

# To Legitimize and Manipulate: Government Officials Explain Why Non-Democracies Enact and Enforce Permissive Civil Society Laws

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## Abstract

Civil society is a bulwark against undemocratic rule. Scholars and activists are calling attention to repressive laws non-democratic governments enact to undermine civil society organizations (CSOs), arguing those laws contribute to democratic recession worldwide. Yet, many non-democratic governments enact permissive, quasi-democratic legal rules alongside repressive ones. Evidence from case studies suggests that non-democracies enact such rules as tactics of a broader strategy to stabilize the regime. This work adds a sub-national comparative case study of Kenya's four CSO regulators to the growing body of evidence showing non-democracies can choose not to repress civil society but rather co-opt it to achieve the regime's aims. 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 uses several legitimization and manipulation tactics collectively, separately, and episodically to manipulate civil society and benefit the regime. While regulators may be able to observe and harass singular organizations, they appear incapable of turning their administrative power into a prolonged national campaign to observe and control CSOs. Instead, national security agencies are the entities harnessing vast administrative power.

**Keywords:** authoritarian legitimation; civil society; human rights; Kenya; NGOs; restrictions

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# 1 Introduction

Non-democratic regimes combine repression, co-optation, and legitimization to stabilize their rule (Gerschewski 2013). Human rights defenders and analysts give increased attention to the first factor and warn that repressive legal rules that regulate civil society (henceforth “CSO laws” or “legal institution”) are fueling a global trend in democratic backsliding (CITES). This focus is not unwarranted. As Boese et al (2022) note, non-democratic leaders understand that civil society is one of the strongest bulwarks against undemocratic rule (see also Diamond 2020; Merkel 2007). Scholars argue domestic factors, path dependence, and policy diffusion profoundly shape the *de jure* and *de facto* rules governments use to regulate civil society (CITES). Despite the many advances in this research area, key questions remain. A nontrivial number of non-democratic governments use CSO laws not only to repress civil society but also to co-opt CSOs and legitimize their regime. Drawing on a subnational comparison of four CSO regulators in Kenya, I examine why and how non-democratic governments enact and enforce quasi-democratic, permissive rules.

The difference between rules-in-form and rules-in-use is a familiar topic and the dichotomy provides a useful entry point into a generally understudied political phenomena. While analysts generally focus on governments enacting restrictive rules that repress civil society, recent work shows that non-democratic governments fuse permissive and restrictive legal rules to craft the legal institutions governments want and need (CITES). Indeed, a nontrivial number of non-democratic governments inscribe permissive, normatively democratic rules into their legal institutions and have done so since their independence (AUTHOR 2020; 2022). Why non-democratic governments enact permissive rules is not always clear. Some governments enact permissive rules without planning to enforce them. Others may enact permissive rules intending and enforce them arbitrarily for several purposes, including burnishing a democratic facade or expanding the regime’s resource base.

The tactics identified by Lorch and Bunk (2017, pp. 989-991) are insightful because each thinks beyond a repression-only-rationale and proposes conditions under which a non-democratic government include permissive legal rules in its CSO laws. My work adds the Kenyan case to the growing number of case studies that show non-democratic regimes choose not to repress civil society but rather co-opt it to achieve the government’s aims. The Government of Kenya’s (GOK) own words provides my

data: I triangulate evidence gathered from elite interviews with GOK elected officials and bureaucrats, and archival data from government libraries and four civil society regulators.<sup>1</sup> Evaluating these data together, I find that the GOK uses several legitimization and manipulation tactics collectively, separately, and episodically to alter its *de facto* regulatory environment to manipulate civil society and benefit the regime through increased legitimization; national security agencies harnessing vast administrative power and bureaucratic sycophants serve as spectres of repression.

The rest of the paper proceeds as follows. I begin by surveying the tactics that explain why non-democratic governments enact permissive CSO laws. To do so, I organize the tactics in a pithy framework for productive discussion: direct legitimization, indirect legitimization, and manipulation. Section 3 explains my case selection and reviews my research design. As I describe in that section, Kenya's CSO regulatory environment offers a compelling opportunity for a sub-national comparative case study because Kenyan law divides regulatory responsibilities across four regulators. Hence, each regulator polices its own CSO legal form—each a subtype of the CSO concept<sup>2</sup>—and enforces its regulation in a common political environment. I present my findings in Section 4. To preview, government research participants and archival data suggest that the GOK uses CSO laws to strengthen its democratic facade, engages CSOs to increase its response legitimacy, emphasizes compliance with the law to bolster its governance authority, and piggybacks on CSOs' service provision to improve its output legitimacy. My research does not find that the government manipulates CSO into complying with laws to increase the regime's administrative power. The conclusion reviews findings and calls on scholars to study the enactment of both repressive and permissive legal rules and how CSO laws are enforced.

## 2 Tactics Explaining why Non-Democracies Enact Permissive Laws

I argue that a non-democratic government's purpose for enforcing CSO laws is to retain its grip on power. One strategy for achieving this goal 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

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<sup>1</sup>University IRB number and NACOSTI research permit number blinded for review.

<sup>2</sup>I define *civil society organizations* as private, self-governed organizations established via voluntary association for purposes other than political control and economic profits.

rules in the legal code means the government forfeits deniability, invites disapproval from international observers, jeopardizes foreign aid, and shuts organizations that provide unmet public service goods.

Another strategy for maintaining power is to enact permissive legal rules and arbitrarily enforce those policies to legitimize the government. Five tactics provide the general framework for how governments manipulate CSO laws to maintain power (Lorch and Bunk 2017: 989-991). Researchers find these tactics in use in the Middle East and North Africa (Wiktorowicz, 2000; Dimitrovova, 2010), Southeast Asia (Lorch, 2006; Giersdorf & Croissant, 2011), Sub-Saharan Africa (Tripp, 2001; Brass, 2016; DeMattee 2020), and many other authoritarian and hybrid regimes around the world (Lewis, 2013; Froissart, 2014; Teets, 2014; Benevolenski & Toepler, 2017; Toepler, Pape, & Benevolenski, 2019; Toepler, Zimmer, Fröhlich, & Obuch, 2020; S. Snyder 2007). I discuss these tactics as contributing to the government's strategy through direct or indirect legitimization or manipulation.

### **Direct Legitimization**

Governments use two tactics to make permissive legal rules directly bolster the regime's legitimacy. The first uses permissive rules to *strengthen the regime's democratic façade* (Tactic #1). The action is that the government makes its CSO laws more permissive. Doing so flashes the impression of democratic qualities to domestic or international observers. The intended effect is to increase diffuse support for the regime from local and international audiences. Making a country's CSO laws more permissive supplies the government with evidence that it is attempting to enact democratic changes; unfortunately, it may not intend to enforce those permissive rules impartially.

Another direct tactic is to *engage CSOs on social matters to demonstrate responsiveness* (Tactic #2). Outreach is the first action that demonstrates responsiveness. Here, the government meets with those CSOs that it claims to represent society's collective interests, even if some of them support the administration. 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 depoliticize widespread social discontent (Giersdorf & Croissant, 2011). Another intended effect is to collect information that the government can use to understand pressing societal concerns and respond to them before they threaten the regime (Tripp, 2001; Teets, 2014). Changing laws to address social matters is the second action that demonstrates responsiveness. Making the country's

CSO laws more permissive allows for the controlled growth of CSOs that address unmet social needs. Some new organizations will align with the government's policy objectives, while rival elites may lead others. Meeting with civil society leaders and amending CSO laws to meet the moment's challenges demonstrates responsiveness that legitimizes the government.

### **Indirect Legitimization**

Governments use two tactics to make permissive legal rules indirectly add to their legitimacy. The first uses permissive rules to *entice CSOs to comply with the regime* (Tactic #3). The action makes the country's CSO laws more permissive to increase the voluntary compliance rate by organizations regulated by them. Increasing voluntary compliance does not directly legitimize the regime. However, governments can argue that increased compliance is evidence of specific support for regulatory policy (Froissart, 2014). The tactic's intended effect is to use compliance rates to measure specific support for the government's policy, and then cite that as evidence of its legitimate authority to govern.

The second indirect tactic is to *use CSOs' service provision to increase the government's output of public service goods* (Tactic #4). The action is that the government enacts permissive rules to encourage and engineer the growth of particular CSOs. This involves facilitating the growth of welfare- and service-oriented CSOs because those organizations fulfill fundamental social needs unmet by the government (Bratton, 1989b; Lorch, 2006; Spires, 2011; Brass, 2016; Toepler et al., 2019; Russell 2022). 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. The improved service provision bolsters the regime's output legitimacy. This tactic also allows incumbents to deny rivals from claiming credit for government programs (Bueno 2018).

### **Manipulation**

The final tactics are manipulative. The first *increases the regime's administrative power* (Tactic #5) using permissive rules to ensnare CSOs "in a web of bureaucratic practices and legal codes" (Wiktorowicz, 2000, p. 43). Similar to Tactic #3, the action is that the government enacts permissive rules to increase voluntary compliance. Manipulation happens when CSOs willingly—and perhaps unknowingly—surrender to the government the basic information it needs to observe these private organizations. This

information may be as banal as physical and website addresses, but 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.

The second manipulative tactic uses permissive rules to *attract international assistance to expand the government's resource base* (Tactic #6).<sup>3</sup> The action is to enact permissive rules that promote foreign financial assistance to local CSOs. The manipulation happens when the rules legally require international assistance to specific locations—e.g., deposited at certain financial institutions, placed in escrow at government ministries for later distribution, or channeled to favored or coopted organizations. The intended effect is to give the regime multiple opportunities to use those funds to increase its influence and resource base (Dimitrovova, 2010, pp. 528-529; Lewis, 2013, p. 329).

### 3 Locating the Tactics in the Kenyan Case

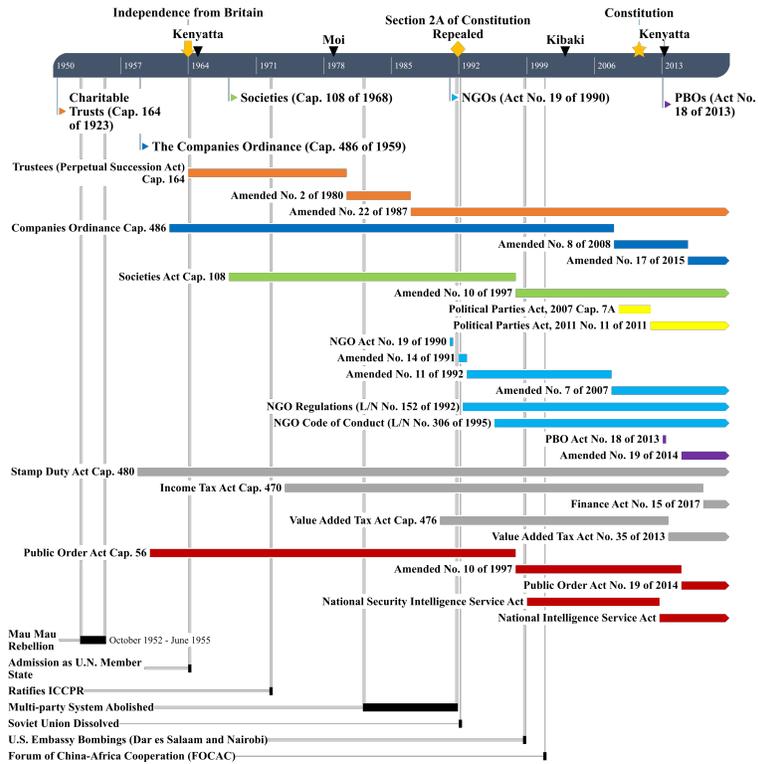
I now use the Kenyan case to demonstrate how the Government of Kenya (GOK) has enforced its legal institution to legitimize the regime and manipulate CSOs. Conceptualizing CSOs as private, self-governed organizations established on the principle of voluntary association for purposes other than political control and economic profits expands the number of legal forms to consider. By this definition, Kenyan CSOs include not only non-governmental organizations but also charitable trusts, companies limited by guarantee, and societies.

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 1a).<sup>4</sup> Throughout its independence, as few as one to as many as thirteen laws simultaneously affect CSOs. Thus, Kenya's regulatory environment can be described as pluralistic or polycentric because the law divides regulatory responsibilities across four regulators (for precise legal definitions see Appendix Table 1), each responsible for a unique legal form

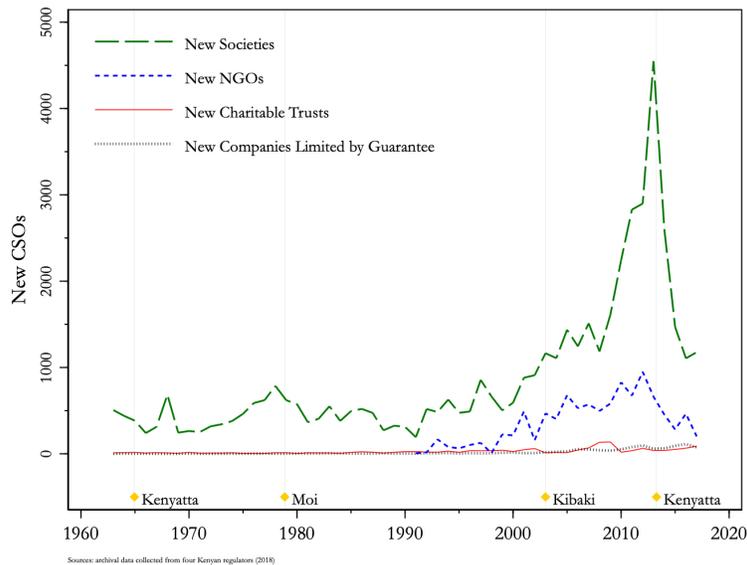
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<sup>3</sup>I omit this tactic from my analysis because my data neither corroborates nor refutes its use.

<sup>4</sup>I thank a highly reputable legal expert in East Africa for initially suggesting this idea to me.



(a) CSO Legal Institution



(b) New CSO Registrations

Figure 1: Kenyan Legal Institution and Civil Society Growth. Figure shows legal rules changes (top panel) and new registrations by legal type (bottom panel).

and unequal number of CSOs (Figure 1b). This regulatory pluralism creates a compelling subnational comparison: each regulator has national jurisdiction over its CSO legal form, receives authority to regulate those CSOs from different laws, and enforces its legal rules in a common political environment.

### **Kenyan Research Participants: MPs, Bureaucrats, and Regulators**

I conduct my analysis using interviews with participants 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 2 identifies the 11 agencies that participated in data collection and describes the data each provided). Senior officials in eight agencies arranged interviews with 23 participants (Appendix Table 3 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. I suspect their necessary participation makes my sample less representative. I also expect that managers handpicked participants who would satisfactorily represent the agency. Taken together, I suspect managers selected participants they thought would make their agency "look good." This curated sample likely biases the data and increases the probability that interview data contains a positive tone regarding CSO laws and their enforcement. 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. 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 (Mahoney, 2012, p. 578; Bennett & Checkel, 2015, p. 17). By comparison, if I included CSO leaders in my analysis, I would discount the highly-probable interview data that discuss CSO laws and regulators with a negative tone and overweight the less-probable data that positively discuss those same topics.

## 4 Analytical Findings

### **Tactic I: Government Uses Laws to Strengthen its Democratic Façade**

Drawing on Kenyan political history, one Member of Parliament 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 (henceforth the “NGOs Act”) was a product of the movement pushing for governance reform and a government willing to negotiate on certain terms (GOK096). He noted that many civil society actors wanted an entirely new constitution (see also Mutunga, 1999). 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. The statute gave CSOs the room necessary to pursue governance activities and made sure those actions took place under the government’s watchful eye.

CSO 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 Co-ordination 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 channeled 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 an agency signals that something in the legal rules swayed it to. Evaluating the decisions sophisticated CSOs made concerning the NGOs Act provides information on whether those actors accepted the government’s gesture that the new law protected society and CSOs. Two sophisticated actors are Oxfam and the Legal Advice

Centre.<sup>5</sup> After Moi enacted and finally commenced the NGOs Act in June 1992,<sup>6</sup> Oxfam registered with the NGOs Board on March 11th, 1993. The local legal experts soon followed, and the Legal Advice Centre registered on August 2nd, 1993. Neither of these CSOs should be considered naïve, and their decisions to register suggest the legitimizing tactic to give domestic and international onlookers the impression of democratic qualities worked, at least to some degree.

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 concurred that President Moi and President Uhuru Kenyatta possessed the willpower necessary to enforce permissive rules minimally. Interview participants generally 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; they must choose to do so (GOK095, GOK103, GOK109, GOK122).

At the agency level, 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). The participant believed the regulator was instructed not to process legitimate registration cancellations because doing so would damage the administration's democratic façade. Additional data suggests that public management objectives and performance benchmarks align with this legitimization tactic to give local and international onlookers the impression of democracy. A growing number of CSOs in a country gives such an impression and is one straightforward metric that onlookers may compare. As one junior professional at the Registrar of Companies told me, her agency structures individual performance goals around the number of CSO registration applications they complete, with higher volumes indicating better performance (GOK112).

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<sup>5</sup>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. Legal experts registered the organization as a society in 1973.

<sup>6</sup>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. 610-612), commenced June 15th, 1992.

Qualitative Insight: *Kenyan elected officials, bureaucrats, and CSO regulators supported the argument that governments use CSO laws to strengthen a democratic façade.*

## **Tactic II: Government Engages CSOs to Increase its Responsiveness Legitimacy**

Politics determines which CSOs the government invites to the table. As one elected official observed, engaging faith groups and secular groups 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 (CITES). However, there are occasions when the government does not want a strong 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 carry a loyalty towards the regime. The implication is that CSOs may self-censor or acquiesce if they wish 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 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 manner of engagement is considered “public participation” and is both 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” (Mutunga, 2018, p. 3). 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 November 11th, 2014 (see Appendix Figure 3 and appendix for full statement). On November 14th, the Attorney General organized a consultative forum to discuss congregations' operations and lay the groundwork for a regulatory framework preventing 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 (March 31st, 2015). An agreement was not reached, and the second forum ended with the moratorium in full effect.

Observers may consider the Attorney General's moratorium an overreaction to protect society from phony 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 (Blackstone, 1765) 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 it is better to let ten go free than allow one innocent to suffer. I then asked whether it is better to let ten phony congregations register or deny one legitimate church the ability to register. He unequivocally explained that it is better to deny all of them registration 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 evenhanded 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.

*Qualitative Insight: Kenyan government officials agreed that the GOK engages CSOs in dialogue to address social problems and preempt public criticism.*

### **Tactic III: Government Uses Compliance to Legitimize its Governance Authority**

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 incredible processes 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 Co-ordination Board 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 (Amollo & The Office of the Ombudsman, 2016, p. 2). 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 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 CSO 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 rather registration, capacity building, and coordination (GOK122). But she remembered a clear turning point several years ago (circa 2015) where 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 explanation of the situation, the low compliance rate was the symptom caused by 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>7</sup> This created a downward spiral where a lack of credibility lowered the compliance rate, and a low compliance rate weakened credibility through an inability to meet statutory obligations. Thus, the immediate reason for improving compliance was to halt the tailspin caused by a lack of credibility.

In the medium-term, the reason the NGOs Board sought to increase compliance was 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 as NGOs, 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 Coordination Board, was a strong 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). In-

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<sup>7</sup>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" fulfills this responsibility.

interview participants at the NGOs Board explained these “goodwill tours” are new while participants outside the NGOs Board gave no indication that the other regulators use similar programs.

Improving year-to-year compliance rates and repairing its damaged reputation add momentum to the agency’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.

*Qualitative Insight: Multiple participants suggested a concerted effort to improve the credibility and legitimacy of agencies. Regulators appeared keenly aware of how government and non-government actors experience and perceive their agency. These individuals suggested a causal connection between the agency’s perceived credibility and its ability to regulate and fulfill statutory responsibilities.*

#### **Tactic IV: Government Co-opts Service Provision to Increase Output Legitimacy**

One elected official explained CSOs are “an addition to public services” that fill the gap, especially in the rural areas on issues such as education and health (GOK097). Similarly, an experienced bureaucrat within the KLRC emphasized that the bigger 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 argued the early CSO laws were meant 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 event marked the beginning of “dark days for the country” (GOK095). He insisted it was not because CSOs were bad, but because of the way 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 certain policies (GOK102).

While an elected official may be able to individually identify and benefit from CSOs’ activities in his/her constituency, it is more laborious for the government to aggregate the actions of tens of thousands of CSOs in Kenya and claim those deeds as its own. In practice, the only formal 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>8</sup>

A third regulator at the NGOs Board explained that the government encourages CSOs to consider supporting particular programmatic “areas of interest” (GOK110). When asked for examples, the respondent identified microfinance and geriatric care as past and present cases, respectively. The participant claimed that government leadership steered CSO programming away from microfinance and into geriatric care. He explained that microfinance had been part of Kenya's charitable sector, but the Microfinance Act (No. 19 of 2006, commencement May 2nd, 2008) moved regulatory authority to the Central Bank of Kenya (GOK110). Archival data refutes these claims. First, CSOs are still active in this commercial sector. According to the NGOs Board's records, there are 660 NGOs (184 international and 476 national) registered with the agency and involved in microfinance to some degree. Yet, only 194 of them registered before the commencement of the Microfinance Act; over 70% of NGOs engaged in microfinance activities registered *after* the the Microfinance Act commenced. This means the government permitted 466 NGOs to participate in this space after declaring it a non-charitable, commercial zone. Second, NGOs' microfinance expenditures increased 13% from 2013 to 2019 (see Appendix Table 4 for government data on NGO expenditure by sector). Thirdly, turning to geriatric care, there exist only 59 registered organizations (20 international and 39 national) engaged in that activity. The expenditure toward that programmatic area decreased 54% from 2017 to 2019. Geriatric care accounted for slightly more than 10% of expenditures allocated towards microfinance. Taken together, the regulator's data does not support the argument that the GOK successfully coordinates or leads CSO activity.

While the government has unsuccessfully led CSOs, it has effectively changed its own policy priorities to follow CSO programmatic activity. In late-2017, the Kenyatta administration identified four flagship programs it publicizes as “The Big 4.”<sup>9</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

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<sup>8</sup>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.

<sup>9</sup><https://www.president.go.ke/> and <https://big4.delivery.go.ke/>

NGOs Board report for 2018/19, 44% of all NGO expenditure was directed to charitable programs closely related to The Big 4 initiatives, including economic trade, agriculture, water, and sanitation, health and HIV/AIDS, and housing (Appendix Table 4). 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 government's policy priorities sometimes follows CSO activity. This tactic allows the administration to capitalize on CSOs' service provision to increase the government's output legitimacy.

*Qualitative Insight: Elected officials, bureaucrats, and regulators agree that non-democratic governments tolerate the growth of service-oriented CSOs because those organizations fulfill needs left unmet by government agencies. However, instead of leading CSOs, the government sets its policy priorities to align with the areas in which CSOs allocate considerable resources. The tactic's outcome is the same, even if the execution differs.*

## **Tactic V: CSO Compliance and the Government's Fractured Administrative Power**

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 regulator at the NGOs Board believed the reason for controlling CSOs after Kenyan independence was the "political differences between Kenya's founding fathers" (GOK118). Supporting prior arguments that CSO laws have long histories (Mayhew 2005; Author 2020), she explained earlier laws followed the colonial example and were established to know what CSOs existed and keep tabs on what they were trying to do.

The strongest critiques against these laws are framed in the context of 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 organize 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 Kenya regulates CSOs firstly to pursue its national interest and achieve national security; then, secondly, 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 proper content and that regulators enforced those legal rules impartially. This is critical because it is the abuse of rules that gives the government some of its 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. CSOs provide their location(s), partner(s), operational scope, and resources. They also provide information regarding the organization’s leaders, including names, biographical information, and qualifications. Regulators keep this data in hardcopy form, organized in single files, and stored in large dusty rooms. Kenyan 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. There were no signs that the situation would change soon, and all regulators admitted that they are severely under-resourced in terms of expertise, staff, and technology (GOK098, GOK101, GOK104, GOK105, GOK108, GOK110, GOK111, GOK114, GOK115, GOK116, GOK118, GOK121, GOK122).

The 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 a handful 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 informa-

tion to other agencies conducting investigations, such as the police or taxation authority. The exception to this is the NGOs Board, which is the only regulator that has created the necessary administrative capacities to investigate the CSOs that register with it.<sup>10</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 mutilations 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 will collect additional information if necessary (GOK118, GOK094). One estimated that he investigates 30 to 40 complaints per week and investigated over 750 in his time at the NGOs Board (GOK094). Of those, 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 the establishment of 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

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<sup>10</sup>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)).

and technological resources seem far inadequate to maintain prolonged efforts to simultaneously observe and subvert collective action in 47 countries 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 is likely capable of using 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 the regulatory enforcement is no surprise to the "closing space" argument, which warns that some governments use security agencies to episodically harass CSOs (Carothers & Brechenmacher, 2014). 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 the security agency's involvement in such simple matters was at the direction of the current administration 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" to just one regulator commenting on registration matters (Table 5).<sup>11</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

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<sup>11</sup>I do not 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.

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 the majority 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 applicants are told 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 one, the NGOs Board does not want organizations to change what they are doing, and two, 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 informal groups rejected by the registration process.

Qualitative Insight: *Some of the interview data support the thesis that CSO laws are an antecedent to control. Yet, my data contain little evidence supporting the notion that regulators can mobilize the administrative power necessary to observe civil society over a large territory for a prolonged period (see also Russell 2022). However, the ability to periodically harass a handful of CSOs is still very much a concern. My data also suggest that true administrative power rests with a government agency mentioned nowhere in Kenya's CSO laws: the National Intelligence Service.*

## 5 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 there is nothing that constrains non-democratic governments from doing the same. Yet, we must also consider the possibility that governments enact permissive rules without intention of enforcing them impartially. 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 own 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 these legal rules and working rules is not guaranteed to be either large nor constant, but to vary at different times and for different reasons.

I have marshaled primary data to explain why governments enact permissive legal rules. The tactics first identified by Lorch and Bunk (2017, pp. 989-991) are especially helpful in this regard because each posits the condition under which the government uses laws for its own purposes. By considering legal rules and working rules simultaneously, my analysis finds the Kenyan government used five tactics collectively, separately, and episodically as it altered its *de facto* legal institution.

First, 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,

either by enacting new permissive rules or enforcing current permissive rules the way they are written. This emphasizes that the enforcement action CSOs experience change through both formal and informal processes.

Second, 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 phony pastors by enacting a moratorium on registering new religious congregations. At the same time, it worked with religious leaders on a solution to a widespread societal problem. While the data show the government makes considerable investments involving CSOs in lawmaking and responding to societal concerns, it remains unanswered whether such engagement produces effective policy. Despite that, my findings accord with the argument that governments engage organizations to maintain their responsiveness legitimacy.

Third, 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 fulfill its statutory responsibilities to elected officials, which they feared would further damage credibility.

Fourth, 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 protect the PBO Act from amendments 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 engineers 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 lead administrations to follow CSOs and claim some of those charitable deeds as policy achievements.

Finally, 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. However, participants explained that all registrations are routed through the national security apparatus, which means the concerns of this tactic are very real but are not wielded by an agency with the legislative authority to regulate CSOs.

Scholars have given significant attention to the enactment of CSO laws worldwide, but most of this research has focused on *de jure* restrictive rules. Yet, permissive rules appear frequently in legal institutions that regulate CSOs. Building on the work of other scholars, I show that it is critical to not only study the enactment of both legal rule types but also how they are enforced. Indeed, there are numerous reasons for non-democratic governments to enact permissive legal rules and allow CSOs to operate.

## Appendix

### Regulatory Pluralism in Kenya

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.”
Companies Ordinance (1962) §§2, 4(2b), 21(1)	Societies Act (1968) §§2(1), 4	Trustees (Perpetual Succession) Act (1923) §3(1)	Non-Governmental Organizations 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

Table 1: Table identifies four regulatory agencies, their line ministries, and the legal form for which each is responsible.

## Research Participants

I utilize primary sources in the form of archival and interview data collected from government sources. I conducted interviews with participants from multiple GOK offices and triangulated the interview data with archival materials from government repositories managed by executive and legislative organs. Appendix Table 2 identifies the 11 GOK entities that participated in my primary data collection and describes the type of data they provided. I attempted to conduct interviews and collect data from the National Intelligence Service (NIS), but despite multiple attempts, I was unable to speak with them.

Accessing research participants required a top-down interviewing strategy. This created unavoidable constraints that prevented me from interviewing a random or representative sample for two reasons. First, requests for information from GOK agencies required approval from a senior official within that agency. The approval process varied across agencies but most required an information packet with a formal letter requesting access.<sup>12</sup> To interview government employees, I had to place a formal request with a senior official in that particular agency. Once I received the necessary permission, I requested to interview 5-15 employees at the agency with varying characteristics according to role and responsibilities, experience within the agency, and gender. I explained that all interviews should be voluntary and offered to meet participants at a time and place of their choice. The process resulted in senior officials in eight agencies arranging interviews with 23 participants. Appendix Table 3 summarizes the interview sample, and my analysis randomizes pronouns to protect participants' identity. I also interviewed six Members of Parliament (MPs). These elected officials averaged over a decade of political experience and represented several political parties.

Involving GOK managers in my recruitment process was unavoidable. I suspect their necessary participation makes my sample less representative. I also expect that managers handpicked participants who would satisfactorily represent the agency. By this, I mean that each participant knew enough about the agency and their position within it to provide adequate responses to my queries and, conservatively, did not harbor underlying resentment towards their employer. Taken together, I suspect managers

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<sup>12</sup>This packet contained my official request and detailed the precise information that I sought, a high-level description of my project, my CV, and copies of my NACOSTI research permit and IRB notification. The speed of approvals came between 1.5 weeks (Library of Parliament) to 11.5 weeks (NGOs Co-ordination Board). Only one request failed to collect information (National Intelligence Service).

GOK ENTITY	AGENCY TYPE	DATA COLLECTED	INTERVIEW PARTICIPANTS
Chief Land Registrar, Ministry of Lands	Regulator	2 Interviews (1.5hrs); Archives	GOK104, GOK115
Commission on Administrative Justice, Office of the Ombudsman	Other Agency	1 Interview (1.5hrs); Archives	GOK103
Kenya Law Reform Commission	Other Agency	2 Interviews (2.3hrs); Archives	GOK096, GOK102
Library of Parliament, National Assembly	Other Agency	Archives	
Members of Parliament	Elected Officials	6 Interviews (5.1hrs)	GOK095, GOK097, GOK099, GOK114, GOK119, GOK120
Ministry of East African Affairs, Commerce and Tourism	Other Agency	1 Interview (0.5hrs); Archives	GOK100
NGOs Co-ordination Board	Regulator	6 Interviews (8.7hrs); Archives	GOK094, GOK101, GOK108, GOK110, GOK118, GOK122
Public Service Commission	Other Agency	1 Interview (1.5hrs); Archives	GOK109
Public Service Performance Management Unit, Executive Office of the President	Other Agency	Archives	
Registrar of Companies, State Law Office	Regulator	5 Interviews (4hrs); Archives	GOK098, GOK112, GOK117, GOK107, GOK113
Registrar of Societies, State Law Office	Regulator	5 Interviews (4.6hrs); Archives	GOK105, GOK106, GOK111, GOK116, GOK121

Table 2: Government Agency Archival and Interview Data. Table identifies government agencies that graciously participated in my research and the type of data each provided.

ID	GOK AGENCY	EXPERIENCE	RESPONSIBILITIES
GOK094	NGOs Board	Under 5 years	Junior Professional
GOK095	Parliament	Over 20 years	MP
GOK096	Kenya Law Reform Commission	Over 20 years	Senior Professional
GOK097	Parliament	Over 20 years	MP
GOK098	Registrar of Companies	5 to 9 years	Senior Professional
GOK099	Parliament	10 to 20 years	MP
GOK100	Ministry of East African Affairs	10 to 20 years	Senior Professional
GOK101	NGOs Board	Under 5 years	Junior Professional
GOK102	Kenya Law Reform Commission	Over 20 years	Senior Professional
GOK103	Ombudsman	10 to 20 years	Senior Professional
GOK104	Registrar of Trusts	10 to 20 years	Senior Professional
GOK105	Registrar of Societies	5 to 9 years	Junior Professional
GOK106	Registrar of Societies	Under 5 years	Junior Professional
GOK107	Registrar of Companies	Under 5 years	Junior Professional
GOK108	NGOs Board	10 to 20 years	Senior Professional
GOK109	Public Service Commission	10 to 20 years	Senior Professional
GOK110	NGOs Board	5 to 9 years	Senior Professional
GOK111	Registrar of Societies	5 to 9 years	Junior Professional
GOK112	Registrar of Companies	5 to 9 years	Junior Professional
GOK113	Registrar of Companies	Under 5 years	Junior Professional
GOK114	Parliament	5 to 9 years	MP
GOK115	Registrar of Trusts	Under 5 years	Junior Professional
GOK116	Registrar of Societies	Over 20 years	Senior Professional
GOK117	Registrar of Companies	5 to 9 years	Junior Professional
GOK118	NGOs Board	5 to 9 years	Senior Professional
GOK119	Parliament	Under 5 years	MP
GOK120	Parliament	10 to 20 years	MP
GOK121	Registrar of Societies	10 to 20 years	Junior Professional
GOK122	NGOs Board	10 to 20 years	Senior Professional

Table 3: Research Participants. Identification numbers randomized and do not reflect interview order. Anonymity given when requesting informed consent. Names/titles redacted to deidentify participants.

selected participants they thought would make their agency “look good.” This curated sample likely biases the data and increases the probability that interview data contains a positive tone regarding CSO laws and their enforcement. I anticipate this distortion is the largest among regulators. 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. To be convincing, nearly all interview participants need to corroborate this straw-in-the-wind evidence (Mahoney, 2012, p. 584; Bennett & Checkel, 2015, p. 17). Conversely, 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 (Mahoney, 2012, p. 578; Bennett & Checkel, 2015, p. 17). By comparison, if I included CSO leaders in my analysis, I would discount the highly-probable interview data that discuss CSO laws and regulators with a negative tone and overweight the less-probable data that positively discuss those same topics.

I conducted nearly 30 hours of interviews with 29 GOK bureaucrats and elected officials between August and December 2018 (Table 3). The average interview lasted slightly over one hour (min = 0.5 hour, max = 2.25 hours). The average interview was shorter for elected officials (51 minutes), approximately the same for CSO regulators (62 minutes), and slightly longer for other GOK agencies (70 minutes). Semi-structured interviews included general questions about participants’ professional background, perception of government-CSO relationships in Kenya, inter-agency partnerships, and the creation and enforcement of Kenyan CSO laws. Handwritten notes were transformed into contemporaneous interview memos following each interview. When participants allowed it, a common smartphone recorded the conversation to assist in writing the interview memos.

Using NVivo (v.12), I analyzed all interview memos according to the themes used to construct my interview protocol. Then, with a second close reading of the data, I used iterative open coding to sort the data into themes explaining why the government enacts and enforces specific legal rules.

## NGO Programmatic Investment

Sector	2012/13 <sup>a</sup>	2013/14 <sup>a</sup>	2017/18 <sup>b</sup>	2018/19 <sup>b</sup>
Microfinance	586.5	904.0	663.1	620.3
Geriatric Care	154.5	227.6	144.0	66.2
Economic Trade	n/a <sup>c</sup>	n/a <sup>c</sup>	17.2	18.9
Agriculture	4,423.5	6,034.6	3,823.8	3,817.9
WASH	4,215.4	4,622.9	2,791.5	2,967.0
Population and Reproductive Health	793.8	2,110.0	4,098.9	4,192.3
HIV/AIDS	7,883.0	10,532.8	12,427.8	10,594.1
Health	n/a <sup>c</sup>	n/a <sup>c</sup>	11,752.6	13,026.1
Housing & Settlement	11.8	6.9	42.4	19.6
Other sectors	42,337.6	47,008.6	43,103.6	43,121.8
<b>TOTAL<sup>d</sup></b>	<b>60,406.1</b>	<b>71,447.4</b>	<b>78,864.9</b>	<b>78,444.2</b>

Note: All values in Kenyan Shillings (KSh). Average exchange rate in 2013 was 86 KSh for 1 USD. In 2018, the average exchange rate was 101 KSh per 1USD.

<sup>a</sup> Source: Annual NGO Sector Report for 2013/14

<sup>b</sup> Source: Annual NGO Sector Report for 2018/19

<sup>c</sup> Total for all sectors as reported in source materials.

Table 4: NGO expenditures for four years using data from the Annual NGO Sector Report for Financial Year 2013/14 (NGOs Co-ordination Board 2014, pp.9-10) and the Annual NGO Sector Report 2018/19 (NGOs Co-Ordination Board 2019, pp.25-26). All values in millions of Kenyan Shilling (KSh.) and not adjusted for inflation. Some sectors omitted.

## Moratorium Stopping the Registration of Religious Organizations

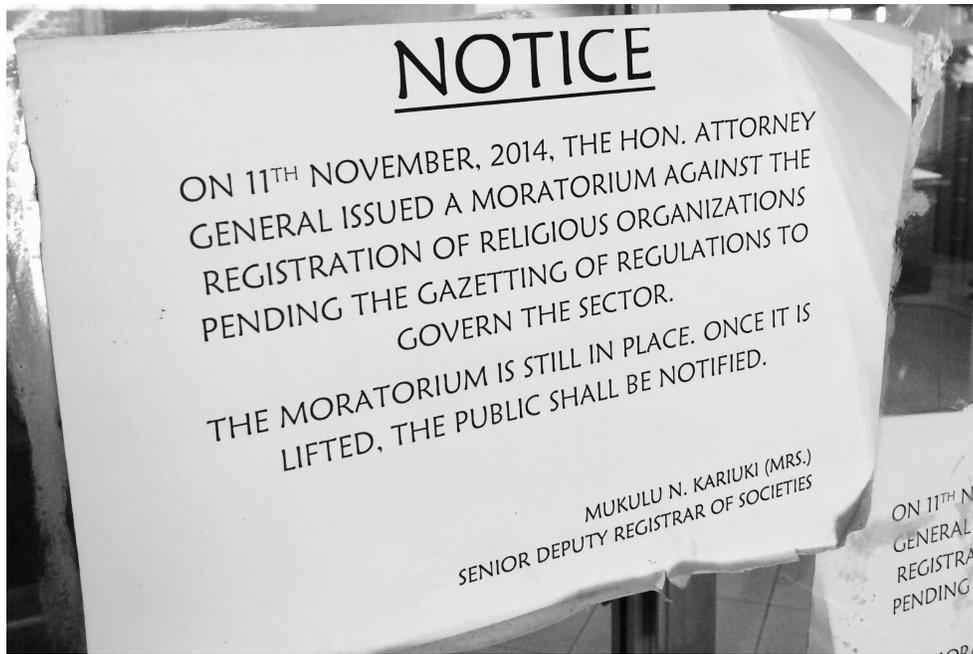


Figure 2: Moratorium Stopping the Registration of Religious Organizations. Public notice of the moratorium halting the registration of new religious organizations in Kenya. Photo taken October 5th, 2018, inside the offices of the Registrar of Societies (State Law Office—Sheria House, Nairobi).



OFFICE OF THE ATTORNEY-GENERAL AND DEPARTMENT OF JUSTICE

PRESS RELEASE ON PROPOSED CHURCHES LAW

The Office of the Attorney General and Department of Justice is drawn to several news articles that have been appearing in various section of the media regarding the proposed law that is aimed at streamlining the processes pertaining to the registration of religious organizations including churches in Kenya.

The Office of the Attorney General and Department of Justice through the Registrar of Societies wishes to issue certain clarifications:

The matter at hand is the subject of ongoing proceedings at the High Court in Nairobi and should be allowed to reach a natural conclusion. This statement is not in any way intended to be an attempt to influence the said court proceedings. This statement is purely for information purposes as aligned with Article 35 of the Constitution of Kenya as well as the Article 5 (1)(b)(c) and Article 13 of the Access to Information Act 2016 which allows for public institutions to "publish all relevant facts while formulating important policies or announcing the decisions which affect the public, and for correction of information;

From the outset, none of the Government agencies including the Office of the Attorney General and the Registrar of Societies, have expressed intention to limit the freedom of association, freedom of conscience, religion, belief, opinion, and access to information as these are guaranteed in Articles 32, 35 and 36 of the Constitution of Kenya. Indeed, the intended objective of the proposed amendments to registration of religious organizations is the legitimate foundation and sustainable development of these organizations;

The Registrar of Societies is mandated to register and regulate all societies including churches under the Societies Act Cap 108 of the Laws of Kenya;

The Moratorium stopping the registration of churches and societies was issued on 11<sup>th</sup> November 2014 by the Attorney General in line with his constitutional mandate to promote, protect and uphold the Rule of Law and defend the public interest. This was necessitated by several reports indicting the officials of several religious institutions and societies of orchestrating certain unconscionable activities that left their congregants at a disadvantage. Such instances included the infamous 'panda mbegu' saga. These incidences are within the public domain having been widely reported by the media. Within the same period, many cases of increased radicalization in the regions of Coast, North Eastern and Nairobi

continued to be reported. These incidences were of grave concern as they are directly connected to the maintenance of law and order within the country and the assurance of security of the citizenry;

On 14<sup>th</sup> November 2014, a consultative meeting to deliberate on the existing operations of the faith based institutions with a view of establishing a regulative framework of the religious bodies was held between the Office of the Attorney General and representatives from the National Council of Churches of Kenya (NCCK), Supreme Council of Kenya Muslims (SUPKEM) and the Hindu Council of Kenya. At the end of the deliberations, the leaders were required to deliberate on the proposed rules with their members and thereafter submit their opinions through memoranda. Many religious bodies submitted their memoranda which formed the basis for yet another workshop that was held at the Kenya School of Government, Nairobi on 31<sup>st</sup> March 2015 under constitutional requirement of public participation in legislative processes. This process has therefore been open and transparent with the full involvement of the stakeholders from the beginning

During this forum on 31<sup>st</sup> March 2015, some factions within the representatives of faith based organizations objected to certain provisions, which they opined would lead to over-regulation by the government. Key among these were provisions touched on leadership and integrity, as well accountability on resources entrusted to religious organizations by congregants. The impasse on these provisions is what has led to the moratorium remaining in place;

**On the concern for registered societies to submit audited accounts, the Office further informs the public thus:**

The requirement that religious organizations submit audited reports is a requirement under the section 30 of the Societies Act (CAP 108), Laws of Kenya.

Every registered Society is required to furnish the Registrar of Societies on an annual basis, on or before the prescribed date, such returns, accounts, and other documents as may be prescribed under Section 30 of the Societies Act (CAP 108). This section should be read together with sections 26, 28 and 29 where every registered society is under obligation to keep one or more books of accounts containing details of monies received and payments made by the society. These records should be availed for inspection to any officer or member and to the Registrar or any person authorized in that behalf. Further every registered society is under obligation to at least once every year, hold a general meeting to which all its members shall be invited, and shall be at the meeting;

During the annual general meetings issues of deliberation include but are not limited to: render a full and true accounts of monies received and paid by the society where such accounts have been audited in accordance with the constitution and rules of the society. Elections of office bearers including committees, trustees and auditors are carried out in accordance with the constitution and rules of the society;

Section 30 therefore contemplates that the accounts referred to under sections 26, 28 and 29 are to be furnished to the Registrar of Societies. It further stipulates that any annual return, account, or other documents that are incomplete in the prescribed manner or form shall be taken not to have been furnished;

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Section 30 provides an offence for registered Societies that fail to comply with the provision;

It is also worthwhile to note that under the Schedule to the Act, the provision of annual and periodical audit of accounts is one of the matters that must be provided in the constitution of registered and exempted Societies, as provided under Section 19 of the Societies Act.

As the country awaits the Court's pronouncement of the suit relating to this matter on the registration of churches, the Office of the Attorney General remains committed to working towards a solution that is in the best interest of all stakeholders and in line with public interest.

Signed,

Registrar of Societies.

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Figure 3: February 2017 Press Release Statement on Proposed Churches Laws. Provided by State Law Office. Original three-page PDF available from the author.

## NIS Memos

I do not 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.

Year	Adverse Comments	Nothing Adverse	Faulty Application	Total
1981	174	3	3	180
1992	11	0	0	11
1993	9	0	0	9
1995	0	1	0	1
1997	42	1	0	43
1998	68	230	6	304
1999	11	78	0	89
2000	109	373	23	505
2001	17	141	25	183
2002	55	339	28	422
2003	303	121	6	430
2004	0	76	4	80
2006	0	25	0	25
2007	0	1	0	1
Total	799	1,389	95	2,283

Table 5: NIS Memos