

# QUEST FOR ENABLING ENVIRONMENT FOR PUBLIC BENEFIT ORGANIZATIONS IN KENYA

AN ACCOUNT OF THE LONG, TORTUOUS AND YET TO BE  
ACCOMPLISHED STRUGGLE BY CIVIL SOCIETY  
ORGANIZATIONS IN KENYA TO ESTABLISH AND REALIZE  
FOR CITIZENS AND THE PUBLIC BENEFIT ORGANIZATIONS  
SECTOR AN ENABLING POLICY, LEGAL AND REGULATORY  
FRAMEWORK UNDER THE AUSPICES OF THE CIVIL  
SOCIETY REFERENCE GROUP (CSRG)

THE  
UNFINISHED  
BUSINESS OF  
PUTTING THE  
PUBLIC BENEFIT  
ORGANIZATIONS  
ACT, 2013 INTO  
OPERATION

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## Introduction

In 1990 the government of Kenya enacted the Non-Governmental Organizations Coordination Act. Popularly known as the NGO Coordination Act, the regulatory framework became the central reference point for registration of local and international not-for-profit organizations operating in the country. However, the development and enactment of this law was not informed by policy as best practice would demand.

In February 2006, the Parliament of Kenya adopted a Sessional Paper on Non-Governmental Organizations. This was the first ever government policy on the not-for-profit organizations. *Sessional Paper No. 1 on Non-Governmental Organizations* was the culmination of a consultative policy formulation process that started in December 2001. In its development, the NGOs Coordination Board involved stakeholders, culminating in the adoption of a comprehensive regulatory framework that would reflect the Government's plan towards enhanced, efficient and quality service delivery in the public benefit organizations sector. In the Commonwealth legislative parlance, Sessional Papers are policy documents directly relevant to impending legislation presented to Parliament for their consideration and approval.

It is within this context that a year after coming into power of the National Rainbow Coalition Government in 2002, the process of developing and adopting Sessional Paper No.1 of 2006 that had begun under the Kenya African National Union (Kanu) resumed with unprecedented momentum. This policy was finally adopted by Parliament and the Cabinet in February 2006 as the first ever government policy on the sector, setting up the stage and the pace for the review of the outmoded Non-Governmental Organizations Coordination Act.

The rationale for the development of the Sessional Paper derived from the recognition of the phenomenal growth and development of the civil society in Kenya. From a sector that started as a small system of volunteers, CSOs have grown and expanded considerably over the years. Today, CSOs are to be found in every conceivable sector of the economy and every corner of the country, targeting the poorest of the poor. The promise of a rejuvenated legal, regulatory and institutional framework as envisaged in the Sessional Paper inspired a wave of optimism that the anticipated regulatory framework would provide the much-needed conducive environment for the formation, operations and growth of public benefit organizations in Kenya. For once, there was Government recognition that besides it being the primary provider of basic services, the CSOs have emerged and are greatly complementing its efforts in governance and development processes.

This is not unique to Kenya. Non-governmental Organisations are increasingly being recognized by governments across the world as potent forces for social and economic development, important partners in national development, and valuable agents in promoting the qualitative and quantitative development of the gross domestic product (GDP) of many an economy. The Sessional Paper thus recognized that the success of socio-economic and democratic governance transformation strategies pursued by the government at present and in the future is to a large extent, dependent on the performance of civil societies as a sector and as an accelerator.

The policy framework contained in this Sessional Paper is the government's first step towards developing conducive legal administrative guidelines to govern the NGOs for optimal operations.

The policy envisaged a framework for the regulation and facilitation of activities of public benefit organizations in a manner that is efficient, effective and transparent and which recognizes the dynamism of the sector and the need to constantly ensure relevance. It also provides a basis for a participatory monitoring of the sector and generation of adequate and quality data on the contribution of the sector to national and local development and on how best the sector can be further supported to ensure the best possible impact.

Review of the Non-Governmental Organizations Coordination Act [1990] was the main directive principle of Sessional Paper No. 1 of 2006, culminating in the adoption by Parliament of the Public Benefit Organizations Bill in 2012 and its subsequent assent by former President H.E. Emilio Mwai Kibaki on January 14, 2013 into the Public Benefit Organizations Act, 2013.

## **Background and Context**

Kenya has a rich tradition of philanthropy and volunteerism deeply rooted in the communal relationships of many an African society. The establishment of colonial authorities in the 19<sup>th</sup> century through Christian missionaries that served as the forerunners of imperialism in Kenya saw the emergence of educational and social welfare clubs to serve the interests of British colonial settlers.

Resistance to this bourgeois middleclass lifestyle previously alien to indigenous Kenyan communities saw the birth of social and political organizations to fight off and combat colonial occupation and racial subjugation. Needless to state that the history of the civil society in Kenya goes back to the 1920s when Africans started forming welfare associations. They used these associations to advocate for their rights and express their dissatisfaction with the colonial government rule and treatment<sup>1</sup>.

Such welfare associations included:

- The Kavirondo Taxpayers Welfare Association,
- The East African Association, Taita Hills Association, and
- The Ukambani Members Association.

These welfare associations also had a political dimension. They advocated for the plight of their ethnic community members. Some made efforts to be trans-tribal. The East African Association belongs in this category. African political movements date back to the years immediately following the First World War and provide in this, a marked contrast with both Tanganyika and Uganda where European settlers played no similar part<sup>2</sup> Upon attainment of independence, there emerged networks of self-help or Harambee (pooling together) promoted by the first post-independence government.

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<sup>1</sup>Githinji: <https://www.afrocave.com/the-role-of-civil-society-in-kenya/>

<sup>2</sup> Prof. George Bennet: Pre-Independence Kenya: <https://www.jstor.org/stable/41230726>

In 1990, the government of Kenya enacted the NGOs Coordination Act (hereinafter referred to as the NGO Coordination Act) as the central reference point for registration of all NGOs (both local and international) operating in Kenya.

Prior to this, various formations of NGOs in Kenya were registered in different legal regimes. These included host-country agreements with the Ministry of Foreign Affairs for international NGOs (INGOs) and Inter-Governmental Organizations (IGOs); operational arrangements with the national Government through the Department of Social Services for Community-Based Organizations (CBOs) and self-help groups; the Office of the Attorney General and Department of Justice for those seeking registration as Societies and Companies Limited by Guarantee, or Trusts under the Ministry of Land.

In the Sessional Paper of 2006, the Government of Kenya explicitly recognized that NGOs are potent forces for social and economic development, important partners in national development, and valuable agents in promoting the qualitative and quantitative development of the Gross Domestic Product (GDP).

The Sessional Paper came more than fifteen years after the enactment of the NGOs Coordination Act that had been in force without a policy paper. It is, however, an important policy document that sets the legal basis for the needed review of the Act.

The Sessional Paper provided an opportunity to expand the definition as provided in the Act and achieve the objective of bringing together as many CSOs as would be possible under a single definition and a consistent, more effective, transparent and accountable regulatory regime.

It is against this backdrop that the Civil Society Reference Group (CSRG), the umbrella organization that brings together community-based, national and international organizations, as well as social movements and other formal and informal citizens' organizations was formed in 2009 primarily to harness the civil society sector, the State and its relevant agencies and other stakeholders with a view to establishing and attaining the realization of enabling policies, laws and institutional frameworks that secure and guarantee citizens ability to fully exercise their fundamental freedoms of association, assembly, expression and to the right to organize and participate in the management of public affairs.

## **Weaknesses of the Existing Regulatory Frameworks for not-for-profits in Kenya**

### **1. Existing regulatory frameworks lack in independent regulators**

For as long as they have been in operation, existing regulatory frameworks for public benefit organizations and other civil society formations in Kenya lack the independence, impartiality and objectivity that they need to deliver on their respective mandates. Most of those appointed to serve as chairpersons of the Board of Directors, Board members and Chief Executive Officers at the NGO Coordination Board, for example, have been political appointees, mostly politicians who have failed to get re-elected who end up taking instructions from the appointing authority.

The President who is also the Head of State and government is the appointing authority and seems to give direction on every decision that the regulatory authorities make on the day-to-day running of the agencies.

Both the Registrar of Companies, and the Registrar of Societies under which not-for-profit companies and welfare associations, including religious organizations are registered and regulated respectively are domiciled in the Office of the Attorney General. By virtue of being the principal legal adviser to the government and representing the national government in court or in any other legal proceedings to which the national government is a party (Article 156 (4) (a) and (b)), these two functions of the (OAG) seem to have overshadowed the main function of the OAG “to promote, protect and uphold the rule of law and defend the public interest”, (Article 156 (6)).

This remains one of the most debilitating and incapacitating challenge with existing regulatory frameworks for CSOs in Kenya.

## **2. There is absence of internal complaints and dispute resolution mechanisms**

Existing regulatory frameworks lack internal dispute resolution and complaints mechanisms, especially concerns that are bound to arise and have they always arisen, between the regulator and registered CSOs. There are also bound to be disputes and complaints between membership-based CSOs and their stakeholders, including members. As such, most disputes that arise either between the regulators and the CSOs, or among different stakeholders within a particular CSO end up in courts of law that are also saddled with other matters to adjudicate, leading to delayed resolution of disputes.

## **3. Lack of framework for Partnership and Collaboration between the State and CSOs**

Most of the existing CSO regulatory frameworks lack general frameworks for principled partnerships and collaboration between the governments at national and county levels on the one hand and civil society organizations operating at the two levels on the other hand.

## **4. Gaps in addressing Leadership and Integrity Concerns**

Existing not-for-profit laws, including the NGO Coordination Act do not adequately address leadership and integrity issues as provided for in Chapter Six of the Constitution.

## **5. Multiple and Overlapping Regulatory Frameworks**

Due to the multiple registration frameworks available for registration, CSOs in Kenya operate in diverse forms and structures, posing a challenge to consistent regulation. While the multiplicity of regulatory regimes is a good thing, enabling as many and diverse civil society formations to conduct their business with considerable operational convenience, a framework with more attractive incentives could easily and voluntarily bring most if not all of them under one roof, making government and self-regulation easier and attainable.

## 6. Factionalism in the National Council of Non-Governmental Organizations

Factional leadership in the National Council of Non-Governmental Organizations (NGO Council) has led to a situation whereby self-regulation as contemplated in the NGO Coordination Act [1990] and its Regulations of 1992 have all but collapsed, with more than 4 factions claiming leadership of the Council.

The National Council of NGOs is charged with the promotion of best practices in the internal governance of NGOs through self-regulation but is in dire need of self-regulation itself.

As at the time of compiling this report, one faction that seemed to have outdone the other 3 in appeasing the State and the regulator, had been allowed by the Ministry of Interior and Coordination of National Government, to operate as State moles from the 15<sup>th</sup> floor of Nyayo House.

That one faction of the NGO Council has lent itself to such roles of serving as snitches for the State illustrates the extent to which self-regulation has failed, shamelessly running its affairs from such a station in exchange for daily handouts even as they actively undermine the push for the realization of enabling environment for a sector it is supposed to be an integral part of.

Nyayo House is the Nairobi regional headquarters of the Ministry of Interior and Coordination of National Government, making it difficult to comprehend how a voluntary body for NGOs would unashamedly chose it as the focal point for coordinating its activities.

Nyayo House is also infamous for its basement cells that were (mis)used as holding and torture chambers in which human rights defenders and 'second liberation' icons were rounded up and subjected to torture and other cruel and degrading human treatment during Kanu's one-party rule in the late 1980s and early 1990s.

But in order to ward off competition from other factions, this faction of the NGO Council has blatantly chosen to operate from Nyayo House as a show of its loyalty to the government while primarily serving as a holding ground for undercover snitches for the Ministry, filing reports on national government departments based at the headquarters, like the Department of Immigration and the numerous Nairobi City County public administration offices based there. It is a well-known anti-rights group that is also known to file reports on the plans and activities of legitimate civil society organizations in exchange for subsistence wages.

The explanation for this regretful state of affairs in the NGO Council is found in the NGO Coordination Act and its 1992 regulations. Unlike in other jurisdictions, e.g. in Malawi where the quorum of the Council of Non-Governmental Organizations (CONGOMA) is fixed at a percentage of fully paid-up members, the quorum of the NGO Council in Kenya has remained stuck at 25 members despite the number of NGOs growing to more than 11,000 by 2021.

This is largely to blame for the many factions of the Council that continue to crop up daily as anyone with the capacity to convene and buy a cup of tea for 25 members can declare oneself Chairperson.

These factors among others, alongside the fact that some of these regulatory frameworks have claw back provisions that negate the values that underlie an open and democratic society based on human rights and dignity, equality, equity and fundamental freedoms, render existing NGO regulatory frameworks incompatible with the 2010 Constitution of Kenya, and the tenets for democratic governance espoused within it.

The need to address these concerns, and to develop a regulatory framework that enables the full realization of the rights and fundamental freedoms of expression, association and assembly as envisaged in Articles 33, 36 and 37 of the Constitution became the compelling impetus for the development of the Public Benefit Organizations Act.

### **Reforming the Non-Governmental Organizations Coordination Act of 1990**

In 1990 the government of Kenya enacted the NGOs Coordination Act. The intention was to create a central regulatory framework for the registration of all local and international NGOs operating in Kenya<sup>3</sup>.

The process of review of the Non-Governmental Organizations Act began in earnest in 2009, pursuant to the directive principles of Sessional Paper No. 1 of 2006. A number of civil society sector experts and veterans who had been part of the Non-Governmental Organizations Coordination Act development processes picked up the gauntlet, providing the much-needed experience that had enabled them to navigate and surmount the challenges that came their way as they went about the onerous task at the zenith of the monolithic one-party Kenyan State.

At the peak of the one-party era, the environment had been fraught with mistrust and mutual suspicion between the retrogressive Kanu regime, and a buoyant and reformist and crusading CSO sector. The ruling party had expelled a number of political stalwarts, and the notorious party disciplinarians and sticklers of intolerance had every reason to fear that any opening no matter how small could provide space for the formation of non-governmental organizations by the disenchanted former party members to organize, and pose a threat to the dictatorship.

### **The Public Benefit Organizations Act, 2013**

The Public Benefit Organisations Bill, 2012, was signed into law by former President Mwai Kibaki on 13th January 2013, just three months before handing over the reins of power to the Jubilee administration in the month of April of the same year.

The objects of the Public Benefit Organizations Act are:

- i. To support the setting up, running and growth of Public Benefit Organisations (PBOs);
- ii. To providing a conducive environment for the growth and operation of PBOs;
- iii. To provide an opportunity for PBOs to effectively self-regulate,
- iv. To set up an independent regulator

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<sup>3</sup> Rahma Adan Jillo, Legal Officer with the NGOs Coordination Board, <https://www.icnl.org/resources/research/ijnl/ngo-law-in-kenya#>

- v. To provide for specific requirements for the transparent and speedy registration of PBOs;
- vi. To provide a framework for partnership between the government and public benefit organisations.
- vii. To promote a re-birth of values within the sector through advancing integrity, good leadership and accountability from PBOs, their forums and the Regulatory Authority, in line with Chapter 6 of the Constitution.

The law seeks to ensure a delicate balance between enablement and regulation. In so enabling PBOs, the law provides space for them to use their comparative strengths:

- i. To mobilize citizens for public participation;
- ii. To promote innovation and flexibility in service provision;
- iii. To advocate against societal ills, without undue interference by the government.

In regulation, it provides the necessary oversight to protect the public interest in the PBOs, promote their increased accountability and protecting the PBOs from potential abuse by rogue directors.<sup>4</sup>

The Act was preceded by Sessional Paper No. 1 of 2006, which sought to provide a framework for the regulation and facilitation of Non-Governmental Organisations (NGOs) operations in Kenya.

In recognizing the significant role and contribution of NGOs as partners in the development process, the Sessional Paper states that it is in the interest of the government to create a conducive and enabling environment to ensure that NGOs potentials and capacities are fully utilized (page 25).

The Policy Paper proposed that a comprehensive review of the NGO Coordination Act be carried out and that a new legislation based on the policy, should be promulgated.

The Public Benefit Organizations (PBO) Act came about as a result of the review of the Non-Governmental Organizations Coordination Act and will render the NGO Coordination Act repealed once it comes into operation.

### **The Public Benefit Organizations Act and the Protection of Civic Space**

According to the Universal Declaration of Human Rights, all people, everywhere in the world, have the right to speak out, to organize, and to take action.

The normative descriptions of the right to speak out, to organize and to take action have been universally framed as the freedom of association, assembly and expression.

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<sup>4</sup>Henry Ochido, Head of operations, compliance and research, NGOs Co-ordination Board “New NGO Act balances enablement and regulation” Saturday, Apr. 6, 2013, Daily Nation, <https://www.nation.co.ke/oped/opinion/New-NGO-Act-balances-enablement-and-regulation/440808-1741134-6eh0i4/index.html>

These rights – the freedoms of association, assembly and expression - give us the freedom to form and join groups, peacefully protest, and advocate for the things we want – and to counter the things we don't.

These freedoms collectively constitute 'civic space' and are an essential part of a vibrant democracy; where debates and discussions thrive, and where people are able to contribute to important decisions that affect them.

Civic Space is thus the enabling and facilitative conditions that allow civil society and individuals to organize, participate and communicate freely and without discrimination, and in so doing, influence the political and social structures around them.

Civic Space also refers to the opportunities citizens have to enjoy their rights and play their duties by participating in the management of public affairs.

In order for citizens to be able to participate effectively in the governance and public decision-making processes, their freedoms of association, assembly, expression and the right to organize become critical ingredients of civic space.

The core civic space rights – the rights to freedom of association, freedom of peaceful assembly and freedom of expression – are guaranteed by law, in most national constitutions including in the Constitution of Kenya, 2010.

These rights and freedoms are also guaranteed in international and regional human rights instruments and as part of States ratification of these conventions is part of their obligations under international law.

In terms of its elaborate mechanisms for the protection and promotion of the rights of citizens and non-citizen actors to exercise their rights and fundamental freedoms of association, assembly and expression, the Public Benefit Organizations Act reinforces the enjoyment of these rights that are also guaranteed in the Bill of Rights of the Constitution of Kenya, 2010, providing the much-needed layer of protection and realization of the same.

### **Development, Enactment and Assent of the Public Benefit Organizations Bill, 2012**

The process leading to the passing of the PBO Act was highly consultative and involved stakeholders from relevant government agencies and NGOs involved in public benefit work.

The process also benefited from consultations with, and borrowed good practice from various renowned PBO regulators such the Charity Commission of England and Wales and the Office of the Scottish Charity Regulator.<sup>5</sup>

From late 2009 to June 2012 there were two parallel processes after a falling out between the NGO Coordination Board and the NGO Council on the one hand, and CSOs under the auspices of the Civil Society Reference Group on the other hand

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<sup>5</sup> Id

The CSO-driven process wanted a broader democratic ownership and went about consulting stakeholders in regional meetings.

The NGOs Coordination Board and its allies in the NGO Council process was mainly preoccupied with the fate of the board and staff members and went developing clauses to secure their future in the event of transition to the new law.

In June 2012, a Joint Working Group bringing together the CSRG-allied actors and the NGO Coordination Board was established to harmonize the two parallel process

From June 2012, the CSRG, then operating as a loosely structured group formed to mobilize participation of civil society organisations (CSOs) in the law review process worked jointly with the NGOs Coordination Board to reach a common understanding on the type of legal framework that would have the best possible effect of ensuring good governance by CSOs on the one hand, while protecting legitimate civil society activity on the other.

The collaboration resulted in joint proposals by the CSOs and Regulator to the Public Benefit Organizations Bill.

In August 2012, there was a Stakeholders Retreat hosted by the Parliamentary Committee on Labour and Social Welfare at the Naro Moru River Lodge at which the joint proposals were tabled before the Parliamentary Committee.

In September 2012, further amendments were submitted on the Draft Bill, incorporating the concerns on transition that had become the main preoccupation of the NGO Coordination Board and the National Council of NGOs.

But even as proponents of the Bill raced against time to finalize the Bill, there was one hurdle to overcome: Who would be the sponsor and mover of the Bill once it was ready for tabling in Parliament?

The 2007 elections had polarized the country, dividing it into two almost equal halves, with one half leaning towards President Kibaki's Party of National Unity. Kibaki had been controversially declared the winner of the 2007 presidential elections with a minority of members in Parliament, while the other half was controlled by the Orange Democratic Movement Party. There were also other fringe parties with politically insignificant representation in the Assembly, like Hon. Stephen Kalonzo Musyoka's Orange Democratic Movement – Kenya that has since been renamed Wiper Democratic Party, with Kalonzo serving as the Vice President after becoming third in the 2007 presidential elections. ODM's Raila Odinga's had narrowly 'lost' to Kibaki with a margin of barely 200 votes in one of the most hotly contested presidential elections in Kenya's multi-party history.

The political divide, worsened by the post-election violence that ensued following the disputed 2007 presidential elections was palpable. It did not help matters that the country was gearing up for another general elections, this time under the new Constitution promulgated in 2010 after its adoption in a plebiscite.

It is this poisoned political atmosphere that proponents of the Public Benefit Organizations Bill, 2012 pinned their hopes of getting the proposed law tabled, debated and adopted.

For years, Sophia Abdi Noor had served as the founding Executive Director of Womankind, a flourishing and forceful women's and human rights organization operating from Garissa County of North Eastern Kenya to promote the rights of women and marginalized communities generally. But after the 2007 elections, the human rights activist was nominated by the Orange Democratic Movement (ODM) Party as a Member of Parliament.

Knowing that politicians can shoot down good ideas largely on account of the messenger, proponents of the Public Benefit Organizations Bill had to be careful on who would table the Bill lest it is shot down on flimsy political grounds. After weeks of soul-searching and assessment of the potential repercussions that a number of possible movers of the Bill would bring, civil society proponents and champions of the Bill in parliament settled on Hon. Sophia Abdi Noor to be the sponsor of the Bill.

Even though she had been nominated by ODM, a party that had reluctantly agreed to form a coalition government with Kibaki PNU following intervention of the international community that hammered a political deal between the two protagonists, Hon. Sophia Abdi Noor had increasingly become a middle-of-the-roader, not too keen to support ODM's scathing attacks on Kibaki's government that had become acerbic especially in the period leading to the 2013 elections.

This, combined with her previous role in Womankind, and the fact of coming from the ethnic Somali minority and a marginalized community that had over the years suffered historical injustices, became her biggest strength as the sponsor of the Public Benefit Organizations Bill, 2012.

The strategy worked. The Bill received enormous support from ODM and PNU-allied MPs. Even the fringe political parties in the Assembly supported it overwhelmingly. There was no way ODM would have opposed a Bill proposed by one of its own members. After all, the party was gearing up for the 2013 elections and had to put its best foot forward to succeed President Kibaki who was set to retire constitutionally.

There is no denying the fact that the civil society sector had achieved a lot under President Kibaki. It is during his first term that the government concluded the process of formulating and adopting Sessional Paper No. 1 of 2006, setting the stage for the review of the Non-Governmental Organizations Coordination Act.

It is also during President Kibaki's second term that the country concluded the constitution making process, setting the stage for the adoption and promulgation of the a constitution with one of the most progressive and revolutionary Bills of Rights.

In a radical departure from the former constitution that took away with the left hand rights and freedoms that it appeared to guarantee with the right hand, the 2010 Constitution of Kenya is not cast in vague, ambiguous and evasive terms requiring much interpretation.

It is against the backdrop of this constitutional and political context that the unicameral Parliament as the national legislature operated under the former constitution passed and adopted the Public Benefit Organizations Bill in November 2012, paving the way for its assent into law by the President.

On January 14, 2013, the Public Benefit Organizations Act was among the Bills that former President Mwai Kibaki signed into law. It was published in the Kenya Gazette in March 2013 ahead of the year's general elections that were held in the same month.

### **Onset Clause that set the stage for filibustering delays in commencement of the PBO Act**

Even though the 2010 Constitution of Kenya had been promulgated at the time the Public Benefit Organizations Bill was adopted, providing for the establishment of the National Assembly and the Senate, election of members of the two deliberative assemblies had to wait until after the March 2013 elections.

The single-chamber Parliament therefore acted in accordance with the transitional provisions of the Constitution and Standing Orders of Parliament in adopting the Public Benefit Organizations Bill, 2012.

Former President Mwai Kibaki had also acted within his powers as conferred under the 2010 Constitution to give his presidential assent to the Bill on January 14, 2013.

Article 115 of the 2010 Constitution provides that "within fourteen days after receipt of a Bill, the President shall:

- a) Assent to the Bill; or
- b) Refer the Bill back to Parliament for reconsideration by Parliament, noting any reservations that the President has concerning the Bill

President Kibaki did not have nor expressed any such reservations and must have been properly advised before assenting to the Public Benefit Organizations Bill, 2012.

Article 116 of the Constitution provides for the manner in which a Bill passed by Parliament and assented to by the President comes into force thus: "A Bill passed by Parliament and assented to by the President shall be published in the Gazette as an Act of Parliament within seven days after assent. The Public Benefit Organizations Act was published in the Gazette on the 18<sup>th</sup> of March 2013 after its assent by the President. Article 116 (2) of the Constitution states that subject to clause (3), an Act of Parliament comes into force on the fourteenth day after its publication in the Gazette, unless the Act stipulates a different date on or time at which it will come into force.

While the PBO Act was signed into law in January 2013, and published in the Gazette in accordance with the Constitution, the Executive has taken undue advantage of the clause requiring the Cabinet Secretary for Devolution and Planning to appoint a commencement date to inordinately delay its operationalization.

## Attempts by the Executive to amend the PBO Act before commencement

On 13th November 2013, *the Statute Law (Miscellaneous Amendments) Bill, 2013* was tabled in the National Assembly. The Bill sought to introduce several amendments to the PBO Act that would have significant impact on civil society in Kenya, through among other things, restricting the amount and sources of income available to PBOs; and limiting the Independence of the PBO Regulatory Authority. Some of the proposed amendments included the following:

- Section 27A (1) required that any funding of a public benefit organization shall be made through the National PBO Federation and not by an individual member organization;
- Section 27A (2) prohibited PBOs from receiving more than 15% of their total budgets from external donors.
- S. 45(1) and S. 45(6) provided respectively that *the Director General of the PBO Authority shall be appointed and removed by the Cabinet Secretary* and not by the PBO Regulatory Authority Board;
- Section 35(1) (b) aimed to reduce the number of Independent Board members who have rendered distinguished service in the civil society, appointed by the Cabinet Secretary from three to two.

The *Statutes Law Miscellaneous Amendment Bill of 2013*, was rejected by Parliament in December 2013. Lawmakers from both political divides challenged the Bill saying it contained many provisions that violated the Constitution. They also questioned the manner in which the controversial amendments, most of which sought to substantially change the PBO Act, were presented, since Statute Law Miscellaneous (Amendments) Bills are intended to be used as a vehicle to introduce nominal changes that do not alter the substance of a law. In contravention of the Constitution, the amendments were drawn up without consultation of the sector. As a result, Majority Leader Aden Duale withdrew the proposals on the PBO Act from the Miscellaneous Amendments Bill.

Between 2014 and 2015, there were three additional attempts to introduce constraining amendments to the PBO Act through various bills in Parliament. *The Statute Law (Miscellaneous Amendments) Bill 2014*, which was published on 30th May 2014, sought to confer sweeping discretionary powers on the PBO Regulatory Authority and to dilute the independence of the Regulator through altering the composition of the PBO Authority's board in favour of the Executive, while reducing the representation of independent members and civil society organisations. The proposals to amend the PBO Act were withdrawn from the Statutes Law Miscellaneous Amendment Bill, 2014, when the Bill came up for debate in Parliament.

Again, in December 2014, another attempt to change the PBO Act was made through the *Security Laws (Miscellaneous Amendment) Bill 2014*. The Bill, which sought to amend several laws, including the PBO Act, proposed to confer sweeping discretionary powers on the PBO Authority,

including powers to classify PBOs in a *prescribed* manner. The Bill was passed by Parliament. The amendments are contained in the **Revised Version of the PBO Act of 2014**.

The fourth Bill, the PBO Act (Amendment) Bill 2015, lapsed due to time. It was tabled by the Executive, and contained proposals in line with recommendations from a report by a Task Force on the review of the PBO Act, which was set up by the Ministry of Devolution. The proposals aimed to amend the PBO Act through:

- i. compulsorily re-registering and regulating all agencies doing public benefits work under one regulatory regime;
- ii. Requiring PBOs to publish their annual audited financial accounts in newspapers of national circulation;
- iii. Compelling PBOs to submit their audited accounts to the Auditor General;
- iv. Capping the amount of funding NGOs can receive from external donors at 15% of their budget;
- v. Labelling PBOs that receive more than 15% from external donors as a "foreign public benefit organizations".
- vi. Giving state officers the task of appointing Board members of the PBO Regulatory Authority;
- vii. Reducing the number of persons from the National Federation of PBOs who would sit on the PBO Regulatory Board;
- viii. Removing the provisions in the PBO Act, which require the Government to provide tax incentives, benefits and other support to PBOs; and those that compel state organs to ensure that their policies and other transactions support a favourable environment for PBOs.

In May 2016, CSOs met with the Cabinet Secretary, Ministry of Devolution and Planning, for discussions on the operationalization of the PBO Act.

The Ministry sought views on proposals to amend certain provisions of the PBO Act 2013, as part of the steps it wanted to take towards operationalization of the law.

On 9 September 2016, the Cabinet Secretary for the Ministry of Devolution announced that the Public Benefit Organisations (PBOs) Act 2013 had become operational.

However, the Office of the office of the Attorney General failed to submit the notice of commencement for gazettelement.

On Oct 28, 2016 through a presidential directive, the coordination of the NGO sector was moved from the Ministry of Devolution and Planning to the Ministry of Interior and National Coordination.

In 2017, the Ministry of Interior drafted the PBO Amendment Bill 2017, which contained a raft of proposed amendments for the PBO Act.

The Ministry set up a committee to make recommendations on the proposed amendments in the draft Bill. The Ministerial Committee submitted its recommendations to the Cabinet Secretary.

On 28 August and October 19th, 2018 the NGO Coordination Board convened a meeting between CSO representatives and members of the Board to discuss the commencement of the PBO Act.

During the meeting, the board shared the Ministry of Interior's latest proposed amendments to the PBO Act and stated the Ministry's objective to amend the Act before commencement.

The CSO representatives gave their feedback on the proposed amendments and reiterated the sector's position, that is, that the PBO Act should be commenced before any amendments are introduced.

The proposed amendments, seek to do the following, amongst other things:

- Amend 6A (1) to be Section 7 to provide for mandatory registration of all civil society organisations that do public benefit work under the PBO Act, as well as sanctions for non-registration.
- Amend Section 29 by adding new sub-sections which provide for disclosure on sources of funds and mandate donors to report to the Regulatory Authority.
- Amend Section 31 by reducing the period of submitting annual report from 6 to 3 months and adding a new sub-section that requires PBOs to get approval for opening a bank account from the PBO Regulatory Authority.
- Amend Section 33 by providing for personal liability of PBO directors in some limited cases.
- Amend Section 63 by introducing provisions that give the Regulatory Authority a lot of discretionary power with respect to inspection of premises of a PBO.
- Amend Section 66 by adding new sub-sections on freezing of PBO bank accounts amongst other things.
- Amend Section 69 by deleting sub-section (4) on the obligation of the Ministry to conduct public consultations when developing regulations.
- Amend the 5th Schedule in para 9 by stating that members of the NGO Council will serve in the board of the Authority for 2 months once PBO Act is operationalized.

### **Efforts by the Civil Society to urge the Executive to commence the PBO Act**

- ix. On 21st November 2013, CSOs submitted 13,032 signed petitions against the Statutes Law Miscellaneous Amendment Bill of 2013 to the Clerk of the National Assembly. The petition was received by Hon. Gladys Wanga representing Homa County, on behalf of the Clerk of

the National Assembly. Hon. John Mbadi, Hon. Keynan Adan and Hon. Gladys Wanga made speeches, acknowledging the impact of Civil Society in Kenya and supported rejection of the proposed amendments.

- x. On 21st November 2013, CSOs met with the Cabinet Secretary, Ministry of Planning and Devolution, Hon. Anne Waiguru. The CSOs stated their rejection of the proposed amendments to the PBO Act, through the miscellaneous amendment bill, on grounds that the process of its development was not participatory or transparent, and that the proposals breached provisions enshrined in the Constitution.
- xi. On 3<sup>rd</sup> December 2013, CSOs met with members of the National Assembly Justice and Legal Affairs Committee and appealed to them to reject proposals to amend the PBO Act. They also met with officials from the office of the Solicitor General, to seek support for rejection of the proposed amendments to the PBO Act.
- xii. In January 2014, members of the CSO Reference Group met with the Attorney General in an effort to garner support from his office in pressing for the commencement of the PBO Act and to advise against proposed amendments to the PBO Act;
- xiii. On March 12, 2014, Civil Society Organisations presented a public petition to the Cabinet Secretary Ministry of Devolution and Planning, urging her to commence the PBO Act 2013.
- xiv. In May 2014, CSOs met with members of the National Assembly's Justice and Legal Affairs Committee and appealed to them to reject proposals to amend the PBO Act, which went against enabling the sector.

The Committee members reassured the CSOs that they were unlikely to support the 15% cap on funding for PBOs and stated that they would propose amendments to make the Regulatory Authority an independent regulatory body answerable to the National Assembly.

- xv. In June 2015, Civil Society Organisations filed a constitutional Petition (No. 351 of 2015) seeking orders to compel the Cabinet Secretary for Devolution and Planning to commence the PBO Act, 2013. On October 31<sup>st</sup>, 2016, through Honorable Justice J.L. Onguto, the court ruled that by failing to appoint a date for the coming into operation of the PBO Act, the Cabinet Secretary for the Ministry of Devolution and Planning, contravened the Constitution and acted contrary to the wishes of Parliament. He gave the Cabinet Secretary 14 days to appoint and publicize a date for the coming into operation of the PBO Act. The judge also declared that the decision by the Ministry to appoint a Taskforce to amend and or propose amendments to the PBO Act, before it became operational, was illegal and contravened Articles 10, 94, 116(2), 129 and 153(4) of the Constitution,.
- xvi. In March 2016, Civil Society Organisations, with the support of the MP for Ndhiwa Constituency, Hon. Agostinho Neto, tabled a bill in Parliament – the PBO (Amendment) Bill, 2016 – seeking to commence the PBO Act. The Bill sought to amend the clause in the PBO Act that gives the Cabinet Secretary of the Ministry of Devolution and National

Development, the discretion to decide when the PBO Act 2013 shall commence. The Bill went through the first reading on April 27, 2016 and through the second reading on August 11, 2016.

- xvii. In June, 2016 the clerk of the National Assembly called upon the public to submit memoranda on the Bill, in line with public participation requirements. However, Parliament was annulled before the Bill made it to the third reading or last stage in the legislative process.
- xviii. In December 2016, CSOs filed contempt of court proceedings against the Cabinet Secretary, Ministry of Devolution and Planning, the Ministry of Interior and National Coordination and the Attorney General, for failing to obey court orders to commence the PBO Act.
- xix. On 12<sup>th</sup> May 2017, Justice Mativo found the CS, Ministry of Interior to be in contempt of court and directed him to obey court orders and operationalize the PBO Act. To date the orders have not been complied with.
- xx. In February, 2017, civil society leaders held the 2<sup>nd</sup> PBO Leaders' Summit. The Summit sought to facilitate policy dialogue between the sector and the new parent Ministry of the Interior and Coordination of National Governmental and discuss collective strategies towards the transformation of the sector. The Ministry did not participate in the meeting.
- xxi. On 7, July, 2017, the Civil Society Reference Group convened the 3rd PBO Leaders' Summit. During the meeting six candidates/representatives for office of the President candidates signed pledges assuring CSOs that they would work towards protecting the civic space before, during and after the elections. Specifically, they pledged to commence or support the commencement of the PBO Act following the elections.
- xxii. On 11, October 2018, the Civil Society Reference Group petitioned the National Assembly Committee on Implementation raising concerns over the inordinate delay in commencing the Public Benefit Organizations Act.
- xxiii. On 8, November 2018, the National Assembly Committee on Implementation accorded the CSRG delegation a hearing, and pledged to support the civil society in its efforts to unlock the impasse on the operationalization of the PBO Act. The Committee asked the CSRG delegation to supply it with additional information it needed on efforts that the sector had made to get the Executive to act and operationalize the PBO Act.
- xxiv. On 23, November 2018, the CSRG communicated with the Implementation Committee, filing with the Office of Clerk of the National Assembly, additional information and a policy brief on actions it could take to get the relevant government Ministry to put the PBO Act into operation.
- xxv. In 2019, the Civil Society Reference Group sent a follow-up letter to the Committee on Implementation after it went mute. The civil society was concerned that after showing so

much enthusiasm, the Committee did not appear interested in getting back to the sector on any progress it had made on the matter. The Committee never communicated to the CSRG thereafter.

xxvi. The CSRG asks to the Committee on Implementation were:

- i. That the Select Committee of the National Assembly on Implementation;
  - ii. That the Select Committee finds that the Executive has failed to implement the PBO Act within the minimum and reasonable time necessary as per the Standing Order 209 (2);
  - iii. That the Select Committee do summon the Cabinet Secretary for Interior and Coordination of National to show cause for the lack of implementation of the PBO Act 2013; and .
  - iv. That in line with its powers under Standing Order 209 (3) move ahead to sanction the Cabinet Secretary on the same.
- On August 20, 2019, the Civil Society Reference Group petitioned the former Prime Minister and African Union High Representative for Infrastructure Development in Africa, the Right Hon. Raila Odinga to intercede and appeal to his colleague in 'The Handshake' H.E. President Uhuru Kenyatta.
  - Earlier in June, 2019, the former Prime Minister had indicated during at the People Dialogue Conference organized by the Centre for Multi-Party Democracy (CMD-Kenya), that even though he was not in the government, he had access to the President and could support the civil society to push for the commencement of the PBO Act.

In addition to these efforts by Civil Society and the Judiciary, a wide variety of stakeholders including the Development Partners, and international actors have urged the Executive to commence the PBO Act. During the Universal Periodic Review of the country in 2015, the United Nations Human Rights Council made a global call for Kenya to commence the PBO Act.

During the **Development Partnership Forum** held on 14<sup>th</sup> November 2018, the Principal Secretary (PS) for the National Treasury recommended that the PBO Act should be commenced as it provided a framework for collaboration between the Government and civil society organisations. The meeting sought to address development cooperation and coordination challenges being faced by development partners that may impact on the realization of the Big4 Agenda.

### **Concerns with Amendments to the PBO Act, and ultra vires actions**

#### **The PBO Act, 2013, Revised Edition 2014**

In line with proposals contained in the Security Laws (Miscellaneous Amendment) Bill 2014, the PBO Act was amended by inserting the following revised sections:

- (4A) *A public benefit organization registered under subsection (1) shall be classified by the Authority in the prescribed manner.*
- (4B) *The Authority upon consultation with the Cabinet Secretary, may from time to time review the classification of public benefit organizations.*
- (4C) *The Cabinet Secretary shall, upon consultation with the Authority, make regulations to provide for the manner, conduct and criteria for classification of public benefit organizations.*

These new provisions introduce a level of uncertainty in the law. There are no standards provided for determining what the “prescribed manner” entails. The language in this subsection is very broad, and could be employed to curtail or target individual organisations.

In addition to the amendments above, **the last schedule in the PBO Act has been irregularly deleted** (that is, outside any legal process). This action reflects desperate efforts to frustrate and interfere with the law making process.

### **Short-term Costs of Delayed Commencement of the PBO Act to the Sector and Country**

The continued refusal or failure by the Executive to commence the PBO Act has resulted in grave confusion in the sector, with the Regulator selectively applying provisions from both the repealed NGO Coordination Act and the PBO Act simultaneously. This has bred uncertainty amongst public benefit organisations, donors, and other stakeholders with many people opting not to register new public benefit organisations, at the expense of the public good.

The Executive has continued to attempt to re-introduce amendments rejected by the National Assembly in 2013 and 2014. By throwing out the proposed amendments in the Statute Law (Miscellaneous Amendments) Bill 2013 and the Statute Law (Miscellaneous Amendments) Bill 2014, Parliament sent a resounding message that it had rejected the same. These actions have come at great cost to the taxpayer, the legislators and the CSO sector. The legislative process is time-consuming and the Executive has gone to great lengths to keep tabling and discussing amendments to the PBO Act. Similarly, CSOs have spent an inordinate amount of time and resources pushing back against ill-conceived amendments and urging the Executive to commence the law.

To hold the entire law in abeyance, on account of the misadvised view that the Act has to be substantially amended before commencement, has hindered the realization of the noble purposes the law seeks to bring about such as:

- The chance to recalibrate the State-civil society relationship. The delay in commencing the PBO Act together with attempts to amend it before its commencement has resulted in acrimony and confrontation between the Sector and the Government. Mutual trust and collaboration has been steadily eroded.

- Opportunities for transformation, growth and collaboration between the Government and the sector;
- Effective self-regulation in the PBO sector;
- Effective coordination and organization of PBOs;
- Enhanced efforts to increase transparency and accountability of the sector;
- Multi-sectoral leverage for the desired quantum leap in the quality of life for Kenyans;
- Decreased reliance on donors and Official Development Assistance (ODA) because structured incentives for growth of domestic funding and support for the efforts of civil society organisations as envisaged in the Act are available.

### **Long-term Impact of the Delayed Commencement of the Public Benefit Organizations Act**

The fact that this law has not been commenced more than six years after it passed, is bound to breed cynicism in the general public, apathy and disregard for the rule of law and encourage the deliberate efforts by the Executive to undermine the law, the spirit of, and public purposes for which it was formulated.

This will set in place a chain reaction whose consequences would be grave and affect not only the PBO Act but other laws and sectors as well. It may also lead to the public perception that Parliament's role in passing laws is subservient to upholding the Executive's interests and dilute their confidence in Kenya's legal system.

### **Latest Efforts being made to get the Public Benefit Organizations Act Put into Force**

- There have been persistent advocacy initiatives under the auspices of the Civil Society Reference Group (CSRG) to get the law commenced – weekly pressers, continuous publication of opinion articles in newspapers, etc.;
- Continued advocacy through sensitization and awareness raising on the Public Benefit Organizations Act and the need to operationalize it among stakeholders;
- Development of a popular version and documentation of the process;
- Sharing success stories around the Public Benefit Organizations Act within the East Africa region and civil society actors;
- Engagements with the African Parliamentarians Network Against Corruption (APNAC) and the Civil Society Parliamentary Engagement Network (CSPEN);
- An online petition to put pressure on the government to operationalize the law;
- A petition is being developed to be presented to the Pan-African Parliament on the continued government delay or refusal to commence the Public Benefit Organizations Act.