

**UNIVERSITY OF NAIROBI**

**MASTERS OF LAW**

**CRITICAL REVIEW OF THE LEGAL FRAMEWORK FOR FINANCIAL BAILOUTS  
OF PUBLIC COMPANIES IN KENYA.**

**BY**

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## DECLARATION

**“This thesis is my original work and has not been presented for a degree in any other university.”**

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**‘This thesis has been submitted for examination with my approval as a University Supervisor’**

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## **DEDICATION**

**To my dad and mum for their moral and financial support, to my daughter Stephanie from whom I derive inspiration and motivation and to the entire family for their unwavering encouragement.**

## **ACKNOWLEDGEMENT**

Many thanks to my lecturers for their selfless assistance in pursuit for my LL.M.

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To Mr. Protus Sigei, Deputy Director, Investment Department of Government Investments & Public Enterprises (DGIPE) and to Dr. Julius Kipng'etich, CEO, Uchumi Supermarkets Ltd, thank you for your unwavering support and insight during my interviews.

## **OPERATIONAL DEFINITION OF TERMS**

### **Bailouts**

This term as used in this thesis paper means the transfer of money from the State to another private agent (for example a public company, state corporation, state owned enterprise) to assist the private agent that finds itself in financial difficulties to meet its financial obligations. This can be in the form of cash, loans, grants or other forms of consideration.

### **State Owned Enterprises**

This term as used in this thesis paper means entities owned by the State for purely commercial gain and where the state owns more than half of the total shares of the company.

### **Public Companies**

This term as used in this thesis paper means a public company that the state has a stake in.

### **Moral Hazards**

This term as used in this thesis paper means the situation in which a SOE or a public company puts itself in excess risk as in the belief that someone else will be the bearer of the costs of such behavior and hence protected from any liability occurring as a result of engaging in the excess risk.

### **State Corporation**

This term as used in this thesis paper means an entity established by the state and which has a legal personality and is purely for commercial purposes.

### **Information Asymmetry**

This term as used in this thesis paper means the situation where one party has more knowledge of something or a situation over the other party.

### **Corporate Governance**

This term as used in this thesis paper means the collection of the sum total rules, practices and processes by which a company is run and this involves bringing on board all the company's stakeholders' interests, which include the customers, suppliers, financiers, managers, shareholders, the government and the community surrounding it

### **Agency Problem**

This term as used in this thesis paper means a relationship between two parties mostly a principle and an agent, where the agent is supposed to act by putting the interests of the principle first and this manifests itself mostly in a corporate kind of setting.

### **Incentives**

This term as used in this thesis paper means something that motivates someone to do something for a desired result and especially for the benefit of another.

**Corporatization**

This term as used in this thesis paper means the process by which an entity (mostly a state) is converted into an independent commercial company.

**Holding Companies**

This term as used in this thesis paper means a company incorporated for the sole purpose of buying and possessing shares in other companies, which it then controls.

## **ABBREVIATIONS AND ACRONYMS**

**KPMG Klyveld, Peat, Marwick, Goerdeler**

**PSC Public Service Commission**

**SCAC- State Corporations Advisory Committee**

**NBK National Bank of Kenya**

**USL Uchumi Supermarkets Limited**

**PFM – Public Finance Management Act**

**KMC Kenya Meat Commission**

**KQ Kenya Airways**

**KNTC Kenya National Trading Corporation**

**ICDC Industrial Commercial & Development Corporation**

**KWAL Kenya Wine Agencies Limited**

**USA United States of America**

**SOX Sarbanes Oxley Act**

**SOE State Owned Enterprises**

**PCAOB Public Company Accounting Oversight Board**

**SEC Securities and Economic Commission**

**TARP Troubled Asset Relief Program**

**SASAC State Owned Assets Supervision and Administration Commission**

**FDIC Federal Deposit Insurance Corporation**

**GFM Government Finance Management Act**

**NT National Treasury**

**GICL Government Investment Corporation Limited**

**UNFAO United Nations Food & Agriculture Organization**

**IFC International Finance Corporation**

**CMA Capital Markets Authority**

**SE Stock Exchange**

**DBK Development Bank of Kenya**

**SC State Corporation**

**GEO Government Owned Enterprises Bill**

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## **ABSTRACT**

Bailouts of public companies or SOEs are a common phenomenon the world over. However, it is not until the great melt down of 2008 in the USA that set down the momentum of interrogating bailouts and corporate financial crisis, their effects and justifications. USA which experienced the 2008 melt down come up with various legislation that deal with bailouts. China, has also in the recent times come up with guiding opinions which are geared towards dealing with the issue of bailouts amongst other issues relating to SOEs.

This thesis paper reviews the financial legal framework in Kenya in relation to bailouts and more specifically, to find out whether there is a legal framework guiding financial bailouts of public companies in Kenya. The methodology used in the research is qualitative methodology and the technique used is the target respondent interviews.

The data was collected through questionnaires.

The results seek to show that there is no legal framework for financial bailouts of public companies in Kenya.

It also shows that bailouts are important in safeguarding and protecting jobs of the taxpayers who are not responsible for the financial failures of public companies that find themselves in financial distress or crisis.

## CHAPTER ONE

### INTRODUCTION

#### 1.1 BACKGROUND AND HISTORICAL CONTEXT OF BAILOUTS IN KENYA

The term bailout means the process of assisting companies that find themselves in financial distress with an aim of preventing it from going under or collapsing. It occurs when the bailing out entity makes direct payments which may be in the form of liquid cash, bank loan guarantees, loans, debt waiver or any other type of consideration to a company that is financially distressed hence unable to meet its financial obligations with the sole aim of enabling company in financial distress be in a position to deal with its debts and normal operations when the failing company does not qualify to get such assistance under any statutory scheme.<sup>1</sup>

However, the origin of the term bailout is coined from the practice of using a small bucket to remove water from a vessel that is at risk of sinking and is mostly used in maritime trade.<sup>2</sup> Most states have bailed out their own struggling state corporations to keep them a float and in Kenya the recent bailout was for Kenya Airways.<sup>3</sup> There are proponents and opponents in the debate.<sup>4</sup> The main feature about bailouts is that it is ex post meaning that bailouts often happen after the

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<sup>1</sup> Hornby A.S (1989) *Oxford Advanced Learner's Dictionary* (4<sup>th</sup> ed) p76 London.Oxford University Press.

<sup>2</sup> Casey A.J & Posner E.A : A Framework for Bailout Regulation ( 2015, Dec 1) *Notre Dame Law Review* Vol. 91, p. 497

<sup>3</sup> Wafula Benjamin (2015, Sept 2); "Troubled KQ gets Ksh 4.2billion from government" *Citizen Digital*.

<sup>4</sup> Njeru Alex ( 2015, Aug 3) "Jubilee Mps oppose plan to bail out Kenya Airways" *Daily Nation* Retrieved 3<sup>rd</sup> March 2016 from [mobile.nation.co.ke](http://mobile.nation.co.ke)

event, in this case after a corporation gets into financial problems such that it needs to be assisted financially.<sup>5</sup>

One of the pertinent question that arise is whether states bailout these failing public companies that it has a stake in because it has the capacity to do or it is for political mileage or because it is important for economic balance?<sup>6</sup> Government expenditure in Kenya is regulated through legislation and all money collected as taxes is budgeted for every financial year through an annual Appropriation Bill.<sup>7</sup> For this reason money given to a failing public company in form of a bailout has to be deallocated from another department to the public company in need as bailouts happen ex post that is after the event.<sup>8</sup> This means that measures have to be put in place in order to safeguard the taxpayers' money.<sup>9</sup>

Government gets most of its money from the taxpayers and if government is to use the money collected as taxes to bailout a public company in financial distress, then there should be a legal justification for such use and consequently a legal framework to guide how these bailouts are to be carried out. The Kenyan government has and continues to bailout many public companies even in the absence there of legal framework for financial bailouts guiding how, when and who or which public companies qualify for bailouts. Some of the public companies that have and continue to benefit from these bailouts are for example; Mumias Sugar Company formed in 1971 primarily engaged in the manufacture and sale of sugar. <sup>10</sup>It is also involved in hybrid high yielding palm oil variety in collaboration with United Nation Food and Agriculture Organization

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<sup>5</sup> Casey A.J & Posner E.A ( 2015, Dec 1) *A Framework for Bailout Regulation* Notre Dame Law Review Vol. 91, p. 515

<sup>6</sup> Lincoln Douglas (2009) *Government Bailouts*, Spring UIL, West Coast Publishing.

<sup>7</sup> *Constitution of Kenya 2010*, Art 221,222,223,224, (Ke)

<sup>8</sup> Lincoln Douglas (2009) *Government Bailouts*, Spring UIL, West Coast Publishing.

<sup>9</sup> *ibid*

<sup>10</sup> Mumias Sugar Company, *History of the Mumias Sugar Company* retrieved 3<sup>rd</sup> May, 2017 from [www.mumias-sugar.com](http://www.mumias-sugar.com)

(UNFAO) and also manufactures ethanol and distilled water.<sup>11</sup> The woes of this public company started in 2012, were largely blamed on inefficiency.<sup>12</sup> A financial audit carried out by KPMG revealed that there were massive financial and procedural irregularities which had been concealed from the board of directors by the senior management which caused the company lose close to 1 billion Kenya shillings.<sup>13</sup> Since the company's woes started in 2012, it had been running on limited cash and had requested the government to come to its rescue by giving it a Kshs 1 billion it had promised to avoid its collapse.<sup>14</sup> The President brokered Kshs 500 million bailout for the company in 2015 after holding a meeting with some of the political leaders from Western Kenya.<sup>15</sup> This was largely seen as a political move amid denials by the president, Mr. Uhuru Kenyatta.<sup>16</sup> Although some of the top management of the company have been sacked, no one has been prosecuted so far for the embezzlement of funds and malpractices at the company.<sup>17</sup>

Another company that has been finding itself in financial distress is the Uchumi Supermarkets Limited a Kenya-based company which was formed as a result of a merger of several government corporations, that is Uchumi shareholders-Industrial Commercial & Development Corporation (ICDC), Kenya Wine Agencies Limited (KWAL) and Kenya National Trading Corporation (KNTC) and set up under the management of Standa SPA of Italy, which had a significant presence in Europe and vast retail experience and were tasked to help in the training of personnel and in the management until such a time when the Kenyan personnel were in a

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<sup>11</sup> ibid

<sup>12</sup> Gibendi Ramenya (2012, Dec 10) "Top Managers made Mumias Lose over Kshs 1 Billion, Audit Reveals" *Daily Nation*, retrieved 3<sup>rd</sup> Feb, 2016 from <http://mobile.nation.co.ke/business/Audit-blames-top-managers-for-Sh1-1bn-loss-by-Mumias/-/1950106/2551960/-/format/xhtml/-/630drjz/-/index.html>.

<sup>13</sup> . ibid

<sup>14</sup> Moses Odhiambo and Benson Amadala (2015, June 11) "Mumias on brink of collapse, urgently needs Sh1bn bailout" *Business Daily* p.7

<sup>15</sup> ibid

<sup>16</sup> ibid

<sup>17</sup> Gibendi Ramenya (2012, Dec 10) "Top Managers made Mumias Lose over Kshs 1 Billion, Audit Reveals" *Daily Nation*, retrieved 3<sup>rd</sup> Feb, 2016 from <http://mobile.nation.co.ke/business/Audit-blames-top-managers-for-Sh1-1bn-loss-by-Mumias/-/1950106/2551960/-/format/xhtml/-/630drjz/-/index.html>.

position to take over the steering forward of the organization.<sup>18</sup> In the 1990's Uchumi initiated the concept of hyper market in, however the retailer fell into financial and operational difficulties in the early 2000s, characterized by a huge debt that reached Kshs 2 billion, and was put under receivership in 2006.<sup>19</sup> The authority in charge of capital markets in Kenya suspended the company from trading its shares at the Nairobi Stock Exchange.<sup>20</sup>

Government came to its rescue by advancing a bailout of Kshs 675 million and on July 15, 2006, the company resumed operations.<sup>21</sup> A new crop of managers, led by Jonathan Ciano as the Chief Executive Officer, came in to inject some fresh breath into the firm, however, Mr. Ciano's stay in Uchumi ended with controversy and prompted his sacking together with other top management in the Company on allegations of gross misconduct and gross negligence.<sup>22</sup> Again no prosecutions have been carried out so far in this case as well. Uchumi Supermarkets is currently closing most of its redundant shops in a bid to restructure and bring its back to profitability.<sup>23</sup>

Another government owned company to be bailed out in the recent past is, Kenya's national carrier Kenya Airways which was formed in the year 1977 after the collapse of the East African Community and consequent dissolution of the East African Airways.<sup>24</sup> In 1995, the Government of Kenya upon the advice of International Finance Corporation (IFC) on privatized Kenya

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<sup>18</sup> ibid

<sup>19</sup> Kwama Kenneth (2015, July 7) "Past beneficiaries of state bailout funds" *Standard Digital*. Retrieved 3<sup>rd</sup> Mar, 2016 from <http://www.standardmedia.co.ke/business/article/2000168256/past-beneficiaries-of-state-bailout-funds>.

<sup>20</sup> ibid

<sup>21</sup> ibid

<sup>22</sup> Miriri Duncan (2015 June 1) "Kenya's Uchumi Supermarkets sacks CEO, probing books over rights issue cash" *Reuters*, retrieved 3<sup>rd</sup> March, 2016 from <http://af.reuters.com/article/investingNews/idAFKBN0OV18X20150615?pageNumber=2&virtualBrandChannel=0>

<sup>23</sup> ibid

<sup>24</sup> Kenya Airways "History on Kenya Airways" retrieved 3<sup>rd</sup> March, 2016 from [https://www.kenya-airways.com/global/About\\_Kenya\\_Airways/Corporate\\_Information/History/](https://www.kenya-airways.com/global/About_Kenya_Airways/Corporate_Information/History/)

Airways, which saw the government sell 26 percent of its shares in the airline to a strategic partner which saw the airline increase its number of flights which saw the airline's flights grow by 61 percent in a span of six years and as a result Nairobi was able to develop into a regional hub.<sup>25</sup> This sale which was concluded in the month of December 1995 and an initial public share offering was done in April 1996 which saw the Kenya airways become profitable for several years until this trend was circumvented.<sup>26</sup> In 2015 Kenya Airways posted a loss of Kshs 25 billion and a preliminary report by a senate committee which was chaired by Prof. Anyang' Nyong'o revealed that some of the reasons that resulted in the loss making by the national carrier are; an expensive ticketing system, routine arrangements with other airlines, a poor employee management policy, fuel hedging, leasing and buying of aircrafts through third party companies and frequent flight cancellation.<sup>27</sup> In May 2015, a bailout plan contained in the supplementary budget was formulated and it was tabled in Parliament as a result of the airline having navigated through strong operational challenges that left it with great losses in the past couple of years and was struggling financially to meet its financial and operational obligations.<sup>28</sup> The bailout proposal was to be in the form of a loan, although the terms were yet to be made public and was also proposed to cushion the airline against the headache of taking more expensive commercial loans that would continue straining its cash flow.<sup>29</sup> At the time the airline's liabilities already stood at Ksh70 billion and it was relying on debt to pay its workforce, extending the extent of the

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<sup>25</sup> International Finance Corporation (2008 Dec) *Public-Private Partnership Stories, Kenya Airways Privatization* (Ke)

<sup>26</sup> *ibid*

<sup>27</sup> Gibendi Ramenya(2015) *5 Reasons Why Kenya Airways Sunk Into Losses* [Web log post] Retrieved 3<sup>rd</sup> March, 2016 from <https://tuko.co.ke/26914-revealed-5-reasons-why-kenya-airways-sunk-into-losses.html>

<sup>28</sup> Mwaniki Charles (2015) "May 28) Kenya Airways gets Sh4.2 billion Treasury bailout" *Business Daily*, Retrieved 3<sup>rd</sup> March, 2016 from [www.businessdailyafrica.com](http://www.businessdailyafrica.com)

<sup>29</sup> *ibid*

financial difficulties it was already facing.<sup>30</sup> Although some blame was imputed on the top management of Kenya Airways, none of them has been prosecuted so far.

## **1.2 STATEMENT OF THE PROBLEM**

In light of the foregoing, we can see that the decision to bailout a public company in financial distress has been brokered by individuals or decided by a parliamentary committee. It is clear that there is no legislative framework for bailing out of listed public companies. While I support bailouts that are necessary in safeguarding jobs of innocent taxpayers and their families' source of livelihood, I also hold the view that there should be in place clear guidelines contained in a legislation. It is on this basis that this study is premised on, to interrogate the financial legal framework for granting financial bailouts to listed public companies that find themselves in financial distress exists and to find out what are the necessary reforms needed to guide bailouts of failing public companies in order to ensure that financial legislative framework put in place protects the public interest.

## **1.3 RESEARCH QUESTIONS**

- i. What is the current legal framework for financial bailouts of public companies in Kenya?
- ii. Is the legal framework effective in protecting the public interest?
- iii. If not what reforms are necessary to ensure that the legislative framework protects public interest?

## **1.4 OBJECTIVES**

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<sup>30</sup> ibid

The study is geared towards interrogating whether the state has any legal and ethical justification to use the taxpayers' money to resuscitate dying public companies when there are no guidelines in place for such expenditure of taxpayers' monies. Secondly, it will show that there is no legal framework in place that provides for financial bailout of public companies by the state. Thirdly, the paper seeks to find out in whose interest or benefit is bailouts for public companies by the state and whether bailouts are necessary or not.

### **1.5 SCOPE AND LIMITATION.**

The scope of this study is the financial legislative framework dealing with government expenditure and the Constitution of Kenya, 2010.

The limitations of the study are, firstly, the issue of bailout though not new in Kenya has not been interrogated and there are no authored books, journals, articles in Kenya written on bailouts and no legislative framework has been developed so far to deal with the issue of bailouts. Secondly, the work that has been written on bailouts in other jurisdictions is limited to internet journals, articles, publications and blogs.

The other limitation is the fact that very few understand the concept of financial bailouts and the few people who would shed light on how bailouts are carried out in Kenya are difficult to find due to their time constraints, busy schedules and government bureaucracy.

### **1.6 THEORETICAL FRAMEWORK**

#### **1.6.1 Utilitarianism**

This is the principle which holds that utility or the greatest happiness principle is justified by an act being right if it is geared towards achieving happiness and wrong if it is geared towards

achieving pain.<sup>31</sup> This is to say that pleasure and freedom from pain are the envisaged end results or the only desirable outcomes expected in the promotion of pleasure and prevention of pain and any other act that brings an outcome different from this is wrongful.<sup>32</sup>

Some philosophers have described utilitarianism as a teleological system premised on an ethical system that decides morals by the end results and this is credited to the philosophies of John Stuart Mills and Jeremy Bentham who were the first to view utilitarianism in this respect.<sup>33</sup>

Jeremy Bentham a philosopher and jurist born on the 15<sup>th</sup> February in the year 1748 in Spitalfields, London, is mostly known for his philosophy premised on morals and most importantly utilitarianism as a principle that evaluates actions on the basis of the consequences they bring about.<sup>34</sup> He advanced his system of ethics within the idea of pleasure, which basically pursued physical pleasure and avoided physical pain and which was built on ancient hedonism.<sup>35</sup>

Bentham's views are premised on a type of calculus which he refers to as the utilitarian calculus which finds its basis on the view that moral acts are those that increase the amount of pleasure and decrease pain. This is also coined in other terms to mean that an act is right if it will bring great amounts of pleasure and wrong if it will reduce the amount of pain.<sup>36</sup>

This philosophy was modified and developed differently from Bentham's hedonism by John Stuart Mill, a philosopher who used the same calculus to center more on the maximization of happiness in general by calculating the greatest good for the greatest number.<sup>37</sup> According to Mills, happiness is as a result of an action or conduct, which cannot be dispensed with in the

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<sup>31</sup> Mill J Stuart (1863) *Utilitarianism* (1 ed), London: Parker, Son & Bourn West Strand p26

<sup>32</sup> *ibid*

<sup>33</sup> Mill J Stuart , *Utilitarianism* (2001) Batoche Books Kitchener. Retrieved 5<sup>th</sup> Nov, 2015 from <http://socserv.mcmaster.ca/econ/ugcm/3ll3/mill/utilitarianism.pdf>.

<sup>34</sup> Kerby A (2004, May 27) *Utilitarianism: The greatest good for the greatest number*, retrieved 5<sup>th</sup> Nov, 2015 from <https://www.probe.org/utilitarianism-the-greatest-good-for-the-greatest-number/>.

<sup>35</sup> *ibid*

<sup>36</sup> *ibid*

<sup>37</sup> *ibid*

acceptance of the utilitarian standard. In his view the indispensable nature of the conduct is based on the assumption that the greatest happiness envisaged is not that of an individual person but the greatest amount of happiness of all people, altogether.<sup>38</sup> While Bentham used the calculus in a quantitative sense, Mill used this calculus in a qualitative sense.<sup>39</sup> Bentham wrote that the principle of utility is that which permits or rejects every action whatsoever, in as far as it has a tendency to reduce or increase the happiness of the party whose interest is in focus.<sup>40</sup>

From a legal perspective, a policy would be good if by its application and adherence, it will cause the greatest good to the greatest number of people. Depending on how one wants to look at bailouts, both the positive application of the utilitarian theory and also the negative application of it would suffice, as long as the greatest good will be for the greatest number of people. This means that if bailouts were to be of greatest good to the greatest number of people then they are justified. A criticism of the Utilitarian theory is that the greatest good might not be achieved by say a few individuals getting more benefits than others while the majority are harmed just a little.<sup>41</sup> This is for example where a corporation that has employed a large number of people and is struggling financially, is bailed out by the government. By saving the jobs of these employees, only that number of people benefits, the greatest number of people, however, might be forced to spend a little more on some commodities as the jobs of those employees are saved.<sup>42</sup> In this case the theory is applied in the negative.

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<sup>38</sup> Mill John Stuart (1863) *Utilitarianism* (1 ed), London: Parker, Son & Bourn West Strand p26

<sup>39</sup> Kerby Anderson (2004, May 27) *Utilitarianism: The greatest good for the greatest number*, retrieved 5<sup>th</sup> Nov, 2015 from <https://www.probe.org/utilitarianism-the-greatest-good-for-the-greatest-number/>.

<sup>40</sup> *ibid*

<sup>41</sup> McGee Robert W (2009, Nov) "An Ethical Analysis of Corporate Bailouts" *The Icfai University Journal of Corporate and Securities Law* Vol. VI SSRN Working paper Nos 20.

<sup>42</sup> *ibid*

## 1.7 LITERATURE REVIEW

Bailing of corporations by governments did not start with the financial crisis of the United States in 2008. <sup>43</sup>In 1970, the government came to the aid of the Penn Central Railroad which collapsed and left many banks with worthless piece of papers. President Nixon agreed to come to its rescue since it was seen as vital to the national defense interests. <sup>44</sup>The Federal Reserve pumped it with liquidity and later the Congress provided it with loan guarantees and billions of direct spending to create Amtrak, which merged with Penn Central Railroad to form the now Conrail which was privatized in 1986. <sup>45</sup>In 1970 the Emergency Loan Guarantee Act was passed to support major businesses facing financial constraints and Lockheed was the first company to be bailed out under this legislation which according to President Nixon was necessary as a matter of national interest. <sup>46</sup> In 1974, the Franklin National Bank almost bowed down but was bailed out as it was believed that if it closed doors, then other banks would also close shop, however, it was later taken over by the European Bank Consortium. <sup>47</sup> In 1980 and 1984 the government bailed out Chrysler and Continental Illinois National Bank respectively. <sup>48</sup> The savings and loans industry went out of control in the 1980s' presumably because of engaging in new business ventures that they had no prior understanding in with the support of the Garn-St. Germain Depository Institutions Act of 1982. <sup>49</sup> During this period, more than two thousand jobs were lost and more than one thousand people were charged with fraud. <sup>50</sup>Even before the 9/11 terrorist attacks, the

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<sup>43</sup>Benton E. Gup (2004) *Too Big To Fail: Policies and Practices in Government Bailouts*. Westport, CT: Praeger p33

<sup>44</sup> Ibid ,34

<sup>45</sup> Ibid ,35

<sup>46</sup> Ibid ,36

<sup>47</sup> Ibid ,37

<sup>48</sup> Ibid ,38

<sup>49</sup> Ibid ,39

<sup>50</sup> ibid

airline industry was in trouble, and the terrorist attack gave it a final blow. President George W Bush and Congress, gave it a new lease of life through the Air Transportation Safety and Stabilization Act.<sup>51</sup>

The 2008-2009 has come to be known as the mother of all bailouts where numerous corporations in almost every sector has come to be bailed out, including Bear Stearns, Freddie Mac, Fannie Mae, Citigroup, JP Morgan Chase, Wells Fargo amongst others.<sup>52</sup> This article is limited to the history of bailouts as they have occurred in the USA and highlights some of the legislation that was enacted in order to allow the state to bail out state corporations in the US. This, however does not apply to the Kenyan, where so far no legal framework has been put in place to guide how bailouts of public listed companies should be conducted which is the focus of this study. The article, however, shows that the bailouts were not done by Presidential proclamation but legislation was enacted in order to allow such spending of taxpayer's money by the US government, unlike the situation in Kenya.

Professor Ann Cudd, a Dean of the College of Arts and Sciences at Boston University, in her essay, *A Contractarian Approach in Corporate Bailouts*, interrogates the moral legitimacy of bailouts against the concept of mutual advantage contractarianism.<sup>53</sup> She bases her argument on the theory of the rational man and submits that if a government policy is legitimate a reasonable or logical man pursuing his own interests would agree to it under the circumstances, whereby there is absence of fraud, threat and violence.<sup>54</sup> She claims that the only justification of bailouts

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<sup>51</sup> Berberoglu Berch (2010) *The Global Capitalist Crisis and Its Aftermath: The Causes and Consequences of the Great Recession of 2008-2009* United Kingdom: Taylor & Francis Ltd p2-3

<sup>52</sup> Myers – Lipton Scott J (2009) *Rebuild America: Solving the Economic Crisis Through Civic Works*, Minnesota Routledge (Taylor & Francis Group) p2

<sup>53</sup> Cudd Anne E:A (2013) "Contractarian Approach to Corporate Bailouts," *The Georgetown Journal of Law & Public Policy*. Vol. 11 p290-295

<sup>54</sup> Ibid

under this method are those whose purpose is to curb a massive systemic failure and should be structured in a way that it is protected from rent-seeking behavior from those receiving bailouts, are filtered through consumers as much as possible and are globally acceptable as a mitigating measure to ensure that there is sustainability of the economy.<sup>55</sup>

In her essay, *Responsibility, Repair and Redistribution in the Wake of Financial Crisis*, Amy J. Sepinwall, J.D., Ph.D. argues that the responsibility of providing corporate bailouts is not limited directly to culpable parties like banks, regulators, lenders, borrowers or the American public who accepted with enthusiasm the flavour of easy money that encouraged the reckless speculation, but extends to all Americans who may be made to pay for being part of the community that allowed the financial crisis to occur.<sup>56</sup> She further, argues that the theory of shared responsibility reduces the existing inequalities of wealth and poses two questions, firstly, who is the bearer of the responsibility for the costs incurred as a result of the bailouts brought about by the economic crunch and secondly, who is the bearer of the duty or the obligation of financially backing the bailouts undertaken by the U.S. government? In answering these questions, in the end she concludes that all Americans bear the financial burden of their government supporting these bailouts.<sup>57</sup> This article though focusing on the U.S, echoes the consequences of bailouts undertaken by governments' world over. The situation in Kenya is no different as any bailout undertaken by government affects the taxpayer, who might not end up benefiting from a particular bailout of a listed public company. By understanding the effects of bailouts, and more importantly the fact that the results of the systemic failures in the public listed companies is shared by all Kenyan taxpayers their participation in such failure notwithstanding, would assist

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<sup>55</sup> ibid

<sup>56</sup> Sepinwall A J (2013) "Responsibility, Repair & Redistribution in the Wake of the Financial Crisis." Retrieved 16<sup>th</sup> Feb, 2016 from <https://works.bepress.com/amysepinwall/12/>

<sup>57</sup> ibid

in coming up with a comprehensive legal framework to guide the conduct of government in bailing out public listed companies that find themselves in financial distress and how to deal with the management of such failing listed public companies.

Professor Jason F. Brennan in his essay, *The Right to Good Faith: How Crony Capitalism Delegitimizes the Administrative State*, argues that citizens who are subjected to the coercive rule of a state have a fundamental right to a government that exercises its powers competently and in good faith and contends that permit bailouts amongst others infringe on this right and therefore cannot be ethically justified.<sup>58</sup>

Professor Michael Huemer, argues that bailouts are by their very nature unjust.<sup>59</sup> He goes further and argues that as an matter that can be verifiable by either observation or experience, the costs and benefits of bailouts has been misleading in a way that when one takes cognizance of it, it ends up undermining the empirical case for the bailouts and correctly points out that bailouts unavoidably lead to political corruption. Professor David Ciepley, of the Political Science department at University of Denver is of the view that it is a mistake to view the choice of whether to bail corporations or not to bail them as interfering or refraining from interfering with free markets as there is no question of free markets in a failing corporation and is of the view that the real battle of minds is deciding between bailouts and bankruptcy both of which are government creatures of departure from free markets.<sup>60</sup> He concludes by saying that the question is not whether to bailout corporations, because they are already State supported, but in which

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<sup>58</sup> Brennan J.F (2013) “The Right to Good Faith: How Crony Capitalism Delegitimizes the Administrative State” *The Georgetown Law Journal of Law & Public Policy* Vol 11 p.313-317

<sup>59</sup>McNaughton, David (2006, Sept 10) edited by ,Michael Huemer: “Ethical Intuitionism”, *Notre Dame Philosophical Reviews*. ISSN 1538-1617.

<sup>60</sup>John Hasnas (2013) “Forward to the Ethics of Bailouts and Government Support of Corporations, Public Benefit or Crony Capitalism?” *The Georgetown Journal of Law & Public Policy* Vol. 11 p.318

way should this support be, that is to say by what means should the support be?<sup>61</sup> Considering that most corporations are owned by people with means, the question that begs for answer is, who benefits from the bailouts undertaken by government and in whose interest are the bailouts?

Professor Marc Allen Eisner of Wesleyan University, Middletown, Connecticut, in his essay, *Before the Third Act: Crony Capitalism and the Origins of the Bailout*, opines that bailouts are a product of crony capitalism and in his examination in to the nature of bailouts, he concludes that they are a furtherance of past favoritisms and as such their benefits are short lived and could actually be setting ground for the next financial crisis.<sup>62</sup> Although most of these authors were addressing the situation in the U.S, this knowledge would come in handy to assist the situation in bailouts as undertaken by government in Kenya, where most bailouts have been criticized to favour the rich citizens who have large shareholding in public listed companies and who mostly are viewed as cronies of the government of the day. This understanding would assist framers of the legal framework on bailouts of public listed companies to come up with the criteria of which public listed company would qualify for bailouts by government and the grounds that would qualify the said companies to getting financial bailout from government.

Other writers are of the view that bailouts have a public benefit even as they agree on the capitalism nature and one such writer is Professor Marilyn Friedman, an American Philosopher. In her essay, *To Bailout or Not to Bailout: Moral Hazard and other Ethical Considerations*, Friedman opines that bailouts have both a capital cronyism and public benefit, in that they play a

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<sup>61</sup> ibid

<sup>62</sup>Eisner M.A (2013) “Before the Third Act: Crony Capitalism and the Origins of the Financial Crisis” *The Georgetown Journal of Law & Public Policy* Vol. 11 p271

role of preserving jobs an important factor in their favour.<sup>63</sup> She distinguishes between bailouts of financial institutions and bailouts of other corporations.<sup>64</sup>

Professor Morris on the other hand, in his essay, *Corrupt Capitalism and Institutional Reform: Some Worries*, replaces the word crony with corrupt, in defining the responsiveness of the federal government to parochial and special interest.<sup>65</sup> His worry though is that efforts to eliminate or reduce such responsiveness will be incompatible with effective government of such a large polity as that of the United States, which in his opinion requires the responsiveness of both the regional and local interests to resist the pressure for succession.<sup>66</sup>

In a case where the government owns a substantial part of a corporation or where the corporation is considered too big to fail, is it possible for the government to make a choice by committing itself not to bail even if it means collapsing of the corporations or as a way of restricting other such corporations? Well, as regards this question, several writers have concluded, that it is not possible. The reason advanced by these writers is that through evidence collected from several countries that experienced financial crisis recently, the answer is in the negative.<sup>67</sup> They suggest that the alternative is make the companies to be too big to fail in the first place. Professor Boyd's view in his essay, *Bringing the GSE's Back In; Federal Housing Policy and The Ethics of Bailouts*, is that the failure of GSEs is not attributable to Congressional affordable housing mandates, but to the same economic incentives that affected the fully private segment of the

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<sup>63</sup> Friedman Marilyn (2013) "To Bail or Not Bail: Moral Hazard and Other Ethical Considerations" *The Georgetown Journal of Law & Public Policy* Vol. 11 p271

<sup>64</sup> *ibid*

<sup>65</sup> Morris C (2013) "Corrupt Capitalism and Institutional Reform: Some Worries" *The Georgetown Journal of Law & Public Policy* Vol. 11 p427-431

<sup>66</sup> *ibid*

<sup>67</sup> Hasnas John (2013) "Forward to the Ethics of Bailouts and Government Support of Corporations, Public Benefit or Crony Capitalism?" *The Georgetown Journal of Law & Public Policy* Vol. 11

market.<sup>68</sup> This is a journal of an institution in the USA whose main focus is the ethical justification of bailouts and their implications in the society. It does not in any way address the legislative or legal policy of bailouts. These articles do not apply to the case in study which endeavors to critic the legal framework of bailing out of public companies in Kenya, but they give an insight of how failing companies can be handled, what to consider when coming up with legislative framework to govern bailouts of public listed companies by understanding the moral and ethical justifications of bailouts and the consequences thereof.

In the article, *A Framework for bailout regulation*, the authors are of the opinion that with the financial crisis of 2008, the term bailout has been abused immensely in the political arena and they examine bailouts from a financial perspective and also examine earlier bailouts and what policy considerations justified them as well as their designs.<sup>69</sup> They argue that bailing out of numerous financial institutions and two automobile firms by the United States government raised controversy and as a result, Congress sought to remedy this through the Dodd Frank Act.<sup>70</sup> This article is limited to the financial crisis that occurred in the USA and does not discuss the situation in Kenya on which this study is premised, however, it shows an effort of the US government in coming up with legislation to guide conduct of government in bailing out listed public companies, which can be a guide to Kenya.

William Cox a retired supervising prosecutor for the State Bar of California, is of the view in his article *Betrayed by the bailout: the death of democracy*, that by Congress enacting legislation that allowed the treasury secretary to take action that he deems necessary to promote financial

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<sup>68</sup> Professor Boyd Richard (2013) "Bringing the GSE's Back In; Federal Housing Policy and The Ethics of Bailouts," *The Georgetown Journal of Law & Public Policy* Vol. 11 p533

<sup>69</sup> Anthony J. Casey & Eric A. Posner (2015, Jan 26), "A Framework for Bailout Regulation" *University of Chicago Law School Journal* vol. 11 p. 516

<sup>70</sup> *ibid*

market stability, the American leadership betrayed its citizens, the taxpayers, since it did not hold public discussions on the matter.<sup>71</sup> He further opines that, members of the Congress who voted for the bailout of the Wall Street violated their oath of office to support and defend the constitution and to bear faith and allegiance as well as to faithfully discharge their duties by abdicating their duties and allowing those responsible for the economic disaster to deal with the situation without involving the public.<sup>72</sup> He further states that by enacting the Emergency Economic Stabilization Act of 2008, Congress gave a deaf ear to great concerns expressed by almost two hundred economists and a strong public opinion who were opposed to the bailouts.<sup>73</sup> According to Cox, the economists viewed the bailout plan as a subsidy to the investors at the expense of the taxpayers and a desperate and short sighted move.<sup>74</sup> This article is limited to the bailouts that occurred in the United States and does not apply to the bailouts as carried out in Kenya which is the focus of this study, but the article brings out the importance of public participation in coming up with a legal framework on bailing out of listed public companies, which is also entrenched in the Constitution of Kenya, 2010.

Adam J. Levitin, in his article, *In Defense of Bailouts*, proposes a framework for relooking at the legitimacy of bailouts by interrogating the institutional design. In his quest, he identifies two pertinent questions, the first one revolving around the ad hoc manner of bailouts or whether bailouts should be institutionalised and the second one being on the assumption of responsibility of the cost of bailout and whether creditors of the bailed out firms can be forced to accept less

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<sup>71</sup> Cox William J (2008 ,October 23), "Betrayed by the Bailout: The Death of Democracy, *Global Research*," Retrieved 31st Oct, 2016 at [www.globalresearch.ca/betrayed-by-the-bailout-the-death-of-democracy/10](http://www.globalresearch.ca/betrayed-by-the-bailout-the-death-of-democracy/10).

<sup>72</sup> ibid

<sup>73</sup> ibid

<sup>74</sup> ibid

than the full payment of part of the bailout.<sup>75</sup> On the first question, the author does not give definitive answers and is of the view that the answer would depend on an individual perception of the corresponding political accountability and the acceptance of the agencies and the congress itself.<sup>76</sup> As regards the second issue, the author argues that acceptance of a reduction of the value of the shares by creditors is essential in reducing government losses, moral hazards and ensuring the political legitimacy of bailouts and opines that if the creditors of a firm know that they will incur a reduction of the value of the shares upon the firm failing or closing shop, then this will prompt them to increase their prices to indicate that risk and therefore the more the riskier a firm's behavior is, then the more it will be expensive for the failing corporation.<sup>77</sup> However, for this to be workable, the author proposes a haircut mechanism that allows haircuts to be enforced on some creditors immediately at the time of the bailout while permitting other critical creditors to take their haircuts over time and that this can be done by using recoupment taxes and force placed investments to avoid stressing critical creditors' finances during the time of the crisis.<sup>78</sup> According to the author this article represents a first attempt to try and address the structural and mechanical aspects of bailouts and its processes in the legal literature and goes further to accuse the legal scholarship of ignoring the issue of systemic risk or bailouts.<sup>79</sup> Although this article was written as a response to the major bailouts of 2008 in , it gives a good direction to framing of regulation of bailouts which Kenya can borrow from as this study is focused on the legal framework of bailouts in Kenya.

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<sup>75</sup> Levitin Adam J (2011) "In Defense of Bailouts," *The Georgetown Law Journal* Vol. 99 p435

<sup>76</sup> Ibid, 436

<sup>77</sup> Ibid, 438

<sup>78</sup> Ibid, 439

<sup>79</sup> Ibid

As regards moral hazard, Kenneth Ayotte & David A. Skeel, Jr in their article, *Bankruptcy or Bailouts?* state that, moral hazard occurs when a person believes that they are protected and therefore cannot bear any consequences, therefore reluctant to take any precautions to avert the risk.<sup>80</sup> The authors are of the view that when there is a possibility of subsidized government funding before a company is declared bankrupt, then this possibility of getting the state funding in itself may promote moral hazard from both the probable investors and the failing company. A potential buyer of a distraught company might, instead of buying the failing firm at an earlier date, wait until the financial position of the failing company is so financially distressed that it can influence for taxpayer assistance as an underlying condition to the acquiring of the failing company or firm.<sup>81</sup> In the same breath, the top managers of the distraught firm may make deliberate fail steps to get ready for bankruptcy if they know that the firm's case for a governmental financial backing becomes tenable if bankruptcy is not a sensible option.<sup>82</sup> Consequently, they argue that the very uncertainty that the government financing is trying to cure may be contributed by the very option of state funding to come to aid of the failing company.<sup>83</sup> The authors opine that the very move that the state made to penalize shareholders' moral hazard made in several resolutions by the failing companies specifically those that took place at the onset of the crisis, this move only amplified the moral hazard of debt.<sup>84</sup>

Further they argue that rescue loans or bailouts often allows government interference at the heart of the system of governance of the company that is receiving a loan.<sup>85</sup> Ayotte and Skeel believe that it is preferable to allow the bankruptcy process to work other than the extemporaneous

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<sup>80</sup> Ayotte K & Skeel David Jr (2010) "Bankruptcy or Bailouts?" *The Journal of Corporation Law*, Vol. 35 p3

<sup>81</sup> Ibid

<sup>82</sup> Ibid, 4

<sup>83</sup> Ibid

<sup>84</sup> Ibid, 5

<sup>85</sup> Ibid, 6

approach of discouraging bankruptcy with last minute rescue efforts.<sup>86</sup> They further believe that the bailout plan preferred in trying to rescue financially distressed firms brought more uncertainty, made the cost of moral hazard to rise and poured water on the incentives of the private sector to act in resolving the financial distress before firms sunk further into the economic distress which in fact increased the cost of the government rescue plan.<sup>87</sup> While acknowledging the downside of resolving distress of corporations through bankruptcy, they still hold the view that this is not sufficient enough to justify bailing out of failing companies.<sup>88</sup> In their opinion, the law offers distressed firms some advantage under bankruptcy that would not be available outside of bankruptcy which helps in determining the allocation of rights to the remaining claimants, preserve the value of the firm and handle moral hazard concerns in a more effective manner.<sup>89</sup> This problem addressed by the authors although identified in corporations in USA, it manifests in corporations that have been rescued by government in Kenya and the article could be of importance in helping Kenyans understand the problem of moral hazard, which has also been discussed by Levitin elsewhere in this thesis paper, which is important when drafting legislation on bailouts as these companies are run by individuals who are tasked with the duty of making decisions for the companies.

In an article appearing on the Mediamax<sup>90</sup> website, *State bailouts for ailing firms bruising taxpayers*, stated that bailouts in Kenya are nothing new.<sup>91</sup> This web log post also lists several companies that have been bailed out before in Kenya, amongst them, Rivatex, Kenya airways, Kenya Meat Commission, Mumias Sugar, Uchumi Supermarkets which bailouts have come to be

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<sup>86</sup> Ibid,6-7

<sup>87</sup> Ibid

<sup>88</sup> Ibid,9-10

<sup>89</sup> Ibid

<sup>90</sup> Mediamax is one of the media houses in Kenya.

<sup>91</sup> Ibid

viewed as financial burdens on tax payers, as money allocated for development is redirected to resuscitate dying public companies, for example, in the financial year 2015/16, Rivatex was bailed out on a Kenya Shilling Five million bailout with money having to be transferred from the ministry of Industrialization and Enterprise Development in order to enable Rivatex to acquire new equipment for its textile factory while Pyrethrum Board of Kenya was given an allocation of Kenya Shilling Three Hundred million as part of the firm's revival plan.<sup>92</sup>

It further states that the government also planned to resuscitate Kenya Meat Commission with a fresh cash injection of at least Kenya Shilling Six Hundred million on the cards as it currently operated below capacity.<sup>93</sup> John Kirimi, a chief executive with Sterlin Investment Bank opines that bailouts should be approached in a holistic manner, taking into account the reasons behind the problems facing companies and most especially bringing the management of these failing companies to account before a company is bailed out<sup>94</sup>

With the financial crisis in the USA in 2008, came the Dodd–Frank Wall Street Reform and Consumer Protection Act, whose purpose was to develop a healthy economic foundation for job growth, protection of consumers, bring sanity in the New York Stock Exchange and hefty dividends, do away with bailouts, discourage firms from being too big to fail and consequently thwart a repeat financial crisis in the USA.<sup>95</sup>The Act's main objective was to end bailouts by creating a soft landing for liquidating failed financial firms, bring on board tough new capital and

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<sup>92</sup>Aminga Fred (2015, June 23) "State bailouts for ailing firms bruise taxpayers," *People's Daily*, Retrieved 3rd April, 2016 at <http://www.mediamaxnetwork.co.ke/people-daily/151130/state-bailouts-for-ailing-firms-bruise-taxpayers/>.

<sup>93</sup> ibid

<sup>94</sup> Ibid, 2

<sup>95</sup> United States Senate (2010, Sept 30) "Dodd Frank Wall Street Reform and Consumer Protection Act." (USA) retrieved 3rd April, 2016 from, [http://www.banking.senate.gov/public/files/070110\\_Dodd\\_Frank\\_Wall\\_Street\\_Reform\\_comprehensive\\_summary\\_Final.pdf](http://www.banking.senate.gov/public/files/070110_Dodd_Frank_Wall_Street_Reform_comprehensive_summary_Final.pdf)

rigorous prerequisites that make it unappealing to get too big, update the Federal's power to accommodate a general backing while not entertaining support for private firms and establish thorough measures and parameters to safeguard the economy which includes consumers, investors.<sup>96</sup> The Act also established a Consumer Financial Protection Bureau which is tasked with amongst other things to be keen and watchful for fishy deals and schemes meaning that the consumers would not have to wait for Congress to pass laws to protect them from poor business ethics.<sup>97</sup> This Act also created a new office to educate on matters finance, a national hotline for complaints by consumers and consolidated the consumer protection office for accountability purposes.<sup>98</sup> Established in the Act also was the Financial Stability Oversight Council, made up of ten federal financial regulators, an independent member and five non-voting members whose responsibility is to identify and act upon any budding risks occurring within the economic system.<sup>99</sup> The Act also addresses governance issues, executive compensation rights of shareholders to non-binding vote on executive pay and golden parachutes.<sup>100</sup> The Securities and Economic Commission is given powers to allow shareholders proxy authority to nominate directors and provides that the standards for trading on the securities exchange requiring compensation committee to only include independent directors only.<sup>101</sup> It also requires public companies to come up with policies to revoke executive compensation if it was based on misrepresented financial statements that are not in tandem with the set accounting standards and to direct the SEC to shed more light on disclosures which concern compensation which includes compelling a company to provide comparative charts of executive remuneration against the stock

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<sup>96</sup> Ibid, art 1

<sup>97</sup> Ibid, art 2

<sup>98</sup> Ibid, art 3

<sup>99</sup> Ibid, art 4

<sup>100</sup> Ibid, art 5

<sup>101</sup> Ibid, art 6

performance over a five year period.<sup>102</sup> The application of this legislation is, however, limited to the United States of America and does not apply to bailouts in Kenya, which is the focus of study.

## **1.8 CONCEPTUAL FRAMEWORK**

This includes a combination of theories and extensive notions which are meant to help a researcher to accurately point or pick out the problem they are looking at in order to be able to frame their questions in a way that would assist them in finding the suitable literature.<sup>103</sup> A conceptual framework is composed of a set of variables such as independent variable, dependent variable and intervening variable.<sup>104</sup> The independent variable as shown in figure 1 is composed of: characteristics of legal framework for financial bailout with indicators such as control huge systematic failure, acceptable to global partners, filtered through consumers, protection from rent seeking behavior; importance of legal framework for financial bailout having such indicators as government, public companies, banks and general public; effects of legal framework for financial bailout whose indicators are boosts corruption, hampers development and jobs preservation. The intervening variable is determined by the needed reforms whose indicators are bailout policies and holding public discussions. The dependent variable is measured by the performance of public companies in Kenya.

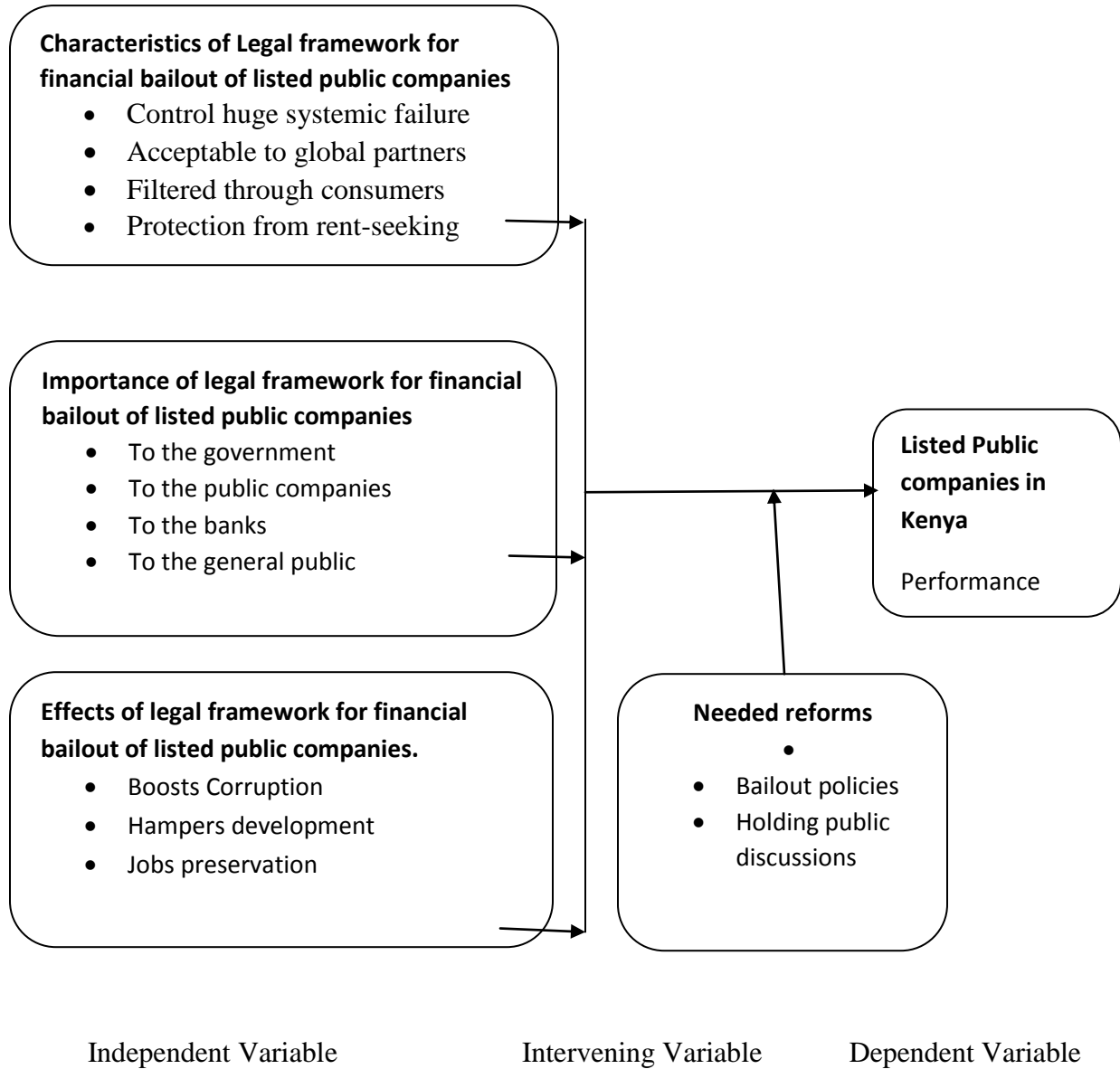
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<sup>102</sup> Ibid, art 10

<sup>103</sup> Smith, R. (2004) "Exploring the usefulness of a conceptual framework as a research tool. A researcher's reflections" *Issues in Educational Research*, p167-180

<sup>104</sup> Ibid

### 1.8.1 CONCEPTUAL FRAMEWORK



## **1.9 METHODOLOGY**

The research method used is qualitative methodology and the technique is the target respondent interviews. The data was collected through interviews and questionnaires. The expected outcome of the research is to show the ad hoc nature of the authority to bailout public companies by the government and the inadequacies of the current financial legal framework on government expenditure as regards to bailouts of public companies.

This thesis paper will make recommendations to assist the government to come up with ways to regulate bailouts of public companies, come up with rules to strictly hold the directors and management of these companies to account and to exploit other avenues of assisting public companies struggling financially and to only bail them out as a matter of last resort.

The target respondent interviews is an acceptable primary data collection method and is appropriate for this research for the reason that bailouts are understood only by specific persons as they are rarely discussed and very little, if any has been written about them as a concept in Kenya and therefore, information about them is with specific persons.

Three stages used to identify the respondents were.

- a) Generation of a list of various economic sectors identified randomly.
- b) Selection of the specific sectors
- c) Selection of interviewees

The data was collected using questionnaires and interviews. A sample questionnaires are attached as appendix 1, 2 and 3, respectively.

The secondary data collection method applied in this study is the desk top research.<sup>105</sup> This will include published reports and statistics which are important sources of information and all other sources of information that do not involve a field survey like libraries.<sup>106</sup> This is an acceptable research method.<sup>107</sup>

### **1.9.1 SUMMARY OF FINDINGS**

While many state owned enterprises have been bailed out over the years, the issue of bailouts is still not well understood even by the people who are mandated to carry out these bailouts. The same applies to the understanding of what a state owned enterprise is.

Mr. Protus Sigei, the deputy director of government investments at the National Treasury (NT), defines state owned enterprises as those enterprises that the state owns more than fifty percent of the total shares whether directly or indirectly. He further says that the role of the NT which is a body corporate is; exercising shareholder rights either singly or with other shareholders in the SOEs or in public companies where the state has a stake; Considers and approves or disapproves SOEs budgets to ensure consistency with the national government's agenda which is also the case when the SOEs want to borrow money; appoints directors for SOEs that fall directly under the NT; tables audited reports for these SOEs in Parliament; and sits in all proceedings of the Public Investment Committees for the SOEs that rely entirely on the ex-chequer. According to Mr.Sigei, the NT does not in any way originate the decision to bailout any SOE, but only comes in to provide the financial resources for the bailouts and the road map in which the financial resources are to be transmitted to the concerned SOE. He agrees that the current financial

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<sup>105</sup> Hague Paul, "A Practical Guide to Market Research" Guildford: Grosvenor House Publishing Ltd Retrieved 4<sup>th</sup> March 2016 from [https://www.b2binternational.com/assets/ebooks/mr\\_guide/04-market-research-ch4.pdf](https://www.b2binternational.com/assets/ebooks/mr_guide/04-market-research-ch4.pdf). P58

<sup>106</sup> ibid

<sup>107</sup> Abel G Mugenda and Olive M Mugenda, (2003 ed) " Research Methods: Quantitative and Qualitative Approaches" Nairobi: African Centre for Technology Studies p12

legislation, does not provide for bailouts and states that the general thrust of the Public Finance Management Act, 2012, was not designed as to allow bailouts. He also agrees that there is need for reforms to guide how bailouts should be carried out and opines that these reforms should be in form of gazetted regulations by the National Treasury, or subsidiary legislation to the already existing financial legislation instead of a fully-fledged legal framework, the reasoning behind this being that, the government should not be a player in private commerce and should only concentrate on regulation and implementation of policies. His concern is how the law would be formulated to ensure that the culprits behind the mismanagement of the enterprises do not end up being the very beneficiaries of the bailouts.

He is of the opinion that the past bailouts of SOEs or Public companies that the state has a stake have not been effective as some of these enterprises have been bailed a couple of times and have not yet been able to realise any progress, while some are allocated public resources every financial year without anything to show for these allocations.

He concludes by saying that, bailouts intentionally end up creating a perverse incentive which in turn encourages complacency, invites unnecessary laxity and increases the moral hazards.

Dr. Julius Kipng'etich the CEO of Uchumi Supermarkets Limited is of the view that we need administrative procedure to specify the criteria of how bailouts are carried out or an amendment of already existing laws that provides for how distressed public companies are to be assisted. He attributes USL's financial distress to poor governance, mismanagement and a competitive business environment. He opines that USL is important to the economy of Kenya and the major beneficiaries of bailouts are the employees, supply chain linkages and the power maximal icons. Dr. Kipng'etich describes SOEs as companies formed with an aim to support government

initiatives in the development of the country and concludes by saying that bailouts should be a last resort measure and must be justifiable.

In a recent discussion of a proposed second bailout of Uchumi Supermarkets Ltd (USL), where the state has a stake of less than fifty percent, a cabinet meeting held at State House, approved a Kenya Shillings 1.2billion to settle part of the supplier's Kshs 3.6billion debt in its turnaround strategy. The cabinet secretary of Industrialization and Trade, Mr. Adan Mohamed EGH, opines that USL supports thousands of employees and suppliers and his ministry believes that its turnaround is in the country's best interest. He adds that the retail store has suffered significantly due to gross mismanagement and the current management has a herculean task of reviving and turning around USL. He premises his justification of the state's decision of bailing out the Supermarket on the fact that the State has a significant number of shares and the importance of USL to the economy. However, the State through the spokesperson at Statehouse, Mr. Manoa Esipisu said that for the supermarket to be bailed out, it has to meet certain conditions. One of the condition is clarity on, if the government cash injection will be turned to equity, in which case this has to be spelt out clearly or if the cash will be a loan, then the interest rate to apply has to be clearly spelt out. The second condition is that USL needs to give an elaborate reason of how different the expected bailout will be from the other bailouts it has received in its journey of turn around proposals. The third is that, the moral hazards of USL also have to be looked at and the people who earlier mismanaged it brought to book. Finally, the fourth condition is that the people who are going to handle the proposed bailout money have to be audited first.

## **2. CHAPTER BREAKDOWN**

### **2.1 Chapter 1; INTRODUCTION**

This chapter focuses on the background of bailouts, the statement of the problem, research questions, objectives, theoretical framework, literature review, conceptual framework, and methodology and chapter breakdown.

### **2.2 Chapter 2; EXISTING LEGAL FRAMEWORK FOR FINANCIAL BAILOUTS IN KENYA**

This chapter will highlight best practices as regards bailouts and the emerging issues surrounding bailouts of listed public companies in other jurisdictions, specifically the U.S.A and China..

### **2.3 Chapter 3; THE BEST PRACTICES OF LEGISLATIVE FRAMEWORK IN SELECTED JURISDICTIONS: THE CASE IN USA AND CHINA**

This chapter reviews the current legal framework that guides government expenditure and its relevance to bailouts and the main focus will be on article 201, article 206, article 208, article 213 and article 225 of the Kenyan Constitution 2010, The Government Financial Management Act Cap 412B and The Public Finance Management Act 18 of 2012 and MWONGOZO: The Code of Governance for State Corporations.

### **2.4 Chapter 4; RECOMMENDATIONS AND CONCLUSION**

This chapter will show the summary findings of the research and the conclusions made thereof. It will also outline the recommendations and areas of reform identified by the study.

## CHAPTER TWO

### EXISTING LEGAL FRAMEWORK FOR FINANCIAL BAILOUTS IN KENYA

#### 2. INTRODUCTION

In Chapter 2, the discussion was centered on the best practices in other jurisdictions, notably the USA and China, where we have seen that both jurisdictions have either a policy or a legislative framework that is geared towards addressing how bailouts are undertaken in these jurisdictions. We have also seen that privatization, mergers and consolidation have also been preferred in other situations to address the issue of failing public companies.

In this chapter, we will review the current legal framework that guides government expenditure and its relevance to bailouts as undertaken in Kenya. The main focus will be on article 201, article 206, article 208, article 213 and article 225 of the Kenyan Constitution 2010, Government Financial Management Act Cap 412B and The Public Finance Management Act 18 of 2012 and the MWONGOZO: The Code of Governance for State Corporations.

In comparison to other countries of similar economy, Kenya has had an over reliance on state corporations many of which are a drain of public resources.<sup>108</sup>

Public or state corporations are institutions of public law with a separate legal personality and derives powers and duties from laws that bring them into being or that decree them.<sup>109</sup> They derive their financing through loans and allotment of shares but not from issuance of stock or

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<sup>108</sup> Njiru Wambeti Esther, (2014, Feb 19) "Intrapreneurial Prerequisites As Determinants Of Organisational Outcomes Among Kenyan State Corporations" (un published Doctorate thesis) Kenyatta University, Nairobi

<sup>109</sup> Bos, D. (1986) *Public Enterprise Economics: Theory and Application*. Amsterdam: Elsevier Science Publishers P112

shares.<sup>110</sup> On the other hand state companies are private institutions created through the Companies Act and controlled considerably by the government due to its ownership of shares whether partly or wholly.<sup>111</sup>

State corporations have been accused of harboring corruption thriving in public monopolies especially when there are loopholes in the oversight management and fiduciary control procedures which was stressed by the Private Sector Corporate Governance Trust guidelines for good corporate governance in state owned corporations.<sup>112</sup>

The constitution of Kenya 2010 at Article 213, provides that the conditions by which the national government may guarantee loans to be prescribed by parliament through legislation.<sup>113</sup> Also article 221(1) prescribes the timelines within which the cabinet secretary in charge for finance is to forward to the national assembly the budget estimates of the revenue and expenditure of the government for the next financial year.<sup>114</sup> Article 225 also provides for the control of public money.<sup>115</sup>

There are also various Acts of parliament that govern how the government expends public money and these include, the Government Financial Management Act Cap 412B and the Public Finance Management Act no.12. The government through the State Corporations Advisory Committee (SCAC) and the Public Service Commission (PSC) have also come up with a code to guide state corporations in their governance, the MWONGOZO which came into operation on January 2015.

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<sup>110</sup> *ibid*

<sup>111</sup> *ibid*,

<sup>112</sup> Private Sector Corporate Governance Trust (2002) "Guidelines for Good Corporate Governance in State Owned Corporations." Nairobi: PSCGT

<sup>113</sup> Constitution of Kenya, 2010, *art 213*

<sup>114</sup> *ibid, art 221(1)*

<sup>115</sup> *ibid, art 225*

## 2.1 POLICY FRAMEWORK

### 2.1.1 MWONGOZO

The road to coming up with the Mwongozo started by the setting up of a task force by H.E Uhuru Kenyatta, The Presidential Taskforce on Parastatal Reforms on the 23<sup>rd</sup> July 2013.<sup>116</sup> The main responsibility of the task force was to relook at the existing policies on the structures of management and governance of parastatals in Kenya with the sole purpose of finding out how best to incorporate them in the pursuit of national development aspirations and their contribution towards the transformative agenda of our country into a land of opportunities and prosperity for all citizens<sup>117</sup> Policy issues and challenges identified by the task force included on the role that these state corporations should play in the economy which is made even more difficult by differing opinion as to the exact role the state plays in the national development, the weak link between the goals of the state corporations activity with those of national development and the conflict in the attempts to define what a state corporation is, which is intermingled by the various legal and regulatory regimes creating notable ownership, manage challenges, insufficient policy and policy coordination which leads to a weak description of mandates, conflicts in mandates, as well as fragmentation of mandates that promote the proliferation of poorly funded state corporations.<sup>118</sup>

Also affected is the place of the state in facilitating the private sector in order to ensure that it supports its national development goals, curb poor governance practices which mostly has resulted in loss of resources and further burdening of the public coffers. This has further been

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<sup>116</sup> Report of The Presidential Taskforce on Parastatal Reforms,( 2013 Oct)(Ke). Retrieved 4<sup>th</sup> May 2016 from <http://www.cofek.co.ke/Report%20of%20The%20Presidential%20Task%20force%20on%20Parastatal%20Reforms.pdf>

<sup>117</sup> Ibid p15

<sup>118</sup> Ibidp22

made worse by having a fragmented regulatory framework that establishes a series of reporting and accountability lines thus affecting the effectiveness of administration of these corporations.<sup>119</sup> A number of Boards exhibited have weakness and ineffectiveness resulting in lack of direction in being strategic, lack of clear government guidelines or policies, ambiguity in the process of establishing and dissolving the parastatals thus making it difficult to have accurate data on the number of parastatals in existence or dissolved and finally inadequacy in the performance of the management framework that can link both an individual and the institution to failure in meeting the national development goals.<sup>120</sup>

Mwongozo addresses corporate governance practices of public service as provided for under article 232 of the Constitution of Kenya, 2010 and ensures an effective and more interactive engagement with the shareholders by providing an avenue for addressing shareholder rights and obligations.<sup>121</sup>

Most importantly, it is geared towards ensuring that tenability, performance and transcendence become the authentication mark of running of parastatals by setting rules and regulations for the proper running of parastatals within the constitutional parameters laid out as well as best global practices.<sup>122</sup> Further it is in support of previous reform agenda in the administration of State Corporations and it is hoped that Kenya will benefit from state corporations that are effective and efficient when run in a transparent and accountable manner after its implementation.<sup>123</sup> It is hoped that Mwongozo will impact positively on how the public will discern the way government

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<sup>119</sup> *ibid*

<sup>120</sup> *ibid*

<sup>121</sup> *ibid*

<sup>122</sup> *ibid*

<sup>123</sup> *ibid*

services are rendered hence the Government's willpower in making sure that Mwongozo is implemented fully and meticulously by SCAC.<sup>124</sup>

There is also the Government Owned Enterprises Bill of 2014 before the August House, whose purpose is intended to provide uniform and comprehensive guidelines for the creation state owned enterprises and the way they are classified in a bid to streamline their mandates, management, regulation and governance through a uniform code of governance.<sup>125</sup>

The bill is also geared towards giving body to the Constitutional provisions under article 10 that touch on principles of leadership, national values, integrity, public service and governance. Through this bill, the Act shall be applicable to all state owned entities established pronouncement of the legislature.<sup>126</sup>

The National Treasury under the Bill shall incorporate a holding company, the Government Investment Corporation Limited (GICL), which shall be entirely owned by the National Treasury and shall be the holding company for all the national government investments in SOEs and shall exercise ownership and investment on behalf of the national treasury. As an investor the GICL shall develop a dividend, recapitalization and privatization policy.<sup>127</sup>

Despite the efforts by the government to come up with the code of ethics of governance for state corporations and a bill for the management, regulation and governance of state corporations, some state owned enterprises have continued experiencing financial difficulties and some are looking at being bailed out. There is also a proposed merger of the National bank of Kenya,

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<sup>124</sup> *ibid*

<sup>125</sup> Government Owned Enterprises Bill (2014) (Ke) retrieved 3<sup>rd</sup> march 2016  
<http://www.klrc.go.ke/index.php/bills/497-government-owned-entities-bill>.

<sup>126</sup> *ibid*

<sup>127</sup> *ibid*

Development bank of Kenya and the Consolidated bank of Kenya, which are facing financial constraints.<sup>128</sup> Most of the problems faced by these institutions are due to governance issues and clearly there is a lot to be done in terms of implementation of the Mwongozo. This is the reason that this study focuses on the need to have a legal framework for bailing out state owned corporations.

## **2.2 LEGISLATIVE FRAMEWORK**

### **2.2.1 THE CONSTITUTION OF KENYA, 2010.**

The relevant articles that deal with government expenditure are articles, 201, 206, 208, 213 and 225. Article 201 deals with the public participation, accountable public finance management and provides for the promotion of equity and fairness in the distribution of the tax burden in the society as well as prudence in the use of public money.<sup>129</sup> That fiscal reporting shall be clear, amongst other principles.<sup>130</sup> Article 206(1), establishes a consolidated fund whereby all revenue collected, donated or obtained by or on behalf of the national government shall be deposited and sub article (4) of this article provides that all the money put in this fund can only be withdrawn upon the approval or authorization of the controller of budget.<sup>131</sup>

Article 208 establishes a contingency fund is, whose operation shall be in accordance with an Act of Parliament<sup>132</sup>

Article 213, provides for the formulation of legislation prescribing circumstances which will permit the government to guarantee loans.<sup>133</sup> Article 225 provides for the formulation of

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<sup>128</sup> Alusula Partrick (2017 April 28) "State-owned banks' merger still on, says CS," *Standard Media* Retrieved 25<sup>th</sup> June 2017 from <https://www.standardmedia.co.ke/business/article/2001237909/state-owned-banks-merger-still-on-says-cs>

<sup>129</sup> The Constitution of Kenya (2010) (Ke) retrieved 3<sup>rd</sup> March 2016 from <http://kenyalaw.org/kl/index.php?id=398>

<sup>130</sup> *ibid*

<sup>131</sup> *Ibid*, art 206(1)

<sup>132</sup> The Contingencies Fund and County Emergency Funds Act (2011) retrieved on 3rd March 2016 <http://www.constitutionnet.org/v1/item/contingencies-fund-and-county-emergency-funds-act-2011>

legislation that will spell out the roles of the national treasury in regulating how government spends revenue collected. The legislation envisaged under article 225(2) may authorize the Cabinet Secretary in charge for finance to halt the allocation of funds to any State organ.<sup>134</sup>

## **2.3 OTHER STATUTES**

The Public Finance Management Act 18 of 2012 at section 93, leaves it to the cabinet secretary to determine the seriousness of the problem of an entity in need of government loan and does not lay a guideline as to how the cabinet secretary is to arrive at such a decision.<sup>135</sup> A reading of the Act raises some serious questions, for example, suppose the cabinet secretary makes a misjudgment as to the seriousness of the material breach and the taxpayers money is lost or misused? What if the cabinet secretary allows a transfer of funds to a failing state enterprise in order to assist his/her cronies who are creditors to caution them from loss? The important question being, what is the standard of measure for the material breach? This is a gap in the Act. Section 94, provides a list of guidelines to help the state in establishing whether a given organ of state is in constant breach of the measures established in the Act. These guidelines include, failure to make payments, delay in submitting financial statements to the auditor general, material questions raised by the controller of budget, withholding of opinion or issuance of disclaimer by the Auditor-General, due to inadequacies and insufficient information in the financial reports of the SOEs or has advised that the said SOE has failed to obey the financial laws in place which points out grave financial problem in the SOE which substantially impede

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<sup>133</sup>The Constitution of Kenya (2010) (Ke) retrieved 3<sup>rd</sup> March 2016 <http://kenyalaw.org/kl/index.php?id=398>

<sup>134</sup> Ibid, art 225

<sup>135</sup> ibid

on the State organ's or public entity's capacity to procure goods, services or credit on usual commercial terms.<sup>136</sup>

The Government Financial Management Act Cap 412B deals with the management of government financial affairs, matters that concern the exchequer account and the Consolidated Fund and the personnel under the National Treasury.<sup>137</sup> The Minister (now the Cabinet Secretary) is in charge of the management of the Consolidated Fund and all matters related to public financial affairs that are not to be discharged by any other Minister.<sup>138</sup> The Act disallows expending of any monies without the express authority of the Treasury regardless of whether there was authority given by a Minister and the Minister may limit or suspend an expenditure if, in his/her opinion, the said demands of the financial situation necessitate such a limitation or suspension necessary.<sup>139</sup>

## 2.4 CONCLUSION

Chapter 12, of the Constitution provides for transparent and accountable public finance management that is anchored on public participation.<sup>140</sup> It provides for tabling in the National Assembly of the budget estimates at least two months before the end of the financial year. The Parliamentary Budget Committee must conduct public participation before making its recommendations. This public participation is also provided for in the Public Finance

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<sup>136</sup> Ibid section 93

<sup>137</sup>The Government Financial Management Act Cap 412B (Ke) retrieved 3rd March 2016 at <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/GovernmentFinancialManagementfinal.pdf>.

<sup>138</sup> ibid

<sup>139</sup> ibid

<sup>140</sup> Jason Lakin (2013 March) "The Kenyan Public Finance Management Act 2012 FAQ (Frequently Asked Questions) For Citizens". *International Budget Partnership*. Retrieved 3<sup>rd</sup> March 2016 <https://www.internationalbudget.org/wp-content/uploads/Kenya-PFM-Act-2012-FAQ.pdf>.

Management Act in detail. <sup>141</sup>The PFM Act creates opportunities for public participation and input at both the national and county level. According to this Act, the spending by the government must go through various stages. <sup>142</sup>The first one is the preparation of the budget estimates, which are tabled before the Budget Committee in Parliament in this regard the PFM Act restricts Parliament in making major changes to the budget estimates and if parliament is not happy with it, it can make changes only through the Budget Policy Statement and only to the extent that it does not raise the deficit.<sup>143</sup> Secondly, the Appropriation bill will be crafted from the report done by the Parliamentary Budget Committee and upon parliament debating and approval it becomes the Appropriation Act. The subsequent Act then sanctions the government to spend the funds as outlined in the budget proposal.<sup>144</sup>

From the foregoing, we can clearly see that government expenditure is regulated by law and can only spend what has been authorized in the Appropriation Act or the approved budget. The very nature of bailouts is ex post and most countries deal with them in an ad hoc manner. This clearly means that the money used to bailout failing public companies or state owned corporations has to be gotten from someplace else as it is not budget for.

Since money budgeted for another use has to be redirected to the failing companies, then there is need to have a policy framework that guides the government on how to deal with bailouts, when and why to bailout failing public companies or state owned enterprises. This is the basis for this study.

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<sup>141</sup> ibid

<sup>142</sup> ibid

<sup>143</sup> ibid, p2

<sup>144</sup> ibid

## **CHAPTER THREE**

### **THE BEST PRACTICES OF LEISLATIVE FRAMEWORK IN SELECTED**

#### **JURISDICTIONS: THE CASE IN USA AND CHINA.**

##### **3.1 INTRODUCTION**

In chapter 1, we stated the problems facing public companies, also referred to as state owned enterprises in some jurisdictions that have been bailed out by government and the inadequacy of a legal framework guiding how bailouts are to be undertaken. In this chapter, the study will examine the best practices of legislative framework for bailing out public or state owned enterprises. The study will more specifically discuss policy guidelines which fall under the code of principles, enacted legislation, privatization, consolidation and mergers as best practices. It is important to note that most companies fail as a result of mismanagement, moral hazards, systemic risks and poor corporate governance and even state interference. Most policies and legislations are geared towards dealing with corporate governance to a large extent.

This chapter will focus on two countries as a point of reference which are the USA which has experienced various bailouts and most notably during the 2008 financial meltdown and has enacted various legislations to deal with the issues of bailouts. The chapter will also discuss China, which is the largest economy in Asia and which runs most of the big companies as State Owned Enterprises. The government of China has recently introduced guiding opinions known as the Guiding Opinions of the Communist Party of China Central Committee and the State

Council on Deepening the Reform of State-Owned Enterprises, which will oversee restructuring and corporatization and consolidation of some of the SOEs.<sup>145</sup>

### **3.2 POLICY FRAMEWORK**

Many countries do not have specific policies that apply to bailouts. Many policies affecting state owned companies are geared towards addressing the moral hazards, which is believed to be the root cause of most state owned companies' financial distress. In China we have the Guiding Opinions of the Communist Party of China Central Committee and the State Council on Deepening the Reform of State-Owned Enterprises. These guidelines have introduced new market forces designed to hold individual firms responsible for their own profits and losses<sup>146</sup> and are aimed at ensuring that the state firms are arranged according to the functions they carry out by bringing together their assets while at the same time ensuring their development in an integrated kind of ownership and how the state will relinquish some of its authority over the top management of these firms especially those in non-strategic sectors.<sup>147</sup>

According to the guidelines, the firms will be divided according to their functions that is the ones pursuing welfare interests and those which are purely for profit making. Each set will be allocated their objectives and evaluated on merit. Those firms that are for public will be evaluated according to how well they can control and manage costs, ensure the maintenance of quality standards of commodities and amenities, demonstrate stability and competence in their

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<sup>145</sup> Guiding Opinions of the Central Committee of the Communist Party of China and the State Council on Deepening State-Owned Enterprise Reform (China) retrieved 3<sup>rd</sup> March 2016 from <http://hk.lexiscn.com/law/guiding-opinions-of-the-central-committee-of-the-communist-party-of-china-and-the-state-council-on-deepening-state-owned-enterprise-reform.html>

<sup>146</sup> Yi-chong X. (2012) "The Political Economy of SOEs in China and India. In: Yi-chong X. (eds) *The Political Economy of State-owned Enterprises in China and India.*" International Political Economy Series. Palgrave Macmillan, London

<sup>147</sup> Wendy Leutert , (2016 Jan) *Challenges Ahead in China's Reform of State-Owned Enterprises*, Asia policy, number p83–99

modus operandi.<sup>148</sup> It is foreseen that the changes in the public entities will mostly be driven by the politics of the day rather than the market dynamics, however, the state will place as a top priority the need to boost market competitiveness as well as delivery gains.<sup>149</sup> The key challenge to these guideline, however, will be on the ways to establish a mode whereby demand and supply play a significant role for those firms that are established for commercial purposes and the ways to align incompatible interests and benefits and finally overcome complicated dynamics within companies.<sup>150</sup>

There has been criticisms levelled against these Opinions in that firstly, the problems identified within the SOEs appear to be incoherent and inconsistent with no workable solutions being proposed.<sup>151</sup> For instance, the opinions support and promote the separation of control from ownership on the one hand yet, they are not alive to the fact that where the entity is state owned the state must act through natural persons. The separation of ownership and control has been the guiding principle for reforms of SOEs for many years, yet things remain the same.<sup>152</sup>

A key point to note is that, when the SOEs are performing dismally, the problem does not necessarily lie within the problem of ownership and control but to a large extent arise out of a mismatch between the alignment of interests and incentives between those of the management and the ones for the state which is the owner in the case of SOEs and the separation of ownership from control, which is an agency problem is unavoidable and can only be managed.<sup>153</sup> This lack of attention to the problem of interests and right incentives for the management is reflected in the

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<sup>148</sup> *ibid*

<sup>149</sup> *ibid*

<sup>150</sup> *ibid*

<sup>151</sup> Clarke Donald C, (2015) "Central Committee and State Council Issue Document on State Owned Enterprise Reform" Retrieved 23<sup>rd</sup> April 2016 from [http://lawprofessors.typepad.com/china\\_law\\_prof\\_blog/2015/09/central-committee-and-state-council-issue-document-on-state-owned-enterprise-reform.html](http://lawprofessors.typepad.com/china_law_prof_blog/2015/09/central-committee-and-state-council-issue-document-on-state-owned-enterprise-reform.html)

<sup>152</sup> *ibid*

<sup>153</sup> *ibid*

language of the opinion guidelines which is geared towards tightening of its supervisory and oversight roles in the internal operations of the SOEs, their staff and workers congress.<sup>154</sup>

Two, the Opinions are devoted to the idea of independent SOEs and the question that lingers in the mind is, they are being independent from what or from whom, yet they seem to agree that the kind of independence envisaged is one where the SOEs have an interest and will of their own and hence capable of managing their affairs, taking care of their losses and profits as well as bearing any risks that come that come along their way, which in itself obscures two points.<sup>155</sup>

Firstly, the fact that SOE managers must be held accountable by a body representing the state which is the main shareholder and investor and secondly, the fact that the state puts itself in a risky position when it owns SOEs.<sup>156</sup> This situation is sort of a gamble for the State which must balance the interests it holds in trust for the citizens in order to caution them from loses. This is due to the fact that when the shareholder makes profits they win and on king loses they are disadvantaged.<sup>157</sup> The state is not bound to pay debts of a failing entity nevertheless it does not mean that it bears a cost when a state owned entity closes shop, but rather it is the other stakeholders who bears this risk of incurring losses.<sup>158</sup>

Thirdly, the Opinions attempts to address the issue of state holding companies, which are yet to be fully understood while some are yet to go through the process of corporatization under the company law.<sup>159</sup>

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<sup>154</sup> *ibid*

<sup>155</sup> *ibid*

<sup>156</sup> *ibid*

<sup>157</sup> *ibid*

<sup>158</sup> *ibid*

<sup>159</sup> *ibid*

The views aid corporatization of holding organizations and recommend that they could be listed with preferential shares. These assessments additionally propose the likelihood of something that resemble an excellent offer where the state has veto powers in administration of SOEs. It is standard for advantages named as favored offers not to have voting rights and all things considered it isn't clear how the suppositions ponder that state control or impact will be kept up in organizations where the states intrigues take that shape.<sup>160</sup> It is customary for interests labeled as preferred shares not to have voting rights, and as such it cannot be understood how the state influence will be limited where its interest in these companies take such form.<sup>161</sup>

The U.S.A's rules and regulations for governance have been codified in legislation under Sarbanes – Oxley Act of 2002, (SOX) and this regime is known as comply or else. It creates legal sanctions for non- compliance.<sup>162</sup>

### **3.3 LEGISLATIVE FRAMEWORK**

USA, bailed out a number of large corporations not only during the financial meltdown of 2008, but on previous other occasions and in fact the 2008 crisis is the fourth time that the USA is coming out to bailout companies in financial distress.<sup>163</sup> The first legislation was the Financial Institutions Reform, Recovery and Enforcement Act of 1989.<sup>164</sup> The Congress has passed a couple of legislation. Most financial woes of public companies has been attributed to mismanagement of the companies by the board of directors and misreporting by the public

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<sup>160</sup> ibid

<sup>161</sup> ibid

<sup>162</sup> ibid

<sup>163</sup> Mridha Sujana,(2016) "Sarbanes Oxley Act," accessed at [http://www.academia.edu/4519534/Oxley\\_Act](http://www.academia.edu/4519534/Oxley_Act) on 29th March 2016.

<sup>164</sup> ibid p2

auditors. Sarbanes Oxley Act of 2002, is regarded as the most intense legislation on the capital markets since the Securities and Exchange Act of 1934.<sup>165</sup>

The Act came about to try and solve the issue of massive fraud that involved several major companies including Enron, Tyco International, Adelphia, Peregrine Systems and World Com, which caused investors billions of dollars after the shares of the affected companies came crumbling down thus shaking the public confidence in the nation's securities markets.<sup>166</sup> The legislation came up with stringent measures to be followed by for company boards, management and public accounting firms in the USA.<sup>167</sup> The Act which contains 11 titles requires the SEC to ensure compliance with the new law and it also created the PCAOB, which was tasked with supervision, controlling, scrutinizing and punishing accounting firms in their roles as auditors of public companies.<sup>168</sup> The Act also deals with issues of the independence of the auditors, corporate governance, internal control assessment, and enhanced financial disclosure.<sup>169</sup> It is also the task of the Act to protect the public from financial deceit public companies and it also endeavors to inculcate principles and accountability in the public companies in the U.S.A.<sup>170</sup>

However, this Act has been criticized by commentators as being very expensive to implement or comply with.<sup>171</sup>

Prof. Ribstein, a professor in the Illinois School of Law is cited as saying that it is not likely that SOX will remedy the issues intended to in the future, most especially because of its arguable

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<sup>165</sup> *ibid*

<sup>166</sup> *ibid*

<sup>167</sup> *ibid*

<sup>168</sup> *ibid*

<sup>169</sup> *ibid*

<sup>170</sup> *ibid*

<sup>171</sup>The Institute of Directors in Southern Africa (2009) "Kings Code of Governance for South Africa" retrieved 3<sup>rd</sup> March 2016 <http://www.ecgi.org/codes/documents/king3.pdf>

effectiveness in response to the current market tribulations as it is seen as a hurriedly formulated regulation.<sup>172</sup> He further says that, even the best regulators are not exempted from making errors when enacting legislation and sometimes they might come up with legislation that makes innovation and entrepreneurship difficult to achieve and in his conclusion he is of the opinion that in the first three years since SOX came into operation, it operated as an overreaction to Enron's problems which ended up being ineffective and unnecessary in the long run.<sup>173</sup> However, despite this legislation, various "too big to fail" companies found themselves in the financial crisis of 2008 and had to seek for bailouts from the government. The federal government responded to this crisis by enacting the Emergency Economic Stabilization Act of 2008 which created the Troubled Asset Relief Program (TARP) which saw many distressed companies bailed out.<sup>174</sup>

Another legislation passed was the Emergency Economic Stabilization Act of 2008 whose purpose was to immediately create an avenue for the Secretary of treasury to exercise authority and facilities that they can use to ensure restoration of a sound financial in the USA; and to make sure that such authorities and state resources are used in a way that preserves home values, college funds, retirement accounts, and life savings; ownership of homes is encouraged; economic growth through job creation is promoted; maximization of taxpayers' returns and accountability in exercising such authority.<sup>175</sup>

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<sup>172</sup> ibid

<sup>173</sup> ibid

<sup>174</sup> Clarke Donald C, (2015) "Central Committee and State Council Issue Document on State Owned Enterprise Reform" Retrieved 23<sup>rd</sup> April 2016 from [http://lawprofessors.typepad.com/china\\_law\\_prof\\_blog/2015/09/central-committee-and-state-council-issue-document-on-state-owned-enterprise-reform.html](http://lawprofessors.typepad.com/china_law_prof_blog/2015/09/central-committee-and-state-council-issue-document-on-state-owned-enterprise-reform.html)

<sup>175</sup> Emergency Economic Stabilization Act of 2008 (USA) ( 2008 OCT 3 ) retrieved 29<sup>th</sup> March 2016 from <https://www.congress.gov/110/plaws/publ343/PLAW-110publ343.pdf>

These responsive efforts were heavily criticized as a misuse of taxpayer dollars and was only hailed at curbing the tailspin of the financial system and economy.<sup>176</sup> However, despite all these government's efforts to resolve the effects of the 2008 financial crisis, the government still did bailout some companies.<sup>177</sup>

In 2009, Congress passed the American Recovery and Reinvestment Act which was tasked with making supplemental appropriations for the creation and preservation of jobs, ensuring investment in infrastructure, deal with energy and science efficiency, ensure assistance to the unemployed, ensure that there is State, and local fiscal stabilization, for the fiscal year ending September 30, 2009, and for other purposes and the Dodd–Frank Wall Street Reform and Consumer Protection Act,<sup>178</sup> whose main purpose was to grow a sound economic foundation to grow jobs, protect consumers, rein in on wall street and big bonuses, end bailouts and too big to fail companies and prevent another financial crisis.<sup>179</sup>

Dodd Frank Act endeavors to end bailouts by creating a safe way to liquidate failed financial firms, introducing tough new capital and leverage requirements that make it undesirable to get too big, updating the Federal's authority to allow system wide support but no longer prop up individual firms and establishing rigorous standards and supervision to protect the economy and American consumers, investors and businesses.<sup>180</sup> It also establishes a Consumer Financial Protection Bureau which amongst other things is to look out for bad deals and schemes hence the

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<sup>176</sup> Mridha Sujan (2016) "Sarbanes Oxley Act," retrieved 29th March 2016 from [http://www.academia.edu/4519534/Oxley\\_Act](http://www.academia.edu/4519534/Oxley_Act).

<sup>177</sup> ibid

<sup>178</sup> Ibid

<sup>179</sup> United States Senate "Dodd-Frank Wall Street Reform and Consumer Protection Act" (USA) retrieved 29th march 2016 from [http://www.banking.senate.gov/public/\\_files/070110\\_Dodd\\_Frank\\_Wall\\_Street\\_Reform\\_comprehensive\\_summary\\_Final.pdf](http://www.banking.senate.gov/public/_files/070110_Dodd_Frank_Wall_Street_Reform_comprehensive_summary_Final.pdf).

<sup>180</sup> ibid

consumers will not have to wait for Congress to pass laws to protect them from bad business practices and also creates a new office to educate on financial literacy, a national consumer complaint hotline and makes one office accountable for consumer protection.<sup>181</sup>

It also creates the Financial Stability Oversight Council, which is composed of ten federal financial regulators, an independent member and five non-voting members and which is tasked with the duty of identifying and responding to emergent risks during the financial system and discourse governance issues, executive compensation and make provision for shareholders' right to a nonbinding vote on executive pay and golden parachutes.<sup>182</sup> It grants the Securities and Economic Commission authority to permit shareholders proxy access to nominate directors and provides the standards for listing on the exchange and also to require compensation committee to only include independent directors and provides the requirements for public companies set policies to take back executive compensation if it was based on inaccurate financial statements that do not comply with accounting standards and directs the SEC to clarify disclosures relating to compensation including requiring a company to provide charts comparing executive compensation with stock performance over a five year period.<sup>183</sup>

Critics of this Act suggest that the Dodd Frank Act should be reviewed and some of the constraints on bailouts be eliminated.<sup>184</sup> Some of the criticism levelled against the Dodd Frank Act is firstly, that the new derivatives rules, tough capital and risk standards will make the U.S.A less competitive with its global competitors.<sup>185</sup> They argue that the new law increased vagueness

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<sup>181</sup> *ibid*

<sup>182</sup> *ibid*

<sup>183</sup> *ibid*

<sup>184</sup> Casey A and Posner E.A (2015) "A Framework for Bailout Regulation" (*Coase-Sandor Working Paper Series in Law and Economics No. 724*).

<sup>185</sup> Katherine Reynolds Lewis (2011 July 19) "The 5 Best and 5 Worst Regulations in Dodd-Frank," *The Fiscal Times Follow* p3

in the business environment in USA instead of rationalizing the already over regulated structure, upgrading and amending existing regulators and making sure that they are aligned to common regulatory approaches to global markets, this law missed the mark by increasing uncertainty for American businesses and hindering their ability to promote economic growth and ensuring creation of jobs.<sup>186</sup>

Secondly, is the government's price control over debit cards and thirdly, is the Volcker rule which critics say could actually end up harming a bank or its customer's ability to manage its assets as well as cut into profits and growth by prohibiting banks from proprietary trading and limitation on investing on hedge funds and private equity firms.<sup>187</sup> Fourthly, by establishing a new regulatory authority, it altered the channels of authority, making institutions liable to reporting and being accountable to several federal agencies, thus bringing uncertainty in the private sector and finally it has been criticized for not addressing the problem in the housing financial systems, which was at the heart of the crisis of 2008.<sup>188</sup>

### **3.4 PRIVATISATION, CONSOLIDATION AND MERGERS AS A BEST PRACTICE**

In theory, merging companies combines complementary capacities and increases resources, that is employees, capital and client networks.<sup>189</sup> Consolidation of central State Owned Enterprises has long been China's preferred method of reform and the State-Owned Assets Supervision and Administration Commission (SASAC), administered 189 nonfinancial SOEs at its establishment in 2003 and of the 83 firms that disappeared over the past years, the vast majority were merged

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<sup>186</sup> *ibid*

<sup>187</sup> Collin P. Janus, "The *Volcker Rule* prohibits banks from increasing your risk by trading for their own profit" retrieved 29th March 2016 from <https://www.federalreserve.gov/supervisionreg/volcker-rule.htm> p1-2

<sup>188</sup> *ibid*

<sup>189</sup> Wendy Leutert (2016 Jan) "Challenges Ahead in China's Reform of State-Owned Enterprises," *Asia policy*, number 21, p83-99

into existing central SOEs while the rest were combined to create new conglomerates or returned to ministerial control.<sup>190</sup> A good example is the Yangtze Estuary Waterway Construction Company was returned to the Ministry of Transportation in 2006 to become the Yangtze Estuary Waterway Administration Bureau, the China Communications Construction Company Group and China Energy Engineering Group are examples of such conglomerates.<sup>191</sup> The consolidation of yangqi was motivated by economic as well as political factors.<sup>192</sup> Politically, it avoids the sensitive issue of selling state firms which prompts corruption concerns, or closing them down and dismissing their employees, which raises the spectra of social instability and economically, it fits into Beijing's win-win vision for reforming SOEs which aspiration is embodied in China's, national champions' strategy: a government long initiative to build large globally competitive state firms.<sup>193</sup> The new guiding opinions call for ongoing government directed consolidation of state owned firms which has been Beijing's stated goal for years.<sup>194</sup>

During the financial crisis in 2008, the U.S. government encouraged the buying off of financially distressed corporations by those that withstood the harsh weather of the financial crisis. Most of these corporations did not have the experience of managing large and interconnected corporations. The US government was eventually forced to take an ad hoc approach by forcing the major investment banks into mergers or acquisitions and as a result today the biggest banks are JP Morgan Chase, Bank of America, Citigroup and Wells Fargo<sup>195</sup>

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<sup>190</sup> *ibid*

<sup>191</sup> *ibid*

<sup>192</sup> *ibid*

<sup>193</sup> *ibid*

<sup>194</sup> *ibid*

<sup>195</sup> Baily M.N, Bekker William and Holmes Sarah E(2015 May 26) " The big four banks: The evolution of the financial sector, Part I," retrieved 29<sup>th</sup> March 2016 <https://www.brookings.edu/research/the-big-four-banks-the-evolution-of-the-financial-sector-part-i/>.

Kenya has also had consolidation of companies for example the Consolidated Bank which was a merger of several financial institutions which were owned by the state and which were not economically viable operating individually<sup>196</sup> This merger which happened in 1989 was meant to stabilize the financial sector through restructuring and professional management of the financial institutions.<sup>197</sup> This is the most successful merger in Kenya so far. In the near future we might experience other mergers of state owned enterprises with discussions on the merger of Consolidated bank, Development bank and National bank on a high notch though they have been trying to consolidate their financial strengths individually .<sup>198</sup> Some state owned enterprises have also been privatized for example, Uchumi Supermarkets, Kenya Airways and Mumias Sugar Company, but with the State still owning a substantial amount of shares. A look at these companies show that they have been making losses in the recent past and had had to be bailed out by the government.

### **3.5 CONCLUSION**

Although the nature of bailouts is largely ad hoc, the countries under discussion have tried to deal with most issues that lead to state owned enterprises or public listed companies finding themselves in financial distress. Bailouts are mostly linked to poor governance, moral hazards, systemic risks, mismanagement and stiff market competition, thus most policies and legislation are geared towards addressing these issues. USA, however, has enacted legislation to deal with bailouts amid criticism of the law. The guiding opinions of China do not really address issues of bailouts and concentrate more on reforms and revamping of the state owned enterprises through

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<sup>196</sup>History and Background of Consolidated Bank Limited retrieved 13<sup>th</sup> May 2017 from <http://consolidated-bank.com/history-and-background.php>.

<sup>197</sup> ibid

<sup>198</sup> Irungu Geoffrey (2016 May 13) "Treasury settles on merging NBK and two other banks," *Business Daily* Retrieved 13<sup>th</sup> May 2017 from <http://www.businessdailyafrica.com/Treasury-settles-on-merging-NBK-and-two-other-banks/-/539552/3153356/-/14g937v/-/index.html>

consolidation and mergers and also through privatization. Kenya can borrow a leaf from USA and enact legislation guiding how and when bailouts of public listed companies should be carried out. Since the inception of the MWONGOZO, The Code of Governance for State Corporations in 2015, there has been little improvement on how state corporations carry out their business. Many state owned companies are still on the loss making trend and hence the need for a stricter legislation to curb on corrupt board members and management.

The MWONGOZO operates on comply or explain basis which basically means that corporations are supposed to comply and if they cannot comply, they are supposed to give the reasons for not complying at that time but are still expected to comply at a later time but within a reasonable time.<sup>199</sup> While full compliance is expected, the approach positively recognizes that a satisfactory explanation, coupled with a roadmap to full compliance, will in certain circumstances be acceptable.<sup>200</sup>

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<sup>199</sup> State Corporations Advisory Committee (2015 Jan), *MWONGOZO, The Code of Governance for State Corporations (Ke)*

<sup>200</sup> *ibid*

## **CHAPTER FOUR**

### **RECOMMENDATIONS AND CONCLUSION**

#### **4.1 RECOMMENDATIONS**

From the summary of findings above, it is easy to pin point the difficulties the State faces when tackling bailouts. For instance, the criteria to consider when reviewing a bailout application, the mode and form in which the bailout should take, the justification of the bailout, the terms and conditions of the bailouts, amongst others. This means that, there are no clear rules and regulations set down to guide how bailouts should take place, who should be bailed out, when and why they should be bailed out.

While most people agree that the State should not be an active player in business and that its role in business should be restricted to regulation and implementation of policies, protection of small and medium enterprises, ensuring a fair playing ground amongst others, the fact that the State is already a player in business cannot be dispensed with and measures to protect the taxpayers money in the business that the State engages in have to be put in place.

Some of the state corporations and public companies that the state has a stake in that have benefitted from bailouts are; Kenya Power and Lighting Company, National Bank of Kenya, Kenya Meat Commission, Uchumi Supermarkets Ltd, Pan African Paper Mills, Telkom Kenya, Kenya Broadcasting Corporation, Tana River Development Authority, Mumias Sugar Company, Kenya Airways to mention but a few.

Billions of shillings of the taxpayers' money have been pumped in into these SOEs and public companies that the State has a stake in over the years without any laws justifying this kind of expenditure by the State.

It is for this reason that I recommend enacting of a new legislation that deals specifically with bailouts. This legislation should address but should not be limited to deterring moral hazards, reducing information asymmetry, recouping the government's investments, enhancing good corporate governance by linking bailouts to governance and system reforms, outline a defined criteria for which SOE or public company that the State has a stake in qualifies for a bailout, the conditions to be met before a bailout is given, an investigation into the reasons why a bailout is needed, whether there is an alternative route besides a bailout.

The legislation should have political accountability as one of its institutional design goal, but of paramount, it should be designed in a way that serves public policy best.

#### **4.3 CONCLUSION**

The nature of bailouts is generally ex post, meaning it happens after the fact and the question that lingers in most peoples' minds is whether bailouts can nonetheless be regulated in advance so that the worst types of bailouts can be avoided and only good bailouts are implemented. In short can the government use bailouts when we cannot legislate the specific conditions under which bailouts must or must not be used?

The need for legislation to deal with bailouts cannot be understated. Every year the State bails out SOEs and public companies that it has a stake in with taxpayers' money and without adequate justification. It is not clear who are the real beneficiaries of these bailouts as there is scarce records of anyone who has been prosecuted for mismanagement and embezzlement of funds in these SOEs and public companies that the state has a stake in.

While most people agree that the State should not be in business and that the free market economy policy should prevail, we cannot dispense with the fact that the State is the largest

mover of business in our economy, however, it should only be in the business that if private players came in, the less fortunate in the society would not afford access to some commodities for example water, electricity and so on.

This means that there should be legislation that guides the State on how to deal with bailouts and when it should let the free market economy to deal with some of the public companies that it has a stake in.

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## RESEARCH QUESTIONNAIRES

Appendix 1

Title: CRITICAL REVIEW OF THE LEGAL FRAMEWORK FOR FINANCIAL BAILOUTS OF PUBLIC COMPANIES IN KENYA

This research project seeks to review the legal framework of financial bailouts of public companies and make the appropriate recommendations for reforms.

The research forms part of my LL.M research project at the University of Nairobi, School of law.

Part of the research involves interviewing individuals who have been directly or indirectly involved with financial bailouts in Kenya or who have information and experience of the profession and reasons used in bailing out of public companies in Kenya.

Being one such person who I have identified, I request you to take part in the interview.

If you agree, to my request I will ask you to participate in an interview of about 10 minutes.

During the interview I will ask you questions on the following;

1. Your understanding on state owned enterprises.
2. The role of the National Treasury in the state owned enterprises?
3. How is the National Treasury involved in decisions of whether to bail out or not to bail out failing state owned enterprises?

4. Whether in your opinion National Treasury has been or is effective in the process of bailing out failing state owned enterprises?
5. Whether the current legislation on public finance and management sufficiently covers bailouts of state owned enterprises?
6. Your thoughts on how bailouts are carried out in Kenya and if there is need for reforms or a legal framework put in place to deal with the issue of bailouts of state owned enterprises?
7. Has there been any impact (positive) on the state owned enterprises that have so far been bailed out and if not what alternative would you propose.

With your permission, I would like to take notes for later analysis.

You can choose not to answer any particular question and you are free to withdraw from the interview at any time. The data will be kept securely and destroyed securely after the completion of the project.

A copy of the completed thesis will be available on request.

The project has been subject to ethical review in accordance with the procedures specified by University of Nairobi ,School of law.

If you have any further questions about the project, please feel free to contact me at the email address below.

Name of researcher: Jackline Wanjiru Mwangi

Email address: [jshiromwangi@gmail.com](mailto:jshiromwangi@gmail.com)

Date .....

## Appendix 2

Title: CRITICAL REVIEW OF THE LEGAL FRAMEWORK FOR FINANCIAL BAILOUTS OF PUBLIC COMPANIES IN KENYA.

This research project seeks to review the legal framework of financial bailouts of public companies and make the appropriate recommendations for reforms.

The research forms part of my LL.M research project at the University of Nairobi, School of law.

Part of the research involves interviewing individuals who have been directly or indirectly involved with financial bailouts in Kenya or who have information and experience of the profession and reasons used in bailing out of public companies in Kenya.

Being one such person who I have identified, I request you to take part in the interview.

If you agree, to my request I will ask you to participate in an interview of about 10 minutes.

During the interview I will ask you questions on the following;

1. Your understanding on state owned enterprises.
2. The role of government in the state owned enterprises?
3. What you think is ailing most of our state owned enterprises.
4. How is Parliament involved in decisions of whether to bail out or not to bail out failing state owned enterprises?

5. Whether in your opinion Parliament has been or is effective in the process of bailing out failing state owned enterprises?
6. Whether the current legislation on public finance and management sufficiently covers bailouts of state owned enterprises?
7. Your thoughts on how bailouts are carried out in Kenya and if there is need for reforms or a legal framework put in place to deal with the issue of bailouts of state owned enterprises?
8. Has there been any impact (positive) on the state owned enterprises that have so far been bailed out and if not what alternative would you propose.

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Date .....

Title: CRITICAL REVIEW OF THE LEGAL FRAMEWORK FOR FINANCIAL BAILOUTS OF PUBLIC COMPANIES IN KENYA

I have read and had explained to me by Jackline Wanjiru Mwangi the information sheet relating to the project and any questions have been answered to my satisfaction.

I agree to the arrangements described in the information sheet insofar as they relate to my participation.

I understand that my participation is entirely voluntary and that I may withdraw from the project at any time.

I have received a copy of this consent form and of the accompanying information sheet.

Name of participant: .....

Signed: .....

Date: .....

Many thanks for your support.

Title: CRITICAL REVIEW OF THE LEGAL FRAMEWORK FOR FINANCIAL BAILOUTS OF PUBLIC COMPANIES IN KENYA

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Name of participant: .....

Signed: .....

Date: .....

Many thanks for your support.

Appendix 3

Title: CRITICAL REVIEW OF THE LEGAL FRAMEWORK FOR FINANCIAL BAILOUTS OF PUBLIC COMPANIES IN KENYA.

This research project seeks to review the legal framework of financial bailouts of public companies and make the appropriate recommendations for reforms.

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Being one such person who I have identified, I request you to take part in the interview.

If you agree, to my request I will ask you to participate in an interview of about 10 minutes.

During the interview I will ask you questions on the following;

1. Your understanding on state owned enterprises and bailouts.
2. Whether the current legislation on public finance and management sufficiently covers bailouts of state owned enterprises?
3. Your thoughts on how bailouts are carried out in Kenya and if there is need for reforms or a legal framework put in place to deal with the issue of bailouts of state owned enterprises?

4. How did your company find itself in financial distress?
5. Has the recent bailouts on your company been effective or not? What other option besides bailouts would you propose?
6. Who are the actual beneficiaries of the bailouts by the government?

With your permission, I would like to take notes for later analysis.

You can choose not to answer any particular question and you are free to withdraw from the interview at any time. The data will be kept securely and destroyed securely after the completion of the project.

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I have received a copy of this consent form and of the accompanying information sheet.

Name of participant: .....

Signed: .....

Date: .....

Many thanks for your support.

**LIST OF SOME BAILED OUT SOES AND COMPANIES AND THEIR  
CURRENT STATUS**

1. Kenya Petroleum Refineries Ltd	Dormant	
2. Cotton Lint & Seed Market Board	Dormant	
3. Kenya Commercial Finance Co. Ltd	Dormant	
4. Kenya Sisal Board	Dormant	
5. Busia Sugar Company Ltd	Dormant	
6. Pan African Paper Mills EA Ltd	Under receivership	Bailed out
7. Miwani Sugar Company Ltd	Under receivership	
8. Muhoroni Sugar Company Ltd	Under receivership	
9. Kenya National Assurance (2001) Ltd	Under liquidation	
10. Kenya Meat Commission	Bailed out	
11. Kenya Airways	Bailed out	
12. Uchumi Supermarkets Ltd	Fighting a liquidation case in court	
13. Mumias Sugar Company Ltd	Bailed out	
14. National Bank of Kenya	Discussion of a possible merger underway	