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REGULATORY REGIMES GOVERNING NGOs IN KENYA

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I. INTRODUCTION

The 1970s through the 1990s have witnessed a substantial growth in the formation, rise, decline and fall of non-governmental organisations (NGOs) in Kenya. A number of factors have contributed to the "proliferation" of NGOs. Firstly, donor confidence in the governmental structures declined in relative terms so that NGOs were regarded as important partners of or alternatives to the Government. Secondly, individuals and associations exploited the uncertain and murky regulatory regime governing the registration and operation of NGOs. Thirdly, the Government, by default and later actively suffered or enabled the registration and operation of NGOs.

It is significant that the NGO sector has become a major factor in public life and in the policy making process. For instance, NGOs account for a substantial amount of donor funds disbursed for projects in Kenya. They also employ a large number of the working population. In fact the NGO sector has been associated with high levels of remuneration and account for a measure of the exodus from the public service. Thus the sector has now been incorporated in the national policy instruments and strategies such as National Development Plans, Sessional Papers, Annual Government Estimates (Budgets), and Economic Surveys.

This report analyses the law and regulations which govern NGOs in Kenya. The focus is to establish the legal and regulatory constraints and opportunities which hinder or promote the efficient and effective operation of NGOs. The report is being prepared for the International Center for Not-for-profit Law (ICNL) and the World Bank under the project entitled Country Reports for Database Project on NGO Laws and Regulations. From the various country reports the two institutions intend to produce a Handbook on Global Standards and Best Practices for Laws Governing Non-Governmental Organizations. I have adopted and adapted a template supplied by ICNL in drafting this report.

II: PROVISIONS OF THE GENERAL LAWS

A: Consistency and Clarity of the Laws

In spite of the significant role NGOs play in the development process, the regulatory regime is hostile, murky, and at best ambiguous. Thus there are some laws and administrative practices which encourage and facilitate NGO registration and operations while others discourage NGO activities (cf. Adiin - Yaansah, 1995). What is remarkable is that to establish what law applies to the NGO sector one must wade through numerous substantive and procedural statutes; common law rules embodied in judicial determinations; and administrative practices. (see s.3 of the Judicature Act, cap. 8).

The body of laws and regulations which affect NGOs are listed under Annexes I, III and IV.

However, it is necessary to mention the most important ones such as the Constitution of Kenya, 1969; Non Governmental Organisations Coordination Act, 1990 (Act No. 19 of 1990); the Societies Act (cap. 108); the Companies Act (cap. 486); the Cooperative Societies Act (cap. 490); the NGO Coordination Regulations, 1992; the NGO Council Code of Conduct, 1995; the Public Order Act (cap. 56); and the Penal Code (cap. 63).

When the NGO Coordination Act, 1990 was enacted there were about four main legal and regulatory regimes which governed the registration and operation of NGOs. These included the Societies Act, the Companies Act, and the Cooperative Societies Act. A fourth "regime" was the certificates of recognition which have historically been granted by the District Social Development Officer (DSDO), under the Ministry of Culture and Social Services, mainly to community based projects and groups (Sihanya, 1996). Such certificates have been necessary to assist the groups or projects in opening or operating bank accounts as well as providing social and political legitimacy to the projects or groups. In the strict legal sense, this does not constitute a distinct registration or operative regime since it confers no new legal identity on the project or group.

A brief discussion of the foregoing regulatory regimes would suffice. It is notable that the choice of an appropriate registration law has been a difficult one but has largely depended on whether a group or association is intended to be completely not-for-profit or to include a profit making component in the institutional mandate. Other factors relate to the size or membership of the group or association; and how the group or institution intends to relate to its own members (if any), officials, non-members, and other groups or associations.

i) The Companies Act, cap. 486

A number of NGOs were and still are registered as public companies whose liability are limited by the guarantee of the directors. Under the Companies Act, a group or association of persons may incorporate a private or public company. A private company consists of at least 2 shareholders and a maximum of 50. The public company has been a popular mode of registering groups or associations. The legal requirements for registration include at least 7 members or shareholders who must forward to the Registrar of Companies the Articles of Association as well as a Memorandum of Association (s.15).

The Articles of Association regulates the internal relationships, organisation, and management of the group. It includes such information as the number of persons to whom membership is open; the number, notice and conduct of general meetings; the quorum for and proceedings at such meetings; the number of directors and the names of the first directors; the powers, disqualification and rotation of directors; the proceedings of directors; the accounts and audit of the funds of the group or association; and the manner of delivering or sending notices to members (ss.9-13 of the Companies Act).

A Memorandum of Association, on the other hand, regulates the relationship between the group or association and non-members. It must include the name of the company; the company's registered office; its objects; the authorized share capital; and whether the liability of the members is limited or not (ss.4-8). The Memorandum of Association must be very accurate or else the company incurs liability to a number of stakeholder who act in reliance

on the information. Such stakeholders include (prospective) shareholders; customers; suppliers; (prospective) employees; managers; consumers of its goods, technology or services; and the general public.

Many welfare groups, charities, trusts, foundations endownments, and NGO oriented organisations and groups have traditionally been registered as public companies limited by guarantee largely because of the latitude the regime offers in terms of registration and operational requirements. Examples of NGOs which were initially registered as such include the Public Law Institute (PLI) and the African Centre for Technology Studies (ACTs). The liability of the members have thus been limited by the guarantee of the directors.

The Minister (which term is not defined in the Act) may exempt an association from using the word "limited" after its name (s.21). This applies where the Minister (who for registration purposes is the Attorney General) is satisfied that "the association about to be formed as a limited company is to be formed for promoting commerce, art, science, religion, charity or any other useful object, and intends to apply its profits, if any, or other income in promoting its objects, and to prohibit the payment of any dividend to its members" (section 21 (1) of the Companies Act). What must be emphasized is that the association or company shall not have profit making as a core motive and shall not apply its income for the benefit of the members or shareholders. Once the Memorandum of Association is registered, the registrar is obliged to certify under his or her hand that the company is incorporated. Incorporation immediately transforms the subscribers to the Memorandum of Association and the members of the company into a body corporate (section 16).

Some of the legal consequences of incorporation include constituting the company into a legal person. The company may thus in its own name own property, enter into contracts, and sue or be sued. It also assumes perpetual succession with the capacity to outlive the founders. Another major attribute is that the company is first and foremost liable for activities, debts and obligations lawfully transacted in its name. Members may, however, contribute to the discharge of such liabilities in the process of the company being dissolved, wound up or liquidated (s.5(3).

ii) The Cooperative Societies Act, cap 490

Cooperative societies are in a way part of the NGO movement in Kenya. The cooperative movement has become a very important feature of Kenya's economic, social and political landscape since the 1980s although the Co-operative Societies Act, cap. 490 was enacted in 1966. In fact a Ministry of Co-operative Development was established to underscore the significance of cooperative societies. There are now about 7000 registered societies with a membership of about 80,000 (Daily Nation, 26.8.96, p.4)

Cooperative societies fall under three categories: primary cooperative societies; cooperative unions; and apex cooperative societies. Primary cooperative societies consist of individual members; cooperative unions are open only to primary cooperative societies; and apex cooperative societies are restricted to cooperative union membership.

The most important type of cooperative for purposes of the NGO movement is the primary

one. The requirements for registration as well as the process are addressed under Part III (sections 5-13) of the Cooperative Societies Act, cap. 490. The requirements for registration include objects which underscore the promotion of the members' economic interests; applicants must be at least 10 in number; applicants must be aged 18 years and above; and applicants must be residents of the society's geographical area of operation or they must occupy land within the said area (Kattambo, 1992: 44ff).

The application form (Form I) which is formulated under s. 7 requires applicants to supply the following details: the name of the proposed society; area of operation; type of society; whether the applicants desire the society to have limited liability; the language in which the books and accounts of the society will be kept; and the name of the person appointed to perform the duties of secretary of the society.

The applicants are also required to enclose a copy of the society's proposed by-laws. The by-laws may be compared to the Memorandum of Association and the Articles of Association of a public company discussed above.

The by-laws should include some of the information in the application forms (Form I). The required information includes the name of the society; the registered office and postal address; the area to which operation and membership shall be confined; the objects of the society; the purposes to which its funds may be applied; and the disposal of its accumulated resources. Other pieces of information include qualifications for membership; the terms of admission of members and the process of their enrollment; the withdrawal and expulsion of membership; and the payment, if at all, to be made to such members and the time within which such payment shall be made.

Additionally, the by-laws should contain the rights, liabilities and obligations of members; the manner of raising funds, including the maximum rate of interest on deposits; its general meetings; the procedure and quorum at such meetings, and the powers of such meetings; the appointment, suspension and removal of members of the committee and officers; the powers and duties of the committee and officers; the society's financial year; the authorization of officers to sign documents on the society's behalf; and provisions regarding dispute resolution (see generally sections 5-13; Kattambo, 1992: 44-48; Nyamweya, 1996).

iii) The Societies Act, cap. 108

Another important legal regime under which NGOs have been constituted, registered and operated is the Societies Act, cap. 108. The Societies Act, defines a society to include "any club, company, partnership or other association of ten or more persons, whatever its nature or object, established in Kenya or having its headquarters or chief place of business in Kenya, and any branch of a society, but does not include a company defined by the Companies Act; any corporation incorporated under any written law; a registered trade union; a company, firm, association or partnership consisting of not more than 20 persons formed and maintained with a view to carrying on business for profit; a cooperative society registered as such under any written law; a school; a building society; a bank; an intergovernmental organisation of which Kenya is a member; any combination or association which the Minister may, by order, declare not to be a society for the purposes of this Act (s.2). The term "Minister" is not defined in

the Act. However, the Attorney-General's Office has been responsible for the registration of societies.

Section 9 of the Act requires every society to apply to the Registrar of Societies (in the Office of the Attorney General) for registration or exemption from registration within 28 days after its formation. It is an offence to be a member of or to manage a society which has not been registered or exempted from registration (sections 4, 5 & 6). In a recent case a man was charged with the offence of belonging to an unlawful society, the February Eighteenth Revolutionary Army (FERA). In acquitting him the judge remarked that the prosecution had not established (but had assumed) the existence of FERA and/or its illegality. Moreover, the judge noted that even if such an association or society existed, the accused had not made any meaningful contact with it or its membership for such a long time that his membership, if he had any, had lapsed. The decision was lauded as an instance in which the judiciary was prepared to uphold and enforce the constitutional freedom of association, liberty, and protection of the law.

Part III (sections 8 - 15) of the Societies Act deals with registration and exemption from registration while Part IV (sections 16 to 32) deals with conduct and administration of societies.

Under s.10(1) the Registrar is obliged to register a society once it applies for registration and if it meets the statutory requirements. On the other hand, the Registrar may exempt a society from registration only with the approval of the Minister. What then are the requirements for registration? The Minister is empowered to formulate rules for the effective implementation of the Act (s. 53). Thus Rule 2 of the Societies Rules, which were formulated under s. 53 provides the requirements to be met for registration. The application must include a duly completed Form A, whose contents are discussed below. It must be in duplicate and typewritten; must be signed by three of the officers of the society (this is usually done by the Chairman, Secretary and Treasurer); must be sent to the Registrar with the prescribed fee; and must be accompanied by two typewritten or printed copies of the society's constitution or rules. There must be a notification in duplicate of the situation of the registered office and postal address of the society.

Form A, which is the "Application for Registration or Exemption from Registration of a Society" is a template or standard form addressed to the Registrar and requires information such as the name of the society; the objects thereof; and the name of each organisation or group of a political nature outside Kenya, if any, to which the society is affiliated. Other information includes the class or classes of persons who may join the society; the current number of members; the titles of the office bearers; the names, occupations and addresses of the present or proposed officers; the land and premises (if any) owned by the society; and the manner in which such property is held or vested.

Form A also requires a commitment that certain basic minimum provisions have been made in the society's constitution as envisaged under s. 19 of the Act. Some of the contents of the constitution are a repetition of aspects of Form A. The contents include the rates of entrance and subscription fees for membership; the method of suspension or expulsion of members; the titles of officers, trustees and auditors and their terms of office; the method of their election,

appointment, dismissal and suspension; the composition of committees of the society; the terms of office of committee members and the method of their election, appointment, suspension and dismissal; the authority for and the method of filling vacancies on committees; and the frequency of quorums for, and dates of, the general meetings. Additionally, the constitution or rules must make provision for the custody and investment of the funds and property of the society, and the designation of the persons responsible therefor; the purpose for which the funds may be used and particularly the prohibition of the distribution of funds among members; the inspection of books and list of members by any member or officer; and the annual or periodical audit of accounts. The last two sets of requirements would ensure that the NGO is accountable to its members, its constituency or target group, as well as the regulator and the Government.

Other contents of the constitution include the formation of branches where appropriate; the procedure of amending the name, constitution or rules of the society; and the manner of the dissolution of the society and the disposal of the property on dissolution. Interestingly the Societies Act still provides that members may contribute a maximum of Kshs. 100/= (1US$ 56 Kshs., approx.) if at the time of its corporate death (liquidation, winding up, or dissolution). The Kshs. 100/= is extremely conservative but underscores the protection the Act intended to accord to members. It also reflects the fact that at the time the law was enacted in 1968 Kshs. 100/= was regarded as a lot of money. In comparison, s. 5 of the Companies Act does not stipulate a limit on the contribution of members but presupposes that the shareholders and/or managers of the corporation would establish a certain limit.

A large number of national and local or district-based NGOs as well as community groups were originally (and still are) registered as societies. Some have, however, since changed regulatory regimes since the Non-Governmental Organisations Coordination Act (Act No. 19 of 1990) came into force.

iv) The Non-Governmental Organisations Coordination Act, Act No. 19 of 1990

One fo the major reasons for enacting the NGO Coordination Act was to ensure that only organisations in the line of political parties, religious and welfare organisations remained under the purview of the Societies Act, cap. 108. Welfare or philanthropic organisations are here distinguished from charities and trusts, although Kenyan law and practice have not drawn a clear cut distinction (cf. Cairns, 1988). In fact the still-born Political Parties Bill, 1995 should be seen as a further move to streamline the murky regime under the Societies Act - political parties would also be removed from the regime of the Societies Act. The Government also indicated that the NGO Coordination Act would be used to co-ordinate NGO activities although many analysts think the intention was to introduce intrusive regulation of and hence control NGOs (cf. Ndirangu, 1990; Adiin - Yaansah, 1995)

A number of organisations, groups and associations which had earlier been registered as companies limited by the guarantee of directors or under the Societies Act were given a grace period to shift to the regime of the NGO Coordination Act. A number have not changed, or are still unregistered under any of the foregoing regimes. This is mainly the case with small, local community based projects who or which are either unaware of the legal changes or cannot access funds and/or expertise to effect necessary registration or adjustments.

The NGO Coordination Act makes it illegal to operate an NGO which has not been registered. There are striking similarities between the requirements for registration under the Societies Act and those under the NGO Coordination Act. Form 3 which has been formulated under Rule 9 of the NGO Coordination Rules stipulates the information which must be incorporated in an application for registration. These include five copies of the application which must be submitted to the NGO Coordination Board; personal particulars of the NGO's three officers; five copies of a letter from the sponsor who is the person or body providing primary financial and material support; two copies of the constitution; two current passport-size photographs of the applicant duly endorsed by the sponsor or referee; and a certificate of registration outside Kenya or incorporation in Kenya where appropriate. The last requirement applies to NGOs which have been registered outside Kenya or associations which have been incorporated in Kenya under a different legal regime.

Other requirements include a copy of the minutes of the meeting of the proposed NGO authorizing the filing of the application; a notification of the location of the office and postal address of the proposed NGO signed by the Chief Executive of the proposed NGO; and the prescribed application fees. Currently local NGOs pay Kshs. 2,000/=, national NGOs pay Kshs. 3,000/=, and international ones pay Kshs. 5,000/= (1US$ = 56 Kshs approx). An international NGO is one which is registered in an may operate in Kenya and any other country.

Other important pieces of information required under Form 3 include the name of the organisation; the name of the Chief Executive; the date and place of first registration (where appropriate); and the nature or functional remit of the proposed NGO. The last includes such fields as welfare, health, informal sector, water, relief, education, agriculture, and environment.

The following pieces of information are pertinent to the Government's regulatory role: the objects of the NGO; the local and foreign personnel requirements; the sources of funds, and the total amount budgeted for; the other countries of operation; affiliate organisations; the location and proposed headquarters; and the districts of operation. It is remarkable that many NGOs are locality oriented and operate in more than one district or province. Community groups are however both issues and locality oriented.

International and technical regulatory issues also come into play hence the NGO must disclose the type of equipment it intends to import into Kenya as well as the nature of Government support it expects. Government support many times comes in the form of tax rebates, exemptions or reliefs or the facilitation and issuance of appropriate work permits for foreign staff.

As I have indicated, there are a number of similarities between the registration of societies and NGOs. This is also reflected in the basic minimum requirements for an NGO constitution. Thus besides some of the information contained in Form 3 (discussed above), the constitution must contain information regarding the custody, use and investment of the funds and property of the NGO and the designation of the persons responsible therefor; and the purpose for which the funds may be used. The latter should include the prohibition of the distribution of funds and assets among members; the prohibition of clauses in the constitution that may permit or suffer the distribution of funds and assets to members or officials except for legitimate

reimbursement of expenses incurred in implementing the objects of the NGO; and rules governing the awarding of contracts to members or officials.

Other pertinent provisions of the constitution include persons or entities which may become members, and the structure and management of the NGO. The latter includes the titles of officers, trustees, auditors and their terms of office and methods of election, appointment, suspension and dismissal. It also encompasses the composition of committees and their terms of office and the methods of election, appointment, suspension and dismissal. Additional important provisions which would ensure effective and efficient financial management and social and political governance and accountability include quorums for and dates of general meetings; financial year and periodicity of audit of accounts; inspection of books and list of members; whether and how branches may be formed; and the manner of amending the name, constitution or rules of the NGO. The last provision would ensure that the NGO responds in a systematic and organised manner to social, economic, cultural and political dynamics. and This is a recognition of the fact that to omit amendment or adjustment clauses in a social-political institution would amount to courting disaster.

Finally, the Second Schedule to the Act realistically makes provision for the corporate death of the NGO; it envisages a clause in the constitution regarding the manner of dissolution of the NGO and the disposal of its property on dissolution.

(v) Ministry of Culture and Social Services

There is a category of income generating, welfare, self help, philanthropic, charitable, and other groups which utilize the regulatory regime under the Ministry of Culture and Social Services. In many instances, the groups are already registered in some parts of the country or outside the country.

Such groups approach the District Social Development Officer (DSDO) under the Ministry of Culture and Social Services for a certificate of recognition to facilitate their operations in the district in question. The certificate does not constitute a certificate of registration, or incorporation and does not confer any new legal personality in the manner already discussed in relation to the four laws above. The main importance of the certificate is the social and political legitimacy which the group or project attains. Before issuing a certificate of recognition, the DSDO usually requires the group to submit a constitution as well as a letter from the chief within whose jurisdiction the group operates as an indication or confirmation of its existence and the lawfulness of its activities.

It is also notable that in a number of cases, such certificates have enabled community based groups to access funds from donors in many instances. Unless such groups are registered or incorporated under a recognized system, funds can only be disbursed to them through accounts to which the District Social Development Officer is a signatory, or through an account operated by an independently registered organisation which would host the group for purposes of disbursements. The main advantages of this system is that it is not technical hence it is relatively easy to obtain a certificate. It is also easier for members to understand and participate in the process. The costs are also affordable. Yet the challenges include lack of a clear cut legal identity and problems of financial accountability which may arise where the

group operates under the host . Project implementation may also delay where signatories who do not belong to the NGO (like the DSDO) are inaccessible.

Comparative Analysis of the Regulatory Regimes.

The various registration and regulatory regimes discussed above carry benefits and pose constraints for the efficient and effective management, operation and regulation of NGOs and community based projects. These advantages and disadvantages are summarized below.

Companies operate under rigid management systems. These include legal requirements such as the processing and filing of financial returns. Registration formalities for a public company are also very complicated and time consuming. They are also expensive as competent legal and technical support is necessary.

The management systems and financial procedures for corporate governance require a measure of literacy and/or familiarity with technical information and processes. Incorporation of companies would thus exclude the majority of the local people or ordinary members from decision making processes. In fact partly because of the foregoing reasons, most decisions are likely to be taken by directors and other corporate managers.

Companies are largely or principally run in the spirit of capitalism. The profit motive may make a company insensitive to the basic problems of rural areas and poor urban sectors, such as the provision of clean drinking water at less than market rates.

The objects of companies, societies, and NGOs tend to be diverse and diffuse. This gives rise to the problem of lack of focus and the question of determining and monitoring the association's adherence to its core concerns. In comparison, the objects of cooperatives tend to be more focussed and specific.

Another management and regulatory problem regarding companies arises from the fact that some members may be only nominal shareholders or they may have minimal shares hence limited say in matters of management and project implementation. Stories on corporate governance in Kenya in the recent past are replete with instances or allegations of the exclusion or oppression of minority shareholders. In fact in one instance the chairman of the Kenya Commercial Bank (KCB) was reported as disregarding and discarding the views of a shareholder mainly because he was in the minority.

In spite of progressive liberalisation in a number of social-economic sectors, cooperative societies have increasingly suffered intrusive regulation by the Commissioner and/or the Minister for Cooperative Development. This is mainly due to the wide regulatory powers governing entry into and operation of cooperative business. The powers include registration or refusal to register a cooperative society afresh, or registration after amalgamation or division. The Act is under review to liberalise the cooperative sector and to give co-operatives more autonomy. It is not known when the review process will be finalized.

As compared to NGOs, stakes in cooperatives are easier to determine. And as compared to companies, cooperatives tend to present a more attractive and acceptable face of capitalism

as their management systems tend to infuse welfare approaches into business schemes. It is thus said that cooperatives are unions of persons while companies are unions of capital (Nyamweya, 1996).

In fact partly because of the foregoing scenario some analysts have opined that cases of cooperative failure in Kenya may be due to the fact that many cooperatives are run as welfare associations while their role as income generating business entities is largely ignored. This creates a regulatory challenge since there is stricter regulation of business entities in comparison to welfare associations.

Part of the problem why cooperatives may not deliver community development is because of their limited exposure to or capacity in financial management and technical skills which are important in running a modern social-economic unit.

An advantage for operating cooperatives includes the fact that registration under the Cooperative Societies Act provides the option on whether the members' liability is limited or not.

The legal restriction on the participation of proxies in decision making processes in cooperatives ensures and enhances personal involvement, which is very important in community and NGO projects. On the other hand, it is many times unrealistic: a member may be indisposed or otherwise incapacitated. In any event, many members enrol in cooperatives while they work in towns or elsewhere far away from home. Like companies and NGOs cooperatives have corporate status, legal personality, and perpetual succession. These attributes facilitate long term planning and the negotiation and conclusion of contracts in the name of the entity.

A problem with cooperatives is that membership may be so large that effective participation of the members may not be easy or possible. Membership is largely attracted by the fact that many cooperatives fuse the spirit of capitalism with a welfarist and philanthropic heart.

The registration of societies and NGOs largely delays because of the screening and vetting processes. NGOs have for a long time been regulated under the internal security portfolio in the President's office. They have been recently transferred to the Provisional Administration docket in the same office. Many times registration is only granted after the Chief Executive and/or other major players have been investigated, interrogated and vetted by the Special Branch (read the political police). In terms of black letter law, however, societies and NGOs may operate as soon as the applications have been filed notwithstanding the delays in registration. But problems arise from political quarters and from the provincial administration.

The registration regime under the Societies Act is however not clear cut. It encompasses all manner of business, welfare, religious, political and developmental entities although the intention and practice in the recent past has been to remove NGO-like bodies from its remit. It has been used largely by community groups as a means of achieving juridical status and getting recognition.

Societies do not have clear-cut legal personality hence many time they have to act through trustees. This imports exclusionary management styles. It locks out participation which is

very necessary in community projects. Trustees act on behalf of the membership hence project ownership appears or is actually removed from the membership.

The liability of the members of a society are likely to be unlimited hence they may be pursued personally for debts or liabilities incurred by the management, officials or trustees.

The Kenyan NGO law is an attempt to codify the law of trusts or charities known to English law. The problem is that the NGO Coordination Act deals with only a few of the issues. As a result many NGOs are managed like traditional profit-making corporations or welfare groups but without the benefit of tested management, accounting and regulatory procedures.

B. Constitution

The Constitution of Kenya, 1969 (Act No. 5 of 1969) embodies a Bill of Rights (ss. 70-86). It embodies human rights principles which have been distilled from, inter alia, the Universal Declaration of Human Rights, 1948; the Magna Carta; the International and Covenant on Civil and Political Rights, 1996; and the American Constitution. Although there are no specific references in the Constitution to the registration, incorporation or operation of NGOs, a number of provisions are relevant to the same.

Some of the most important constitutional provisions whose interpretation, application and enforcement would assist or constrain NGO activities include s.70 which, in preambular form, guarantees the fundamental rights and freedoms of the individual; s.77 which embodies due process; s.78 which protects freedom of conscience; s.79 on freedom of expression; s.80 which ensures the freedom of assembly and association; s.81 on freedom of movement; and ss.83, 84, 85 and 86 which make provisions on derogation from fundamental rights and freedoms, enforcement of protective provisions, the preservation of public security, and the interpretation of the Bill of Rights and saving clauses, respectively.

There are many claw-back provisions on the Bill of Rights to an extent that many scholars have remarked that the constitutional limitations are more significant in practical terms than the freedoms, liberties, and rights which the Bill guarantees. The main forms of limitation are related to the preservation of national security and public order. Thus under the Preservation of Public Security Act, cap. 57, the President may suspend the validity of various aspects of the constitutional provisions. This may be in the case of a state of emergency related to break down of political and social order, drought, famine, floods, invasion, insurrection, etc (see generally Ghai & McAuslan, 1970; Ojwang, 1990; Ojwang & Otieno-Odek, 1988).

Moreover, the Public Order Act, cap. 56 has been applied to limit the operation NGOs. For instance, a number of workshops, conferences, seminars, cultural events and other activities organised by NGOs or attended by NGO representatives have been interrupted or denied licenses ostensibly because they would disrupt public order.

C Types of Organisation

The organisations which operate as NGOs in Kenya include those specifically registered as such; welfare and self help groups; cooperatives; trusts; foundations; charities; and philanthropic associations.

See the discussion (above) on Consistency and Clarity of the Laws for a detailed disussion.

D Purposes

The different legal entities which constitute NGOs may be established for various purposes. These include training and education; cultural activities; scientific and technological development; various forms of charitable work; policy or action oriented research; legal aid or public interest legal intervention; promotion of health and family planning; child welfare e.g. Child Welfare Society of Kenya (CWSK); disaster relief; and other forms of relief, etc.
See also the preceding section (section C) above for a detailed discussion.

E Registration or Incorporation Requirement

There are striking similarities and divergences in the registration and incorporation requirements.

See discussion (above) on Consistency and Clarity of Laws for a detailed discussion.

F NGO Register

The NGO Coordination Board maintains a register of registered national and international NGOs in its head office (s.7 of the Act and s.4 of the NGO Co-ordination Regulations). Some of the information in the register includes the names of the NGOs, the dates of registration, the registered officials or managers, the registered office, etc. The public have access to the register, which is supposed to be published periodically, by law. Section 23 of the NGO Coordination Regulations provides for amendment of the register. Hence defunct organisations may be expunged from the register although the law does not specifically say so. The register is not required by law to contain names of organisations that were denied registration or the reason therefor. The register is considered not to be up-to-date largely because NGO reporting is haphazard, irregular or inaccurate.

G General Powers

Upon registration and incorporation NGOs have and can exercise wide ranging rights and powers, including the right to own property; enter into contracts; sue, and be sued etc. They can do these things in their corporate name. The specific powers which NGOs or NGO managers may exercise are embodied in the objects which form part of the constitution of the NGO. These powers, and the objects, are further circumscribed by the general law.

Where NGOs fail to comply with their mandates, stakeholders may raise the issue with the managers, the NGO Board, the courts, the Attorney General's Chambers, or the police. The last instance applies where the activities in question amount to an infraction of the penal law. Among the stakeholders, those who have the least legal capacity to seek redress against an NGO in the circumstances are the intended, prospective or actual beneficiaries. This is mainly because due to the strict rules of locus standi, it would be difficult for them to establish in law their legal interest as well as how that interest has been injured.

H Membership Organisations

The cooperative law based NGOs have strong provisions on the role of members. This is perhaps because of the fact that cooperatives combine a welfare approach with the economic interests of members. Thus there is a tendency to ensure that economic interests which go with membership are protected.

Under the Societies Act, the Companies Act, and the NGO Coordination Act, the role of members is at best dubious. In fact the NGO Coordination Act and the Companies Act are not very clear on the role of members in the management and operation of the NGOs. They are, however, emphatic on the fact that no income or assets should inure to the members; and that members would contribute in the event of the dissolution of the associations.

The laws which make provision for members give the constitution drafters as well as the managers a lot of latitude on the discipline, suspension, removal or expulsion of members. There are no clear guidelines on these issues. The same applies to reasons and procedures which would give rise to a member resigning from the organisation. Managers exploit these loopholes to lock out member participation and to unlawfully remove those who question certain practices.

Some membership organisations such as the Law Society of Kenya (LSK), the Kenya Medical Association (KMA), and the Kenya Medical Women's Association (KMWA) are sometimes erroneously referred to as NGOs. In the case of LSK, it is a statutory body established under the Law Society of Kenya Act (cap. 18).

Some of the main statutory objects and functions for which the LSK was established include: to maintain and improve the standards of conduct and learning of the legal profession in Kenya (s.4(a)); to facilitate the acquisition of legal knowledge by members of the legal profession and others (s.4(b)); to assist the Government and the courts in all matters affecting legislation and the administration and practice of the law in Kenya (s.4(c)); to represent, protect and assist members of the legal profession in Kenya in respect of conditions of practice and otherwise (s.4(d)); and to protect and assist the public in Kenya in all matters touching, ancillary or incidental to the law (s.4(e)). The LSK plays a self-regulatory role in the discipline of the members.

LSK's regulatory mandate over its members has been affected or circumscribed by legislation as well as political and administrative practices by state functionaries. Thus the Advocates Act, cap.16 was amended in 1989 with the effect of establishing the Advocates Complaints Commission. The members of the Commission are presidential or ministerial (A-G's)

appointees (s.53-54). The Commission has the effect of whittling down the authority of LSK's Disciplinary Committee which has historically been the self regulatory authority on the professional conduct of advocates.

Other professional bodies, including the Architectural Association of Kenya (AAK) and the Kenya Engineers Association (KEA) do not have the dubious statutory stature which LSK has. In fact just as advocates get practising certificates from the judiciary (rather than from the LSK), the Medical Practitioners and Dentists Board, rather than the KMA, has a lot of regulatory authority on the practice of medicine and dentistry. That role includes licensing of practitioners. The Board is established under the Medical Practitioners and Dentists Act, cap. 253. The LSK has limited or no role in the appointment of judges, magistrates or members of the Advocates Complaints Commission just as the KMA and KMWA have a limited or no role in the appointment of the senior officers or bureaucrats in the Ministry of Health.

III GOVERNANCE

The four statutory regimes which regulate NGOs have convergent and divergent provisions on governance. Under the Companies Act, the governance structure has been modified by practice to include the general membership who may requisition meetings or inspect books of accounts and list of members; directors who are referred to as a board or as a governing council; an executive director or managing director, as the head of the secretariat who is responsible for the day-to-day operations of the NGO; and the membership in general meeting which is the supreme decision making body.

Under the Societies Act, the governance structure consists of the membership in general meeting as supreme organ; and the principal officers, who are usually designated as Chairman, Secretary and Treasurer and who are elected by the membership. The title of the principal officers is not a statutory matter and vary from one organisation to another. Other organs include trustees whose significance lie in the fact that the assets, funds and property of the organisation are vested in them because a society is an unincorporated association.

The governance structure under the Cooperative Societies Act is largely similar to that under the Societies Act. But in addition, Rule 32 of the Cooperative Societies Rules provides that "[e]very registered cooperative society shall have a committee consisting of not less than five and not more than nine members which number shall include the chairman and vice-chairman who shall be elected by the committee from amongst the members of the committee."

The committee is empowered by Rule 34 to act as the governing authority of the society. Its mandate is however circumscribed by the general meeting and by the by-laws of the society. The powers of the committee which are outlined under Rule 34(1) include entering into contracts; borrowing money; and instituting and defending suits or other legal proceedings. It may also do all other things necessary to achieve the society's objects in accordance with the by-laws. The committee's duties include ensuring that any payments made by cheque are signed by the appropriate officers and countersigned by the Commissioner or his or her nominee; taking responsibility for the custody of all the society's funds and banking the same appropriately; ensuring that "any negotiable instrument and any order for goods in excess of amounts specified hereunder are countersigned by the Commissioner" or his or her nominee

(Rule 34(2) (c)). The role of the committee is strikingly similar to that performed by trustees in societies registered under the Societies Act.

The governance structure anticipated under the NGO Coordination Act includes the Chief Executive and other officers of the organisation (s.10 of the Act). The Second Schedule to the NGO Coordination Regulations complements the Act and requires that the constitution of the organisation, which is a mandatory document for registration, should contain the titles of officers, trustees, auditors as well as the composition of committees. Many NGOs do not have trustees. Many transact most business in their own names, thanks to their corporate status or because the business partners do not notice or insist on the difference. The titles of the officers and the appointment of auditors also vary from one NGO to another. In some NGOs auditors are appointed by the membership, the management, or the supreme governing authority.

The various registration regimes anticipate the existence of Chief Executives and their assistants or deputies. However, the titles, powers, duties, mode of appointment, and terms of service are, however, largely left to the constitutions, by-laws, or decisions of the general meetings of the organisations. It is significant, however, that Rule 32 (3) of the Cooperative Societies Rules provide that no person shall serve as chairman of the society for more than three consecutive years. Moreover, any person who has held office for three consecutive years is not eligible for re-election as chairman for a period of two years from the date on which he or she vacated office. The Commissioner may, however, remove the disability.

Trustees may be appointed at annual or special general meetings. Their powers and duties may be stipulated in trust deeds or under the constitution or by-laws. What is significant is that chief executives have residual powers on a wide range of issues relating to the management and governance of NGOs.

It is remarkable that in membership organisations the role of members in the management of the organisation is largely limited to the annual, special or extra ordinary general meetings. In a number of cases, such meetings are rarely convened so that most decisions are taken by the chief executive and/or the governing body. Members are only involved when their confirmation or ratification of decisions, which have been taken, is required. Some of the crucial areas in which participation of the members is excluded is the formulation and implementation of budgets. The law largely provides the members with the role of performing the post mortem, for instance, inspecting the books of accounts or approving the auditors' reports. It must be appreciated, however, that drafting budgets is both technical and tedious and many members or beneficiaries of the NGOs may lack the time, expertise or interest.

The governing bodies such as the board of directors, governing council, executive committee, and general meeting usually play policy making rather than executive roles. Where they have executive roles, such as hiring and firing staff, negotiating and signing contracts, signing cheques, or authorizing the use of the seal, the role is either vested in or delegated to one of them or to the Chief Executive.

Members of the governing bodies may be personally liable for their conduct or their conduct may be fully attributed to the organisation depending on the constitutive and operative law and the instruments governing the organisation. Thus, for instance, some constitutions indicate

that members of governing bodies may only be compensated or reimbursed for expenses incurred in the implementation of the objects of the organisation. Moreover, they are many times liable solely or along with the organisation for any criminal conduct (cf. Moran, 1992). The members may meet their own expenses where they are sued or held liable for harm done to the organisation or third parties where their conduct constitute a breach of the organisation's instruments or state law, like where they have entered into an immoral or illegal contract or where they have acted negligently.

The extent to which third parties, the members, or the intended beneficiaries may get relief for harm done by the governing bodies or managers depend on the provision of the constitution and the general state law. It is remarkable that although the managers and members of the governing bodies may be surcharged for unauthorized expenses or they may lose their jobs under the respective constitutions, general corporate law lacks provisions equivalent to the UK law on the disqualification of directors for surpassing or failing to fulfil their mandates.

All the four regimes, save the Cooperative Societies Act, emphasize that the funds of the organisation should not be used for the objects of the organisation and prohibiting the distribution of the same to members or officials. In the same vein, the regimes regulate the award of contracts by or on behalf of the organisation to avoid conflicts of interest and self dealing. On this issue, the guidelines for drafting an NGO constitution require that there should be a provision governing the awarding of contracts to members and officials. There are no clear guidelines on how the clause should be drafted. Many NGO constitutions have liberally borrowed from provisions in the Local Government Act, cap. 265 and the case law thereon which require that participants in the awarding of contracts should declare or disclose any interest they have in the proposed contract and/or they should not participate in the deliberations or voting if they have any (substantial) interest. Members and beneficiaries are largely kept out of such transactions and the provisions controlling self dealing and conflict of interest are rarely enforced.

The meetings of the members, managers and the governing bodies play an important role in governance. Whether attendance by proxy is allowable and the role of a proxy is dubious. The role of the proxy is cherished and well developed in NGOs which are registered under the Companies Act. Their role is quite limited: personal involvement is regarded as quite significant. On the other hand, the law governing proxies is not clear under the Societies Act or the NGO Coordination Act.

The law on quorums, voting, and how decisions are taken is equally dubious and ambivalent. Under the NGO Coordination Act, for instance the NGO has a free hand to determine the quorums for and dates of general meetings. Form A which is formulated under s.29 of the Societies Act also gives societies a lot of discretion on the frequency of, quorums for, and dates of the general meetings. S.29, however, makes it mandatory for every registered society to hold a general meeting at least once every year. This is the annual general meeting (AGM) to which all members must be invited and at which a full and true audited account of the funds of the organisation must be rendered. The AGM also serves as an opportunity for the election or appointment of officers, trustees, auditors, and committees.

Most of the decisions which affect the operation of the NGOs are taken not at general

meetings, but as day-to-day management decisions by the chief executives acting alone or in consultation with (sections of) the governing bodies. Where any of the matters are deliberated upon at general meetings, the decision is usually taken by a simple majority of the persons present and voting. This is largely because most of the regulatory regimes do not stipulate the requisite majorities and only require super-majorities (such as two thirds or three quarters of the membership) where the decision would fundamentally affect the legal character of the organisation. Thus such super majorities are required in the case of, for instance, amendment of the constitution or memorandum of association and the dissolution, winding up or liquidation of the organisation.

IV DISSOLUTION, WINDING UP, AND LIQUIDATION OF ASSETS

All the regulatory regimes require that the constitutive and operative legal instruments (eg. constitution, by-laws, regulations, etc) should make provision on when and how an organisation should be dissolved, woundup or liquidated. There should also be provisions on what follows dissolution, winding up or liquidation. However, the constitutive and operative legal instruments of many NGOs do not have such provisions; the result is that their corporate death is unorganized. This ensures that some managers and members of the governing bodies become the beneficiaries of organizational failure.

NGOs may be dissolved voluntarily by the act of the members, managers, or governing bodies or involuntarily. This may happen in a number of instances including upon completion of the project for which the NGO was established. In fact the NGO Coordination Act envisages the establishment of an NGO to perform a task whose duration is specific and limited. Other reasons for dissolution may be where the members, management and governing body no longer agree on the objects or modus operandi of the organisation; and where the objects for which the NGO was established has been frustrated or rendered unattainable or unviable. Personality cults also lead to dissolution of NGOs.

Involuntary dissolution may also occur where a project or organisation is deregistered or denied registration.

An NGO may be dissolved where its objects or activities are illegal; where it cannot meet its debts and obligations when they become due and payable; when they contravene the law and/or their own constitutive and operative legal instruments; where two organisations merge; or where it is just and equitable so to do. Some analysts are of the view that the deregistration of an NGO would only deprive it of its charitable status; it would not result in dissolution but would leave the NGO as a body corporate especially if it had been registered under the NGO Coordination Act or under the Companies Act.

Under s.16 of the NGO Coordination Act, the NGO Coordination Board may cancel or suspend a certificate of registration in three situations. Firstly, if the Board is satisfied that the terms or conditions attached to the certificate have been violated. The second situation in which the Board may so act is where the organisation has breached the NGO Coordination Act. Thirdly, the cancellation or suspension would arise where the Board is satisfied that the National Council of Voluntary Agencies, which is supposed to be a self-regulatory agency, has submitted a satisfactory recommendation for the cancellation of the certificate.

The procedures for dissolution vary from one regime or NGO to another. In many instances, a member, creditor, stakeholder, or the Registrar of Companies may bring a winding-up petition to the High Court. The petitioner must give reasons why the organisation should be dissolved. Members may also agree to dissolve the NGO at a general meeting specially convened for the purpose. In such a case the special resolution or proposal to dissolve the NGO must have been circulated to the members as part of the agenda. The notice of such a meeting varies from one NGO to another. Usually, a special majority is stipulated in the constitutive or operative instrument.

Under the Companies (Winding Up) Rules, formulated under s. 221 of the Companies Act require that petitions must plead the material facts. These are the background to and reasons for the petition. There should also be an affidavit verifying the petition. The petition must be served on the company or NGO at its registered office (Rule 24) and an affidavit of service must be duly field. The Rules also require that the petition be advertised. It is significant to note that a stakeholder may oppose the winding-up petition.

The constitutive or operative legal instrument and the dissolution order or agreement usually give details on how the funds and assets of the NGO should be disposed of upon dissolution. The cardinal point is that the assets must not be distributed among the members or officials. The funds and assets are largely to be used in satisfying the NGO's outstanding debts, liabilities and obligations. Any balance may then be donated to a charity, fund, trust, foundation, philanthropic organisation or NGO whose objects are not inconsistent with those of the NGO under liquidation. (see Article 24 of the PAMFORK Constitution, for instance).

The extent to which the creditors can realize their rights and interests depends on whether the NGO is a body corporate and how much the liquidation process realizes. In the case of unincorporated bodies, the creditors mainly have recourse to the managers or the governing bodies who may either be difficult to trace or may not have sufficient resources to meet the NGO's debts, liabilities and obligations.

Section 270 of the Companies Act donates to the Court of Appeal the power to entertain appeals from any decision or order given or made by the High Court in the exercise of the jurisdiction to wind up companies. The decisions of the NGO Coordination Board regarding registration and deregistration are appealable to the Minister - presumably the Minister in charge of provincial administration in the Office of the President. A final appeal lies in the High Court thanks to a later amendment to s.19.

V. REGULATION

NGOs fall under the purview of several regulatory authorities, depending on the regime under which they are registered or incorporated. Under the NGO Coordination Act, the principal regulatory authorities include the NGO Coordination Board (s.3 of the Act); the NGO Coordination Bureau (s.10), which is the executive directorate of the Board; and the National Council of Voluntary Agencies (s.23) which is a "collective forum of all the voluntary agencies" registered under the Act. The Council is supposed to strengthen self-regulation by NGOs. The Minister, which term is not defined in the interpretation clause (s.2) is another regulatory authority. Currently the Minister responsible for provincial administration in the

Office of the President is the one in charge. He appoints members of the Board (s.4(1)) as well as the Executive Director of the Bureau (s.5(1)). While the Bureau has the responsibility of processing applications for registration, only the Minister may exempt an applicant from registration (s. 10(4)), an area in which he or she seems to have absolute discretion. Section 19 also donates to the Minister appellate jurisdiction on the Board's mandate in matters relating to registration and licensing of NGOs (s.19). And by a 1992 amendment, the High Court now has jurisdiction as the final appellate body (Adiin-Yaansah, 1995: 43).

Under the Societies Act the regulatory authorities include the Registrar of Societies (s.8) and the Minister responsible for societies. The specific Minister is not indicated in the interpretation clause. However, the Attorney-General's Chambers has historically had the mandate to register or de-register societies (s.12). The Attorney General may also approve exempt societies from registration (s.10).

Upon registration or exemption from registration a society is consistently regulated by the Registrar of Societies regarding compliance with the general law and the society's constitution and rules. The matters in question are as diverse as holding of meetings; elections and change of office bearers; amendment of the society's name and constitution (s.20); and the keeping and rendering of accounts, documents and lists of members (s.27, s.28 and s.31). The Attorney General's Chambers has regulatory remit on these issues.

In the case of cooperative societies the Commissioner of Cooperatives is the main regulatory authority. Appointed by the Minister under s. 3, his or her regulatory duties, powers and functions include registering cooperative societies (s.5); requiring primary cooperative societies to join a cooperative union or a district cooperative union (s.9); receiving, considering, approving and registering amendments to the by-laws of a society (s.10); and approving the amalgamation, merger, division or demerger of cooperative societies (s.26).

The regulatory authorities for NGOs registered or incorporated under the Companies Act include the Registrar of Companies and the Attorney General; and judicial authorities, especially the High Court and the Court of Appeal. The Registrar is responsible, inter alia, for keeping the Register of Companies (s.30) "wherein shall be entered all the matters prescribed" by the Companies Act.

Lastly, the regulatory authorities in the case of NGOs which operate under the DSDO's certificate of recognition include the DSDO, the local chief, and the Ministry responsible for the field or sector in which the NGO operates.

The regulatory regimes discussed above require the filing of a number of reports. These should contain, inter alia, the name, registered physical address and postal address of the NGO; the sector in which the NGO seeks to operate; and the date of registration in Kenya (see ss.7 (e) and 9 of the NGO Coordination Act); the meetings of the NGO; the annual financial reports, including audited accounts; and any changes or amendments to the name, objects or location of the NGO or the projects for which it was established.

The time of reporting by NGOs varies. Reports regarding the constitution or establishment of the NGO must be given upon or immediately after its establishment. These include the name and location of the NGO as well as its prospective source of funding (see Form A of the

Societies Act on Application for Registration or Exemption from Registration; s.7 of the NGO Coordination Act; s.4 of the NGO Coordination Rules, and especially Form 1 set out in the First Schedule). There are also routine annual reports (see s.24 of the NGO Coordination Regulations) and special ones which are submitted to the regulator on request.

In many instances, the contents of the reports submitted by the NGOs to the regulatory authorities are a matter of public record. Most of these records are, however, located in central depositories in the capital city of Nairobi. The main depositories are the Companies Registry in the Attorney General's Chambers; the Societies Registry in the same chambers; and the NGO Bureau under the Office of the President. Records on cooperative societies are kept at the offices of the Ministry of Cooperative Development. The NGO Council keeps records on NGOs in its offices in the suburbs of Nairobi.

The various stakeholders such as the members and beneficiaries of NGOs as well as the general public and regulators find it difficult to access the information because of a variety of reasons. These include poor record keeping in congested buildings; misplacement or concealment of files; and shoddiness in answering queries. Moreover, the public have to pay search fees and in fact pay more money in case they wish to secure copies of the relevant documents (see s.31 of the NGO Coordination Regulations). Most of the registries have not been computerised hence they do not reap the benefits of modern technology in the keeping, maintenance, access and dissemination of records. It is also notable that the registries are not easily accessible to the majority of the population who live away from Nairobi.

B: FAILURE TO FILE REPORTS

The default in filing reports attracts various sanctions and penalties. These include fines, deregistration and winding-up. In fact under s.222 of the Companies Act an NGO may be wound up due to failure to file statutory returns to the Registrar.

The reporting requirements for NGOs are rarely enforced. This is partly because of inadequate personnel to conduct inspection, regulation and supervision. Moreover, NGOs exist in diverse forms and have diverse sizes hence it is not easy to determine how best to enforce reporting requirements. It is also remarkable that the regulators have a very narrow, deficient, inaccurate and inadequate information base from which to regulate NGOs.

VI: FOREIGN ORGANISATIONS

A. Registration, etc.

The registration, regulation, and dissolution of foreign organisations is largely built into the regimes which govern local and national NGOs. There are no special or sui generis bodies of law specifically dealing with foreign organisations.

Under the Companies Act, an organisation which has been incorporated abroad may apply for registration in Kenya. The requirements are not radically different from those governing indigenous associations. Regarding winding-up, however, s. 219 of the Companies Act makes

a provision which is specific to companies which have been incorporated abroad. Thus besides the other (common) grounds upon which a company may be wound-up is the clause that a company may be wound up by court:

> "in the case of a company incorporated outside Kenya and carrying on business in Kenya, [where] winding-up proceedings have been commenced in respect of it in the country or territory of its incorporation or in any other country or territory in which it has established a place of business" (s.219 (g)).

Under the Societies Act one of the requirements for registration is the disclosure of whether the applicant society is affiliated to any political association in or outside Kenya. This is a rather ambivalent provision having regard to the fact that what constitutes a political association, or "outside Kenya" are not defined in the Societies Act. Moreover, given the nature of the mandate of many NGOs, which covers lobbying and seeking regulatory, legal and other reforms, it is possible to read them or their donors and affiliates as political entities.

The NGO Coordination Act deals with foreign NGOs in the context of international NGOs as well as on the issue of the sourcing of funds. An international NGO "means a Non-Governmental Organisation with the original incorporation in one or more countries other than Kenya, but operating within Kenya under a certificate of registration" (s.2, NGO Coordination Act; my emphasis). International NGOs are required to pay Kshs. 5,000/= in order to be registered. This is in comparison to Kshs. 3,000/=, and Kshs. 2,000/= for NGOs which ar described as national and those which are indigenous and operating in only one district, respectively (see s.33 of the NGO Coordination Rules) (1UD4 = Kshs, approx.).

There is no specific provision dealing with foreign or international cooperative societies. However, the provisions of ss. 5, 6 and 7 of the Cooperative Societies Act tend to imply that there should be a strong Kenyan or local grounding in terms of membership. For instance, s. 6 read with s. 14 is to the effect that the minimum number of ten members which is required to register a cooperative society assumes that each of such members is "resident within, or occupies land within, the society's area of operation as described in the relevant by-laws" (s. 14(1) (b)).

There are no special or sui generis regulatory authorities which have been established to deal specifically with foreign or international NGOs. It is remarkable, however, that in the case of international NGOs, or NGOs with branches or affiliates outside Kenya, the Kenyan NGO regulatory agencies, as well as the Ministry of Foreign Affairs and International Coordination play an important role in fact finding, and in regulatory coordination, collaboration and cooperation with foreign and local regulators.

B FOREIGN GRANTS

There are no strict or special rules of law governing receipt of foreign funds by domestic organisations. However, some regulatory requirements and practices in effect enable the Government and the regulators to monitor NGOs' sources of funding. For instance, Form 3 under the NGO Coordination Regulations require NGOs to include their sources in the package containing application for registration.

The role of the DSDO and the provincial administration in the disbursement, encashment, and utilization of funds by NGOs enables the Government to monitor the sources of NGO funds. This should be seen in the light of the fact that before, during and after the enactment of the NGO Coordination Act, Government functionaries and some politicians have been keen to monitor how the NGOs source their funds. This is partly because of competition for donor funds at a time when it is perceived that some donors prefer NGOs to the Central or Local Government. Moreover, the Government functionaries and politicians have made allegations that funds to NGOs are sourced from abroad for purposes of destablising or subverting the Government.

VII. MISCELLANEOUS

A NGO mergers and demergers

Only the Cooperative Societies Act makes specific and explicit regulations on NGO mergers and split-ups. The provisions of the Restrictive Trade Practices, Monopolies and Price Control Act, cap. 504 would apply where the NGO has a business component; for instance where its subsidiary, or the target NGO carries on some business. In that case the consent or approval of the Minister for Finance would be necessary before the merger, acquisition or takeover (ss. 27, 28, 29 and 30).

Under s. 26 of the Cooperative Societies Act the approval of the Commissioner of Cooperatives is necessary before an amalgamation or division of societies can take effect. In case of amalgamation, the two or more societies must present to the Commissioner a special resolution to amalgamate. A member of any of the societies may indicate, by notice in writing given to his or her society at least one month before the date of the proposed amalgamation, that he or she does not intend to become a member of the amalgamated society (s. 26 (3)).

Another set of stakeholders who have some say in the amalgamation process are creditors. Hence "any creditor of any of the societies concerned may ... by notice in writing given to such society at least one month before the date specified as the date of amalgamation, intimate his [or her] intention to demand the payment of any money due to him [or her]" (s. 26 (4)). Moreover, any other person whose interest will be affected by an amalgamation may object to the amalgamation unless his or her claim is satisfied.

Under the other regulatory regimes, a merger or demerger would be governed by the law of mergers, acquisitions and splits of corporate and unincorporated entities. For instance, under the Companies Act, this would mean that a new corporate entity has to be registered probably with modified objects or different office holders and residential addresses. The demerger of political parties in Kenya, especially the original Forum for the Restoration of Democracy (FORD), Ford-Kenya and Ford-Asili illustrates how the matter is dealt with under the Societies Act. A demerger has mainly meant change of office holders; the modification or change of the name; and the change of residential address. The constitutive and operative legal instruments have largely remained the same save for a little tinkering.

B. Investment of Property

NGOs operate as legal persons with the capacity to acquire, use, deal with and dispose of their funds as they deem fit provided they do not contravene the general law or their objects or constitutions. But it is remarkable that NGOs have some characteristics of charities and public trust corporations and foundations in the UK or the US where there are rules governing investment avenues for NGO funds. The objects and registration of Kenyan NGOs are regarded as sufficient to constitute them into charitable, trust, or philanthropic organisations. Thus under s. 21 of the Companies Act, a corporation may not use the word "limited" and may negotiate tax exemption, and work permits for expatriate employees, among others. Another factor is the requirement under the Societies Act and the NGO Coordination Act that NGO constitutions must indicate that the funds shall not be used for the benefit of its members or officers (see also s.21 of the Companies Act). There must be a clause indicating that the funds or assets shall not be used or invested in for-profit activities.

The Trustee Act, cap. 167 indicates some permitted or authorised investment avenues for purposes of private investment funds (see s.4 of the Trustee Act and the Schedule formulated thereunder). This statute is therefore instructive on principles governing the investment of trust funds; these principles include security and certainty. This is so because a number of NGOs have established income generating or consultancy units which source some investment funds from the NGOs.

C. Investment Abroad

There are no specific rules barring or permitting NGOs from investing or to invest abroad. Given that some (international) NGOs already operate foreign exchange accounts and have outposts, branches, or affiliates outside Kenya, offshore investment is possible and in fact takes place. This is also because the consultancy or income generating units of NGOs may be regarded as ordinary (as compared to charitable) corporate entities at a time when the Government has been encouraging offshore investment in the wake of trade and investment liberalisation as a way of earning foreign exchange.

D. Political and Legislative Activities

NGOs involved in policy research or those involved in monitoring the observance or violation of human rights or in environmental governance have actively participated in political and legislative processes. Some have commented on or participated in the drafting of national legislation as exemplified by the drafting of the Industrial Property Act, 1989 and the NGO Coordination Act, 1990. In both instances, particular NGOs or a consortium of NGOs were consulted by the Government.

Moreover the National Council of Churches of Kenya (NCCK), a consortium of Christian Churches, is reported to have lobbied for the establishment of the Ministry responsible for environmental governance. In 1994 the International Commission of Jurists (Kenya Section), the Law Society of Kenya (LSK) and the Kenya Human Rights Commission drafted and have since lobbied for the adoption or adaptation of the Model Constitution for Kenya. NGOs have

also lobbied for or endorsed candidates for public office.

In the field of policy research and lobbying, NGOs still face the challenge of avoiding partisan politics. In fact a justification for the enactment of the NGO Coordination Act as far as the Government and its sympathizers were concerned was the need to stop NGO involvement in national politics mainly because at the time the NCCK and the LSK had been agitating for plural party politics. They had also condemned corruption, ethnic chauvinism and hegemony, and inefficiency in public life.

In other instances, NGOs have done policy work in a timid fashion thereby ignoring or failing to provide policy frameworks which are alternative to, or which would facilitate the efficient implementation of, those offered by the Government.

VIII. TAX LAWS

A: NGO taxation

Before the enactment of the NGO Coordination Act, 1990, tax exemption for NGOs was not regulated by any specific or explicit law but by practice which largely depended on ministerial discretion.

1. Exemption from income tax

NGOs registered under the Companies Act and the Societies Act have historically had to apply for tax exemption on their incomes which mainly consist of donor funds. The main requirements are that the organisation is not operated for the purpose of making profit for its members or officials and that it is formed for promoting commerce, art, science, religion, charity or any other useful object. The additional requirement is that it intends to apply its profits, if any, or other income, in promoting its objects (s. 21, Companies Act). Another requirement is the prohibition of payment of any dividend to the members of the NGO.

The Ministry of Finance has historically made the decision on whether to extend income tax exemption. This has been mainly through memoranda of understanding between the Ministry and the relevant NGO. The Commissioner of Income Tax and the bureaucrats under him are responsible for administering the income tax laws.

Under s.30 of the NGO Coordination Regulations, an NGO may apply through the NGO Coordination Board to the Minister for the time being responsible for finance for the grant of exemption in respect of value added tax on income generating activities or income tax for expatriate employees (Regulation 30 (1) (b) and (c)). It is remarkable that the local employees of NGOs cannot be tax exempt: tax exemption for expatriate staff is supposed to encourage and give NGOs incentives to bring into the country knowledgeable, trained, and experienced personnel who have expertise in fields necessary or crucial for national development.

2. State and local income-tax

Taxes in Kenya fall under the jurisdiction of the national Government or under the local authorities. The national and state jurisdictions are coterminous. Only the national authorities have jurisdiction in respect of income tax. The Kenya Revenue Authority (KRA) which was established in 1995 encompasses departments which deal with income tax, value added tax and custom and excise (see Kenya Revenue Authority Act, 1995).

3. Value added taxation

Regulation 30 (1) (a) of the NGO Coordination Regulations enables NGOs to apply for tax exemption in respect of value added tax on goods and services required to meet the organisation's objectives. Many times the exemption in respect of imported goods and services is done on a case-by-case basis. The application is made to the Minister for the time being responsible for finance through the NGO Coordination Board.

4. Exemption from duty

Until the enactment of the NGO Coordination Act, 1990, there was no legal provision specifically dealing with the exemption of NGOs from the payment of import duty, custom duty or excise duty. Some NGOs which had sufficient visibility or contacts obtained exemptions, under memoranda of understanding, on a case by case basis.

Regulation 29 of the NGO Coordination Regulations forms a fairly clear statutory basis upon which NGOs may seek exemption from import duty. Thus, where an NGO is importing equipment or goods which are required for its activities in Kenya it may apply through the Board to the Minister for Finance for exemption. The NGO must meet any of a number of requirements, including proof that the foreign exchange for such goods is not raised in Kenya; that the importation of such equipment will generate foreign currency for the country; and that the importing organisation has earned through income generating activities foreign exchange equivalent to the price of the imported equipment. Other requirements, which are read disjunctively, in terms of the black letter law, include proof that the cost of the imported equipment does not exceed thirty five percentum of the total annual budget of the organisation; or that the price of similar goods in the local market exceeds the price of the imported equipment by at least thirty percentum. Imports by NGOs include equipment and goods which they have purchased directly as well as those which have been donated to them. I am inclined to conclude that in practice, (some of) the foregoing requirements are read conjunctively.

Although the statutory guidelines are fairly clear, arbitrary practices and bureaucratic delays in the Ministry of Finance translate into uncertainty and even oppression of NGOs which have a genuine case for importing equipment and goods.

B: Taxation of donors

Individual, corporate, unincorporated, or intergovernmental donors are not automatically

entitled to deductions, credits, or rebates for contributions to qualified NGOs. This is unlike the position in some countries where donations are set-off against tax as a way of providing incentives for contributions to, and the development of, charities, trusts, foundations, and endowments.

Kenyan NGOs and many analysts have observed that lack of tax incentives or rewards is largely responsible for the unorganized, unsystematic or the low level of donations and contributions from local individuals, corporations, and unincorporated bodies.

1. Contributions by businesses

Businesses may contribute funds to any extent they wish. However, there is no automatic tax deduction, credit, or rebate. Section 15 (2) (h) of the Income Tax Act gives donors limited tax relief. Thus in computing for a year of income the gains or profits chargeable to tax, amounts of money, which a person (an individual or a corporation) has contributed to specified organisations or purposes, may be deducted. The contributions or donations which are tax deductible relate to expenditures incurred by the person for the purposes of a business carried on by him or her being:

> "s.15 (2) (n) (i) expenditure of a capital nature on scientific research; or
>
> (ii) expenditure not of a capital nature on scientific research; or
>
> (iii) a sum paid to a scientific research association approved ... by the Commissioner [of Income Tax] as being an association which has as it objects the undertaking of scientific research related to the class of business to which the business belongs; or
>
> (iv) a sum paid to a university, college, research institute or other similar institution approved .... by the Commissioner [of Income Tax] for scientific research

2. Contributions by individuals

Individual donors may also contribute any amount they wish. The foregoing paragraph on contributions by businesses is apposite. The lack of tax incentives or rewards translates into the desire to establish and operate private trusts, charities, and endowments rather than donate to the more general public causes or NGOs.

3. Contributions by estates

Donations and contributions by estates of deceased persons are not tax deductible or creditable. It is in fact notable that estates pay estate duty (ss.35 to 39 of the Income Tax Act, cap. 470 and the Estate Duty Act, cap. 483). Estate duty is regarded by some analysts as inimical to the formation and accumulation of capital for charitable and philanthropic work.

Section 39 of the Income Tax Act, cap. 470 allows set-off of tax where an amount of tax has

been borne by a trustee, executor or administrator in his or her capacity as such on an amount paid as income to a beneficiary. The tax so paid by the legal representative is deemed "to have been paid by the person chargeable with that tax and is then set off for the purposes of collecting against the tax charged on that person for the year of income in respect of which it was deducted..." Where the beneficiary is an NGO, it is possible that the set-off would benefit the NGO because NGOs do not pay taxes on their incomes. What must be emphasized is that the law is not unequivocal.

4. Special Tax Laws

There are special national or state and local tax laws. But there is none specifically directed at NGO activities. These include the Value Added Tax Act, 1989, cap. 476; the Telecommunications Tax Act, cap. 473; the Public Roads Toll Act, cap. 407, cap. 274; the Valuation for Rating Act, cap. 266; the Rating Act, cap. 267; the Refinery Throughput Act, cap. 474; the Air Passenger Tax Act, cap. 475; the Hotel Accommodation Tax Act, cap. 478; the Entertainments Tax Act, cap. 479; the Stamp Duty Act, cap. 480; the Estate Duty Act, cap. 483; and the Second-hand Motor Vehicles Purchase Tax Act, cap. 484.

C: Endowment Issues

1. Earnings on endowments such as interest and dividends ar taxable (see Steptoe & Johnson, 1996: 213 -265; and Simiyu, 1996: 112-113).

2. Endowments may be invested in majority ownership of businesses. The dividends or other payments to an NGO from such subsidiaries are free of income tax while in the hands of the NGO. But in the hands of the business they are taxable income.

D: Commercial/Business/Economic Activities

1. The engagement of NGOs in commercial or business activities is historical and derives partly from the fact that the major NGOs were originally registered under the Companies Act and also because a number of the early NGO leaders and employees had been strongly influenced by commercial practices. Moreover, insufficient donor funding and lack of Government grants have largely boiled down to Government reluctance to enforce anti-commerce clauses in NGO laws and constitutions.

2. Some NGOs have conducted business activities directly under their names and from their premises. Such activities include selling products of research such as books, journals, magazines and reports; providing commercial consultancy services such as conference organisation or in-putting into workshops as facilitators, paper presenters or discussants; and providing commercial photocopying, telephone or fax facilities.

   A number of NGOs have established semi-autonomous for-profit subsidiaries (see Norris, 1992). In the case of law NGOs, there are constraints under the Advocates Act, cap. 16. Under the Act, an NGO cannot act as an advocate and hence charge

advocates' fees. Thus any legal proceedings taken out through the NGO go under the name of a qualified advocate as the legal representative. There have been suggestions that the Act be amended to facilitate incorporation of law NGOs into firms of advocates.

3. All the commercial, business, or economic activities of an NGO or a subsidiary of an NGO are subject to tax. There are, however, difficulties of separating the transactions and accounts; there are issues of the tax exempt transactions of the NGO being used to subsidise the commercial components; there are problems of transfer pricing.

4. Tax rules distinguish between related and unrelated commercial, business or economic activities. The activities of corporations or unincorporated organizations are related on the basis of registration, legal character and the decision making process. Thus the holding company or organisation is liable to pay tax for the subsidiaries where the holding company or organisation adopts the consolidated or integrated accounting system. Where one organisation has no authority to incur expenditure on management salaries or emoluments and capital investments then the organisation which makes the decision pays tax on the other's behalf: the two are related.

E. Reporting

1. NGOs are exempted from paying income tax, value added tax, import duty, custom duty, and excise duty upon successfully applying for exemption. But they have to make reports on income tax (Pay As You Earn, or PAYE) which is payable by their (local) employees.

2. There are donee NGOs, donor NGOs and NGOs which combine both. NGOs have to report on the amount of money they receive; the sources of the funds; any disbursements which they make in support of projects, NGOs and charitable or philanthropic activities or purposes. They have to attach the contracts relating to the receipts or contributions. The contracts substantiate the receipts, contributions or donations.

3. Foundations and endowments vary. Some are established mainly to disburse funds received from donors; others source their funds from commercial enterprises. In the latter case, their incomes are subjected to the rules which govern the taxation of commercial activities. In the former case, they are treated like NGOs and have to secure tax exemption or concession.

F. Miscellaneous

1. The law does not regulate or stipulate the limits on administrative expenses or salaries which NGOs may incur. The Government and some donors have been keen to encourage donees (NGOs) to place limits on such expenses. For instance, the Government has intervened administratively, politically and through good offices to request or require international NGOs and agencies to limit salaries. This is mainly to

check on inflation as well as reduce large income disparities which would arise.

Donors tend to limit expenses on administration and salaries through the contracts under which the funds are disbursed. There have been concerns by some donors for the development and implementation of programmes rather than large and expensive administrative and bureaucratic structures.

2. There are special accounting rules for NGOs partly because they are largely treated as having no income generating or commercial enterprises. Hence NGOs only submit fund accounting and receipts and expenditures. They do not have to submit balance sheets and statements of profit and loss, unlike commercial corporations.

IX. COMPLIANCE

A. General

There are some general impressions regarding the laws, rules, and regulations applicable to NGOs. Firstly, there is no comprehensive and easily accessible body of NGO law. NGOs are governed and regulated by a plethora or labyrinth of legal and regulatory regimes. Hence it is not easy to discern, understand and enforce the applicable rules and procedures.

Secondly, many NGO managers, governing bodies, members, employees, creditors, and other stakeholders do not clearly understand or enforce the laws applicable to NGOs. This is partly because of ignorance, exclusion by managers or regulators, the complexity of the laws and procedures, or insufficient interest in the matter.

Thirdly, the regulatory regime for NGOs is ambiguous, ambivalent, and hence difficult to understand, enforce or implement. For instance, historically, political parties have been registrable under the same regime as village social and economic welfare groups and international NGOs.

Fourthly, as I have indicated in this report, poor information management and communication systems among NGOs and NGO regulatory authorities make the law less and less accessible, intelligible and enforceable. Many NGOs and some NGO regulators do not comply with the reporting requirements, such as annual reports, hence there is a limited information base.

The enforcement is also not generally knowledgeable, fair, efficient, or effective partly because of the foregoing and other reasons. For instance, very few persons who work with NGOs, NGO regulators, or the judiciary have had sufficient training in or exposure to NGO work.

Moreover, because of an inadequate information base on the nature, number, activities, and practices of NGOs, only those which are visible and especially the controversial ones are regulated. In fact deregistration, tax concessions, and the grant of work permits for expatriates are many times effected arbitrarily.

To my knowledge there is no comprehensive study on compliance by NGOs with the laws in Kenya. The studies by Edward Adiin - Yaansah (Adiin - Yaansah, 1995) and myself (Sihanya,

1996) are attempts to fill this void. However, Adiin - Yaansah's study focuses on the existing legislation and regulations which apply to NGOs, rather than how NGOs have complied with the same. My study, on the other hand, addresses how community based groups, projects, or NGOs may utilize the existing NGO regulatory regime to realise effective, efficient and participatory management and governance.

Although this report has dealt to some extent with compliance by NGOs with the law, a specific, more comprehensive study is necessary.

B. Specific

1. There is a perception in certain circles that NGOs are money-minting machines which are partly established or operated to avoid taxes which ought to be paid on commercial profits. This contention is partly borne out by the establishment of commercial consultancy units under the auspices or guise of NGOs.

2. There is also a perception that NGOs have been used by politicians and Government officials to benefit themselves politically and financially. For example, the Maendeleo Ya Wanawake Organisation (MYWO) ("Women's Development") has been coopted by or affiliated to the ruling party, Kenya African Nation Union (KANU) since the 1980s.

   In fact a number of the officials are the wives, relatives or sypathisers of KANU politicians. Other examples which are given include the fact that opposition and Government politicians use NGOs to articulate their partisan views. In fact some NGOs have been labelled oppositionist and others pro-establishment. Some pro-establishment NGOs have been referred to as Government Organised NGOs (GONGOs). Some of these politically correct NGOs have benefitted from expedited regulatory procedures, such as tax concessions, thanks to their contacts.

   It is also felt that some opposition politicians or NGO managers use NGOs as launching pads into politics and/or a fairly sustainable political platform. In some cases political activities are funded from the coffers of NGOs. Examples include where politicians act as "consultants" in NGO projects. Some Government and opposition politicians use NGOs to import equipment or goods so that they do not pay duty.

C. Sanctions

There are various sanctions attached to a situation in which an NGO has violated or contravened the law. These vary from one regulatory regime to another. For instance, in 1995 the Permanent Secretary in the Ministry of Lands and Settlement and the Attorney-General ordered Mwangaza Trust, which had been registered as a charitable trust under the Registration of Documents Act, cap. 285, to stop operating since Mwangaza had allegedly breached the law by engaging in political activities (see Re Mwangaza Trust, 1995). The Centre for Law and Research International (CLARION) was also deregistered in 1995 for similar reasons. CLARION's deregistration was lifted in early 1996.

An NGO registered under the Companies Act may be wound up in the event it fails to hold the statutory meeting or to deliver the statutory report (s.219).

Where an NGO registered under the Companies Act is in default of the law, a manager, receiver, or liquidator may be appointed by the court or creditors. The NGO's bank account may be frozen to facilitate inspection, receivership or liquidation or in order to revive it.

Under s.77 of the Cooperative Societies Act the Commissioner of Cooperatives may surcharge an officer of a registered society where he or she has misapplied or retained or become liable or accountable for "any money or property of the society, or has been guilty of a misfeasance or breach of trust in relation to the society".

Section 12 of the Societies Act stipulates scenarios in which an NGO's activities and operations may be suspended. These include where the Registrar is of the opinion that the registered society is likely to pursue an unlawful purpose; where the interests of peace, welfare or good order would be prejudiced; and where "the terms of the constitution or the rules of the society are, in his (or her) opinion in any respect repugnant to or inconsistent with any law" (s.12(1)(c)). Other grounds for suspension arise where the society has contravened its constitution or rules; where it has failed to deliver to the Registrar information and accounts required by the Registrar; where the NGO has dissolved itself; where the executive of the society is constituted otherwise than in conformity with its constitution and rules; where one of the officers of the NGO has been an officer of and NGO which has been refused registration under the Societies Act; where the NGO has failed to furnish annual returns promptly; and where the NGO is, "or has without the Registrar's consent become, a branch of or affiliated to, or connected with, any organisation or group of a political nature established outside Kenya" (s.12(1)(j)).

Under s. 16 of the NGO Coordination Act, the NGO Coordination Board may cancel or suspend an NGO's certificate of registration where the terms or conditions attached to the certificate have been violated; where the NGO has breached the NGO Coordination Act; and where the National Council of Voluntary Agencies has submitted a satisfactory recommendation for the cancellation of the certificate.

Some of the special sanctions which an NGO may suffer for non-compliance with the law include revocation or denial of tax concessions or exemption. Under the self-regulatory system established by the NGO Council Code of Conduct, 1995, the Regulatory Committee of the Council may order that the NGO be admonished, or recommend to the NGO Coordination Board that the certificate of registration of the NGO be cancelled or suspended (Regulation 20). There is also the possibility that a non-compliant NGO may be ostracized by the network of NGOs.

Most of the sanctions against an NGO are not self-executing. Thus creditors, the Registrar of Societies, the Registrar of Companies, the NGO Coordination Board, the National Council of NGOs or the Regulatory Council of the Council must act. Even the court rarely acts suo motto in such matters.

X. GOVERNMENT FUNDING

The general rule is that although the Government has recognized the contribution of NGOs to the development process, the Government has no policy regulating how it may make grants to NGOs. In fact direct grants are rare. What is common are joint proposals and contracts between the Government and NGOs on a number of projects. In some of these instances the Government leverages friendly donors for its benefit and that of the partner NGO.

Some NGOs have participated in the progressive liberalisation of the economy, trade and investment. These are mainly cooperative societies or the commercial, consultancy, investment, or endowment units of NGOs. There is no law barring NGOs from participating in the progressive liberalisation of the economy.

Some of the basic rules, however, provide that privatization contracts should be awarded to the highest tenderer; that there should be no conflict of interest on the part of the tenderer or the person(s) awarding the tender; and that persons or associations who have a stake or interest in the business, corporation or facility being privatized should not tender. These rules are not always complied with.

The Government recognizes the need to continue to provide support for privatized services. This is evidenced by the fact that the Government has negotiated with donors and especially the International Monetary Fund (IMF) and the World Bank the programme entitled Social Dimensions of Development (SDD). The programme is located in the Office of the President.

However, there are problems associated with the Government's support for social services. These include poor prioritization; inadequate coordination; and rent-seeking or corruption in the implementation of the projects and programmes. For instance, reports have indicated that there were accountability and transparency problems in the tendering and execution of a malaria control project whose cost is estimated at Kshs. 7.2 billion (1USD = Kshs. 56, approximately) (see the East African (Nairobi), August 26 - September 1, 1996, p.1)

Some politicians, NGOs, and individuals have complained that the process of progressive privatization has been used to benefit or enrich some ethnic groups organisations, individuals or groups of individuals. The evidence is scanty largely because some of the transactions are not published. However, some analysts indicate that some NGOs which are formed, organised, or controlled by the Government are beneficiaries.

XI. PRIVATIZATION

I am not aware of any special legal forms or procedures which have been created to permit or facilitate the acquisition of state assets or programmes by the NGO sector. The general policy is that a number of cultural, educational, or health institutions or programmes should be in the hands of the private sector or the community.

The role of the community may be played by NGOs although the policy and legal regime has not specifically indicated how this would work in the progressive privatization process.

It is not clear whether the Government has privatized certain formerly state activities by out sourcing them by contract to NGOs. The privatization rules and procedures are as discussed above and do not indicate whether NGOs may specifically negotiate or conclude privatization contracts with the Government.

XII. CONCLUSIONS

Some of the most important legal issues currently confronting the NGO sector include the lack of a comprehensive, easily accessible and ascertainable regulatory regime; and ambivalence and ambiguity in the regulatory regime where, for instance, some provisions conflict and are contradictory. Some of the laws would aid the development of NGOs while others would seriously hinder. Moreover, a number of regulatory issues, such as registration, deregistration, and tax concessions, are largely governed by the discretion of the regulatory authorities. There are also problems with the way records, documents and information regarding NGOs are kept, accessed, and disseminated.

A number of concrete steps are necessary to improve the laws, or the administration and enforcement of the same, in order to strengthen the NGO movement. These include consolidating and codifying the law applicable to NGOs, charities, trusts, foundations, and endowments. There is also need to train personnel on NGO matters, and especially from the membership, management and regulatory bodies. It is also very important that the self-regulatory NGO Council be strengthened in terms of additional or more qualified, committed and competent personnel as well as in terms of finance and equipment. In fact part of the legislative reform should strengthen the role of the Council in the regulation and operation of NGOs.

Finally, the International Center for Not-for-profit Law (ICNL) and the World Bank deserve congratulations on initiating a comprehensive study on NGOs. Yet there is still an urgent need to do a more comprehensive study on NGOs in Kenya. Such a study would make specific proposals for reform.

I wish to acknowledge with thanks the comments from and discussions with Ms. Pauline Nyamweya and Mwalimu Mati both of the Public Law Institute (PLI). Halima Muli also of PLI painstakingly made sense of my hardly legible handwriting and also incorporated numerous editorial corrections. All the barbs must be reserved for me.

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ANNEX I

Kenya Laws and Regulations on NGOs

Constitution of Kenya, Act No. 5 of 1969, as amended
Advocates Act, cap. 16
Public Order Act, cap. 56
Preservation of Public Security Act, cap. 57
Societies Act, cap. 108
Trustees (Perpetual Succession) Act, cap. 164
Trustee Act, cap. 167
Income Tax Act, cap. 470
Customs and Excise Act, cap. 472
Companies Act, cap. 486
Non Governmental Organisations Coordination Act, Act No. 19 of 1990
Non Governmental Organisations Coordination Regulations, 1992, Legal Notice No. 152 of 1992
Non Governmental Organisations Council Code of Conduct, 1995, Legal Notice No. 306 of 1995
Penal Code, cap. 63
Central Bank of Kenya Act, cap. 491
Unit Trusts Act, cap. 521
Police Act, cap. 84
Civil Procedure Act, cap. 21
Cooperative Societies Act, cap. 490
Law Society of Kenya, cap. 18
Architects and Quantity Surveyors Act, cap. 525
Engineers Registration Act, cap. 530
Accountants Act, cap.531
Valuers Act, cap. 532
Estate Agents Act, cap. 533
Certified Public Secretaries Act, cap. 534
Restrictive Trade Practices, Monopolies and Price Control Act, cap. 504
Transfer of Businesses Act, cap. 500
Registration of Business Names Act, cap. 499
Shelter Afrique Act, cap. 493C
Building Societies Act cap. 489
Banking Act, cap. 488
Insurance Act, cap. 487
Capital Markets Authority Act, cap. 485A
Estate Duty Act, cap. 483
Stamp Duty Act, cap. 480
Entertainments Tax Act, cap. 479
Hotel Accommodation Tax Act, cap. 478
Value Added Tax Act, cap. 476
Air Passenger Tax Act, cap. 475
Consolidated Bank of Kenya Act, 1991

Prevention of Corruption Act, cap. 65
Criminal Procedure Code, cap. 75
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Kenya National Library Service Board Act, cap. 225
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Films and Stage Plays Act, cap. 222
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Girl Guides Act, cap. 220
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Kenya Cultural Centre Act, cap. 218
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Permanent Secretary to the Treasury (Incorporation) Act, cap. 101
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Advocates Act, cap. 16
Oaths and Statutory Declarations Act, cap. 15
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Foreign Judgments (Reciprocal Enforcement) Act, cap. 43
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Kadhis' Courts Act, cap. 11
Appellate Jurisdiction Act, cap. 9
Judicature Act, cap. 8
Eastern and Southern African Management Institute Act, cap. 4A
East African Community Mediation Agreement Act, cap. 4
Law Reform Commission Act, cap. 3
Interpretation and General Provisions Act, cap. 2
Revision of the Laws Act, cap. 1
Kenya Revenue Authority Act, 1995

ANNEX II

Proposed Laws and Regulations Affecting NGOs in Kenya

Political Parties Bill, 1995
Children Bill, 1995
National Intelligence Services Bill, 1996

ANNEX III

Relevant Foreign Laws and Regulations Affecting NGOs

Charitable Uses Act, 1601 (UK) (The Statute of Elizabeth)
Charities Act, 1960 (UK)
Companies Act, 1985) (UK)
Friendly Societies Act, 1974 (UK)
Charities Act, 1992, cap. 41 (UK)

Charities Act, 1993, cap. 10 (UK)
Constitution of the United States of America, as amended.

ANNEX IV

Relevant International Legal Instruments Affecting NGOs

African Charter on Human and Peoples Rights, adopted June 1981, Nairobi; came into force October 21, 1986
Universal Declaration of Human Rights, 1948
International Covenant on Civil and Political Rights, 1966
International Covenant on Economic, Social and Cultural Rights, 1966
Freedom of Association and Protection of the Right to Organize Convention, 1948 (adopted by the General Conference of ILO on July 9, 1948)
Universal Declaration of the Rights of Peoples, Algiers, 1976
Vienna Convention on the Law of Treaties, 1969

ANNEX V

Selected NGO Constitutions

Constitution of the Public Law Institute, 1993
Constitution of the Participatory Methodologies Forum of Kenya (PAMFORK), 1996
Constitution (or Charter) of the African Centre for Technology Studies (ACTS), 1992
Constitution of the Forum for the Restoration of Democracy (FORD), 1992

ANNEX VI

Relevant Case Law Affecting NGOs

Alukwe v. Registrar of Trade Unions Nairobi Civil Appeal No. 26 of 1977

Angaha v. Registrar of Trade Unions [1973] EA 297

Enderby Town Footbal Club v. The Football Association Ltd. [1971] 1 All E.R. 215

Nyali Ltd. v. Attorney General [1956] 1 Q.B. 1

Odiago v. Registrar of Societies Nairobi Civil Appeal No. 27 of 1961

Tera Aduda v. Registrar of Trade Unions [1978] KLR 119

Republic v. Oloo, Daily Nation (Nairobi) October 27, 1982

Kaggia v. Republic [1969] EA 451

Mugaa M'Mpwii v. G.N. Kariuki Nairobi High Court Civil Case No. 556 of 1981 (unreported)

Stanley Munga Githunguri v. Attorney General Nairobi High Court Criminal Appeal No. 271 of 1985 (Nairobi) (unreported).

Re Mwangaza Trust Nariobi High Court Miscellaneous Application No. 98 of 1995

Re Madhupaper International High Court of Kenya (Nairobi) Winding up Cause No. 12 of 1995