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## To manipulate and legitimise: government officials explain why non-democracies enact and enforce permissive civil society laws

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RESEARCH ARTICLE



# To manipulate and legitimise: government officials explain why non-democracies enact and enforce permissive civil society laws

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## ABSTRACT

Civil society is a bulwark against autocratic rule; its erosion contributes to democratic recession worldwide. Scholars and activists are calling attention to repressive laws non-democratic governments enact to undermine civil society organizations (CSOs). Yet, non-democratic governments do not only enact repressive laws; they also enact permissive, quasi-democratic legal rules. Evidence from case studies suggests that non-democratic governments enact such rules as part of a broader strategy to stabilize the regime. This article adds a within-case comparative study of Kenya's four CSO regulators to the growing evidence showing that non-democracies can choose to manipulate civil society rather than repress it. The government's words and documentation provide evidence: I triangulate elite interviews with elected officials and bureaucrats with archival data from government libraries and four CSO regulators. I find that the government enacts permissive legal rules and then uses several control and consultation tactics collectively, separately, and episodically to manipulate CSOs and legitimise the regime.

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**KEYWORDS** Consultative authoritarianism; authoritarian legitimation; civil society; human rights; Kenya; NGOs

## Introduction

Non-democratic regimes combine repression, co-optation, and legitimization to stabilize their rule.<sup>1</sup> Human rights defenders and analysts give increased attention to the first tactic and warn that repressive regulation of civil society fuels a global trend in democratic backsliding.<sup>2</sup> However, repression is not the only tactic available to governments and scholarly attention to other tactics is lacking.

A nontrivial number of non-democratic governments use CSO laws to manipulate CSOs and legitimise their regime. These government actions align with a style of state-society interactions that Teets<sup>3</sup> refers to as “consultative authoritarianism,” a relationship that combines the expansion of a quasi-autonomous civil society involved in policy formation and implementation with tools of state control.<sup>4</sup> This can be seen in the case of Daniel arap Moi, who, while serving as the president of Kenya for a

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quarter-century, took many actions objectively considered authoritarian, such as arresting political rivals, abolishing multi-party elections, eliminating the secret ballot, and removing judicial tenure. Moi's power had become so authoritarian by the close of the 1980s that "civil society, or whatever fledgling nongovernmental organizations existed, the churches, and the press all operated under great strain and threat."<sup>5</sup> Given Moi's authoritarian tendencies, track record of human rights abuses, and firm hold on power, we might predict Moi's legal regime regulating civil society to be highly restrictive and its enforcement suffocating. But the opposite is true. Kenya's legal institution became more permissive over time, including the passage of the *NGOs Act of 1990*, which contained more permissive provisions (12) than restrictive ones (8). Moreover, during Moi's presidency, the number of legally registered CSOs grew from 9,091–24,724. In this article, I use a within-case comparison of four CSO regulators in Kenya to examine why and how non-democratic governments enact and enforce quasi-democratic, permissive rules.

Prior researchers have studied the conditions under which governments enact and enforce restrictive laws to regulate CSOs.<sup>6</sup> While this work has yielded key results, studying only restrictive rules undermines our theory-building if governments also enact and enforce permissive civil society laws. Recent work shows that non-democratic governments fuse permissive and restrictive legal rules to craft the legal institutions governments want and need.<sup>7</sup> Non-democratic governments inscribe permissive, normatively democratic rules into their legal institutions and have done so since their independence.<sup>8</sup> Why non-democratic governments enact permissive rules needs to be understood. The rules-in-form and rules-in-use dichotomy provides a valuable entry point. Some governments enact permissive rules without planning to enforce them. Others may enact permissive rules intending to enforce them arbitrarily. This capriciousness may burnish the regime's democratic façade, demonstrate its responsiveness to social matters, or increase its provision of public service goods related to policy priorities.

Lorch and Bunk propose conditions under which a non-democratic government might include permissive legal rules in its CSO laws.<sup>9</sup> My work adds the Kenyan case to the growing number of articles showing that non-democratic regimes may choose not to repress civil society but instead manipulate it to achieve the government's aims. I support this argument with interview data from multiple Government of Kenya (GOK) officials triangulated with archival materials from several government repositories. Twenty-three interview participants represent eight government agencies, and six others are elected members of parliament. I integrate interview data with archival evidence from several sources, including the Library of Parliament, the Commission on Administrative Justice, and four CSO regulators.<sup>10</sup> My analysis does not draw on evidence collected from CSOs, which means my findings are limited to what government actors believe the GOK wants in the state-society relationship and not necessarily how things are happening on the ground.

I find that the GOK uses several tactics to manipulate civil society and benefit the regime through increased legitimization. Two control tactics expand the regime's ability to penetrate, observe, and affect collective action. Yet, little evidence supports the notion that regulators can mobilize the administrative power necessary to observe civil society over a large territory for a prolonged period. Three other consultation tactics burnish the regime's legitimacy to domestic and international observers. These consultation tactics allow the government to strengthen its democratic façade,

engage CSOs in dialogue to address social problems and preempt public criticism, use CSOs to fulfil unmet public service needs, and reactively shift its policy priorities to align with the areas where CSOs allocate considerable resources. Importantly, I find that the GOK does not always use all tactics. Instead, it uses these control and consultation tactics collectively, separately, and episodically to alter its *de facto* regulatory environment to manipulate civil society and benefit the regime through increased legitimization.

The rest of the article proceeds as follows. I begin by surveying why a non-democratic government enact permissive CSO laws. Next, I identify a pithy and accessible two-piece framework that organizes governments' tactics to control and manipulate civil society for the regime's benefit. Section 3 explains my case selection and research design. As I describe, Kenya's CSO regulatory environment offers a compelling opportunity for a within-case comparative study because Kenyan law divides regulatory authority across four regulators. Hence, each regulator polices its own CSO legal form<sup>11</sup> and enforces its regulation in a common political, historical, and socio-economic environment. I present my findings in Section 4. The conclusion summarizes findings and urges scholars to pay more attention to the permissive rules frequently appearing in the legal institutions that regulate CSOs.

## Why non-democracies enact permissive laws

A non-democratic government's ultimate purpose in enacting and enforcing CSO laws is to retain its grip on power. One strategy to achieve this purpose is to enact repressive legal rules and enforce those rules as written. While this heavy-handed strategy may succeed in the short term, cementing draconian rules in the legal code means the government forfeits deniability, invites disapproval from international observers, jeopardizes foreign aid, and shuts CSOs that provide unmet public service needs.

Governments may need to consider other tactics when blatant oppression is not optimal for retaining power. Studying civil society expansion under Turkey's competitive-authoritarian regime, Yabancı finds that the ruling party uses two strategies to tame civil society: containment through selective repression and appropriation through building an alternative civil society.<sup>12</sup> These strategies generally align with consultative authoritarianism's proposition that non-democratic governments use control and consultation as alternatives to blatant repression.<sup>13</sup> Adding further evidence, Lorch and Bunk<sup>14</sup> identify six tactics that fall under the control-consultation framework: increase the regime's administrative power, entice CSOs to comply with the regime, attract international assistance to expand the government's resource base,<sup>15</sup> strengthen the regime's democratic façade, engage CSOs on social matters to demonstrate responsiveness, and make use of services provided by CSOs to increase the government's output of public service goods. Researchers find these tactics in use in the Middle East and North Africa,<sup>16</sup> Southeast Asia,<sup>17</sup> Sub-Saharan Africa,<sup>18</sup> and many other authoritarian and hybrid regimes around the world.<sup>19</sup>

### Control tactics

Two tactics directly bolster a regime's control over CSOs. The first *increases the regime's administrative power* (Tactic #1) by using permissive rules to ensnare CSOs "in a web of bureaucratic practices and legal codes."<sup>20</sup> Legal rules do not enforce

themselves, and governments must optimize compliance rates and enforcement costs. All else equal, we can expect enforcement costs to be highest when rules are oppressive because voluntary compliance is minimal; enacting permissive legal rules decreases enforcement costs by increasing voluntary compliance. The regime's administrative power increases when CSOs willingly – and perhaps unknowingly – surrender to the government the basic information it needs to surveil them. This information may be as banal as physical and website addresses. Still, it allows governments to scrape additional information, monitor social media accounts, collect names and phone numbers, and arrive unannounced at public meetings. The intended effect is accumulating the administrative power necessary to penetrate, observe, control, and prevent collective action. Bureaucratic capacity is a crucial constraint on a regime's ability to wield administrative power. As I detail in my analysis section, my findings show that all four regulators possess information that government could transform into administrative power. Yet, my analysis also shows that most Kenyan agencies lack the necessary technology and personnel to make administrative power an omnipresent threat.

The second control tactic uses permissive rules to *entice CSOs to comply with the regime* (Tactic #2). Increasing voluntary compliance does not directly legitimise the regime. However, governments can argue that increased compliance is evidence of specific support for regulatory policy.<sup>21</sup> The objective is to use compliance rates to measure specific support for a policy; then, the government cites that support as evidence of its legitimate authority to govern. The existence of four CSO regulators in Kenya gives CSOs the option to register with the regulator that best meets their needs. New organizations, for example, may register with the regulator with the strictest registration requirements to signal funding partners that the unproven organization is legitimate. An internationally reputable organization may register with the regulator with the lowest administrative burden because its reputation is decoupled from its Kenyan legal registration. This regulatory pluralism creates competition between regulators to attract and retain CSO registration. Moreover, interviews with government officials suggest a causal connection between a regulator's credibility and ability to fulfil its statutory responsibilities.

### **Consultation tactics**

Unlike control tactics that aim to institute a regime's control over civil society, consultation tactics establish an exchange relationship between the government and civil society. The first two consultation tactics directly bolster the regime's legitimacy with various audiences. The first tactic uses permissive rules to *strengthen the regime's democratic façade* (Tactic #3). The enactment of permissive CSO laws flashes the impression of democratic qualities to observers. This display is similar to organizing elections that are, in reality, "elections without democracy."<sup>22</sup> The intended effect is to increase diffuse support for the regime from local and international audiences. Permissive CSO law supplies the government with *de jure* evidence that it is attempting to enact democratic changes; unfortunately, it may not intend to enforce those permissive rules impartially or at all. Scholars, practitioners, and policymakers sometimes use CSO registration to measure civil society robustness.<sup>23</sup> Thus, another way to strengthen the regime's democratic façade is to show evidence that civil society has prospered under the regulatory regime. My archival data reveals that the

number of CSOs in Kenya grew during its least democratic periods. Onlookers at the time may have interpreted this as a sign of a robust civic space and emerging democracy, but government officials explained the intention was to strengthen the government's democratic façade.

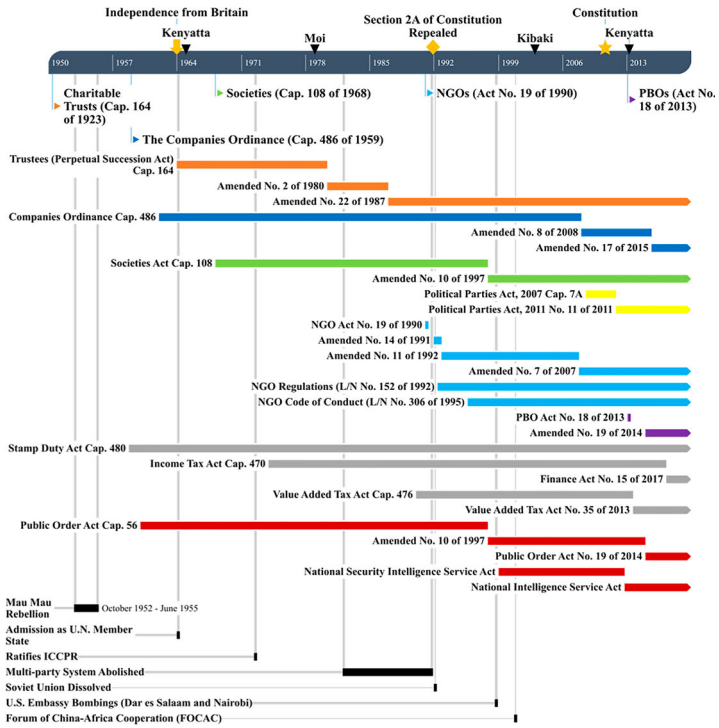
The second consultation tactic *engages CSOs on social matters to demonstrate responsiveness* (Tactic #4). Here, the government meets with those CSOs that it claims represent society's collective interests. This public dialogue demonstrates the government's willingness to work with non-governmental groups to resolve social matters. One intended effect is to show engagement with legally registered CSOs and depoliticise widespread social discontent.<sup>24</sup> Another is to collect information that the government can use to understand pressing societal concerns and respond to them before they threaten the regime.<sup>25</sup> Making the country's CSO laws more permissive allows for the controlled growth of CSOs that address unmet social needs. Meeting the moment's challenges demonstrates responsiveness and preempts public criticism.

Permissive CSO law may also *use services provided by CSOs to increase the government's output of public service goods* (Tactic #5). The government enacts permissive rules to encourage and engineer the growth of particular welfare- and service-oriented CSOs, as those organizations serve as an appendage of the state to fulfil fundamental social needs unmet by the government.<sup>26</sup> The intended effect is to usurp CSOs' organizational outputs into the government's official policy and allow the regime to seize credit for those successes. As I explain in detail in my analysis section, interview data with government officials demonstrate that non-democratic governments tolerate the growth of service-oriented CSOs that fulfil unmet service needs because improvements in service provision increase the regime's output legitimacy. However, my archival data suggests that instead of leading CSOs, the Government of Kenya recently shifted its policy priorities to align with the areas where CSOs allocate considerable resources. This insight means the government has two pathways to increase its output legitimacy: first, actively foster CSO activity to address particular policy issues. Second, reactively shift its policy priorities to align with issues the government knows CSOs are already channelling considerable resources.

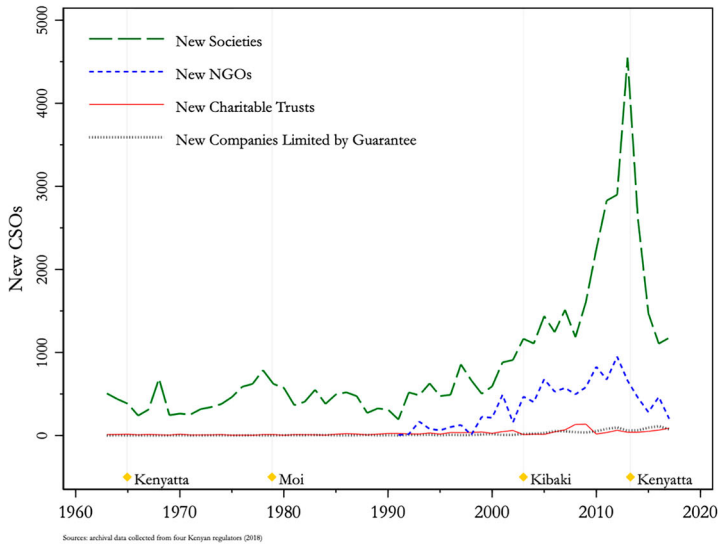
### Locating the tactics in the Kenyan case

I now use the Kenyan case to demonstrate how the Government of Kenya (GOK) has enforced its legal institution to legitimise the regime and manipulate CSOs. Defining CSOs as private, self-governed organizations established on the principle of voluntary association for purposes other than political control and economic profits expands the number of legal forms to consider. By this definition, Kenyan CSOs include non-governmental organizations, charitable trusts, companies limited by guarantee, and societies. For the remainder of this article, I use the term "CSO" to refer to the broad concept of a civil society organization; the terms "non-governmental organisation," "charitable trust," "company limited by guarantee," and "society" address a specific legal form.

The Kenyan legal institution was not a blank slate at its independence in December 1963. Instead, it inherited a legal institution from the colonial government that included several ordinances regulating voluntary association to some degree (Figure



(a) CSO Legal Institution



(b) New CSO Registrations

**Figure 1.** Kenyan Legal Institution and Civil Society Growth. Figure shows instances when the government changed legal rules (top) and new registrations by legal type (bottom).

1A).<sup>27</sup> Throughout its independence, as few as one to as many as thirteen laws simultaneously affect CSOs.

We can describe Kenya's regulatory environment as pluralistic or polycentric because the law divides regulatory authority across four unique agencies nested within three government ministries (Table 1). Each regulator has jurisdictional authority to police its specific CSO legal form throughout Kenya. This regulatory pluralism creates a compelling within-case comparison: each regulator has national jurisdiction over a single CSO legal form; receives authority to regulate those CSOs from different laws each containing a unique bundle of legal rules; and enforces its legal rules in a common political, historical, and socioeconomic environment. In my analysis section, I use tables to summarize how legal rules relevant to each tactic vary across regulators.<sup>28</sup>

Limitations in bureaucratic capacity and recordkeeping made it impossible to collect the necessary information to definitively describe Kenya's CSO landscape, including how many of each legal form exist, the age and size of most groups, and whether certain legal forms cluster in particular sectors. The only comparable indicator available from all regulators is the number of organizations registered yearly (Figure

**Table 1.** Four Kenyan CSO regulatory agencies, their line ministries, and the legal form they regulate.

GOVERNMENT OF KENYA (GOK)			
State Law Office		Ministry of Lands	Ministry of Interior
Registrar of Companies	Registrar of Societies	Registrar of Trusts	NGOs Board
<i>Company Limited by Guarantee</i> is "a company having the liability of its members limited by the memorandum to such amount as the members may respectively thereby undertake to contribute to the assets of the company in the event of its being wound up [and] 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."	<i>Society</i> "includes 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 not including companies, corporations, firms, cooperative societies, schools, building societies, banks, international organizations, and unlawful societies]."	<i>Perpetual Trust</i> (known locally as " <i>charitable trust</i> ") are "trustees who have been appointed by any body or association of persons established for any religious, educational, literary, scientific, social, athletic or charitable purpose, or who have constituted themselves for any such purpose."	<i>Non-governmental Organization</i> "means a private voluntary groups of individuals or associations, not operated for profit or for other commercial purposes but which have organized themselves nationally or internationally for the promotion of social welfare, development, charity or research through mobilization of resources."
Defined by Companies Ordinance (1962) §§ 2, 4(2b), 21(1)	Defined by Societies Act (1968) §§ 2(1), 4	Defined by Trustees (Perpetual Succession) Act (1923) § 3(1)	Defined by NGOs Co-Ordination Act (1990) § 2
Averages 19 new registrations per year (std. dev. 28.7) 1963–2017	Averages 863 new registrations per year (std. dev. 814.4) 1963–2017	Averages 28 new registrations per year (std. dev. 28.5) 1963–2018	Averages 360 new registrations per year (std. dev. 264.2) 1991–2018



1B). Applying a 30–80% survival rate<sup>29</sup> to the number of each legal form ever registered as of December 2018 leads me to estimate the number of organizations operating as each legal form: companies limited by guarantee (308–820), societies (13,040–34,774), charitable trusts (440–1,172), and NGOs (3,023–8,065). In total, of the 56,038 CSOs to ever register as a legal form in Kenya, I estimate that roughly 16,811–44,830 were still operational at the end of 2018.

### ***Kenyan research participants: MPs, bureaucrats, and regulators***

I conduct my analysis using interviews data from multiple GOK offices triangulated with archival materials from several government repositories. Accessing research participants and archival data required a senior official's approval from the agency (Appendix Table 7 identifies the 11 GOK entities that participated and describes the data each provided). Senior officials in eight agencies arranged interviews with 23 participants (Appendix Table 8 summarizes the interview sample). I also interviewed six Members of Parliament (MPs), averaging over a decade of political experience and representing several political parties.

Involving GOK managers in my recruitment process was unavoidable; their necessary participation makes my sample less representative. I also expect that managers handpicked participants who would satisfactorily represent the agency. This curated sample likely biases the data and increases the probability that interview data contains a positive tone regarding CSO laws and their enforcement. Given the gatekeeper-selected sample, I give extra attention to the low-probability interview data that negatively discuss CSO laws and consider it smoking-gun evidence.<sup>30</sup> Accordingly, I discount thinly corroborated interview data that paints legal rules and regulators in a positive light. Data of this sort would likely embellish rules as strongly permissive, exaggerate compliance rates from CSOs, and overstate the resources and capacities of the agency.

## **Analytical findings**

### ***Tactic 1 (Control): increase the regime's administrative power***

All four CSO regulators have the legal authority to create new rules unilaterally (Table 2). Though rulemaking follows a different process for each regulator, this authority allows regulators to require new information on registration forms or mandate CSOs include specific data in annual reports. Kenyan law allows no regulator to investigate CSOs without reasonable cause, which limits administrative power. However, the law only prohibits the Registrar of Companies and Registrar of Societies from pursuing investigations without cause. CSOs registered as societies or non-governmental organizations must report on operational and financial activities annually. These legal rules ensure that the raw material necessary for administrative power – i.e. information – flows to regulators regularly.

Interview participants disagreed on the legal rules the legal institution should and should not contain. The types of rules that the law should contain and the powers regulators should have seemed to vary across interview participants and how they perceive Kenya's political history. One NGOs Board regulator believed the reason for controlling CSOs after Kenyan independence was the "political differences between Kenya's

**Table 2.** Legal rules supporting administrative power by agency.

Legal Rule Type	Registrar of Companies <sup>a</sup>	Registrar of Societies <sup>b</sup>	Registrar of Trusts <sup>c</sup>	NGOs Board <sup>d</sup>
Agency may create new rules outside legislative process	Law supports tactic §1022	Law supports tactic §53	Law supports tactic §17	Law supports tactic §87(f), 32
Agency may investigate without reasonable cause	Law undermines tactic: government must demonstrate “good reason for requiring the investigation.” §786(2)	Law undermines tactic: inquiries (§31(1)) and investigations (§§38–39) require reasonable cause		
CSO must file report of operational activities		Law supports tactic §30 and makes records available to public §48		Law <sup>e</sup> supports tactic §24 and makes records available to public §31
CSO must file report of financial statements		Law supports tactic §27 and makes records available to public §48		Law <sup>e</sup> supports tactic §24 and makes records available to public §31

Empty cells indicate the law does not contain language relevant to the legal rule type.

<sup>a</sup>Companies Act (No. 17 of 2015).

<sup>b</sup>Societies Act (No. 10 of 1997).

<sup>c</sup>Trustees (Perpetual Succession) Act (No. 22 of 1987).

<sup>d</sup>Non-Governmental Organizations Co-ordination Act, 1990 (No. 7 of 2007).

<sup>e</sup>Non-Governmental Organizations Co-ordination Regulations, 1992 (Legal Notice No. 152 of 1992).

founding fathers” (GOK118). Supporting prior arguments that CSO laws have long histories,<sup>31</sup> scholars argue some governments follow their colonial examples and enact laws to know what CSOs exist and keep tabs on what they are trying to do.

The strongest critiques against these laws tend to villainize the Moi administration. One observer with the Public Service Commission noted the legal rules Kenyatta used to build the country in partnership with Kenyan CSOs were manipulated by Moi to “stifle” political competition (GOK109). An elected official agreed with this and explained that Moi directed the bureaucracy to use its administrative power to selectively target CSOs organized to agitate and challenge the political regime (GOK114). She insisted the government’s true motivation in Moi’s enactment and enforcement of these laws was to control the civic space saying, “[Moi told CSOs] you have a chance to organise yourselves, agitate, make demands of the government, *but we will control* how much you will do” (GOK114, emphasis added). Her explanation was not limited to the NGOs Act that Moi enacted and enforced in the early-1990s. She made a point to emphasize that Moi’s fixation with power and control began when he became president in 1978, a period in which only charitable trusts, societies, and companies limited by guarantee were the official CSO legal forms.

An experienced observer of both Kenyan law and civil society shared a less-scathing opinion of Kenya’s legal institution. This member of the KLRC observed that Kenya regulates CSOs firstly to pursue its national interest and achieve national security; then, to promote social or national cohesion (GOK102). Her assessment bordered on approval, “We can say that regulations promote social justice and national cohesion. Then the regulations are also meant to regulate the actions and activities of

CSOs so as to achieve a measure of accountability” (GOK102). Her opinion emphasized ensuring that the laws had the appropriate content and that regulators enforced those legal rules impartially. Arbitrary enforcement is critical because it allows the government to abuse rules and wield administrative power.

When discussing administrative power it is necessary to understand the types of information CSOs give regulators. Most are banal information that parallel intake documentation required by regulators in liberal democracies – e.g. CSO location(s), partner(s), operational scope, and resources. A CSO also provide information regarding its leaders, including names, biographical information, and qualifications. Kenyan regulators keep this data in hardcopy form, organized in single files, and stored in large dusty rooms. Regulators have made modest efforts to digitize these records. But unreliable systems and the lack of resources keep regulators tethered to physical documents and manual processes. Collecting archival data and interviewing regulators surfaced no indications that the situation would change soon. Indeed, all regulators admitted that they are severely under-resourced regarding expertise, staff, and technology (GOK098, GOK101, GOK104, GOK105, GOK108, GOK110, GOK111, GOK114, GOK115, GOK116, GOK118, GOK121, GOK122).

Regulators seemed technically incapable of turning their administrative power into a prolonged national campaign to observe and control Kenya’s civic space. It did appear that regulators could respond to requests to compile and provide information on handfuls of CSOs. Interview participants concurred they use their administrative power to assist investigations into alleged unlawful activities but explained their involvement in investigations typically starts and ends with providing requested information to other agencies conducting investigations, such as the police or taxation authority. The exception is the NGOs Board, the only regulator that has created the necessary administrative capacities to investigate the CSOs registered with it.<sup>32</sup>

Only two participants had the necessary experience to discuss the NGO Board’s investigation processes. Beginning in 2015, the NGOs Board started relying on citizen-based complaints to investigate CSOs (GOK118). Fire-alarm complaints ranged from matters of internal governance to complaints from citizens that included untrue, frivolous, and legitimate complaints (GOK094). The NGOs Board’s Operations Department leads investigations and allocates three full-time employees to receive, verify, and prioritize complaints from citizens regarding CSO activities. Citing concerning examples that include female genital mutilation and child abuse, interview participants separately emphasized prudence when receiving unsolicited and unverified information. Investigations proceed carefully using documentation stored at the NGOs Board, including annual reports, compliance history, assets, and prior complaints. This information allows investigators to make a preliminary desk review and collect additional information if necessary (GOK118, GOK094). One estimated that he investigates 30–40 complaints per week and investigated over 750 in his time at the NGOs Board (GOK094). He estimated that fewer than five came from outside this normal fire-alarm process. Two of those five, he recalls, were high-profile organizations that he saw in the news after conducting those investigations “off the books” (GK094). He underscored that these cases were anomalies and occurred before establishing the Compliance and Enforcement Committee, a subsidiary organ within the regulator that prevents administrators of the NGO Board from unilaterally investigating NGOs.

Overall, the evidence I collected and the processes I observed indicate that regulators do not possess the assets necessary to abuse their administrative power. The power

to observe the Kenyan civic space is decentralized across four regulators, an arrangement that I refer to as “regulatory pluralism.” Participants from each regulator lamented their dependency on manual systems and physical recordkeeping. And while the ability to observe and harass singular organizations may be possible, regulators’ expertise and technological resources seem far inadequate to maintain prolonged efforts to simultaneously observe and subvert collective action in 47 counties and multiple CSO legal forms.

CSO regulators might not be the agency that should concern us. Multiple participants explained that the National Intelligence Service (NIS) possesses the administrative power to observe Kenyan CSOs for a prolonged period. And given the agency’s history and resources, the NIS can likely use this power to control or undermine CSOs. In general, national security agencies are not involved with CSOs. It would certainly be the exception rather than the rule for agencies such as the American FBI or the British MI5 to participate in CSO affairs. Learning the NIS is involved with regulatory enforcement is no surprise to the “closing space” argument, which warns that some governments use security agencies to harass CSOs episodically.<sup>33</sup> What is unusual is that multiple interview participants revealed that the NIS is involved with *every* registration decision processed by Kenya’s four CSO regulators. One elected official explained that the security agency’s involvement in such simple matters was at the current administration’s direction, who sought revenge on “evil society organizations” that provided evidence to the International Criminal Court’s 2010–2015 investigation into the post-election violence of 2007/8 (GOK097). She believed the government only recently – circa 2015 – sought to boost its administrative power by making CSO regulation part of the national security apparatus (GOK097).

Archival data at one CSO regulator refutes this. Between 1981 and 2007, the Office for the National Intelligence Service sent more than 2,200 “secret” and “confidential” memos to one regulator commenting on registration matters (Appendix 10).<sup>34</sup> Of the 2,283 memoranda collected from government archives, NIS provided adverse comments and recommended against registration 35% of the time. Memos could contain multiple adverse comments, including drawing attention to organizations with questionable aims or leaders with questionable backgrounds (410 memos), suggesting the proposed organization was redundant with business, government, or another CSO and therefore unnecessary (260 memos), and flagging for-profit nightclubs attempting to register as CSOs to avoid other laws (37 memos). Only 143 memos – less than 18% of those with adverse comments – raise concerns that the CSO’s activities may have undesirable effects on electoral and ethnic politics. NIS stated in its memos that it found nothing adverse in over 60% of cases. Despite offering “positive” or “non-adverse” recommendations in most of its opinions, it is apparent that the 40-year involvement with the registration process makes the NIS a super-aggregator of information that gives it unparalleled administrative power.

I was unable to collect precise information on NIS and its processes. Research participants insisted their roles and responsibilities as regulators were to prepare the necessary materials for NIS to determine whether a particular CSO should be allowed to operate in Kenya.

Regulators vary in what they tell applicants about NIS and its process. The Registrar of Companies explained it tells applicants the NIS will contact them and that the CSO cannot begin operations until after NIS makes its recommendation and the regulator completes its registration process (GOK112). A participant at the NGOs Board

reported that he tells organizations they will be contacted to provide more information but does not go into specifics because “we don’t want them to preempt their activity” (GOK110). He elaborated that the rationale for this is that the NGOs Board does not want organizations to change what they are doing, and he and his colleagues do not know how NIS operates.

While some participants expressed that the NIS vetting process may be slow and that ordinary citizens registering their organization may find it difficult, all regulators support the intelligence agency’s expertise. One participant at the Registrar of Companies told me, “NIS will investigate applicants to be sure they are not malicious in their intentions and that the company limited by guarantee will work as directed” (GOK098). Another at the NGOs Board justified the vetting process because “[CSOs] work in a very sensitive sector, and we don’t want [unqualified people] managing such organizations. So we need to vet them, and if they pass the vetting process, we issue a registration” (GOK110). Respondents unequivocally emphasized that the NIS recommendation is a nearly unchallengeable veto point. Unfortunately, NIS’s vetting process remains a black box because it did not accept two formal invitations to participate in this research. The government’s silence aside, none of the over 75 CSOs independently interviewed in Kenya reported negative experiences with the NIS process. Those that chose to elaborate shared similar experiences and described the vetting experience as cordial, undisruptive, and on some occasions, even humorous. Of course, that interview data is censored and does not contain any data from groups rejected by the registration process.

Insight I: Some government officials support the claim that CSO laws are an antecedent to control. Yet, there is little evidence supporting the notion that any of the four regulators can mobilize the administrative power necessary to observe civil society over a large territory for a prolonged period. The ability to periodically harass a handful of CSOs is still very much a concern, especially the NGOs Board whose statute does not discuss reasonable cause when investigating NGOs. Evidence also suggests that true administrative power rests with a government agency mentioned nowhere in Kenya’s CSO laws: the National Intelligence Service.

### ***Tactic II (Control): entice CSOs to comply with the regime***

Each regulatory regime contains legal rules that attract CSOs to register with the agency and exist as that legal entity (Table 3). Three of the regulators have statutory responsibilities to applicants: the Registrar of Companies must give successful applicants a written document certifying incorporation; the Registrar of Societies must make a registration decision within 120 days of receiving an application; and the NGOs Board must provide written explanations for why the agency rejected a registration application. Other enticements include offering unsuccessful applicants the ability to appeal the registration decision, allowing organizations of that legal form to fundraise and operate with tax-exempt status, and permitting audits to minimize fraud and abuse.

My interview data expands the proposition that compliance gives laws and regulators credibility, which in turn legitimizes the government’s authority to govern. One participant with the Registrar of Trusts retold stories of ordinary citizens feeling frustrated or defeated by the extensive process of registration that laypersons believe should be simple and quick (GOK115). He suggested that these events tarnished the agency’s reputation and credibility among citizens. Regulators at the NGOs Board

**Table 3.** Legal rules that entice CSO to comply with the laws as written.

Legal Rule Type	Registrar of Companies <sup>a</sup>	Registrar of Societies <sup>b</sup>	Registrar of Trusts <sup>c</sup>	NGOs Board <sup>d</sup>
Registrations processed by given time and/or with written decisions	Law supports tactic: Certificate to CSOs that comply with requirements §§17–19	Law supports tactic: Registration decisions rendered “within one hundred and twenty days of receipt of the application.” §4(2)		Law supports tactic: Applicant notified of refusal according to “Form 6 set out in the First Schedule.” §12 <sup>e</sup>
CSO may appeal registration or deregistration decision		Law supports tactic §15	Law supports tactic §8(1)	Law supports tactic §19
CSO has tax exemption or allowed to fundraise			Law supports fundraising §12	Law supports tax exemption §§29–30 <sup>e</sup>
Agency may audit CSOs to prevent abuse of legal form		Law supports tactic §§28,31		

Empty cells indicate the law does not contain language relevant to the legal rule type.

<sup>a</sup>Companies Act (No. 17 of 2015).

<sup>b</sup>Societies Act (No. 10 of 1997).

<sup>c</sup>Trustees (Perpetual Succession) Act (No. 22 of 1987).

<sup>d</sup>Non-Governmental Organizations Co-ordination Act, 1990 (No. 7 of 2007).

<sup>e</sup>Non-Governmental Organizations Co-ordination Regulations, 1992 (Legal Notice No. 152 of 1992).

felt strongly that the wrongful actions of a single individual in a leadership role severely damaged the credibility of the entire organization. A long-time employee of the NGOs Board described how the actions of Mr. Yusuf Mahamed Fazul, Executive Director of the regulator from December 2014 to February 2018, stained the regulator with a negative perception and caused it to lose credibility among CSOs, government agencies, and elected officials (GOK108).

The Commission on Administrative Justice investigated allegations that Mr. Fazul lacked the necessary qualifications for the position, made irregular promotions and transfers of agency staff, victimized and intimidated personnel, and mismanaged public funds.<sup>35</sup> The underlying allegations first surfaced in July 2015 and concluded in November 2016 with the official report “Death of Integrity.” The report, alongside a courtroom defeat of Mr. Fazul and his questionable deregistration of specific CSOs, sowed distrust and “bad blood” between CSOs and the regulator (GOK904).

Interview participants also held Former Executive Director Fazul singularly responsible for tarnishing the reputation of the NGOs Board and harming the credibility of the law that empowers it. This led the NGOs Board to undertake actions different from other regulators. Following his departure, the NGOs Board launched initiatives to rebuild its credibility and increase compliance with the law. One seasoned MP recalled that, historically, the NGO Board’s top priority was not compliance but registration, capacity building, and coordination (GOK122). But she remembered a clear turning point, circa 2015, when compliance became the top priority.

Triangulating my interview data and knowledge of Kenya’s CSO laws leads me to identify three overlapping reasons that explain the urgency surrounding these compliance initiatives. Most immediately, a savvy regulatory veteran of the NGOs Board cited

precise numbers off the top of her head that less than 25% of the over 11,000 organizations registered with the NGOs Board submit annual reports (GOK122). While several factors may contribute to the low compliance rate, she suggested that a diminished level of credibility made the compliance level abnormally low. In her estimation, the low compliance rate was the symptom of a lack of credibility among CSOs. This had a knock-on effect that impeded the NGOs Board from fulfilling its statutory duty to advise the government on the role of NGOs in Kenya.<sup>36</sup> This process created a downward spiral. A lack of credibility lowered the compliance rate, and a low compliance rate weakened credibility through an inability to meet statutory obligations.

In the medium-term, the NGOs Board sought to increase compliance to repair its damaged reputation in the eyes of CSOs and government officials. This reputational rebuilding will take time, and the agency has initiated several strategies to mend relations between the NGOs Board, CSOs registered with it, and Kenyan civil society more broadly. Appointing Gichira Kibara – a civil society insider, legal expert, proven manager, and former Kibaki appointee – Chairman of the NGOs Board, was a vital first step. Additional efforts included TV interviews with its chairman, networking with clusters of CSOs such as the Civil Society Reference Group and the NGO Council, and engagement forums with organizations in Mombasa, Kisumu, and Nairobi (GOK108). Each of these forums aimed to raise compliance levels through dialogue on laws and regulations, compliance training, goodwill, and post-workshop surveys to identify areas where the agency can improve (GOK110). Interview participants at the NGOs Board explained these “goodwill tours” are new, while participants outside the NGOs Board did not indicate that the other regulators use similar programmes.

Improving year-to-year compliance rates and repairing its damaged reputation add momentum to the NGO Board’s long-term goal of becoming Kenya’s lone CSO regulator. Many interview participants interpreted the legal language of the Public Benefits Organization Act as consolidating all CSO regulators into one: the Public Benefit Organizations Regulatory Authority, or “the Authority.” The transitional provisions in the PBO Act (§ 70 and Schedule Five) explain that the NGOs Board will temporarily act as the PBO Authority and regulate all CSOs in Kenya. The act does not explicitly state the Board will become the Authority, however. Interview participants at the NGOs Board presumed the NGOs Board would seamlessly and fully transition into the Authority. But others disagreed. CSO regulators widely acknowledged the NGOs Board would act as a custodian, but those outside the NGOs Board maintained the Authority’s structure and personnel would look different from the Board. Elected officials, meanwhile, suggested little will change until MPs exercise oversight responsibilities.

Insight II: Government officials explained a concerted effort exists to improve the credibility and legitimacy of agencies. Regulators appeared keenly aware of how other actors experience and perceive their agencies. This is especially true for the NGOs Board which, unlike other regulators, has a legal obligation to advise the government on NGOs’ development activity (NGOs Act of 1990, §7). NGOs Board regulators suggested a causal connection between an agency’s credibility and ability to fulfil statutory responsibilities.

### ***Tactic III (Consultative): strengthen the regime’s democratic façade***

Most regulators enforce regulatory regimes that contain legal rules that appear objectively democratic (Table 4). The same statute that created the newest regulator, the

NGOs Board, also created a dispute resolution mechanism, established a non-governmental entity to self-regulate non-governmental organizations, and created an oversight body to ensure the agency conducts its affairs appropriately. The government's ability to determine which CSO are registered undermines permissive rules' potential protections. Kenyan law allows most agencies to refuse registrations for reasons that are undefined and appear subjective: the Registrar of Societies refuses registrations if it "is satisfied" the CSO is connected with a CSO of political nature established outside Kenya (§11(1)(a)) or "it appears" the CSO is likely to pursue activities that are unlawful, prejudicial, or incompatible with peace, welfare, or good order in Kenya (§11(2)(a)); the Registrar of Trusts only registers CSOs for which the Minister "considers incorporation expedient" (§3(2)); and the NGOs Board refuses registration if it "is satisfied" that the applicant's activities or procedures are not in the national interests.

Kenyan elected officials, bureaucrats, and regulators discussed the need for a certain degree of willpower among political elites to execute the democratic façade tactic (GOK095, GOK096, GOK097, GOK109, and GOK114). Participants identified President Moi and President Uhuru Kenyatta as examples. These leaders were unwilling to tarnish their democratic façade by expunging permissive legal rules from Kenya's legal code; however, these leaders wilfully disregarded their public duty to impartially enforce the laws as written. By contrast, interview participants identified President Kibaki as genuinely interested in helping civil society. They described President Jomo Kenyatta as supporting CSOs to achieve a broader policy agenda. Several research participants, including MPs, bureaucrats, and regulators, suggested that political elites can direct the bureaucracy to enforce legal rules that help CSOs, but those elites must choose to do so (GOK095, GOK103, GOK109, GOK122).

One NGOs Board regulator suggested that presidents' concerns for control and legitimacy manifest as a constraint on regulators (GOK118). The Kenyan legal institution directs regulators to cancel or suspend registrations for legitimate purposes by following an exact process (e.g. Societies Act § 12; NGOs Act § 16). This senior regulator believed the government instructed the regulator not to process legitimate

**Table 4.** Legal rules strengthening the regime's democratic façade.

Legal Rule Type	Registrar of Companies <sup>a</sup>	Registrar of Societies <sup>b</sup>	Registrar of Trusts <sup>c</sup>	NGOs Board <sup>d</sup>
Government creates dispute resolution forum		Law supports tactic with courts as forum §41		Law supports tactic with Minister then High Court as forum escalation §34
Government creates CSO self-regulation entity				Law supports tactic §23
Regulator accountable to oversight body				Law supports tactic §54(1), 30–31
Agency may refuse registration on subjective grounds		Law supports tactic §11	Law supports tactic §3	Law supports tactic §14(a)

Empty cells indicate the law does not contain language relevant to the legal rule type.

<sup>a</sup>Companies Act (No. 17 of 2015).

<sup>b</sup>Societies Act (No. 10 of 1997).

<sup>c</sup>Trustees (Perpetual Succession) Act (No. 22 of 1987).

<sup>d</sup>Non-Governmental Organizations Co-ordination Act, 1990 (No. 7 of 2007).

<sup>e</sup>Non-Governmental Organizations Co-ordination Regulations, 1992 (Legal Notice No. 152 of 1992).



registration cancellations because doing administration appear undemocratic; meaning cancellations would damage the democratic façade. Additional data suggests that management objectives and performance benchmarks – e.g. the number of new CSOs registered and time to registration – are structured to give local and international onlookers the impression of democracy. For example, the steady registration of new CSOs under President Moi (see [Figure 1](#)) may have given analyst of the day misplaced confidence in Kenya’s democratic trajectory and durability.

Drawing on Kenyan political history, one Member of Parliament trained in human rights law explained that during the Cold War, Moi used a strategy of non-alignment to allow himself maximum leeway on domestic issues. She continued that after the fall of the Soviet Union, Kenya had to “lean towards the West” and Moi used the return of multi-party democracy as a brick in the democratic façade (GOK114). A Kenyan legal expert and a senior official with the Kenya Law Reform Commission (KLRC) supported this. He observed that the Non-Governmental Organizations Co-Ordination Act of 1990 was a product of the movement pushing for governance reform and a government willing to negotiate on specific terms (GOK096). He noted that many civil society actors wanted an entirely new constitution.<sup>37</sup> Instead, to appease critics, President Moi showed his commitment to the democratization efforts and agreed to changes in the NGOs bill demanded by CSOs pushing for democracy and governance reform. While the statute gave CSOs room to pursue governance activities, its legal rules also ensured those actions took place under the government’s watchful eye.

Regulators also described CSO laws as possessing dual intentions. A legal expert with the Registrar of Societies explained that the government publicly portrays the Societies Act and similar laws as protecting society and societal actors, but the private intention has always been to ensure these actors play by the rules (GOK106). A seasoned regulator at the NGOs Board verified this. She shared that her experiences in the 1990s led her to believe that foreign donors “imposed” multi-party democracy on an unwilling government and that CSO laws had two intentions: one was to control and stifle political competition, and the other was to regulate the CSOs that were now receiving increased levels of foreign aid that donors once channelled to the government (GOK122).

CSOs weigh many things when deciding whether and if to incorporate as an official legal entity. Not registering with the regulator does not prove decision-makers saw through a democratic façade or any other attempt to manipulate CSOs. Still, a CSO’s decision to register with one agency and not another – i.e. as a particular legal form and not another – suggests that something in the legal rules swayed it. Evaluating the decisions sophisticated CSOs made concerning the NGOs Act provides information on whether those actors accepted the government’s assertion that the new law protected society and CSOs. Two sophisticated actors are Oxfam and the Legal Advice Centre.<sup>38</sup> After Moi enacted and finally commenced the NGOs Act in June 1992,<sup>39</sup> Oxfam registered with the NGOs Board on 11 March 1993. The local legal experts soon followed, and the Legal Advice Centre registered on 2 August 1993. Neither of these CSO should be considered naïve, and their decisions suggest the legitimizing tactic to give domestic and international onlookers the impression of democratic qualities worked, at least to some degree.

Insight III: Kenyan elected officials, bureaucrats, and CSO regulators supported the argument that governments include permissive legal rules in CSO laws to strengthen a democratic façade.

However, the Registrar of Societies, Registrar of Trusts, and the NGOs Board can each refuse registrations for subjective reasons. Biased registration practices undermine permissive rules' protections that should apply impartially to all CSOs, regardless of a CSO's political leanings or activities.

#### **Tactic IV (Consultative): engage CSOs to demonstrate responsiveness**

Government action in the form of CSO engagement matters more than legal rules when demonstrating responsiveness. Once registered by either the Registrar of Trusts or the NGOs Board, CSOs can operate throughout the country without needing additional operational approvals. The law ensures that the government does not lose sight of some CSOs. Legal rules require societies and non-governmental organizations to file annual operational reports with their respective regulator. Once in the government possession, this information makes it simple to identify non-political or regime friendly CSOs to engage on social matters; this engagement demonstrates responsiveness [Table 5](#).

Politics determines which CSOs the government invites to the table. As one elected official observed, engaging faith groups and secular organizations together is the most effective way to address social unrest (GOK120). Broad coalitions such as these were vital to democratization in the 1990s, constitutional reform in the 2000s, and reconciling election disputes after the 2010 constitution.<sup>40</sup> However, there are occasions when the government does not want a stout or effective CSO coalition. The government can profoundly influence – and sometimes predetermine – the engagement outcome by intentionally selecting participants. As another MP reported, the government is reluctant to involve “noisemakers” in policymaking (GOK097). The government may further influence engagement by handpicking particular CSOs that promote a particular policy or are loyal to the regime. The implication is that CSOs may self-censor or acquiesce if they seek to remain involved in future policy discussions.

The preponderance of interview data I collected depicts genuine engagement with CSOs. As one bureaucrat with over 20 years of experience drafting legislation in multiple policy areas told me, her agency routinely invites CSOs with relevant expertise to comment on particular social problems and contribute to policymaking (GOK102). She explained that her agency – the KLRC – first produces a “concept paper” that

**Table 5.** Legal rules supporting engagement and responsiveness.

Legal Rule Type	Registrar of Companies <sup>a</sup>	Registrar of Societies <sup>b</sup>	Registrar of Trusts <sup>c</sup>	NGOs Board <sup>d</sup>
Registered CSO permitted to operate without additional approvals			Law supports tactic §7	Law supports tactic §12 (2)
CSO must file report of operational activities		Law supports tactic §30 and makes records available to public §48		Law <sup>e</sup> supports tactic §24 and makes records available to public §31

Empty cells indicate the law does not contain language relevant to the legal rule type.

<sup>a</sup>Companies Act (No. 17 of 2015).

<sup>b</sup>Societies Act (No. 10 of 1997).

<sup>c</sup>Trustees (Perpetual Succession) Act (No. 22 of 1987).

<sup>d</sup>Non-Governmental Organizations Co-ordination Act, 1990 (No. 7 of 2007).

<sup>e</sup>Non-Governmental Organizations Co-ordination Regulations, 1992 (Legal Notice No. 152 of 1992).

summarizes the social problem a government partner wants to address through legislation. Next, the KLRC makes a “request for memorandums” through publicly accessible sources, including its website and the media. After sufficient time, the KLRC identifies and invites CSOs to a multi-day forum to discuss the issue: “[we] discuss, we exchange views, and we reach consensus.” She clarified that the KLRC asks regulators for recommendations on which CSOs are the most relevant to a particular issue. The respondent proudly informed me that this engagement is considered “public participation” and is constitutionally and statutorily required.

The Registrar of Societies maintains ongoing discussions with religious CSOs regarding the alleged dishonest actions of religious leaders and self-regulation within religious communities. Some religious leaders in Kenya have taken to “misquoting Holy Scriptures” and abusing the prosperity gospel to commit “blatant theft.”<sup>41</sup> Growing allegations of this led the Attorney General to respond quickly to this public concern. He directed his Registrar of Societies to halt the registration of religious congregations effective 11 November 2014 (see Appendix Figure 2 and appendix for entire statement). On 14 November, the Attorney General organized a consultative forum to discuss congregations’ operations and lay the groundwork for a regulatory framework that would protect religious freedom and prevent future abuses. Representatives from the National Council of Churches of Kenya, Supreme Council of Kenya Muslims, and the Hindu Council of Kenya attended. Following the forum, religious CSOs submitted their opinions as memoranda that laid the foundation for a policy discussion at a second forum four months later (31 March 2015). The forum did not reach an agreement, and the meeting ended with the moratorium in full effect.

Observers may consider the Attorney General’s moratorium an overreaction to protect society from phoney pastors as punishing innocent religious groups unnecessarily. I explored this possibility with a senior member of the State Law Office who was quite generous with his time, given the responsibilities of his senior position. Our conversation turned to the Blackstone formulation<sup>42</sup> to discuss whether it is better to let ten guilty persons escape than wrongfully imprison one innocent person. Without hesitation and with full conviction, he expressed that letting ten go free is better than allowing one innocent to suffer. I then asked whether it is better to let ten phoney congregations register or deny one legitimate church the ability to register. He unequivocally explained that denying all of them registration is better and said, “There needs to be a proper framework to protect the public interest. That framework is the law.”

What is compelling about this exchange is that the respondent’s full-throated endorsement of the current moratorium is unshaken despite first anchoring him to Blackstone’s legal rationalization. Still, every word he spoke during our 143-minute interview seemed honest, relaxed, and unrehearsed. His insights regarding the moratorium seemed to me to be a sincere explanation of what he thought was the government’s prudent and even-handed course of action. If experienced legal experts such as this gentleman go to such lengths to demonstrate genuine responsiveness, then a similar attitude may energize regulatory fixes to societal concerns relating to CSOs more broadly, such as briefcase NGOs and terrorism. Elected officials, bureaucrats, and regulators repeatedly identified those societal issues as leading justifications for legislative action (GOK098, GOK095, GOK109, GOK122).

Interview data show that this legitimacy-through-engagement tactic is a nuanced process. Respondents widely agreed that the government actively recruits and meets with CSOs to prevent allegations that the government is unresponsive. These

officials commented that the ample supply of CSOs makes it easy to initiate engagement because all CSOs seek dialogue with policymakers.

Insight IV: Kenyan government officials agreed that the GOK engages CSOs in dialogue to address social problems and preempt public criticism. This tactic was especially salient among the Kenya Law Reform Commission and Registrar of Societies on policymaking matters.

### ***Tactic V (Consultative): use CSO service provision to increase output legitimacy***

Several legal rules enable the government to manipulate CSOs' service provision to enhance its public service goods provision, or output legitimacy. Coordinating work in specific areas allows the government to claim credit for service provision. Only the NGOs Board has the authority to "facilitate and co-ordinate the work" of all CSOs registered under it. Completed projects and unused assets are another pathway for the government to enhance its output legitimacy. When a society or charitable trust dissolves, the law requires that organization surrender its projects and assets to the government. Finally, societies and non-governmental organizations must report annually on their operational activities. Collecting operational reports allows the government to shift its policy priorities and reactively align with those activities to which CSOs allocate considerable resources [Table 6](#).

One elected official explained CSOs are "an addition to public services" that fill the gap, especially in the rural areas, in services such as education and health (GOK097). Similarly, an experienced bureaucrat within the KLRC emphasized that the larger the gap, the greater the urgency. Citing South Sudan as an example, she explained, "[the country is] in the middle of a civil war, and it would make more sense for international relief organizations to be given a bigger leeway to operate in the country, to deliver food and medical supplies" (GOK102). Referring to Kenyan history, another MP

**Table 6.** Legal rules supporting the government's output legitimacy.

Legal Rule Type	Registrar of Companies <sup>a</sup>	Registrar of Societies <sup>b</sup>	Registrar of Trusts <sup>c</sup>	NGOs Board <sup>d</sup>
Agency may compel cooperation with government or CSOs				Law supports tactic §7
CSO surrenders projects or assets to government at dissolution		Law supports tactic §§33–37, 43	Law supports tactic §16 (2)	Law undermines tactic: "An Organization whose registration is cancelled shall tender its assets or operations to other Organizations with similar objectives" §16(6)
CSO must file report of operational activities		Law supports tactic §30 and makes records available to public §48		Law supports tactic §24 and makes records available to public §31

Empty cells indicate the law does not contain language relevant to the legal rule type.

<sup>a</sup>Companies Act (No. 17 of 2015).

<sup>b</sup>Societies Act (No. 10 of 1997).

<sup>c</sup>Trustees (Perpetual Succession) Act (No. 22 of 1987).

<sup>d</sup>Non-Governmental Organizations Co-ordination Act, 1990 (No. 7 of 2007).

<sup>e</sup>Non-Governmental Organizations Co-ordination Regulations, 1992 (Legal Notice No. 152 of 1992).

argued the early CSO laws existed to help farmers, particularly tea farmers, organize themselves so that they could better work with the government. She interpreted the Societies Act (1968) and other early laws as establishing governance and facilitating economic transactions between government and the civil society groups, what she referred to as “the business nature of things” (GOK114).

Another MP’s account suggests this particular legitimizing tactic may be newer than others. The participant was alive at the time of Jomo Kenyatta’s death and explained that his passing marked the beginning of “dark days for the country” (GOK095). He insisted it was not because CSOs were terrible, but because of how Moi’s regime treated them. He retold many accounts from that period and informed me that Moi never attempted to claim credit for the public service goods provided by CSOs and financed by international donors.

Now, with the benefit of learned experience, elected officials seem to be turning away from Moi’s example and embracing CSOs’ public contributions. The same elected official recited his involvement in the legislature concerning the proposed 2014 amendments to the PBO Act (2013). According to him, a multi-party coalition defeated those amendments because the elected officials recognized the restrictive rules would adversely affect CSOs’ ability to complement and supplement public service provision within constituencies. To be clear, the elected official did not suggest that in 2014, Kenyan MPs were liberal vanguards protecting CSOs. He suggested instead that there is a positive relationship between an incumbent’s reelection and CSOs providing public service goods in their constituencies (GOK095). A top-level bureaucrat at the KLRC agreed that this new perspective exists. She reported that CSOs can sometimes go on the offensive and will “withhold their services, like their attendance of meetings, their formulation of policies, joint partnerships with government and other organizations” until elected officials prioritize specific policies (GOK102).

While an elected official may be able to individually identify and benefit from CSOs’ activities in their constituency, it is more laborious for the government to aggregate the actions of tens of thousands of CSOs and claim those deeds as its own. In practice, the only tool available to accomplish such widespread usurpation is the “NGO Sector Report” published by the NGOs Board. Interview participants at the NGOs Board expressed that the report demonstrates the government’s ability to organize, understand, and communicate what NGOs have done in the country over a particular period (GOK0094, GOK122).<sup>43</sup>

A third regulator at the NGOs Board explained that the government encourages CSOs to consider supporting programmatic “areas of interest” (GOK110). When asked for examples, the respondent identified microfinance and geriatric care as past and present cases. The participant claimed that government leadership steered CSO programming from microfinance into geriatric care. He explained that microfinance had been part of Kenya’s charitable sector, but the Microfinance Act (No. 19 of 2006, commencement 2 May 2008) moved regulatory authority to the Central Bank of Kenya (GOK110).

Archival data allows me to test the regulator’s claims. He asserts that government leadership led CSO activity from microfinance to geriatric care. Archival data refutes these claims. First, CSOs are still active in microfinance. According to the NGOs Board’s records, 660 non-governmental organizations (184 international and 476 national) registered with the agency and are involved in microfinance to some

degree. Yet, only 194 registered before the Microfinance Act's 2008 commencement. This sequencing means that over 70% of non-governmental organizations registered in microfinance activities *after* the Microfinance Act commenced. This also means the NGOs Board permitted 466 non-governmental organizations to participate in this space after declaring it a non-charitable, commercial zone. Second, non-governmental organizations' microfinance expenditures increased 13% from 2013 to 2019 (see Appendix Table 9 for government data on expenditure by sector). Thirdly, turning to geriatric care, only 59 registered non-governmental organizations (20 international and 39 national) participate in that activity. Expenditure towards geriatric care decreased 54% from 2017 to 2019. In 2019, geriatric care equals roughly 10% of expenditures allocated towards microfinance. Taken together, archival data does not support the argument that the GOK successfully coordinates or leads CSO activity.

While the GOK has unsuccessfully led CSOs, it has effectively shifted its policy priorities to follow CSO programmatic activity. In late 2017, the Kenyatta administration identified four flagship programmes it publicized as "The Big 4."<sup>44</sup> These initiatives include manufacturing, affordable housing, universal health coverage, and food security. Governmental reports show these principal policy areas are the same sectors in which CSOs are highly active as measured by expenditure. In the most recent NGOs Board report for 2018/19, 44% of all NGO expenditure directed to charitable programmes closely related to The Big 4 initiatives, including economic trade, agriculture, water, and sanitation, health and HIV/AIDS, and housing (Appendix Table 9). In 2013, just as President Kenyatta was coming into office, these sectors accounted for roughly one-third of all NGO expenditure. In the larger picture, the government seems unable to steer CSO activity towards the administration's policy priorities. Instead, archival data suggests that the GOK has shifted its policy priorities to follow CSO activity. This tactic allows the administration to capitalize on CSOs' service provision to increase the government's output legitimacy.

Insight V: Elected officials, bureaucrats, and regulators agree that non-democratic governments tolerate the growth of service-oriented CSOs because those organizations act as an appendage of the state to fulfil needs left unmet by government agencies. Evidence collected from the NGOs Board suggests that instead of leading CSOs, the government can also reactively shift its policy priorities to align with the areas in which CSOs allocate considerable resources.

## Conclusion

We cannot speak about a law's effect on society without studying how its implemented and enforced. We expect liberal democracies to enact permissive rules with the genuine intention of helping CSOs, and nothing constrains non-democratic governments from doing the same. Yet, we must also consider the possibility that governments enact permissive rules intending to enforce them arbitrarily. Using the case of Kenya to compare its four CSO regulators, I have considered several tactics to explain the conditions under which governments use CSO laws for their purposes. Triangulating government interviews and archival data, this analysis shows that the Kenyan government altered its legal rules and enforcement actions to create the *de facto* legal institution it wanted. The complication for researchers is that the deviation between legal and working rules is not guaranteed to be either large or constant, but to vary at different times and for different reasons.

Scholars and human rights defenders are right to raise alarms when governments openly repress their people using legal instruments. Yet, a government's blatant weaponization of legal rules may initiate undesirable responses from domestic and international actors. These repercussions mean governments may need to consider other tactics when heavy-handed oppression is not the optimal tool for retaining power. Consultative authoritarianism theory<sup>45</sup> posits non-democratic governments use control and consultation as alternatives to blatant repression. By marshalling primary data and considering legal rules and working rules simultaneously, I find the Kenyan government uses several tactics<sup>46</sup> to structure its state-society relationship. I then group these tactics into consultative authoritarianism's theoretical framework: control tactics allow for control over civil society, while consultation tactics establish an exchange relationship between the government and CSOs. Taken together, I find the government uses several control and consultation tactics collectively, separately, and episodically to manipulate CSOs and legitimise the regime.

First, a consistent theme throughout the government interviews was that CSO regulators possessed administrative power, but it was weak. Participants in all corners of the government told me regulators lack resources and technology. Assembling their collective grievance of low morale, understaffing, and unreliable physical and electronic systems suggests that regulators are incapable of mounting a large-scale campaign to observe – much less control – civil society. And the institutional arrangement within Kenya means what administrative power does exist is fractured among its regulators. However, participants explained that all registrations pass through the national security apparatus, which means the concerns of this tactic are real. What is more, the government entity best positioned to wield this power has no legislative authority to regulate CSOs.

Second, data show mixed support for the argument that compliance with the legal institution gives laws and regulators credibility, which in turn legitimizes the government's authority to govern. Although interview participants did not refute that causal process explanation, the dominant theme in the interview data suggested the compliance-legitimacy process is salient only at the agency level. What is most interesting from the data is that compliance and credibility are interdependent. Several government participants believed that the inappropriate enforcement actions of one former senior manager directly contributed to lower compliance levels. This made it harder for this regulator to fulfil its statutory responsibilities to elected officials, which they feared would further damage credibility.

Third, multiple elected officials, bureaucrats, and CSO regulators suggested that the government enacts permissive rules to give the impression of democratic institutions to local and international observers. Government interview participants made a point to explain that not all administrations use this tactic. They stressed that the government could improve the CSO legal institution in two ways: enacting new permissive rules or enforcing current permissive rules as written. This emphasizes that the enforcement action CSOs experience change through formal and informal processes.

Fourth, interview data from senior government officials indicated that the government goes to great lengths to incorporate CSOs in policy discussions to demonstrate responsiveness. One salient example of this is the routine involvement of CSOs whenever the Kenyan Law Reform Commission crafts new legislation. Another powerful example comes from the Registrar of Societies, which moved very quickly to protect citizens from phoney pastors by enacting a moratorium on registering new religious

congregations. At the same time, it worked with religious leaders to solve a widespread societal problem. While the data show the government makes considerable investments involving CSOs in lawmaking and responding to societal concerns, whether such engagement produces effective policy remains unanswered. Despite that, my findings show that governments engage CSOs to demonstrate their responsiveness to urgent social matters and reinforce their legitimacy to govern.

Finally, interview and archival data support the hypothesis that governments use CSOs' service provision to bolster their output legitimacy. The evidence appeared strongest at the local level based on the report that MPs mobilized to defeat legislation that would add restrictive rules that would hinder CSOs' ability to provide public service goods to MPs' constituencies. Nationally, there was little evidence to support the claim that the government leads CSO activity to support its policy initiatives. More investigation is required, but the data suggested that CSOs' ability to access charitable donations and foreign assistance may cause governments to reactively shift their policy priorities to align with CSOs' activity and later claim charitable deeds as policy achievements.

Scholars have given significant attention to CSO laws worldwide, but most of this research has focused on a narrow set of *de jure* restrictive rules. Yet, we cannot ignore the legal reality that permissive rules frequently appear in legal institutions that regulate CSOs. Their existence is not immaterial, and there are numerous reasons for non-democratic governments to enact permissive rules affecting CSOs. The rationale for these rules manifests as the control and consultation tactics discussed above; they aim to manipulate CSOs and legitimise the regime. Two future agendas that researchers ought to consider are the conditions under which a government uses one tactic versus another and the conditions under which each tactic affects society. Scholars will better understand how and why governments use laws to regulate the freedom of association once we respect these legal institutions' complexity and rigorously examine enforcement actions.

## Notes

1. Lorch and Bunk, "Using Civil Society as an Authoritarian Legitimation Strategy"; Gerschewski, "The Three Pillars of Stability."
2. Lührmann and Lindberg, "A third wave of autocratization is here"; Swiney, "The Counter-Associational Revolution"; Diamond, "Democratic regression in comparative perspective"; Boese et al., "State of the world 2021"; Cheeseman and Dodsworth, "Defending Civic Space."
3. Teets, "Let Many Civil Societies Bloom," 33.
4. See also Truex, "Consultative Authoritarianism and Its Limits."
5. Mutua, *Kenya's Quest for Democracy*, 67.
6. See Bratton, "The Politics of Government-NGO Relations in Africa"; Mayhew, "Hegemony, Politics and Ideology"; Christensen and Weinstein, "Defunding Dissent"; Rutzen, "Aid Barriers and the Rise of Philanthropic Protectionism"; Reddy, "Do Good Fences Make Good Neighbours?"; DeMattee, "Covenants, Constitutions, and Distinct Law Types."
7. See Lorch and Bunk, "Using Civil Society as an Authoritarian Legitimation Strategy"; DeMattee and Swiney, "Ostromian Logic Applied to Civil Society Organizations and the Rules that Shape Them"; DeMattee, "A Grammar of Institutions for Complex Legal Topics."
8. DeMattee, "Toward a Coherent Framework"; *Ibid.*, *Domesticating Civil Society*.
9. Lorch and Bunk, "Using Civil Society as an Authoritarian Legitimation Strategy," 989–91. See also Yabanci, "Turkey's Tamed Civil Society."
10. Indiana University IRB Study No. 1805354074 and Kenya NACOSTI Permit No. NACOSTI/P/18/65047/23638. Appendix Tables 7 and 8 contain information on field research data sources.



11. I define *civil society organizations* as private, self-governed organizations established via voluntary association for purposes other than political control and economic profits.
12. Yabanci, “Turkey’s Tamed Civil Society.”
13. Teets, “Let Many Civil Societies Bloom,” 34–6.
14. Lorch and Bunk, “Using Civil Society as an Authoritarian Legitimation Strategy.”
15. I omit this tactic from my analysis because my data neither corroborates nor refutes its use.
16. Wiktorowicz, “Civil Society as Social Control: State Power in Jordan”; Dimitrova, “Reshaping Civil Society in Morocco.”
17. Mayhew, “Hegemony, Politics and Ideology”; Lorch, “Civil Society under Authoritarian Rule.”
18. Brass, “Blurring Boundaries”; Ibid. *Allies or Adversaries?*
19. Lewis, “Civil Society and the Authoritarian State”; Froissart, “The Ambiguities between Contention and Political Participation”; Teets, *Civil Society Under Authoritarianism*; Wischermann et al., “Do Associations Support Authoritarian Rule?”; Toepler et al., “The Changing Space for NGOs.”
20. Wiktorowicz, “Civil Society as Social Control,” 43.
21. Froissart, “The Ambiguities between Contention and Political Participation.”
22. Diamond, “Democratic regression in comparative perspective,” 21.
23. See Samuels and Zucco, “Crafting Mass Partisanship at the Grass Roots.”
24. Giersdorf and Croissant, “Civil Society and Competitive Authoritarianism in Malaysia.”
25. Tripp, “The Politics of Autonomy and Cooptation in Africa”; Teets, *Civil Society Under Authoritarianism*.
26. Spires, “Contingent Symbiosis and Civil Society in an Authoritarian State”; Fröhlich and Skokova, “Two for One”; Russell, “Reconstituted authoritarianism.”
27. I thank a highly reputable legal expert in East Africa for initially suggesting this idea to me.
28. Summaries exclude laws that apply to all regulators (e.g., The Finance Act No. 15 of 2017). Due to space limitations, I direct readers to existing research explaining how laws are systematically coded using a 58-item coding protocol (DeMattee 2019, 2020, 2022)
29. The “Annual NGO Sector Report 2018/19” (NGOs Co-Ordination Board 2019, 22) gives us this range. Since its inception, the NGOs Board has registered 11,262 NGOs as of June 30, 2019. The Board has deregistered 2,468 and reinstated 113 NGOs. Only 14 NGOs have dissolved. The Board estimates the number of “active” NGOs are those that registered, minus those deregistered, plus those reinstated, minus those dissolved (11,262 – 2,468 + 113 – 14 = 8,893). This represents 79% of NGOs ever registered. However, “[t]he report notes low compliance levels in submission of annual reports. Out of 8,893 expected to be active, only 3,028 NGOs (34%) filed their reports during the year” (p. 17). As of December 31st, 2018, the true but unknown number of NGOs operating in Kenya ranges between 26.9% (3,023 are active and compliant) and 79.0% (8,892 are active and either compliant or non-compliant) of all NGOs ever registered.
30. Mahoney, “The Logic of Process Tracing Tests in the Social Sciences.”
31. Mayhew, “Hegemony, Politics and Ideology”; DeMattee, *Domesticating Civil Society*.
32. The NGOs Act gives the NGOs Board the ability to establish “subsidiary organs” that are “necessary for the performance of its functions” (§ 8(a)), which includes only eight functions. The broadest function is “to conduct a regular review of the register to determine the consistency with the reports submitted by NGOs” (§ 7(e)).
33. Carothers and Brechenmacher, *Closing Space*.
34. I cannot claim that this data is comprehensive nor representative of NIS’s involvement in the registration process. Nevertheless, these decades-old communiqués provide uncommon and unvarnished insight into a national security agency’s activities to undermine civil society.
35. Amollo and The Office of the Ombudsman, *Death of Integrity*.
36. Unlike other regulators in Kenya, the NGOs Act requires the NGOs Board to advise the government on the role NGOs have in development within Kenya (§ 7). NGOs Board interview participants concur that the publication of the “Annual NGO Sector Report” fulfils this responsibility.
37. See also Mutunga, *Constitution-Making from the Middle*.
38. Oxfam registered as a company limited by guarantee in 1977. The Legal Advice Centre (Kituo Cha Sheria) is one of the oldest and most experienced legal aid CSOs in East Africa and offers free legal advice to Kenyans. Its legal experts registered the organisation in 1973.

39. NGOs Act (No. 19 of 1990) assented January 14th, 1991, amended by The Statute Law (Repeal and Miscellaneous Amendments) Act (No. 14 of 1991, pp. 610–2), commenced June 15th, 1992.
40. Branch, *Kenya*; Hornsby, *Kenya*.
41. Mutunga, *Problematizing and Interrogating the Theme “Shrinking Civic Space, Freedom of Assembly and of Association,”* 3.
42. Blackstone, *Commentaries on the Laws of England*.
43. When requesting access to these reports, the NGOs Board explained it could not share unpublished drafts and directed me to its Resource Center library for all available documents. That library contained only one such report (Financial Year 2013/14). Since concluding fieldwork, the regulator published the 2018/19 report (NGOs Co-Ordination Board 2019)
44. The Executive Office of The President, President’s Delivery Unit. (n.d.). *The Big 4*. <https://big4.delivery.go.ke/>
45. Teets, “Let Many Civil Societies Bloom”; Ibid. *Civil Society Under Authoritarianism*.
46. I credit Lorch and Bunk (2017, 989–91) who first identified these tactics.

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