

THE PUBLIC BENEFIT ORGANISATIONS ACT, 2013 A GUIDE



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Acronyms

CSO	Civil Society Organisation
INGO	International non-governmental organisation
NGO	Non-Governmental Organisation
PBO	Public Benefit Organisation



INTRODUCTION

On 13th January 2013, Kenya's President signed a new law into existence: the Public Benefit Organisations (PBO) Act, 2013. This law aims to support the setting up, running and growth of Public Benefit Organisations (PBOs).

Defining Civil Society Organizations

Generally, there are two main types of Civil Society Organisations (CSOs) recognized in Kenya. First, organizations that work for the benefit of the public or to promote the common interest of their members. These are referred to in this document as Public Benefit Organisations. They are currently registered as Non-Governmental Organisations (NGOs), Trusts and Companies Limited by Guarantee. The second type of CSOs are set up for the personal gain or profit of their members. They include self-help groups, youth and women's groups and community based organizations. Though NGOs are just a small part of the larger civil society sector, they are the most visible.

Why a New Law?

There are two key factors that drove the making of the PBO Act. First, Kenyans voted for a new Constitution. Second, the law that supported the registration and running of organisations that exist for the benefit of the public, that is the NGO Coordination Act, was inadequate.

A New Constitution

When the Constitution of Kenya was passed in 2010, it was necessary to review the provisions of a number of existing laws, in order to ensure that they were in line with the principles in the Constitution. Though discussions regarding the need to revise the NGO Coordination Act were already underway, the revision received a boost from the new Constitution.

The revised law therefore provides a legal base for giving effect to some principles in the Constitution of Kenya including the Freedoms of Expression, Association, and of Assembly. The Act also requires good leadership and integrity from PBOs, in line with Chapter 6 of the Constitution. In addition, it provides a foundation for public participation by PBOs in decision making at every level of government.

An Inadequate NGO Coordination Act

The second factor regards the flaws in the NGO Coordination Act. The PBO Act seeks to replace the NGOs Coordination Act, 1990. While there are several other laws that allow a variety of civil society organisations to exist¹, the NGOs Coordination Act was meant to serve as the main law for registration and regulation of organisations that are involved in work for the benefit of the public. However, the NGO Coordination Act was unable to do so satisfactorily. The existence of several laws for registering and regulating public benefit organisations made it difficult for the Government to come up with coordinated plans for the organisations and to ensure that they were being run responsibly.

In addition, the structures and provisions of the NGO Coordination Act failed to successfully oversee and support the growth and development of the organisations. This was particularly the case after the rapid growth of NGOs in the period between 1997 and 2013. NGOs grew from 836 entities in 1997 to a significant 4,500 in 2006. Today, there are more than 8,800 registered NGOs in Kenya.

¹ The laws include the Companies Act (for registering Companies Limited by Guarantee), the Societies Act (for Societies), and the Trustee Perpetual Succession Act (for Trusts).



The systems and processes for self regulation in the NGO Coordination Act have proved to be inadequate. Further, since 2007, persistent leadership wrangles in the umbrella organization for NGOs (the National NGOs Council) led to loss of focus, declining standards and professionalism in the sector. As a result, NGOs lost confidence in the ability of the NGOs Council to enforce self-regulation.

The NGO Coordination Act does not provide an independent mechanism for disputes resolution (outside the NGO Council)² to address complaints in cases where the NGO Council's mechanisms fail. In addition, an NGO that is not satisfied with a decision by the Regulator of NGOs (the NGO Coordination Board) is expected to appeal to the NGO Board or the Minister in charge of NGOs, for a remedy, before appealing to the High Court.

Strengths of the PBO Act

The PBO Act will address the numerous challenges facing PBOs as a result of the unsatisfactory legal framework by:

1. Providing a favorable environment for the setting up, growth and running of PBOs.
2. Putting in place a useful system of rules, laws and institutions that support registration and functioning of PBOs.
3. Triggering a re-birth of values within the sector by strengthening self regulation.
4. Putting in place an independent complaint and redress mechanism - The PBO Disputes Tribunal - to give PBOs and members of the public access to remedies where the self-regulatory mechanisms have failed or where they view decisions by the PBO Regulatory Authority as unsatisfactory.
5. Specifically allowing PBOs to take on commercial activities in order to support their public benefit objectives.

² The National Council of NGOs is set up by the NGO Coordination Act as an umbrella organization for registered NGOs. The key role of the Council is self regulation of NGOs.



BACKGROUND

CSOs have played a critical role in promoting and delivering socio-economic development, social justice, fundamental rights and freedoms, good governance and democratic development. They provide avenues and opportunities for participation in decision-making in every level of society, and empower organizations and individuals to deal with problems relating to welfare services, welfare service delivery or neglect. CSOs also provide technical support in policy formulation and implementation processes especially in the social development sectors both locally and nationally, as well as a wide variety of other results for the benefit of Kenyans. Their work individually and in partnership, has been crucial in assisting the government move toward achieving the Millennium Development Goals.

Sessional Paper No. 1 of 2006 on NGOs recognizes 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.

If the CSO sector is to have anything like the impact suggested above on poverty alleviation, democracy, welfare provision and social development, an enabling environment is required. The Government has since 1990 recognised the sector's role in development and sought to develop laws to govern its existence and operation.

History on the Law Review Process

The context in which the NGO Coordination Act of 1990 was passed was rife with mistrust between the Government and NGOs. Though NGOs participated in the development of the law, they did so very late and with strong suspicions about the Government's intentions. Eventually, the Act was passed.

However, the lack of a policy framework inhibited the implementation of some provisions of the Act. In 1996, the NGO Coordination Board (the Government Agency which exists to register, coordinate and facilitate the work of NGOs) decided that there was a need for a national policy on NGOs.

By 2001, there was general agreement amongst NGO sector and government actors that a comprehensive policy would aid in the creation of a sound law on the NGO sector.

It was not until January 2006 that Parliament passed *Sessional paper No. 1 of 2006 on NGOs* (the National Policy on NGOs). The Policy called for the review of the NGOs Coordination Act 1990. As a result, Civil Society Organizations (CSOs) in Kenya engaged in ongoing conversations and consultations around the most desirable regulatory and administrative framework for their operations.

During the course of these conversations, a broadly inclusive, loosely structured CSO Reference Group was created in 2009. The initial volunteers to this group developed a framework of essential principles to guide the development of a new enabling legal, regulatory and institutional framework for CSOs in Kenya. The group met with various government Ministries, Departments and Agencies including the Ministry in charge of NGOs then (Ministry of National Heritage and Culture), the Registrar General, the Kenya Law Reform Commission, The Constitution Implementation Commission and the NGOs Coordination Board.



The group also mobilized CSO participation through national and regional CSO leaders' workshops and through thematic meetings, which targeted thematic CSO groups. The regional consultations were held in ten regions across the country. These meetings provided useful platforms for consultation with the constituencies that would be directly affected by the law. Over 1,500 civil society leaders contributed to the discussions.

Key Issues to Address

Emerging from the consultations were six critical issues, which interested parties felt they wanted to be addressed in the new law. These issues included the following:

1. Transparency of Registration Procedures;
2. Meaningful Protection of Fundamental Rights and Freedoms especially the Freedom of Association, Expression and Assembly;
3. The Independence of the Regulator;
4. Accountability and Transparency of NGOs; and
5. Growth of effective Self-Regulation.

The discussions resulted in a draft law or bill – the Public Benefit Organization (PBO) Bill 2012, which captured the aspirations of the NGO sector and aimed to address the challenges facing the sector. The bill eventually passed through Parliament to become the PBO Act, 2013.

The CSO Reference Group requested a Member of Parliament, Hon. Sophia Abdi Noor, to table the PBO Bill in Parliament as a Private Member's Bill. She agreed. On 27th April, 2012, Parliament published the PBO Bill.

In June 2012, the CSO Reference Group reached out to the NGOs Coordination Board and agreed to work together to support a legal framework that ensures good governance by CSOs on the one hand, while protecting genuine civil society activity on the other. The collaboration resulted in joint proposals to the PBO Bill, which were tabled before the Parliamentary Committee for Labour and Social Welfare, at a Stakeholder's retreat in August 2012. The Parliamentary Committee continued to receive memoranda with proposals to amend the Bill from different interested parties, up till the 3rd Reading of the Bill in Parliament in December 2012. The Bill eventually passed through Parliament to become the PBO Act, 2013.

Call to Action

Despite the numerous resources and time it took for the PBO Act to successfully pass through Parliament, the law is not yet in operation. The Act urgently requires a starting date, which must be announced by the Cabinet Secretary for the Ministry of Devolution. The PBO Act provides a perfect opportunity to begin addressing the numerous challenges facing the PBO Sector. It will also help to unlock the benefits that will result from a well regulated sector.

For the PBO Act to achieve its objectives, the public and PBOs must be informed about it. They must play their roles while working with other actors to ensure that the Act's provisions are properly applied. *Sessional Paper No. 1 of 2006* on NGOs notes that the aims and aspirations expressed in it for an enabling environment will remain a distant dream if the identified policies and strategies are not put in practice by both the regulator and the sector players. The same views apply to the PBO Act.



DEFINITIONS

Meaning of Public Benefit Organisation and Public Benefit Activity

The PBO Act introduces a number of words and phrases that require interpretation, since they are unique to the law and frequently repeated in its text. These words include among others *Public Benefit Activity* and *Public Benefit Organisation*.

The word **Public Benefit Organisation** (PBO) is defined in section 5 as *a voluntary membership or non-membership grouping of individuals or organizations, which is autonomous, non-partisan, non-profit making and which is organized and operated locally, nationally or internationally to engage in Public Benefit Activities and is registered as such by the Authority.*

The definition outlines several key elements that make a PBO, that is, a PBO must be:

- Voluntary: Participation in or contribution to the PBO's activities or affairs is on a willing, non-compulsory, unpaid basis.
- Autonomous: PBOs are able to control their own activities and to come up with and apply their own procedures. They are not controlled by outside entities.
- Non-partisan: PBOs are independent from political groups;
- Not-for-profit distributing: PBOs do not exist to make profits for their founders or members and any profits must be ploughed back into the PBO's mission;
- Organized to support or promote public benefit activities: PBOs are set up to perform publicly beneficial services or act in the public interest.
- Registered by the Public Benefit Organisations Regulatory Authority: The Act gives formal recognition to entities that are registered by the institution that is set up to regulate PBOs.

The definition also clearly states what entities cannot be a PBO, for example, a trade union and a political party.

According to section 2(1), a **Public Benefit Activity** means *“any lawful activity that supports or promotes public benefit by enhancing or promoting the legitimate economic, environmental, social or cultural development or protecting the environment or lobbying or advocating on issues of general public interest or the interest or well-being of the general public or a group of individuals or organizations.”*

The definition of public benefit activity covers a wide range of activities that PBOs can involve themselves in the interest of the public. The Sixth Schedule of the Act provides a list of public benefit activities. The list is not final but, read together with the definition in section 2(1), provides a useful guide to PBOs and the PBO Authority on what is a public benefit activity.

OBJECTS OF THE ACT

The Objects of the PBO Act are clearly outlined. The Act is primarily meant to support the setting up, running and growth of PBOs and to provide the structures, laws and guidelines to help PBOs carry on with their affairs.

The key aims and purposes of the PBO Act are to:



1. Encourage and support public benefit organisations by creating a favourable environment in which PBOs can thrive and carry on with their affairs freely without unnecessary state interference.
2. Set up institutions and give clear procedures that support a number of processes including registration of PBOs, disputes resolution, processing of tax incentives, provision of information on PBOs amongst other things.
3. Encourage PBOs to set up effective self regulation systems amongst themselves while keeping and improving high standards of good governance within their individual organizations.
4. Make it possible for the public to access information on registered PBOs. In keeping with technological advancement, the Act provides that the Registration body (the PBO Regulatory Authority) should use the internet (its website) as one of the mechanisms for enabling the public to access the registry of PBOs.³
5. Promote beneficial and ethical partnership between PBOs and various actors in development including the government and donors.
6. Help PBOs comply with their legal obligations.
7. Ensure that the freedoms of association, of expression and peaceful assembly are fully protected.

GOVERNMENT OBLIGATIONS

Unlike other laws in Kenya, the PBO Act begins with a preamble, which recognizes the important role that public benefit organisations play. The preamble also emphasises the complementary role that PBOs, the private and public sectors play, in meeting Kenya’s development goals. As a result, the Government has a duty to create, respect and promote a favourable or enabling environment for PBOs to operate (section 4). It does this in various ways, which are captured in the PBO Act.

Providing Laws and Regulations that Support the Growth and Operation of the PBO Sector

In providing a favourable environment for PBOs, the government will set up institutions (such as the PBO Regulatory Authority and the PBO Tribunal) and a regulatory framework (such as the PBO Act and its regulations) that will enable PBOs to conduct their work (Section 3(a) (ii)). The institutions and rules provide support that PBOs need to register and carry out their operations.

In line with its obligation to provide an enabling environment, the government will also provide “mechanisms to support PBOs, such as funding of PBOs activities” (Section 3(g)). The Government is to avail benefits to PBOs registered under the Act, in order to enhance their contribution (Section 6(1)). These benefits include exemption from certain taxes, government grants and trainings (Second Schedule).

In addition, the Government will promote a spirit of cooperation and shared responsibility within government and various actors in their dealings with PBOs (Section 3 (a) (v)). The Act provides a framework for collaboration to guide Government – CSO partnerships at every level. This framework includes:

- Principles for effective collaboration (in Schedule 1).⁴ The Government has a duty to observe the principles (Section 4(2)).

³ Section 15 (2)(b), PBO Act.

⁴These principles were developed jointly by government and CSO representatives over a period of one year (2008-2009) through a Working Group for Government-CSO Collaboration.



- A structural framework for collaboration: Every Ministry is to select officers who are to deal with matters relating to PBOs. The officers will work closely with each other and with the PBO Regulatory Authority (Section. 67).

Respecting the freedoms of expression, association and peaceful assembly of individuals and groups

In line with its international and national obligations, the Government must:

- a) Avoid interfering with or hindering PBOs from:
 - i. Expressing themselves freely through advocacy, education and publication (Section 66(1) (2), PBO Act and Article 33, Constitution of Kenya).
 - ii. Forming, joining and participating in PBOs and PBO forums (section 20, PBO Act and Constitution of Kenya, Article 36).
 - iii. Peacefully demonstrating, assembling, picketing and presenting petitions to public authorities (Article 37, Constitution of Kenya and Section 66, PBO Act).
- b) Protect individuals and groups against human rights abuses.
- c) Create a favourable environment for individuals and PBOs to enjoy the freedoms of expression, association and peaceful assembly.

Consultation in Policy Making

1. The Government has a duty to involve PBOs at the national and local levels in policy making processes (Section 67 and Section 66(4)).
2. The Cabinet Secretary for the Ministry in charge of PBOs has power to make rules to help in carrying out the Act's provisions (Section 69(1)). However, he or she is to give notice in at least two daily newspapers of national circulation of the Government's intention to make the Rules and Regulations. In addition, the Cabinet Secretary is to give time for interested parties to comment on the draft Regulations and consider the comments before making the Regulations (Section 69(4)).

Coordination and Application of Policies

1. Every State organ has a duty to identify and manage the way its policies and other transactions are carried out, so as to promote, support and provide a favourable environment for PBOs (Section 4(1)).
2. The Government is to ensure that the services of the PBO Regulatory Authority are available to PBOs throughout the country (Section 34(3)).
3. The Government has a duty to ensure that every Ministry has an officer dealing with matters regarding PBOs. The appointed officer will work together with officials from other Ministries and with the Authority (Section 67).

Is it illegal to form or join or operate an association for the benefit of the public without registering it as a PBO?
 The principle of the freedom of association in the Constitution gives all Kenyans a right to get together and form associations of any kind, including formal or informal groups, without necessarily registering them. However, registered organizations receive the benefit of formal recognition. The PBO Act does not recognize CSOs that are not registered under it, as PBOs. While associations are encouraged to register, they are not required to do so.



REGISTRATION OF PBOS

No organization is to claim that it is a PBO unless it is registered under the PBO Act (Section 7(a)).

An organization that is registered under another law has to have its registration cancelled before it can be registered under the PBO Act (Section 6(2)). In cases where an organization is registered under the PBO Act and another law, it will be considered to be registered under the PBO Act and the other registration shall be of no effect (Section 6(4)).

However, in certain circumstances, the PBO Authority can give an organization that is registered under another law, Public Benefit Status (Section 7(b)). This means that the organization will be “recognized” by the Public Benefit Regulatory Authority as an organization that provides services for the public’s benefit or that acts in the public interest. The Rules and Regulations of the PBO Act will specify how the Authority will go about giving public benefit status.

The PBO Act aims to give CSOs that are operated for the benefit of the public certain privileges, which are not available to other CSOs. This will distinguish public benefit organisations from other CSOs. It will also serve as an incentive to encourage public benefit CSOs to register themselves under the PBO Act and to abide by their duties under the law. Hence the Act provides that any organization wishing to receive benefits that are set aside for PBOs under the Act must register as a PBO (Section 6(1)).

Should a CSO that wants to receive the benefits under the PBO Act register as a PBO?

PBOs that register under the PBO Act will qualify to enjoy certain benefits. The benefits will be diverse including tax incentives, government grants, preferential treatment in public procurement and training. They will be available specifically to organisations that receive a public benefit status, from the PBO Regulatory Authority.

Registration Requirements

Section 8 of the PBO Act provides clear, straightforward criteria for registration of PBOs.

An application for registration requires the following:

1. A copy of the founding document or constitution of the PBO;
2. Names and addresses of the founders;
3. The public benefit purposes and the principal activities of the PBO;
4. The main office and the postal address of the PBO;
5. The application fee;
6. Other information to help the Authority decide whether or not to register the PBO.

The founding document or constitution of a PBO must fulfill a number of requirements (Section 8(4)). It must:

- a. state the organisation's name;
- b. state the organisation's objectives;
- c. state that participation in the organisation is to be voluntary;
- d. state that the organisation's income and property are not to be distributed to its members or governing body, except as a refund for expenses incurred or as reasonable payment for services provided;
- e. provide that the PBO is a body corporate, which means it has an identity and existence separate from its members or governing body;



- f. ensure that the members or governing body have no rights in the financial resources or other property of the organisation just because they are members or the governing body;
- g. specify the organisational structures and governing system;
- h. set out the rules for calling and running meetings, including quorums required and the minutes to be kept of those meetings;
- i. agree on the manner in which decisions are to be made;
- j. provide that the organisation's financial transactions must be carried out by means of a banking account;
- k. set out a procedure for changing the constitution;
- l. set out a procedure by which the organisation can cease to exist;
- m. provide that when the organisation is being shut down, the governing body of the PBO is to identify another public benefit organisation with similar objectives that will receive any resources, which remain after it meets its financial legal responsibilities.

When the PBO makes changes to any of the details necessary in its constitution, it must alert the Authority within sixty days of the change (section 8(8)).

The constitution of a PBO with members can also contain other clauses that are related to the functions of the PBO and which the members may wish to include (section 8(5)).

Registration Requirements for International PBOs

An international non-governmental organization (INGOs) wishing to be registered as a PBO is to present the following to the Authority:

- 1. A filled in application form;
- 2. The organisation's address in Kenya;
- 3. A statement in writing specifying the purposes of the INGO, a general description of its activities and the name, address and other contact information of the person who will be able to receive official orders, notices and inquiries on its behalf (Section 8(3)).

The Regulatory Authority will give the applicant:

- 1. A permit for Operation - Where the applicant organization does not plan to directly carry out activities or programs in Kenya.
- 2. A Certificate of Registration where the applicant organisation:
 - a. Is itself involved in or plans to carry out any activities or programs in Kenya;
 - b. Plans to operate from Kenya in order to carry out activities in another country;
 - c. Operates from Kenya in order to carry out any activities or programs in another country;
 - d. Raises funds in Kenya. (Section 11)

An international organisation that has been given a certificate of registration will be expected to:

- a. Show the Authority that one third of the members of its governing board of directors are Kenyan citizens and have lived in Kenya for several years.
- b. Maintain an office in Kenya.

Action on the Registration Application

Once the Authority has received an application, it has a duty to consider the application and register the PBO, if the application meets the requirements (Section 9(1)).

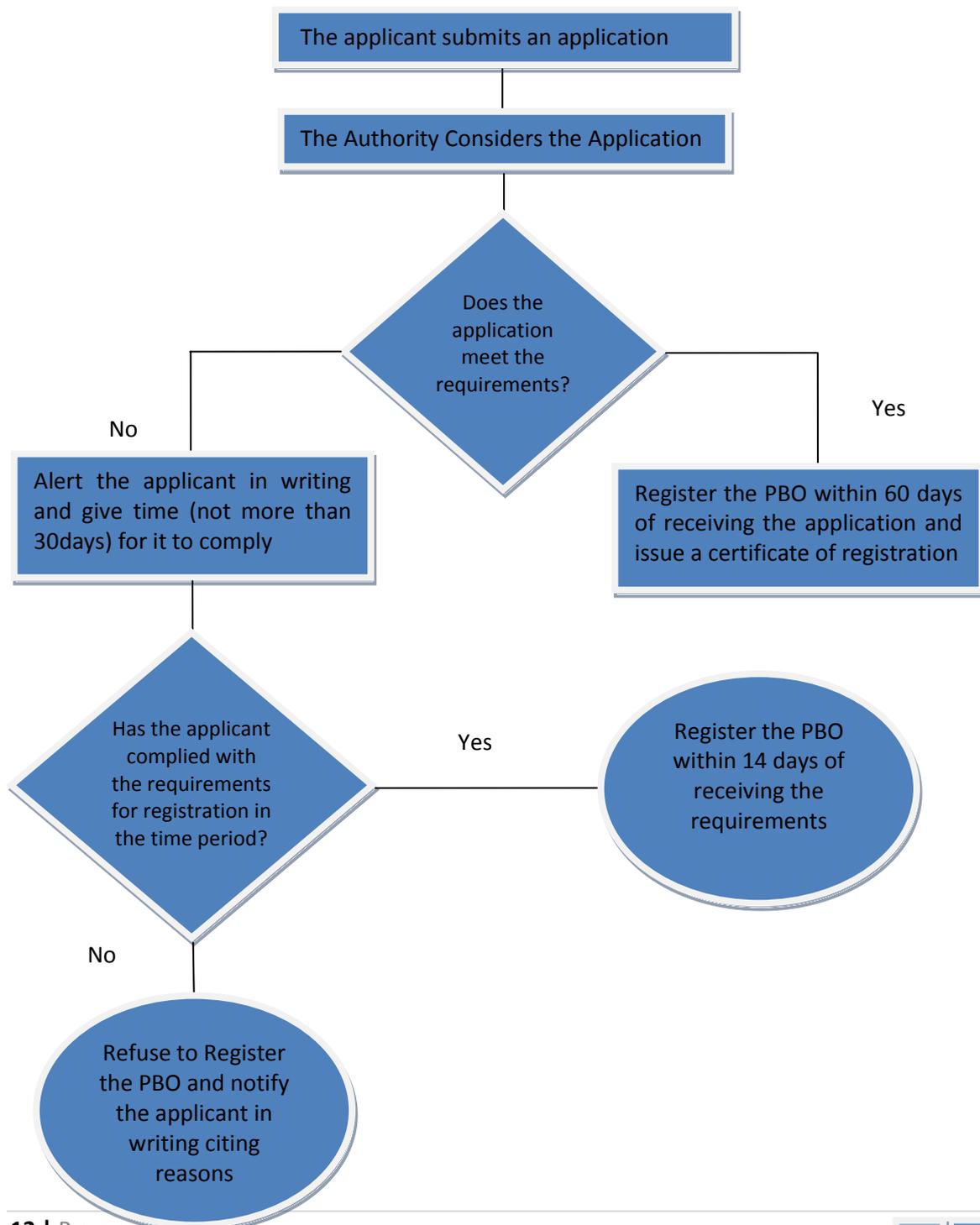
Section 8(4) goes to great length in listing the content that a PBO applicant should include in its constitution. The contents are related to basic issues of protection of assets, good governance and accountability. The registration process is therefore designed in such a way as to aid PBOs to comply better with standards of good governance, as well as with laws and regulations, following



If the Authority is not satisfied that the application meets the requirements, it must alert the applicant in writing and give reasons for the decision. Further, the Authority must inform the applicant that it has not more than 30 days, from the date of the notice, to submit the required information (Section 9(2)).

If the applicant meets the requirements within the time period given in the notice, the Authority must register the PBO within 14 days or refuse to register the PBO if the applicant fails to meet the requirements. The Authority must provide the applicant with its reasons for refusing to register the PBO in writing (Section 9 (5)).

THE REGISTRATION PROCESS



Grounds for Refusal to Register a PBO

The Authority can refuse to register any organization as a PBO for the following reasons (Section 16):

- The applicant has failed to meet the requirements for registration;
- The proposed objectives of the PBO break any written law;
- The applicant organisation has broken the PBO Act and other laws several times or committed a serious offence;
- The applicant has given wrong or misleading information;
- The name of the proposed PBO is likely to mislead the public as it is similar to another organisation.

Presumption of Registration and Time limits

The PBO Act provides that the PBO Authority must act within a maximum time of 60 days after it receives an application for registration (Section 9(1)). If the Authority has not made a decision within 60 days of receiving a registration application, a PBO can appeal to the Tribunal. The Tribunal can order the Authority to:

- Give the applicant a certificate of registration or
- Inform the applicant that it refused to register and give the reasons for the refusal. The reasons for refusal must be in line with those that the PBO Act provides (Section 12).

Reconsideration and Appeal of the Authority's Refusal to Register

An applicant, who is not satisfied with the decision of the Authority, can request it to reconsider its decision. The applicant must do so within 30 days of receiving the notice of refusal from the Authority.

The applicant can choose to appeal to the Tribunal against the decision of the Authority. The Tribunal has 60 days to hear the appeal from the date it receives the appeal documents.

Suspension or Cancellation of Registration

The PBO Regulatory Authority's power to order cancellation or suspension of a certificate is exercised within clear limits.

Reasons for Cancellation of Certificate

The Authority can suspend or cancel a certificate of registration if:

- the PBO has broken the provisions of the PBO Act.
- the PBO is carrying out activities in a way that is different from its constitution.
- there is considerable and reliable proof that the PBO has ceased to exist. (Section 19)

The Act gives the procedure or steps to be followed. The Authority should send a written notice to the PBO specifying the offence and giving the organisation a chance to defend itself or correct the situation within 15 days (Section 18(1) - (3)). Where the organisation fails to take the necessary steps, the Authority is to fine, suspend or cancel the certificate of registration.

Steps to be followed in Suspension or Cancellation of Certificate

The PBO Act provides the steps that the Authority should take when it cancels or suspends a certificate of registration. It is to:

- Give the PBO written notice within 21 days from the date of cancelling or suspending a certificate of registration;
- Order the PBO to stop running;
- Remove the PBO's name from the register.



The PBO is not excused from its legal responsibilities when its certificate is cancelled. Any duties regarding monies or assets or reporting requirements regarding those monies or assets must be fulfilled (Section 19(4)).

Appeals against Suspension or Cancellation of Registration

A PBO which is not satisfied with the reasons given by the Authority for fining it, or suspending or canceling its registration can request the Authority to reconsider its decision. The PBO must do so within 60 days of receiving the notice of the decision.

The applicant can choose to appeal to the Tribunal against the decision of the Authority. The Tribunal is to give its decision within 60 days from the date it receives the appeal. (Section 18(4) and 18(5))

Offences and Penalties

The PBO Act provides that it is a crime for a person to alter or falsify any document or to make false statements while applying for registration. It is also a crime to falsely make an organisation appear to be a PBO, or to make use of a registration number, certificate or other information in a registration certificate to mislead people. These crimes can attract a fine of up to KShs. 300 000 or imprisonment for not more than two years or both penalties (Section 64).

Certificate of Registration and Effect of Registration

Once a PBO is registered, it is to receive a certificate of registration from the Authority. A registered PBO is to be accepted as a legal body that is capable of taking somebody to court or being taken to court; buying, handling or selling property; entering contracts or taking on any activities that a legal person can, as long as the activities are lawful. (Section 10)

A PBO will remain registered until it chooses to close down or its registration is cancelled by the Authority.

RIGHTS OF PBOS

Self Regulation

The PBO Act provides that every organization has the freedom to willingly get together with other organizations and to take part in forming a forum of PBOs. Every organisation also has a right to join a forum of PBOs or leave a forum of PBOs. Further, every PBO that is a member of a forum of PBOs has a right to take part in its activities and to elect its officials or representatives (Section 20 PBO Act, Constitution of Kenya (Article 36))

Right to Engage in Advocacy

In line with the Constitution of Kenya (Article 37) which gives every person the right to peacefully demonstrate, assemble, picket and present petitions to public authorities, section 66 and 67 of the PBO Act gives PBOs the right to involve themselves freely in advocacy. The definition of a public benefit activity (section 2) also identifies advocacy as one of the activities that PBOs can pursue.

However, a PBO cannot get involved in fundraising or campaigning to support or oppose any political party or candidate for public office. It also cannot recommend or register candidates to be elected for public office (Section 66(3)).



Right to Take Part in Policy Making

PBOs have a right to take part in policy making especially at the local level (section 66(4) and section 67).

OBLIGATIONS OF PBOS

PBOs must abide by the requirements placed on them by the PBO Act. The Act demands good leadership from PBOs. It outlines a list of principles that PBOs must observe in section 27. For example, PBOs must practice transparency and accountability, follow conflict of interest principles and keep high standards of professionalism. They should also promote democracy, human rights, and the rule of law, good governance and justice for Kenyans and be committed to peaceful and non-violent ways in all their activities. (Section 25(2),(3), 27(1)(a)(b)(j))

Following registration, PBOs have a duty to:

- a. Ensure that they use financial and other resources for the purposes which they were requested (section 27).
- b. Keep proper accounting records and other reports and records relating to their activities and operations (section 30(1)).
- c. Prepare financial statements to the standards of generally accepted accounting practice, within six months of the end of each financial year (Section 30(2), 31(a)).
- d. Plan to have an independent auditor inspect the financial statements and prepare a report for the PBO Regulatory Authority confirming that the statements are in line with the PBOs financial position during the reporting period (Section 30(2), 31(b))
- e. Annually present to the PBO Regulatory Authority the audited financial statements as well as reports on the PBO's activities and operations carried out during the financial year (Section 31(b) and (c)).
- f. Provide the Authority with the contact details of members of its governing body within one month after appointment or election of the governing body. These details include their physical, business and residential addresses (Section 32).

Primary duties of PBO the governing body (Section 8(7))

The governing body of the PBO is primarily responsible for the following tasks:

- Inspecting the books and records of the PBO and ensuring that the accounting records are kept in line with generally accepted accounting principles.
- Reviewing and approving reports on the activities and finances of the organization to ensure that they are consistent with the purposes that are stated in the PBOs founding documents.
- Selecting members of the governing board.
- Deciding the method of changing the founding document or constitution.
- Decisions to close or shut down the PBO.

No governing board member is to be held personally responsible for any act they carried out in line with their duties and in a responsible and honest manner (Section 33).

Effects of Non-Compliance with Obligations

When a registered PBO fails to act in line with its duties under the PBO Act, it may receive a written notice from the PBO Regulatory Authority, requesting it to abide by the law or to explain its actions. If the PBO fails to meet the requirements of the notice within a certain period, its registration can be



cancelled (Section 18 (1-4)). The PBO Act sets out a procedure for appeals against the cancellation of registration (Section 18 (4), (5)).

WINDING-UP OR DISSOLUTION OF THE ORGANISATION

Section 61

When an organisation freely chooses to shut down or close, it must send to the Director General of the PBO Authority a written notice stating that:

- two thirds of the members voted to wind-up or dissolve the organization (in case of a membership PBO) or,
- the governing body willingly decided, in accordance with the organisation’s constitution, to wind-up or dissolve the organization (in case of a non-membership PBO).

The notice must include the reasons for the decision to wind-up or dissolve and the date when the organization is to cease to exist. The PBO must also give the Authority copies of all relevant documents confirming the winding up or dissolution, and a copy of the written report, financial statements and an auditor’s report for the period running from its previous financial year up to the date of the written notice (section 61 (1-3)).

After receiving the notice, the Authority will cancel the organisation’s certificate of registration and inform the organisation in writing about this.

Handling the PBO’s Assets

The governing body of the PBO is to identify another public benefit organisation with similar objectives to receive any resources that remain after it meets all its financial responsibilities. The PBO chosen must be approved as credible by the Authority (Section 62(5)). If the governing body fails to choose a PBO which will receive the remaining assets, the Authority will do so (section 61(4)).

The Authority can require officials or members of the PBO to give it a list of the assets of the organisation and their location in order to safeguard the assets. It is an offence to fail to provide a list of the assets when requested (Section 62(1)).

SELF REGULATION

The preamble of the PBO Act declares that satisfactory self regulation is a must for a successful civil society. One of the key objectives of the PBO Act is to “to promote the development of self-regulation among PBOs” (section 3(c)). This object is met through four key ways:

- a. Providing for setting up of PBO self regulation forums;
- b. Outlining key principles that can guide PBOs in their work and interactions;
- c. Providing for a body (the National PBO Federation) to promote self regulation;
- d. Giving support to PBOs.

Setting up PBO self regulation forums

The PBO Act allows PBOs to form independent self-regulation bodies or forums (section 28(1)) and to organise themselves into a federation of forums in order to boost self-regulation (Section 24(2)). The Act permits the forums of PBOs to develop their own code of conduct and standards and to ensure that their members apply these (section 24(1), 28(1)).

Abiding by Key Principles



The Act also spells out a long list of principles to guide PBOs in their operations. Further, it gives the governing bodies of PBOs the duty of developing guidelines that will help the employees of PBOs in handling a number of issues including conflict of interest (section 25(2), 27(1)). The principles also provide a useful guide for helping PBO forums to develop self regulation mechanisms such as Codes of Conduct.

Establishing the National PBO Federation (section 21)

The PBO Act sets up an umbrella organization of registered PBOs known as the National PBO Federation. The role of the Federation is primarily to promote effective self-regulation through coordinating self-regulation in the sector, building the capacity of PBOs and representing the sector in public bodies or at various fora.

Every registered PBO has a right to join the Federation as a member. Self Regulation Forums of PBOs can also become members of the Federation (section 21(1) and (2)). Every member of the Federation is to have a right to vote in the elections of the Federation’s governing board.

The governing board of the Federation is to select persons who will represent the Federation, where required, in public bodies. During the selection, the board is to observe certain principles, to consult widely and ensure public participation. They must not select themselves (board members) to represent the Federation in public bodies except where the PBO Act specifies that they can do so (Section 22).

Support from the Authority

The Authority will support the sector in its efforts to promote self regulation. The PBO forums are expected to enter into an agreement with the Regulatory Authority. The Agreement:

- Enables the Authority to be familiar with the forums and their efforts to improve self regulation in the sector.
- Encourages collaboration between the forum and the Authority, in support of effective self regulation.

The Authority will carry out training on self regulation of PBOs, to improve the knowledge of PBOs and strengthen their ability to self regulate.

Is the National Federation of PBOs going to replace the NGO Council?

No. The law provides that PBOs and PBO self-regulation forums can set up an umbrella organization, whose membership will be voluntary. The National Federation of PBOs is a *new* institution set up under the PBO Act. Members of the Federation will have to set up the rules and procedures for the functioning of the Federation and elect its leaders.

REGULATION OF PBOS

The PBO Act sets up a registration and regulatory Body – The PBO Regulatory Authority (Section 34(1)). The Authority is tasked with monitoring PBOs to ensure that they are complying with their obligations under the PBO Act. It also provides the Government with assistance in registering and cancelling the registration of PBOs; Making the national policy on PBOs clear so as to assist in its smooth application by Government ministries, departments and agencies; Keeping a register of PBOs and providing advise on the activities of PBOs. The PBO Authority assists PBOs to abide by the PBO Act requirements through availing the necessary forms, instructions and model documents. It also makes it easier for the Government and PBOs to network and share information (Section 42(1)).

The governing body of the PBO Regulatory Authority (the Board of the Authority), includes representatives from Government ministries dealing with PBOs, Finance and Foreign Affairs, as well as representatives from the National Federation of PBOs, and members of the public who have served in civil society (Section 35).

Independence of the Regulator



To guard the independence of the Regulator, the Act outlines a detailed process for selecting board members (Schedule 3) and sets out the qualifications for members of the governing board (Section 36). The Act also provides a procedure that guards against Conflict of Interest in the Board. (Schedule 4, part 3). Further, the Act specifies which persons cannot qualify to be appointed to the board of the Authority. They include members of the National Assembly, members of a local authority, members of the executive body of a political party or those actively involved in the political party's affairs (Section 36(2)).

Power to Institute Inquiries

Where necessary, the Authority can carry out an inquiry to find out if the activities of a PBO are not in line with the PBO Act. The Authority can order a person who is in a position to obtain information relating to the inquiry, to give evidence or bring to it documents for the inquiry. The Authority can refund the person for the costs or expenses borne in appearing to give evidence or to produce documents.

THE PBO TRIBUNAL

A Tribunal to be known as the Public Benefit Organizations Disputes Tribunal is set up by the PBO Act (Section 50(1)) as an independent mechanism of complaint and redress.

Power of the Tribunal

The Tribunal is to have power to hear and reach decisions regarding complaints resulting from actions that break the provisions of the PBO Act. PBOs that would like to appeal the decisions of the PBO Regulatory Authority, or members of the public wishing to have complaints regarding PBOs addressed, can take their cases to the Tribunal. The decisions of the Tribunal can be reviewed by the High Court (section 52(11)). The Tribunal does not have power to hear criminal matters (Section 51).

Once the Tribunal has heard a matter, it can agree with, set aside, change or cancel the order or decision in question. It can also order the Authority to adjust or look at its decision again (Section 52(7)). Anyone who disobeys the decision of the Tribunal shall be breaking the law. The Act provides penalties that parties who disobey the Tribunal will face.

Composition of the Tribunal

The Tribunal will be made up of 5 members, who will be appointed by the Chief Justice and approved by the National Assembly. The members will be advocates and persons with special knowledge or skill for carrying out the functions of the Tribunal (Section 50(1)). The Act provides that no member of the PBO Authority can serve as a member of the Tribunal (Section 50(3)). This will curb against conflict of interest and guard the independence of the Tribunal.



TRANSITIONAL MATTERS

Non Governmental Organisations and Civil Society Organisations

NGOs registered under the NGO Coordination Act before the starting date of the PBO Act will be considered to be registered as PBOs under the PBO Act (Fifth Schedule, Part 7(1)). If a CSO is not registered by the NGO Coordination Board as an NGO, but is registered under a different registration regime, it is free to seek registration under the new PBO Act.

The Public Benefit Organizations Regulatory Authority

Once the PBO Act comes into force:

- All funds, assets and other property, rights, powers, liabilities and duties of the Non-Governmental Organizations Coordination Board shall belong to the Public Benefit Organizations Regulatory Authority (Fifth Schedule, Clause 2(1)).
- Administrative decisions made by the former NGO Board shall have power as if they were issued under the PBO Act (Fifth Schedule, Clause 4).
- A person who was a member, staff or agent of the NGO Coordination Board shall be considered to be a member, staff or agent of the Board of the PBO Regulatory Authority for the remainder of their term, unless that person is a public officer (Fifth Schedule, Clause 8).
- The Executive Director serving in the NGO Coordination Board shall continue as the Executive Director of the PBO Regulatory Authority for his/her unexpired term provided that that person is qualified for reappointment as Director (Fifth Schedule, Clause 5(3)).

Rules and Regulations

There are some provisions of the PBO Act that require additional support in order for them to be clear and easy to put into action. They will require Rules and Regulations. The process of developing Rules and Regulations to support the Act will begin once the PBO Act is in operation.

Will NGOs have to Register Afresh?

The law does not require NGOs that were earlier registered under the NGOs Coordination Act 1990 to register afresh. New registration will only be required for CSOs that were registered under other laws and would like to be registered under the PBO Act.

