "reputational assurance".

[200] Doreen McBarnet, *"Corporate Social Responsibility; Beyond the Law, Through the Law, for Law; the Corporate Accountability"* (2009) University of Edinburgh School of Law, Working Paper No. 2009/03 at p. 22. [Available at SSRN:http://ssrn.com/abstract=1369305 or http://dx.doi.org/10.2139/ssrn.1369305] accessed in 7/06/2016.
See also The Economist, 22 January 2005, CSR survey supplement at p.8, *"Corporate Philanthropy is charity with other people's money…when Robin Hood stole from the rich to give to the poor, he was still stealing…he was still a bandit and less of one, arguably than the vicariously charitable CEO, who is spending money taken from people who have placed him in a position of trust to safeguard their property"*.

[201] Ibid at p.23
See also *Dodge V. Ford Motor Company*, 170 NW 668 (1919). Henry Ford wanted to invest the retained earnings of the company back into the company rather than distribute it to the shareholders. The intention was to plough back the profit to make cheaper cars and increase employment. The Dodge brothers who were minority shareholders brought a suit against the company alleging that the intention was to benefit employees and consumers at the expense of shareholders. The court held that the business of the corporation is organized around and carried out primarily for the benefit of the shareholders.

[202] Ibid at p.12

[203] National Consumer Council (UK), "Modes of Self-regulation; An Overview of Models in Business and Professions" (2000). [Available at www.talkingcure.co.uk/articles/ncc_self_regulation.pdf] accessed on 7/06/2016

[204] Ibid.

Self-regulation is used by industries to respond to lack of laws/regulations on a particular issue or the risk of unwarranted government regulation.[205] Business utilizes self-regulation to protect consumers by increasing public trust.[206] Some argue that self-regulation substitutes for governments where they lack capacity while others argue that it compliments government efforts by contributing to regulatory initiatives.[207]

Self-regulation may take the form of unilateral conducts of conduct, customer charters, unilateral sectorial, negotiated, recognized, official and guidance and legal codes.[208] Unilateral codes of conduct involve individual business adopting and implementing specific policies which amount to self-restraint conduct.[209] Customer charters involve an individual business having a formal aspect of its dealings with its customers to ensure it delivers quality and satisfactory services to its customers.[210] Unilateral sectorial codes include sets of rules unilaterally adopted by a trade or profession.[211] Negotiated codes involve codes negotiated through stakeholder involvement between industry bodies on one side and the government or consumer organizations on the other.[212] Recognized codes include codes of professionals, for example, codes for lawyers or doctors.[213] Official codes and guidance are codes issued by a government department to regulate a specific business sector.[214] Legal codes involve codes created by government but which lack full force of conventional law.[215]

In terms of self-regulation of Corporate Social Responsibility, codes may be adopted by a specific industry to govern how the participants conduct Corporate Social Responsibility. These

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205 Daniel Castro, "Benefits and Limitations of Industry Self-Regulation for Online Behavioral Advertising" (*The Information Technology and Innovation Foundation* 2011) at p.3 [Available at www.itif.org/files/2011-self-regulation-online-behavioural-advertising.pdf] Accessed on 7/06/2016

206 Ibid.

207 Virginia Haufler, "Beyond Government: Business Self-regulation in International Affairs" (*Carnegie Endowment for International Peace* 1998) [Available at carnegieendowment.org/1998/10/06/beyond-government-business-self-regulation-in-international-affairs] accessed on 7/06/2016

208 National Consumer Council (UK), " Modes of Self-regulation; An Overview of Models in Business and Professions" (2000)at p.6. [Available at www.talkingcure.co.uk/articles/ncc_self_regulation.pdf] accessed on 7/06/2016

209 Ibid at p.7

210 Ibid at p.8-9

211 Ibid at p.10

212 Ibid at p.11

213 Ibid at p.11

214 Ibid at p.14

215 Ibid at p.15

codes are mostly adopted on a voluntary basis.[216] It may involve business coming up with its own internal policies on Corporate Social Responsibility that strictly bind the company.[217]

3.2.1.1 Benefits and Limitations

Self-regulation has many benefits. First it reduces the threat of regulation by the government. It provides efficient regulation as it caters to the needs of the specific industry therefore reducing chance of inefficiency within the industry.[218] Self-regulation promotes innovation and competition within an industry.[219] It is also faster as rule-making; enforcement and punishment for non-adherence are carried out by the same body.[220] It is more flexible then government regulation as it is more responsive to change; guidelines evolve with time and the industry experts can regularly review them to keep up with the changes.[221] It creates rules that are easily accepted by businesses because the rules are created by peers and therefore there is a sense of respect.

On the other hand, there are various limits to self-regulation. It may lack public confidence and the public may be skeptical about the ability of the industry to enforce the rules.[222] There may also be perceived doubts on the ability of the industry to represent the wellbeing of its members and those of consumers or general public at the same time.[223] There may be a multiple set of rules within one industry therefore creating confusion and making it difficult for the members to commit themselves to any of the rules. Members of a specific industry may not take the rules seriously and may not abide by them due to lack of punitive measures. Self-regulation requires commitment from all industry participants without which it becomes ineffective. Finally self-

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[216] Maggie Opondo, *"Emerging Corporate Social Responsibility in Kenya's Cut Flower Industry"* Department of Geography and Environmental Studies, University of Nairobi. [Available at www.unisa.ac.za/contents/colleges/col/econ_man_science/occ/docs/opondo.pdf] Accessed on 7/06.2016

For instance the Code of Practice adopted by the Cut-flower industry in Kenya which deals with employment insecurity, union membership, communication between stakeholders, wages among other issues.

[217] An example would be the Safaricom CSR Policy available at www.safaricom.co.ke.

[218] Daniel Castro, *"Benefits and Limitations of Industry Self-Regulation for Online Behavioral Advertising*" (*The Information Technology and Innovation Foundation*, 2011) at p.5 [Available at www.itif.org/files/2011-self-regulation-online-behavioural-advertising.pdf] Accessed on 7/06/2016

[219] Ibid.

[220] Ibid.

[221] Ibid.

[222] National Consumer Council (UK), " Modes of Self-regulation; An Overview of Models in Business and Professions" (2000)at p.25. [Available at www.talkingcure.co.uk/articles/ncc_self_regulation.pdf] accessed on 7/06/2016

[223] Ibid.

regulation only covers those within the industry and does not apply to non-members while it is often those outside the industry that cause problems.[224]

In Kenya, there is self-regulation of Corporate Social Responsibility by corporations. Self-regulation takes the form of internal controls set up by individual corporations or their parent company that direct the manner in which Corporate Social Responsibility activities are carried out. In essence, corporations are left to their own mechanisms on issues of Corporate Social Responsibility. This approach gives corporations the freedom and flexibility to adopt Corporate Social Responsibility making this form of regulation convenient for corporations.

Self-regulation may be a convenient from of regulation of Corporate Social Responsibility to most businesses but is it sufficient? Doreen McBarnet[225] in arguing against sufficiency of self-regulation of Corporate Social Responsibility asks, "how many companies are adopting voluntary Corporate Social Responsibility policies? Does self-regulation deal with the significant variations in uptake of Corporate Social Responsibility? Are individual Corporate Social Responsibility guidelines in practice? And are Corporate Social Responsibility policies implemented and enforced under self-regulation?[226]" These questions will be addressed by looking at government regulation as a form of regulation.

3.2.2 Government Regulation

Government regulation refers to laws emanating from the government that control the way that a business can operate.[227] Government regulation may be adopted as a government measure to correct some market failure.[228] Government assumes that the market is incapable of fixing the failure, so it steps in to ensure efficiency of the market and protect the public.[229] Government

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[224] Ibid at p.24

[225] Doreen McBarnet, *"Corporate Social Responsibility; Beyond the Law, Through the Law, for Law; the Corporate Accountability"* (2009) University of Edinburgh School of Law, Working Paper No. 2009/03 at p. 25-26. [Available at SSRN:http://ssrn.com/abstract=1369305 or http://dx.doi.org/10.2139/ssrn.1369305] accessed in 7/06/2016.

[226] McBarnet n30

[227] Dictionary.cambridge.org/us/dictionary/English/government-regulation Accessed on 8/06/2016

[228] Kevin Guerin, *Encouraging Quality Regulation: Theories and Tools* (Working Paper 03/24 2003) *New Zealand Treasury*. [Available at www.treasury.gov.nz/publications/research-policy/wp/2003/03-24] Accessed on 8/06/2016

[229] Ibid.

It is based on the public interest theory which predicts how public interest is translated through political institutions into a decision and who will be regulated and who will receive the benefits or bear the costs of the regulation.

regulation also seeks to serve the interests of those regulated as a response to interest group demands.[230] In this case regulation is required by the sector and is designed to benefit the sector.

In light of Corporate Social Responsibility, government regulation is required because of the inadequacy of voluntary corporate action. John Ruggie[231] argues that compliance efforts in relation to Corporate Social Responsibility cannot succeed without government intervention.[232] The same sentiments are echoed by various international groups, for instance, Friends of the Earth group note that;

> We remain concerned that CSR may be used as a convenient excuse by companies to undermine necessary legislation and regulation that supports sustainable development…While CSR may be valuable in terms of promoting better corporate behavior it can never be seen as an alternative to good public policy and legislation…Voluntary commitments are hardly the basis for ensuring responsible corporate behavior.[233]

Government regulation has been hailed as the solution to the effectiveness of voluntary Corporate Social Responsibility. While voluntary Corporate Social Responsibility leads to market driven Corporate Social Responsibility which is good, however, its voluntary nature cannot be a substitute for the law.[234] Only government regulation leads to a systematic impact because it is enforceable against all businesses, it is fairer as it levels the playing field for all businesses and it has legitimacy.[235]

Two assumptions are made about government regulation of Corporate Social Responsibility that undermine it. First, that Corporate Social Responsibility is a smoke screen for deregulation and possible window dressing for irresponsible behavior.[236] Under this view corporations actively shape Corporate Social Responsibility in order to avoid regulation and decrease its chances of delivering social reform.[237] The second assumption is that Corporate Social Responsibility

[230]Ibid.
[231] UN Special Representative for Business and Human Rights.
[232] Remarks at the forum on CSR, Bamberg, Germany, 14th June 2006
See also McBarnet (n30) at p.28
[233] Friends of the Earth, December, 2001, at p.2
[234]D. Vogel, *"The limits of the Market for Value: Ethical Corporation",* September 2005 at p.46
[235]Doreen McBarnet, *"Corporate Social Responsibility; Beyond the Law, Through the Law, for Law; the Corporate Accountability"* (2009) University of Edinburgh School of Law, Working Paper No. 2009/03 at p. 46. [Available at SSRN:http://ssrn.com/abstract=1369305 or http://dx.doi.org/10.2139/ssrn.1369305] accessed in 7/06/2016.
[236] Jean Pascal Gond, Nahee Kong and Jeremy Moon, *"The Government of Self-Regulation: On the Dynamics of Corporate Social Responsibility"* (2011) 40 Economy and Society 640. [Available at http://dx.doi.org/1080/03085147.2011.607364] Accessed on 30/10/2015
[237] Ibid at p.5

involves going beyond the law.[238] This view considers Corporate Social Responsibility as a form of self-regulation which exists alongside government rules thus the government and Corporate Social Responsibility co-exist but have no relationship and therefore the government cannot interfere in matters of Corporate Social Responsibility.[239]

3.2.2.1 Forms of Government Regulation of Corporate Social Responsibility

Government regulation of Corporate Social Responsibility may take the following forms;

- **"Corporate Social Responsibility as facilitated by the government**- Governments facilitate Corporate Social Responsibility through endorsements which could be in the form of speeches and other means of lending their support to businesses' contributions to society. Such modes of facilitation do not necessarily rely on any form of legal development.[240]
- **Corporate Social Responsibility as partnership with the government**- Governments partner with corporations to promote Corporate Social Responsibility.[241] Partnership can occur with individual companies or with business associations. Governments bring fiscal and regulatory capacity whereas companies bring their networks, employees and knowledge to bear in addressing problems. This partnership also involves civil society that brings their understanding of social expectations and of social problems.[242]
- **Corporate Social Responsibility as mandated by the government**- This obviates corporate discretion. First governments use "soft law[243]" to encourage Corporate Social Responsibility. Regulation is used in various ways which falls short of coercion and punishment.[244] Second, a number of governments have underpinned various regulations with the rhetoric of Corporate Social Responsibility in order to legitimize these regulations. Third, legal frameworks have been mobilized proactively by NGOs in ways

[238] Ibid at p.6
[239] Ibid.
[240] Ibid.
[241] This is especially the case with developing countries and often in the extractive process such as the oil industry in Angola or the mining industry in the Philippines.
[242] Gond, Kang and Mond (n236)
[243]Soft law refers rules that are neither strictly binding in nature nor completely lacking legal significance. Definition available at https//www.definitions.uslegal.com
[244] For example, a number of governments have required companies to report their social, environmental and ethical impact without specifying the particular behaviour they deem responsible.

that turn initially "voluntary" Corporate Social Responsibility initiatives or codes of conduct into legally binding obligations. Here, control of Corporate Social Responsibility lies principally with the government although co-operation with the law and NGOs can also be a factor.[245]

- **Corporate Social Responsibility as a form of government**- In this mode business initiatives do not necessarily complement government's action but are a substitute for this action. Corporations substitute for government in terms of both societal roles and over the definition and control of their own initiatives".[246]

3.2.2.2 Benefits and Limitations

The benefits of government regulation include that it takes the command and control approach where the enacted laws are implemented by authorized agencies and enforced by the courts.[247] The laws enacted apply to all and not selectively as in self-regulation. The laws also have sanctions in case of disobedience unlike self-regulation where disobedience is rarely reprimanded. Government regulation also prevents market failure and allocates resources efficiently to maximize social welfare.[248] It is also concerned with balancing the protection of consumers' interests and that of business without having one at expense of the other. It also levels the playing field for all businesses by coming up with consistent rules that bind all businesses.[249]

The limitations of government regulation include that development and enforcement process may be very expensive and protracted.[250] It is also argued that there may be inconsistent and inadequate implementation and enforcement especially in developing countries due to insufficient funding.[251] With the rapid technological changes, it is hard for the law to keep up and

[245] Gond, Kang and Moon (n41)
[246] ibid
[247] Global Environmental Health in the 21st Century
[248] Bator Francis M, *"The Anatomy of Market Failure"* (1958) the quarterly journal of economics 351-379
[249] HF Johnson, *"Government Regulation of Business: Golden Parachutes Revisted"* (1998) 23 Wake Forest Law Review.
[250] Global Environmental Health in the 21st Century
[251] Ibid.

it is always a step behind in addressing certain issues.[252] Finally, government regulation may be counter-productive and end up hurting the same businesses that it was meant to protect.[253]

This study adopts the view that government regulation is a more appropriate form of regulation of Corporate Social Responsibility because of its coercive nature. The rationale for this view is that majority of the aspects of corporations are controlled by government. Laws are enacted on the process of incorporation of a company, structure of a company and management and control of a company. It is therefore questionable why Corporate Social Responsibility should be subjected to the free will of the corporations. Government through regulation can serve to ensure that corporations are socially responsible.

3.2.2.3 Why Should the Government be interested in Corporate Social Responsibility?

The government is generally concerned with Corporate Social Responsibility because of its relationship with the society. Corporate Social Responsibility directly impacts citizens of any nation. The government encourages Corporate Social Responsibility because it can act as a substitute for government effort or add to government effort.[254] Corporate Social Responsibility activities assist the government to meet societal needs.[255] Corporate Social Responsibility activities can also offer a competitive advantage for a country.[256]

Today, government alone cannot solve societal problems; the private sector and Civil Society have to contribute towards resolving some of the problems. This comes from the realization that companies today are dominant institutions wielding significant power and therefore they have to assist to improve the welfare of humankind.[257] It can no longer be claimed that the business of

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[252] Ibid.

[253] David Macaray, "We Need More Government Regulation of Businesses…Not Less*",Huffpost Business* (19 August 2013). [Availabe at www.huffingtonpost.com/david-macaray/we-need-more-government-r-b-3456640.html] Accessed on 9/06/2016

[254] Jeremy Moon, *"Government as the Driver of Corporate Social Responsibility"* 2004 ICCSR Research Paper Series No. 20-2004-ISSN 1479-5124 at p.5. [Available at http://www.nottingham.ac.uk/business/ICCSR] Accessed on 6/06/2016

[255] Global Environmental Health in the 21st Century, *"From Government Regulation to Corporate Social Responsibilities"* National Institute of Medicine (US), Roundtable on Environmental Health Sciences, Research and Medicine, National Academies Press (2007), Workshop Summary [Available at www.nchi.nlm/nih.gov/books/NBK53982] Accessed on 6/06/2016

[256] Ibid.

For instance in the UK the approach taken to CSR has led to institute pension disclosure laws, support ethical trading initiatives and improved standards, as a result UK has gained competitive advantage over other countries in terms of service provision.

[257] Ibid.

business is business.[258] It is also important to note that markets and politics cannot be separated in reality. The government in a sense controls the governance of markets.[259]

However, suggestions have been made that a middle ground can be reached between voluntary Corporate Social Responsibility and government regulation. This is by way of creating partnerships between the government and companies/organizations. The government can play the role of an active partner that supports and promotes Corporate Social Responsibility. In doing so the government is expected to set an example for corporations. Reinhard Steurer[260] suggests that the government can play the following roles in such a partnership;

a) "*Raise awareness and build capacities for Corporate Social Responsibility. Due to the voluntary character of Corporate Social Responsibility, management activities and corporate performances essentially depend on how social management and environmental concerns are perceived among companies and stakeholders. Thus an important activity for government is to raise awareness for Corporate Social Responsibility and build the respective capacities among both groups. In Kenya, the government can do this by sensitizing companies and stakeholders on the significance of Corporate Social Responsibility and its overall impact on both the society and the corporations. A starting point would be publicizing the recently enacted Companies Act 2015 and the Mwongozo Code for State Owned Enterprises (SOEs) that makes provisions for Corporate Social Responsibility.*
b) *Improve disclosure and transparency. Government can play a key role in ensuring its entities disseminate quality reports on Corporate Social Responsibility. Such information could be used by investors, suppliers, regulators and customers in deciding whether to do business with the entity.*

[258] Ekomes Mertens, *"Milton Friedman and Social Responsibility: An Ethical Defense of the Stockholder Theory"* 2013, Dissertation for Masters Thesis in Philosophy, University of Oslo at p.20.
See also Milton Friedman, "The Social Responsibility of Business is to Increase its Profits" *New York Times Magazine* (13 September 1970)
[259] Jean Pascal Gond, Nahee Kong and Jeremy Moon, *"The Government of Self-Regulation: On the Dynamics of Corporate Social Responsibility"* (2011) 40 Economy and Society at p.647. [Available at http://dx.doi.org/1080/03085147.2011.607364] Accessed on 30/10/2015
[260] Reinhard Steurer, *The Role of Governments in CSR: Characterizing Public Policies on CSR in Europe* (Discussion Paper 2, 2010) Institute of Forest, Environmental and Natural Resource Policy InFER.
Available at <papers.ssrn.com/so/3/papers.cfm?abstract-id=2342120> accessed on 24/07/2016

c) *Facilitate socially responsible investment (SRI). By considering the economic, social, environmental and other ethical criteria in investment decisions, SRI merges the concerns of a broad variety of stakeholders with shareholder interests. Fostering SRI helps to embed Corporate Social Responsibility in the functioning of shareholder capitalism.*

d) *Leading by example. The government can be in fore front regarding socially responsible practices that foster Corporate Social Responsibility. This can be applied in;*

   a. *Making public procurement more sustainable.*

   b. *Applying socially responsible investment (SRI) principles to the management of public funds.*

   c. *Reporting on the social and environmental performance of government bodies".*

3.3 How can the government regulate Corporate Social Responsibility in Kenya?

Corporate Social Responsibility is not a new concept in Kenya, many businesses carry out social responsibilities through their internal Corporate Social Responsibility policies. However, when one looks beneath the commitments and popularization of Corporate Social Responsibility, it is obvious that Corporate Social Responsibility is not being taken seriously. To engage in effective Corporate Social Responsibility a firm needs to have a basic description of Corporate Social Responsibility; an understanding of the issues surrounding social responsibility and identify stakeholders the firm has a responsibility to.[261] Enactment of laws on Corporate Social Responsibility can help identify these two scopes of Corporate Social Responsibility.

Laws give business a reference point. They create a common set of benchmarks to ensure attainment of Corporate Social Responsibility. Although enactment of laws may be viewed by business as the government interfering with the market mechanism, it's the only way to ensure that Corporate Social Responsibility is no longer carried out as a public relations initiative and that the various needs of stakeholders are addressed by the various Corporate Social Responsibility strategies.

[261] Archie B Carroll, *"A Three Dimensional Conceptual Model of Corporate Performance"* 1979 Academy of Management Review, Vol 4 at p.504. [Available at https://www.researchgate.net/profile/Archie-Carroll/publication/239354892] Accessed on 9/06/2016

In Kenya there is no law that explicitly deals with Corporate Social Responsibility. The Companies Act[262] at Section 144 (1) (c) and (d) provides that a company shall have regard to the need to maintain the company's relationship with its stakeholders and the effect of its operations on the community and the environment. The Act does acknowledge the need for companies to recognize its stakeholders but does not address how the company can do this. Section 655 of the Act[263] requires directors to include in their report a business report which shall include information on the impact of the firm's activities on the environment[264], its employees[265] and the community[266].

The Companies Act which is the fundamental legislation governing companies fails in advocating for corporate social responsibility. As evidenced above the Act does not make specific provisions for corporate social responsibility but only suggests that companies should act in a socially responsible manner. These suggestions are likely not to suffice. More stringent provisions are required to streamline the uptake of Corporate Social Responsibility across all corporations and ensure compliance.

The Act should have specific provisions on Corporate Social Responsibility which provisions should include a definition of the term, activities that comprise Corporate Social Responsibility, the minimum amount of money to be channeled to Corporate Social Responsibility and whether the said money should be ejected from the profits of the business or the capital and reporting or disclosure on social responsibility of the corporation for each financial year.

In further regulation of Corporate Social Responsibility, the Act can look into the structure of companies. Companies are managed by Boards of Directors. It is the role of directors to manage the company's business. In execution of this mandate, the Board of Directors delegates its powers to committees of the board. Committees of the board deal with specific issues which the board is responsible for. The Board, being the organ of the company that directs and controls the affairs of the company, should be mandated with social responsibility of a corporation. To this end, the Companies Act should make a provision requiring the Boards of Directors to have a

[262] The Companies Act, 2015, *Government Printers*, Nairobi.
[263] The Companies Act, 2015
[264] Section 655 (4) (b) (i) of the Companies Act, 2015
[265] Section 655(4) (b) (ii) of the Companies Act, 2015
[266] Section 655(4) (b) (iii) of the Companies Act, 2015

Corporate Social Responsibility Committee as one of the board committees. Introduction of a Corporate Social Responsibility Committee will allow the board to bring in non-executive or independent directors who may have expertise in the area of social responsibility. This Committee will be tasked with coming up with company policies and strategies on Corporate Social Responsibility, ensuring compliance with the law and preparing an annual report on the social responsibility of the company.

The above recommended provisions on regulation of Corporate Social Responsibility may be replicated in the State Corporations Act which governs state owned corporations.

3.4 Conclusion

This Chapter has discussed the two forms of regulation of Corporate Social Responsibility with intent of establishing overall advantages of government regulation over self-regulation. While the norm has been to view Corporate Social Responsibility as a voluntary initiative, it is now time to examine the positive impact that government regulation would have on Corporate Social Responsibility in Kenya.

Kenya needs to enact laws on Corporate Social Responsibility to address the variations in Corporate Social Responsibility among business and come up with a common definition of Corporate Social Responsibility, set of activities to be regarded as acting in socially responsible ways and elaborate on how Corporate Social Responsibility activities are to be conducted and finally ensure companies undertake Corporate Social Responsibility activities.

CHAPTER FOUR

COMPARATIVE ANALYSIS ON REGULATION OF CORPORATE SOCIAL RESPONSIBILITY IN DIFFERENT COUNTRIES

This chapter will endeavor to carry out a comparative study on government regulation of Corporate Social Responsibility in other jurisdictions. The jurisdictions to be studied are the Republic of South Africa (RSA) and India. These countries were picked for varied reasons. RSA is within the continent and thus may share some historical and cultural practices with Kenya. Also, the RSA has been hailed for its comprehensive legal framework and Kenya has borrowed some of its legal provisions from the RSA. India on the other hand, shares the same colonial ties as Kenya but despite these India has grown to become a major economy in the world. Secondly, India is the first country to enact legislation that makes Corporate Social Responsibility a mandatory requirement. Other countries such as Nigeria and Vietnam will be studied although briefly. The choice of Nigeria and Vietnam is because both countries have found unique ways to promote the uptake of Corporate Social Responsibility by corporations within their jurisdiction that does not necessarily involve hard regulation.

This chapter will look at the legal frameworks of these countries and analyze provisions that can be found in the laws of these countries and link these provisions to advancement of Corporate Social Responsibility in these countries. It will also seek to compare the practices of these countries with what we have locally to see whether Kenya can borrow some lessons from these countries.

4.1 The Republic of South Africa (RSA)

In the Republic of South Africa (RSA) the definition of Corporate Social Responsibility[267] has been significantly influenced by colonization and apartheid.[268] This history that includes racial discrimination, structural unemployment, poverty , low levels of education and training and the HIV/AIDS epidemic has created a multifaceted understanding of Corporate Social Responsibility

[267]A definition offered for CSR in South Africa is that of operating an organization in a manner that takes responsibility for the social and environmental impact of the organization. It involves developing policies and practices that integrate practices into daily business operations.

[268] Martin Arendoff, "Corporate Social Responsibility; Then, Now and Impact to businesses in South Africa" (2015) Available at https://www.linkedin.com/pilse/corporate-social-responsibility-now-impact-south-africa-arendoff accessed on 11/07/2016

and shaped Corporate Social Responsibility related activities in the RSA.[269] Most Corporate Social Responsibility activities have therefore for the longest time focused on transformation and affirmative action, education and skill development.

The rationale for Corporate Social Responsibility in the RSA is the realization that the government cannot be the exclusive change agent and that corporations cannot operate in isolation to the community; they need to participate in social and community projects that depict good governance beyond the work they perform in their offices.[270] Corporations in RSA have shifted their vision from shareholder value satisfaction to value enhancement that considers other stakeholders.

4.1.1 Legal Framework for Corporate Social Responsibility in the Republic of South Africa

Despite common assumption that Corporate Social Responsibility is about voluntary initiatives, legislation has been key in the development of Corporate Social Responsibility in the RSA. RSA unlike most developing states has legislated on social issues due to the understanding that business voluntarism will not always lead to the desired effects.[271] Since its independence in 1994, the RSA has embarked on various legislative developments that have shaped Corporate Social Responsibility although it is still argued that Corporate Social Responsibility is not a key focus area for the government.

In 1997, Reverend Leon H. Sullivan launched the Sullivan Principles that were geared towards equal treatment of employees by international businesses based in the RSA. [272]These principles were re-launched in 1999 at the UN as the Global Sullivan Principles of Corporate Social Responsibility.[273] The objectives of the principles can be summarized as "*support economic, social and political justice by companies where they do business, to support human rights and to encourage equal opportunity at all levels of employment including racial and gender diversity, to*

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[269]Ibid.

[270] In On Africa IOA, "Corporate Social Responsibility in South Africa: More than nice intention, Policy, Law, Economics and Politics" (2011)
Available at www.polity.org.za/article/corporate-social-responsibility-in-south-africa-more-than-a-nice-intention-2011-09-12 accessed on 11/07/2016

[271] In On Africa IOA, "Corporate Social Responsibility in South Africa: More than nice intention, Policy, Law, Economics and Politics" (2011)
Available at www.polity.org.za/article/corporate-social-responsibility-in-south-africa-more-than-a-nice-intention-2011-09-12 accessed on 11/07/2016

[272] Freemantle & Rockey, 2005

[273] Ibid

train and advance disadvantaged workers and to assist with greater tolerance and understanding among people thereby improving life for workers and the community with dignity and equality"[274]. Organizations that endorsed these principles were required to develop and implement company policies that depicted commitment to the principles.

The RSA Companies Act 61 of 1973 does not make Corporate Social Responsibility mandatory; however, the country's policy document and the King II and III reports[275] explicitly address the need and relevance of considering stakeholders. The King II report (2002) emphasized on going beyond financial obligations and including recommendations on broader stakeholder interests.[276] It also integrated sustainability reporting as part of the publications made by corporations and since its publication corporations have focused on effect of their activities on the community and the environment as part of their performance. It should however be noted that the report was not enacted into law and was enforced on a "comply or explain" basis. The King III report was published in 2009 and emphasized relevance of good governance among companies or

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[274] Ibid

The principles in summary emphasize support for universal human rights, equal opportunities, respect for freedom of association, levels of employee compensation, training, health and safety, sustainable development, fair competition and working in partnerships to improve quality of life.

See also Liesl Van Den Ende, *"Corporate Social Responsibility in South Africa: Fact or Fiction*" (2004) A dissertation submitted in partial fulfillment of the requirements for the degree of Magister Commercii in Business Management, Faculty of Economic and Management Sciences, Rand Afrikaans University. P45-46

[275] In On Africa (IOA) "Corporate Social Responsibility in South Africa: More than nice intention, Policy, Law, Economics and Politics" (2011)

Available at www.polity.org.za/article/corporate-social-responsibility-in-south-africa-more-than-a-nice-intention-2011-09-12 accessed on 11/07/2016

The King Reports on Corporate Governance set out a wide range of recommendations to encourage organizations to act ethically and to promote the highest standards of corporate governance

[276] Liesl Van Den Ende, *"Corporate Social Responsibility in South Africa: Fact or Fiction"* (2004) A dissertation submitted in partial fulfillment of the requirements for the degree of Magister Commercii in Business Management, Faculty of Economic and Management Sciences, Rand Afrikaans University. P45-46

organizations.[277] It highlighted seven good corporate governance elements that any corporation should adopt including social responsibility.[278]

The RSA government has also enacted the Black Economic Empowerment (BEE), 2003. The BEE Act mandates RSA based companies to take into account all stakeholders when conducting their activities in order to eradicate inequalities inherited from the apartheid regime.[279] The provisions of the BEE Act are not applied on a voluntary basis. Therefore, companies that are in violation of its provisions receive negative ratings that may compromise their operations in the country.[280] The Act does not only seek to encourage black participation or address racial imbalances but also encourages social responsibility programs among corporations.[281]

Another aspect of Corporate Social Responsibility in the RSA is the Johannesburg Stock Exchange Social Responsibility Index (JSE SRI). The JSE SRI was launched in 2004. It informs investors and market agents corporate sustainability policies and practices of listed companies and encourages investors to support "friendly" companies involved in social and environmental transformation.[282] Organizations have to satisfy certain requirements before being allowed to list on the Social Responsibility Index which include environment management, enforcement of human rights and maintenance of stakeholder relationships.[283] The Social Responsibility Index aims to;

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[277] Peters A. Hendricks and Ricardo G. Wyngward, *"South Africa's King III: A Commercial Code Determining Standards of Conduct for Civil Society Organizations"* (2010) ICNL Vol 12 Issue 2
Available at www.icnl/org/research/journal/vol12issu2/art_1_html accessed on 11/07/2016
The Institute of Directors while emphasizing the relevance of the King III stated that "Corporate Governance is not something that exists separate from the law and it is inappropriate to unhinge governance from the law and that corporate governance practices, codes and guidelines therefore lift the bar of what are regarded as appropriate standards of conduct. Consequently, any failure to meet a recognized standard of governance albeit not legislated may render a board or individual director liable.

[278] The other six corporate governance elements include discipline, transparency, independence, accountability, fairness and responsibility.

[279] In On Africa IOA, "Corporate Social Responsibility in South Africa: More than nice intention, Policy, Law, Economics and Politics" (2011)
Available at www.polity.org.za/article/corporate-social-responsibility-in-south-africa-more-than-a-nice-intention-2011-09-12 accessed on 11/07/2016

[280] Ibid.

[281] Ibid.

[282] Ibid.

[283] Liesl Van Den Ende, *"Corporate Social Responsibility in South Africa: Fact or Fiction"* (2004) A dissertation submitted in partial fulfillment of the requirements for the degree of Magister Commercii in Business Management, Faculty of Economic and Management Sciences, Rand Afrikaans University. P45-46

a) Reflect best practices in Corporate Social Responsibility.
b) Shine a light on organizations with good Corporate Social Responsibility track records.
c) Analyze the performance of shares of these organizations.
d) Highlight financial Social Responsibility Index products.

The above discussed legal framework embodies the positive steps that have been taken by the RSA as a nation in advancing the Corporate Social Responsibility agenda.

4.2 India

Corporate Social Responsibility in India stems from its tradition of paternalistic philanthropy that involved helping the poor and disadvantaged in the society.[284] During the 19th Century, Corporate Social Responsibility was mainly conducted by industrial families that had an inclination towards charity and social problems. However, donations to these causes were not taken from the shareholder's money but rather out of the personal savings of the owners.[285] Therefore it can be said that during this period there was social responsibility by individuals and not corporations, there was little or no documentation of social responsibility initiative by corporations. As time passed there was a growing realization of the need to contribute to social activities by companies in India and they began to pay attention to the principles of social responsible behavior mostly because it was favored by the public and it indirectly increased value for a corporation.[286]

To stem the importance of Corporate Social Responsibility, there has been emphasizes that corporations should go beyond conducting themselves as good citizens. Corporations should contribute towards public welfare through various activities such as donating funds to charitable causes, using their resources, both financial and human, towards improvement of human life.[287]

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[284]Chamber of Commerce, *"Corporate Social Responsibility in India; Potential to contribute towards inclusive social development"* (2013) Global CSR Summit-An Agenda for Inclusive Growth,p1-28
Available at <www.eg.com/piblication/wLUAssets/EY-Government-and-Public-Sector-Corporate-Social-Responsibility-in-India> accessed on 13/07/2016

[285]Ibid.

[286] Dr P Chinnadurai, *"Corporate Social Responsibility and Sustainable Development"* (2015) IJMSS Vol 3 Iss02 atp.104
Available at http://ijmr.net.in/download.php?filename=H8KGRySKMg877/pdf&new=IJMSS227/feb11.pd accessed on 13/07/2016

[287]Ibid.

Judicial precedence has contributed immensely towards the uptake of Corporate Social Responsibility in India. In *K.K Baskaran V. State rep by its Secretary Tamil Nadu*[288], a case concerning the protection of financial stakeholders from fraudsters the court held;

> *"The State being the custodian of the welfare of the citizens as parens patriae cannot be a silent speculator without finding a solution for this malady. The financial swindlers, who are nothing but cheats and charlatans having no social responsibility but only a lust for easy money by making false promise of attractive returns for the gullible investors had to be dealt with strongly"*[289]

The court seemed to opine that fraudulent activities in companies are as a result of lack of social responsibility. In *Commissioner of Income Tax V. Modi Industries Ltd*[290] the court noted the importance of appreciating employees' interests and emphasized that employees' interests were now to be treated as part of Corporate Social Responsibility.[291]

In *The Tata Power Company Ltd (Transmission) V. Maharashtra Electricity Regulatory State Commission*[292], a case involving funding of Corporate Social Responsibility activities the court held that Corporate Social Responsibility expenditure was the sole responsibility of the company which expense should not be incurred by the consumers of the company.[293] In *Aam Janta V. State of Mp.Ors*[294] where five villages filed a suit against Prism Cement Ltd for pollution. The court directed the company to maintain a good relationship with all its stakeholders' particularly persons who reside in their locality and to demonstrate commitment by undertaking various

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[288] A.I.R.2011 S.C.1485 at p.4

[289] Sandeep Gopaplan, Akshaya Kamalnath, *"Mandatory Corporate Social Responsibility As a Vehicle For Reducing Inequality: An Indian Solution for Piketty and the Millennials"* (2015) Northwestern Journal of Law &Social Policy, Vol16 Issue1 at p.52
Available at <http://scholarlycommons.law.northwestern.edu/nj/sp/vol10/iss1/2> accessed on 13/07/2016

[290] (2010) 327 I.T.R (570)

[291] Sandeep Gopaplan, Akshaya Kamalnath, *"Mandatory Corporate Social Responsibility As a Vehicle For Reducing Inequality: An Indian Solution for Piketty and the Millennials"* (2015) Northwestern Journal of Law &Social Policy, Vol16 Issue1 at p.52
Available at <http://scholarlycommons.law.northwestern.edu/nj/sp/vol10/iss1/2> accessed on 13/07/2016

[292] (MANU/ET/0150/2013)

[293] Sandeep Gopaplan, Akshaya Kamalnath, *"Mandatory Corporate Social Responsibility As a Vehicle For Reducing Inequality: An Indian Solution for Piketty and the Millennials*" (2015) Northwestern Journal of Law &Social Policy, Vol16 Issue1 at p.52
Available at <http://scholarlycommons.law.northwestern.edu/nj/sp/vol10/iss1/2> accessed on 13/07/2016

[294] C.S No.35 2013

welfare measures. Further, the court observed that the company should not only strive to increase its profits but also fulfills its Corporate Social Responsibility obligation.[295]

4.2.1 Legal Framework for Corporate Social Responsibility in India

The Companies Act 1956 (now repealed) did not promote Corporate Social Responsibility. It was based on the shareholder primacy model.[296] The first time the interests of stakeholders were acknowledged was through the Kumar Mangalam Birla Committee on Corporate Governance Report of 1999.[297] Attempts were made to amend the Companies Act in 2004 to include Corporate Social Responsibility requirements, these attempts failed. In 2005, the Expert Committee on Company Law considered the interests of non-shareholders pointing out a legal framework for regulation had to balance the interests of both investors and stakeholders.[298] The government was still determined to regulate Corporate Social Responsibility and in 2009, the Ministry of Corporate Affairs issued the Corporate Social Responsibility voluntary guidelines.[299] These guidelines clarified that the Corporate Social Responsibility it contemplates is not philanthropy.[300] It focused on both Corporate Social Responsibility activities, ethical and sustainable conduct of business, human rights and rights of stakeholders.[301]

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295 Sandeep Gopaplan, Akshaya Kamalnath, *"Mandatory Corporate Social Responsibility As a Vehicle For Reducing Inequality: An Indian Solution for Piketty and the Millennials"* (2015) Northwestern Journal of Law &Social Policy, Vol16 Issue1 at p.52

Available at <http://scholarlycommons.law.northwestern.edu/nj/sp/vol10/iss1/2> accessed on 13/07/2016

296 See Anant K. Sundram & Andrew C. Inkpen, *"The Corporate Objective Revisited"* (2004) 15. ORG.SCI.3,350-363

297 N.Balasubramanan, *"Strengthening Corporate Governance in India: A Review of Legislative and Regulatory Initiatives in 2013-2014"* Indian Institute of Management Bangalore, Working Paper No.447, 2014.

Available at <http://www.iimb.ernet.in/research/sites/default/files/WP%20No.20447%20(Revised)_0pdf> accessed on 13/07/2016

The Birla Committee's recommendations were crystallised in Clause 49 of the Listing Agreement in 2000.

298 Expert Comm.On.Co.Law, Rep.On.Co.Law (2005) Available at http://www.acga-asia/org/publc/files/JJ%20/rani%20Report.pdf accessed on 13/07/2016

299 Ministry of Corporate Affairs, Government of India, "Corporate Social Responsibility Voluntary Guidelines" (2009)

Available at< http://www.mcagov.in/Ministry/latestnews/CSR_Voluntary_Guidelines-24dec2009.pdf> accessed on 14/07/2016

300 Sandeep Gopaplan, Akshaya Kamalnath, *"Mandatory Corporate Social Responsibility As a Vehicle For Reducing Inequality: An Indian Solution for Piketty and the Millennials*" (2015) Northwestern Journal of Law &Social Policy, Vol16 Issue1 at p.52

Available at <http://scholarlycommons.law.northwestern.edu/nj/sp/vol10/iss1/2> accessed on 13/07/2016

301 Ministry of Corporate Affairs, Government of India, "Corporate Social Responsibility Voluntary Guidelines" (2009)p.11-13

Available at< http://www.mcagov.in/Ministry/latestnews/CSR_Voluntary_Guidelines-24dec2009.pdf> accessed on 14/07/2016

In 2011, the National Voluntary Guidelines on Social, Environment and Economic Responsibilities of Business were issued.[302] The guidelines advocated for the conduct of business on the basis of accountability and transparency by providing quality goods, promoting welfare of employees, respecting interests of stakeholders with a focus on stakeholders who are disadvantaged or vulnerable, promoting and respecting human rights, respecting and protecting the environment, supporting inclusive growth and equitable development.[303]

The above guidelines amended the listing requirements introducing the SEBI Circular on Business Responsibility Report 2012 which required the top 100 listed entities to include business reports along with their annual reports.[304] The rationale was that having been funded by the public, listed companies should disclose how they have catered for their stakeholders.[305] The listing requirements also tasked companies with reporting the total amount they have spent on Corporate Social Responsibility after tax each year and the Corporate Social Responsibility activities they have engaged in.

The turning point for Corporate Social Responsibility in India was in 2013 when the Companies Act, 2013[306] was enacted. Section 135 of the Act made Corporate Social Responsibility mandatory and the provision is applicable to all companies that have a net worth of at least rupees 500 crore (approximately eight million dollars) or those that have an annual turnover of at least rupees 1,000 crore (approximately eight hundred thousand dollars)[307]. Such companies are mandated to spend at least two percent (2%) of their average net profits in the preceding three financial years on Corporate Social Responsibility activities.[308] Section 135(1) of the Act provides that the board of directors of companies covered under these provisions must constitute a Corporate Social Responsibility committee that shall be charged with developing the

302 MINISTRY OF CORPORATE AFFAIRS, GOVERNMENT OF INDIA, NAT'L VOLUNTARY GUIDELINES ON SOCIAL, ENVTL & ECON.RESPONSIBILITIES OF BUS (2011)
Available at <http://www/mca.gov.in/Ministry/latestnews/National-Voluntary_Guidelines_2011_12ju/2011.pdf >accessed on 14/07/2016

303 Ibid.p.7-26

304 Circular from Sunil Kadam, General Manager, Securities and Exchange Board of India , to all Stock Exchanges (13th Aug 2012)
Available at http://www.sebi.gov.in/cms/sebi_data/attachdocs/1344915990072.pdf> accessed on 14/07/2016

305 Ibid

306 The Companies Act, 2013,No.18, Acts of Parliament, 2013

307 Ibid. Section 135(1)

308 Ibid. Section 135(5)

company's Corporate Social Responsibility policy, outlining the activities to be undertaken and the amount to be spent.

The activities that the company may engage in as part of Corporate Social Responsibility under the Act include "eradicating hunger, poverty and malnutrition, promoting preventive healthcare, promoting education and promoting gender equality, setting up homes for women, orphans and senior citizens, ensuring environmental sustainability, measures for reducing inequalities faced by socially and economically backward groups, animal welfare, protection of national heritage and art and culture, sports, measures for the benefit of the armed forces"[309]. In determining the activities to be undertaken, a corporation shall first consider the needs of the community within which it operates. There is no penalty for companies that fail to comply with the provision. A penalty is only available where the board fails to report on the Corporate Social Responsibility activities of the company.

Since the enactment of mandatory provisions on Corporate Social Responsibility, the uptake of Corporate Social Responsibility by companies in India has increased significantly. For instance, for the financial year 2015-2016, India experienced a 28% growth in Corporate Social Responsibility spending compared to the previous year.[310] The growth has been attributed to some of the internal measures that have been developed by most companies. For instance, many companies have set up specific departments or teams within the company to develop Corporate Social Responsibility strategies and goals and come up with a separate budget to support Corporate Social Responsibility programs.

Corporations have also aligned their Corporate Social Responsibility initiative with government programs that promote social welfare such as Clean India and Digital India.[311] However, corporations are encouraged when considering recipients of their initiatives to give preference to the local areas within which the corporations operate.

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[309] Ibid

[310]Dezan Shira & Associates, "*Corporate Social Responsibility in India*" January 11th 2017, India Briefing. Available at https://www.india-briefing.com/news/corporate-social-responsibility-india-5511.html/, last accessed on 30/08/2018.

[311] Ibid.

India is the first country to make Corporate Social Responsibility mandatory in abide to make it more effective. It is anticipated that this approach may be successful in promoting Corporate Social Responsibility in India.

4.3 Nigeria

In Nigeria there is no specific law that addresses Corporate Social Responsibility. There are several legislations that advocate for Corporate Social Responsibility either directly or in directly. Some of these legislations include Section 279(4) of the Companies and Allied Matters Act that states that directors are to have regard to the interests of employees while carrying out their duties.[312] Indirectly, the Act requires companies to carry out social responsible activities such as environmental sustainability and embed other socially friendly policies in its constitutive documents; the Articles and Memorandum of Association.

In a move towards enacting a single law on Corporate Social Responsibility, there is a Bill on Corporate Social Responsibility presently before the Nigerian National Assembly (National Assembly of Nigeria 2012).[313] The Bill seeks to establish the Corporate Social Responsibility Commission that will formulate policies geared towards assisting communities that have been adversely affected by the activities or operations of companies.[314] The passage of the Bill will transform the practice of Corporate Social Responsibility in Nigeria. The Bills seeks to compel companies registered in Nigeria to use not less than 3.5% of their annual gross profits on Corporate Social Responsibility programmes in the locations they do their business.[315] The Corporate Social Responsibility activities are expected to include educational, cultural, environmental and economic activities. The Corporate Social Responsibility Commission under the Bill is given power to suspend the operations of any company for a minimum of 30 days for non-compliance with the proposed provisions.

4.4 Vietnam

[312] Chima Mordi, Iroye Samuel Opeyemi Mordi Tonbara, Stella Ojo, *"Corporate Social Responsibility and the Legal Regulation in Nigeria"* Economic Insights;Trends and Challenges Vol LXIV No.1 (2012)p1-8
Available at www.upg-bulletin-ro/archieve/2012-1/1%20Mordi-Opeyemi-Tonbara-Ojo-pdf accessed on 25/07/2016
[313] Ibid
[314] Ibid
[315] Osergho Associates , *Social Responsibility Bill* (2008)
Available at http://www.oseroghoassociates.com/pdf/2008-10.pdf accessed on 25/07/2016

The Vietnamese government allocated the Vietnamese Chamber of Commerce and Industry (VCCI) the mandate to deliver Corporate Social Responsibility support services to businesses.[316] In doing so the Chamber of Commerce raises Corporate Social Responsibility awareness and promotes good Corporate Social Responsibility practices. The Ministry of Labor, Invalids and Social Affairs in conjunction with other government ministries has since 2006 launched the Corporate Social Responsibility Award that recognizes organizations that are leading in Corporate Social Responsibility. As a reward the government offers tax incentives to companies that have excelled in Corporate Social Responsibility performance.

4.5 Existing Legal Framework for Corporate Social Responsibility in Kenya

There is no specific law that provides for Corporate Social Responsibility in Kenya as compared to other countries discussed above. Corporate Social Responsibility is currently practiced on a voluntary basis; corporations choose to adhere to their own set of Corporate Social Responsibility guidelines and the government cannot purport to interfere and impose sanctions for any failures or non-compliance by the corporations. However, there are laws within our legal framework that may not expressly promote Corporate Social Responsibility but are seen indirectly to enforce some elements of Corporate Social Responsibility. These laws include The Environmental Management and Coordination Act of 1999 established to provide a framework for the management of the environment; The Factories Act of 1951 which protects labor rights in industries and The Anti-Corruption and Economic Crimes Act of 2003 which requires directors not to compromise the interests of the company by accepting gifts or donations for their personal gratification.[317] The lack of regulation of Corporate Social Responsibility or the reduction of regulations for business is viewed as attracting foreign investment.[318] The Kenyan government has thus been apprehensive about imposing regulations for fear of discouraging domestic investment.

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[316] UN, *"Developing Countries; What is the scope for government action?"* Sustainable Development Innovation Briefs, (2207) Issue 1
Available at https://sustainabledevelopment.in.org/content/ accessed on 25/07/2016

[317] Judy N Muthuri and Victoria Gilbert, *'An Institutional Analysis of Corporate Social Responsibility in Kenya'* (2011) 98 Journal of Business Ethics 471. Available at http://dx.doi.org/10.1007/10551-010-0588-9 , last accessed on 30/10/2015

[318] Ibid

Recently measures have been out in place to boost Corporate Social Responsibility through legislation. The Companies Act which was ratified in 2015 has been argued to be alive to the practices and realities of business. The Act embraces "*an enlightened stakeholder view*" of the firm unlike its predecessor that took the shareholder primacy view. The enlightened stakeholder view of the firm acknowledges the interests of stakeholders in the corporations as groups of persons who are affected or affect the operations of a corporation. Section 143 (1) of the Act provides that a director is to promote success of the company by having regard to *"the long term consequences of any decision of the directors; the interests of the employees of the company; the need to foster the company's business relationships with suppliers, customers and others; the impact of the operations of the company on the community and the environment; the desirability of the company to maintain a reputation for high standards of business conduct; and the need to act fairly as between the directors and the members of the company."*[319]

Section 655 requires directors to include in their report (that they are obligated to prepare under Section 653) a business review report. In the case of a quoted (listed) company, the directors shall specify in their business review report "*the main trends and factors likely to affect the future development and position of the business of the company*[320]*; information about environmental matters*[321]*; the employees of the company*[322] *and social and community issues*[323]*; and information persons with whom the company has contractual or other arrangements that are essential to the business of the company*[324]." These provisions are the first steps towards legally demanding social accountability of corporations; however, it is important to note that there are no specific direct sanctions for companies that fail to carry out Corporate Social Responsibility. The conclusion hence is that Corporate Social Responsibility is still carried out on a voluntary basis despite these provisions. The Companies Act, 2015 neither specifies activities that comprise Corporate Social Responsibility nor the amount that corporations need to allocate towards Corporate Social Responsibility activities.

[319] Companies Act 2015, Section 143 (1)
[320] Section 655 (4) (a) Companies Act, 2015
[321] Section 655 (4) (b) (i) Companies Act, 2015
[322] Section 655 (4) (b) (ii) Companies Act 2015
[323] Section 655 (4) (b) (iii) Companies Act, 2015
[324] Section 655 (4) (c) Companies Act, 2015

The Mwongozo Code of Governance for State Corporations which was also published in 2015 provides guidelines for state corporations in relation to corporate governance. Specifically at Chapter Four on Ethical Leadership and Corporate Citizenship the Code requires Boards of State Corporations to have policies on good corporate citizenship, allocate an appropriate budget to Corporate Social Responsibility and investment and to respect and promote sustainable development.[325] Though the Code only acts as a guide to state corporations therefore not mandatory, it is hoped that some of these principles especially those on Corporate Social Responsibility will be codified under the new proposed legislation on State Corporations.

The Code of Corporate Governance Practices for Issuers of Securities to the Public was published in 2015 and succeeds the Guidelines on Corporate Governance Practices by Public Listed Companies in Kenya, 2002. The Code was published by virtue of the Capital Markets Act[326] and provides in Chapter Five for ethical leadership and corporate citizenship and encourages listed companies to act in socially responsible ways. The Code is however applied on the "apply or explain" basis requiring companies that do not comply to give reasons for non-compliance. A company can therefore continuously provide reasons for not adhering to the Code as it is safe to say that the company will not face any sanctions.

Is Kenya on the right track in relation to the legal framework on Corporate Social Responsibility? As evidenced from the discussion on the practices of various countries, Kenya is lagging behind in regulation of Corporate Social Responsibility and more needs to be done if we are to have corporations that are socially responsible.

4.5.1 Best Practices that Kenya can borrow from the comparative study

From the comparative study done above, there are various practices that Kenya can borrow from the countries analyzed. First, for companies trading on the Nairobi Stock Exchange, the CMA as part of its regulatory mandate may create a Social Responsibility Index. The CMA should set requirements that need to be satisfied by companies before being listed on the index. The Social Responsibility Index should aim to highlight social responsibility best practices and policies of companies. In return, the CMA should encourage investors to invest in these companies. Further,

[325] Governance Principle No.4.5
[326] The Capital Markets Act, Cap 485A, Laws of Kenya, *Government Printers*, Nairobi.

the Social Responsibility Index may serve to enlighten the CMA on measures that can be taken to improve Corporate Social Responsibility among listed companies.

Second, the government through the National Assembly may introduce amendments to the Companies Act, 2015 to include mandatory provisions on Corporate Social Responsibility. The mandatory provisions may include the categories of companies to be subjected to the provisions, the amount of money to be injected into Corporate Social Responsibility annually and the activities that comprise Corporate Social Responsibility. The provisions may also require every company's board of directors affected by the provisions to constitute a Corporate Social Responsibility Committee to implement the provisions by developing a Corporate Social Responsibility policy for the company.

Third, apart from the Companies Act, Parliament may enact legislation to promote the welfare of stakeholders of corporations. In South Africa the government enacted the BEE Act that required companies to consider their stakeholders and conduct their activities in a manner that eradicates inequalities inherited from the apartheid administration. In Kenya, the legislation can focus on the current social issues such as ethnicity and gender inequality. The legislation can require corporations to consider regional diversity during the recruitment and promotion processes.

Fourth, the government can opt for non-coercive ways to promote Corporate Social Responsibility in Kenya. For instance, the government can form an entity or organization tasked with creating awareness on Corporate Social Responsibility among corporations. The body may enlighten corporations on good Corporate Social Responsibility practices. Also, the government may consider rewarding corporations deemed to lead in Corporate Social Responsibility. The rewards may include incentives such as tax incentives.

4.6 Conclusion

This Chapter has analyzed legal framework for Corporate Social Responsibility in different countries in a bid to compare this to Kenya. The countries that were picked are almost similar to Kenya economically and are considered to be in the same bracket of developing countries as she is. The aim was to find some of the best practices of regulation of Corporate Social Responsibility from countries Kenya can relate with. The best practices highlighted in this Chapter will be further discussed as recommendations in the next Chapter.

CHAPTER FIVE

OVERALL CONCLUSIONS AND THE WAY FORWARD

5.1 A review of the study

This study has dealt with a number of Corporate Social Responsibility issues ranging importance of Corporate Social Responsibility to an economy, making Corporate Social Responsibility more meaningful by moving away from the ideology that it is just mere philanthropy, activities or programs that make Corporate Social Responsibility more strategic, the need for mandatory or government regulation of Corporate Social Responsibility particularly the failure of voluntary mechanisms to promote Corporate Social Responsibility and the need for Kenya to look to other countries for best practices on Corporate Social Responsibility.

In Chapter One, the problem investigated by this study was identified. It emerged that most corporations in Kenya center their Corporate Social Responsibility activities on philanthropic initiatives neglecting other important aspects of Corporate Social Responsibility. This led to companies facing various challenges for instance stakeholder uproar, employee strikes, corruption among other issues that would have been solved by having in place an all-inclusive Corporate Social Responsibility strategy. This chapter also revealed that government regulation of Corporate Social Responsibility could be a solution to this problem as it would provide policies that serve as a reference point for all corporations when conducting Corporate Social Responsibility activities and corporations would not veer off such provisions for fear of sanctions.

Chapter two delved into Corporate Social Responsibility strategies that are wholesome for a corporation. It discussed various Corporate Social Responsibility activities that are mostly neglected by corporations but are meaningful if the interests of stakeholders are to be met. This chapter aimed to disprove the notion that Corporate Social Responsibility is mere philanthropy arguing that philanthropy is just an aspect of Corporate Social Responsibility and other aspects such as human rights, corruption, environment management, stakeholder engagement need to be considered. It also argued that Corporate Social Responsibility activities may be unique to each corporation and as such each corporation needs to critically analyze which Corporate Social Responsibility activities to advance. In making Corporate Social Responsibility meaningful, a corporation needs to consider Corporate Social Responsibility as part of its strategic plan and an objective that it needs to meet continuously as it carries out its operations. Corporations have previously carried out Corporate Social Responsibility more “casually” only considering it at the end of their financial year when a portion of their earnings is given to charity.

Chapter three looked into government regulation of Corporate Social Responsibility vis-a-vie self-regulation. It made a case for government regulation by highlighting its advantages and the weaknesses of self-regulation. It looked at the different forms of government regulation that Corporate Social Responsibility can take and described the current state of regulation of Corporate Social Responsibility in Kenya. This Chapter revealed that corporations may be taking advantage of self-regulation and its lack of sanctions not to meet the needs of its stakeholders. Corporations may not act in socially responsible ways out of their own volition but if forced to do so by the law then they have no choice.

Chapter four brought out a comparison between Kenya’s regulation of Corporate Social Responsibility and regulation practices in India and Republic of South Africa. These jurisdictions are considered to be almost similar to Kenya as they are both developing countries and their economic and political strengths are not far part from those of Kenya. From this comparison, it was evident that Kenya can learn a lot from these jurisdictions in terms of expanding the government’s part in promoting uptake of Corporate Social Responsibility by corporations.

5.2 Lessons

The study has established that although corporations in Kenya are involved in Corporate Social Responsibility majority of them engage themselves in it as a marketing strategy in order to ultimately benefit themselves. Alternatively, those that genuinely engage in Corporate Social Responsibility restrict themselves to a few aspects of Corporate Social Responsibility neglecting other crucial aspects. A comparative study was done in the preceding chapter. It analyzed Corporate Social Responsibility practices from other jurisdictions. It is opined that Kenya can learn some lessons from these countries that could help improve Corporate Social Responsibility.

In RSA, legislation has enhanced the development of Corporate Social Responsibility. For instance the Sullivan Principles that were later re-launched by the UN as the Global Sullivan

Principles of Corporate Social Responsibility.[327] These principles urged businesses to promote social justice while conducting business and by doing so bring about gender and racial diversity in employment, advance disadvantaged workers and ultimately improve the life of the workers and the community around them.[328] The Republic of South Africa also passed the BEE Act[329] which mandates companies based within the Republic of South Africa to consider all stakeholders when conducting their activities in order to inequalities inherited from the apartheid regime.[330] Though there is no one sole piece of legislation in Republic of South Africa that entirely governs Corporate Social Responsibility, the different legislations that advocate for Corporate Social Responsibility have gone a long way in development of Corporate Social Responsibility in Republic of South Africa. The Republic of South Africa also established the Johannesburg Stock Exchange Social Responsibility Index (JSE SRI) that monitors the social responsibility policies of listed companies and encourages investment in socially responsible companies.

In India, unlike the Republic of South Africa, judicial precedence has contributed significantly towards the development of Corporate Social Responsibility. Various cases as discussed earlier emphasized the need and relevance of Corporate Social Responsibility in India necessitating the enactment of the Companies Act, 2013[331]. The Act at Section 135 made Corporate Social Responsibility mandatory to all companies within a particular financial bracket. The rationale for the provision was to make companies more socially responsible by ensuring companies understand their social obligations. The Act stipulates activities that fall within Corporate Social Responsibility and requires companies to come up with Corporate Social Responsibility policies.

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327 In On Africa (IOA) "Corporate Social Responsibility in South Africa: More than nice intention, Policy, Law, Economics and Politics*"* (2011)
Available at www.polity.org.za/article/corporate-social-responsibility-in-south-africa-more-than-a-nice-intention-2011-09-12 accessed on 11/07/2016

328 The principles in summary emphasize support for universal human rights, equal opportunities, respect for freedom of association, levels of employee compensation, training, health and safety, sustainable development, fair competition and working in partnerships to improve quality of life.
See also Liesl Van Den Ende, *"Corporate Social Responsibility in South Africa: Fact or Fiction*" (2004) A dissertation submitted in partial fulfillment of the requirements for the degree of Magister Commercii in Business Management, Faculty of Economic and Management Sciences, Rand Afrikaans University. P45-46

329 Black Economic Empowerment Act, 2003

330 In On Africa (IOA) "Corporate Social Responsibility in South Africa: More than nice intention, Policy, Law, Economics and Politics" (2011)
Available at www.polity.org.za/article/corporate-social-responsibility-in-south-africa-more-than-a-nice-intention-2011-09-12 accessed on 11/07/2016

331 The Companies Act, 2013, No.18, Acts of Parliament, 2013.

5.3 Recommendations and the way forward

The overall study established that Kenya has no specific legal structure for Corporate Social Responsibility except for the Companies Act, 2015 that urges directors to take into account the concerns of stakeholders. The Code of Corporate Governance for Issuers of Securities, 2016 also makes an attempt to regulate Corporate Social Responsibility but fails as it is implemented on "apply or explain" basis.

How then can the government contribute towards enhancing Corporate Social Responsibility among corporations in Kenya? This study suggests the following government measures to guarantee that corporations in Kenya act in responsible ways by undertaking meaningful Corporate Social Responsibility activities:

a) The government through its legislative arm, Parliament, should consider enacting a legislation or subsidiary legislation to govern Corporate Social Responsibility. If the government opts for a subsidiary legislation, then the legislation can be subsidiary to the Companies Act, 2015 or the Capital Markets Act Cap 485A, or both. Such legislation will provide a mechanism for regulating Corporate Social Responsibility among corporations in Kenya. The Act should provide a general definition of Corporate Social Responsibility (taking to account the circumstances of Kenya, this definition should be unique to Kenya and should not necessarily be adopted from conventional definitions), activities that amount to Corporate Social Responsibility, amounts that corporations should channel towards Corporate Social Responsibility annually, reiterate the importance of Corporate Social Responsibility, identify the stakeholders in corporations and stipulate sanctions for corporations that do not adhere to its provisions.

Alternatively, Parliament could opt to codify existing good practices on Corporate Social Responsibility into the current laws rather than enact a new legislation. For instance, the principles on Corporate Social Responsibility enumerated in the Mwongozo, Code of governance for State Corporations, 2015 could be enacted into the proposed new legislation on State Corporations. Pertinent provisions of the Code of Corporate Governance for Issuers of

Securities, 2016 on Corporate Social Responsibility could be incorporated into the Companies Act and enforced on more mandatory terms.

b) The CMA is the government regulator tasked with regulating the capital markets in Kenya. As part of its mandate, the CMA lists securities of corporations that meet its prerequisite requirements on the Nairobi Stock Exchange (NSE). The government through the CMA can establish a Social Responsibility Index at the Nairobi Stock Exchange (NSE). The Index should set requirements that corporations need to fulfill in relation to Corporate Social Responsibility so as to be listed on the index. This would set high Corporate Social Responsibility standards for corporations in Kenya. The Index should rank listed companies in terms of their sustainability policies and their socially "friendly" initiatives. The CMA can then encourage investors to invest in companies that are listed on the Social Responsibility Index. This Index will reveal best Corporate Social Responsibility practices and corporations striving to be part of the index will have a reference point upon which to mold their Corporate Social Responsibility activities. Additionally, the index will promote accountability, transparency and disclosure which go hand in hand with Corporate Social Responsibility.

c) The government can form partnerships with corporations to promote Corporate Social Responsibility. The government can boost Corporate Social Responsibility among corporations by providing incentives to corporations that carry out Corporate Social Responsibility activities that are geared at supporting the government's developmental priorities. Such incentives could be in the form of tax reliefs. The government can encourage corporations to partner with it in some of its projects and such projects can form part of the corporations' Corporate Social Responsibility agenda. At the end most Corporate Social Responsibility initiatives promote economic and human development that cannot be left to the government entirely.

The government can also offer training in the form of seminars to corporations and sensitize them on Corporate Social Responsibility and how to carry it out effectively. The government can also popularize any legislation that promotes Corporate Social Responsibility.

d) The government owns and controls wholly or partly various SOEs. As such the government can come up with measures to ensure that these corporations are socially responsible. The government can restructure the management of SOEs to include a Corporate Social Responsibility Committee at that board level. The mandate of this committee should include coming up with policies and strategies on Corporate Social Responsibility. The committee should also prepare a sustainability report of the corporation annually. This report can be used to assess the performance of the corporation on matters of social responsibility.

e) Shareholders are financiers of corporations. Therefore, shareholders can be said to have a critical role in the success of a corporation. However, shareholders are sometimes deemed to be an impediment in achievement of meaningful Corporate Social Responsibility by corporations. This is because most shareholders think that Corporate Social Responsibility is charity or worse helping the government to carry out its duties. It is this misconception that leads to shareholders not having an inclination towards Corporate Social Responsibility. They feel that their money is being utilized for other "extraneous" activities and they do not get to enjoy their investment. According to majority of the shareholders, corporations pay taxes to the government and as such they should not be required to go an extra mile to assist the government in welfare improvement.

This shareholder perspective needs to change. There is need for introduction of the "enlightened shareholder" among corporations. An enlightened shareholder is a shareholder who is not only concerned with the corporation making profit but is also concerned with the interests of other stakeholders of the corporation. Such a shareholder would be concerned with the corporation being socially responsible.

To achieve this government through its agencies can offer training to shareholders on the importance and the need for corporations to engage in Corporate Social Responsibility. Such trainings can be conducted during the Annual General Meeting (AGM) of companies.

5.4 Conclusion

Corporate Social Responsibility is not a new concept, it has been there for many decades. It started out on a religious perspective which was coined around philanthropy-giving back to the society. In as much as this was a good initiative, corporate social responsibility evolved to include other facets which entailed a corporation's relationship with its stakeholders. In this relationship a corporation acquires responsibility for all its stakeholders who include its employees, customers, shareholders, community, environment, suppliers. In management of these crucial relationships a corporation cannot limit itself to philanthropy only. Corporations must engage in other activities that nurture and sustain these relationships which are central to their existence. However, most corporations choose philanthropy over other corporate social responsibility strategies/activities for selfish reasons and government regulation is seen as the only possible way that corporations can be compelled to expand their corporate social responsibility strategies beyond philanthropy.

The Constitution of Kenya has been termed as one of the most progressive in the world and some nations are now looking towards Kenya for best governance practices. The time is right for the government to come up with mechanisms for regulating Corporate Social Responsibility in Kenya. India became the first nation to make Corporate Social Responsibility mandatory and come up with a comprehensive mechanism for regulating it. Kenya can also take the same approach as India. This will ensure that corporations in Kenya engage in meaningful Corporate Social Responsibility that promotes the welfare of their stakeholders.

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APPENDICES

APPENDIX 1

Researcher's introduction letter

Dear Respondent,

I am seeking your assistance in answering a few interview questions. I am a Master of Laws student at the University of Nairobi-Reg No. 82117/2015 and am conducting research on "Reinventing Corporate Social Responsibility in Kenya through Government Regulation".

This research is conducted to comply with the requirements of the Masters Degree Programme. Any information that you provide will be used purely for academic purpose and will be treated with the utmost confidentiality.

Please answer the questions with the appropriate information. Any additional information offered will be highly appreciated.

Thank you.

Mary Makena Gituma.

<u>APPENDIX 2</u>

<u>INTERVIEW QUESTIONS</u>

<u>Corporate Social Responsibility (CSR)-Reinventing Corporate Social Responsibility in Kenya through Government Regulation</u>

(For Public Listed Companies, Private Companies & SOEs)

<u>PART I</u>

Bio Data

1. Name (optional):

2. Name of company or parastatal:

3. Position held:

<u>PART II</u>

Awareness of CSR

1. Does your company/parastatal engage in CSR?

2. How do you define CSR within your company/parastatal?

3. Do you view CSR as merely acts of philanthropy?

4. What activities do you engage in as part of your CSR? (Rank the activities in terms of percentage, eg; Philanthropy-70%, Environment management-30%)

<u>PART 111</u>

CSR engagement

1. Do you have guidelines or policies within your company/parastatal or within your industry that influence how you conduct CSR? (If Yes, what are these guidelines?)

2. Is CSR part of your corporation's strategic plan? If not explain how CSR fits into your corporation.

3. Do you consult your stakeholders on their needs and/or interests before coming up with your CSR strategies?

4. Does your corporation monitor its CSR performance in order to determine which CSR activities should be prioritized?

5. In your opinion would government regulation which provides a clear definition of CSR, guidelines on how CSR should be carried out improve how CSR is conducted among companies/parastatals in Kenya? (Such regulation would be in the form of legislation or subsidiary legislation)

6. Would government regulation positively impact how your company/parastatal carries out CSR?

7. Any other relevant information.

Thank you for your participation.

Mary Makena Gituma

INTERVIEW QUESTIONS

Corporate Social Responsibility (CSR)-Reinventing Corporate Social Responsibility in Kenya through Government Regulation

(For Capital Markets Authority)

PART I

Bio Data

1. Name (Optional):

2. Name of organization:

3. Position held:

PART II

Regulation of CSR

1. As a regulator, how do you define CSR?

2. The Code of Corporate Governance for Issuers of Securities, 2015 provides that Issuers of Securities should be socially responsible. However, the Code is applied on an “apply or explain” basis. Do you think this gives room for listed companies not to abide by the Code?

3. Can it therefore be said that the “apply or explain” approach makes the Code a voluntary mechanism for regulating listed companies?

4. Why has the CMA not considered moving towards a mandatory Code? How would a mandatory Code affect companies?

5. Considering that listed companies do not have a proper mechanism for carrying out CSR, can it be said that the Code has failed in regulating CSR and is it time to consider mandatory provisions for CSR?

6. Some countries have a Social Responsibility Index as part of their Stock Exchange where companies are ranked in terms of sustainability policies and practices, why has the CMA not considered this approach as a way to promote CSR in Kenya?

7. Any other relevant information.

Thank you for your participation.

Mary Makena Gituma

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