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NGOs as Pluralizing Agents in Civil Society in Kenya

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Abstract

Much of the literature on the impact of NGOs on politics and democratization in Africa relates to their potential for 'pluralizing civil society' as suggested by Michael Bratton (1989b). However, this assertion has not been adequately demonstrated. This paper seeks to demonstrate this proposition by examining organized efforts by Kenyan NGOs to lobby for their own 'enabling environment' in response to the introduction of the controlling NGO legislation. The NGOs successes in this arena, I argue, are milestones in defining state-civil society relations in Kenya.

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Introduction

Over the last two decades there has been growing evidence of the inability of the African state to deliver on its development promise. Indeed the state in Africa has variously been described as 'weak' or 'soft' – in other words, unable to pursue its objectives. Progressively, the proposition that the post-independence African state is indeed *the problem* and the inhibitor of social, economic, and political development has become the common view among students of African development. This amounts to a turn-around in development theory that previously held the state to be the ultimate purveyor of development in Africa. That this shift has taken root in the current thinking on development is suggested not only by the expansive literature on the demise of the African state and the ascendancy of 'civil society' but also by the policies of donor agencies and development practitioners.

Thus, in the study of political development we have come full circle from the statist arguments of the late 1960s and 1970s. For example, the previous concern with the ability of newly independent states to govern (and develop) their populations (Huntington 1968) has evolved into the present occupation with the legitimacy of states in civil society (Hyden and Bratton 1992). The serious and largely successful challenges faced by formerly 'strong' (autocratic) states from their citizens (for example, in Eastern Europe and Latin America) have thrust the question of democratization to the fore in the study of political development. The prevailing wisdom holds that to institute governments anchored in

prevailing wisdom holds that to institute governments anchored in democratic institutions and ethos such as accountability and transparency (euphemistically referred to as 'good governance'), it is necessary to have an active and developed 'civil society' which would hold the state to account in various arenas. Civil society is defined as the collection of organizations in society that exist apart from the state and are situated across all classes and interests and which seek to represent and advance these interests (Stepan 1988). Among the organizations that are said to compose civil society are Non-Governmental Organizations, private voluntary organizations, churches and other religious bodies as well as associational and professional bodies.

Non-governmental organizational (NGOs) can essentially be defined as organizations that are constituted outside the state but that act in the public sphere. The very generic and all-encompassing term — non-governmental organization — is derived from the fact that, historically, state or government organizations have been the ones discharging public duty or public policy. Actors doing the same outside government can best distinguish themselves by adopting the seemingly negative definition. Local self-groups, voluntary or non-profit organizations, community groups, youth or women clubs, ethnic or professional associations, national and international research institutes can all be counted as NGOs. NGOs therefore consist of a variety of very *dissimilar* organizations that are tied together by their 'public duty' and by not being part of government. (See other discussions in Kanyinga 1993; Bratton 1989b; Fowler 1991). In the development field, the NGOs that we focus on are those that are

engaged in various aspects of development work (community development, environment, agriculture etc).

The Political Context of NGOs in Africa

In his seminal work on civil society and associational life in Africa, Michael Bratton (1989a) argues that it is these organizations in civil society that may hold the key to democratization. From the evidence available as early as the 1980s, Bratton could argue that "voluntary organizations are already becoming more organized and more assertive" in challenging the authoritarian state in Africa (1989a: 412). This proposition also resides in the empirical work of others. For instance, Larry Diamond (1988) offers perhaps the boldest conclusion that the "pluralism" of civil society in Africa "has become the cutting edge of the effort to build a viable democratic order" (p. 26, cited in Bratton 1989a). However, Bratton who reviews the evidence adduced in a number of works is less assertive, choosing to restrict his bolder statements to the effects of the expansion (pluralism/plurality) of civil society on state-society and to leave aside the larger "question of democracy (which) is more vexed" (p. 430).

Alan Fowler (1991b) looks specifically at NGOs in Africa as part of this civil society but finds them incapable of contributing to democratization. Fowler cites a number of reasons that make NGOs unable to advance the political liberalization agenda in African countries. One is especially

important here. He argues that the project financing mode that is the norm with NGOs involved in development work hardly features "emancipatory" issues (for example, land reform or empowering underprivileged groups) but instead focuses on "modernization" projects (for example, small business credit, shelter for the poor, and family planning) (p. 70). This leads to a situation where donors finance NGOs "for what they do — implement projects — rather than what they can be — politically pluralizing entities" (p. 74). Fowler therefore advocates for a more deliberate effort by donors to strengthen civil society, especially by supporting advocacy and internal democratization of NGOs via transparency, accountability, and institution-building. According to Fowler, the democratization effect of NGOs must be "consciously" sought and not expected to automatically 'spin off' from NGO modernization projects (p. 78).

This paper demonstrates the contributions of NGOs in expanding and strengthening civil society in Kenya. I examine organized efforts by Kenyan NGOs to lobby for their own 'enabling environment' in response to the introduction of controlling NGO legislation. The NGOs' successes in this arena, I argue, are milestones in defining state-civil society relations in Kenya. I propose factors that may have facilitated the NGOs' measured success and also point to other areas where similar efforts by organized actors might be fruitful. My findings are largely based on close examination of internal records of the NGO lobby group (the NGO Standing Committee) that document the manifold actions undertaken by NGOs in regard to the legislation introduced by the Kenya government in 1990. I

draw substantially from both draft (some verbatim recordings) and final reports of the proceedings of the NGO lobby's national workshops, except for one that I was able to attend and whose report is yet to be released. Wherever possible I have verified the information from these internal documents with newspaper reports and private conversations with NGO officials not directly involved in the actual lobby efforts (e. g. the Green Belt Movement). One obvious drawback in my methodology is that, for a variety of reasons, I have yet to interview government officials involved in the lobby efforts.

NGO Growth and Growing Political Tensions with States

The growing presence and capacity of NGOs in all sectors of development and their 'overtaking' African states in some instances due to the lessening capacity of the latter has put the two on a sure collision course. As Fowler (1991b) points out, NGO activities which tend to overshadow the state will tend to be viewed as direct challenges to the "imperatives of statehood" — territorial hegemony, security, autonomy, legitimacy, and revenue (p. 57; [See also Young 1988]). For most post-independence African states these 'imperatives' have been anchored to their ability to 'deliver development' and are therefore endangered by its eroded capacity to do so or by the presence of alternative suppliers. This is especially so since in many instances NGOs have spread out to all corners of their host countries in pursuit of their goals. This has at times taken them to the

most remote or most strife-torn regions where their host governments may not have secured these "imperatives of statehood" (for example northern Uganda or southern Sudan). For this reason African governments have come to view NGOs as socio-economic assets but also more warily as political challengers whose benevolence needs to be directed in order not to undermine the state.

Governments in Africa are therefore concerned about the growth of NGOs on two *political* counts: 1) because they constitute a network of resourceful organizations that are growing more autonomous of the state; and 2) because they have the potential to change state-society relations in the grassroots communities they work in (see also Bratton 1989b). On their part, NGOs have exacerbated these concerns somewhat unwittingly by overtaking the state as the sole or prime development agent — especially by penetrating areas that the state has been unable or unwilling to reach. Some NGOs have also taken bold actions to challenge state policies or actions, especially those relating to the administration of development aid and political reforms. Moreover, the decline of official aid to states in Africa and the more recent withdrawal or conditionality of the remainder has not endeared NGOs to states which view them as competitors. The ensuing 'political jealousy' has led governments to various attempts to control NGOs and their resources in the name of preserving their national sovereignty.

According to Bratton (1989b), African governments have attempted to control NGOs through monitoring, coordination, co-optation, or outright dissolution. Among these controls, only dissolution would effectively

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undermine their capacity for grassroots empowerment. However, as Bratton observes further, dissolution has been a rare control method since it entails an immediate loss of resources as well as an unfavorable image for the country as an inhospitable location for NGO work. Within the lesser controls there is ample latitude to pursue work that may still influence state-society relations, notwithstanding the constraints. Indeed, this is the general atmosphere that NGOs have worked in for most of the last decade in Kenya.

In Kenya the government has responded to the NGO political challenges by effecting the NGO Coordination Act of 1990 which seeks to monitor and control NGO activities. This legislation has itself been a contentious issue and is the focus of this paper. Similarly, in 1989 the Ugandan government introduced similar legislation that placed NGOs under its internal affairs secretariat. Prior to that the Ugandan government had in 1987 outlawed the use of radios by NGOs for cross-country communication (Weekly Review June 19, 1992). Moreover, the Zimbabwean government shut down operations of the massive, indigenous NGO ORAP (Organization of Rural Association for Progress) which was operating in the troubled Matabeleland region (Bratton 1989b, p. 579). Other cases of African governments clamping down on NGOs and which were ostensibly precipitated by challenges to the "imperatives of the state" can be found in Ethiopia (1985), Sudan (1987), Zambia, Tanzania, and South Africa (Bratton 1989b; Weekly Review June 19, 1992).

There is nevertheless a conscious effort among regional NGOs to

pursue greater advocacy work towards altering the life conditions of their grassroots communities. This includes efforts to "exercise greater leadership in addressing the negative aspects of policy and unsatisfactory institutional settings within which they work . . . (and) . . . to challenge the structures of impoverishment that keep their constituencies destitute" (NGO Task Force 1991, p. 5). Furthermore, they assert, "as professed supporters of the marginalized and the disenfranchised . . . NGOs have the moral mandate and responsibility to channel grassroots perspectives and concerns to policy formulations" (sic) (p. 5).

However, NGOs find that their host governments are less receptive to this kind of 'development'. In many instances, governments have instituted control mechanisms (as above) to contain such advocacy attempts by NGOs. One of the overriding issues for NGOs in Africa has therefore been the need for greater autonomy from the state to choose and to pursue their development objectives. Faced by a hostile state that has denied them an "enabling environment" NGOs are evolving a collective will to assert themselves as is evident in their bold resolution that: "NGOs must be prepared to challenge state activities which they find inconsistent with the interests of their constituency, as well as oppose legislation and administrative steps which undermine their autonomy and participation in the development process" (NGO Task Force 1991, p. 7). NGOs in Africa are therefore keenly aware of their 'pluralizing' role in civil society.

The next section examines efforts by Kenyan NGOs to "safeguard" their working environment against an encroaching state. This attempt can

be said to have contributed to shaping the state-civil society relations or, in other words, to 'pluralizing' civil society.

Searching for an Enabling Environment in Kenya

Like many other countries in Africa, Kenya had few controls on NGOs prior to the late 1980s. But as the number of NGOs and the amount of development resources they controlled grew, the government sought to 'coordinate' them to ensure their activities were compatible with its own development plans. As we have seen, a shift in the prevailing development theory was primarily responsible for the phenomenal expansion of the role of NGOs in development. The clearest signs of this shift were the increase in the number of NGOs, the amount of resources they brought into developing countries, and the channelling of substantial official aid through NGOs and away from states. Moreover, as the financial position of African states has worsened with cutbacks in aid and declining economies, their demand for alternative resources to secure their position through political patronage has increased. With this, the need to control or direct the NGO sector and, therefore tap into its substantial resources to support state patronage, has also increased.

As early as 1986 the Kenyan government was concerned about the burgeoning NGO sector. By then the government was well aware of the evolving donor preference for NGOs over developing country governments

as agents of development administration. And all indications at the time suggested this trend would continue unabated, especially as the age of structural adjustment programs dawned on the country. Recognizing that NGOs would set their own priorities which may collectively prove to be diverse and wayward from its own development plans, the Kenyan government sought to 'coordinate' and direct them towards its own vision. Thus, a ranking government official remarked to NGOs in 1986.

When you have 350 or so bodies all active in one aspect or other of a country's development, you run the danger of losing sight of the main challenges of development and much duplication of effort. . . . Where resources are limited, as is the case in this country and other third world nations, to be meaningful, development must involve planning the utilization of available resources to achieve agreed social and economic goals (Oyugi 1986, p. 5).

The solution was therefore 'planning in context', i. e. coordination. This coordination was to be effected by requiring all NGOs to liaise with the local District Development Committees (DDC) which were ostensibly the grassroots decision-making bodies. However, in reality DDCs were effectively controlled by the central government: the committee membership was restricted to politicians from the single-party (KANU) and chaired by the District Commissioner who is a presidential appointee under the docket of Provincial Administration and Internal Security. It is with such DDCs that NGOs were required to clear their projects and budgets. At the national level they were required to clear the same with relevant

ministries, especially the Treasury and Planning ministries in order that these may be noted in the government's development record (Republic of Kenya 1989). In effect this meant that NGO projects would become 'government' projects making them potential pork for political patronage. } *phm*

While these initial overtures were couched in the language of 'coordination' for the sake of development, their origin in the Executive's arm overseeing internal security rather than development planning was foreboding. (The speaker quoted above was the then Permanent Secretary in the Office of the President in charge of Internal Security, arguably one of the most powerful officials at the time). Indeed, it was not long after that in 1987 the largest indigenous women organization, *Maendeleo ya Wanawake* — with its immense resources and a grassroots network of thousands of self-help groups country-wide — was annexed by the single-party which was then synonymous with the state.

A more public statement of the government's intentions to 'coordinate' the growing NGO presence came in 1989 when President Daniel arap Moi announced that the government would create a directorate to coordinate NGOs and ensure their activities were compatible with the national interests (The Standard, October 24, 1992). Previously, the President had also made the explicit call that future NGO funding would have to be channelled through the government (Daily Nation, September 10, 1986). And in December the same year, he underlined his commitment to reign in NGOs by charging that some NGOs were involved in "subversive"

activities (Daily Nation, December 14, 1986). Moi's call for greater state control of NGOs had snowballing but somewhat erratic effects. In January 1987 NGOs were required to register with the Treasury, but the government circular was sent to only seventy NGOs whose addresses it knew. This itself was a major indication of the government's lack of control over the sector with over 400 operating NGOs. The information required in this registration included names of senior officers, project location, and source of funds and projected expenditure from 1986 to 1991. Thereafter the registration of new NGOs was severely restricted as were services traditionally offered to the sector, for example, duty-free imports of equipment and entry/work permits for expatriate staff pending the formation of the NGO directorate (Daily Nation, August 19, 1988; Fowler 1991a).

Meanwhile, the NGO community was itself well aware of its uncoordinated state and the adverse effects this had on its shared goals. Their sectoral disarray was well reflected by their duplication of work, reinventions of solutions, and a general lack of information exchange (KNCSS 1989). A more important indication of their disorganization was the fact that less than half of them were members of their umbrella body, the Kenya National Council of Social Services in existence since 1963 (KNCSS 1989). This situation was partially a result of the different arrangements under which NGOs could operate in the country which gave them different legal identities. Most NGOs were registered under the Society Act and were placed under the Ministry of Culture and Social Services — thus the KNCSS umbrella body. However, many others operated under the Companies

Act, the Trustee Act, or under other protocol arrangements with the Ministry of Foreign Affairs or Ministry of Planning. Moreover, their privileges and services were administered by scattered agencies such as the immigration and customs departments. This situation made it difficult for NGOs to perceive themselves as one community.

NGO discussions on coordination climaxed in late 1989 in apparent reaction to the previous announcements and current movements in government indicating that work was underway to establish the NGO directorate and draft governing legislation (see Njiru 1989, p. 6). In a 1989 seminar organized by the KNCSS and the Institute for Development Studies, one of the policy research arms of the University of Nairobi, NGOs came up with proposals on how best to coordinate their activities and facilitate their development work (KNCSS 1989; Waruhiu 1989). These proposals were later presented by the KNCSS to an inter-ministerial team working on the NGO legislation. This team brought together the traditional ministries involved in NGO work and development planning and the now ubiquitous office of the President.

emphasized by At the same time events on the ground highlighted for the government the political imperative of controlling NGOs. The most prominent of these were outright confrontations between the government and two NGOs — the National Council of Churches of Kenya (NCCCK) and the Green Belt Movement. Indeed, the most forceful calls (such as the President's directives for NGO coordination in 1986) were made ostensibly in response to the NCCCK's opposition to the queue-voting method

introduced by the single-party KANU for both its in-house and the country general elections. The NCK's stand against KANU was roundly condemned by party stalwarts who called for more stringent controls on both local and foreign NGOs (Omore 1986).

An even more fiery confrontation between the government and the Green Belt Movement may have triggered off the concerted efforts to reign in the NGO sector in Kenya. In 1989, the KANU government cordoned off part of Uhuru Park, the only public park in the center of Nairobi. The purpose was to build a sixty storey media complex that would have been the largest structure of its kind in Africa. The Green Belt Movement vehemently opposed this project as environmentally unsound since it would destroy one of the surviving green spots in the city and would also deny thousands of city residents their recreation facilities. The NGO proceeded to sue the government and lobby the project's external financiers to drop their sponsorship of the complex unless the environmental implications were adequately addressed. Predictably, these actions provoked the wrath of the government and in and out of Parliament the party politicians, including the President, condemned the NGO and called for its de-registration and for more stringent controls on NGOs in general (see Daily Nation, November 9-24, 1989).¹

This confrontation pushed NGOs into the political limelight and their 'coordination' became an even more urgent concern for the government. Behind the scenes, in a rather unremarkable event in a single-party state, the Office of the President personnel hijacked the drafting of the

legislation (Fowler 1991a; NGOSC Memo 1991). From the subsequent Bill it was clear the KNCS recommendations presented to the inter-ministerial panel working on the NGO legislation had been largely sidelined. Moreover, from the various inconsistencies and inadequacies contained in the Bill, legal experts were of the considered opinion that it was not the work of experienced legal draft-persons and was hurriedly drafted to respond to the political exigencies of the day rather to the need to facilitate NGO development activities (Jaffer 1991).

In November 1990 the NGO Coordination Bill was published and introduced in Parliament, but suddenly withdrawn without reason. It was re-introduced in December, a few days before Parliament would adjourn for the long Christmas recess. Within two days, the Bill had been rushed through the required readings, debated, and passed. It now only required Presidential assent to become law. In the parliamentary debate NGOs came under severe criticism for over-running the country and 'operating outside the system' — essentially challenging the system where the single-party state was the supreme authority and development machine. None of the recorded contributions espoused the positive contributions NGOs make to the country's development nor the need for coordination to facilitate their work which was the government's official *raison detre* for the legislation. The common theme of the members' contributions was the need to 'control' NGOs, and especially their finances. In his concluding remarks the then Minister of State who moved the Bill, Hon. Burudi Nabwera, stated: "Once the Board is established no NGO will be allowed to

operate outside the system. If an NGO engages in activities inimical to the country, it will be de-registered. An organization like Green Belt Movement will be expected to plant trees and not engage in other (political) things" (Daily Nation, December 14, 1990).

Bill

Although fundamentally flawed, the NGO Bill went some ways to fulfill the expressed wish of NGOs for an institutional framework for their operations (see especially KNCSS 1989; Waruhiu 1989). First and foremost it provided a single law that would govern the whole sector, rather than the varied legal regimes under which they operated. It thus gave them a recognized legal status, with a standard legal definition as corporate bodies. It also established an executive directorate, named the NGO Bureau, which would oversee the administration of the NGO sector including registration and coordination; an NGO Board which was the government/NGO policy and decision-making body (to which the Bureau was the executive directorate); and a National Council of Voluntary Agencies that was the recognized body for NGO self-government.

bill

Despite these seemingly laudable provisions NGOs were extremely alarmed by the Bill. They saw it not as an enabling piece of legislation that would facilitate their work but as one that would control and constrain their work. The parliamentary debate on the Bill had betrayed the government's intentions to control NGOs in the name of coordination. This was further borne out by the specific provisions of the Bill. The composition of the NGO Board was heavily in favor of the government; the powers of the Board were wide and far reaching; the operations of the

Council (the NGO self-governing body) were not independent from government interference; the Minister in charge of the NGO sector was granted absolute powers and no recourse to the courts was provided; and, the administering authority was under the internal security and not development planning department (see Republic of Kenya 1990). While the NGOs were familiarizing themselves with the Bill, the president granted his assent thus making it law in January 1991. What remained to make the law operational was the drafting of subsidiary legislation (rules and regulations) and a notice of commencement by the Minister in charge.

**The NGO Reaction to the Legislation:
From Disorganized Apprehension to Organized Lobbying**

As NGOs continued to talk to each other and express their concerns, there was a need to bring them together to share views and be educated on the new law. The Institute for Development Studies (IDS), which had long been involved with NGOs and government in research and policy matters and had been instrumental in the 1989 KNCSS workshop on coordination, organized a seminar in February 1991 for NGOs to familiarize themselves with the new law. This seminar was attended by over 130 NGOs and ranking government officials, including one who later became the Executive Director of the new NGO Coordination Bureau.

The purpose of the seminar was purely to educate the NGOs on the Act, its requirements, and its implications for their work. Neither the NGOs nor IDS policy analysts harbored any illusions that they could press for changes favorable to NGOs. Indeed, Alan Fowler, one of the foremost

observers of the NGO scene in Kenya wrote in an *aide memoir* to NGOs: "Given the parliamentarians response to the Bill it is highly unlikely that it will be repealed or amended on the basis of strong NGO lobbying. A more important and practical response therefore, is to try and influence the regulations defining the actual operation of the Bureau . . ." (1991a, p. 5). However, the NGO discussions revealed deep and widespread displeasure with the Act and sought more fundamental changes than influencing the rules and regulations. While conceding the Act was an attempt at resolving many issues raised by NGOs themselves in their 1989 KNCSS report, the NGOs argued vehemently that the government's legislation was 'controlling' rather than regulatory or 'facilitatory' (NGOSC Concerns 1991, p. 3).

Among the major concerns expressed by the NGOs at the meeting were the following:

1. The Government's intention: the intention of the Act was suspect. While it was couched in the language of facilitation and coordination which were welcome goals, the Act actually controlled and constrained NGOs through the Board whose membership was heavily weighted in the government's favor.
2. The Minister's absolute power: The Act bestowed absolute power on the minister in charge in determining the affairs of NGOs such as registration, de-registration, duty exemption, work permits, etc. All

appeals were to be made to the minister, whose decision would be final. Most important, no recourse to courts of law was provided.

3. Registration Period: The Act required NGOs to renew their registration certificates every five years. In effect this limited the life span of NGOs to five years at a time. NGOs felt this would adversely affect their operations, especially planning and resource procurement. Moreover, there was no guarantee that new terms and conditions would not be introduced at the renewal stage.
4. De-registration: The Act empowered the Board to suspend or de-register an NGO for the actions of its officers. NGOs felt this would be too punitive since closing down an NGO would have widespread adverse effects, and to do so on account of an individual's action was excessive. Also there was no formal mechanism for appeal except to the Minister — essentially to the same government that would have 'apprehended, prosecuted, and punished' the NGO.
4. Self-Government: The Act provided for the establishment of the National Council of Voluntary Agencies (presumably to replace the KNCSS) whose membership would be limited to the first 100 NGOs whose registration was approved by the Board. This Council would then draft a Code of Conduct to be approved by the minister and binding for all NGOs. NGOs felt the Council should be elected by *all* NGOs and democratic principles followed in its operations. Its decisions should not require further approval from the government.

5. The relations, rights and obligations between the Board and the Council needed to be clarified.
6. Financing the Law's Operation: The memorandum accompanying the Bill had explicitly stated that the exchequer would not incur any additional expense for the administration of the law. The NGOs wanted to know if they would then be required to finance the Executive Bureau's operations.
7. Transitional Arrangements: The status of previous privileges (e. g. duty exemption) as well as the operating status of many NGOs under protocol arrangements was unclear.
8. Definitions: Many of the Act's definitions were vague. For example, it was unclear whether churches and self-help groups, donor organizations without projects were classified as NGOs. (See NGOSC Concerns 1991).

The 130 NGOs at this February workshop resolved to press the government to examine these concerns and rectify the legislation and at the same time educate other NGOs in the country about the adverse effects of the law. Given the nebulous legal status that the new legislation left the KNCSS in, the NGOs constituted themselves into an NGO Network -- a loosely organized body with the sole purpose of discussing NGO concerns regarding the Act and making representations to the government. To facilitate this goal, the Network elected a 10-member NGO Standing Committee (NGOSC) with the mandate to make representations to the

government on behalf of the Network members and report back to them.

It is instructive to note that the 10 members of the Standing Committee included leading figures in the NGO sector and representatives of major foreign and local NGOs. The leading personalities who also headed or represented large and influential NGOs included Ezra Mbogori — director of Unaugu Society of Kenya, Dr. Njuguna Ngethe — director of the Institute for Development Studies, Achoka Awori of KENGO, and Dr. John Batten — director of Action Aid in Kenya. Other influential NGOs represented included the National Council of Churches of Kenya (NCCK), a leading proponent of political pluralism, the Aga Khan Foundation, FEMNET (a women rights NGO), and *Kituo cha Sheria* (a high profile legal advisory center). This Standing Committee was specifically mandated to refine the issues and concerns and resolutions of the Network and present them to the Office of the President; to make recommendations on the Act and the rules to be formulated; and, to establish dialogue with the government in regard to the implementation of the Act to ensure NGO interests were taken into consideration (NGOSC Concerns 1991, p. 4).

In March 1991, the NGO Standing Committee (NGOSC) met ranking government officials from various ministries led by those of the Office of the President and presented the NGO concerns on the Act. The presentation included a document comprised of the preliminary report of the February IDS/NGO seminar; a document enumerating NGO general concerns; a document detailing these concerns and recommendations on the Act section by section; and a draft Bill synthesizing the NGO suggestions

(see NGOSC Concerns 1991). In the four-hour long meeting at the Office of the President, the government officials sought to dispel any illusions that the Act would be amended and encouraged the NGOs to instead contribute to the rule-making exercise underway. However, in the ensuing discussion and debate the NGOSC exposed many issues that the government officials conceded were legitimate and needed to be addressed (NGOSC/OCP Minutes 1991). Despite their emphasis that the Act was already operational and that the question of amendments was therefore moot, the government officials gave encouraging signs that the government was committed to further consultations with NGOs. Indeed, they strategically asserted that this initial meeting was a "continuation of government-NGO dialogue" and, by implication, that the NGO legislation was a product of previous dialogue; of course, the NGOSC was aware this was the first such consultative meeting! (NGOSC/OFP Minutes 1991).

The NGOSC reported back to the NGO Network in a second workshop held in mid-April and again attended by over 130 NGO representatives. While most Network members commended the achievements of the NGOSC and were particularly appreciative of the government's willingness to dialogue, many expressed doubts that verbal concessions on the inadequacies of the Act would amount to much. They did not want their concerns dismissed as 'bumps' in the legislation that could be ironed out later; instead they wanted them addressed more concretely through amendments to the Act. The Network unanimously agreed that the implementation of the Act as it stood would adversely affect their independence and operations and, consequently, their grassroot constituents. They would therefore press for

the necessary amendments to correct the situation before the Act was implemented. To this end they resolved and mandated the Standing Committee to request the government to: 1) delay the implementation of the Act until the NGO concerns were resolved; and 2) halt the drafting of the rules until these concerns were resolved (NGOSC Report April 1991).

In addition, the NGOSC would seek the donors' position on the Act in order to find out if they could intercede for NGOs if current efforts did not result in favorable amendments. To this end the Standing Committee met representatives of major donor agencies (USAID, UNEP, UNDP, UNICEF, Ford Foundation, and the World Bank, among others). The donor representatives expressed both concern with the legislation and support for the Network's efforts. On their part, the donors (through their sub-committee on NGOs) urged the Kenya government to respond favorably to NGO concerns by making amendments to the legislation (Donor Statement 1991). While NGOs would for the moment not request donors to lobby on their behalf, they would rely on them to back them up, especially in the event of a hostile government reaction, since "donors may facilitate further concessions without the need for NGOs, who are more vulnerable, to light more fires" (NGOSC/DA Minutes 1991, p. 3).

Furthermore, there was a need for alternative strategies to persuade the government to address NGO concerns if present approaches were rejected. Among the suggestions made to the Standing Committee were the following:

1. Continue to hold a series of round-table talks with policy-makers to discuss the Act and make further representations.
2. Push for a national forum at which the government would educate all NGOs about the Act; this would also give NGOs an opportunity to forcefully make their concerns known.
3. As a final option in direct dealing with the government, request the President to intervene.
4. Request donors to lobby on their behalf since they have greater leverage.
5. Institute court action in the form of 'an interpretation suit' that would delay the operationalization of the act.
6. Wait and see what happens with the implementation. (Some NGOs argued that the government would not be able to effect the legislation).
7. If all else fails, and the Act is actually implemented, seek to influence the appointments to the NGO Board which was the central decision-making body. (See NGOSC May 1991, pp. 5-6).

For a number of reasons most of these options were abandoned as being too confrontational (2, 3, 4, & 5) or likely to be too late to achieve much (3, 6, & 7). The Network had consistently eschewed confrontation and preferred low-profile lobbying of high ranking officials. The only

option open therefore was lobbying as they had been doing (1). Lobbying, they collectively reasoned, "was a legitimate activity that should be undertaken without fear and that it should be carried out from a wholistic (sic) approach which entails utilization of all possible ways and means to achieve underlying objectives" (NGOSC Report May 1991, p. 8).

To facilitate this expanded lobbying effort, the Network resolved to expand the membership of the NGOSC from 10 to 20. The enlarged Standing Committee was also divided into three sub-committees with specialized tasks in: 1) liaison with the government; 2) public education; and 3) rules and regulations. The Liaison sub-committee had the responsibility of making representations to the government. The Standing Committee was now mandated to expand its lobbying contacts from only the Office of the President to the Attorney General Chambers, and Parliament. The NGOSC would continue to hold consultative meetings with government representatives and to pursue NGO concerns "as diplomatically as possible" (p. 8). The Public Education sub-committee would work to educate donors and other NGOs and in particular the public on the implications of the NGO Act. This would be done through direct contact with donors and NGOs and a media campaign highlighting NGO contributions to development in Kenya. The Rules and Regulations sub-committee would work on the Act's subsidiary legislation proposed by the government to ensure they addressed NGO concerns as reflected in the NGO version of the Act.

In the meantime, the NGOSC contacted the Office of the President and informed the Permanent Secretary (PS) of the standing concerns of

members of the Network. In late May 1991, the NGOSC received positive indications from the PS that the government was indeed "taking their observations seriously . . . (and) drafting the appropriate miscellaneous amendments to make (the NGO working) environment even more harmonious" (Republic of Kenya 1991a, p.1). These amendments, the communication stated, would be tabled in Parliament as soon it reconvened. At the same time the PS took the opportunity to discourage NGOs from "donor lobbying" as this would be detrimental to a harmonious working environment (p. 2). The NGOSC duly communicated these positive overtures to its constituents, the Network, and the lobbying took a lull as they anticipated the publication of the amendments.

However, when in September 1991 the government published the Miscellaneous Amendment Bill which included the intended amendments to the NGO Act, NGOs were shocked. Very little of their concerns had been addressed in the proposed amendments. Only three amendments were considered important by NGOs: 1) the requirement that NGOs should renew their registration every 5 years was dropped, thus granting NGOs corporate status with perpetual succession; 2) the provision that the first 100 NGOs registered would form the NGO Council was amended so that they would only form an interim council. (The Council's name was also changed to the National Council of NGOs, not Voluntary Agencies); 3) the Board's power to 'suspend' was retracted but not the greater power to de-register an NGO. The other major amendments suggested by the NGOs were completely sidestepped.

An urgent third national workshop for the NGO Network was hurriedly

convened in October 1991 at which over seventy NGOs were represented. While expressing appreciation for the concessions already made by the government, the Network did not hide the fact that it expected and would press for more amendments. Problems such as the absolute powers of the minister, the Board's composition, registration and de-registration requirements, and the question how the Bureau's operations would be financed were yet to be addressed. Furthermore, adding urgency to the situation, the government presented the Network with the draft rules for comment — which indicated the government's intention to proceed despite the outstanding NGO concerns.

Realizing that dialogue with the Office of the President had not borne fair fruit, the NGOSC had to turn to the Attorney General's office which would move the amendments in Parliament and could possibly see the necessity of addressing the NGO concerns. In its meeting with the AG, the NGOSC expressed the network's dissatisfaction with the published amendments which fell short of their requests and were disappointing in light of what had seemed to be very positive indications from the highest levels of the President's Office. The NGOs therefore indicated their intention to pursue more vigorous lobbying especially of lawmakers in order to ensure more favorable amendments were passed. The AG on his part reiterated the government's commitment to providing an 'enabling environment' to NGOs and promised to 'slip' the overlooked amendments into the Amendment Bill when it was tabled in Parliament (NGOSC Notes 1991). Given that in the single-party state whatever the AG tabled in Parliament would pass in its entirety, this undertaking by the AG made

lobbying lawmakers an unnecessary high-profile tactic that the NGOSC dropped. The AG's promise was duly communicated to the Network members.

When the Miscellaneous Amendment Bill was tabled in Parliament in December 1991, the NGOs were once again shocked that it did not include their suggested amendments, and was passed as it had been published. The AG had been 'unable' to slip in the more favorable NGO amendments. It seemed that all efforts to lobby for changes in the Act had fallen on deaf ears and the NGOs had only been able to achieve very limited results. The NGOs were particularly incensed by this turn of events given that Kenya was undergoing fundamental changes towards political pluralism that was expected to open up 'civil society' (NGOSC Report February 1992). Indeed, throughout the lobbying period the single-party regime was slowly crumbling under the onslaught of multi-party advocates. Moved by sporadic riots and the suspension of aid by the Paris Club in November 1991, the Kenya government repealed the section of the Constitution that outlawed opposition parties in December 1991. NGOs therefore saw the recent developments regarding the NGO Act as contradicting this new phase of political reform. The besieged condition of the single-party dictatorship may also have emboldened NGOs to challenge it to retract one of its more overbearing laws. Furthermore, the network had received funding and other support from major donors (UNDP, Ford Foundation) to set up a secretariat and to underwrite the costs of the continuing lobbying exercise. This donor support as well as the government's own recognition of the Network as the *de facto* representative of NGOs went a long way to

institutionalize and strengthen it in its lobby efforts.

The NGOs therefore called another urgent meeting in February 1992 for NGOs to discuss the recent developments and map out a new strategy. At this fourth national workshop over 200 NGOs were represented — suggesting the growing concern at the recent turn of events. In this charged atmosphere, the NGOs radically changed their accommodative stand of lobbying for amendments: they now sought to have the law repealed altogether. Furthermore, they refused to contribute to the draft subsidiary legislation that they had received for comment from the government arguing that it was useless to make rules and regulations for legislation that was fundamentally flawed. This collective decision to reject the legislation was prompted by the government's own negative response to NGO representations and was duly communicated to the Office of the President and the Attorney General. The NGOs resolved that the Network would from then on be their self-governing body (much like the interim Council the legislation provided for) and would also come up with an alternative act and attendant regulations as well as a Code of Conduct. The NGOs however reiterated their commitment to their non-political and diplomatic approach in their lobbying efforts. The NGO Standing Committee communicated to the government the Network's outstanding concerns and strong resolutions but also made it clear that it would continue to pursue dialogue and was awaiting a response from the government.

However in June 1992, NGOs were once again thrown into panic as the government, without forewarning or response to the latest NGO overtures,

published the Rules accompanying the NGO Act. This was yet another sign that the government intended to implement the Act before the outstanding NGO concerns were resolved. The government's intentions were soon confirmed by a gazette notice published thereafter by the minister in charge announcing the commencement of the Act on June 15th 1992.

The NGO Standing Committee was seemingly outpaced by events but was quick to react. In an advertisement in the national dailies, the NGOSC urged all NGOs in the Network not to register until they attended the next (sixth) workshop to be held in the first week of July. The NGOSC also invited the Permanent Secretary in the Office of the President and the Attorney General to address NGO representatives at this crucial meeting. And in parallel dispatches to all NGOs the NGOSC reiterated that NGOs should not register and highlighted the dangers of the legislation as it stood, especially the absolute powers of the minister, the lack of recourse to the courts, and the registration requirements that included such personal information as spouse's names.

While the NGOSC call to boycott registration was presented as 'advice to delay' until the July meeting, it was nonetheless a call to boycott. The Network had seemingly crossed the threshold to confront the state. Government officials were "surprised" that the NGOSC was "concerned" that they had gone ahead to implement the Act despite outstanding issues (NGOSC Internal Memo 1992). Apparently, the senior government officials could not relate to this concern over the unilateral and 'snap'

implementation of the Act -- the predominant *modus operandi* in the single-party state. Predictably, and in reaction to the ensuing furore, some government departments that offered services to NGOs (such as the Treasury and immigration departments) referred all matters regarding NGOs to the Office of the President. Meanwhile, many NGOs expressed grave concern at the government's latest action and solidarity with the actions of the NGOSC. Similarly, the fledgling opposition parties were solidly behind the NGOs' actions (see later also). The donor community was equally taken aback by the government's unilateral decision to implement the disputed legislation. This was especially so since the donors' Subcommittee on NGOs had made representations to the government regarding the Act and sought to be included in the government-NGO dialogue but had yet to receive a response. Donor agencies and home country embassies of foreign NGOs called in their NGO leaders for consultations. For instance, the British High Commissioner convened a meeting of ten major British NGOs to consult with them about the situation. Similarly, US and Canadian NGOs, and donors such as the UNDP met for similar consultations (NGOSC Minutes July 1992; NGOSC July 1992; NGOSC Internal Memo 1992).

In the July meeting, the sixth national workshop, the NGOSC presented a draft of their alternative legislation, the Private Voluntary Organizations Act as an alternative to the NGO Act. This was unanimously adopted by the Network for presentation to the government as the basis for future dialogue (NGOSC Report July 1992). Neither the PS in the President's Office nor the Attorney General attended this meeting to which they had

been invited to explain the government's stand. The AG however indicated he would be willing to meet the Standing Committee at a later date. The Network resolved to re-start the stalled dialogue, but called on the government to suspend registration for three months to give a chance to the new negotiations. Meanwhile, all NGOs were requested not to register until further notice from the Network.

At the same time, there were several undercurrents to enlist the foreign missions of major donor countries to pressure or lobby the government to reverse its implementation of the Act. Among the actions suggested to the NGOSC included: 1) Requesting the ambassadors of Britain, United States, Germany, Japan, and the European Commission, as well as representatives of multilateral bodies to request/press President Moi to reverse the government's decision; 2) Individually and separately, those NGO leaders with personal access to the AG should be encouraged to 'advise' him that aid to Kenya would be frozen if the Act was implemented; 3) That if by September 1992 the situation had not improved, NGO leaders should publicly announce a freeze in new projects in Kenya and request their home (or donor) governments to withhold aid until the government reversed its decision (Meagan 1992; NGOSC Minutes July 1992). While none of these 'hard' tactics were ever employed, they were considered important possibilities to fall back on if the stalemate continued.

The NGOSC sought and received audience with the Attorney General and presented him with their PVO Act in August 1992. On his part, the AG

made it clear that the government would not reverse its decision and that all NGOs were required to comply with the law as it stood and register immediately as there would be no extension in the registration period. The AG however undertook to look at the NGOs' greatest outstanding concern that the minister in charge had absolute powers and they had no recourse to the courts. He would therefore advise the government to provide for appeals to the High Court. He also undertook to advise the government to place the administration of the Act under a ministry other than the Ministry of State/Office of the President (NGOSC/AG Notes 1992).

These latest consultations bore fruit as the AG tabled and Parliament passed amendments to the Act in late August 1992. The most important amendment provided for recourse to the High Court as the final arbiter of disputes between NGOs and the minister or the Board. Furthermore, the NGO membership on the Board was raised from five to seven, representing one-third of the maximum number of members. (This would give NGOs greater voice in the Board but little possibility of marshalling a majority since most of the other members would be senior government functionaries and it was not yet established if decisions would be by simple or extraordinary majority). While the Act would still to be administered by the Office of the President, the AG stressed that the government had made these new changes in good faith and left the door open for further consultation and action in the future.

Given these positive developments the NGO Standing Committee reconvened the network for a seventh national workshop in October 1992

to re-appraise the situation and especially to reconsider 1) whether to register or to continue the boycott, and 2) whether, having resolved the most contentious issues, they should cease to lobby. On the question of registration most members agreed that the most pressing issues had been resolved and they could now go ahead and register. (Indeed, they had obtained favorable amendments in five crucial issues). However, there were still more that needed to be pursued, including the less contentious issues. For instance, the regulations accompanying the Act still needed to be reviewed since the NGOs had not contributed to their formulation. (The Network had boycotted to contribute to their formulation after the government passed the minimal amendments in late 1991; see above). More important, the NGOs did not want to stop here; they still objected to the legislation and sought to have it repealed altogether. This, they asserted, was their ultimate aim and should be pursued tirelessly. However, in the meantime as much reform on the existing legislation should be sought (NGOSC Report October 1992).

Amendments
By the end of 1992, the government had made good on its promise to respond to more of the NGO concerns and had revised the subsidiary legislation, including the gazetted forms. For instance, the more objectionable requirements for personal information from the head officers of NGOs (such as spouse names) were dropped. Also where detailed annual budgets and sources of funding were required, estimates were acceptable. To be sure there are many outstanding issues and concerns, but the NGOSC is satisfied with the changes instituted so far and the government's renewed spirit of cooperation that bodes well for further reforms. Further

changes are anticipated albeit at a slower pace. Indeed, in the eighth national workshop held in January 1993, the NGOSC — eager to portray its own spirit of goodwill — advised Network members to register with the Bureau. The NGOSC also directed its concerns on the more administrative aspects of the legislation to the NGO Bureau: for instance, the Network request for an extension of the registration deadline from December 1992 to March 1993 and for the continued recognition of the NGO Network as the interim Council until the NGO Council is constituted. (Both were granted). These moves by NGOs suggest their pragmatic acceptance of the NGO Bureau as a legitimate though still problematic body that they can deal with.

Conclusion

The limited success of Kenyan NGOs in combating the government's attempts to control and restrict their activities is an important contribution to t

he expansion and strengthening of civil society in Kenya. As the NGO Network recognizes, its achievements have "created opportunities out of a worrying situation (legislation)" in its own area of operations (Personal Notes 1993). Moreover, the NGOs now recognize that by establishing a strong and truly representative NGO Council they can work to resolve the outstanding concerns in the Act. The NGOs' expressed goodwill has in no way diminished their goal to have the Act repealed altogether as is evident

from their resolutions and communications to the government. NGOs reiterate their endorsement of their PVO Act and its attendant rules and regulations and their commitment to "retain these proposals as the basis for all future dialogue and registration" (NGOSC Report October 1992).

The achievements of the Network can be traced to a number of factors: 1) the immense resources that NGOs collectively command and whose continued flow into the country the state wanted to maintain; 2) the organizational sophistication of the NGO Network, including the democratic and accountability values demonstrated in its internal decision-making leading to near-unanimous decisions; 3) the leadership provided by some of the more prominent NGOs and NGO leaders, mostly local Kenyans with access to and experience dealing with high ranking government officials (see also fn. 2); 4) the low-profile 'diplomatic', non-confrontational and, therefore, non-threatening approach adopted in the lobbying efforts; but also the obvious potential to boycott and withdraw from Kenya (see (1) above); 5) the support from major donors not only in funding the workshops and lobby efforts but also philosophically and, eventually, their readiness to take punitive action against the Kenya government; and, 6) an ailing single-party state encountering challenges from a myriad of places (donors, opposition parties, and grassroot unrest). In particular, the international media focus on Kenya at the time may have encouraged the government to appease NGOs to avoid being isolated by donors whose interests were shifting towards the new democracies of Eastern Europe.³ All these factors contributed towards making the limited success possible in an apparently inhospitable environment.

Moreover, in its efforts to lobby for a more enabling environment the NGOSC did not restrict itself to dealing with the seating government but had also approached the opposition parties prior to the December 1992 elections. Indeed, many of the civil society organizations that backed the NGO cause such as *Kinyo cha Sheria* (legal advisory center) and the NCCK were also at the forefront of oppositional politics. In their joint blueprint for post-election reforms, the major opposition parties had highlighted the NGO sector as one of the areas targeted for policy reform in their first 100 days in office. The extent to which the NGO Network had successfully 'lobbied' these alternate governments was impressive: The opposition not only adopted the NGO language and statements on the need for a more 'enabling environment' but also undertook to repeal the NGO Act within the first two weeks of assuming office, and replace it with the Network's own PVO Act (Blueprint 1992). Unfortunately for the NGOs, KANU retained power in 1993 with a comfortable majority in Parliament to hold its own. For the moment, the NGOs have had to make the best of a bad law by pressing for and accepting piece-meal amendments wherever possible.

The amended NGO Act and the new spirit of goodwill that the KANU government has assured NGOs of, as well as the institutionalization of the Network and its Standing Committee as organs of self-government and representation have left NGOs in Kenya with a more hospitable working environment than would have been the case had the government proceeded with the original Act. By establishing itself as a strong and tested lobby group, the NGO Network has effectively expanded and reinforced the strength of civil society vis a vis the state in Kenya. More important, by

*better
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election*

ensuring an "enabling environment" for NGO activities in Kenya the Network may have made a crucial contribution to the democratization process by enabling NGOs to pursue their development work unfettered by the state.

*Support
democratisation
thesis
+ mean that
Fowler
was wrong*

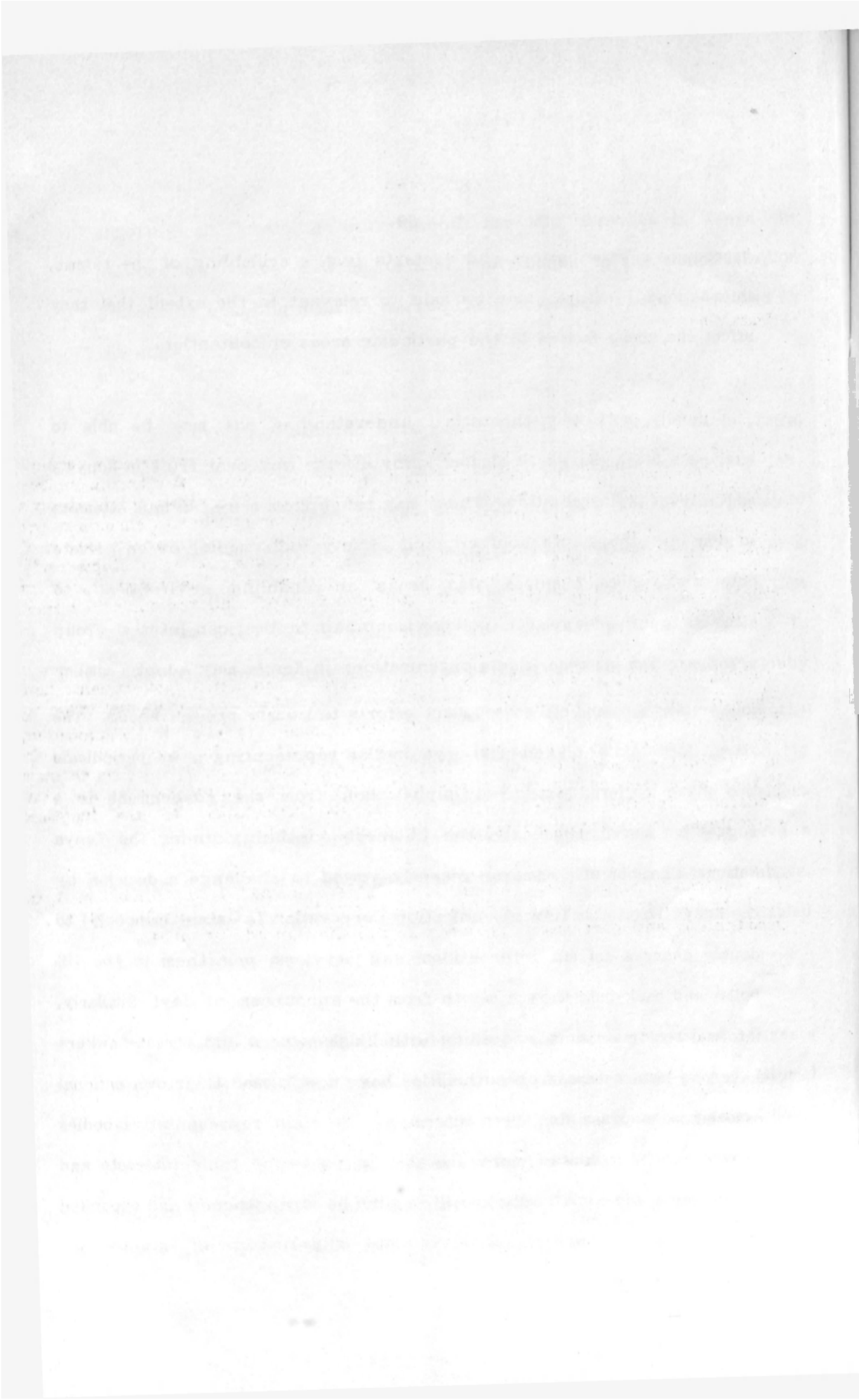
The evidence adduced here supports the thesis that NGOs in Africa, as part of civil society, may contribute constructively to the democratization process. Indeed, the NGO efforts in Kenya have certainly altered the relations between the state and institutional members in civil society. This support for Bratton's thesis does not however imply that Fowler — who argues that NGOs are not yet able to contribute to democratization — is mistaken. As is evident from the NGO Network's lobby efforts, it was their *expressive commitment* to democratizing their work-space that pushed them to challenge the Kenyan state. The Bratton vs. Fowler argument may not present such a chasm after all if one considers that conditions prevailing in a particular spatial/time context have a bearing on the outcome of political actions by NGOs. As I suggest above, the conditions prevailing at the time of the NGO agitation may have enabled them to achieve important concessions from the state.

*Imp.
of NGO
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As regards general political theory, the incident examined suggests that even in situations where civil society is constrained by a dictatorial regime, pressure groups that do not have political patronage from 'above' can extract important concessions from the state. This, however, will depend heavily on certain factors, namely: their resources, organization, voice, and, most importantly, their leverage viz a vis the state. The

importance of other actors and contexts (e.g. a crumbling of the regime, international pressures) can be said to be relevant to the extent that they affect the above factors in the particular areas of contention.

Finally, with this theoretical understanding one may be able to suggest a few areas where similar lobby efforts may bear fruit in Kenya's march towards liberalisation. These may range from more obvious attempts to dismantle the state's hold on civil society (e.g. media) or on private enterprise where business also seeks an 'enabling environment', to attempts to influence specific policies much akin to American interest-group pluralism. For instance, media organizations in Kenya may adopt a similar lobby effort to ward off government efforts to muzzle press freedom. The recent formation of an umbrella organization representing news periodicals that have suffered extensive suppression from the government is a suggestive move. Similarly, the business community under the Kenya National Chamber of Commerce recently vowed to challenge a decision by the Kenya Posts and Telecommunication Corporation (a state monopoly) to double charges for its international call services, peg them to the US Dollar and back-date them a month from the announcement day! Similarly, informal sector artisans who along with kiosk owners and street-hawkers have long been harassed by authorities have now formed their own national association to press for their interests. As such representative bodies emerge and as more and more are able to press for their interests and achieve some gains, civil society will in turn be strengthened and expanded as an effective bulwark against state suppression of groups and individuals in Kenya.

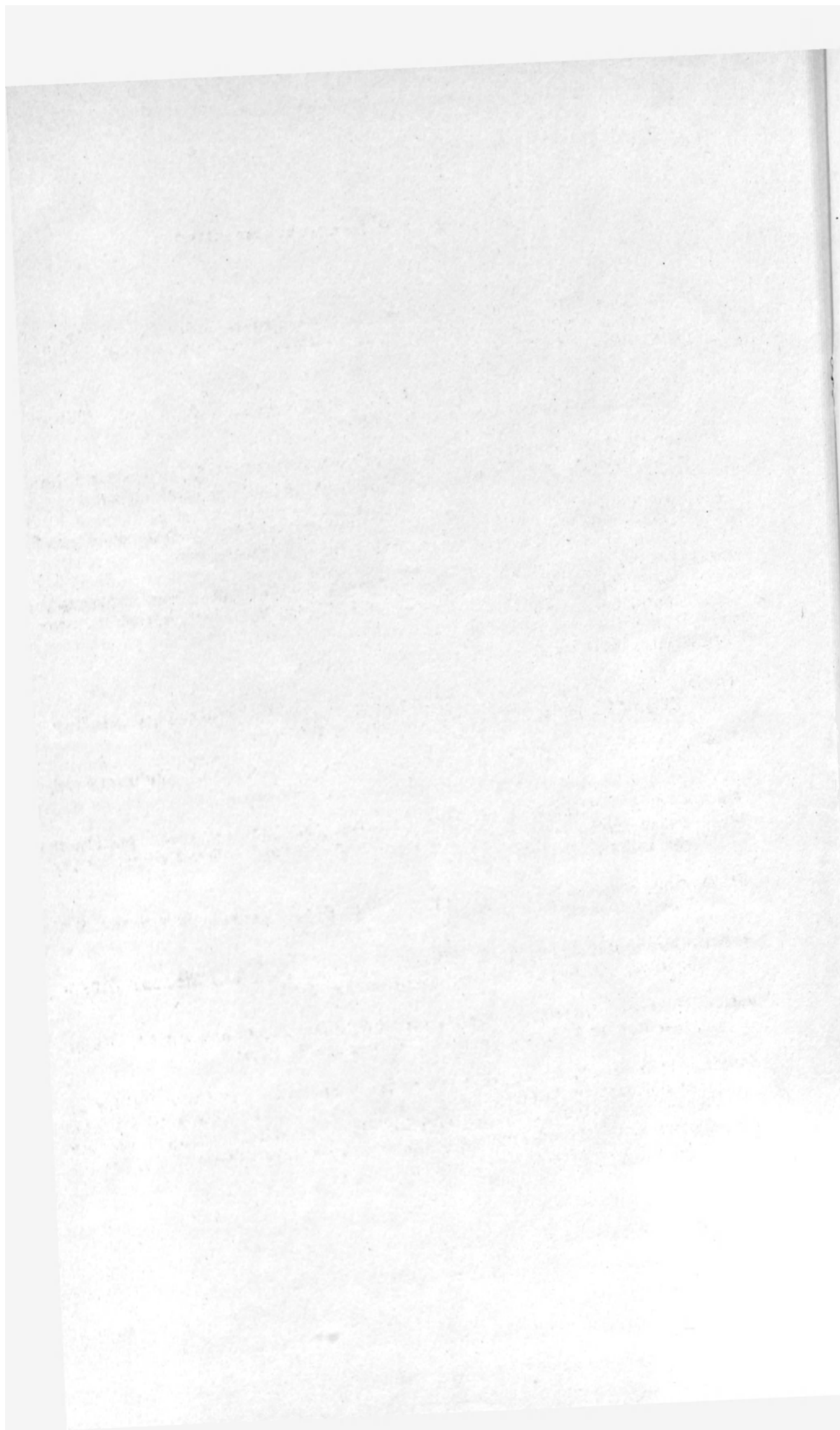


Endnotes

The above confrontations were merely an indication of a much broader process of the state engulfing civil society institutions as networks of furthering its own legitimation. Henry Kanyinga (personal communication, 1993) views these attempts at controlling NGOs as a continuation of a process that started in earnest in the early 1980s when Moi sought to consolidate his power. An important aspect of this 'construction of the Moi state' was the establishment of a single-party supremacy and the amputation of existing civil society institutions such as ethnic associations, the national trade union movement, and the national women organization.

Indeed, according to Henry Kanyinga some donors and donor governments had adopted a wait and see attitude and hinted that they would sooner move to Eastern Europe than work in a hostile environment (personal communication, 1993). Moreover, Kanyinga points out that some of the foreign NGOs initially involved in the lobby effort later withdrew citing possible repercussions on them if they were seen as 'fighting their host state'. This suggests that the local leadership in the Network was of extreme importance to the 'political correctness' and eventual success of the lobby effort.

The Association of the Free and Independent Press (AFIP) was formed in April 1993 shortly after armed police invaded a Nairobi press that prints most of the recognizably anti-government periodicals and dismantled the press.



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