



Synthesis of Existing Legal Environment Assessments for Civil Society Organizations and Philanthropic Support Organizations in Kenya

Final Report, August 2021

Facilitated by



StrategicConnections Limited
Morningside Office Park, 1st Floor | Ngong Road
P. O. Box 25527- 00100, Nairobi, Kenya
t. +254 (20) 8029746 | +254 733 527220 | +254 716 151001
w. www.sclkenya.com | e. info@sclkenya.com

TABLE OF CONTENT

TABLE OF CONTENT	2
LIST OF ACRONYMS AND ABBREVIATIONS.....	3
ACKNOWLEDGEMENT AND DISCLAIMER.....	3
EXECUTIVE SUMMARY	4
1.0 BACKGROUND AND INTRODUCTION.....	8
1.1 About the Africa Philanthropy Network	8
1.2 Study Scope, Process and Methodology.....	9
1.3 Study Limitations	10
1.4 Structure and Content of Report.....	10
2.0 DETAILED FINDINGS AND ANALYSIS.....	11
2.1 Background and Overview	11
2.2 Overview of Regulatory Frameworks Governing CSO/As in Kenya.....	12
2.3 Freedom of Association and Registration of CSOs In Kenya.....	14
2.4 Fundraising / Resource Mobilization	18
2.5 Taxation.....	22
2.6 State Oversight and (Self) Regulation.....	25
2.7 Reporting, Accountability and Transparency.....	29
2.8 Engagement in Policy and Advocacy	30
3.0 CONCLUSIONS AND RECOMMENDATIONS	32
3.1 Overall Conclusions.....	32
3.2 Major Recommendations.....	33
4.0 ANNEXES	35
4.1 Annex 1: List of Referenced Materials.....	35
4.2 Annex 2: List of Consulted Persons.....	36
4.3 Appendix 1: Framework for Analysis of CSA Regulatory Instruments.....	36
4.4 Appendix 2: Filled WINGS/ ICNL forms	36
4.5 Appendix 3: Terms of Reference	36

LIST OF ACRONYMS AND ABBREVIATIONS

APN	Africa Philanthropy Network
CBO	Community Based Organization
CoK	Constitution of Kenya 2010
CSA	Civil Society Actors
CSOs	Civil Society Organizations
KCDF	Kenya Community Development Foundation
KRA	Kenya Revenue Authority
GfC	Giving for Change (Program)
GfCA	Giving for Change Alliance
ICCPR	International Covenant on Civil and Political Rights
ICNL	International Center for Not-for-Profit Law
MTP	Medium Term Plans
NGO	Non-Governmental Organization
NPO	Not for Profit Organization
PBO	Public Benefits Organization
SCL	Strategic Connections Limited
UDHR	Universal Declaration of Human Rights
VAT	Value Added Tax
WINGS	Worldwide Initiatives for Grantmaker Support

ACKNOWLEDGEMENT AND DISCLAIMER

This report has been compiled by Strategic Connections Ltd (SCL), using information from secondary data review and inputs from the Kenya Community Development Foundation (KCDF), the African Philanthropy Network (APN) and its stakeholders. We are grateful to the leadership of APN and KCDF for entrusting us with this important assignment. We are deeply appreciative of everyone who contributed to the review, particularly those who unreservedly offered crucial information that has formed the basis of the study report.

It is important to note that the findings contained in this report are based on the observations and reviews as of the time of the assessment. We are conscious of the fact that such status is bound to change with time. Finally, we wish to stress that the opinions expressed in this report are purely those of the authors and are based on the observations and findings of the review. It therefore goes without saying that the authors - and not KCDF, APN or its stakeholders - take full responsibility for any errors or omissions that may be found in the report.

EXECUTIVE SUMMARY

KCDF is an indigenous public philanthropic foundation that supports sustainable community driven development. KCDF believes that systemic and enduring change is possible when communities drive their development agenda, and work with multi-sectional actors to ensure access basic rights while harnessing and growing their resources. KCDF thus invests in enhancing organized community-led initiatives to create a firm basis for sustainable development and social justice.

APN is, on the other hand, a continent-wide network of institutions and individuals who promote the culture of philanthropic giving in Africa. The Network brings together varied philanthropy support institutions and civil society actors with an aim consolidating the voice of African philanthropy to address social injustice and development issues on the continent. Ultimately, APN seeks to enhance domestic capital through asset building and recognizing creative means of citizen participation.

In April 2021, APN in collaboration with KCDF under the Giving for Change Alliance (GfCA) programme contracted SCL to synthesize existing documentation on the national and county legal environment for Civil Society Organizations/ Actors (CSO/As), and to propose options of how its GfCA program and other philanthropy actors can engage with the same. This study sought to enable relevant stakeholders in Kenya understand the situation and provide a baseline for lobby and advocacy initiatives and other related interventions.

The review was undertaken in April and June 2021. Multiple techniques were used to collect data amongst them secondary data review and Key Informant Interviews. Data from these sources was synthesised and compiled into this report.

The review reveals that several positive points, but also a few areas of attention; this executive summary only highlights some of these, hence one needs to read the entire report to appreciate the full picture. The overall findings are summarized as follows:

The regulatory frameworks touching on *freedom of association and establishment of Civil Society Organizations (CSOs)* in Kenya are well documented. In this regard, all CSO registration laws contain well defined legal provisions, rules, regulations, and forms that explain the establishment process. The spirit of most of the laws governing CSOs in Kenya were also noted to be written and administered in ways that seek to make it relatively easy and inexpensive to legally establish CSOs.

To a large extent, the CSO laws comply with most provisions of international law and international standards of good practice as far as CSO registration pertains. These include for instance compliance with Articles 21 and 22 of the ICCPR of 1966 and Articles 19 and 20 of the UDHR of 1948, that guarantee the rights of peaceful assembly and freedom of association as well as right to freedom of opinion and expression. It is noteworthy however that other laws that are not necessarily CSO specific such as the Security Amendment Act 2014, Prevention of Terrorist Act Amendment Bill 2018, Public Order Amendment Bill 2019, Data Protection Bill 2018 contain some provisions that restrict freedoms of association, assembly, and expression.

The existing regulatory frameworks however appear to disadvantage grassroots formations such as Community Based Organization (CBOs). As an example, CBOs are required to renew their registrations

on an annual basis¹. This creates unnecessary bureaucratic review and control, as opposed to meaningful oversight mechanisms such as annual reporting. Further, CBOs do not fit within the definition of Public Benefit Organizations (PBOs) as per the PBO Act of 2013, hence will not benefit from the Act once commenced. Finally, CBOs are also not amongst the organization listed as having the possibilities to benefit from tax exemption.

Furthermore, other than the Trustees (Perpetual Succession) Act 2012, all other CSO registration laws are silent on the possibility for individuals to create a CSO by testamentary act. This limits possibilities for people to make testamentary gifts to or bequeaths organizations they create themselves by e.g., through a will. Separately, it is worth noting that the NGO Coordination Act (1990) contains a few vague terms for refusal of registration, however, these challenges are cured by the PBO Act 2013, which makes the process of registration easy to follow.

Concerning *fundraising*, the study noted that existing CSO laws in Kenya are fragmented and do not comprehensively address the conduct of fundraising activities, including fundraising principles, practices and oversight. The fundraising activities are principally regulated by the Public Collections Act, Chapter 106, the Public Officers Ethics Act, Chapter 186, and the Elections Act, 2011. Other laws that have a bearing on resource mobilization and giving include Societies Act and Chiefs' Authority Act. There are in this regard for example very few references to fundraising in the PBO Act 2013 or the NGO Coordination Act 1990. No CSO specific law governs cross-border giving.

Generally, while both the NGO Coordination Act and the PBO Act makes provisions for self-regulation, none of these provisions touch on fundraising. This is notwithstanding the fact that fundraising is a very fruitful area for self-regulation, to protect the image and standing of CSOs, protect the public, and enhance public assurance that (locally) mobilised resources will be well used. Additionally, while opportunities for and adoption of innovative digital technologies for resource mobilization, have significantly increased, and often brought new range of risks, the same are largely not regulated by the current CSOs laws.

Regarding *taxation*, there exists a very explicit set of laws that amongst others specify various tax obligations, applicable tax categories, and tax exemptions. In the first place, the different tax acts provide clear conditions for application and processing exemptions and justifiable grounds for rejection of any such requests. There are also clear mechanisms to appeal an erroneous or arbitrary refusal to grant tax exemption. However, while these terms meet conditions for good laws, in practice, they are often not followed to the letter. As an example, the timelines are rarely adhered to.

On the other hand, whereas there are a number of tax incentives available to CSOs in Kenya, they tend to be illusory in practice largely due to burdensome procedures and or flouting of the same by tax authorities or officials. As an example, although the laws stipulate that tax exemptions should be granted within 60 days, in practice, these often run into months or years. There are also often no feedback mechanisms on progress of one's application or reasons for refusal to grant exemptions. Furthermore, CSOs are required to separately apply for exemptions for the different taxes such as income tax, VAT, and Import Duty, as opposed to one blanket application. Finally, trusts and

¹ Article 14 (1) of the proposed Community Groups Registration Bill 2021 however proposes that renewal of registration of CBOs be done biennially.

foundations cannot qualify for exemptions under the VAT Act and the Customs and Excise Act which do not include them in the definition of charitable organizations.

On the other end, most CSO/As are often not sufficiently knowledgeable of the available tax exemption incentives and or the processes of securing the same. Structured awareness raising for CSO/As on available tax incentives is thus imperative, and advocacy towards concerned authorities to make access to available tax incentives more accessible is needed.

As pertaining to *state oversight and (self)regulation*, there exists several institutional frameworks that oversee various aspects of CSOs in Kenya. The key institutions include among others the NGO Coordination Board, The Kenya Revenue Authority (KRA), the Ministry of Labour, Social Security and Services, and Ministry of Lands. The NGO Council also acts as self-regulation mechanisms for NGOs. Further the PBO Act 2013 has proposes the establishment of a Public Benefit Organizations Regulatory Authority to take over from the NGO Board; a Public Benefit Organizations Disputes Tribunal; and a National Federation of Public Benefits Organizations as the main self-regulation mechanism for PBOs.

The PBO Act 2013 explicitly provides that PBO regulations shall be proportionate to their objects, and as far as possible not limit the rights of concerned persons and bodies. All the laws contain the principle of non-distribution, which prohibits CSOs from transfer of their assets, resources or earnings meant for public good into private hands, or be used to provide special personal benefits, directly or indirectly, for any person connected with the CSO. The Societies Act does not however explicitly prohibit distribution of assets to members upon the society's dissolution.

Both the NGO Board and NGO Council have regional presence. This is in line with international best practice requirement that agencies responsible for CSO/As oversight be adequately staffed and have services accessible in all parts of the country. In reality however, the staffing for both the NGO Board and NGO Council tends to be very thin compared to the large number of CSO/As that they need to serve. It is thus important that the existing CSO oversight bodies are supported by a meaningful enforcement program, besides structured investments in capacity strengthening of these oversight institutions.

Regarding *reporting, accountability, and transparency*, the existing PBO laws stresses organizational integrity and encourages PBOs to maintain high standards of governance and management. Per international best practices, all CSO laws require that all CSOs whose activities significantly affect the public interest file detailed reports annually on their finances and operations with the respective agencies responsible for their supervision.

Both the PBO Act and NGO Coordination Act have elaborate formats and procedures for making annual returns. On the flipside however, the annual reporting requirements are standardized and do not adequately cater for diversities in the typologies, operational scope, and capacities of CSOs. There are also no provisions to synchronize reporting across different oversight institutions such as the KRA, NGO Board, and Registrar of Companies. Furthermore, the review noted that the reporting forms for returns to the NGO Board ask for detailed information about funding sources, which could contravene best practices for protection of legitimate privacy interests of donors and recipients of benefits.

Finally, as far as *CSO/As' engagement on policy advocacy* pertains, the study observed that the Kenyan CSO/A laws largely provide for the right to engage freely in advocacy on issues and public debate, even where the positions may not align with government positions. These freedoms are guaranteed in the amongst others in the Constitution of Kenya (CoK) 2010.

In reality however, Kenya has proposed, enacted and implemented certain laws that restrict freedoms of assembly or expression². These include Security Amendment Act 2014, Prevention of Terrorist Act Amendment Bill 2018, Public Order Amendment Bill 2019, and Data Protection Bill 2018³. These are besides administrative barriers such as threats of de-registration, disproportionate penalties and restrictions on work permits for expatriates, as well as censorship and surveillance.

Based on the review findings, the following overall recommendations emerge:

1. Review existing fundraising laws and regulations to ensure these are comprehensive, favourable, unfragmented and able to create confidence in the public concerning integrity, transparency, and accountability of CSO/As. Also strengthen self-regulation mechanisms for CSOs.
2. Collectively, and with one voice, continue the push for commencement of the PBO Act, as well for consistent vigilance towards safeguarding the same.
3. Harmonise existing efforts towards review of the trusts and foundation laws, considering all existing proposals to ensure that these are as comprehensive and progressive as possible. Provide inputs into the Community Groups Registration Bill 2021, that was introduced to the Senate in April 2021.
4. Review and harmonise existing tax exemption incentives to ensure inclusive definition of tax-exempt organizations; and to establish simpler, open and transparent processes for administration of tax exemption applications. Also educate CSO/As on available tax incentives and how to make use of the same.
5. Invest in and or advocate for strengthening of existing CSO oversight institutions and self-regulation formations, to enable effectively regulate the sector. Also, advocate for removal of intrusive and or burdensome, and multiple reporting requirements or audit practices.

² <https://katibainstitute.org/the-state-of-human-rights-and-freedoms-in-kenya/>

³ Henry O Maina, "An Audit of the Constitution of Kenya: Friend or Foe – The Government of Kenya and Freedom of Expression

1.0 BACKGROUND AND INTRODUCTION

1.1 About KCDF, APN, and the Giving for Change Alliance Program

KCDF is a public philanthropic foundation that supports sustainable community driven development through grantmaking and capacity building of local organizations. KCDF holds strongly that systemic change is possible when communities can initiate and drive their development agenda, work with governments and other actors to access basic rights and services as well as harness and grow their own resources. KCDF works with poor and disadvantaged communities as its primary target group and looks to provide them support to uplift themselves from their situation through their own efforts.

In an effort to assist communities pursue sustainable development and social justice, KCDF continues to partner with, and facilitates strengthening of local communities and their organizations by: Building strong and credible institutions for sustainable community development; and influencing and fostering favourable policy framework and an enabling environment for organized giving and social justice.

The Africa Philanthropy Network, on its part, is a continent-wide network of institutions and individuals in Africa and its diaspora who promote the culture of philanthropic giving by providing leadership on the development of philanthropy agendas. APN envisions a strong and effective philanthropic community, striving to build equitable and just societies in Africa. It seeks to enhance domestic capital information through asset building and recognizing creative means of citizen participation.

The Network brings together an ecosystem of varied philanthropy support institutions and civil society members serving different forms of philanthropy with an aim consolidating the voice of African philanthropy to address social injustice and development issues on the continent. APN thus acts as a space for African institutions to interrogate and intervene in the power dynamics that shape how resource mobilization, distribution and spending impact possibilities of transformative change in Africa.

APN in collaboration with KCDF and other GfCA members are implementing the Giving for Change (GfC) program. The program seeks to enhance recognition of domestic resources as a basis of increased local ownership, agency, and communities' claim making abilities. In Kenya, the project is implemented nationally with a focus on Nairobi, Kwale, Kisumu, Kakamega, and Busia Counties.

The GfC program recognizes that many governments have regulatory frameworks that discourage CSAs from raising their own funds. This raises the need to invest in establishment and or operationalization of progressive legal, policy and institutional frameworks for local resources mobilization. This should be accompanied by public conscientization to enable them effectively hold governments to account for their responsibilities, while demonstrating how investing in public goods benefits the government.

GfC seeks among others to influence state and in-country CSAs to support community philanthropy by creating favourable conditions that promote domestic philanthropic giving. Such influencing is to be based on a clear evidence base. GfC acknowledges existence of a raft of regulatory frameworks, as well as research, evaluation, and assessment reports of varied actors on such regulatory environments of CSO/As that could provide evidence for such influencing work.

1.2 Study Scope, Process and Methodology

Assessment scope: The study sought to synthesize existing documentation on the national and county legal environment for CSO/As and propose options of how GfC and other philanthropy actors can engage in Kenya. The assignment is aligned to domain 2 of the GfC program which is to facilitate the building of philanthropic culture and domestic resource mobilization, and the recognition of the role of philanthropic giving as a driver for change by the national state and CSAs.

The outcomes of the study will offer greater stakeholders' understanding of the regulatory frameworks, and to provide a baseline for lobby and advocacy initiatives and other related interventions with regard to various policy issues. The study largely entails desktop analysis of existing materials of existing regulatory frameworks and previous studies of philanthropy in Kenya and elsewhere.

Approach and methodology: A combination of qualitative research methodologies were applied. These included secondary data review, Key Informant Interviews (KII), and internet-based reviews. In particular, the consultants reviewed previous research, assessments, and study reports by various philanthropy actors. The list of referenced documents is included in Annex 1 of this report.

Though external in nature, the review was implemented in active engagement of KCDF, APN and key project stakeholders to enable establish the link with learning and future follow ups. The approach also places premium on voices and experiences of key informants as well as outcomes of previous studies, but technically interrogates these with the consultants' perspectives. The nature of the review was 'explorative and descriptive' with emphasis on 'what is emerging'. The review also had a 'formative' character, as it proposes recommendations for improvement, rather than stopping at fact-finding.

Review process and key steps: The review was carried out between the months of April and June 2021. On embarking on the assignment, the consultants held entry meetings with APN and KCDF to level expectations concerning the review. Secondary data availed by APN/ KCDF was then reviewed by the assessment team. The list of reviewed literature is contained in annex 1 of this report. The review team subsequently developed assessment frameworks, workplans and tools which were shared with APN as part of an inception report. The developed tools and materials were formally approved by APN and KCDF during the preliminary stages of the study process.

The analysis and synthesis of the regulatory frameworks and various reports on the CSO/A regulatory environment was focused on, but not limited to 5 key themes/ areas as required by the study Terms of Reference (ToRs), being: (i) Registration, (ii) Taxation, (iii) Fundraising/ local resource mobilization, (iv) Oversight and Accountability, and (v) Policy engagement.

Further, the analysis was guided by the WINGS/ICNL⁴ tool and ICNL document on fundraising principles⁵. These tools were mainly used to guide the:

1. documentation of key issues with the CSAs regulatory environment and their effects, major actors, and different factors to consider when deciding whether to engage.

⁴ See <https://wings.issuelab.org/resource/assessing-the-legal-environment-for-civil-societyorganizations.html>.

⁵ <https://ecnl.org/publications/fundraising-principles>

2. mapping and prioritisation of major issues on CSOs' regulations, including how long it could take to resolve the issues and possible resource needs.
3. identification of possible allies/ stakeholders who could support civil society engagement, their potential contribution, and potential openings to reach decision makers.

The filled tool is appended to this report. The information extracted from primary and secondary data was subsequently triangulated and analysed, and the findings compiled into this report.

It is anticipated that the final report will be discussed at a national stakeholders' validation and learning workshop. The workshop will also seek to further distil major lessons from previous efforts, besides developing strategies of (and workplan for) taking forward the key recommendations of the report.

1.3 Study Limitations

Every evaluative study has its limitations and invariably time is often one of them. This review was carried out within tight timelines, and at a time when physical meetings were restricted due to the corona virus disease 2019 health protocols. This meant that most of the KIIs could only be held using online meetings. Further, the busy nature of some of the key informants meant that the interviews had to be postponed several times, sometimes at the last minute. The net effect of these postponements was an overall delay in data collection and subsequent delay in data analysis and report finalization.

The above challenges notwithstanding, the consultants believe that the information received was sufficient and a reasonable basis to arrive at the indicated conclusions and recommendations, and that the limitations have not negatively affected the findings of the report.

1.4 Structure and Content of Report

This report is structured into four sections, besides the executive summary and the preliminary pages. Section one of the report presents the background information on KCDF, APN and the GfCA program; the review objectives, process, and methods; as well as review limitations. Section two, on the other hand, presents the detailed findings and analysis. The findings are organized per the review study areas as defined in the ToRs for the same. Section three on its part highlights the review conclusions, lessons and recommendations, while section four contains the review annexes and appendices.

2.0 DETAILED FINDINGS AND ANALYSIS

2.1 Background and Overview

According to the World Bank, Civil Society Organization/ Actors (CSO/As) refers to the wide array of Not-for-Profit Organizations (NPOs) with a presence in public life, expressing the interests and values of their members or communities and which are founded on ethical, cultural, political, scientific, religious, or philanthropic considerations⁶. CSOs include among others Community Based Organizations (CBOs), labour unions, Non-Governmental Organizations (NGOs), indigenous associations, Faith-Based Organizations (FBOs), charitable organizations, media professional associations and foundations.

CSOs play an important role in addressing quality of life issues, that cannot be resolved by the government alone, and for which businesses often do not have enough economic incentive to engage into⁷. CSO/As are important partners of the state in the provision of essential social services⁸.

Further, CSO/As provide indirect support for the success and growth of market economies⁹. Market economies flourish best where social stability, public trust of institutions, and respect for the rule of law exist¹⁰. Other economic justifications of CSO/As include claims of efficiency in provision of public goods and services, and knowledge of the real needs of the people and how to meet these¹¹.

Similarly, CSO/As offer mechanisms for promoting individual initiatives for the public good. As an example, most social enterprises offer essential goods or services that are not profitable enough to incentivise supply by the private sector, or for which the state is unable to offer due to budget constraints or limited political will. Subsequently, encouraging a sound NGO sector may help to strengthen economic growth and eliminate burgeoning economic challenges¹².

Finally, socio-political justifications for CSOs include giving voice to under-represented people and integrating these perspectives into social and political life. Laws that permit individuals and groups to meet gaps created by market and government failures in public service delivery therefore play a vital role in enriching the society and assuring that those public goods or services to which individuals are willing to devote their own resources will be provided.

Ultimately, however, it is important to acknowledge that the amount of space allowed to CSOs in any given country is often, first and foremost based on political considerations, rather than any calculation of the contributions of NGOs to economic and social development¹³.

⁶ PWC 2014 Change the Game - Phase 1 Pilot in Kenya: Analysis of laws and regulations, Final Report 4 June 2014

⁷ Global Civil Society Dimensions of the Non-profit Sector, by Lester M. Salamon; Helmut K. Anheier; Regina List; Stefan Toepler; S. Wojciech Sokolowski; and Associates, The Johns Hopkins Center for Civil Society Studies Baltimore, MD, 1999.

⁸ <http://documents1.worldbank.org/curated/en/201351468332690971/pdf/639500WP0WB0Ha00Box0361533B0PUBLIC0.pdf>

⁹ Leon E. Irish *the Role and Purpose of the Not-For-Profit Sector*, The International Center for Not-for-Profit Law, March 1995

¹⁰ <https://www.socialcapitalresearch.com/putnam-on-social-capital-democratic-or-civic-perspective/>

¹¹ United Nations Development Programme, *Joint Venture Public-Private Partnerships for Urban Environmental Services*, PPU Working Paper Series, Vol. 11, (New York: UNDP, 2000):

¹² <https://documents1.worldbank.org/curated/en/201351468332690971/pdf/639500WP0WB0Ha00Box0361533B0PUBLIC0.pdf>

¹³ Michael Bratton. *The Politics of NGO-Government Relations in Africa*. World Development 17(4) (quoted in John Farrington & David Lewis. *Reluctant Partners: NGOs, the State, and Sustainable Agricultural Development* (Routledge 1993).

2.2 Overview of Regulatory Frameworks Governing CSO/As in Kenya

Freedom of Association is one of the most developed of the fundamental principles of international human rights law. Article 20 of the Universal Declaration of Human Rights (UDHR) of 1948 protects the right to peaceful assembly and association, while Article 19 states that everyone has the right to freedom of opinion and expression. Kenya ratified the Universal Declaration of Human Rights in 1990.

Similarly, the International Covenant on Civil and Political Rights (ICCPR) of 1966, on the other hand, is a binding multilateral treaty that has been ratified by over 135 countries, including Kenya in 1972. Articles 21 and 22 of the Covenant guarantees, respectively, the rights of peaceful assembly and freedom of association. Under the Covenant, states party are required to conform their legislation to recognize and protect the rights established in the Covenant.

Within Kenya, the Constitution of Kenya (CoK) 2010 provides the overarching policy framework for Kenya. The human rights and fundamental freedoms contained in Article 19 (1) (2) of CoK 2010 - the Bill of Rights - cover equality, privacy, property, freedom of expression and freedom of association. The right to freedom of association is of great significance to CSOs as it sets the basis for their existence. Further, Article 20 (4) (b) and Article 21 further reinforces the need for the implementation of the Bill of Rights for all citizens without undue discrimination.

Separately, Kenya's Vision 2030 is the country's main long-term development blueprint. The strategy is implemented in successive five-year Medium-Term Plans (MTPs). The blueprint hinges on three core elements namely the economic, social, and political pillars. The social pillar aims to build a just and cohesive society, that enjoys equitable social development in a clean and secure environment. MTP 2018-2022, focuses on four pillars namely food security, affordable housing, manufacturing, and affordable healthcare¹⁴. It is apparent that the task of achieving the ambition set out in Vision 2030 can only be executed effectively when government, businesses and civil society pull together.

More specifically, there is a wide array of legislative frameworks that guide the legal establishment NPOs in Kenya. Broadly, there are four primary types of NPOs under which charitable or philanthropic institutions may fall. These are as follows:

1. **Public Benefits Organizations (PBO):** The Public Benefits Organizations Act No. 18 of 2013 defines a public benefit organization as 'a voluntary grouping of individuals or organizations, which is autonomous, nonpartisan, non-profit making that engages in public benefit activities and is registered as such by the Authority'. The definition of PBOs specifically excludes trade unions, political parties, cooperatives, religious organizations, societies, co-operative societies, corporations, micro-finance institutions, SACCOs, and CBOs.
2. **Companies:** A number of charities and philanthropic (not-profit) organizations are registered as companies whose liability is limited by guarantee of the members. A company limited by guarantee under the Kenyan Companies Act 2015 must be incorporated without a share capital. The Companies Act offer little support to the charitable companies and the only little and social benefit

¹⁴ <http://planning.go.ke/wp-content/uploads/2018/12/THIRD-MEDIUM-TERM-PLAN-2018-2022.pdf>

offered is recognition that they can be exempted from the use of the word 'limited' and the requirement that every company must have a company secretary.

3. **Societies:** Under the Societies Act, a society is any club, company, partnership, or other association of ten or more persons, whatever its nature or object. The definition specifically excludes trade unions, cooperatives, corporations, and certain other entities. A society's governing documents are called the Constitution or Rules of the Society. Societies are registered and regulated by the Registrar of Societies.
4. **Trusts:** A trust is an entity created to hold and manage assets for the benefit of others. Trusts can be established under the Trustees (Perpetual Succession) Act, Chapter 164. Under the section 3 of the Act, trustees who have been appointed by anybody or association of persons established for any religious, educational, literary, scientific, social, athletic or charitable purpose, or who have constituted themselves for any such purpose, may apply to the Minister in the manner provided in the Act for a certificate of incorporation of trustees as a corporate body.
5. **Foundations:** Since there is no distinct legal regime for registration of foundations, they take the form of a PBO, company, society or trust. Of the local foundations, about 40% are registered as trusts, 35% as NGOs, 20% as companies limited by guarantee and around 5% as CBOs¹⁵.
6. **Community Based Organizations:** CBOs including self-help groups are only recognized under the Department of Culture in the Ministry of Youth, Gender, Children Affairs and Social Services. CBOs have been commonly defined as all such organizations, institutions or congregations of people, which have local area/village-based presence, maturity and structural arrangements¹⁶. The CBOs form the largest single block of Kenya's non-profit sector. This denies a large pool of philanthropic activity the legal support and as consequent they fail to reach the masses¹⁷.
7. **Others:** Other relevant laws and regulations governing CSOs operations and oversight include the Trustee Act, Income Tax Act, the Value Added Tax (VAT) Act, Value Added Tax (Remission) (Charitable Organizations) Order (1999), the Customs and Excise Act, Chapter 472 of the Laws of Kenya (2000), the Employment Act, Security Laws as well as sectoral laws such as those governing education, health, environment, water, and agriculture sectors.

¹⁵ East African Association of Grant-makers, The East Africa Giving Report, 2012

¹⁶ PWC 2014 Change the Game - Phase 1 Pilot in Kenya: Analysis of laws and regulations, Final Report 4 June 2014

¹⁷ Karuti Kanyinga W.Mitullah and S.Njagi, (2007), The Non-Profit sector in Kenya, the Size scope and Financing, The Institute for Development Studies, University of Nairobi, Aga Khan Development Network, P 17.

2.3 Freedom of Association and Registration of CSOs in Kenya

Documentation and Administration of CSO Registration Laws: Most regulatory frameworks touching on CSOs establishment are well documented. In the first instance, the CoK 2010 provides numerous guarantees for civic space. Article 19 (1), the Bill of Rights, forms the main framework for social, economic, and cultural policies. Part (2) provides that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings. Article 21. (1) further states that it is a fundamental duty of the State and every State organ to observe, respect, protect, promote, and fulfil the rights and fundamental freedoms in the Bill of Rights.

CoK 2010's provisions on freedom of association complies with international law and meet international standards of good practice. This includes for example Articles 21 and 22 of the ICCPR of 1966 and Articles 19 and 20 of the UDHR of 1948, which guarantee the rights to peaceful assembly and freedom of association as well as right to freedom of opinion and expression. However, there exists a mismatch between the content of CoK 2010 and a few Kenyan laws such as the Security Amendment Act 2014, Prevention of Terrorist Act Amendment Bill 2018, Public Order Amendment Bill 2019, Data Protection Bill 2018 of which certain clauses restrict freedoms of association, assembly, and expression.

All laws for registration of CSOs contain well defined legal provisions, rules, regulations, and forms that explain the establishment process. Registration rules also mostly set out reasonable time limits within which the registering agencies must act on applications for registration. These provisions ensure that the laws do not confer too much discretion on government officials to decide whether or not to permit the establishment of a CSO.

To start with, Section 10 (3) and (5) of the NGO Coordination Act of 1990 outlines the key requirements for registration of NGOs. Section 10 (4) of the Act further makes provisions for exemption and cancellation of such registration. These provisions are available in rules and regulations for the establishment of CSOs. The provisions of the NGO Coordination Act are complemented by Sections 8 and 9 of the NGO Coordination Regulations [1992] that further sets out the registration process, as well as the required fees, information and documentation.

Similarly, Sections 6 to 13 of the Public Benefit Organizations (PBO) Act 2013¹⁸ provides clear and unambiguous guidelines for registration of PBOs. To illustrate, Section 8 outlines the documents and information that must accompany an application for registration. These include for instance a copy of the PBO's constitution, founders' names and addresses, the public benefit purposes, postal and physical address, principal place of business, and the prescribed registration fee.

Under both the NGO Coordination Act and the PBO Act, registered entities become body corporate with perpetual succession upon being issued with a certificate. The certificate is also a conclusive proof that the organization has authority to operate in Kenya. This means that the law does not require NGOs, trusts, societies and Companies to undertake annual renewals of their registrations. This perpetual existence makes it easy for continuation of NPOs' activities.

¹⁸ The **PBO Act, 2013** repeals the **NGO Co-ordination Act, 1990**. The PBO Act is however not yet commenced.

Pursuant to Section 5 of the Fifth Schedule of the PBO Act, every NGO registered under the repealed NGO Coordination Act will be deemed to be registered as a PBO under the PBO Act upon the commencement of the PBO Act and shall have up to one (1) year from the commencement date to confirm its status as such through formal registration under the new Act. In the event that an NGO fails to apply for registration under the PBO Act 2013 within the grace period, it shall cease to have PBO status thirty (30) days after the expiry of the regulatory notice requiring it to do so. This provision is likely to have a far-reaching effect in the near future and may prompt some organizations to adopt other organizational forms to pursue their objectives.

To further exemplify, the Company's Act, Section 15 requires that a company limited by guarantee attach a statement of guarantee containing the prescribed information to enable the memorandum of association's subscribers to be identified. However, one can also establish a CSO through the registrar of companies under a company limited by guarantee which has the capacity to operate as a non-profit. This is set out in the Companies Act Section 7.

However, CBOs are currently required to renew their registrations on an annual basis. Article 14 (1) of the proposed Community Groups Registration Bill 2021 however proposes that renewal of registration of CBOs be done biennially. While the establishment of the Community Groups Registration Bill is a step in the right direction, biennial renewal of registration leads to unnecessary paperwork and bureaucratic review and control. The authorities need in this regard to assure that CBOs meet their obligations, not by biennial re-registration but, rather, through meaningful annual reporting requirements.

Ease of Establishment of PBOs: The spirit of most laws governing CSOs in Kenya are written and administered in ways that seek to make it relatively easy and inexpensive to legally establish CSOs. As an example, Article 34(3) of the PBO Act provide that the registering authority ensures reasonable access to its services in all parts of the Republic of Kenya, so far as it is appropriate to do so having regard to the nature of the service. This ensures that if the founders of an NGO must appear personally before the establishing agency, rather than being able to become a legal person by mail, offices performing that function should be located at convenient places throughout the country.

Any person can establish a CSO in Kenya regardless of nationality. As an example, foreign NGOs can establish branches in Kenya as long as they comply with the law and regulations set. Such foreign NGOs would receive the same rights, powers, privileges, and immunities enjoyed by domestic NGOs. The rules for foreign NGO establishment are generally largely the same as for domestic NGO establishment, but for additional documentation such as proof of registration in other countries (PBO Act 8 (3)).

Refusal to Register NPOs and Appeal Mechanisms: Article 36 (1 and 3) of CoK 2010 provides that every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind. Subsequently, any legislation that requires registration of an association of any kind shall provide that, (a) registration may not be withheld or withdrawn unreasonably; and (b) there shall be a right to have a fair hearing before a registration is cancelled.

The NGO Coordination Act of 1990 contained some vague grounds for denial of registration, placing a lot of discretion on the registering authority in setting terms and conditions on NGO registration. This includes provisions of Article 14 (a) of the Act that registration be denied where activities or procedures 'are not in the national interest', and Article 14 (c) that registration be declined if 'the NGO Council

recommends that the applicant should not be registered'. Further, the NGO Coordination Act does not provide a fixed time period for the review of applications, besides the fact that the law is also silent on the need for the NGO Board to provide reasons for its refusal to register an organization.

On the other hand, however, Article 16 (1) of the PBO Act 2013 provides clear grounds for refusal to register an entity as a PBO. Further, where the Authority has refused registration of a proposed PBO, it shall, within fourteen days of the decision, notify the applicant of the reasons for the refusal.

The PBO Act also provides clear mechanisms to appeal an erroneous or arbitrary refusal to establish a PBO. This makes it easy for those who feel aggrieved by decisions of the board get relief in court. Article 17 (1) of the PBO Act provides that any applicant who is aggrieved by a decision of the Authority may apply to the Authority for review of its decision within thirty days of receiving a written notice of the disputed decision, and subsequently to the Public Benefit Organization Disputes Tribunal if not satisfied.

Further, the PBO Act provides for presumptive approval if there is no action from the Authority 60 days of applying for registration under section 9(1). In such as case, Article 12 of the PBO Act, allows the PBO to apply to the Tribunal for an order requiring the Authority to issue to it a certificate of registration or communicate to the organization that the registration has been refused, together with the reasons therefor. This provision precludes officials overseeing establishment procedures from using delay as a means of denying establishment to an organization, they do not favour.

Noted Areas of Attention and Recommendations

1. *Multiplicity of applicable CSO regulatory regimes:* The regulations governing the registration and operation of CSOs is still unharmonized with various CSOs being regulated under different laws. To exemplify, religious organizations are regulated as Societies act; NGOs are under NGO Coordination Act; Trusts are under Ministry of Lands; Foundations under the Company Act; and CBOs under the Ministry of Labour and Social Protection. This affects possibilities for standardization or simplification of operational requirements and processes across PBOs. Additionally, this situation makes compliance rather high burdensome and costly, and specifically increases the risk of noncompliance for low funded CSOs.

Linked to this, it is notable that the first ever policy covering the entire civil society sector - sessional paper 1 of 2006 – is very old. The policy sought to inform various regulatory frameworks for the civil society sector, but unfortunately only addresses the sector from an NGO coordination Act perspective. It is thus imperative that the policy framework be reviewed and updated, amongst others to recognize all NPOs/ PBOs other than just NGOs, irrespective of the legal frameworks under which they are registered.

2. *Delayed operationalization of the PBO Act 2013:* Accented into law in 2013, the PBO act has never been operationalized or commenced to date. There appears to exist very limited political goodwill on the part of the state towards operationalization of the Act, despite the fact that it is much more comprehensive and tries to cure various gaps in the NGO Coordination Act of 1990 that it seeks to replace. The delayed operationalization of the PBO act is also testament of non-adherence to rule of law by certain state officials. This is because court orders seeking to compel responsible authorities to commence the act have been ignored to date.

The Statute Law Miscellaneous Amendment Bill 2013 demonstrated how far some state parties can go to jeopardize the ability of CSOs to carry out their activities effectively, independently and free from governmental interference. The attempts to amend the PBO Act 2013 even before its commencement is even more curious. It is thus imperative that CSO/As continue the push for commencement of the PBO Act, as well for consistent vigilance towards safeguarding the same.

It is thus important that the Kenyan civil society actors collectively, and with one voice, maintain the momentum of advocacy towards commencement of the PBO Act.

3. *Unharmonized definitions and benefits to CSOs:* The various laws governing registration and operation of CSOs seem to disadvantage CBOs in various ways. In the first place, they are required to renew their registration annually which is cumbersome¹⁹. Further, CBOs do not fit within the definition of PBOs and so ordinarily will not benefit from the PBOs act once commenced. Finally, CBOs are also not amongst the organization listed as having the possibilities to benefit from tax exemption. These gaps are notwithstanding the important role CBOs play in improving the quality of life of communities at grassroots, as well as the potential to play a critical role on local community resource mobilization.

The current Community Groups Registration Bill 2021 before the Senate is thus a big step in the right direction. It will however be a missed opportunity if the bill becomes law without attending to the noted concerns. It is thus imperative that CSOs engage with the Bill with a view to making the same comprehensive but contextualised to the special situations of grassroots CBOs.

Separately, the existing laws do not sufficiently cover registration and operation of Foundations. The result of this situation is that certain CSOs, mostly foundations have to operate under multiple laws, mostly the Trustees Perpetual Succession Act, Companies Act and NGO Coordination Act, to navigate these loopholes. It is however appreciated that some investments are already being made to harmonize the trusts and foundation laws with a view to having a common legal regime for foundations and trusts.

4. *Administration of testamentary acts:* The Trustees (Perpetual Succession) Act Section 12 allows people to lawfully give donation, gifts or bequeath property to incorporated Trusts or PBOs, through a deed, will, or testamentary act. On the other hand, however, all other CSO laws are silent on the possibility for individuals to create a CSO by testamentary act (e.g., through a will). This, if linked to the Succession Act Cap 160, could form an important way in which the law can encourage private property to be left for a public purpose.

Further, although many testamentary gifts are made to existing NGOs, experience indicates that many individuals prefer to make testamentary gifts to organizations they create themselves by testamentary act. There is thus a need to advocate for insertion of a clause that allows for creation of CSOs by testamentary act in various CSO laws.

¹⁹ It is noteworthy, however, that the Community Groups Registration Bill 2021 proposes this to be done biennially.

2.4 Fundraising / Resource Mobilization

Regulatory Frameworks Governing Fundraising: Fundraising activities in Kenya are principally regulated by the Public Collections Act, Chapter 106, the Public Officers Ethics Act, Chapter 186, and the Elections Act, 2011. Other laws that have a bearing on resource mobilization and giving include Societies Act and Chiefs' Authority Act.

The existing CSO laws however do not comprehensively address the conduct of fundraising activities²⁰, including fundraising principles in Kenya²¹. To exemplify, there are very few references to fundraising in the PBO Act: Article 65. (1) allows PBOs to engage in economic lawful economic activities if the income is used solely to support the public benefit purposes for which the organization was established. Further, Article 65 (2) lists possible incomes for PBOs, which include among others, donations, bequests, gifts, and grants. Lastly, Article 66 (3) prohibits PBOs from engaging in fundraising to support or oppose any political party or candidate for appointive or elective public office.

Curiously, several months after the passing of the PBO Act, but before its commencement, a Statute Law Miscellaneous Amendment Bill 2013, was introduced in parliament seeking to limit how much funding PBOs can receive from foreign funding sources. Section 27 A (2) of the Miscellaneous Amendment Bill stated that: '*A PBO shall not receive more than 15% of its total funding from external donors*'. This would be in addition to prohibiting PBOs from receiving their funding directly from donors, rather having to channel these through a new PBO Federation. Further the amendments would have altered the composition of the PBO Regulatory Authority's governance body in favour of the executive and awarded the Authority discretionary powers²².

The proposal, if passed, would have led to the closure of many PBOs, since majority depend substantially, if not wholly, on foreign funding. This is because most PBOs in Kenya have not developed to the point where they can rely on local or own generated resources.²³

On its part, the Public Collections Act provides for regulation of collections of money and property from the public. Article 4 (2) of the Act states that a person intending to promote a collection shall give notice of such intent to the regulating officer at least three days before commencing such promotion. The notification and authorization requirements for fundraising activities per the act are simple, inexpensive, and not burdensome. The Act provides explicit and limited grounds for denial of permits that meet the ICCPR standard of justifiable grounds for rejecting a permit or license²⁴.

On the other hand, however, the Public Collections Act does not vary the requirements to enable these to be proportionate to say the CSO's size and scope of activities. Further, the Act requires CSOs to provide intrusive information such as planned use of the funds, bank accounts to which funds will be deposited, expected amounts to be collected, and a vague statement of such additional information as

²⁰ KCDF, 2017. Report on Policy and Context Analysis of Laws and Regulations that Support Local Giving in Kenya

²¹ <https://ecnl.org/sites/default/files/2020-08/Fundraising-Principles-Briefer.pdf>

²² <https://www.fidh.org/en/region/Africa/kenya/14469-kenya-parliament-decides-to-withdraw-controversial-amendments-targeting>

²³ Gitau Joseph J. Mwangi (2012) Charities and Kenya's tax system: A proposal for tax Law reforms, A thesis in partial fulfillment of the requirement of the degree of Master of Laws (LL.M) at School of Law, University of Nairobi October 2012, Nairobi

²⁴ 270 UN General Assembly. 'Report of the Special Rapporteur on the situation of human rights defenders', A/64/226, 4 August 2009, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N09/441/98/PDF/N0944198.pdf?OpenElement>, para 113.

may be necessary. These stipulations also contravene the UN Special Rapporteur's recommendation for laws that focus on notification rather than a prior authorization procedures as a basis for better protection of the freedom of association²⁵.

The responsibility for administration of the Public Collections Act is on the national government coordination administration (formerly provincial administration), hence not aligned with the new devolved structures. The requirements of the Public Collections Act are likely to be technical for grassroots actors thus discouraging local fundraising. The Act also criminalises collections outside the provisions of the Act and subject collectors and promoters directly to the authority of public administrators and police. Finally, the Public Collections Act excludes from its purview, religious purposes yet this forms a large component of Harambees in Kenya⁵⁶.

On its part, the Public Officers Ethics Act prohibits public officers from presiding over or playing a central role in fundraising activities, including being the guest of honour for the same (Article 15(1)0. It also prohibits public officers from using their offices to receive contributions for *Harambees* or influencing, inducing or in any manner exerting pressure on a person to contribute to *Harambee*.

Finally, the Chiefs Authority Act Chapter 128, Laws of Kenya subjects any collections of funds to the regulation of the Chief. The provisions are not clear on how the chief is to regulate the collection. These provisions have been abused by the chiefs and led to the undermining of the 'harambee' spirit at the local community level.

Oversight over Resource Mobilization Initiatives: The Public Collections Act, and the supporting Regulations provide an accountability structure and mechanism which, if applied strictly, would ensure that public funds are collected and used for legitimate purposes. These includes for regulations for use of badges (Article 5), records of collectors, fundraising costs, and accountability for fundraising proceeds (Article 6), as well as penalties for misapplication of proceeds of collection (Article 7).

The Public Collections Regulations in essence prohibit those engaging in fundraising from engaging in any misrepresentation in connection with the solicitation of funds. Further, fundraisers are required to divulge, in connection with its fundraising, the extent to which the funds are used to defray direct and indirect costs of fundraising, including remunerations to promoter(s), collector(s), and any other involved person(s). The law is however silent on the amounts or percentages of funds a CSO may expend on administrative or fundraising expenses, which is a positive thing since rigid rules on this would fail to respond to the great diversity among CSOs and fundraising options.

On its part, Sec 10 (3) of the NGO Coordination Act requires that every organization during registration shall declare its sources of funding and shall give an audited report every year. On the other hand, per the Companies Act, a company registered by guarantee is not expected to give its sources of funding but is also expected to file audited annual returns. Such filing enables keep each CSO in check, and monitor its sources of funding.

It is observable that no specific Kenyan law governs cross-border giving. However, laws that affect cross-border giving include the Income Tax Act, the Central Bank of Kenya Act, the Proceeds of Crime and

²⁵ https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf

Anti-Money Laundering Act and the Banking Act. In most of the cases, decisions on permitting cross border donations lie with regulatory authorities who process the donations. The process can therefore be described as unclear and arbitrary.

Furthermore, none of the laws make explicit reference to or promote possibilities to transfer various governmental assets or programs – say medical, educational, or research - out of the public sector to CSOs, where these could be run more efficiently by a PBO, or if they might be supported in whole or in part through private donations. There is equally no explicit reference to the possibilities for CSOs to openly and fairly bid, tender, or procure for substantial grants or purchases by contracts from a governmental body or agency.

Finally, there are specific provisions requiring public disclosure of actual amounts fundraised and how the same has been spent. However, for this to be effective, it may be essential first to have generally accepted standards for cost accounting, so that fair comparisons can be made between different CSOs. Kenya has not adopted accounting principles for NPOs and doing so should be a priority. The next step is to require public disclosure of such key numbers as percentage of revenues spent on overhead and fundraising and how resources have been used. This is an excellent area for self-regulation (see below sections for further details on self-regulation).

Self-Regulation: The point of all the reference CSO regulations on fundraising is of course to protect the public from fraud and misrepresentation. Overall, while both the NGO Coordination Act (see Articles 9 and 23) and the PBO Act (see Articles 21 (1), 21 (9), 23 (1), 24 (2) and 25), makes provisions for self-regulation, none of the provisions touch on fundraising. This is notwithstanding the fact that resource mobilization is a very fruitful area for self-regulation, to protect the image and standing of CSOs, protect the public, and enhance public confidence that (locally) mobilised resources will be well used²⁶.

Noted Areas of Attention and Recommendations

1. *Gaps in resource mobilization laws:* The government approach to supporting local philanthropy through regulation of local resource mobilization is fragmented, inadequate and not inclusive of all NPOs. In particular, the Public Collection Act does not adequately regulate the public collection of money and property from the public, while the Public Officers Ethics Act only acts to prohibit fundraising activities for public officers. These laws are also not aligned with the NGO Coordination Act of the PBO Act. These are besides absence of clear accountability and transparency frameworks for CSOs that receive money from the public due to low capacity by regulatory authorities to enforce the set laws and regulations.

Separately, it is notable that opportunities for use of digital technologies that provide innovative and cost-effective means to raise funds has increased tremendously over the past few years²⁷. These include say donations through Instagram or Facebook accounts, mobile phones, crowdfunding platforms, as well as use of artificial intelligence applications or algorithm-based systems. On the other hand, the digital revolution has also brought a range of new risks and challenges to fundamental rights. With this trend, questions about how to appropriately regulate

²⁶ One World Trust (Obrecht, A.). 'Effective Accountability? The drivers, benefits and mechanisms of CSO self-regulation', Briefing no. 130, July 2012, available at: <http://www.oneworldtrust.org/accountability.html>.

²⁷ <https://ecnl.org/sites/default/files/2020-08/Fundraising-Principles.pdf>

these new practices has increasingly become pertinent, yet the same are not yet appropriately covered by existing regulatory frameworks in Kenya.

There is thus an urgent need to review laws and or policies relating to local giving, fundraising or resource mobilization to ensure these are comprehensive, favourable, and able to create confidence in the public concerning integrity, transparency and accountability of CSO/As.

2. *Accountability gaps*: The extent to which CSOs engage and or inform the public on their operations and impact or and value add is pretty limited. At the moment, there appears to be greater attention to accountability to international or institutional donors, and much less accountability by CSOs towards local public/ communities, including informing them of their work and or value add. This is further exacerbated by inadequate self-regulation within the sector, and existence of a few CSOs with doubtful integrity that dent the image of the entire sector.

There thus a need to further build confidence and trust in the CSO sector towards the public as a way of encouraging local giving.

3. *Self-regulation*: International best practices require adoption of codes of conduct, codes of ethics, or some other set of standards and principles to guide CSOs' own behavior, practices, and accountability standards. Self-regulatory bodies may also participate in developing fundraising regulations that are more favorable to fundraisers and in line with the codes that have already been developed by the sector. Additionally, various forms of certification and accreditation programs can equally preempt calls for increased control of fundraising and boost support for easing the restrictions on fundraisers²⁸.

Currently, none of these elements are adequately covered existing policy, legal and institutional frameworks. There is thus a need for CSOs to invest in exploring, jointly with State parties, whether self-regulatory mechanisms can complement or replace existing requirements oversight mechanisms for fundraising, or whether to enhance existing laws such as the PBO Act.

²⁸ PricewaterhouseCoopers Advisory, (2014), Change the Game - Phase 1 Pilot in Kenya Analysis of Laws and Regulations

2.5 Taxation

Applicable Regulatory Frameworks on PBO Taxation: There exists very explicit laws on taxation, including for PBOs. These include who should pay tax, applicable tax categories, and who are exempted from various taxes. The subsections below highlight some of the tax provisions that affect PBOs.

Income Tax: Incomes of PBOs, like other entities are regulated primarily by the Income Tax Act, Chapter 470 of the Laws of Kenya [1989]. Article 15 (2) of the Income Tax Act exempts from tax cash donations to charitable organizations registered or exempt from registration under the Societies Act (Cap. 108) or the NGO Co-ordination Act, 1990 (Act No. 19 of 1990). Further, Section 13 of the Act provides that the income of a registered trust is exempt from income tax. Under Section 13 (2) the Minister of Finance is empowered to issue tax exempt status a class(es) of income(s) accrued in or derived from Kenya. Similarly, the Finance Minister has powers to grant tax exempt status to specific projects²⁹.

According to the PBO Act Second Schedule, Paragraph 1(a), PBOs are exempt from taxation of: (i) any donations, grants, or membership subscriptions; (ii) income from conduct of income-producing activities if the income is wholly used to support the public benefit purposes; (iii) interest and dividends on investments and gains earned on assets or the sale of assets; (iv) stamp duty; and (v) court fees. It is important to note that no PBO is exempted or given preferential treatment for payroll taxes.

Applications for income tax exemption are made to the Cabinet Secretary for finance through the Kenya Revenue Authority (KRA). If issued, tax exemption certificates are valid for a period of five years after which they have to be renewed. The Cabinet Secretary may however revoke an exemption based on any just cause (Income Tax Act First Schedule Para. 10 (23)). According to the Act, a renewal certificate is to be issued within 60 days of lodging the application, but in reality, this often takes much longer. These rules apply to trusts, NGOs, churches, and other PBOs involved in development activities.

If a PBO receives funds from a donor - be it a company, individual or development partner - the donor will be allowed by the KRA to claim the donations as an allowable expense only if the recipient PBO has an income tax exempt status³⁰ (Para. 10 of the First Schedule (Income Tax Act Sec 15(2)(w)). This also applies to projects approved by the Cabinet Secretary of Finance (Income Tax Act Sec 15(2)(w)).

Expenditures of a capital nature by a person on the construction of a public school, hospital, road, or any similar kind of social infrastructure can be deducted as well, with prior approval of the Cabinet Secretary (Income Tax Act Section 15(2)(x)). Furthermore, deductibility is permitted for expenditures on scientific research, including sums paid to approved scientific research institutes or universities, provided that certain conditions are satisfied (Income Tax Act Section 15(2)(n)).

An important question is whether a contributor to a PBO should get a tax credit or a tax deduction. A tax credit reduces the amount of tax owed, often unit-for-unit, whereas a deduction only reduces the amount of income that is subject to tax. Section 15(1) of the Income Tax Act provides for allowable deductions from taxable income, with Section 15(2) listing allowable deductions from business income and expenditures thereof. As a matter of tax policy, however, tax credits are preferable to tax deductions for individuals under a progressive income tax system.

²⁹ Checklist for NPO Laws, International Centre for Not-for-Profit Law - www.sdn.org/gy/csoc/report

³⁰ <https://www.cof.org/content/nonprofit-law-kenya#Laws#Laws>

PBOs in Kenya are allowed to engage in economic activities so long as those activities do not constitute their principal aim or activity. Such incomes must also be wholly used to support the public benefit causes for which the PBO was established (Income Tax Act First Schedule Cap. 470). These requirements ensure that assets derived by a PBO as a result of tax privileges or donations are not converted to private use. It also means that a PBO is generally not allowed to convert to for-profit status.

Generally, the Income Tax Act provides explicit conditions for application for exemption and justifiable grounds for rejection of any such requests. The Act also sets timelines by which applications for tax exemption and renewal of the same need to be undertaken. Further, State agencies are required to provide written statement of reasons for any refusal grant tax exemption status. There are also clear mechanisms to appeal an erroneous or arbitrary refusal to grant tax exemption. However, with these terms meet conditions for good laws, in practice, they are often not followed to the letter. As an example, the timelines are rarely adhered to.

Value Added Tax (VAT): The VAT Act No. 35 of 2013 (Revised 2018), exempts the supply of services rendered by educational, religious, welfare, and other philanthropic associations provided that this shall not apply where any such services are rendered by way of business. To qualify for VAT exemption, a PBO must be registered under the Societies Act or NGO Act, or be exempted from registration by the Registrar of Societies or the NGO Coordination Board. Furthermore, the PBO's incomes must be exempt from tax under the Income Tax Act (VAT Act First Schedule, Part 2, Para. 11(a) and 11(b)).

The above provisions of the VAT Act are complemented by Regulation 30 of the NGO Coordination Regulations 1992, which stipulates that any organizations requiring exemption from VAT applies for the same to the Cabinet Secretary of Finance through the NGO's Board. Similarly, the Second Schedule Para. (1)(b) of the PBO Act, provides for preferential treatment under VAT for goods or services that are used to further an organization's public benefit purposes.

The best situation for a CSO is to be included in the VAT system but to be zero-rated. This means that, though the NGO pays VAT on the goods and services it buys, it gets back as a rebate the input VAT paid plus the amount of any imputed VAT on goods and services it sells to others. Any policy advocacy towards VAT exemption for CSOs should thus push for this option. The more general approach is to give PBOs a favourable VAT rate, but not a zero rate.

Customs Duties: Customs duties are levied on imported goods. The application and management of customs duties is governed by the East African Customs Management Act. To obtain exemptions on import custom duties, CSOs must apply to the Cabinet Secretary for National Treasury through the NGO Board/PBO Authority. The PBO Act, Second Schedule Para. (1)(b) provides for preferential treatment under customs duties for goods or services that are used to further public benefit purposes.

Noted Areas of Attention and Recommendations

While all duly registered PBOs are exempt from Income Tax and or eligible for exemption from VAT and customs duties, a number of gaps are observable. These include:

1. *Access to tax incentives:* While there are significant tax incentives available to organizations registered as NGOs in Kenya under the NGO Act, they tend to be illusory in practice. This is because often tax authorities or officials do not adhere to set laws or make the procedures unnecessarily

burdensome. As a result of these situations, PBOs seeking exemption often end up spending disproportionate amounts of time to get goods cleared, including getting more senior officers or 'well-connected persons' to get the exemption benefits. There is thus also a need in this regard to ensure that PBOs get a certificate, license or document that ensure that a PBO's exemption from specific taxes will be honoured.

On the other end, most CSO/As are often not sufficiently knowledgeable of the available tax exemption incentives and or the processes of securing the same. A structured awareness raising or conscientization mechanisms for CSO/As on available tax incentives is thus imperative.

Additionally, there are a number of institutional forms of philanthropy actors that do not clearly fit within the legal definition of charitable organizations within the existing laws of Kenya. In the first place, existing tax benefits to support charitable and public benefit purposes through the Income Tax, Customs and Excise Duty and VAT laws exclude CBOs³¹. Similarly, under the VAT Act and the Customs and Excise Act, trusts and foundations do not qualify as charitable organizations and hence are not exempt organizations because even though they are exempt under the Income Tax Act, they are neither registered under the PBO/NGO Coordination Act and the Societies Act, nor exempted from registration under any of them.

This lack of uniformity in the definition of tax-exempt organizations may be construed as indicative of an absence of a wholesome view of CSOs and the evolving concepts of philanthropy in Kenya³². This calls for advocacy for clarity and inclusivity in the definition of exempt organizations³³.

2. *Administrative efficiencies:* Although PBOs/NGOs and religious bodies qualify for exemption provisions of the Income Tax Act, application for exemption is cumbersome, not contextualised to different CSO situations, including situation for grassroots CSOs/ CBOs. Further, the stipulations of Rule 29 of NGO Regulations of 1992 which requires PBOs/NGOs to apply for exemption to the Minister of Finance, through the NGO Coordination Board is cumbersome and bureaucratic. The same requirement applies for exemption from VAT. In this case, the NGO Board becomes an unnecessary 'clearing house' for applications for tax exemptions for CSOs.

Further, the duration taken to get a certificate of exemption is in practice often very long, running into years for most applicants. In addition, one cannot get a blanket tax exemption status but must file for exemption for the different taxes such as income tax, VAT, and Import Duty. There are also often no feedback mechanisms on progress of one's application or reasons for denial of the certificate to an applicant.

Separately, the Customs and Excise Act constrains philanthropy by not allowing exemptions where the gift is in kind. A person who makes a claim for a donation to be allowed under section 15(2) (w) of the Act is required to provide proof of the donation to the Commissioner. The proof of the donation required must be in form of a receipt issued and certified by the recipient of the donation. Ordinarily access the Commissioner is not feasible in most cases.

³¹ KCDF, 2017. Report on Policy and Context Analysis of Laws and Regulations that Support Local Giving in Kenya

³² Gitau Joseph J. Mwangi (2012) Charities and Kenya's tax system: A proposal for tax Law reforms, A thesis in

³³ Houghton C.N, *Philanthropy in East Africa: The Nature, Challenges and Potential*. A study by Allavida, 2004. p7

2.6 State Oversight and (Self) Regulation

Oversight Institutions: The NGO Coordination Act sections 7 (d) and 7 (g) mandates the NGO Board to advise the Government on the activities of NGOs and their role in development within Kenya. Further, the NGO Board is mandated to receive, discuss, and approve regular reports of the NGO Council and to advise on strategies for efficient planning and co-ordination of NGOs' activities in Kenya.

There also exist a National Council of NGOs established by Section 23 of the NGO coordination Act. The Council exists to promote self-regulation, offer capacity development, and provide a platform for CSOs to effectively engage the government and other key stakeholders.

The table below highlights details of key entities involved in oversight of CSO/As in Kenya, their major functions and contacts.

Table 1: Overview of Major Oversight Institutions in Kenya

Institution	What they do	Contacts
The NGO Coordination Board	<ul style="list-style-type: none"> Register, coordinate and facilitate the work of national and international NGOs operating in Kenya. Maintain a register of national and international NGOs operating in Kenya, with their precise sectors, affiliations and location of their activities. Receive, analyse and evaluate the annual reports of NGOs. Advise the State on the activities of NGOs and their contributions to national development in Kenya. Providing policy guidelines for NGOs to align their activities with national priorities and receiving. 	Co-op Bank House, 15th Floor, Haile Selassie Avenue P.O. Box 44617-00100, Nairobi, Kenya info@ngobureau.or.ke www.ngobureau.or.ke
The Council of NGOs	<ul style="list-style-type: none"> Provide overall leadership for the sector. Regulates the activities of NGOs with regards to funding, foreign affiliations, national security, training and institutional building. Champion accountability, probity, justice, transparency & good governance in the sector Enhance self-regulation and adherence to rule of law. 	The National Council of NGOs, P.O. Box 48278-00100, Nairobi, Kenya https://ngocouncilofkenya.org/
Ministry of Labour, Social Security & Services	<ul style="list-style-type: none"> Registration of CBOs & SHGs through the Department of Social Development Officer Development of policies 	NSSF Building P. O. Box 40326-00100, Nairobi, info@labour.go.ke www.labour.go.ke
The Ministry of Devolution and Planning	<ul style="list-style-type: none"> Offers grants to PBOs (e.g., Women Empowerment Fund, Uwezo fund) Formulates laws and standards for the PBO sector 	NSSF Building, Block A, P.O Box 30007-00100, Nairobi info@devolutionplanning.go.ke www.devolutionplanning.go.ke
KRA & The Ministry of Finance	<ul style="list-style-type: none"> Oversees taxation of CSOs (and all other individual and corporate citizens) Processing and issuing tax exemption 	https://kra.go.ke/ https://www.treasury.go.ke/

In addition to the above entities, the PBO Act Section 34. (1) foresees the establishment of the Public Benefit Organizations Regulatory Authority, whose functions will include registration and deregistration

of PBOs as well as maintained of a register of all PBOs registered under the Act (PBO Act 42. 1(a) and 42. 1(b)). The PBO regulatory authority will replace the NGO Coordination Board once the PBO Act is commenced.

Furthermore, Article 50 (1) of the PBO Act provides for the establishment of a Public Benefit Organizations Disputes Tribunal that will be responsible for amongst others, hearing and determining complaints arising out of any breach of the provisions of the PBO Act. The establishment of the Tribunal cures the risk of consolidating regulatory authority over PBOs in a single agency or commission, which often leads to abuse of power. The members of the PBO Tribunal are to be appointed by the Chief Justice and approved by the National Assembly.

*Self-regulation*³⁴: Self-regulation is essential to the existence of a well-ordered CSO sector. International best practices encourage establishment of 'watchdog' organizations to monitor and evaluate operations of CSOs. This also includes permitting and encouraging individual or groups of NPOs to set higher standards and or adopt explicit standards of conduct and performance through self-regulation³⁵.

One of the main objects of the PBO Act is to promote the development of self- regulation among PBOs (PBO Act Article 3 (c)). Part 3 of the PBO Act and Part IV of the NGO Coordination Act provides for establishment of self-regulation mechanisms. Specifically, Article 21 (1) of the PBO Act provides for established the National Federation of Public Benefits Organizations, which shall be the recognized self-regulation forum for registered PBOs. The indicated self-regulation mechanisms are also expected to develop codes of conduct for member CSOs.

Oversight over PBO Resources: Most of the laws governing PBOs including the PBO Act, Trustees Perpetual Succession Act, and the NGO Coordination Act require the CSOs' boards to control, supervise and administer the assets of the CSOs in such manner as best promotes the purpose for which they are established (article 43 of the PBO Act). The principle of non-distribution is the single most important feature distinguishing CSOs from for-profit entities. Article 59 (1) of the PBO Act and 30 (1) of the NGO Coordination Act specifically requires Boards to ensure that all proper books and records of accounts of the income, expenditure, assets, and liabilities are kept.

The NGO Coordination Act, PBO Act and the Trustees (Perpetual Succession) Act prohibit transfer of CSO assets, resources or earnings meant for public good into private hands, or be used to provide special personal benefits, directly or indirectly, for any person connected with the CSO. This requirement complies with international best practice which requires that NPOs that have received government funds, public donations or significant tax preferences must not have such resources revert to its founders, directors, or officers³⁶. In particular, Article 62 (1) of the PBO Act requires members of a PBO to furnish the PBO Authority with an inventory and whereabouts of its assets should its registration be cancelled.

³⁴ **self-regulation** means the exercise of autonomy, observance of stability and the practice of adaptability.

³⁵ World Bank. 1997. Handbook on Good Practices for Laws Relating to Non-Governmental Organizations. Prepared for the World Bank by the International Centre for Non-Profit Law.

³⁶ World Bank. 1997. Handbook on Good Practices for Laws Relating to Non-Governmental Organizations. Prepared for the World Bank by the International Centre for Non-Profit Law.

On the other hand, the NGO Coordination Act 17 (6) stipulates that an NGO whose registration is cancelled shall tender its assets or operations to other organizations with similar objectives within sixty days from the date of notification of such cancellation. Further, the NGO Coordination Act 17 (6), second schedule Article 4 prohibits the distribution of NGO funds and assets among members or officials except for legitimate reimbursement of expenses in carrying out the objects of the NGO. Similarly, the Trustees Perpetual Succession Act article 16 (2) stipulates that all Trust land held by a dissolved Trust be reverted to the County authorities, and non-trust land, to the national Government.

On its part, the Companies Act [2015] 15. (2) requires that should the company be liquidated, members will contribute to the assets of the company such amount as may be required for paying the debts and liabilities of the company, and the costs, charges, and expenses of liquidation.

The Societies Act does not however explicitly prohibit distribution of assets to members upon the society's dissolution (Section 34(1)). The requirement in this case is for a receiver to be appointed to handle the dissolution of a society (Societies Act Section 33(a)). The receiver is in this regard required to propose a scheme for distribution of any surplus assets. Such proposals must however be approved by the Cabinet Secretary. In this case, the priority in which debts are to be paid is the same as the priority of payment of debts for companies being dissolved, as provided under the Insolvency Act.

Amendments, Sanctions and Dissolution: Good laws should allow CSOs to amend their governing documents, activities or purposes, without having to entirely re-establish the organization. Similarly, NPOs should be permitted to terminate its activities and liquidate their assets upon the decision of its highest governing body. Most Kenyan CSO laws adhere to this best practice. As an example, the Societies Act, Chapter 108 of the Laws of Kenya [1998], Section 20 require a registered society to obtain consent of Registrar before amending name, constitution, etc.

Article 69 (1) of the PBO Act provides that the Cabinet Secretary may, on the recommendations of the PBO Authority, make regulations generally for the better carrying into effect of the provisions of this Act. Both the NGO Coordination Act and PBO Act provides for warnings before sanctions are imposed on NGOs for various types of violations. To illustrate, Article 69 (3) of the PBO Act provides that before being subjected to any sanctions, the affected person shall be notified and granted a reasonable opportunity to comply with the Regulations.

Further, as soon as the investigators have reason to believe that criminal conduct may be involved, they are required to notify those that are the target of the investigation that it has taken on criminal overtones, so that the target can take appropriate action to protect its interests. Additionally, any adverse decisions of the CSO regulatory authorities are subject to appeals, and do not become effective until the appeal is completed or the time for appeal has lapsed.

The PBO Act explicitly provides that regulations shall be proportionate to their objects, and as far as possible not limit the rights of concerned persons and bodies. Thus, while the PBO Authority has the power to cancel or suspend a certificate of registration, such actions are limited to specific instances such as a flagrant fraud, other abuse, or repeated failure to comply with certain rules. The PBO Act also requires the Authority to notify the organization within twenty-one (21) days if its certificate of registration is suspended or cancelled. While cancellation terminates all of the PBO's benefits, it does not terminate its obligations.

The Insolvency Act 2015 has repealed the provisions of Chapter 486, the Companies Act chapter on insolvency. The Insolvency Act amends and consolidates the laws relating to the insolvency of incorporated and unincorporated bodies which were previously provided for under Chapter 486. Under the Insolvency Act, companies limited by guarantee may be liquidated either voluntarily or by order of the High Court. At liquidation, the debts must be paid out in priority to all unsecured debts (Insolvency Act Second Schedule)

Noted Areas of Attention and Recommendations

1. *Capacity of oversight institutions:* A good institutional regulatory framework for CSO/As require that services be accessible in all parts of the Country. In this regard, Section 34 (3) of the PBO Act requires that the PBO Authority establishes mechanisms for ensuring that its services are available in all parts of the Republic. At the moment, both the NGO Board and NGO Council have regional presence. The NGO Board for instance has regional offices in Kisumu, Mombasa, Eldoret, and Garissa, while the NGO Council has executive committee members that represent various parts of Kenya along the former provincial administrative regions.

On the same breadth, international best practice requires that agencies responsible for CSO/As oversight be adequately staffed with competent professionals. In this regard, section 46 (1) of the PBO Act requires that the PBO Board appoints a Deputy Director, and such officers and other staff as are necessary for the proper discharge of the functions of the Authority under this Act. Article 8 (a) and 8 (b) of the NGO Coordination Act contain similar provisions requiring the NGO board to establish subsidiary organs and to appoint officers as may be necessary for the performance of its functions.

In reality however, the staffing for both the NGO Board and NGO Council tends to be very thin compared to the large number of CSO/As that they need to serve. Similarly, the agencies are not usually structured, staffed and capacitated to adequately investigate complaints or monitor compliance with the laws. It is thus important that the existing CSO oversight bodies are supported by a meaningful enforcement program. The above institutional status demonstrates the need for future investment in the capacities of institutions charged with oversight of CSOs.

To facilitate the interests of both the government and the public, there should be, where possible, a single national register of CSO/As. This would be irrespective of whether certain classes of CSOs are established in one or many locations. Thus, and in addition to any local registries, there should be a single, national registry of all established CSOs that is accessible to the public – preferably online and physical. For their own protection, citizens need to be able to check whether a purported CSO that seeks their support is established or not. However, as of the time of this report, the register of NGOs or any other CSOs were not available online.

2. *Amendments to governing documents:* As alluded earlier, the PBO Act and other CSO laws are largely silent on the possibility for individuals to create a CSO by testamentary act (e.g., through a will). There are thus by extension no explicit procedures for amending the governing documents of CSOs if the organization cannot do so by its own independent action especially where a CSO was created by a will or other testamentary document. This implies that any amendment of the laws to

allow for creation of CSOs by testamentary act should be accompanied by provisions for amendment of governing documents, other than by the founding members or directors.

3. *Gaps in oversight mechanisms:* The CSOs law largely grant licensing agencies the right to audit and inspect the CSOs for compliance with applicable licensing or regulatory requirements. As an example, section 42 (1) (h) of the PBO Act provides that the Authority may institute inquiries to establish whether the activities of PBOs comply with the Act. However, in most cases, these stipulations do not explicitly prohibit the authorities from examining other aspects of the CSO/A that are unrelated to compliance. As an example, there should be explicit protections in place to prevent the supervising agency from using the pretext of an audit of a CSO to extract information about one or more individuals. Such revisions should also onboard provisions to ensure that CSOs are not subjected to frequent and/or burdensome audits or intrusive office inspections by State or regulatory authorities.

2.7 Reporting, Accountability and Transparency

Governance and Oversight: The PBO Act stresses organizational integrity and encourages PBOs to maintain high standards of governance and management. The PBO Act provides in this regard that the governing body of the PBO must be voluntary and be distinct or separate from the administrative and day-to-day management PBO. The governing body is tasked with establishing clear and unambiguous guidelines relating to the operations of the organization. The common practice amongst CSOs is that the highest governing body of a CSO – often the assembly of members or the board of directors - is required to receive and approve annual reports on the finances and operations of the CSO. This is in line with the provisions of the NGO Coordination Act and the PBO Act.

Annual Returns: Best regulatory frameworks require that any established NPO that has activities that significantly affect the public interest should be required to file reasonably detailed reports annually on its finances and operations with the agency responsible for general supervision of NGOs. A review of the various CSO laws demonstrate that the latter largely meet this criteria. In particular, the Government is mandated through various line ministries, and State agencies to regulate the activities of the CSO through audit reports. This requirement seeks to give CSOs the opportunity to exercise their mandate and achieve set goals without constant supervision and interference.

Specifically, the NGO Board is mandated to prescribe rules and procedures for the audit of the accounts of NGOs (NGO Coordination Act 24(4)). Article 24 (1) and 24 (2) requires that all registered NGOs furnish to the NGO Board with its annual reports on or before the 31st of May of every year. Failure to submit these reports as stipulated attracts a fine of Kshs 25,000. Per the fifth schedule, Article 7 (1) of the PBO Act, the obligations to submit returns will automatically be transferred to the PBO authority upon commencement of the PBO Act.

On its part, the Companies Act Section 709 (1) requires directors of a company to ensure that the company's annual financial statements are audited unless the company is exempt from audit under section 711 or 714 of the Act. Section 705 (3) (b) of the Companies Act further stipulates those annual returns should be lodged with the Registrar within 28 days after the date to which it is made up.

Furthermore, Section 30 (1) of the Societies Act, require that every registered society annually furnishes to the Registrar of Societies, on or before the prescribed date, complete returns, accounts and other documents as prescribed by the Act. Failure to make returns under the Societies Act attracts a fine not exceeding Kenya shillings 10,000 or imprisonment for one year or both such fine and imprisonment.

For CSOs registered as a Company limited by guarantee, the CSO should file monthly nil returns and then have an audited report every year filed at the Registrar of companies.

Noted Areas of Attention and Recommendations

1. *Ease of CSO administration of CSO reporting requirements:* Both the PBO Act and NGO Coordination Act have relatively elaborate and clear requirements and procedures for making annual returns. The NGO Coordination Act especially has prescribed form that are to be used for making annual returns. It is notable however that the reporting requirements are standardized and do not for instance allow small NGOs to file comparatively simpler reports. Separately, there are no attempts to synchronise reporting requirements across various oversight institutions. As an example, at the moment, separate reports are filled with tax authorities as is with the NGO Coordination Board, Registrar of Companies and any other oversight authorities.

In addition, it is observable that the standard forms for returns to the NGO board ask for detailed information about funding sources. This contravenes best practices that make appropriate provision to protect the legitimate privacy interests of donors and recipients of benefits, as well as the protection of any other confidential information.

2.8 Engagement in Policy and Advocacy

The CSO sector offers a strategically important middle ground between market and state and complement government development agenda. CSOs are also key participants in framing and debating issues of public policy. In this regard, CSOs can play an important role in advancing free expression by giving individuals vehicles to collectively voice their opinions and participate in public policy debates³⁷. However, the CSO/As watchdog function has often placed the Kenyan civil society at odds with government, leading to mistrust and suspicion. However, going by the principle that the most effective formula for CSO law reform occurs when government and work together, it is imperative that CSOs build mutual trust and jointly seek solutions to existing issues within CSO legislation.

The main laws governing CSO in Kenya largely provide for the right of CSOs to engage freely in research, education, and advocacy on issues of public debate, even where the positions they take are not in accord with stated government policy. These freedoms are guaranteed in the CoK 2010.

Article 66 (1) of the PBO Act allows PBOs to engage freely in research, education, publication and advocacy with activities respect to any issue affecting the public interest, including criticism of the policies or activities of the state or any officer or organ thereof. Further, Article 66 (2) provides for PBOs to express their views on any issue or policy that is or may be debated or discussed in the course of a political campaign or election. Furthermore, the PBO Act provides for the government shall engage with

³⁷ Global Trends in NGO Law: Bared from the Debate – Restrictions on NGO public Policy Activities.

PBOs on all matters of development and shall invite them to participate in policy making (Article 66 (4)), besides engaging them in policy decision making on issues affecting them (Article 67).

On the same breadth, Section 7 (f) of the NGO Coordination Act provides one of the functions of the NGO Board as providing policy guidelines to NGOs to enable harmonization of their activities to the national development agenda for Kenya. This is in recognition of the fact that absence of critical voices weakens the resulting policies, and by extension, effective governance. Governments, along with CSOs and the public, stand to gain by removing barriers to CSO participation in public policy development.

Noted Areas of Attention and Recommendations

1. Generally, CSO laws are not vaguely worded to restrict CSOs from expressing opinions or exchanging information about important public issues say, politics, human rights, and legal reforms. There is equally, formally, no restrictions placed on advocacy CSOs by regulatory agencies, including on access to internet, media and communications.

On the other hand, however, Kenya has proposed, enacted and implemented certain laws that restrict freedoms of assembly or expression³⁸. These include Security Amendment Act 2014, Prevention of Terrorist Act Amendment Bill 2018, Public Order Amendment Bill 2019, and Data Protection Bill 2018³⁹. There has also been imposition of administrative restrictions on human rights CSOs, such as threats of de-registration, disproportionate penalties and restrictions on work permits for expatriates that increasingly constrained civic space.

The Internet has tremendous potential for fostering democratic participation, giving voice to the voiceless⁴⁰. The power of the internet to facilitate expression by civil society is on the rise, however, internet censorship and surveillance are growing global phenomena⁴¹.

There is also an increasing tendency of the state to respond to critical voices with harassment, threats, criminal charges, surveillance, and violence against journalists or activists⁴². The net effect of these actions is an increasingly constructed civic space.

2. *Quality of CSO advocacy*: It is notable that there is no effective coordination amongst CSOs when it comes to collective advocacy towards regulatory reforms. Often, there are many small networks of CSOs focusing on very specific, but different thematic issues. The net effect of such disintegration is reduced voice, agency, and bargaining power. Finally, there is very limited awareness by many CSOs on applicable incentives, and how to go through the motions to benefit from such provisions.

³⁸ <https://katibainstitute.org/the-state-of-human-rights-and-freedoms-in-kenya/>

³⁹ Henry O Maina, "An Audit of the Constitution of Kenya: Friend or Foe – The Government of Kenya and Freedom of Expression

⁴⁰ Global Internet Liberty Campaign, *Regardless of Frontiers: Protecting the Human Right to Freedom of Expression on the Global Internet*, p. 6, (September 1998) available at http://www.cdt.org/gilc/Regardless_of_Frontiers.pdf

⁴¹ See Open Net Initiative at <http://opennet.net/>

⁴² <https://www.hrw.org/report/2017/05/30/not-worth-risk/threats-free-expression-ahead-kenyas-2017-elections>

3.0 CONCLUSIONS AND RECOMMENDATIONS

3.1 Overall Conclusions

The following general conclusions may be drawn from the analysis of existing documentation and conversations with various key informants.

1. The Kenyan regulatory frameworks on registration of CSOs are well documented, and contain clear laws, rules, regulations, and forms that explain the establishment process. To a large extent, the CSO laws comply with most provisions of international law and international standards of good practice for registration of CSOs. The registration of CSOs is however still unharmonized since the existing framework has various forms regulated under different laws. Further, the laws do not sufficiently cover registration and operation of Foundations. There is also a need to review the requirement for CBOs to register either annually or biennially and provide for creation of CSOs using testamentary acts.
2. The laws governing resource mobilization are fragmented and do not adequately cover key elements of fundraising such as applications for licenses, public collection of money and property, accountability, and oversight. As an example, the PBO Act does not adequately regulate the from the public. Further, no specific CSO regulatory framework governs cross-border giving. On the other hand, CSOs' accountability and reporting to the general public is much less compared to that towards international or institutional donors. This situation works against public trust and confidence towards CSOs. This is further exacerbated by inadequate self-regulation within the sector, and existence of a few CSOs with doubtful integrity that dent the image of the entire sector.
3. The current framework of CSO tax incentives do not apply favourably to all legal CSO formations. Furthermore, the administration of tax exemptions is often bureaucratic, cumbersome, opaque, and not implemented in strict adherence to stipulated regulations. In addition, granting of tax exemptions is often at the discretion of tax authorities/ officials. There are cases of flagrant flouting of set regulations paving way for corrupt practices. These challenges, together with limited awareness by many CSOs on the tax incentive provisions and processes, means that many CSOs currently do not benefit from the existing tax incentives.
4. The Kenyan CSO regulatory frameworks are, compared to other developing countries, are relatively well developed and reasonably supportive. The main challenge is about operationalization of these frameworks. A good example is the PBO Act that was accented into law in 2013, but is yet to be commenced, largely due to limited political goodwill and to mistrust between the government and CSOs. The delayed operationalization of the PBO act is also testament of non-adherence to rule of law by certain state officials, exemplified by flouting of court orders that sought to compel the state to operationalise the Act. It is thus important that the civil society collectively, and with one voice, maintain the momentum of advocacy towards commencement of the PBO Act.

Points three and four above point to the fact that having good CSO/A laws is a necessary but not a sufficient condition for the existence of a strong, independent, accountable, and transparent civil society sector. What is additionally necessary, is that laws are adequately understood by all parties and be accompanied by vigorous and fair enforcement.

5. The law provides for several oversight institutions for CSOs in Kenya. There are also good legal provisions for the conduct of CSO oversight institutions and the CSOs themselves, that meet international best practices and standards. There is however a challenge with capacity of most enforcement agencies and non-adherence to set oversight requirements by some CSOs. CSO self-regulation mechanisms are also underdeveloped. It is thus imperative that CSO oversight provisions are supported by meaningful enforcement programs, and structured investments in capacity strengthening of these oversight institutions.
6. The Kenyan CSO/A laws largely provide for the right to engage freely in advocacy on issues and public debate, even where the positions may not align with government positions. On the other hand, however, there exists ineffective coordination amongst CSOs when it comes to collective advocacy, say towards regulatory reforms. The net effect of such disintegration is reduced voice, agency, and bargaining power.

3.2 Major Recommendations

A number of recommendations have been provided within the body of this report, directly addressing the noted points of attention under each sub section of the report. This section therefore only presents the overall or general recommendations; these should be read together with the recommendations under each subsection of the report. The recommendations include:

1. Granted that the current laws on fundraising are fragmented, inadequate and not inclusive of all NPOs, there is thus an urgent need to review these laws to ensure these are comprehensive, favourable, and able to create confidence in the public concerning integrity, transparency and accountability of CSO/As. This should be complemented by strengthen CSO self-regulation mechanisms, including adoption of codes of conduct, ethical principles, standards, regulations and certification or accreditation programs for (local) resource mobilization.
2. The non-operationalization of the PBO Act 2013, continued to deny the civil society sector the numerous benefits that the act is likely to bring about, including curing some of the shortfalls of the NGO Coordination Act of 1990. It is thus imperative that Kenyan civil society collectively, and with one voice, continue the push for commencement of the PBO Act, as well for consistent vigilance towards safeguarding the same.

Further, considering that then policy covering the civil society sector - sessional paper 1 of 2006 – is very old, and largely uses and NGO lens, it is imperative that the policy framework be reviewed and updated. This will amongst others enable recognize all NPOs/ PBOs other than just NGOs, irrespective of the legal frameworks under which they are registered. This also makes it easier for various stakeholders to engage with regulators under their respective legal frameworks, since ordinarily policy precedes the laws.

3. The various laws governing registration and operation of CSOs seem to disadvantage CBOs, foundations and trusts in various ways. As an example, CBOs have to renew their registrations annually and do not qualify for tax incentives available to others CSOs, while foundations often have to operate under multiple laws to navigate loopholes in existing CSO laws. There are currently multiple efforts to review the Foundations Law, besides introduction of a Community Groups Registration Bill 2021 at the Senate. It is important that these processes are harmonised and pushed to their conclusion. The Trust law is also seen in this regard as a possible path of least resistance, compared to experiences in getting the PBO Act commenced.
4. In order to ensure that CSOs benefit from existing tax laws, it is necessary that the tax exemption incentives are reviewed to ensure inclusive definition of tax-exempt organizations; and to establish simpler, open and transparent processes for administration of tax exemption applications. There should also be accountability mechanisms for tax authorities/ officials regarding adherence to set laws or procedures. These efforts should be complemented by structured education of CSO/As on available tax incentives and how to make use of the same.
5. The existing limited capacities of formal oversight institutions and self-regulation formations for CSOs in Kenya significantly limits their capacity to effectively regulate the sector. There is thus a need for further strengthen the service delivery capacity of the existing oversight bodies and support established legal oversight provisions with meaningful enforcement programs. This could include amongst others ensuring an accessible single national registry of CSOs and removal of intrusive and or burdensome, and multiple reporting requirements or audit practices.

4.0 ANNEXES

4.1 Annex 1: List of Referenced Materials

1. The Constitution of Kenya [2010]
2. The Non-Governmental Organizations Coordination Act [1990]
3. The Non-Governmental Organizations Coordination Regulations [1992]
4. The Non-Governmental Organizations Council Code of Conduct [1995]
5. The Public Benefit Organizations Act [2013] (not officially commenced)
6. The Companies Act [2015]
7. The Societies Act, Chapter 108 of the Laws of Kenya [1998]
8. The Trustees (Perpetual Succession) Act, Chapter 164 of the Laws of Kenya [1981]
9. The Trustee Act, Chapter 167 of the Laws of Kenya [1929]
10. The Value Added Tax Act (Act No. 35 of 2013)
11. The Income Tax Act, Chapter 470 of the Laws of Kenya [1989]
12. Excise Duty Act (Act No. 23 of 2015)
13. The Employment Act, Chapter 226 of the Laws of Kenya [2007]
14. The Political Parties Act, Chapter 7B of the Laws of Kenya [2011]
15. The GfC programme document (proposal)
16. Country Multi-Annual Plan Giving for Change Alliance
17. GfC Theory of Change
18. Giving for Change Multi-Annual Plan 2021-2025
19. Giving for Change Year Plan 2021
20. Recommendations for the modernizing of Registration, Regulation and Governance of Trusts and Foundations in Kenya Introduction
21. APN strategic plan document
22. Principles for Statutory Regulation and Self-Regulation of Fundraising (WINGS)
23. Assessing the Legal Environment for Civil Society Organizations (ICNL)
24. The African Charter on Human and People's Rights
25. The Universal Declaration of Human Rights
26. The International Covenant for Civil and Political Rights
27. The International Covenant on Economic Social and Cultural Rights
28. The Convention on the Elimination of all Forms of Discrimination Against Women
29. International Budget Partnership - A Guide to Tax Work for NGOs
30. Annual Report PBO Act 2013-14
31. Civic Engagement Alliance – State of Civic Engagement in Kenya
32. KCDF Report of Status Civic Engagement Report
33. Global Trends in NGO Law: Barred from The Debate: Restrictions on NGO Public Policy Activities
34. Assessment of NGO Legislation in Belarus
35. EAAG - Guidelines for effective philanthropy
36. Landscape of Support to Corporate Philanthropy -EAAG
37. Review of Tax Policy for Philanthropy in East Africa
38. KCDF Pamoja For Change Policy and Context Analysis Report
39. KCDF - How Community Philanthropy Shifts Power
40. State & nature of Philanthropy in EA - EAAG
41. ICNL Principles for Statutory Regulation and Self-Regulation of Fundraising

4.2 Annex 2: List of Consulted Persons

#	Name	Organization	Position
1	Cynthia Onyango	Agha Khan Foundation East Africa	Regional Technical Advisor, Civil Society
2	Tom Were	Act Change Transform (Act!)	Executive Director
3	Melvin Chibole	Techsoup	Regional Director
4	Faith Kisinga		Independent Consultant
5	Ceaser Ngule	KCDF/ KPN	Program Director
6	Purity Murungu	KCDF/ APN	Head of Partnership & Resource Development
7	Suba Churchill	CSRG	Executive Director

3.3 Appendix 1: Framework for Analysis of CSA Regulatory Instruments

4.4 Appendix 2: Filled WINGS/ ICNL Assessment Forms

4.5 Appendix 3: Terms of Reference