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**STRATHMORE UNIVERSITY**

**LAW SCHOOL**

**THE INADEQUACIES IN THE LEGAL AND REGULATORY FRAMEWORK  
ON ACCOUNTABILITY OF NGOs IN KENYA**

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**120017**

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**Submitted in partial fulfilment of the requirements for the Master of Laws Degree  
(International Financial Law and Regulation) Strathmore Law School, Strathmore  
University**

**JUNE, 2020**

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24<sup>th</sup> November, 2020

## APPROVAL

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## **ABSTRACT**

NGOs play a significant role in advancing development in Kenya. Over the years there has been significant growth in the NGO sector. While this is good, trouble begins where there are no adequate accountability measures in place to regulate the sector. The rift between the growth in the NGO sector and the accountability mechanisms has led to an increase in demands for accountability in the sector. This thesis is meant to determine the status of NGO accountability within the country and begins by considering the current state of affairs. It analyses the existing legal and regulatory frameworks on accountability and proceeds to examine their impact in order to determine the adequacy of the provisions. Research was conducted with reliance on the stakeholder theory which advocate for the inclusion of all relevant parties and due consideration of the interests of all parties in all governance structures. It was revealed through the extensive research done that there are a number of inadequacies in the law in relation to accountability. The inadequacies revolve around the lack of clarity as to the what, why and who of accountability measures. It also explores the extent to which key accountability mechanisms such as self-regulation, participation and social auditing are incorporated into existing structures. Upon establishing the inadequacies, a comparison with South Africa follows to determine whether the South African NGO sector has in place a proper accountability framework to guide the operations of NGOs. In conclusion, the research outlines the shortcomings identified providing viable recommendations to curb each problem in efforts to implement holistic accountability measures in the sector.

## ACKNOWLEDGEMENTS

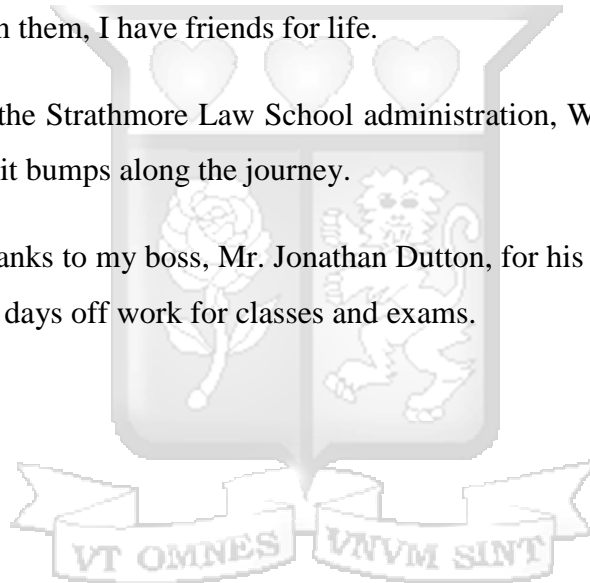
Special thanks to my Supervisor, Dr Kwenjera, for giving his time to supervise this research. He imparted knowledge to me, gave great insights and invaluable support to this research. I could never thank him enough. God bless.

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## TABLE OF CONTENTS

<b>DECLARATION</b> .....	i
<b>ABSTRACT</b> .....	ii
<b>TABLE OF CONTENTS</b> .....	iv
<b>LIST OF ABBREVIATIONS</b> .....	viii
<b>LIST OF CASES</b> .....	ix
<b>LIST OF STATUTES AND REGULATIONS</b> .....	x
<b>CHAPTER ONE</b> .....	1
<b>1.0 INTRODUCTION</b> .....	1
<b>1.1. Background of the Study</b> .....	1
<b>1.2. Problem Statement</b> .....	5
<b>1.3. Hypothesis</b> .....	6
<b>1.4. Research Objectives</b> .....	6
<b>1.5. Research Questions</b> .....	6
<b>1.6. Literature review</b> .....	7
<b>1.7. Justification of the Study</b> .....	13
<b>1.8. Research Methodology</b> .....	13
<b>1.9. Limitations of the study</b> .....	14
<b>1.10. Chapter breakdown</b> .....	15
<b>CHAPTER 2</b> .....	17
<b>THEORETICAL FRAMEWORK</b> .....	17
<b>2.0 INTRODUCTION</b> .....	17
<b>2.1 THEORY</b> .....	17
<b>2.1.1 Stakeholder Theory</b> .....	17
<b>2.1.1.1 Foundations of the Stakeholder Theory</b> .....	17
<b>2.1.1.2 Scope of the Stakeholder Theory</b> .....	18
<b>2.1.1.3 Justifications of the Stakeholder Theory</b> .....	20
<b>2.1.1.4 Stakeholder theory and related disciplines</b> .....	21
<b>2.1.1.5 Criticism of the Stakeholder theory</b> .....	23
<b>2.2 CONCLUSION</b> .....	28

<b>CHAPTER 3 .....</b>	<b>30</b>
<b>THE LEGAL AND REGULATORY FRAMEWORK FOR NGOS IN KENYA</b>	<b>30</b>
<b>3.0 INTRODUCTION.....</b>	<b>30</b>
<b>3.1 HISTORICAL DEVELOPMENT OF LAWS IN THE NGO SECTOR IN KENYA .....</b>	<b>30</b>
<b>3.2 THE GENERAL NGO REGULATORY FRAMEWORK IN KENYA .....</b>	<b>32</b>
<b>3.2.1 The Constitution of Kenya, 2010.....</b>	<b>33</b>
<b>3.2.2 The International Framework .....</b>	<b>33</b>
<b>3.2.3 The Companies Act, 2015 .....</b>	<b>35</b>
<b>3.3 NGO SECTOR SPECIFIC FRAMEWORK.....</b>	<b>35</b>
<b>3.3.1 The NGO Coordination Act No. 19 of 1990 (NGO Act) .....</b>	<b>35</b>
<b>3.3.2 The NGO Regulations .....</b>	<b>36</b>
<b>3.3.3 The NGO Code of Conduct .....</b>	<b>36</b>
<b>3.3.4 The Public Benefit Organization Act of 2013(PBO Act) .....</b>	<b>37</b>
<b>3.4 THE WEAKNESSES OF THE NGO SECTOR LEGAL FRAMEWORK IN RELATION TO ACCOUNTABILITY MECHANISMS .....</b>	<b>39</b>
<b>3.4.1 Who is accountable?.....</b>	<b>39</b>
<b>3.4.1.1 Definition provisions and the implications on accountability .....</b>	<b>39</b>
<b>3.4.1.2 Allocation of accountability.....</b>	<b>42</b>
<b>3.4.2 Accountability for what? .....</b>	<b>44</b>
<b>3.4.2.1 Disclosure of financial information.....</b>	<b>44</b>
<b>3.4.3 How to ensure Accountability .....</b>	<b>47</b>
<b>3.4.3.1 Accountability from a self-regulation perspective.....</b>	<b>47</b>
<b>3.4.3.2 Accountability from participation perspective .....</b>	<b>50</b>
<b>3.4.3.3 Accountability from a social audit perspective.....</b>	<b>52</b>
<b>3.5 CONCLUSION.....</b>	<b>54</b>
<b>CHAPTER 4 .....</b>	<b>55</b>
<b>COMPARATIVE STUDY OF NON-GOVERNMENTAL ORGANIZATION REGULATIONS IN SOUTH AFRICA .....</b>	<b>55</b>
<b>4.0 INTRODUCTION.....</b>	<b>55</b>
<b>4.1 HISTORY OF NGO ACCOUNTABILITY IN SOUTH AFRICA .....</b>	<b>55</b>
<b>4.2 THE SOUTH AFRICAN NGO LEGAL AND REGULATORY FRAMEWORK.....</b>	<b>57</b>

4.2.1	The Constitution of South Africa, 1996.....	57
4.2.2	The International Framework .....	57
4.2.3	Legal and Regulatory Provisions on Registration.....	58
4.2.3.1	Common Law.....	58
4.2.3.2	Trust Property Control Act, 1988.....	59
4.2.3.3	The Companies Act, 2008 .....	59
4.2.3.4	The Non- Profit Organizations Act, 1997.....	60
4.3	<b>THE WEAKNESSES OF THE NGO SECTOR LEGAL FRAMEWORK IN RELATION TO ACCOUNTABILITY MECHANISMS</b> .....	61
4.3.1	Registration.....	61
4.3.2	Freedom of association.....	62
4.3.3	Areas of accountability .....	64
4.3.4	Self-regulation mechanisms, codes of conduct and their weaknesses.....	65
4.4	<b>CONCLUSION</b> .....	67
	<b>CHAPTER 5</b> .....	69
	<b>CONCLUSION AND RECOMMENDATIONS</b> .....	69
5.0	<b>INTRODUCTION</b> .....	69
5.1	<b>OVERVIEW OF THE ESSENCE OF REGULATION ON ACCOUNTABILITY</b> .....	69
5.2	<b>SUMMARY OF ACCOUNTABILITY CHALLENGES IN EXISTING LAWS AND REGULATIONS</b> .....	70
5.2.1	Failure of legal and regulatory provisions to clarify accountability mechanisms.....	70
5.2.2	Lack of adequate provisions on self-regulation.....	71
5.2.3	Multiplicity in modes of registration .....	71
5.2.4	Excessive government involvement.....	72
5.2.5	Inadequacy in the provisions on enforcement .....	72
5.3	<b>RECOMMENDATIONS</b> .....	73
5.3.1	Establishment of a clear accountability framework.....	73
5.3.2	Promotion of Self-regulation and Participation .....	73
5.3.3	Reduction in the modes of registration.....	74
5.3.4	Reduction of Government Intervention .....	75
5.3.5	Improvement of enforcement mechanisms .....	75

**5.4 CONCLUSION.....76**  
**BIBLIOGRAPHY .....77**  
**APPENDICES .....88**  
**APPENDIX I: ETHICAL CLEARANCE REPORT .....88**  
**APPENDIX II: TURN IT IN REPORT .....89**



## LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
CBO	Community Based Organisations
CIPC	Companies and Intellectual Property Commission
CSO	Civil Society Organizations
CSR	Corporate Social Responsibility
ICESR	International Covenant on Economic Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
ISEA	Institute of Social and Ethical Accountability
KHRC	Kenya Human Rights Commission
NGO	Non-Governmental Organisation
NGOCB	Non-Governmental Organisations Coordination Board
NPC	Non Profit Companies
NPO	Non- Profit Organization
NPT	Non- Profit Trusts
PBO	Public Benefits Organisation
PBOA	Public Benefit Organizations Regulatory Authority
SANGOCO	South African National Non-Governmental Organization Coalition
SARS	South Africa Revenue Service
UDHR	Universal Declaration of Human Rights

## LIST OF CASES

- Cabinet Secretary Ministry of Interior & Co-ordination of National Government & 6 others Ex-parte Africa Centre for Open Governance & 7 others (2017) eKLR
- Civil Liberties Organisation v Nigeria, ACmHPR Communication No. 101/93 (1995)
- Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance(NASA) Kenya & 6 others (2017) eKLR
- Kenya Human Rights Commission v Non-Governmental Organizations Co-ordination Board (2016) eKLR
- Mohamed Aktar Kana vs. Attorney General (2010) eKLR
- National Council of Non-Governmental Organizations v Orié Rogo Manduli & Another (2009) eKLR
- Non-Governmental Organizations Co-Ordination Board v EG & 5 others (2015) eKLR
- Republic v Cabinet Secretary Ministry of Interior & Co-ordination of National Government & 6 others Ex-parte Africa Centre for Open Governance & 7 others (2017) eKLR
- Republic v Minister of State for National Heritage & Culture & 2 Others Ex-Parte National Council of Non-Governmental Organizations & Another (2009) eKLR
- Trusted Society of Human Rights Alliance v Cabinet Secretary Devolution and Planning & 3 others (2016) eKLR
- Trusted Society of Human Rights Alliance v Cabinet Secretary for Devolution and Planning & 3 others (2017) eKLR

## **LIST OF STATUTES AND REGULATIONS**

- The Constitution of Kenya, 2010

### **INTERNATIONAL INSTRUMENTS**

- African [Banjul] Charter on Human and Peoples' Rights, 1986
- Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Human Rights Defenders Declaration), General Assembly resolution 53/144, 1999
- International Covenant on Economic, Social and Cultural Rights, 1966
- International Covenant on Civil and Political Rights, 1966
- The Kampala Declaration on Intellectual Freedom and Social Responsibility, 1990
- The Treaty for the Establishment of the East African Community, 1999
- Universal Declaration of Human Rights, 1948

### **NATIONAL INSTRUMENTS**

- Companies Act, 2015, Laws of Kenya
- Companies Act (No. 12 of 2002) (Tanzania)
- Companies Act, South Africa, 2008
- Non-Governmental Organization Council code of conduct, 1995, Laws of Kenya
- Non-Governmental Organization Coordination Act, 1990 (as amended by Legal Notice 11 of 1992), Laws of Kenya
- Non-Governmental Organizations Act (No. 24 of 2001) (Tanzania)

- Non-Governmental Organizations Co-ordination Regulations, 1992, Laws of Kenya
- Public Benefits Organization Act (Act No. 18 of 2013), Laws of Kenya
- South African Non-Governmental Organizations Coalition Code of Ethics, 1997
- The Non Profit Organizations Act, No 71 of 1997, (South Africa)
- Trust Property Control Act, Act No. 57 of 1988, (South Africa)
- Voluntary Independent Code of Governance and Values for NPOs in South Africa, 2012



## CHAPTER ONE

### 1.0 INTRODUCTION

This chapter lays the foundation of the thesis by briefly discussing corporate governance and delving into accountability as a key aspect of corporate governance with specific focus on Non-Governmental Organizations (NGOs). The research outline is laid out in this chapter starting with a definition of NGOs to demonstrate the scope of coverage and moving on to the statement of the problem, the hypothesis and on to the research questions. Literature from various authors on NGO accountability and other related areas will be evaluated and summarized for purposes of identifying key areas of interest. The literature reviewed is also meant to demonstrate the areas covered by previous research in order to establish existing gaps that this thesis is meant to address. Research methods relied on shall be discussed in this chapter. The limitations encountered during research shall also be presented for purposes of demonstrating their implications on the research.

#### 1.1. Background of the Study

Corporate governance has in the recent times become a vital component for the success of any organisation. The global economy and business environment have experienced a number of scandals and corporate failures which have exacerbated the need for organisations in both developed and developing countries to embrace corporate governance.<sup>1</sup> Much of the attention has been directed towards the profit sector, even though the non-profit sector has also had its share of failures in efforts to foster accountability. In *Republic v Cabinet Secretary Ministry of Interior & Co-ordination of National Government & 6 others Ex-parte Africa Centre for Open Governance & 7 others*<sup>2</sup> the court granted an order of certiorari quashing the decision by the Non-Governmental Organisations Coordination Board (NGOCB) to close down operations by Africa Centre for Open Governance (AfriCOG) based on the manner in which the action was undertaken. This is just one out of the suits filed and whose judgements are indicative

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<sup>1</sup> Sonmez M and Yildirim S, 'A theoretical aspect on corporate governance and its fundamental problems: Is it a cure or another problem in the financial markets?' 3(1 and 2), *Journal of Business Law and Ethics*, 2015, 21.

<sup>2</sup> (2017) eKLR.

of the failures of NGO/CB accountability efforts. There is need therefore, to widen the scope of corporate governance to cater for this sector.

There is no consensus on the meaning of corporate governance incorporated in the numerous writings on the subject.<sup>3</sup> The foregoing notwithstanding, corporate governance is widely defined as the arrangement by which corporations are directed and controlled.<sup>4</sup> With respect to NGOs, it is defined as a set of principles and practices adopted by the governing body, in sectors both private and social-welfare oriented, to assure stakeholders of effective and appropriate management of the entity.<sup>5</sup> It is therefore concerned with creating a balance between commercial *vis-a-vis* societal goals and between individual *vis-à-vis* shared goals. In doing this, corporate governance encourages efficient resource management, accountability in the use of power, stewardship and possible alignment of the interests of parties concerned and in society at large.<sup>6</sup> In comparing the general definitions, one notes that corporate governance generally creates a balance in the different relationships existing amongst the various players in an organisation including directors, managers, shareholders, financiers amongst others.

Corporate governance espouses a number of pillars and principles and centre to it is the principle of accountability and this research will deal with the principle of accountability in relation to NGOs. The concept of accountability has widespread use and just like corporate governance, there is no agreement concerning its definition. Most of the definitions reviewed concentrate on the interaction amongst a number of actors, where a part of the actors provide description of their activities and others receive and evaluate

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<sup>3</sup> Sonmez M and Yildirim S, 'A theoretical aspect on corporate governance and its fundamental problems', 23.

<sup>4</sup> Cadbury, A, 'Report of the committee on the financial aspects of corporate governance'-< <https://ecgi.global/sites/default/files/codes/documents/cadbury.pdf>> 1992.

<sup>5</sup> The Government of Hong Kong, *Special administration region report*.

<sup>6</sup> Private sector initiative for corporate governance, Nairobi; *Principles for corporate governance in Kenya and a sample code of best practice for corporate governance*.-< [https://www.ics.ke/wp-content/uploads/bsk-pdf-manager/Principles\\_of\\_good\\_corporate\\_Governance\\_Private\\_Sector\\_-\\_CS\\_Gabriel\\_Kimani\\_110.pdf](https://www.ics.ke/wp-content/uploads/bsk-pdf-manager/Principles_of_good_corporate_Governance_Private_Sector_-_CS_Gabriel_Kimani_110.pdf)> Nairobi, Kenya : Private Sector Corporate Governance Trust, 1999.

those activities. Emphasis is placed on the accountability of individuals through systems which reduce the conflict of competing interests amongst these actors.<sup>7</sup>

An argument can be advanced to the effect that corporate governance relates to companies as it takes a stakeholder oriented approach. However, it is notable that in the recent past, corporate governance has continued to adopt a stakeholder oriented approach and it mandates management to consider the interests of stakeholders and the organisation as a whole. A stakeholder has been defined by Edward Freeman as a party likely to be impacted by an organisation's actions<sup>8</sup> or whose actions are likely to affect the attainment of the objectives of the organization.<sup>9</sup> NGOs operate across the country in various sectors therefore affecting the interest of many people. There are levels of stakeholders and this will be explored in detail in chapter three and four of this research.

To trace the historical background of NGOs, one has to understand charity and philanthropy. Charity and philanthropy entailed giving to others in need by those with accumulated resources, to advance the idea of sharing in order to help, protect and preserve the community.<sup>10</sup> The government failure theory has been used to explain the existence of non-profit organisations. The theory argues that the government suffers limitations in relation to the goods and services that it is required to provide to the citizens and non-profit organisations step in to fill the niches left unserved by the government. Most of the non-profit organization's activities are therefore prominent in minority areas where citizen populations are most diverse.<sup>11</sup>

There has been a tremendous increase in the number of organizations participating in the development sector over time. Globally, the statistics remain inconclusive.<sup>12</sup> In Kenya, the growth is evidenced in the number, geographical distribution and scope of NGOs. In

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<sup>7</sup> Khan H, 'A Literature review of corporate governance' International Conference on E-business, Management and Economics (IPEDR) Vol 25, <http://www.ipedr.com/vol25/1-ICEME2011-A10015.pdf>, 2011, 1.

<sup>8</sup> Murray V, 'Governance of non-profit organisations' West View Press, Colorado, 2001, 10.

<sup>9</sup> Freeman R, Strategic management: A stakeholder approach. Boston, MA: Pitman, 1984, 46.

<sup>10</sup> Block S, 'Board of directors' West View Press, Colorado, 2001, 15.

<sup>11</sup> Froelich K, 'Diversification of revenue strategies; Evolving resource dependence in non-profit organisations', West View Press, Colorado, 2001, 190.

<sup>12</sup> Werekoh K, 'Accountability systems of non-governmental organisations (NGOs): Case study from Ghana' Unpublished LLM thesis, University of Birmingham, Birmingham, 2014, 1.

1993, there were 250 registered NGOs in Kenya; this number grew to 1441 NGOs in 2000<sup>13</sup>, 9728 NGOs in 2014<sup>14</sup> and 11,262 in 2019.<sup>15</sup> Currently, over 11,000 NGOs are operating in all counties and in different sectors of the economy.<sup>16</sup> The steady growth points to a growing interest in the third sector<sup>17</sup> in Kenya.

The growth has led to increased governance and regulatory problems for players in that space including regulators and donors.<sup>18</sup> In Africa, these problems have been responded to in two ways. The first is evidenced by governments progressively proposing tougher consolidated regulatory rules for NGOs, but with inadequate capability for execution. The second is where NGOs try out schemes of private self-regulation. Self-regulation is a term used to refer to NGO efforts to regulate themselves and further refers to efforts of groups of NGOs to set and enforce standards for all participants within the group.<sup>19</sup> The overriding objective of these regulations is to ensure that measures be established for checks, balances and accountability by NGOs.

Over the years, the NGO CB has de-registered, suspended or threatened to deregister NGOs in Kenya. Such actions are as a result of violations of the provisions of the NGO Coordination Act (NGO Act) and its regulations, or violations of the terms and conditions of registration.<sup>20</sup> In 2014, NGO CB deregistered 510 NGOs on grounds of suspicion of raising funds for terrorism, engaging in criminal activities and failing to provide financial audit returns.<sup>21</sup> During the same period, the development sector in Kenya received more

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<sup>13</sup> Kameri - Mbote P, 'The operational environment and constraints for NGOs in Kenya: Strategies for good policy and practice' International Environment Law Research Centre, Working Paper Number 2, 2014 – <http://www.ielrc.org/content/w002.pdf> on 8 December 2016.

<sup>14</sup> Non-Governmental Organizations Co-ordination Board, *NGO sector report*, 2013/2014.

<sup>15</sup> Non-Governmental Organizations Co-ordination Board, *The annual NGO sector report*, 2018/2019, 20.

<sup>16</sup> Non-Governmental Organisation Board, *Annual report and financial statement*, VII, 30 June 2016.

<sup>17</sup> Makoba W, Non-Governmental Organizations (NGOS) and third world development: An alternative approach to development, *Journal of Third World Studies* -< <https://www.globalpolicy.org/component/content/article/177/31620.html> > 2002,

<sup>18</sup> Gugerty K, 'Models of NGO self-regulation: Theory and evidence from Africa' University of Washington, Working Paper Number 4, 2007– <https://evans.uw.edu/sites/default/files/public/EvansWorkingPaper-2007-04.pdf> on 27 January 2019.

<sup>19</sup> The International Centre for Not-for-Profit Law, *Handbook on good practices for laws relating to NGOs*, The World Bank discussion draft, May 1997.

<sup>20</sup> *The annual NGO sector report*, 2018/2019, 21.

<sup>21</sup> Agence France-Presse, 'Kenya closes down hundreds of NGOs' Aljazeera, 16 December 2014–< <https://www.aljazeera.com/news/africa/2014/12/kenya-closes-down-hundreds-ngos-20141216124722577348.html>> on 16 December 2014.

than Kshs. 120 billion to fund humanitarian projects, with more than Kshs. 6 billion of that amount coming from undisclosed sources.<sup>22</sup> In 2015, the NGOCB threatened to deregister 959 NGOs for failure to account for their funding from donors, operating multiple bank accounts and engaging in money laundering. The NGOs at risk of deregistration at the time failed to account for more than Kshs. 25 billion.<sup>23</sup>

In the *Kenya Human Rights Commission v Non-Governmental Organizations Co-ordination Board (2016)* eKLR issues pertaining to fair administrative action and constitutionality of the provisions of the NGO Act were raised. Following the cancellation of its certificate of registration, the Kenya Human Rights Commission (KHRC) filed a petition against the NGOCB arguing that the actions by NGOCB violated its right to fair administrative action and to fair hearing as stipulated in Article 47 and 50 of the Constitution of Kenya respectively. KHRC therefore sought from the court a declaration that the NGOCB's actions were unconstitutional. It was held that, while the respondent indeed acted in compliance with the provisions of the NGO Act, the provisions did not conform to the constitutional provisions. A declaration was therefore issued rendering the actions by the NGOCB unconstitutional, null and void.

From this analysis, one also notes that there are incidences of non-accountability by NGOs as well as an impulsive regulator.

## 1.2. Problem Statement

The legislative and regulatory framework on NGOs in Kenya has proven inadequate in ensuring accountability of NGOs to their stakeholders leading to a rise in cases of non-accountability of NGOs.

The NGOs Act approach is largely of self-regulation to be achieved through openness to learning and change and periodic appraising and evaluating of conduct on the part of the

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<sup>22</sup> Standard Digital, 'List of Kenyan NGOs that risk deregistration' - <<https://www.standardmedia.co.ke/article/2000181037/list-of-kenyan-ngos-that-risk-de-registration> 7May 2019 >, on 29 October, 2015

<sup>23</sup> The New Humanitarian News, 'NGOs in Kenya protest threatened deregistration of 959 organizations' The Humanitarian, 30 October 2015—<<http://www.thenewhumanitarian.org/analysis/2015/10/30/ngos-kenya-protest-threatened-deregistration-959-organisations>> on 30 October 2015.

NGOs. The NGO Act further establishes regulatory institutions such as the NGOCB, which is mandated to hold NGOs accountable. Despite the existence of the above legal provisions and regulatory institutions, the public has continued to witness cases of misappropriation of funds by NGOs amongst other ills which point to inadequacy of the legal and regulatory framework.

### **1.3. Hypothesis**

- a. H1: Increased cases of non-accountability by NGOs in Kenya indicate that there are inadequacies in the Kenya's legal and regulatory framework in relation to NGO accountability.
- b. H2: Reforms in the legislative framework to bring about a system of accountability that is inclusive of all stakeholders in the NGO sector in Kenya and provides for their active involvement will enhance accountability practices by Kenyan NGOs.

### **1.4. Research Objectives**

- a. Analyse the approach taken by the Kenya's legal and regulatory framework in relation to NGO accountability.
- b. Analyse how the specific inadequacies in the legal and regulatory framework for regulation of NGOs in Kenya contribute to deficits in NGO accountability to stakeholders.
- c. Analyse the specific reforms on accountability that are required to be included in the existing NGO legal and regulatory framework in order to foster good governance.

### **1.5. Research Questions**

- a. What approach to NGO accountability does Kenya's legal and regulatory framework take?
- b. What specific inadequacies in the legal framework for regulation of NGOs in Kenya contribute to deficits in NGO accountability to stakeholders?
- c. What specific reforms in the existing NGO legislation framework are required to include adequate provisions on accountability to stakeholders in order to foster good governance?

## 1.6. Literature review

Good corporate governance allows for enhancement of business integrity and creation of market confidence. This is crucial for future-oriented organisations in need of funding for their sustenance. The NGO sector all over the world has enjoyed a period of relative disinterest with minimal focus on it. However, in the recent past there has been increased scrutiny and criticism to the sector with the illumination of scandals.<sup>24</sup> At the international level, there are media reports that 255,000 British Pounds is the mean salary for a chief executive officer of the top 100 charities with the highest paid earning about 850,000 British Pounds a year<sup>25</sup> and in view of this, financiers begin to question the use of the resources donated to NGOs. Such reports have contributed to the increased calls for NGOs to be accountable.

Jordan contends that demands are being made on NGOs to respond to queries concerning their level of independence and reliability of their structures, legitimacy and effectiveness.<sup>26</sup> The independence and reliability questions are asked as a result of the rapid growth of the sector which necessitates the need to strengthen the NGO structures on governance, financial management practices and policies amongst others. Legitimacy questions are based on the need to demonstrate public transparency, compliance to mission, relationship with the communities served and the value to the society as a whole. Effectiveness questions relate to the quality of the services delivered by NGOs and responsiveness to the needs of their beneficiaries.

Brown, Moore and Honan recommend that when NGOs evaluate their accountability to different stakeholders they should ask whether accountability is undertaken on moral, legal or prudential grounds.<sup>27</sup> Moral grounds encompass analysing whether NGOs are accountable in terms of moral values held by the society or organisational values. The

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<sup>24</sup> OTT J, *Understanding Non Profit Organisations: Accountability concepts and controversies*, Westview Press, USA, 2001, 352.

<sup>25</sup> Morley D, 'NGO scandal: making poverty profitable' International Marxist Tendency, <https://www.marxist.com/ngo-scandal-making-poverty-profitable.htm> , 02 March 2018.

<sup>26</sup> Jordan L, 'Mechanisms for NGO accountability' GPPi research paper Series No. 3, Global Public Policy Institute- <http://www.globalpublicpolicy.net> , 2005,7.

<sup>27</sup> Moore M, Brown D and Honan J, 'Building strategic accountability systems for International NGOs' Issue 2 *Accountability forum*, Summer 2004, 31-43, 36.

legal ground determines whether accountability is as a result of the law, tradition, regulation or policy. The prudential ground demonstrates to the NGO whether failure to account will result in severe financial sanctions to the NGOs.

As noted from the foregoing, questions on NGO accountability are broad in scope. Bendell argues that the questions directed at NGOs generally seek to determine the question of who should be accountable, why should they be accountable, to whom are they accountable, what are they accountable for and how should they apply accountability practices.<sup>28</sup>

*In relation to the question of who*, Cavill and Sohail reason that identifying actors within the NGO who are charged with accountability is a complicated process as it results into what they term as the problem of many hands.<sup>29</sup> That notwithstanding, its argued that accountability may generally lie with the organisation itself through organisational accountability, directors through personal accountability, members of the organisation through collective accountability and individuals within the NGO through individual responsibility. Bendell on other hand does not identify the actors but generally argues that the person or group that affects another person or group must be accountable to the affected.<sup>30</sup> The writers provide a good starting point for a discussion on the persons responsible for accountability in NGOs. This study purposes to add onto that body of knowledge by focusing on the extent to which the law can solve the problem of many hands and clearly identify and allocate responsibilities in relation accountability in NGOs.

*In relation to the question of why*, it is notable in the past, virtuous objectives and morals provided sufficient foundation for NGO legitimacy. Lloyd and Casas argue that currently, the foregoing is not sufficient and NGOs are under pressure to give proof of the positive impact created and demonstrate effective representation of the people they support.<sup>31</sup> This pressure has led to the legitimacy crisis since the organisations are perceived as having

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<sup>28</sup> Bendell J, 'Debating NGO accountability' United Nations, New York and Geneva, UN Non-Governmental Liaison (NGLS), 2006, 1.

<sup>29</sup> Cavill S and Sohail M, Increasing strategic accountability: A framework for INGOs, 17 (2) *Development in Practice*, Routledge / Taylor & Francis, 2007, 231-248, 235.

<sup>30</sup> Bendell J, 'Debating NGO accountability'.

<sup>31</sup> Lloyd R and Lucy de las Casas, 'NGO self-regulation: enforcing and balancing accountability' One World Trust, 2006.

veered away from the purpose of their establishment.<sup>32</sup> Ease of access to information, increased visibility and technological advancements have further contributed to such inquiries.<sup>33</sup> The foregoing, coupled with continued criticism towards NGOs on the use of funds, power abuse, poor management and governance challenges explains why NGOs have to be accountable.

*In relation to the question of, to whom,* most of the works analysed adopt a position of recognising the body or person to which an NGO should be accountable to. According to Najam's conceptual framework, there are three groupings that effectively cover the broad range of likelihoods in so far as NGO accountability is concerned. The three distinct categories are accountability to patrons including the donors, accountability to clients including the communities they serve and accountability to the NGOs themselves.<sup>34</sup>

Naidoo on the other hand identifies three levels of accountability for NGOs.<sup>35</sup> First is upward accountability which is the accountability towards funders, regulatory regimes of the NGOs and compliance to any formal requirements that an organization needs to meet. This level of accountability has a legal basis with the entity holding the NGO accountable having control of the terms and conditions of the relationship.<sup>36</sup> In view of the legal basis for this level of accountability it is noted that accountability therefore is predominantly upward at the expense of other stakeholders and this is a serious issue that requires legal redress.

Second is downward accountability which entails accountability towards the people affected and/or being governed by the actions of the NGO. Werekoh argues that this approach gives room for beneficiaries to take part in the project through participation in

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<sup>32</sup> Lloyd R *et al*, 'NGO self-regulation: enforcing and balancing accountability'.

<sup>33</sup> Harsh M, Mbatia P and Shrum W, 'Accountability and inaction: NGOs and resource lodging in development', *Development and change*, published on behalf of the Institute of Social Studies, The Hague.

<sup>34</sup> Najam A, 'NGO accountability: A conceptual framework' Vol 14 *Development Policy Review*, Overseas Development Institute, 1996, 339-354.

<sup>35</sup> Naidoo K, 'The end of blind faith? Civil society and the challenge of accountability, legitimacy and transparency' Issue 2, *Accountability forum*, 14-25, 21.

<sup>36</sup> Van Zyl H and Claeys F, 'Up and down, and inside out: Where do we stand on NGO accountability?' *The European Journal of Development Research*, <https://link.springer.com/article/10.1057%2Fs41287-018-0170-3>.

decision making, active involvement in project activities and learning.<sup>37</sup> According to Banks, NGOs are to ensure that there exists mechanisms for accountability to beneficiaries through effective communication between the NGOs and the beneficiaries by use of either formal or semi-formal means.<sup>38</sup> Whereas this is a viable model, Werekoh argues that the law more often than not fails to impose an obligation on NGOs to undertake downward accountability and this weakens accountability of NGOs have to their beneficiaries.<sup>39</sup> The inadequacies in the law in providing for downward accountability leads to an accountability gap which this study focuses on with an intention of proposing legal solutions for bridging this accountability gap.

The third form is horizontal accountability which is towards persons of the same level in an organization. This is also referred to as peer accountability<sup>40</sup> or sideward accountability. Kilby argues that to achieve horizontal accountability, peer regulation measures taken should entail common standards of quality and accountability by NGOs and should be voluntarily agreed upon by the NGOs without any legally binding force.<sup>41</sup> In addition to the three levels above, Cavill and Sohail argue for a fourth level which they refer to as directional accountability which involves staff members' commitment to overall vision, mission and organizational values leading up to the fulfilment of what is expected of them by their stakeholders.<sup>42</sup> Notable is that this framework is premised on cooperation by concerned parties without which it is likely to be ineffectual.

*In relation to the question of what NGOs should be accountable for*, Mosunova summarizes the key issues that raise accountability questions namely: legal and regulatory compliance, financial reporting and performance, safeguarding stakeholder interests and delivery to targeted persons.<sup>43</sup> Ebrahim argues that NGO accountability entails functional and strategic accountability. The former refers to accountability for the particular actions

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<sup>37</sup> Werekoh K, 'Accountability Systems of Non-Governmental Organisations'.

<sup>38</sup> Banks N, Hulme D and Edwards M, 'NGOs, states and donors revisited: still too close for comfort?' Vol 66, *World Development*, 2014- < <http://dx.doi.org/10.1016/j.worlddev.2014.09.028> > 2015, 707-718.

<sup>39</sup> Werekoh K, 'Accountability Systems of Non-Governmental Organisations'.

<sup>40</sup> Najam A, 'NGO accountability: A conceptual framework', 348.

<sup>41</sup> Crack A, 'Reversing the telescope: Evaluating NGO peer regulation initiatives', Vol 28 *Journal of International Development*, published online on 1 June 2014 in Wiley Online Library ([wileyonlinelibrary.com](http://wileyonlinelibrary.com)), 2016, 40-56, 41.

<sup>42</sup> Cavill S and Sohail M, 'Increasing strategic accountability'.

<sup>43</sup> Mosunova N, 'The content of accountability in corporate governance', 116.

and programmes that NGOs are expected to perform while the latter refers to accountability related to the NGOs vision, mission, objectives, goals and policies.<sup>44</sup> Functional accountability forms a central part of NGO accountability because it concerns itself with proper resource allocation, sound implementation and the impact of an NGO's activities in pursuance of its mission. Strategic accountability on the other hand, focuses on how NGOs carry out their activities in relation to their mission.

*In relation to the question of how*, Ebrahim proposes an integrated approach to accountability by identifying five non-exhaustive but concrete accountability mechanisms that can either be a tool or a process. The five mechanisms are reports and disclosure statements and reporting, evaluations and performance assessments, industry self-regulation; participation and social auditing.<sup>45</sup> The tools and processes identified are geared towards meeting the external stakeholders' needs and since one group of stakeholders may have considerable leverage on NGOs, then accountability will be skewed towards that group.<sup>46</sup> For internal accountability, Mosunova argues that it may take the approach of adopting governance regulations, establishment of a board of directors, consistent financial reporting and the presence of internal audit committees and external auditors.<sup>47</sup>

Accountability in the Kenyan perspective can only be loosely seen in the call for self-regulation and this barely gives clarity and responsibility on the part of the NGOs. Self-regulation is a vague term used to refer to the efforts of an NGO to regulate itself and further refer to efforts of groups of NGOs to set and enforce standards for all participants in the group.<sup>48</sup> According to Moore and Stewart, NGOs need collective self-regulation to solve the challenges of accountability, evaluation, organisational growth and economies of scale.<sup>49</sup> Gurgerty argues that weak government oversight and the inability to undertake

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<sup>44</sup> Ebrahim A, 'Accountability in practice: Mechanisms for NGOs', 31(5) *World Development*, 2003, 813-829.

<sup>45</sup> Ebrahim A, Accountability in practice: Mechanisms for NGOs, 815.

<sup>46</sup> Jordan L, 'Mechanisms for NGO accountability'.

<sup>47</sup> Mosunova N, The content of accountability in corporate governance.

<sup>48</sup> The International Centre for Not-for-Profit Law, *Handbook on good practices for laws relating to NGOs*.

<sup>49</sup> Moore M and Stewart S, 'Corporate governance for NGOs?' *Development in Practice*, 1998 - <[10.1080/09614529853620](https://doi.org/10.1080/09614529853620)> on 27 January 2019, 335-342.

effective regulatory oversight also necessitate the need for self-regulation.<sup>50</sup> This is important as self-regulation uptake by NGOs is intended to repair the NGOs legitimacy and credibility with the donors.

Kameri's position is that there is an undeniable role to be played by government in the regulation of NGOs in order to guard against misuse of resources and to safeguard against weakening of state's legitimacy.<sup>51</sup> However, it is possible that the government can use such powers as retaliation towards NGOs that advocate against certain organisations, stakeholders or the government itself. In advancing this argument, Tricker states that it is paramount that the governments through regulatory bodies do not use accountability as a way of retaliating and should not wield excessive powers against NGOs.<sup>52</sup>

The question then becomes; who should be setting the guidelines that regulate NGOs? Moore and Stewart argue that in the first instance, the norms should be developed by the NGOs and only when they fail should the government step in.<sup>53</sup> This approach is in accordance with the principle of subsidiarity<sup>54</sup> which posits that decisions at the first instance should be made at the level that has closest proximity to the issue at hand. In light of this therefore, it is necessary and important for Kenya to have laws and regulations formulated with the requisite involvement of the public and participation of relevant stakeholders including donors, as is required by the Constitution of Kenya.<sup>55</sup> This will encourage NGOs to execute their important contribution to the development process.

Various authors' positions on NGO accountability are influenced by different schools of thought. Those whose work is analysed in this section advance the position that accountability is indeed an essential part of NGO operations. While they are cognizant of the accountability issues and approaches in the NGO sector, they do not address the most

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<sup>50</sup> Gugerty M, 'The goldilocks challenge: Right-fit evidence for the social sector (2015), Oxford University, Published to Oxford Scholarship Online, May 2018, 87.

<sup>51</sup> Kameri-Mbote P, 'The operational environment and constraints for NGOs in Kenya'.

<sup>52</sup> Tricker I. R, *Corporate governance: Principles, policies, and practices*, Bloomberg Press London, 2014, S97.

<sup>53</sup> Moore M and Stewart S, 'Corporate governance for NGOs'.

<sup>54</sup> Gosepath S. (2005) *The Principle of Subsidiarity*. In: Follesdal A., Pogge T. (eds) *Real World Justice. Studies in Global Justice*, Vol 1. Springer, Dordrecht. [https://doi.org/10.1007/1-4020-3142-4\\_9](https://doi.org/10.1007/1-4020-3142-4_9) Pages 157-170 Chapter 9

<sup>55</sup> Article 118, *Constitution of Kenya* (2010).

crucial aspect, namely how legislation and regulation should incorporate a holistic accountability mechanism for NGOs. This therefore leaves a research gap which this thesis seeks to address.

### **1.7. Justification of the Study**

The research is meant to examine the status of NGO Accountability with due consideration of legislative provisions on NGO administrations in Kenya. There is a significant rift between the existing provisions and their implementation. A number of shortcomings are also evident in the current structures as on many occasions, they fail to include vital accountability concepts. The purpose of this research therefore is to present the inadequacies while exploring suitable solutions and recommendations likely to remedy the situation.

### **1.8. Research Methodology**

The research will adopt a doctrinal approach and shall focus on the analysis of statutes, case law, and other legal sources. The doctrinal approach is suitable as the research seeks to undertake an analysis of the inadequacies in the legislative and regulatory framework on accountability of NGOs. This will include studying the existing laws on NGO accountability, cases relating to accountability and other literature specific to NGO accountability.

The research will rely on solely on theoretical data from both primary and secondary sources. On primary sources, the study will examine international instruments, relating to the operations of NGOs, ascribed to by Kenya. The intention of the analysis of these instruments would be to ascertain the extent to which the Kenyan legislative and regulatory frameworks comply to the provisions of the treaties in relation to NGO operations generally and specifically on accountability.

The research will further analyse primary data from local legislative and regulatory positions on NGOs and their provisions on accountability for the NGOs, the enforcement challenges and the need to recommend for the enactment of legislation to fill the gaps that remain unaddressed by the legislation on accountability by NGOs. Case laws on disputes

around NGO registration, accountability and general operations, shall also be relied on to establish the existence of accountability and enforcement mechanisms or lack thereof.

Secondary sources will be consulted extensively including literature from various authors as published in books, journals, working papers, research articles, theses, newspapers, reports and online platforms. An assessment of the diverse positions will be done to determine whether Kenyan frameworks are reflective of the same and what position is best suited for Kenya in relation to NGO accountability.

A comparative analysis with particular interest in South Africa will be incorporated in order to compare the Kenyan NGO framework to the South African accountability mechanisms. Focus on South Africa over other states is due to the legislative and regulatory advancements in the country as compared to other African countries, particularly in relation to NGOs from which a productive comparison can be drawn. South Africa also happens to have one of the largest NGO sectors among developing and transitional nations in the world exceeding even the developing country average.<sup>56</sup> The comparative approach is meant to eliminate any biased perceptions of the shortcomings encountered in the Kenyan case and determine whether there is need to make alterations to existing frameworks. It will also allow for assessment of systems generally assumed to be better or more advanced thus ensuring elimination of misconceived perfection and blind borrowing.

### **1.9. Limitations of the study**

The research is basically a desktop analysis with its base on review of texts, existing laws, scholarly articles and court verdicts. While research has been done on the general topic of accountability, it is mostly restricted to the traditional corporate sector with little mention of accountability in NGO operations. In Kenya, minimal research has been done on NGO accountability and related areas thus limiting information and resources. Reliance is

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<sup>56</sup> Swilling M, Russell B, Sokolowski S and Salamon L, 'South Africa' in Sokolowski S and Salamon L, Vol 2, *Global Civil Society: Dimensions of the Non-profit Sector*, Kumarian Press, Inc, 2004.

placed mainly on the domestic legal and regulatory frameworks which are not inclusive of views and perspectives of individuals.

In the Kenyan context, concerns over accountability are common in corporate circles and specifically in profit generating entities and the government and state entities. As a result, there were not as many cases relating to NGO accountability in comparison with suits relating to accountability of other players in the corporate sector, to be relied on for the research. Recently there have been a few concerns raised, with NGOCB initiating action to deregister NGOs for allegations relating to non-accountability leading to suits that have set precedential records.

Due to time constraints, field work was not possible and this also impeded the chances of conducting interviews with NGOs and regulatory bodies in the country to get an insightful perspective as to the accountability frameworks.

#### **1.10. Chapter breakdown**

This research is split into five chapters with the first chapter providing the background of the study by analysing corporate governance generally and why the same should apply to NGOs. Chapter one focuses on the specific principle of interest to the research which is accountability and how that plays out in the NGO sector. This chapter also states the hypothesis of the research, research objectives and the research questions which the research attempts to answer. The research methodology and limitations to the study are also be presented in this chapter. Present literature on the research was reviewed and gaps identified to offer an overview of the problem.

Chapter two extensively discusses the theory informing the study that is the stakeholder theory as introduced in the first chapter. The chapter shall further discuss how the theory affects accountability mechanisms in the NGO sector. The theory adopted provides a lens through which the results of the study could be explained.

The Kenyan Regulatory Framework of NGOs i.e. the NGO Act and its Regulations, the Public Benefits Organisation Act and other related NGO laws are analysed in Chapter three. The Chapter specifically looks at the provisions on accountability, self-regulation

and general regulation of NGOs. The chapter sought to understand how the gaps within the law contribute to non-accountability by NGOs and reforms required for better accountability practices.

Chapter four undertakes a comparative study of NGOs laws in South Africa in order to establish the distinctive elements from the Kenyan framework. This allows for determination of what works best in initiatives to foster accountability.

Chapter five provides the general synopsis, conclusion and the recommended position on the subject of discussion. It presents the final position on NGO accountability in response to the research questions raised the hypothesis and offers a solution to the problem statement.



## CHAPTER 2

### THEORETICAL FRAMEWORK

#### 2.0 INTRODUCTION

The need for NGOs to be accountable to all their stakeholders is supported by the ensuing discussion of the theoretical underpinnings of stakeholder accountability. This chapter will analyse the theory supporting stakeholder accountability, specifically, the stakeholder theory as conceived by Edward Freeman. A discussion of the theory will indicate the importance of proper stakeholder management by organisation. The stakeholder theory provides the basis for recognition of the wide range of stakeholders by organisations beyond the investors. This chapter will seek to establish how concepts from the theory can be tied to NGO accountability discussions.

#### 2.1 THEORY

##### 2.1.1 Stakeholder Theory

##### 2.1.1.1 Foundations of the Stakeholder Theory

The theory is commonly referred to as Freeman's stakeholder theory due to Edward Freeman's extensive research in the area and its origins are traceable to the mid-1980s<sup>57</sup>. In that period, it is argued that the business environment was undergoing environmental turbulence and the traditional strategies were not adequate in resolving the challenges and supporting the development of new opportunities.<sup>58</sup> The response to this problem was the emergence of the stakeholder approach.

According to the stakeholder theory, the function of an organisation is to guarantee that the organisation takes into account wider societal interests that go beyond financial growth for investors. It argues that managers should understand the interests, relationships and

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<sup>57</sup> Freeman R, Harrison J, Wicks A, Parmar B, Simone de Colle, 'Stakeholder theory; The state of the art' 4(1) *The Academy of Management Annals*, 2010, 403–445, 404.

<sup>58</sup> Freeman R and Mc Vea J, 'A stakeholder approach to strategic management' University of Virginia, Working Paper Number 01-02, 1 - < [http://papers.ssrn.com/paper.taf?abstract\\_id=263511](http://papers.ssrn.com/paper.taf?abstract_id=263511) >.

the interconnections of all the stakeholders and manage them for the long term success of the organisation.<sup>59</sup> Freeman reasons that the foregoing is important since managerial actions affect a wide range of person or groups and in the same manner that the objectives of an organisation can be halted or affected by the actions a wide range of person or groups.<sup>60</sup>

Donaldson and Preston, as cited by Freeman, contend that the theory is divided into four parts as follows: descriptive, instrumental, normative and managerial<sup>61</sup> and that the four aspects of the theory are not differentiated but are embedded and intertwined.<sup>62</sup> The descriptive part of the theory gives an explanation of the features and the conduct of an organisation. The instrumental approach stresses on identifying the stakeholders and the manner in which the stakeholders will be managed for purpose of achieving the objectives of the organisation. Stakeholder collaboration as envisioned in the instrumental approach results in high levels of trust from stakeholders, increased efficiency and more predictable outcomes. The managerial approach speaks to the needs of practitioners within the organization. The normative approach is a means of discerning the function of the organisation and speaks to the morality of actions undertaken by the organisation.<sup>63</sup>

### **2.1.1.2 Scope of the Stakeholder Theory**

Stakeholders may consist of organisations, groups and individuals interested in the operations and output of an entity, which then means that they may be affected by the organisation or are essential to the survival of an organisation.<sup>64</sup> Developed as a stakeholder management method, stakeholder prioritization is applied to determine which

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<sup>59</sup> Freeman R *et al*, 'A stakeholder approach to strategic management', 11.

<sup>60</sup> Freeman R, *et al*, 'Stakeholder theory; The state of the art' 4(1) *The Academy of Management Annals*, 2010, 403–445, 404.

<sup>61</sup> Freeman R *et al*, 'A stakeholder approach to strategic management', 13.

<sup>62</sup> Inha M, 'Stakeholder relationships in a non- profit network organisation; Case: European Business Ethics Network', Unpublished M.Sc. thesis, University of Tampere School of Management, 2015.

<sup>63</sup> Harrison J and St. John C, 'Managing and partnering with external stakeholders' 10(2) *Academy of Management Executives*, 1996, 46–60.

<sup>64</sup> Conservation International, *Social policy and practice; Stakeholder's mapping guide for conservation, International Country Programs and Partners*, April 2014, 4 -<<https://iwlearn.net/resolveuid/d20fc335-aa29-440b-ae14-f94f37321427>> on 19 September 2018.

stakeholder to give precedence to, based on a number of issues.<sup>65</sup> These include power, knowledge and general preferences amongst other reasons.<sup>66</sup> Clarkson classifies stakeholders as primary and secondary stakeholders. He defines primary as the group which the organisation needs for it to exist as a going concern and the secondary group as the category that impacts or is affected by the organisation but is not critical for its survival.<sup>67</sup> Mitchell on the hand classifies stakeholders as latent, expectant or definite stakeholders based on the number of characteristics held by the stakeholder at the time.<sup>68</sup> The criterion ranks stakeholders based on three characteristics that are: the stakeholders' ability to influence an organisation; the validity of the stakeholder's relationship with the organisation and; how critical the stakeholders claim is on the organisation.

According to the stakeholder theory, stakeholder management should focus more on working on the relationships rather than on the groupings<sup>69</sup> as stakeholders lack homogeneity thus vary across organisations.<sup>70</sup> Freeman argues that it is important to recognize the varied interests of stakeholders in the determination of legitimacy and their involvement in an organisation's operations. This recognition would help in striking a balance between risks and rewards derived from different stakeholders and in helping an organisation reconcile conflicting interests of stakeholders hence limit retaliation.<sup>71</sup> From the managers point of view, Freeman argues that there is need to promote basic rights in every action undertaken, transparency in any engagements with stakeholders, recognition and regulation of conflict interests by managers.<sup>72</sup>

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<sup>65</sup> Berens W, 'Customers, employees, NGOs-Which stakeholders do really count? A holistic conceptual framework for stakeholder prioritization and expectation management' Working Paper Number 15-1, 1 -< <http://www.wiwi.uni-muenster.de/ctrl>> May 2012.

<sup>66</sup> Berens W, 'Customers, Employees, NGOs-Which stakeholders do really count?' 3.

<sup>67</sup> Clarkson M, 'A stakeholder framework for analyzing and evaluating corporate social performance' 20(1) *The Academy of Management Review*, 1995, 92-117, 106.

<sup>68</sup> Mitchell R, Agle B and Wood D, 'Toward a theory of stakeholder identification and salience: Defining the principle of who and what really counts' 22(4) *The Academy of Management Review*, 1997, 853-886, 854.

<sup>69</sup> Friedman A and Miles S, *Stakeholders theory and practice*, 1<sup>st</sup> ed, Oxford University Press, United States, 2006, 149.

<sup>70</sup> Harrison J *et al*, 'Stakeholder theory as an ethical approach to effective management', 863.

<sup>71</sup> Friedman A *et al*, *Stakeholders theory and practice*, 151.

<sup>72</sup> Friedman A *et al*, *Stakeholders theory and practice*, 152.

### 2.1.1.3 Justifications of the Stakeholder Theory

There are justifications towards this shift and towards inclusion of stakeholders in governance of organisations suggesting that their participation is an effective means of improving efficiency, competition and economic success. Freeman argues that the theory is a means to achieve practical, efficient and ethical management of organisations and that for its long term survival, an organisation should serve multiple stakeholder interests rather than shareholder interests alone.<sup>73</sup> This means that, rather than viewing stakeholders as ‘the end’, they need to also be considered as the ‘means to an end’ with the end being premised on the need to allow organisations serve a wider public purpose.<sup>74</sup> The bottom-line of the stakeholder theory is that organisation must purpose to ensure fair, honest and ethical treatment of all stakeholders.

Ethics in the corporate world has always been a contentious issue and the stakeholder theory offers an opportunity for reconciliation. In their day to day operations, organisations affect the society in multiple ways but despite this fact, most fail to incorporate ethical practises in their operations.<sup>75</sup> This affects their ability to attain accountability and transparency. Through application of the stakeholder theory, accountability and transparency is fostered within organisations since all interests are considered in decision making among other areas of management. Rebuttals by Freeman of Friedman’s stockholder theory position on the purpose of business being maximization of profits are demonstrative of the ethical connotations which influence the stakeholder theory. Its application goes beyond profit making to include ethical and moral perspectives in conduct of business.<sup>76</sup>

Management influenced by the stakeholder theory also allows for the organisations in question to make better informed decisions from the input from stakeholders thus promoting public interest which in turn builds trust thus minimising regulatory restrictions

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<sup>73</sup> Freeman R, ‘The politics of stakeholder theory’ *Business Ethics Quarterly*, 1994, 409-21, 4.

<sup>74</sup> Clarke T and Clegg S, ‘*Changing paradigms: The transformation of management knowledge for the 21st century*’, 1998, 106-107.

<sup>75</sup> Phillips R, *Stakeholder theory and organisational ethics*, Berrett-Koehler Publishers, 2003, 1.

<sup>76</sup> Phillips R, *Stakeholder theory and organisational ethics*, 4.

by the state.<sup>77</sup> Arguments by stakeholder theorists suggest that stakeholder-based entities should not only be managed by parties affected by decisions and actions of the entity but also that their independence from the state be maintained and that governance should be geared towards social good.<sup>78</sup> This installs a sense of ownership and encourages participation by stakeholders.<sup>79</sup> Such participation results in reduced business constraints likely to affect an organisations operations. It also allows for prior preparation which helps in elimination of potential risks along with enhancing the understanding of criticisms levelled against the organisation and finding suitable solutions.<sup>80</sup>

#### **2.1.1.4 Stakeholder theory and related disciplines**

Extensive discussions on the stakeholder theory have been had since its inception resulting in the emergence of multiple interrelated disciplines and in some instances these have been marred with confusion. One such development is the political stakeholder theory<sup>81</sup> which relates to the role of the state as a stakeholder. In the context of this thesis, political stakeholder theory is based on the superiority of the state over all other stakeholders in the NGO sector. The compulsive powers and capabilities held only by the state place it at an advantage over other stakeholders.

Aside from having the ability to layout the regulatory and organisational framework governing various entities, states are capable of directly and indirectly influencing other relevant stakeholders by putting in place predetermined transactions amongst them.<sup>82</sup> State superiority is premised on the prioritization model that is often adopted by NGOs where the NGOs, through various means establish which stakeholder they stand to benefit

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<sup>77</sup> Olsen T, Political stakeholder theory: The State, legitimacy and the ethics of microfinance in emerging economies, 27(1) *University of Denver Business Ethics Quarterly*, January 2017, 71–98, 75.

<sup>78</sup> Benedict S, 'Scrooge-The Reluctant stakeholder: Theoretical problems in the shareholder-stakeholder debate', *University of Miami Business Law Review*, Rev 193, 2005, 201 -<<http://repository.law.miami.edu/umblr/vol14/iss1/6>>.

<sup>79</sup> Usadolo S and Caldwell M, 'A stakeholder approach to community participation in a rural development project' SAGE Open, January-March 2016, 1– 9,1.

<sup>80</sup> Jeffery N, 'Stakeholder engagement: A road map to meaningful engagement in the Doughty Centre', 'How to do corporate responsibility' Series Doughty Centre, Cranfield School of Management, July 2009, 11.

<sup>81</sup> Olsen T, 'Political stakeholder theory'.

<sup>82</sup> Olsen T, 'Political stakeholder theory', 77.

from the most and give priority to that stakeholder.<sup>83</sup> Prioritization of the state is informed by the power it holds. Donor prioritization on the other hand, is informed by resource dependency theory, under which priority of stakeholders is determined by their ability to provide resources to the NGOs.<sup>84</sup> According to the resource dependency theory, NGOs place reliance on external sources of financial support which in turn contributes to loss of autonomy as the dependency makes them susceptible to external control.<sup>85</sup> Prioritization under the circumstances discussed has led NGOs to make reports only to donors and governments and not to the other stakeholders who do not have as much power or resources over NGOs. NGOs should consider the interests of all stakeholders as is expected by the stakeholder theory to ensure that the various stakeholder's interests are taken into account.<sup>86</sup>

From the foundations of the stockholder theory, it is evident that it is also closely related to the stakeholder theory. According to Friedman, the stockholder theory is premised on moral purpose and responsibility of an entity.<sup>87</sup> To support this notion, Friedman further states that shareholder wealth maximization as per the stockholder theory must be done with due consideration of legal provisions and moral implications.<sup>88</sup> Operating in a voluntary contractual relationship, the executives and the stockholders are charged with specific obligations in a principal-agent model. Acting as the agents of the stockholders, the executives have to, in performing their duties, act in accordance with the directives and expectations of the stockholders.<sup>89</sup> This fiduciary relationship is similar to the one between management and stakeholders but in the case of stockholder theory, the

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<sup>83</sup> Berens W, 'Customers, employees, NGOs-Which stakeholders do really count? A holistic conceptual framework for stakeholder prioritization and expectation management' Working Paper Number 15-1, 1 -< <http://www.wiwi.uni-muenster.de/ctrl>> May 2012.

<sup>84</sup> Yuesti A and Rustiarini N, 'Accountability problem of Non- Government Organisations on practice and perspective stakeholder theory' Vol 15 *Journal of International Accounting Auditing and Taxation*, September 2017, 72.

<sup>85</sup> Mitchell G, 'Strategic Responses to Resource Dependence Among Transnational NGOs Registered in the United States' 25 (1) *Voluntas: International Journal of Voluntary and Non-profit Organisations*, February 2014, pp. 67-91.

<sup>86</sup> Yuesti A *et al*, 'Accountability problem of Non- Government Organisations', 78.

<sup>87</sup> Mertens K, 'Milton Friedman and social responsibility – An ethical defence of the stockholder theory' Unpublished thesis, The University of Oslo, 2013, 6.

<sup>88</sup> Phillips R *et al*, 'What stakeholder theory is not', 493.

<sup>89</sup> Mertens K, 'Milton Friedman and social responsibility', 5.

manager's sole motivation is always a positive increment in shareholder wealth as is demanded by the wealth maximization concept.<sup>90</sup>

Owing to the similarity in models of application, manifestations of the stakeholder theory are commonly confused with corporate social responsibility (CSR) efforts.<sup>91</sup> The confusion is as a result of the fact that most organisations have deliberately taken up corporate social responsibility initiatives to foster relations with stakeholders in an effort to avert the pressure to do so. Growing interest by the stakeholders themselves has contributed to this shift<sup>92</sup> and demands for accountability from NGOs by donors are a clear demonstration of such pressures. The two concepts have been discussed by various authors concurrently but there is a major variation since CSR relies on separation of business and societal needs and treating the two differently. Stakeholder theory on the other hand argues that one cannot separate the two.<sup>93</sup>

Overall, the stakeholder theory seeks to promote fairness in an organisation by ensuring all stakeholders are treated as equals in spite of the variation in their inputs and general contribution.<sup>94</sup> Application of the stakeholder theory fosters accountability in organisations as it seeks to have the problems of accountability solved in a synthesized manner. Such problems include: reporting and disclosure, social audit, self-regulation, performance assessment and evaluation.<sup>95</sup>

#### **2.1.1.5 Criticism of the Stakeholder theory**

While the stakeholder theory received positive reception in most parts, criticism has been levelled against its application. One of the most notable critics is Elaine Sternberg whose arguments revolve around the incompatibility of stakeholder theory with corporate governance. Arguments by Sternberg are structured in the form of inquiries as to the proponents of the stakeholder theory.

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<sup>90</sup> Dunn C and Burton B, 'Friedman's 'The social responsibility of business is to increase its profits: A critique for the classroom'', Western Washington University, Conference paper, January 2006.

<sup>91</sup> Freeman R *et al*, 'Stakeholder theory; The state of the art', 436.

<sup>92</sup> Harrison J *et al*, 'Stakeholder theory as an ethical approach to effective management', 864.

<sup>93</sup> Harrison J *et al*, 'Stakeholder theory as an ethical approach to effective management', 860.

<sup>94</sup> Yuesti A *et al*, 'Accountability problem of Non- Government Organisations', 78.

<sup>95</sup> Yuesti A *et al*, 'Accountability problem of Non- Government Organisations', 83.

According to Stenberg, the principle of equal accountability to all stakeholders as required by the stakeholder theory is contradictory to the position in corporate governance that holds directors accountable to shareholders.<sup>96</sup> In support of this argument, Marcoux outlines three possible versions of equity that should be applied in order to attain the requisite equity for an organization's stakeholders. The first is egalitarianism, which is based on John Rawls theory of justice and requires that distribution to stakeholders is done in a socially just manner. Second is equalitarianism which requires that all stakeholders have, in equal share, all entitlements and obligations. The third is pareto consequentialism which involves making at least one better whilst maintaining the status of another.<sup>97</sup> In the analysis of this position, Phillips, Freeman and Wicks argue that by highlighting these three concepts, Marcoux omits the strongest version of interpretation of equity which is meritocracy.<sup>98</sup> Under meritocracy, an organisation can employ the use of fairness in distribution of benefits so that there is a proper balance between benefits distributed to stakeholders as against the benefits received from the stakeholders. They further argue that key distinctions among stakeholders can be made such that each organisation can then have an opportunity to handle the matter of distribution differently depending on its own particular version of stakeholder theory.<sup>99</sup>

Marcoux criticizes the stakeholder theory further by adding that it is primarily concerned with distribution of financial outputs.<sup>100</sup> He argues that stakeholder theory is concerned with who receives how much of the resources and why, thus leading to a conflict between investors and other stakeholders over resource allocation. In response to this, Freeman argues that distribution of financial outputs is only but a part of the stakeholder theory. He states that the crucial part which the critics fail to recognize is about processes and procedural justice. This he argues, gives room for stakeholder input in decisions relating to how resources are allocated and decision on who should benefit from the outcomes of

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<sup>96</sup> Benedict S, 'Scrooge-The reluctant stakeholder', 203.

<sup>97</sup> Marcoux A, 'A fiduciary argument against stakeholder theory' 13(1) *Business Ethics Quarterly*, 2003, 1-24

<sup>98</sup> Phillips R, Freeman R, and Wicks A, 'What stakeholder theory is not' 13(4) *Business Ethics Quarterly*, 2003, 479-502, 488.

<sup>99</sup> Freeman R *et al*, 'Stakeholder theory; The state of the art', 8.

<sup>100</sup> Marcoux A, 'A fiduciary argument against stakeholder theory'.

such decisions.<sup>101</sup> Freeman cites research showing that stakeholders accept results when they consider the process of arriving at such decisions to be fair even in cases where the results themselves are poor. In support of the foregoing, Phillip, Freeman and Wicks add that stakeholder theorists and critics should be fully cognizant of the procedural prescriptions of the theory along with the distributive aspects.<sup>102</sup> This is because focus on distribution of resources and ignoring the processes is what leads to the notion that distribution of outputs is a limitation on stakeholder theory. Notable is that measurable outputs are not the only priority of distribution because other aspects can be distributed including information.

The stakeholder theory has been termed a tool of opportunist management which allows for immoral managers to prioritize their interests over all else.<sup>103</sup> Such opportunistic tendencies are backed by the management's claims of benefiting the organisation through maximization of contributions by other stakeholders. This notion is derived from Sternberg's criticism on the lack of performance evaluation mechanisms for actions undertaken by management. In counter arguing this position, Freeman and other authors state that there have been considerable reports in mismanagement of organisations and managerial opportunistic behaviours noted under other theories like the agency theory. Therefore, the occurrence of opportunistic behaviour is not a creation of stakeholder theory and is not specific to stakeholder theory only. To the contrary, they opine that the creation of more accountability obligations and duties of care to more constituencies for managers will ensure that managers are less likely to engage in self-dealing.<sup>104</sup>

Friedman's stockholder theory has long been viewed as an opposition to the stakeholder theory. According to Friedman, businesses are made successful by maximization of profits.<sup>105</sup> This capitalist approach is contrary to the stakeholder theory that considers business success a direct result of solid relationships combined with good production and

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<sup>101</sup> Freeman R *et al*, 'Stakeholder theory; The state of the art', 7.

<sup>102</sup> Phillips R, Freeman R, and Wicks A, 'What stakeholder theory is not' 13(4) *Business Ethics Quarterly*, 2003, 479-502.

<sup>103</sup> Yuesti A *et al*, 'Accountability problem of Non-Government Organisations', 72.

<sup>104</sup> Freeman R *et al*, 'Stakeholder theory; The state of the art', 7

<sup>105</sup> Friedman M, 'The social responsibility of business is to increase its profits' *The New York Times Magazine*, 13 September 1970.

maximization of profit with support of the communities.<sup>106</sup> Stakeholder theory further takes into consideration the potential implications of a manager's actions on concerned parties by incorporating the accountability obligations as stated in the preceding paragraph. This is unlike the stockholder theory position which only considers the interest of stockholders among other parties.<sup>107</sup>

Stenberg further argues that the stakeholder theory fails to give an organisation purpose of existence and rather requires that businesses balance the interests of stakeholders with no long term value added to the owners.<sup>108</sup> She argues that the stakeholder theory makes the conduct of business impractical since businesses which focus on maximization of profits rather than balancing stakeholder interests are not recognized under the stakeholder theory.<sup>109</sup>

In addition to this position, Marcoux argues that while stakeholder theorist rejects the maximization of profits objective, they still fail to offer helpful guidance.<sup>110</sup> Phillip, Freeman and Wicks agree that in some sense, this critique is correct as the theory does not provide a procedure for daily administrative decision making due to the level of generalization at which the discussion is taking place.<sup>111</sup> According to them, the essence of the theory is to give the system by which stakeholder obligations are derived and caution that managers must be accountable for the interests of all stakeholders when making decisions. They add that at that level of abstraction it is not possible to indicate in advance what these interests are to be and how they may be accounted for due to the numerous ways in which an organisation operates. In furtherance of this argument, the authors propose that there is need for legislation to ensure management considers interests of stakeholder as a mandatory obligation.<sup>112</sup> This will ensure the contributions by stakeholders will not be dismissed at the decision making stage.

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<sup>106</sup> Freeman R *et al*, 'Stakeholder theory; The state of the art', 410.

<sup>107</sup> Freeman R *et al*, 'Stakeholder theory; The state of the art', 433.

<sup>108</sup> Sternberg E, 'Stakeholder theory exposed', *The Corporate Governance Quarterly*, March 1996.

<sup>109</sup> Sternberg E, 'Stakeholder theory exposed', 36.

<sup>110</sup> Marcoux A, 'A fiduciary argument against stakeholder theory'.

<sup>111</sup> Phillips R *et al*, 'What stakeholder theory is not'.

<sup>112</sup> Phillips R *et al*, 'What stakeholder theory is not', 490.

The stakeholder theory has also been criticized for failing to take into consideration the different roles played by various stakeholders. This variation extends to their objectives which may vary in terms of longevity, risks assumed and profits. According to critics, this is advanced by the lack of guidelines in the selection and categorization process of stakeholders. Consequently, determination of the needs of stakeholders and of the extent of benefits derived from and to be granted to stakeholders is rendered impossible.<sup>113</sup> Existing legal provisions fail to remedy this situation since, rather than offering a clear framework on stakeholder interests, they attempt to outline provisions covering all stakeholders without specificity as to the limits or extent of their roles and obligations.<sup>114</sup> Considering the position of law, Benedict further argues that this criticism can only be dismissed upon the introduction of well-structured laws that are responsive to the problem at hand.<sup>115</sup>

Another criticism is based solely on the misconception of the stakeholder theory as a comprehensive moral doctrine<sup>116</sup> A theory is considered a comprehensive moral doctrine when all moral questions can be answered by the theory and where it has the ability, with no reference to other theories, to cover the entire moral universe.<sup>117</sup> Stakeholder theory is a theory of organizational ethics and as such does not respond to all moral questions as is the case with comprehensive moral doctrines.<sup>118</sup> While the question of morality arises in events such as human rights violations, it does not always involve stakeholder based obligations. Morality concerns may be influenced by concepts that are not necessarily informed by the stakeholder theory. The duty to respect human rights is inherent for all entities regardless of their general operations; therefore failure to uphold such rights is a violation irrespective of the stakeholder's position.<sup>119</sup> As a result of this distinction, criticism against the stakeholder theory in light of it being a comprehensive moral doctrine does not suffice. The criticisms levelled if considered critically, do in fact indicate lacunas in the application of the stakeholder theory. However, they are not sufficient to lead to the

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<sup>113</sup> Sternberg E, 'Stakeholder theory exposed', 36.

<sup>114</sup> Benedict S, 'Scrooge-The reluctant stakeholder'.

<sup>115</sup> Benedict S, 'Scrooge-The reluctant stakeholder'.

<sup>116</sup> Phillips R *et al*, 'What stakeholder theory is not', 493.

<sup>117</sup> Rawls J, *A theory of justice*, The Belknap Press of Harvard University Press Cambridge, 1971.

<sup>118</sup> Phillips R *et al*, 'What stakeholder theory is not', 493.

<sup>119</sup> Phillips R *et al*, 'What stakeholder theory is not', 494.

elimination of the theory altogether but rather offer an opportunity for re-evaluation to address the issues that draw back application of the theory. Besides, the criticisms are mostly based on misinterpretations of the stakeholder theory which does not actually imply that all stakeholders be treated equally regardless of existing variations.<sup>120</sup> The stakeholder theory has to be applied reflectively in order to tap into the limitless managerial prescriptions and implications.<sup>121</sup>

That entities cannot do without stakeholders, contributes greatly to the pragmatic nature of the stakeholder theory since it allows for proper management, causing stakeholders to respond positively in a general exchange model.<sup>122</sup> Its vitality to corporate governance is undeniable. The theory is informed by optimum business output and improvement potential with focus on creation of value and proper business management.<sup>123</sup> While it may appear unnecessary to adopt changes in law to incorporate the stakeholder theory since it is not currently prohibited, there is need for enactment of legislation that is reflective of the elements of the theory. This would not only advance its viability but also ensure that stakeholder interests are not undermined at any given point.

## **2.2 CONCLUSION**

The stakeholder theory offers a basis upon which arguments for accountability to stakeholders can be founded. With the stakeholder theory advancing the argument for stakeholder engagement it is demonstrative of the need to look at organisations beyond the profit generation capabilities and beyond investors. The theory is crucial to the discussion on NGO accountability since it directly deals with the importance of involving stakeholders in operations which can then enhance holistic accountability.

Accountability problems have to be analysed with due consideration of implementation and enforcement measures. The diverse accountability mechanisms discussed in Chapter

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<sup>120</sup> Fassin Y, 'Imperfections and shortcomings of the stakeholder model's graphical representation, Working Paper Number 504, 2008, 5, on February 2008.

<sup>121</sup> Phillips R *et al*, 'What stakeholder theory is not', 479.

<sup>122</sup> Harrison J, Freeman R, Sá de Abreu M, 'Stakeholder theory as an ethical approach to effective management: Applying the theory to multiple contexts', 17(55) Special edition, *Revista Brasileira De Gestão De Negócios*, Review of Business Management, São Paulo, 2015, 858-869, 858.

<sup>123</sup> Freeman R, *et al*, 'Stakeholder theory; The state of the art', 409.

one of the thesis offer a wide range of measures that can be applied in an effort to resolve accountability problems. In light of the foregoing, the accountability mechanisms discussed and the theoretical basis discussed in this Chapter will be used as a threshold upon which the legal and regulatory frameworks discussed in Chapter three can be analysed to establish the viability of accountability provisions.



## **CHAPTER 3**

### **THE LEGAL AND REGULATORY FRAMEWORK FOR NGOS IN KENYA**

#### **3.0 INTRODUCTION**

The legal and regulatory framework for NGOs in Kenya has undergone a number of developments over the years. While progress has been made on making necessary adjustments on various aspects, NGO accountability is yet to be achieved holistically. Continued breach of the accountability provisions by NGOs may be attributed to the inadequacy of the legislative and regulatory framework in providing for a holistic mechanism on accountability of NGOs. This chapter will analyse the specific inadequacies in the legal and regulatory framework for regulation of NGOs in Kenya contribute to deficits in NGO accountability to stakeholders and the specific reforms required in order to foster accountability. An analysis of the international laws and their influence on domestic legislation will be done so as to determine the level of compliance. Consideration will be given to the Constitution of Kenya, 2010, the NGO Coordination Act of 1990 and its regulations and the Public Benefits Organization Act of 2013. These instruments shall further be discussed in light of accountability mechanisms, tools and processes with due consideration of the concerned parties in order to allow for identification of gaps and establishment of potential solutions.

#### **3.1 HISTORICAL DEVELOPMENT OF LAWS IN THE NGO SECTOR IN KENYA**

Prior to 1990, non-profit organizations were registered under different regimes including companies limited by guarantee, trusts, foundations and societies. In relation to the regulatory framework, non-profit organizations were regulated by different entities and through different mechanisms such as the Ministry of culture and social services, the Office of the Attorney General, the Ministry of Gender and Youth or through specific legislations such as the Kenya Red Cross Society Act, Companies Act, Societies Act or

Trustees Act amongst others.<sup>124</sup> In practice, the organizations operated and undertook their activities in line with the diverse policies and legal structures under which they were registered and this led to complications in creating a uniform regulatory structure.<sup>125</sup>

During the period 1963 to 1990 there was lack of government's appreciation of the work undertaken by NGOs and its role in the development of the country because of the absence of a national policy or framework governing NGOs. In 1986, the ministry of culture and social services unsuccessfully attempted to legislate NGO operations by drafting a paper to the cabinet on the need to regulate the operations of NGOs in Kenya.<sup>126</sup>

In 1989, a presidential edict was issued for officials to commence the development of a framework for the regulation and coordination of NGOs under the office of the president which led to the appointment of an inter-ministerial taskforce to handle the process.<sup>127</sup> The need for the law was triggered by doubt on the genuineness of NGOs after several NGOs were cited for acquisition of arms amongst others. <sup>128</sup> On the other hand, NGOs were also advocating for an elaborate law that took into consideration their concerns. Nonetheless, their views were side-lined.<sup>129</sup>

In view of the suspicion between the government and NGOs, it is argued that the context in which the NGO Act was developed was not favourable for NGOs. Participants in the NGO sector strongly opposed the law on the grounds that the provisions were not creating an enabling operating environment but rather aimed at oppressing and controlling the sector. This led to a number of discussions between sector participants and the government resulting in compromise proposals which were presented to the government in the form

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<sup>124</sup> Kameri-Mbote P, 'Operational environment and constraints for NGOs in Kenya: Strategies for good policy and practice' International Environmental Law Research Centre, IELRC Working Paper Number 2, 2000., <http://www.ielrc.org/content/w0002.pdf> .

<sup>125</sup> Jillo R, 'Restrictions on Foreign Funding of Civil Society NGO Law in Kenya' 11(4) *The International Journal of Not-for-Profit Law*, <https://www.icnl.org/resources/research/ijnl/ngo-law-in-kenya>, 2009.

<sup>126</sup> Kameri - Mbote P, 'The operational environment and constraints for NGOs in Kenya: Strategies for good policy and practice' International Environment Law Research Centre, Working Paper Number 2, 2014 – <http://www.ielrc.org/content/w002.pdf> on 8 December 2016.

<sup>127</sup> Kameri-Mbote P, The operational environment and constraints for NGOs in Kenya.

<sup>128</sup> Kameri-Mbote P, The operational environment and constraints for NGOs in Kenya.

<sup>129</sup> Kanyinga K, 'Why government and NGOs aren't friends, and what not to do about it'.

of a draft bill which formed the basis of the NGO Act.<sup>130</sup> The history and the process of the development of the law is important as it gives insights to the genesis of the tension that exists between the government and the NGOs. It is also indicative of why the laws enacted may not be creating an enabling environment for NGOs which leads to issues of non-accountability.

### **3.2 THE GENERAL NGO REGULATORY FRAMEWORK IN KENYA**

This section explores the international treaties, the position of the Kenyan law and examines the extent of accountability provisions as initiated by the existing provisions. The legal and regulatory framework on NGOs in Kenya is grounded in the Constitution of Kenya, 2010 which is the supreme law of the land. The bill of rights is integral to the operations of NGOs as it lays the foundation for the work and idea of NGOs.

In relation to the sector specific legislation, in 1990, the NGO Act of 1990 and the regulations therein were enacted in an effort to ensure that there exists a single authority for registration and regulation of NGOs. However, this was done in the absence of a national policy on NGOs. The implementation led to queries about the effectiveness of the law since in circumstances where the law was silent or led to misunderstandings, there was no policy position to make reference to. In 1996, the NGOCB thought it necessary to have a national policy on NGOs and in January 2006, Sessional Paper Number 1 of 2006 containing the National Policy on Non-Governmental Organizations (NGO policy) was adopted by the parliament.<sup>131</sup> Both the Constitution of Kenya, 2010 under its Article 2(5) and the NGO policy recognize the provisions of international conventions and treaties governing the operations and activities of NGOs. The policy also recognizes NGOs' contribution to the economy and thus proposes mechanisms for better regulation and coordination.<sup>132</sup>

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<sup>130</sup> Kisinga F, 'The process of reviewing the NGO Coordination Act, 1990: A step-by-step road map' The International Centre for Not-For-Profit-Law, [www.icnl.org](http://www.icnl.org).

<sup>131</sup> Kisinga F, 'The process of reviewing the NGO Coordination Act 1990'.

<sup>132</sup> Poverty Eradication Network, *Background notes for the NGO law review CSO consultation workshops*, 2010.

The PBO Act of 2013, once effected, is meant to provide a more advanced model of regulation covering accountability extensively in public benefit organizations in Kenya.

### **3.2.1 The Constitution of Kenya, 2010**

In August 2010, Kenya promulgated a new constitution and based on the foundation of this progressive constitution, the legal environment in Kenya has been generally supportive of NGOs. The Constitution upholds the freedom of association, freedom of expression and freedom of access to information as provided for in the international and regional legal instruments.<sup>133</sup> The right to associate, express oneself and have peaceful assembly are the essential principles upon which NGOs operate and as such NGOs may not exist unless the law gives significant protection to these fundamental freedoms.<sup>134</sup>

The freedoms discussed have to a large extent, been respected in Kenya save for some instances where the government has used the Public Order Act to call off opposition<sup>135</sup>, civil society assemblies and demonstrations.<sup>136</sup> The government of Kenya has continued to provide the space for exercising freedoms discussed. However, with the terrorist attacks in the past decade in Kenya, there is increased fear and the national security machinery has limited the formation and operations of some groups especially for youths and citizens aligned to Islam. This was particularly evident when the government attempted to close the operations of two key organisations Muslims for Human Rights (MUHURI) and Haki Africa for alleged links to terrorist groups.<sup>137</sup>

### **3.2.2 The International Framework**

The Constitution of Kenya is cognizant of the vitality of international law. According to Article 2(5) of the Constitution of Kenya, treaties and conventions to which Kenya is a

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<sup>133</sup> Article 33, 36 37, *Constitution of Kenya*, 2010.

<sup>134</sup> Jillo R, *NGOs Law Reform in Kenya: Incorporating Best Practices*, Unpublished LLM Thesis, University of Nairobi, Nairobi, 2010.

<sup>135</sup> Civicus, *State increases pressure on civil society organisations in Kenya*, -< <https://monitor.civicus.org/updates/2016/12/23/kenya/> >- 23 December 2016

<sup>136</sup> Kenya Human Rights Commission, 'Shrinking Civic and Democratic Space' -< <https://www.khrc.or.ke/shrinking-civic-space.html> >

<sup>137</sup> Maina K, 'Why Muhuri and Haki Africa are undergoing crippling harassment' Daily Nation -< <https://muhuri.org/wp-content/uploads/2019/12/Why-Muhuri-and-Haki-Africa-are-undergoing-crippling-harassment.pdf> > Daily Nation, 30 May 2015.

signatory become part of the laws of Kenya upon ratification.<sup>138</sup> Article 2(5) of the Constitution of Kenya accords international law a prominent role in the Kenyan domestic legal system by directly including ratified treaty law as part of the Kenyan legal system thus making it a valid source of law. There are a number of international treaties with both express and indirect provisions meant to guide operations of NGOs at various levels including registration and at the operation stage. As a member state, Kenya is obligated to ensure implementation of the provisions therein.

In relation to formation and membership, the Universal Declaration on Human Rights (UDHR) for instance, explicitly provides for freedom of association. It gives rights to persons to form groups, to organize peaceful meetings and prohibits any person from being forced to belong to any group without their consent. The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic and Social Rights (ICESR) to which Kenya is a state party, also guarantee the freedom of expression, the right to hold peaceful assemblies and the freedom to associate. In *Non-Governmental Organizations Co-ordination Board v EG & 5 others (2015) eKLR*<sup>139</sup>, Waki J, in determining whether the freedom of association was infringed, referred first to the binding nature of principles and values derived from rules of international laws as ratified by Kenya. In its determination, the court held that indeed the NGOCB had violated the freedom of association of the first respondents by failing to register their organization for want of a desirable name. The said violation was owing to the fact that it was in contravention, not only of Article 36 of the constitution, but also of Article 20 of the UDHR, Article 22 of the ICCPR and Article 10 of the African Charter on Human and People's Rights (ACHPR) which provide that every individual has a right to freely associate with others. Reference was also made to *Civil Liberties Organisation v Nigeria, ACmHPR Communication No 101/93 (1995)*,<sup>140</sup> where the African Commission on Human and People's Rights established that the freedom of association is an individual right thereby imposing an obligatory mandate on the state to refrain from interference. The Commission went on to state that mechanisms need to be put in place to ensure

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<sup>138</sup> Article 2(5), *The Constitution of Kenya*, 2010.

<sup>139</sup> Civil Appeal 145 of 2015[2019] eKLR.

<sup>140</sup> African Commission on Human and Peoples' Rights, Comm. No. 101/93 (1995).

citizens can freely join association. The appeal was therefore dismissed for lack of merit. The former case is demonstrative of the need to abide by constitutional provisions and international laws by regulatory bodies as early on as upon registration.

The international framework, similarly to the constitution, is integral to the operations of NGOs as it also lays the foundation for the work and idea of NGOs.

### **3.2.3 The Companies Act, 2015**

The Companies Act is the primary Act for governing companies in Kenya. A brief analysis and comparison of the same to the NGO Act will be undertaken to so as to gauge the level of regulation of NGOs *vis-a-vis* regulation of companies on specifically financial reporting.

## **3.3 NGO SECTOR SPECIFIC FRAMEWORK**

### **3.3.1 The NGO Coordination Act No. 19 of 1990 (NGO Act)**

The NGO Act is the primary legislation governing NGO operations in Kenya. It establishes a regulatory Board known as the NGOCB and a self-regulatory agency to govern the NGOs known as Non-Governmental Organisations Council (NGO Council). The NGO Council is the collective forum for all NGOs registered under the NGO Act. Section 24 of the NGO Act mandates the NGO Council to give advice to the NGOCB in relation to the code of conduct and such other statutes as may be necessary for the regulation of NGOs on a number of matters including national security and training.

The purpose of the NGO Act was to create a unifying legislation for the registration and coordination of the activities of NGOs.<sup>141</sup> The NGO Act became effective on 15 June 1992 and provided a six-month transition period for the affected organizations.<sup>142</sup> This period was later extended by three months to 15 February 1993 during which all existing NGOs were required to register with the NGOCB.<sup>143</sup> The Act provides for various corporate governance and accountability aspects but has failed consolidate all organizations under

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<sup>141</sup> Section 25, *NGO Coordination Act*, 1990.

<sup>142</sup> Section 25, *NGO Coordination Act* 1990.

<sup>143</sup> Jillo R, *NGOs Law Reform in Kenya: Incorporating Best Practices*.

its umbrella thus leading to multiplicity of registered entities with similar models of operation and absence of a holistic approach to accountability for NGOs.

### **3.3.2 The NGO Regulations**

The NGO Coordination Regulations<sup>144</sup> were also enacted under the NGO Act in order to back the operations of NGOs and as a subsidiary legislation to the 1990 Act. The regulations generally deal with the registration, deregistration, conduct and administration of NGOs in Kenya.

### **3.3.3 The NGO Code of Conduct**

The NGO Act provides for a code of conduct applicable to NGOs by mandating NGOC to develop the code of conduct.<sup>145</sup> The Act further requires the code of conduct to be approved by the NGOCB and gazetted, therefore placing legal compliance obligations on NGOs.<sup>146</sup> Pursuant to the provisions of the NGO Act, the code of conduct was developed and gazetted on 8<sup>th</sup> September, 1995. The code has seven guiding principles including probity, self-regulation, justice, service, cooperation, prudence and respect.<sup>147</sup> The intention of the code was to standardize the conduct, action and behaviour of NGOs as well as putting in place mechanisms to ensure that the NGOs comply with the set standards. Every registered organization is expected to apply and observe the provisions of the code.<sup>148</sup> Failure to abide by the provisions is considered a breach of the code and is subject to regulatory action as detailed in Part V of the code.<sup>149</sup> The code establishes the Regulatory Committee<sup>150</sup> which is mandated with promoting and maintaining compliance to the rules and regulations amongst other functions.<sup>151</sup>

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<sup>144</sup> *The Non-Governmental Organizations Coordination Regulations* (1992).

<sup>145</sup> Part III, *Non-Governmental Organizations Council Code of Conduct*, 1995.

<sup>146</sup> Section 24 (5), *NGO Coordination Act*, 1990.

<sup>147</sup> The National Council of NGOs, *A guide to the NGO code of conduct*, 1995, 2004, 7.

<sup>148</sup> Section 3, *Non-Governmental Organizations Council Code of Conduct*, 1995.

<sup>149</sup> Section 6, *Non-Governmental Organizations Council Code of Conduct*, 1995.

<sup>150</sup> Regulation 15, *The Non-Governmental Organizations Coordination Regulations* (1992).

<sup>151</sup> Regulation 17, *The Non-Governmental Organizations Coordination Regulations* (1992).

### 3.3.4 The Public Benefit Organization Act of 2013(PBO Act)

The PBO Act of 2013 is intended to provide a framework for the regulation of the affairs and the conduct of public benefit organizations in Kenya. The PBO Act introduces a number of provisions in the areas of accountability, self-regulation, liberty to associate, and public participation amongst others.<sup>152</sup>

The PBO Act is yet to be operationalized despite court orders being issued to that effect. In the *Trusted Society of Human Rights Alliance v Cabinet Secretary Devolution and Planning & 3 others*<sup>153</sup> petitioners filed the petition following the respondents failure to provide an effective date for the PBO Act thus failing to trigger its commencement for over two years. The petition was allowed by the court and it was held that the failure to provide a commencement date for the PBO Act, was in violation of Articles 1, 10, 73, 94, 116(2), 129 and 153(4) of the Constitution of Kenya, 2010. An order was therefore issued compelling the respondent to issue and gazette a commencement date within fourteen days of the judgement rendered on 31<sup>st</sup> October, 2016.

Despite the above ruling the Cabinet Secretary is yet to appoint a commencement date. Subsequently, in 2015, the Truth and Justice and Trusted Society of Human Rights Alliance filed contempt of court proceedings against the Cabinet Secretary for the Ministry of Devolution and Planning and the Attorney General for failing to commence the PBO Act as directed by the High Court.<sup>154</sup> It was held that the court directive should be implemented. However, to date the Cabinet Secretary has not issued the effective date for the law.

The PBO Act is meant to bring about sanity in the operating environment by creating a supporting environment for public benefits organisations in Kenya.<sup>155</sup> In light of the foregoing, an analysis of the PBO Act is therefore important for purposes of this research.

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<sup>152</sup> Kalii D, 'Regulating Non-Governmental Organizations in Kenya: A critical analysis of the corporate governance system', Unpublished LLM Thesis, University of Nairobi, September 2017.

<sup>153</sup> *Trusted Society of Human Rights Alliance v Cabinet Secretary Devolution and Planning & 3 others* (2016) eKLR.

<sup>154</sup> *Trusted Society of Human Rights Alliance v Cabinet Secretary for Devolution and Planning & 3 others* (2017) eKLR

<sup>155</sup> Section 3, *Public Benefits Organisations Act*, 2013.

The PBO Act envisages the creation of the National Federation of Public Benefits Organizations, which will act as the overarching body for all public benefit organizations registered under the PBO Act as well as oversee the self-regulation mechanisms within the industry.<sup>156</sup>

Efforts towards internal governance are also evident in the PBO Act which contains provisions to the effect that PBOs are to keep proper books of account to be presented to the Public Benefit Organizations Regulatory Authority (PBOA) within six months.<sup>157</sup>

The PBO Act is a great improvement from the current NGO Act. However, as discussed in detail in part 3.4, it fails to cater for the holistic and clear accountable system that is advocated for in this research. When compared with companies, one notes that the laws relating to companies makes them more accountable as it is very clear and the system is holistic and encompasses most of the stakeholders involved. The Companies Act has clear guidelines on financial reporting, accountability to stakeholder, governance requirements amongst other aspects pertaining to Companies registered under it. There have been instances where conflict has arisen with Regulatory bodies established under the NGO Act exercising their mandate on entities registered under the company act.

Considering the challenges encountered in regulation, there is need to reconcile the provisions contained in the Acts, regulations and policies discussed above with constitutional provisions. This means respect for national values included therein, the bill of rights and international laws by extension considering the obligations imposed upon ratification. Such reconciliation will see to the end of challenges encountered in regulation of NGOs as discussed in subsequent parts of this chapter resulting in improved accountability across the board.

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<sup>156</sup> Section 21, *Public Benefits Organisations Act*, 2013.

<sup>157</sup> Section 30(3), *Public Benefit Organizations Act*, 2013.

## **3.4 THE WEAKNESSES OF THE NGO SECTOR LEGAL FRAMEWORK IN RELATION TO ACCOUNTABILITY MECHANISMS**

### **3.4.1 Who is accountable?**

#### **3.4.1.1 Definition provisions and the implications on accountability**

The definition of an NGO<sup>158</sup> is specific on what an NGO is and categorizes NGOs into international or national NGOs. The definition provided presupposes that all private, voluntary and not for profit entities that are for public interest are NGOs. However, as explained before, this definition is over-inclusive and vague. There are different legal frameworks in Kenya (other than the NGO Act) that allow for registration of organizations that would ordinarily fall within the definition of an NGO as provided in the NGO Act. Such organisations include companies limited by guarantee, trusts and foundations. Whereas such organisations may fall within that definition, the regulation of such organizations is vested under different legislative and regulatory frameworks other than the NGO Act. This position makes the implementation of a holistic accountability framework for multiple organisations under the multiple legal regimes, almost impossible.<sup>159</sup>

The PBO Act on the other hand, renames the NGOs to PBOs and defines them as organisations registered under the PBO Act for purposes of engaging in public benefit activities. The PBOs may be voluntary, membership or non-membership, autonomous, non-partisan, non-profit making and should operate locally, nationally or internationally.<sup>160</sup> The PBO Act goes further to expressly exclude from its definition of PBOs a number of organizations including trade unions, religious organizations, societies and community based organizations.<sup>161</sup> Kalii argues that upon commencement of the PBO Act, all organisations that have a not for profit reference and are registered under other laws, including under the Companies Act and Trustees Act, will have to wind up or

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<sup>158</sup> Section 2, *Non-Governmental Organizations Co-ordination Act*, 1990.

<sup>159</sup> Kalii D, 'Regulating Non-Governmental Organizations in Kenya'.

<sup>160</sup> Section 5(1), *Public Benefit Organization(PBO) Act*, 2013.

<sup>161</sup> Section 5(2), *Public Benefit Organizations Act*, 2013.

dissolve and register afresh under the PBO Act.<sup>162</sup> However, it is notable that the fifth schedule of the PBO Act has transitional provisions which requires organizations that are registered under the NGO Act to transition to the PBO Act thus repealing the NGO Act. The PBO Act does not make any reference to transitioning of the entities registered under other Acts.

The PBO Act was expected to correct the confusion and ensure clarity in definition as well as be the unifying law for all not for profit organisations. Based on the analysis of the definition in the two Acts, it is doubtful as to whether the issue of multiplicity of registrations will be cured by the coming into effect of the PBO Act. It is also clear that the PBO Act will not be the unifying law for all not for profit organizations. The sector will continue to witness multiple and overlapping legal framework on registrations thus making it difficult to implement coherent and coordinated policies for the sector.

A number of concerns have been raised as a result of the legislative framework making room for many forms of registrations for not for profit entities. Organisations have the latitude to choose how they want to be registered and the requirements they are able to fulfil act as determining factors. Interference by the NGOCB often transcends the limits of entities registered as NGOs and conflicts have arisen after the NGOCB attempted to deregister entities<sup>163</sup> even outside of their jurisdiction. In *Cabinet Secretary Ministry of Interior & Co-ordination of National Government & 6 others Ex-parte Africa Centre for Open Governance & 7 others*,<sup>164</sup> the applicant sought among other orders, an order of *certiorari* to quash the decision of the 4<sup>th</sup> Respondent, the Executive Director of the NGOCB, that urged and directed the 5<sup>th</sup> and 6<sup>th</sup> Respondent to close down the operations of the 1<sup>st</sup> Ex-Parte Applicant (AfriCOG) in order to allow for the committee to work with the Ex-parte Applicant to meet the Regulation and compliance needs of the 3<sup>rd</sup> Respondent(NGOCB).

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<sup>162</sup> Kalii D, 'Regulating Non-Governmental Organizations in Kenya', 31.

<sup>163</sup> Jerving S, 'Legal limbo leaves Kenya civil society vulnerable to targeting', Devex East Africa, 11 October 2017-<<https://www.devex.com/news/legal-limbo-leaves-kenya-civil-society-vulnerable-to-targeting-91059>>.

<sup>164</sup> *Cabinet Secretary Ministry of Interior & Co-ordination of National Government & 6 others Ex-parte Africa Centre for Open Governance & 7 others* (2017) eKLR.

The applicants argued that the letter containing the decision cited a legal regime that did not apply to the applicant as they were registered as Company limited by guarantee under the Companies Act, 2015 and were therefore not bound by the NGO Act. Since there was no legal provision empowering the respondents to act as they did, they had no powers whatsoever to make demands, issue directives and/or recommendations whatsoever relating to the 1st applicant's activities and/or operations.

In its determination the court was guided by the doctrine of *ultra vires* stating that where the law exhaustively provides for the jurisdiction of an executive body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. Based on this and in consideration of the provisions of the NGO Act on the duties of the board, it was apparent that the said provisions applied where registration and co-ordination of entities falling within the scope of definition for NGOs in Kenya were concerned. It was therefore held that the NGOCB actions were out of place and the court issued an order of certiorari sought, thereby quashing the decision of the NGOCB.

The court also noted, relying on *Mohamed Aktar Kana vs. Attorney General*,<sup>165</sup> that the numerous suits being filed against the said Respondents revolving around abuse of their powers are indicative of failure to adhere to the rule of law as required of them under Article 10 of the Constitution. Aside from the demonstrated lack of understanding and appreciation of the constitution, abidance by the provisions of the NGO Act under which they operate is also wanting and depicts the impunity of yesteryears thriving in the executive arm of Government. The deduction from this was that state organs or officers need to stick to the straight and narrow whilst exercising their powers and rely on the powers to bring them back in line when they step outside.

The need for clarity and consistency in the provisions of the law regarding multiplicity of the registration of not for profit organisations is irrefutable. For a sustainable solution, the law needs to provide an enriched definition of NGOs or PBOs that incorporates all not for profit organisations and provides for their regulation under a single regulator. This will

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<sup>165</sup> *Mohamed Aktar Kana vs. Attorney General* (2010) eKLR.

simplify the regulatory regime thus bringing about a holistic accountability structure. An example of such clarity can be borrowed from Tanzania where in 2019, the Government of Tanzania through the Written Laws (Miscellaneous Amendments) Act, No 3 of 2019 (the Miscellaneous Amendments Act), introduced amendments to the Companies Act<sup>166</sup> and the NGO Act.<sup>167</sup> Pursuant to the amendment all organizations registered as companies limited by guarantee and having certificate of compliance that allowed them to operate as NGOs, were deregistered and removed from the register of companies and were required to re-register as NGOs as provided under the NGO Act.<sup>168</sup> The Miscellaneous Amendments Act further amended the definition of NGOs to make it explicit by including Community Based Organisations (CBOs) which had previously been excluded from the definition.<sup>169</sup> Through this amendment, the legal status of CBOs was established. This amendment was very clear and does not leave any room for ambiguity as to what an NGO is and what it is not.

#### **3.4.1.2 Allocation of accountability**

In reference to the literature review under Chapter 1, specifically the discussion on accountability “*in relation to the question of who is accountable*”, the research identified four categories of actors within NGOs who are charged with accountability. They include the organisation through organisational accountability, directors through personal accountability, all members and staff of the organisation through collective accountability and individuals within the NGO through individual responsibility. From the Kenyan perspective, the NGO Act has not allocated any responsibilities of accountability on any of the parties highlighted above. From the Act, one notes that aside from the presumption of responsibility being placed on the boards, the Act does not provide for the mechanism of achieving organisational, personal, individual or collective accountability within the NGOs.

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<sup>166</sup> *Companies Act* (No. 12 of 2002).

<sup>167</sup> *Non-Governmental Organizations Act* (No. 24 of 2001).

<sup>168</sup> Section 6 *Miscellaneous Amendments Act*, 2019.

<sup>169</sup> Section 3 *Miscellaneous Amendments Act*, 2019.

The NGO Act does not specifically indicate who in the organization is responsible for the various compliance requirements raised therein. Section 24 for instance, which deals with annual returns, provides that every organization shall furnish NGOCB with annual reports. However, it does not state whether it is the board members, the chairperson, members of the organization, the officials or the executive staff who are responsible for ensuring that the returns are filed. The failure to be specific on allocation of responsibility is a major gap in the NGO Act.

The PBO Act echoes the position in the NGO Act. While it provides for accountability in the form of annual returns, it lacks specificity with regards to who exactly is expected to ensure reporting is done. The PBO Act simply states that every registered PBO shall cause to be made and submitted to the authority, an annual report detailing the statement of audited accounts, the financial statements and the activities of the organization.<sup>170</sup> Who this mandate is placed upon is not mentioned. It may be argued that the failure to specify which body or person within NGOs is to be held accountable for this reporting obligation is consistent with the spirit of self-regulation and that both the PBO Act and the NGO Act leaves it up to the NGO's own internal mechanisms to allocate this responsibility. This lack of specificity on the allocation of responsibility is what was alluded to in Chapter 1 as *the problem of many hands* which makes it impossible to hold an individual responsible for non-accountability. For NGOs that have implemented proper governance systems and have boards, it is presumed that the boards shall be responsible for ensuring compliance.

In comparison to the Companies Act, provisions regarding who is to be held accountable are clear in the sense that directors are expected to prepare individual financial statements for the company annually.<sup>171</sup> The Act goes further to provide for a penalty in the event of non-compliance by the directors under Section 635(3) and places this obligation and penalties squarely on the directors. Besides this requirement, directors are expected to prepare director's reports for each financial year in relation to the undertakings to which the financial statement relates.<sup>172</sup> Considering the prowess on accountability for

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<sup>170</sup> Section 31, *PBO Act*, 2013.

<sup>171</sup> Section 635 (1) *Companies Act*, 2015.

<sup>172</sup> Section 653(1) *Companies Act*, 2015.

companies in Kenya, which is attributable mainly to the existing legislative and regulatory frameworks, there is need to emulate the levels of specificity contained in the Companies Act. From the NGO Act point of view, it is important that legislation provides expressly on allocation of responsibility of each party that is charged with responsibility for avoidance of the problem of many hands.

### **3.4.2 Accountability for what?**

#### **3.4.2.1 Disclosure of financial information**

During the period between January 2018 and December 2019, 3028 NGOs received a total of Kshs 166 billion as funding from affiliate NGOs, foreign government development agencies, international NGOs, foundations, trusts, individual donors and religious institutions.<sup>173</sup> The figures demonstrate the importance of the proper financial accountability by NGOs. Financial disclosures and reporting is one of the most employed mechanism of accountability across many organizations and jurisdictions. In Kenya, the NGO Act<sup>174</sup> and its regulations provide that during registration, the applicant must indicate its sources of funds. Further to that, each year all registered NGOs are required to file annual reports with the NGOCB detailing inter alia, receipts and expenditures. The Act further requires that any expenditure exceeding Kshs 1 million be audited by a Kenyan audit firm.<sup>175</sup> The returns are filed by filling form 14 which requires the NGOs to provide information on personnel, finances, governance, organizational structure and programs.<sup>176</sup> This information is then used by the NGOCB to ensure that the activities undertaken by NGOs are in line with the objectives listed upon registration.

The PBO Act improves the disclosure and reporting responsibilities. It places fiscal transparency responsibilities on the organization by requiring the PBOs to implement in-house accounting and administrative measures to guarantee openness in its operations and appropriate deployment of resources for the achievement of the organisation's

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<sup>173</sup> NGO Coordination Board, *The Annual NGO Sector report*, 2018/2019.

<sup>174</sup> Section 10 (2)(g), *NGO Coordination Act*, 1990.

<sup>175</sup> Condition 5, Terms and conditions attached to the Registration Certificate and NGO co-ordination regulation 24.

<sup>176</sup> NGO Board Annual Report Form 14.

objectives.<sup>177</sup> This was not present in the NGO Act. It further requires the organisations to maintain books of account and records and prepare financial statements in line with accepted standards.<sup>178</sup> Such statements have to be accompanied by the independent opinion of an auditor and then filed with the PBOA within six months of the close of the financial year.<sup>179</sup>

The reporting and disclosures provided for in the two Acts are important mechanisms of accountability because they make accessible to the regulator, information on NGO operations. Other than the regulator, the legal disclosures enable some degree of upwards accountability to the donors and persons who have the capacity to access these reports at the NGOCB offices at a fee. The government being the chief regulator, has the power to enforce this requirement by imposing sanctions in the event of non-compliance. Such sanctions may include fines, imprisonment, threats of loss of registrations status or threat of loss of financial support.<sup>180</sup>

The gap in the law in relation to financial disclosures is that, the requirement provided fulfils upward accountability concerns to the government and regulator with no attention to other stakeholders including donors, beneficiaries and other NGOs. Both Acts remain silent as to the dissemination of financial reports to all other stakeholders discussed. NGOs are supposed to embrace values such as integrity, transparency and accountability in all operations in order to ensure that stakeholders are not taken advantage of more so the beneficiaries who receive the services of the NGOs. It can be argued that in the in the spirit of self-regulation, the government does not make it its business to tell the NGO who its stakeholders are and who needs to be informed of its activities, however, the stakeholder theory relied upon in this research demonstrates that organisations have an obligation to comprehend the interests and the relationships of all the stakeholders and to manage them. It is therefore imperative for the law to adopt a holistic accountability approach on disclosure of financial information that encompass all levels of accountability including upward, downward, internal and horizontal. The law must seek to fulfil the

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<sup>177</sup> Section 29, *PBO Act*, 2013.

<sup>178</sup> Section 30, *PBO Act*, 2013.

<sup>179</sup> Section 31, *PBO Act*, 2013.

<sup>180</sup> Regulation 32, *Non-Governmental Organizations Coordination Regulations*, 1992.

needs of all stakeholders of NGOs through placing an obligation and a clear mechanism for dissemination of information to the other stakeholders.

In relation to enforcement, one can argue that express enforcement mechanisms on the provisions of the NGO Act and regulations are lacking and this has resulted in continued non-compliance by NGOs on the accountability requirements. For instance, in 2019, the NGOCB noted very low compliance levels in the submission of annual reports. Out of the expected 8893 active NGOs, only 3,028 NGOs filed their returns for the year.<sup>181</sup> Section 32 of the NGO Regulations sets out the general penalty for offences under the regulations as fine and imprisonment, other than that there are no provisions under the regulations or the NGO Act that render the failure to account through annual reports an offence to begin with.

The penalty for failing to submit returns within stipulated deadlines by NGOs was set out in Legal Notice No. 84 of 2004.<sup>182</sup> Deregistration ensues following such non-compliance and reinstatement is only possible upon application and payment of the penalty. Kshs 25,000 along with Kshs 11,000 for issuance of a new certificate and filing fee of Kshs 2000 to accompany their returns. As an enforcement mechanism this is clearly wanting and insufficient in terms of ensuring accountability since in spite of its existence NGOs continue to evade fulfilling their duties as the figures above demonstrate.

Enforcement mechanisms under the PBO Act follow the same pattern. Save for the fines and imprisonment terms imposed upon conviction for failure to produce records upon issuance of summons,<sup>183</sup> the PBO Act does not directly address enforcement procedures for failure to account in the first instance. Section 64 of the PBO Act considers it an offence punishable by payment of a fine and imprisonment upon conviction to make any material false statements in any document submitted to the PBOA. The lack of specificity as to what document is referred to jeopardises the chances of accountability.

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<sup>181</sup> NGO Coordination Board, *The Annual NGO sector report*, 2018/2019.

<sup>182</sup> Kenya Gazette Volume CVI No. 68 Supplement No. 48, 6 August 2004

<sup>183</sup> Section 53, *PBO Act*, 2013.

### 3.4.3 How to ensure Accountability

#### 3.4.3.1 Accountability from a self-regulation perspective

The NGO Act provides for self-regulation through a collective forum of the NGOs established under the Act namely the NGO Council.<sup>184</sup> The intent of creating the NGO council was good as it promoted the NGO's idea of reducing government control over the sector. The NGO Council was to foster self-regulation amongst NGOs.<sup>185</sup> However, the NGO Council has had challenging times with leadership wrangles and mistrust between the NGO Council and NGOCB.<sup>186</sup>

Such wrangles have been witnessed in the past leading to multiple suits. In *Republic v Minister of State for National Heritage & Culture & 2 Others Ex-Parte National Council of Non-Governmental Organizations & Another (2009) eKLR*, the *ex parte* applicants sought to have the decision by the Minister of State for National Heritage and Culture to appoint a new chairperson dismissed. The notice issued by the Minister regarding the dismissal led to a chain of suits in attempts to resolve the issue. In this particular case, whereas the court dismissed the suit for want of merit, it raised concerns regarding the NGO Council's pre-existing wrangles which was evidenced by a number of suits filed in court concerning leadership and involving various parties. Some of these include *National Council for NGOs v Kituo Cha Sheria*<sup>187</sup>; *National Council of NGOs v George Gitau Wainaina*<sup>188</sup>; *National Council of NGOS v Simeon Kanani*<sup>189</sup> and; *Spears of Hope Others v National Council of NGOs*<sup>190</sup> to mention but a few. These wrangles, the court further noted, occurred in spite of clear guidelines under the NGO Code of Conduct on the functions of the Regulatory Committee in relation to appointments.<sup>191</sup>

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<sup>184</sup> Section 23, *NGO Coordination Act*, 1990.

<sup>185</sup> Okinda W, 'Accountability of donor funding by Non-Governmental Organizations in Kisumu County', Unpublished MBA Thesis, University of Nairobi November, 2013.

<sup>186</sup> Kisinga F, 'The process of reviewing the NGO Coordination Act 1990'.

<sup>187</sup> (2007) eKLR.

<sup>188</sup> (2009) eKLR.

<sup>189</sup> (2007) eKLR.

<sup>190</sup> (2006) eKLR.

<sup>191</sup> Section 17, *Non-Governmental Organizations Co-ordination Council Code of Conduct*, 1995.

Another demonstration of the NGO Council's incompetence is in the *National Council of Non-Governmental Organizations v Orio Rogo Manduli & Another (2009) eKLR*. The presiding judge in the ruling, took note of the lack of sanity within the governance, leadership and general organization of the membership of the NGO council.<sup>192</sup> Even though the case was dismissed, it was a clear indication of the tensions that lay in the operations of the NGO council and its relation to other entities.

The NGO Act creates a relationship between NGOCB and the NGO Council by providing that the NGO Council has an advisory function to the NGOCB in respect of the code of conduct and any further statutes that support the regulation of activities of NGOs.<sup>193</sup> Based on the provisions of section 24 discussed herein, it is notable that first, the power of the NGO Council is limited to an advisory role and the NGOCB has the regulatory role. Secondly, the code must be approved by the NGOCB and lastly, there is no involvement of NGOs in the development of the code of conduct. This therefore means that the role of determining the final contents of the code of conduct vests with NGOCB thus raising the concern as to whether this is self-regulation or imposition of codes on the NGOs by the NGOCB. Ali-Noor argues that the process adopted in developing the codes is crucial because it affords NGOs an opportunity to articulate the values that NGOs believe in. Further to that, he opines that the process adopted will determine the eventual adoption of the code and active participation by members.<sup>194</sup> Consequently, the issues raised above in relation to the Kenyan context and most importantly, the failure to involve NGOs in the process of developing the code is arguably what has led to minimal uptake and non-compliance with the code.

The NGO Act curtails forming of alliances by different NGOs, in line with the freedom of association, since it recognizes the NGO Council as the sole forum for NGOs to raise issues and policy concerning the sector. Other informal forums or coalitions formed by NGOs are not recognized and have no legal standing to advise the NGOCB on any issues. This prevents the comprehensive view of all NGOs since not all NGOs are of the same

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<sup>192</sup> National Council of Non-Governmental Organizations v Orio Rogo Manduli & Another (2009) eKLR.

<sup>193</sup> Section 24, *NGO Coordination Act*, 1990.

<sup>194</sup> Ebrahim A, 'Accountability in practice'.

category and neither do they all engage in the same sector and therefore trying to coalesce different ideas into one voice of the NGO Council becomes difficult. The NGO Council has no set down functions and structure of existence and the implication is that NGOs with more influence might engineer mischief or create policies that will favour their operations without considering the necessary interests of all NGOs or other stakeholders.

The PBO Act emphasizes on the freedom of association which encourages PBOs to form alliances in the form of self-regulating forums<sup>195</sup> amongst themselves on a voluntary basis.<sup>196</sup> It goes on to establish a federation for PBOs which will act as an umbrella organization of all registered PBOs and the self-regulation forums recognized by the PBOA. The federation has been given more structure by the law where it establishes offices such as board of governors, provides for the federation objectives and empowers member PBOs to vote in election members to the board. The self-regulation forums are required to put in place a code and standard to ensure compliance by members.<sup>197</sup> This is a great improvement from the position of the NGO Act which stops at requiring the NGO Council to develop a code requiring the approval of the NGOCB.

The PBO Act further provides that PBOs should apply the principles of transparency and accountability in their dealings with donors, the government, beneficiaries and other stakeholders. It obligates the PBO Authority to undertake training on self-regulation for purposes of the capacity building and general strengthening of PBOs.<sup>198</sup> It lays down the ethical principles and aspirations and key amongst which is for the PBOs to have a culture of transparency and accountability especially on matters of financial resources.<sup>199</sup> Coupled with other provisions, the Act seems to take a more assertive approach in regulating NGOs amongst themselves compared to the NGO Act which does not provide for any rules governing self-regulation.

Self-regulation remains a key component of the PBO Act with principles of governance having been incorporated therein including separation of powers, accountability, integrity,

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<sup>195</sup> Section 20, *Public Benefit Organizations Act*, 2013.

<sup>196</sup> Section 23, *Public Benefit Organizations Act*, 2013.

<sup>197</sup> Section 24, *Public Benefit Organizations Act*, 2013.

<sup>198</sup> Section 28 (2), *Public Benefit Organizations Act*, 2013.

<sup>199</sup> Section 27 (1)(g), *Public Benefit Organizations Act*, 2013.

transparency amongst others. Opportunities have been created for organisations to voluntarily be part of the self- regulation forums of any registered PBO. The forums are obligated to have a recognition agreement with the PBOA upon proof, to the satisfaction of the PBOA, that the forum represents a significant number of PBOs registered by the PBOA. The forums are further required to develop and implement a code and standards which their members shall be required to comply with.

Self-regulation as provided for under the PBO Act is susceptible to non-compliance since the PBO Act has limited enforcement mechanisms. The Board of the PBOA is obligated to institute inquiries to determine compliance by PBOs to the provisions of the PBO Act.<sup>200</sup> The generality of this provision does not offer much guidance regarding self-regulation especially since membership to self-regulation forums is voluntary. In the event of breach of the provisions of the code and standards of each forum, intervention by the board is likely to be futile. There is need for inclusion of detailed enforcement measures in the Act.

#### **3.4.3.2 Accountability from participation perspective**

Participation is the route through which members of the public can contribute in the various stages of project planning including budgeting, financial planning, decision making and monitoring of project execution. There are different levels of participation, the first level is where information regarding a planned project is made available to the public through public meetings or negotiations on available project choices. The second level of participation comprises of actual community participation in the project related activities through labour provision, fundraising or offering of maintenance services. The third level is where the members of the public have the capacity to discuss and bargain over decisions with NGOs or government agencies and where possible hold the power to reject decisions that are not in their best interests. The final level is where the public is capable of initiating its own initiatives independent of NGOs and the government.<sup>201</sup> According to the Arnstein's ladder of participation, there are eight levels of participation

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<sup>200</sup> Section 42(1)(h), *Public Benefit Organizations Act*, 2013.

<sup>201</sup> Ebrahim A, 'Accountability in practice' 818.

and the groups the levels into three broad categories. The bottom-level which is categorized as nonparticipation and tokenism is characterised by little to no citizen power in the citizen participation process, whereas the higher levels namely degrees of tokenism and degree of citizen power and have higher levels of citizen power. Arnstein argues that through relocation of power, communities are better placed in terms of realizing their community goals.<sup>202</sup>

Najam argues that claims by NGOs that participation occurs can only be termed as sham rituals and a feel-good exercise.<sup>203</sup> This is because very little authority to make decisions rests with the communities and project objectives are decided by NGOs long before the participation occurs. The sham participation then translates into sham accountability given that unlike donors', communities may not possess the power to impose any form of sanctions on the NGOs.

Participation therefore is a crucial aspect of ensuring accountability. In order to understand the needs of different stakeholders and respond to them, organizations have to involve them in the discussions leading up to implementation of projects. They also need to engage them in activities to foster such implementation and to incorporate the decisions made by the stakeholders. Under the theoretical discussion, it was noted that the crucial part in relation to accountability is about the process and procedural justice that gives room to stakeholders to input in decisions relating to how resources are allocated and who benefits from the outcomes of such decisions.<sup>204</sup> Stakeholders accept results when they consider the process of arriving at such decisions to be fair even in cases where the results themselves are unfavourable.

There is need for legislative action to give force to this aspect of accountability. Unfortunately, neither the NGO Act nor the PBO Act contain express provisions in relation to the participation in any of the process highlighted above. This not only gives NGOs leverage to ignore the needs of other stakeholders focusing more on one

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<sup>202</sup> Arnstein S, 'A ladder of citizen participation' 35(4) *Journal of the American Institute of planners*, 1969, 216-224.

<sup>203</sup> Najam A, 'NGO Accountability: A Conceptual Framework', 346.

<sup>204</sup> Freeman R *et al*, 'Stakeholder theory; The state of the art', 7.

stakeholder thus leading to an imbalance in accountability. It is also contrary to the provisions of the constitution on national values under Article 10<sup>205</sup> which stipulate that participation among the other national values and principles is binding on all state organs, state officers and all persons. This applies in the application or interpretation of the constitution; in the enactment, application and interpretation of any law or; in the making or implementation of public policy decisions. Failure to abide by a principle this fundamental is likely to render the existing provisions null. In *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others (2017) eKLR*, the Court of appeal firmly determined, relying on jurisprudence from the Supreme Court, that Article 10 (2) of the Constitution is justiciable and enforceable. This therefore means that in the event of violation, a cause of action can be founded on its own or along with other constitutional or statutory provisions. This decision demonstrates the integral nature of public participation. Therefore laws have to be inclusive of public participation clauses and regulatory bodies have to implement the same in executing their duties.

#### **3.4.3.3 Accountability from a social audit perspective**

Social auditing is a process that collects information on the resources of an organization and this information is analysed in terms of how resources are used for social objectives and shared publicly in a participatory process. The process is usually geared towards encouraging community participation in the monitoring of service delivery and expenditure, are conducted by the NGOs with due representation of interests of different parties including funders and the beneficiaries. Participation by the community would involve gaining an understanding of NGOs' operations, measuring performance against indicators, verifying the actual performance and reporting, thus contributing to the improvement of NGOs performance. Social audit is therefore an important tool for enhancing grassroots participation and monitoring the accountability of spending by NGOs.

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<sup>205</sup> Article 10, *Constitution of Kenya*, 2010

Social auditing presents a number of advantages to NGO operations such as, ensuring proper strategic planning and performance monitoring. Several factors may hinder the use of social auditing by NGOs including cost implications, requirements and lack of convergence on standards by NGOs. This does not however diminish its value as an accountability mechanism and it deserves consideration.

There are a number of social auditing models and models geared towards improving social performance that have developed over the years. The ethical accounting statement concentrates on dialogues with stakeholder and their perceptions. Similar, to that model is the social performance reports which focus on stakeholder perspectives. Lastly, there is the social auditing processes model which was developed by the Institute of Social and Ethical Accountability (ISEA) in 1999 and revised in 2002. This model combines dialogues with the stakeholder together with development of indicators and assessment procedures. Despite the differences in the approaches, each of these models includes five key elements of the process: stakeholder identification, stakeholder dialogue, use of indicators and/or benchmarks, continuous improvement, and public disclosure.<sup>206</sup>

In Kenya, both the NGO Act and the PBO Act do not make any provisions around social auditing. The self-regulating codes need to consider social audits so as to improve both upward and downward accountability through its integrated approach that allows for combination of tools and processes. Successful integration into legal and regulatory frameworks is dependent on systematic engagement of stakeholders in dialogues on matters that concern them. Laws cognizant of social audit are able to achieve an integration of strategic planning, organizational values and governance. In efforts to introduce social audit, Kenya should be guided by the models discussed above to avoid ineffectual provisions.<sup>207</sup>

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<sup>206</sup> Gonella, C, Pilling A, and Zadek, S, 'Making values count: contemporary experience in social and ethical accounting, auditing, and reporting' The Association of Chartered Certified Accountants, 1998, 22.

<sup>207</sup> Ebrahim A, 'Accountability in practice', 824.

### 3.5 CONCLUSION

The Constitution of Kenya forms the basis for existence of NGOs by providing for the freedom of association, expression and access to information. Compliance to this in the non-profit sector is vital to the realization of good governance. There is also need for compliance with international laws which inform the operations of non-profit organizations starting with the recognition of the freedom of association and freedom of expression as fundamental considerations in regulation of NGOs.

The NGO specific legal and regulatory framework in Kenya, while progressive, has multiple shortcomings with regards to accountability. Having analysed the different provisions, it is clear that the NGO Act in particular is not accommodative of vital accountability mechanisms such as reporting, self-regulation, social auditing, and participation among others as discussed in this Chapter.

Recent developments have led to the introduction of the PBO Act, which has been lauded for incorporation of constitutional provisions. Unfortunately, it fails to tackle the challenges relating to accountability in relation to registration. Without express provisions on multiplicity of registrations amongst others discussed in this chapter, a continuum of the drawbacks that befell the NGO Act are likely to arise. There is need therefore to streamline the provisions on accountability and include proper definition of PBOs, provide for enforcement measures and provide for the shortcomings identified herein in order to ensure that the Kenyan legal and regulatory frameworks on NGOs is sustainable. Due consideration should be given to the questions of “who? to whom? for what? and how?” in order to ensure that any proposed measures are responsive to this for better accountability in the NGO sector. Transparency between government and NGOs is vital in preventing legislation from being used as a means to stifle NGO operations.

## **CHAPTER 4**

### **COMPARATIVE STUDY OF NON-GOVERNMENTAL ORGANIZATION REGULATIONS IN SOUTH AFRICA**

#### **4.0 INTRODUCTION**

The chapter will first discuss the historical background of accountability in South Africa before delving into the specific legal and regulatory provisions relating to NGOs in the country. An analysis of the application of accountability mechanisms shall follow before a discussion on self-regulation as a means of achieving accountability and how the same has been applied in South Africa. In conclusion, this chapter shall summarize the similarities and differences between the two countries and whether there are concepts that Kenya can borrow from South Africa to improve on its accountability practices.

Over the past few decades and following its independence, South Africa has experienced marked growth in different sectors and particularly in the political and social realms. This is attributed to, among other reasons, the input from the NGO sector which over the years has seen rapid growth. According to the Department of Social Development of South Africa, the number of NGOs increased by 573% from 13, 282 in the year 2000 to 76,175 in 2011.<sup>208</sup> In spite of the impressive figures, the sector has been faced with multiple challenges which are tied to accountability. These figures present a great foundation for analysing and comparing the status of NGO regulations in the two countries since they not only depict positive progress but also indicate flaws in the system.

#### **4.1 HISTORY OF NGO ACCOUNTABILITY IN SOUTH AFRICA**

Historical foundations play an important role in the shaping of a country's legal structures. Apartheid shaped most of South Africa's existing governance structures and in this context, the NGO legislative framework. During the apartheid era, Non-Profit Organization (NPOs) were formed in two forms; in support of apartheid and anti-

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<sup>208</sup> Department of Social Development, Republic of South Africa < <http://www.npo.gov.za/PublicNpo/Npo> >

apartheid.<sup>209</sup> The latter kind received most of their funding from international bodies having been denied funding by the apartheid government. Issuance of international funding came with accountability conditions.<sup>210</sup>

With the introduction of democracy in 1994, came an opportunity for collaboration with the government along with funding. This shift also brought along a change in trajectory of funding by the international community which focused on government development projects instead. Strict accountability requirements led to the rise of donor-centrism with less attention to beneficiaries of the programmes<sup>211</sup> just as is the case in Kenya. Without inclusion of input from beneficiaries and other stakeholders, downward accountability is affected and this ripples down to overall good governance of NGOs.<sup>212</sup> Similar to the Kenyan case, NGO legislation in South Africa, especially pertaining to accountability, originated from concerns about the credibility and legitimacy of NGOs.<sup>213</sup> Most, if not all laws and regulations were enacted to foster upward accountability among other governance issues.

In South Africa, government efforts at involvement are normally impeded by the inadequacy of resources for monitoring and enforcement once the regulations have been enacted.<sup>214</sup> On the other hand, the government in some instances uses the veil of ensuring accountability to limit NGO operations.<sup>215</sup> The challenges encountered draw attention to the need for exploration of other viable alternatives.

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<sup>209</sup> Kumaran M, Samuel N and Winston L, 'The NGO sector in South Africa: history, issues and prospects' 1 (2) *Journal for Development and Leadership*, December 2012,34.

<sup>210</sup> Burger, Jegers, Seabe, Owens & Vanroose, *NPO Accountability in a disconnected and divided South Africa*, NPO Report, Vol 3(4), 6.

<sup>211</sup> Burger, et al, *NPO Accountability in a disconnected and divided South Africa*, 7.

<sup>212</sup> Brennan K, 'Embedding Downward Accountability', *Mimeo*, 2010.

<sup>213</sup> Kumaran M, *et al*, 'The NGO sector in South Africa', 37.

<sup>214</sup> Yaansah E, Harrell-Bond B, *Regulating the Non-Governmental Sector: Global Policy Forum*, <https://www.globalpolicy.org/index.php> , posted on Nettime, February 4, 1997.

<sup>215</sup> Musila G, 'Freedom Under Threat: The Spread of Anti-NGO Measures in Africa', *Freedom House* <https://freedomhouse.org/report/special-reports/freedom-under-threat-spread-anti-ngo-measures-africa-> Accessed February 19, 2019.

## **4.2 THE SOUTH AFRICAN NGO LEGAL AND REGULATORY FRAMEWORK**

In this section, an assessment of the South African laws pertaining to NGOs shall be done to establish what the status of regulation is in the country. This will allow for a determination of whether or not the provisions cater for accountability in the sector. The legal and regulatory systems in South Africa are similar to the Kenyan frameworks in the sense that they are often derivatives of constitutional provisions and where they are not, they have to be in accordance with the constitution being the supreme law of the land.

### **4.2.1 The Constitution of South Africa, 1996**

Section 18 of the South African constitution<sup>216</sup> expressly provides for the right to freedom of association for all. This freedom however is subject to limitations as stipulated in Section 36 on limitation of rights.

The government has relied on this clause to interfere with NPO operations throughout the country without taking into account the constitutional requirement for consideration of the nature of the right, the purpose and extent of the limitation and most importantly, availability of less restrictive means for achieving its purpose. This is similar to the Kenyan situation as discussed in Chapter three on the excessive involvement of government in the NGO sector.

### **4.2.2 The International Framework**

As a signatory<sup>217</sup> of the Universal Declaration of Human Rights (UDHR),<sup>218</sup> South Africa is expected to abide by all its provisions and in this context the proviso under Article 20. The said article states that everyone has the right to freedom of peaceful assembly and association. According to Article 22 of the International Covenant on Civil and Political Rights (ICCPR),<sup>219</sup> everyone has the right to freedom of association with others and state parties are prohibited from applying the law in a prejudicial manner. The International

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<sup>216</sup> *The Constitution of South Africa, 1996.*

<sup>217</sup> United Nations Human Rights Office of the High Commissioner, South Africa <<https://www.ohchr.org/EN/Countries/AfricaRegion/Pages/ZAIindex.aspx>>

<sup>218</sup> Article 20, *Universal Declaration of Human Rights, 1948.*

<sup>219</sup> Article 22, *International Covenant on Civil and Political Rights, 1966.*

Covenant on Economic, Social and Cultural Rights (ICESR)<sup>220</sup> echoes this provision by stating that all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Freedom of association is further enshrined in the Declaration on Human Rights Defenders which stipulates that everyone has the right, both individually and in association with others, to meet peacefully; to form, join and participate in non-governmental organizations, associations and groups and to communicate with non-governmental and intergovernmental bodies. On the regional front, The African Charter on Human and Peoples' Rights (ACHPR)<sup>221</sup> and the Kampala Declaration<sup>222</sup> expressly guarantee freedom of association.

Having ratified these laws South Africa, just like Kenya, is bound to abide by the laws based on constitutional provisions on international law. Owing to this, the international provisions apply to all spheres of governance including NPO regulation. Unfortunately, the South African government has fallen short of meeting its obligations in the NPO sector on many occasions.

### **4.2.3 Legal and Regulatory Provisions on Registration**

Considering the historical foundations of NGOs as discussed in section 4.1., NPO regulation has come a long way in its evolution. South African law allows for existence of charitable organizations in various forms as is the case in Kenya. Currently, there are five models of registration of NPOs in South Africa as discussed further below.

#### **4.2.3.1 Common Law**

The first and most common of NPO is Voluntary Associations. Owing to the ease in registration and less formalities in operation, most entities opt for this model. Voluntary Associations are governed by common law and are based on agreement by at least three

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<sup>220</sup>Article 1, *International Covenant on Economic, Social and Cultural Rights*, 1966.

<sup>221</sup> Article 10, *The African Charter on Human and Peoples' Rights*, 1981.

<sup>222</sup> *The Kampala Declaration on Intellectual Freedom and Social Responsibility*, 1990.

people. A written constitution may be put in place to further support the agreement but this is left to the discretion of the parties involved. Similar to regular partnerships under the Partnership Act, all members have a collective responsibility over the association save for circumstances where a management committee of sorts is put in place.<sup>223</sup> Voluntary Associations may be listed as corporate or unincorporated bodies or as a universitas.<sup>224</sup>

#### **4.2.3.2 Trust Property Control Act, 1988**

NPOs can be registered as Non-Profit Trusts (NPTs) which is similar to the trusts registered in Kenya under Trustees Act. The registration and management of NPTs is governed by the Trust Property Control Act<sup>225</sup> which stipulates that registration is to be done by a master of the High court. The registration process involves examination of the trust deed and is rendered complete upon receipt of letters of authority duly signed and sealed by the master.<sup>226</sup> A key consideration prior to registration is the philanthropic intent of the proposed trust and the Act further provides that any land granted to the trust must be used in compliance with this objective.

#### **4.2.3.3 The Companies Act, 2008**

Non Profit Companies (NPCs) which are also commonly referred to as Section 21 Companies exist and operate as NPOs. The establishment of NPCs is guided by the provisions of the Companies Act, 2008 and particularly Section 21 which outlines specific qualifications for registration under the Act. A company whose mission and vision involves public benefit, cultural, social activities or communal interests meets this requirement.

The Companies and Intellectual Property Commission (CIPC) under the Companies Act has specific registration requirements which upon fulfillment, the company is granted a certificate of incorporation duly signed and sealed by the Commission. Foreign

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<sup>223</sup> *The Independent Code of Governance for Non-Profit Organisations in South Africa*, 2012.

<sup>224</sup> Laws and Regulations Governing Non-Profit Organisations in South Africa 'International Charity Law: Comparative Seminar' Beijing, China October 12-14, 2004, 9.

<sup>225</sup> Section 3, *Trust Property Control Act* (No 57 of 1988).

<sup>226</sup> South African Government, Services; Register a non-profit organisation <<https://www.gov.za/services/register-nonprofit-organisation>>

organizations are also incorporated under the Companies Act<sup>227</sup> and have to abide by Section 21 provisions.

#### 4.2.3.4 The Non- Profit Organizations Act, 1997

The most common form of NPOs are those created under the NPO Act, 1997.<sup>228</sup> These are registered and controlled by the NPO Directorate established under Section 5 of the NPO Act which is also where reports of activities are submitted on an annual basis.

The NPO Act was enacted to encourage and support NPOs in their contribution to meeting the diverse needs of the population. It is also meant to create a conducive environment to allow NPOs to flourish. This is achieved by creation of an administrative and regulatory framework under which NPOs can conduct their affairs. Another objective of the NPO Act which is critical to the discussion in this thesis, is to encourage NPOs to maintain and improve adequate standards of governance, transparency and accountability. In furtherance of this objective, the NPO Act also exists to ensure members of the public can access information concerning registered NPOs. The NPO Act is also meant to promote a spirit of co-operation and shared responsibility with government, donors and amongst other interested persons in their dealings with NPOs.<sup>229</sup> With objectives this clear, NPOs registered under this Act are expected to excel in their operations. However, as is the case with Kenya there is a challenge both in adequacy and in implementation of existing provisions.

Failure to abide by existing frameworks has contributed to the extension of poor transparency and accountability in the sector. According to a SANGONet survey conducted in 2006<sup>230</sup>, 58% of the members of public agreed that the South African NPO sector lacked in accountability. This was further echoed in Hans Holmen's *Snakes in Paradise*<sup>231</sup> wherein he criticized the lack of accountability in the NPO sectors in South Africa and in the rest of the continent.

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<sup>227</sup> Section 21A, *Companies Act*, 2008.

<sup>228</sup> *The Non Profit Organizations Act*, (No. 71 of 1997)

<sup>229</sup> Section 2, *Non Profit Organizations Act*, 1997.

<sup>230</sup> SANGONet Survey, July 2006.

<sup>231</sup> Holmen H, *Snakes in Paradise – NGOs and the Aid Industry in Africa*, Kumarian Press, 2010.

## **4.3 THE WEAKNESSES OF THE NGO SECTOR LEGAL FRAMEWORK IN RELATION TO ACCOUNTABILITY MECHANISMS**

### **4.3.1 Registration**

Registration is not a mandatory prerequisite for NPOs to operate in South Africa. Due to this, it is possible that there is a larger number of NPOs in the country than records show.<sup>232</sup> By 2011, only 69% of the 15, 265 NGOs that made applications for registration were accepted. 4,729 of these applications were either rejected or cancelled. In spite of registration of NPOs not being compulsory in South Africa, section 4.2.3 of the research has demonstrated the multiple forms of registrations. This can be attributed to that fact that NPOs that anticipate donor funding are incentivized to register because non registration constricts receipt of government funding or subsidies. Corporate donors are also reluctant to donate to the organizations not recognized by the Directorate.<sup>233</sup> Besides, registration creates an opportunity for tax exemptions provided certain requirements are met as is the case in Kenya.

While the existence of multiple forms of registration presents an opportunity for growth in the non-profit sector and may be lauded for opening up the non-profit sector to a wider portion of the public, a decline in donor funding, reduced government subsidies and tax exemptions is evident. It also presents the challenge of confusion in terms of what mode to register under and on the binding force of the given provisions. The challenge of multiplicity as was seen in the Kenyan NGO Regulatory framework as discussed in Chapter 3 is also present in the South African context.

The Government of South Africa through the NPO Act allows for registration of NPOs upon submission of requisite documentation. It has gone a step further to ensure ease of registration by making online registration possible although this does not benefit NPOs

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<sup>232</sup> Kumaran M, *et al*, 'The NGO sector in South Africa'.

<sup>233</sup> Morgan Y, 'The Potential for an Independent Regulatory Authority for NGOs in South Africa' *The International Journal of Not-For-Profit Law*, 7 (3) 2005.

beyond city limits with no access to the directorate.<sup>234</sup> This challenge of not having proper devolved offices was also seen in the discussion under the Kenyan context.

In furtherance of the accountability agenda, the act provides that the directorate is supposed to maintain records of the registered NPOs and review the accounts and reports of activities that are filed with them annually by the organizations.<sup>235</sup> The Directorate is supposed to oversee that NPOs adhere to the Act, the code of practice that it has created, the NPOs own laws and constitution up to the point of dissolution or winding up. Unfortunately, the NPO register lacks detailed information on the all the registered organizations<sup>236</sup> and the availability of the register to the public to foster accountability and transparency is pointless. This is because access to NGO documents at the Board is a daunting task and this coupled with ignorance amongst citizens, presents a challenge in putting to account the NGOs.

#### **4.3.2 Freedom of association**

Freedom of association for non-profits can be subjected to limitations through placement of various barriers. Such barriers include barriers to entry, to operational activity, to resources, to communication and contact, to speech and advocacy among others.<sup>237</sup> Through such barriers, the state is able to restrict the activities of NPOs which in most cases translates to denial of fundamental freedoms which organizations are entitled to. Direct infringement of the freedom of association can be derived from action by government through means such as intimidation and harassment, arbitrary arrests and detention. Aside from such means, these barriers are manifested in legal and regulatory frameworks<sup>238</sup> thorough placement of funding restrictions, imposition of complex

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<sup>234</sup> Republic of South Africa, Joint Submission to the UN Universal Periodic Review, 27th Session of the UPR Working Group, Submitted 6 October 2016 Submission by CIVICUS: World Alliance for Citizen Participation, NGO in General Consultative Status with ECOSOC and Human Rights Institute of South Africa (HURISA), 3.

<sup>235</sup> Section 5, *Non-Profit Organizations Act*, 1997.

<sup>236</sup> Burger, *et al*, NPO Accountability in a disconnected and divided South Africa, 7.

<sup>237</sup> Ponce C, Briceño A, McHale K, 'Freedom of association & assembly – creating an adequate space for Civil Society and NGOs to operate', Memorandum about Freedom of Association & Assembly.

<sup>238</sup> Ponce C et al, Freedom of association & assembly – creating an adequate space for Civil Society and NGOs to operate, 2.

registration processes, limitation of the scope and nature of activities, maintaining control of vital areas of NPO operations.

An indicator of the limitation of the freedom of association is in the lengthy duration of registration of NPOs. For those registered under the NPO Act, the period of review by authorities is set to 2 months although more often than not it takes 6 months and beyond. Review of NPT applications should take roughly 3 weeks and NPCs roughly 3 months although this is never the case in spite of it already being too long a period.<sup>239</sup> This was also the case in the Kenyan context with registrations taking as long as two years to be finalized.

Impediments to the freedom of association are also evident in the reporting frameworks and deregistration procedures. Failure by NPOs to submit annual audited statements and a narrative report to the NPO directorate as per the Act may amount to deregistration by the directorate. Although this is in fact a reasonable provision, it is prone to misuse by state in an effort to intimidate NPOs and especially those engaged in ensuring government transparency.<sup>240</sup> Chapter three of the research discussed this challenge in Kenya's context as well and notable is that the situation is similar in Kenya.

Denial of registration of NPOs by relevant authorities is based primarily on non-compliance by the entity concerned. Questions of infringement of the freedom of association arise from the lack of reasons for denial and lack of express provisions on appeals and other measures to safeguard the interests of the NPO.<sup>241</sup> NPTs and NPCs may seek redress through the Public Administrative Justice Act of 2000 which would require the Master, the Registrar of the Director of NPO's office to provide reasons for denial to an independent court.<sup>242</sup> While this offers an opportunity for appeals, it is a long shot and provisions of the same in the respective acts governing registration would simplify the process thus promoting the freedom of association.

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<sup>239</sup> Wyngaard R, 'Sub-Saharan Africa Country Reports: South Africa', *The International Journal of Not-for-Profit Law*, Volume 12, Issue 2, February 2010, <https://www.icnl.org/resources/research/ijnl/south-africa>

<sup>240</sup> Republic of South Africa Joint Submission to the UN Universal Periodic Review, 4.

<sup>241</sup> Wyngaard R, 'Sub-Saharan Africa Country Reports: South Africa', 4.

<sup>242</sup> Wyngaard R, 'Sub-Saharan Africa Country Reports: South Africa', 4.

### 4.3.3 Areas of accountability

The NPO Act not only introduced voluntary registration of NGOs but also provides for structural and managerial guidelines for non-profits in South Africa. One of the key objectives of the Act is to encourage NPOs to maintain adequate standards of governance, transparency and accountability and to improve those standards.<sup>243</sup>

Further, the NPO Act provides that every registered non-profit must keep accounting records of its income assets and liabilities and draw up financial statements with the prescribed information and within the stipulated timelines.<sup>244</sup> Section 18 of the NPO Act goes further to state that NPOs must provide written narratives of its activities as prescribed to the director. Information submitted to the director is subjected to scrutiny to determine compliance with relevant provisions. These measures are meant to ensure upward accountability of the NPOs to the regulator. Other than this form of accountability, the NPO Act does not provide for any other form and does not in any way cater for other stakeholders discussed under the theories underpinning this research.

In NPTs, trustees are not obligated to submit audited financial statements on a regular basis and only make submissions upon written requests by the Master for administration and disposal of trust property.<sup>245</sup> NPCs on the other hand, have an obligation to prepare annual audited financial accounts and present them through the directors during the Annual General Meeting to the members of the company. Another measure of accountability is with regards to taxation. Public Benefit Organizations which are regulated by the South Africa Revenue Service (SARS) are required to submit financial statements in support of the organization's income tax return.

Failure to comply with the provisions on reporting has consequences that may involve cancellation of membership although this is clearly insufficient considering the continued breaches. The NPO Directorate's powers for instance, are limited to cancellation of registration as a measure of enforcement and nothing more. While the acts are clear on the

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<sup>243</sup> Section 2(c), *Non-Profit Organizations Act*, 1997.

<sup>244</sup> Section 17, *NPO Act*, 1997.

<sup>245</sup> *Laws and Regulations Governing Non-Profit Organizations in South Africa*, 12.

need for reporting, there are no provisions on measures to be taken in the event of misappropriation of funds or even fraud and such issues are left to criminal law provisions.

NPOs in South Africa stand to be sued by beneficiaries or the general public should they derogate from their stated objectives. This is similar to the Kenyan situation where anyone else including the donors or government can sue a NGO if it breaches its mandate.

#### **4.3.4 Self-regulation mechanisms, codes of conduct and their weaknesses**

With a self-regulation model, entities within the NPO sector will achieve an ease in operations all the way from implementation, enforcement, monitoring, reporting and accountability. Existing regulatory frameworks are relied on not only by internal parties. External parties including donors rely on the accountability achieved by regulations in place to determine the potential output. In an effort to ensure compliance therefore, organizations tend to seek means to impress regulators and miss out on opportunities to build their own capacity. Self-regulation allows for independence since funding is delivered directly to the NPOs for equitable distribution.<sup>246</sup>

South Africa has the South African NGO Coalition (SANGOCO) that was established in 1995 and serves as the umbrella body for NGOs in South Africa. Its role is to ensure that NGOs have an input into the government policies. The SANGOCO has a code of conduct that incorporates a number of aspects including transparency. Under the code, SANGOCO commits to develop a mechanism that will permit all its stakeholders to be involved in programme planning for programmes directly affecting them as well as providing opportunities for the evaluation.<sup>247</sup> It further provides for updating and implementing programmes with stakeholder and community input. Notable is that the membership to SANGOCO is voluntary and this progressive provision can only apply to NGOs that have registered with SANGOCO.

The existence of the voluntary code notwithstanding, NPOs are still lacking in terms of participation and involvement of beneficiaries and other stakeholders at various levels of

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<sup>246</sup> Magongo B, Enhancing Civil Society Participation in the South African Development Agenda, 11.

<sup>247</sup> SANGOCO Code of Ethics for NGOs, 1997

operations. Beyond donor-centric efforts and legal abidance, NPOs do not make an effort to include the views of other stakeholders whose roles are vital as recognized under the code. This is similar to the Kenyan structure considering that on many occasions the NGOCB and the NGO Council have in exercise of their mandate failed to incorporate participation as a key principle for NGOs. A recommendation for the states would be to improve public participation and access to information in light of the existing gaps.<sup>248</sup> By implementing self-regulation more room is given for much needed partnerships between government and non-profit entities.<sup>249</sup>

Other than the SANGOCO code of ethics, in 2012, the Independent Code of Good Governance for NPOs<sup>250</sup> was formed by a collective of NPOs to enhance self-regulation and offer guidance for NPOs in their operations with due consideration of the diversity, capacity, resources and purpose. The code contains guidelines for good governance and standards of performance<sup>251</sup> and provides for voluntary commitment along with compliance undertakings. The code received major support from donors and the NPO directorate at its inception.

Both codes of ethics in South Africa face the same problem of lacking a means of enforcement of accountability measures just like the Kenyan NGO Council's Code of conduct.<sup>252</sup> Codes in both jurisdictions outline clearly values and principles including accountability but the same appear to be ineffectual on a practical basis.

The Act also establishes an Arbitration Tribunal<sup>253</sup> which only has jurisdiction for matters that concern the registration status of NPOs by the Directorate. The tribunal checks on any arbitrary actions by the directorate and government in general. This is unlike the Kenyan case where appeals are left to the Cabinet Secretary in charge of NGO registration.

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<sup>248</sup> Meeting Report, Reflecting on the Closing of Civic Spaces and its Impact on Marginalised Groups in Southern Africa, Southern Africa Human Rights Defenders Summit, Johannesburg, 14-16 November 2018, 26.

<sup>249</sup> The conversation, 'The role of NGOs in Africa: are they a force for good?' April 25, 2017 - <<https://theconversation.com/the-role-of-ngos-in-africa-are-they-a-force-for-good-76227>>

<sup>250</sup> Voluntary Independent Code of Governance and Values for NPOs in South Africa, 2012.

<sup>251</sup> Section 2, Voluntary Independent Code of Governance and Values for NPOs in South Africa.

<sup>252</sup> Non-Governmental Organisation Council code of conduct, 1995.

<sup>253</sup> Section 9, *Non-profit Organizations Act*, 1997.

There is clear lack of harmony in South African NPO regulations. This is attributable to the multiplicity of regulatory bodies which complicates compliance efforts especially for smaller organizations.<sup>254</sup>

#### **4.4 CONCLUSION**

The South African NPO framework has a number of similarities as well as distinctive features with the Kenyan NGO framework as discussed in parts of this chapter. This is attributable to the foundations which derive from British common law as a result of the shared colonial history. One of the differences is the provisions of non-registrations of voluntary associations in South Africa. The Kenyan context does not have a similar position or legislation. Whereas, generally there are arguments that the Kenyan position requiring organisations to register in order to be recognized as legal entities is infringing on their freedom of association, we note that in South Africa where there is a provision for not registering, entities still choose to register due to the benefits that come with registration including donor funding and tax exemptions.

In both countries, NGO operations are conducted on the basis of fostering human rights and ensuring development. The activities of NGOs base their existence on fundamental freedoms such as the freedom of association. These freedoms give a foundation to the operations of NGOs even before accountability is considered as the fundamental freedoms determine their establishment. Freedom of association is provided for both in the Kenyan and South African Constitutions which also extend the obligation to international laws.

In both the South African and Kenyan frameworks there is heavy government influence which on most occasions results in excessive control. This is because most laws relating to NGO and NPO operations in both countries fail to draw a line indicating how far the government can go in playing its part. This has often resulted in loss of autonomy on the part of NGOs which contributes largely to the lack of accountability. Advancement of challenges in implementation of measures such as self-regulation and donor-centrism remain constant.

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<sup>254</sup> Laws and Regulations Governing Non-Profit Organisations in South Africa, 22.

Both jurisdictions have multiple modes of registrations for NPOs thus entities are governed by different statutes. While this allows for multiple alternatives in registration, it has been criticized as part of the challenge in ensuring accountability. This is because the multiplicity tends to cause confusion regarding the integral mechanisms of accountability i.e. lack of proper responses to the questions *Who should be accountable? Whom they should be accountable to? What are they accountable for? How should they be accountable?* Where these questions cannot be answered accordingly, accountability is prevented as is the case for Kenya and South Africa.

Both jurisdictions also place emphasis on financial reporting which is a mechanism for upward accountability to the government. The legal frameworks within the countries fail to give consideration to other stakeholders on accountability. In addition to that, the aspects of meaningful stakeholder participation and social accountability are not factored in the legislative or regulatory framework and where it is factored in the codes it is seldom practiced by the NGOs.

In terms of self-regulation, both jurisdictions have failed to implement an effective self-regulation framework. Both countries have codes of conduct with the South African codes being non-binding in nature while the Kenyan one is binding on all registered NGOs. The foregoing notwithstanding, the research noted that in both cases the self-regulating mechanisms have been ineffective.

From the comparison of the two countries, it has been revealed that in both, notwithstanding the fact that South Africa is arguably an advanced economy compared to Kenya, the NGO frameworks are riddled with challenges that hinder the realisation of accountability in the sector. The inadequacies in the legal and regulatory frameworks on accountability have contributed to the limitations on opportunities for sustainable growth in the non-profit sector. Any efforts by Kenya to borrow from South Africa would therefore be rendered futile seeing as there is just as much need for amendments in the existing laws and regulations to ensure accountability concerns are captured accordingly and requisite enforcement measures are set.

## CHAPTER 5

### CONCLUSION AND RECOMMENDATIONS

#### 5.0 INTRODUCTION

The two hypothesis to the research argued that the increased cases of non-accountability by NGOs in Kenya indicates that there are inadequacies in the Kenya's legal and regulatory framework in relation to NGO accountability. In addition to that, reforms in the legislative framework to bring about a system of accountability that is inclusive of all stakeholders in the NGO sector in Kenya and provides for their active involvement will enhance accountability practices by Kenyan NGOs.

Having discussed the inadequacies in Chapter 3, this chapter will establish a recommended position on the subject of discussion. The recommendations shall be given based on the research findings and shall be reflective of the hypotheses above and responsive to the research questions raised, in an attempt to resolve the problem as identified in the problem statement. This chapter will first consider the necessity of effective regulation as revealed throughout the research.

#### 5.1 OVERVIEW OF THE ESSENCE OF REGULATION ON ACCOUNTABILITY

The growth in the NGO sector calls for establishment of regulatory frameworks to ensure proper coordination of activities and accountability. The contribution of NGOs in the economy has attracted the interest of government in their operations thus leading to enactment of relevant laws and regulations. Existing laws allow for government involvement in the operations of NGOs. However, without limitation as to the extent of such involvement, more often than not, this would translate into interference by government which jeopardizes NGO independence.<sup>255</sup>

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<sup>255</sup> Yaansah E, Harrell-Bond B, Regulating the Non-Governmental Sector: Global Policy Forum, <https://www.globalpolicy.org/index.php> , posted on Nettime, February 4, 1997.

In chapter three, there was a clear demonstration of the impediments caused by government intervention in NGO operations in Kenya through regulatory bodies and legislative provisions. On the other hand, we noted in chapter one that there is an undeniable role of government to regulate NGOs in order to guard against misuse of resources by NGOs and to safeguard against weakening of state's legitimacy.<sup>256</sup> In light of the foregoing, the argument advanced by this research is; the essence of regulation on accountability should be to provide a foundation for the NGOs in their implementation of accountability practices and to further provide a mechanism for monitoring and measuring the level of accountability by NGOs in Kenya. The result would be a good balance between NGO autonomy and government intervention through regulatory actions.

## **5.2 SUMMARY OF ACCOUNTABILITY CHALLENGES IN EXISTING LAWS AND REGULATIONS**

### **5.2.1 Failure of legal and regulatory provisions to clarify accountability mechanisms**

From the theories discussed in chapter two, it is noted that the legal and regulatory framework on NGO in Kenya is not guided by the stakeholder theory. The legal and regulatory framework fails to consider vital approaches to accountability which include upward, downward, horizontal, inward and functional accountability, all of which are important in the realization of holistic accountability. This can be seen in the biases encouraged by the provisions towards specific stakeholders within the NGO sector. Focus has been placed solely on upward accountability which is keen on financial reporting and favours those in power such as the government and donors leading to donor centrism and government prioritization whilst neglecting other stakeholders.

In addition, the existing accountability mechanisms are also not guided by the questions “who? to whom? for what? and how?”. This is evident in the lack of clarity in legislation on all the parties to be held accountable, to who they should account, what they should

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<sup>256</sup> Kameri-Mbote P, ‘The operational environment and constraints for NGOs in Kenya’.

account for and the means through which they should account. The position greatly inhibits the law's ability to offer proper solutions to common issues around accountability.

While there is constant pressure on NGOs to respond specifically to accountability concerns, the legal and regulatory provisions which should be the guiding framework for such responses, does not give clarity on the issue of accountability.

### **5.2.2 Lack of adequate provisions on self-regulation**

The NGO Act, its regulations and the code of conduct fail to adequately provide for self-regulation as an accountability mechanism. Aside from establishing the NGO Council and enactment of the code of conduct with limited provisions on self-regulation, the NGO Act as is, does not prioritize accountability. The PBO Act makes an effort to cater for accountability through self-regulation, especially with the establishment of the National Federation of Public Benefit Organizations which is meant to oversee self-regulation in the sector. Its implementation however, is impeded by the government's failure to publish its commencement date even though there have been court orders to that effect. The implication is that unless the PBO Act is implemented, the sector will not derive the intended benefits.

### **5.2.3 Multiplicity in modes of registration**

The legislative framework provides for multiplicity in modes of registration for charitable organizations. Failure of the legislative framework to consolidate entities of similar nature under one law has contributed to the emergence of numerous entities with similar models of operation. The fact that these entities are registered under different legislative frameworks renders the realization of holistic accountability near impossible.

While the PBO Act holds great promise for NGO accountability, it presents a number of shortcomings including the failure to resolve the multiplicity problem. The PBO Act defines PBOs and goes ahead to exclude certain entities from its definition but this does not stop them from operating within the confines of the interpretations in the PBO Act.

#### **5.2.4 Excessive government involvement**

The discussions in chapter three shed light on the inadequacies of the legislative framework on NGOs in Kenya with regards to the provisions on accountability. Excessive government involvement for one, is one of the main shortcomings and it greatly affects NGO autonomy. In addition, The Constitution of Kenya is crucial in the realization of accountability as part of the principles of good governance. It also provides for fundamental freedoms such as the freedom of association, expression and access to information all of which inform accountability of NGOs. Provisions of the NGO Act and its regulations fail to put in place mechanisms to control excessive interference by the government, as well as failing to give recognition to these constitutional provisions and international provisions relating to NGO accountability.

#### **5.2.5 Inadequacy in the provisions on enforcement**

The inadequacy in the provisions on enforcement under the NGO Act and the PBO Act exposes the provisions to non-compliance. Besides mandating the board to the PBOA to institute inquiries to determine compliance, the PBO Act establishes a tribunal to deal with disputes regarding compliance. Due to the generality of these provisions, they fail to offer a proper guiding framework regarding enforcement of accountability measures contained in the PBO Act. Noting that the NGO Act was passed almost 3 decades ago, the provisions on dispute resolution do not follow the current system of dispute resolution which is based on principles of natural justice that should afford an aggrieved party of comfort of trusting the process.

Having established the challenges facing the achievement of NGO accountability through legislation, it is important to consider possible solutions that will aid in the achievement of accountability.

## **5.3 RECOMMENDATIONS**

### **5.3.1 Establishment of a clear accountability framework**

As noted in this research, NGOs have to deal with multiple stakeholders who have competing demands. The law therefore must make provisions for an integrated approach on how NGOs deal with multiple and competing accountability demands. The law has to ensure that issues to do with accountability are clearly laid out. This can be achieved through, first, ensuring that, legislation and regulations are cognizant of the vital tenets of accountability that is: who is accountable; to whom they are accountable; what they are accountable for and; how they should apply accountability practices. The frameworks should consider responses to these questions in order to ensure that any proposed measures are responsive to them for better accountability in the NGO sector.

Secondly, it should recognise the different levels of accountability being upward, downward, horizontal, functional and internal. For this to happen, the legislative measures need to be cognizant of the arguments advanced by stakeholder theory as it informs accountability measures. Stakeholder theory speaks to the need for consideration of the interests of all stakeholders and helps avert favouritism and advances accountability towards all concerned parties. Enactment of laws reflective of this will contribute immensely to the achievement of accountability in the NGO Sector.

### **5.3.2 Promotion of Self-regulation and Participation**

As discussed above, some degree of external intervention through the regulatory initiatives may be necessary to deal with the issue of accountability. However, as seen in Chapter three of this research, self-regulation by NGOs offers a better approach to accountability as it allows NGOs to deal with issues affecting their sector on their own in order to build integrity.

To promote self-regulation, the study recommends, that the government should expedite the process of implementation of the PBO Act as it has improved provisions on self-regulation compared to the NGO Act. To further enhance self-regulation, the codes of conduct to be enacted in line with the PBO Act need to be consistent with the relevant

federation's mandate. Regular trainings by the regulator of new and pre-existing NGOs needs to be done on self-regulation for better understanding of the concept and of related aspects such as internal governance.

Further to that, there is need to enact codes under the code of conduct that ensure inclusion and participation of members of the community. Involvement should be both at the planning and implementation stage of projects to foster meaningful participation as it ensures interests of beneficiaries and other concerned parties are taken into consideration and the accountability process is eased.

### **5.3.3 Reduction in the modes of registration**

Multiplicity in the forms of registration as has been cited as a major impediment to accountability due to the confusion occasioned by the existence of numerous entities operating along similar models but registered under different laws. There is need therefore to consolidate entities to be governed by a single law.

Section 2 of the NGO Act for instance, needs to be clear on the definition by stating the extent to which the interpretation shall apply. Such clarity in the definitive scope allows for clarity and therefore confusion as to what entities are governed is avoided. The same should apply to Section 5 of the PBO Act such that the broad approach to definition is applied to all entities currently not registered under the PBO Act. The PBO Act should be clear on the transitional clauses to include the registration of such entities including, NGOs, Trusts and companies limited by guarantee. The implication would be that all charitable organisations would be required to register under the PBO Act.

For the issue of multiplicity to be resolved further, there is also need for collaboration amongst the all the relevant regulatory bodies. This will ensure there is a reconciliation of the provisions of the legislative instruments providing for each entity starting with the definitions and moving on to their roles. With this in place the confusion caused from the similarities and more so the overlapping mandates is likely to be resolved.

### **5.3.4 Reduction of Government Intervention**

Reduction in government intervention is required in order to foster autonomy within NGOs and promote self-regulation. Therefore, the model of NGO accountability to be provided by the law, should ensure that the government and its public agencies shift from the existing adversarial approaches to accountability enforcement and lay emphasis on cooperation by both the government and the NGOs. The NGOCB as it currently stands subject to section 4 is comprised of members who are not only government officials but the appointment is also done by the government through the president and the minister. Seeing as it governs NGO operations, there is need for more representation of NGOs than government officials. There is also need to consider having mandatory meetings between stakeholders, NGO officials and members, the NGOCB and the NGO Councils to ensure the interests of all parties are accommodated.

In addition to this, the government should exercise its mandate with due restrictions and in compliance with The Constitution of Kenya as well as the international treaties. Where government intervention is allowed, there is need for utmost transparency of information between the government with its public agencies and NGOs in order to prevent legislation from being used as a means to stifle operations. Limitation of government interference will also ensure NGO autonomy which contributes immensely to accountability responsibility and fosters self-regulation.

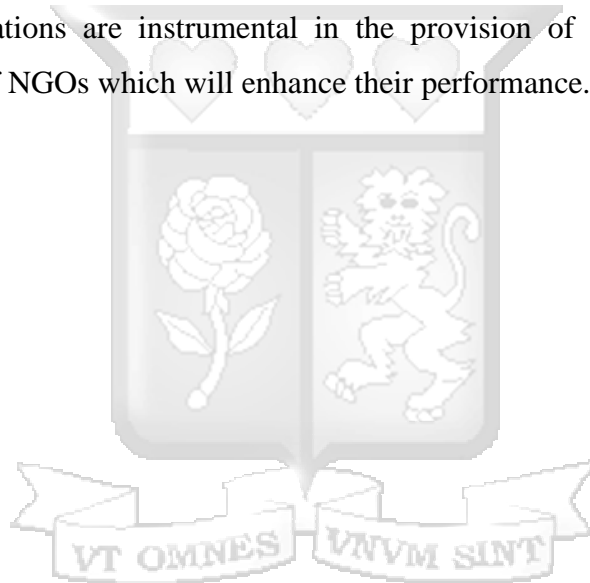
### **5.3.5 Improvement of enforcement mechanisms**

Amendments in the NGO Act to include proper dispute resolution mechanisms reflective of principles of natural justice are necessary. Alternatively, reliance can be placed on the PBO Act, upon commencement, considering its progressive inclusions on dispute resolution. There is need for revision of the PBO Act before operationalization so as to include comprehensive provisions regarding accountability and related areas. Other than that, the PBO Act needs to include express guidelines on enforcement measures to be taken in the event of infringement of the provisions on accountability as stipulated in the Act. Clarity and consistency regarding what is expected is crucial and has to be considered in making the amendments. Accountability provisions need to be supported with proper

enforcement measures so as to foster sustainability in the legal and regulatory frameworks on NGOs. These adjustments will see to it that the challenges of implementation and enforcement do not recur thus rendering existing provisions invalid.

#### **5.4 CONCLUSION**

Application of these recommendations will not only see to the resolution of the challenges encountered with regards to accountability in the NGO sector, but will also foster the overall success of the sector as a key player in development. The inadequacies identified in the legislative and regulatory framework on NGOs in Kenya shall, upon implementation of the given recommendations be resolved accordingly. This is because the recommendations are instrumental in the provision of a holistic mechanism on accountability of NGOs which will enhance their performance.



## BIBLIOGRAPHY

### BOOKS

- Freeman R, Harrison J, Wicks A, Parmar B and Simone de Colle, *Stakeholder theory; The state of the art*, 1<sup>st</sup> ed, Cambridge University Press, New York, 2010.
- Friedman A and Miles S, *Stakeholders theory and practice*, 1<sup>st</sup> ed, Oxford University Press, United States, 2006.
- Holmen H, *Snakes in Paradise – NGOs and the Aid Industry in Africa*, Kumarian Press, 2010.
- OTT J, *Understanding Non Profit Organisations: Accountability concepts and controversies, edition*, Westview Press, USA, 2001.
- OTT J, *Understanding Non Profit Organisations: Governance leadership and management, edition*, Westview Press, USA, 2001.
- Phillips R, *Stakeholder theory and organisational ethics*, Berrett-Koehler Publishers, 2003.
- Swilling M, Russell B, Sokolowski S and Salamon L, 'South Africa' in Sokolowski S and Salamon L, Vol 2, *Global Civil Society: Dimensions of the Non-profit Sector*, Kumarian Press, Inc, 2004.
- Rawls J, *A theory of justice*, The Belknap Press of Harvard University Press Cambridge, 1971.

### JOURNAL ARTICLES

- Arnstein S, 'A ladder of citizen participation' 35(4) *Journal of the American Institute of planners*, 1969, 216-224.
- Banks N, Hulme D and Edwards M, 'NGOs, states and donors revisited: still too close for comfort?' Vol 66, *World Development*, 2014-<  
<http://dx.doi.org/10.1016/j.worlddev.2014.09.028> > 2015, 707-718.
- Benedict S, 'Scrooge-The reluctant stakeholder: Theoretical problems in the shareholder-stakeholder debate', *University of Miami Business Law Review*, Rev. 193 2005, <http://repository.law.miami.edu/umblr/vol14/iss1/6>.

- Cavill S and Sohail M, 'Increasing strategic accountability: A framework for INGOs' 17 (2) *Development in Practice*, Routledge / Taylor & Francis, 2007, 231-248.
- Clarkson M, 'A stakeholder framework for analyzing and evaluating corporate social performance' 20(1) *The Academy of Management Review*, 1995, 92-117.
- Crack A, 'Reversing the telescope: Evaluating NGO peer regulation initiatives' Vol 28 *Journal of International Development*, published online on 1 June 2014 in Wiley Online Library (wileyonlinelibrary.com), 2016, 40–56.
- Davis J, Schoorman D, and Donaldson L, 'Toward a stewardship theory of management' 22(1) *Academy of Management Review*, 1997, 20–47.
- Donaldson L and Davis J, 'Stewardship theory or agency theory: CEO governance and shareholder returns' 16(1) *Australian Journal of Management*, June 1991.
- Ebrahim A, 'Accountability in practice: Mechanisms for NGOs' 31(5) *World Development*, 2003, 813-829.
- Freeman R, Harrison J, Wicks A, Parmar B, Simone de Colle, 'Stakeholder theory; The state of the art' 4(1) *The Academy of Management Annals*, 2010, 403–445.
- Freeman R, 'The politics of stakeholder theory' *Business Ethics Quarterly*, 1994, 4, 409-21.
- Grundei J, 'Are manager's agents or stewards of their principals? Logic, critique, and reconciliation of two conflicting theories of corporate governance' Vol 58 *Journal für Betriebswirtschaft*, September 2008, 141–166.
- Harrison J, Freeman E, Cavalcanti M, Sá de Abreu M, 'Stakeholder theory as an ethical approach to effective management: Applying the theory to multiple contexts, *Revista Brasileira De Gestão De Negócios, Review of Business Management*, São Paulo, 17(55), Special edition 2015, 858-869.
- Harrison J and St. John C, 'Managing and partnering with external stakeholders' 10(2), *Academy of Management Executive*, 1996, 46–60.
- Jillo R, 'Restrictions on foreign funding of civil society NGO law in Kenya' 11(4) *The International Journal of Not-for-Profit Law*, <https://www.icnl.org/resources/research/ijnl/ngo-law-in-kenya>, 2009.
- Karns, G, 'Stewardship: A new vision for the purpose of business' 11(4) *Corporate Governance*, 337-347.

- Keay A, 'Stewardship theory: Is board accountability necessary?' 59 (6) *International Journal of Law and Management*, 2017,1292-1314.
- Kumaran M, Samuel N and Winston L, 'The NGO sector in South Africa: history, issues and prospects' 1 (2) *Journal for Development and Leadership*, December 2012.
- Makoba W, 'Non-Governmental Organizations (NGOS) and third world development: An alternative approach to development' *Journal of Third World Studies* -< <https://www.globalpolicy.org/component/content/article/177/31620.html> >, 2002.
- Marcoux A, 'A fiduciary argument against stakeholder theory' 13(1) *Business Ethics Quarterly*, 2003, 1-24.
- McGee R, 'Aid transparency and accountability: 'Build it and they'll come?'' 31 (1) *Development Policy Review*, 2013, 107-124.
- Mitchell G, 'Strategic Responses to Resource Dependence Among Transnational NGOs Registered in the United States' 25(1) *Voluntas: International Journal of Voluntary and Non-profit Organisations*, February 2014, pp. 67-91.
- Mitchell R, Agle B and Wood D, 'Toward a theory of stakeholder identification and salience: Defining the principle of who and what really counts' 22(4) *The Academy of Management Review*, 1997, 853-886.
- Moore M, Brown D and Honan J, 'Building strategic accountability systems for International NGOs' Issue 2 *Accountability forum*, Summer 2004, 31-43.
- Moore M and Stewart S, 'Corporate governance for NGOs?' *Development in Practice*, 1998 -<[10.1080/09614529853620](https://doi.org/10.1080/09614529853620)> on 27 January 2019, 335-342.
- Morgan Y, 'The Potential for an Independent Regulatory Authority for NGOs in South Africa' 7 (3) *The International Journal of Not-For-Profit Law*, 2005.
- Mosunova N, 'The content of accountability in corporate governance' 2(3) *Russian Law Journal*, 2014.
- Naidoo K, 'The end of blind faith? Civil society and the challenge of accountability, legitimacy and transparency' Issue 2, *Accountability forum*, 14-25.
- Najam A, 'NGO accountability: A conceptual framework' Vol 14 *Development Policy Review*, Overseas Development Institute, 1996, 339-354.

- Olsen T, 'Political stakeholder theory: The state, legitimacy and the ethics of microfinance in emerging economies' 27(1) *University of Denver Business Ethics Quarterly* (January 2017), 2016,71–98.
- Phillips R, Freeman R, and Wicks A, 'What stakeholder theory is not' 13(4) *Business Ethics Quarterly*, 2003, 479-502.
- Pratoom K, 'Cross validating the consequences model of corporate governance underlying combination of stewardship and stakeholder theories' 5(27), *African Journal of Business Management*, 9 November, 2011, 11178-11188.
- Sternberg E, 'Stakeholder theory exposed' *The Corporate Governance Quarterly*, March 1996.
- Sonmez M and Yildirim S, 'A theoretical aspect on corporate governance and its fundamental problems: Is it a cure or another problem in the financial markets?' 3(1 and 2) *Journal of Business Law and Ethics*, 2015.
- Subramanian S, 'Stewardship theory of corporate governance and value system: The case of a family-owned business group in India' 11(1) *Indian Journal of Corporate Governance*, 2018, 88–102.
- Sundaramurthy C, Lewis M, 'Control and collaboration: paradoxes of governance' Vol 28, *Academic Management Review*, 397–415.
- Van M, 'Agents or stewards: Using theory to understand the government non-profit social service contracting relationship, 17, *Journal of Public Administration Research and Theory*, 2006.
- Van Zyl H and Claeys F, 'Up and down, and inside out: Where do we stand on NGO accountability?' *The European Journal of Development Research*, <https://link.springer.com/article/10.1057%2Fs41287-018-0170-3>.
- Wyngaard R, 'Sub-Saharan Africa Country Reports: South Africa' 12(2) *The International Journal of Not-for-Profit Law*, February 2010.
- Yuesti A and Rustiarini N, 'Accountability problem of non- government organisation on practice and perspective stakeholder theory' Vol 15 *Journal of International Accounting Auditing and Taxation*, September 2017.

## WORKING PAPERS

- Berens W, ‘Customers, employees, NGOs-Which stakeholders do really count? A holistic conceptual framework for stakeholder prioritization and expectation management’ Working Paper Number 15-1-<<http://www.wiwi.uni-muenster.de/ctrl>> ,May 2012.
- Fassin Y, ‘Imperfections and shortcomings of the stakeholder model’s graphical representation’ Ghent University, Working Paper Number. 2008/504, February 2008.
- Freeman R and Mc Vea J, ‘ A stakeholder approach to strategic management’ University of Virginia, Working Paper Number 01-02 -<[http://papers.ssrn.com/paper.taf?abstract\\_id=263511](http://papers.ssrn.com/paper.taf?abstract_id=263511)>.
- Gugerty K, ‘Models of NGO self-regulation: Theory and evidence from Africa’ University of Washington, Working Paper Number 4, 2007–<https://evans.uw.edu/sites/default/files/public/EvansWorkingPaper-2007-04.pdf> on 27 January 2019.
- Kameri-Mbote P, ‘Operational environment and constraints for NGOs in Kenya: Strategies for good policy and practice’ International Environmental Law Research Centre, IELRC Working Paper Number 2, 2000, <http://www.ielrc.org/content/w0002.pdf> .
- Nelson J, The operation of Non-Governmental Organizations (NGOs) in a world of corporate and other codes of conduct’, John F. Kennedy School of Government, Harvard University, 2007, Working Paper No. 34, [https://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper\\_34\\_nelson.pdf](https://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_34_nelson.pdf) on 03 January 2019.

## **SELF-PUBLISHED ARTICLES**

- Bendell J, ‘Debating NGO accountability’ United Nations, New York and Geneva, UN Non-Governmental Liaison (NGLS), 2006.
- Brennan K, ‘Embedding Downward Accountability’, Mimeo, 2010.
- Block S, ‘Board of Directors’ West View Press, Colorado, 2001.
- Clarke T and Clegg S, ‘Changing Paradigms: The Transformation of Management Knowledge for the 21<sup>st</sup>Century’, 1998, 106-107.
- Cossin D, Ong B, Coughlan S, ‘Practical perspective: Stewardship fostering responsible long-term wealth creation’ IMD Global, 2015.

- Cropley A, 'Qualitative research methods: A practice-oriented introduction for students of psychology and education', 2<sup>nd</sup> updated, revised and enlarged edition, 2019.
- Esposito De Falco S, Renzi A, 'Agency theory, stewardship theory and residual right: logics and interpretative models', Research Gate, December 2007.
- Forsyth J, 'Is agency theory incompatible with stewardship theory?' 8 July 2016, Updated: 9 May 2019.
- Freeman R, 'Strategic management: A stakeholder approach. Boston, MA: Pitman, 1984.
- Froelich K, 'Diversification of revenue strategies; Evolving resource dependence in Non-profit organizations', West View Press, Colorado, 2001.
- Gonella, C, Pilling A, and Zadek, S, 'Making values count: contemporary experience in social and ethical accounting, auditing, and reporting' The Association of Chartered Certified Accountants, 1998.
- Gugerty M, 'The goldilocks challenge: right-fit evidence for the social sector' Oxford University, 2015, Published to Oxford Scholarship online, May 2018.
- Jeffery N, Stakeholder engagement: A road map to meaningful engagement in the Doughty Centre 'How to do corporate responsibility' Series Doughty Centre, Cranfield School of Management, July 2009.
- Jerving S, 'Legal limbo leaves Kenya civil society vulnerable to targeting', Devex East Africa, 11 October 2017-<https://www.devex.com/news/legal-limbo-leaves-kenya-civil-society-vulnerable-to-targeting-91059> >.
- Jordan L, 'Mechanisms for NGO accountability' GPPi research paper series No. 3, Global Public Policy Institute- <http://www.globalpublicpolicy.net>, 2005.
- Jordan L and Tuijl P, 'NGO Accountability: Politics, principles and innovations' London and Sterling, VA: Earthscan, 2006.
- Kanyinga K, 'Why government and NGOs aren't friends, and what not to do about it'.
- Kisinga F, 'The process of reviewing the NGO Coordination Act, 1990: A step-by-step road map' The International Centre for Not-For-Profit-Law, [www.icnl.org](http://www.icnl.org).
- Larson S, 'Stewardship theory, stakeholder theory and convergence' July 14, 2013.

- Lloyd R and Lucy de las Casas, 'NGO self-regulation: enforcing and balancing accountability' One World Trust, 2006.
- Madison K, 'Agency theory and stewardship theory integrated, expanded, and bounded by context: An empirical investigation of structure, behaviour, and performance within family firms', Trace: Tennessee Research and Creative Exchange, University of Tennessee – Knoxville 5-2014.
- Magongo B, Enhancing Civil Society Participation in the South African Development Agenda: The Role of Civil Society Organisations- The landscape of the Civil Society Sector in South Africa (1-11), National Development Agency, 2016.
- Malenaa C, 'Working with NGOs: Practical guide to operational collaboration between the World Bank and Non-Governmental Organizations' Operations Policy Department, World Bank, March 1995.
- Mohajan H, 'Qualitative Research Methodology in Social Sciences and Related Subjects' Munich Personal RePEc Archive, Premier University, Chittagong, Bangladesh, 10 December 2018.
- Morley D, 'NGO scandal: making poverty profitable' International Marxist Tendency, <https://www.marxist.com/ngo-scandal-making-poverty-profitable.htm> , 02 March 2018.
- Murray V, 'Governance of non-profit organisations' West View Press, Colorado, 2001.
- Musila G, 'Freedom Under Threat: The Spread of Anti-NGO Measures in Africa', Freedom House-<https://freedomhouse.org/report/special-reports/freedom-under-threat-spread-anti-ngo-measures-africa>
- Ponce C, Briceño A, McHale K, 'Freedom of association & assembly – creating an adequate space for Civil Society and NGOs to operate', Memorandum about Freedom of Association & Assembly.
- Thijs de Boer, 'Moving beyond agency and stewardship theory: Testing a reputation-based approach to understanding government – Non-profit accountability relations.
- Tricker I. R, Corporate governance: Principles, policies, and practices, Bloomberg Press London, 2014.

- Usadolo S and Caldwell M, 'A stakeholder approach to community participation in a rural development project', SAGE Open, January-March 2016, 1– 9.
- Yaansah E, Harrell-Bond B, Regulating the Non-Governmental Sector: Global Policy Forum, <https://www.globalpolicy.org/index.php> , posted on Nettime, February 4, 1997.
- Zalta N, Nodelman U, Allen C and Aderson R, ' The rule of law' Stanford Encyclopedia of Philosophy, <https://leibniz.stanford.edu/friends/preview/rule-of-law/> > 2014.

## REPORTS

- Burger, Jegers, Seabe, Owens & Vanroose, *NPO Accountability in a disconnected and divided South Africa*, NPO Report, Vol 3(4).
- Cadbury, A, 'Report of the committee on the financial aspects of corporate governance' -< <https://ecgi.global/sites/default/files/codes/documents/cadbury.pdf>> 1992.
- Kelly L, *Legislation on non-governmental organizations (NGOs) in Tanzania, Uganda, Ethiopia, Rwanda and England and Wales*, University of Manchester, K4D Helpdesk Report, 21 August 2019.
- Meeting Report, *Reflecting on the Closing of Civic Spaces and its Impact on Marginalised Groups in Southern Africa*, Southern Africa Human Rights Defenders Summit, Johannesburg, 14-16 November 2018.
- Non-Governmental Organisation Co-ordination Board, *Annual report and financial statement*, VII, 30 June 2016.
- Non-Governmental Organizations Co-ordination Board, *NGO sector report*, 2013/2014.
- Non-Governmental Organizations Co-ordination Board, *The annual NGO sector report*, 2018/2019.
- Terms and conditions attached to the Registration Certificate and NGO co-ordination regulation.
- The Government of Hong Kong, *Special administration region report*.

## CONFERENCE PAPERS

- Davis J, Schoorman D, and Donaldson L, 'Toward a stewardship theory of management' Strategic Management & Corporate Governance, Presented by Ocampo T, 20 February 2013.
- Dunn C and Burton B, 'Friedman's "The social responsibility of business is to increase its profits": A critique for the classroom', Western Washington University, Conference Paper, January 2006.
- Khan H, 'A Literature review of corporate governance' International Conference on E-business, Management and Economics (IPEDR) Vol 25, <http://www.ipedr.com/vol25/1-ICEME2011-A10015.pdf> , 2011.
- Laws and Regulations Governing Non-Profit Organisations in South Africa 'International Charity Law: Comparative Seminar' Beijing, China October 12-14, 2004.
- O'Dwyer B and Unerman J, 'Enhancing the role of accountability in promoting the rights of beneficiaries of development NGOs' Presentation at Manchester Business School seminar, 27 May 2009.
- Republic of South Africa, Joint Submission to the UN Universal Periodic Review, 27<sup>th</sup> Session of the UPR Working Group, Submitted 6 October 2016 Submission by CIVICUS: World Alliance for Citizen Participation, NGO in General Consultative Status with ECOSOC and Human Rights Institute of South Africa (HURISA).

## INSTITUTIONAL PAPERS

- Civicus, '*State increases pressure on civil society organisations in Kenya*, -< <https://monitor.civicus.org/updates/2016/12/23/kenya/> >- 23 December 2016.
- Conservation International, *Social policy & practice, stakeholder mapping guide for conservation*, International country programs & partners, SEP-stakeholder mapping guide, April 2014.

- Harsh M, Mbatia P and Shrum W, '*Accountability and inaction: NGOs and resource lodging in development*', Development and change, published on behalf of the Institute of Social Studies, The Hague.
- Kenya Human Rights Commission, '*Shrinking civic and democratic space*'-<  
<https://www.khrc.or.ke/shrinking-civic-space.html> >.
- Poverty Eradication Network, *Background notes for the NGO law review CSO consultation workshops*, 2010.
- Private sector initiative for corporate governance, Nairobi; *Principles for corporate governance in Kenya and a sample code of best practice for corporate governance*.-<  
[https://www.ics.ke/wp-content/uploads/bsk-pdf-manager/Principles\\_of\\_good\\_corporate\\_Governance\\_Private\\_Sector\\_-\\_CS\\_Gabriel\\_Kimani\\_110.pdf](https://www.ics.ke/wp-content/uploads/bsk-pdf-manager/Principles_of_good_corporate_Governance_Private_Sector_-_CS_Gabriel_Kimani_110.pdf)> Nairobi, Kenya : Private Sector Corporate Governance Trust, 1999.
- The National Council of NGOs, *A guide to the NGO code of conduct*, 1995, 2004.
- The International Centre for Not-for-profit Law, *Handbook on good practices for laws relating to NGOs, The World Bank discussion draft*, May 1997.
- The London School of Economics and Political Science (LSE), *How to measure civil society*, <http://fathom.lse.ac.uk/features/122552>, 2001.
- Transparency International, *The anti-corruption plain language guide*. Berlin, 2009.

## NEWSPAPER ARTICLES

- Agence France-Presse, 'Kenya closes down hundreds of NGOs' Aljazeera, 16 December 2014– <<https://www.aljazeera.com/news/africa/2014/12/kenya-closes-down-hundreds-ngos-20141216124722577348.html>> on 16 December 2014.
- Cherono S, 'NGO Board de-registers KHRC' Daily Nation, 14 August 2017–<<https://www.nation.co.ke/news/kenya-Human-Rights-Commission-deregistered-/1056-4057174-102910d/index.html>> on 14 August 2017.
- Friedman M, 'The social responsibility of business is to increase its profits' The New York Times Magazine, 13 September, 1970.

- Maina K, 'Why Muhuri and Haki Africa are undergoing crippling harassment' Daily Nation-< <https://muhuri.org/wp-content/uploads/2019/12/Why-Muhuri-and-Haki-Africa-are-undergoing-crippling-harassment.pdf> > Daily Nation, 30 May 2015.
- Standard Digital, 'List of Kenyan NGOs that risk deregistration' <https://www.standardmedia.co.ke/article/2000181037/list-of-kenyan-ngos-that-risk-de-registration> >on 7 May 2019 on 29 October 2015.
- The new humanitarian news, 'NGOs in Kenya protest threatened deregistration of 959 organizations' The Humanitarian, 30 October 2015–<<http://www.thenewhumanitarian.org/analysis/2015/10/30/ngos-kenya-protest-threatened-deregistration-959-organisations>> on 30 October 2015.
- The conversation, 'The role of NGOs in Africa: are they a force for good?' April 25, 2017 - <https://theconversation.com/the-role-of-ngos-in-africa-are-they-a-force-for-good-76227>

## THESES

- Inha M, 'Stakeholder relationships in a non- profit network organisation, Case: European Business Ethics Network', Unpublished M.Sc. Thesis, University of Tampere School of Management, 2015.
- Jillo R, 'NGOs law reform in Kenya: Incorporating best practices' Unpublished LLM Thesis, University of Nairobi, Nairobi, 2010.
- Kalii D, 'Regulating Non-Governmental Organizations in Kenya: A critical analysis of the corporate governance system', Unpublished LLM Thesis, University of Nairobi, September 2017.
- Mertens K,' Milton Friedman and social responsibility – An ethical defence of the stockholder theory' Unpublished thesis, The University of Oslo, 2013.
- Okinda W, 'Accountability of donor funding by Non-Governmental Organizations in Kisumu County', Unpublished MBA Thesis, University of Nairobi November, 2013.
- Werekoh K, Accountability systems of Non-Governmental Organisations (NGOs): Case study from Ghana, Unpublished PhD, University of Birmingham, Birmingham, 2014.

## APPENDICES

### APPENDIX I: ETHICAL CLEARANCE REPORT

RHInno Ethics - SU-IERC0946/20 - 1 of 1

#### Completion of Online Research Ethics Review Submission

You have successfully submitted your application for ethics review "ANALYSIS OF THE LEGAL FRAMEWORK ON ACCOUNTABILITY STRUCTURES OF NON-GOVERNMENTAL ORGANISATIONS IN KENYA"

**Certificate awarded to:** Ms Barasa, Diana

**Reference number:** SU-IERC0946/20

**Date and Time:** 2020-11-18 17:24:21



## APPENDIX II: TURN IT IN REPORT

The screenshot displays the Turn It In software interface. The main window shows a document with a highlighted section titled "DECLARATION". The text in this section reads: "I declare that this work has not been previously submitted and approved for the award of a degree by this or any other University. To the best of my knowledge and belief, the thesis contains no...".

On the right side, a "Match Overview" panel is visible, showing a total match percentage of 15%. Below this, a list of sources is provided:

Rank	Source	Match Percentage
1	kenyalaw.org Internet Source	1%
2	www.icnl.org Internet Source	1%
3	pdfs.semanticscholar... Internet Source	1%
4	mafiadoc.com Internet Source	1%
5	twaweza.org Internet Source	<1%
6	www.ielrc.org Internet Source	<1%

At the bottom of the interface, a status bar shows "Page: 2 of 93" and "Word Count: 26735". There are also options for "Text-only Report" and "High Resolution" (set to "On").

