

BACKGROUND NOTES FOR THE NGO LAW REVIEW CSO CONSULTATION WORKSHOPS

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DEFINITIONS

- FBO** Faith Based Organization. This refers to an organization established by a faith propagating group to promote public benefit objectives. Many operate under the auspices and registration of their faith community and are governed within the faith community hierarchy. Others register as societies, CBOs, NGOs or other not for profit entity and adopt their own governance structure.
- CBO** Community Based Organisation. Also referred to as grassroots organizations, they include: hometown organizations, community-based welfare organizations, self-help groups, neighbourhood associations, women's and youth groups. Most CBOs exist at the local, village or sub-location level and exist to advance the interests of their members and the immediate needs of the local communities in which they operate. However, there are many strong, well established CBOs that have evolved into intermediate organisations and share many characteristics with NGOs. CBOs are governed by their members who directly appoint management and operational staff as required.
- CSO:** Civil Society Organisation. This term is used generally and globally to refer to the wide array of organizations, registered and unregistered, that operate in the realm between the family, the state and the market and are formed to promote the interests of their members, a portion of the public or the public at large. It includes a rich array of organizations including: trade unions, cooperatives, foundations, faith-based and religious groups, community-based organizations, non-governmental organizations (NGOs), not for profit companies, trusts, social movements and networks. In Kenya trade unions and cooperatives have their own Acts of Parliament and regulatory requirements.
- NGO** Non-Governmental Organization. In Kenya NGOs were legally defined for the first time under the 1990 NGO Coordination Act and a new definition is now included in the Sessional Paper No. 1 of 2006. NGOs are private voluntary groupings of individuals or associations, not operated for profit or for other commercial purposes but which have organized themselves regionally, nationally or internationally for the benefit of the public at large and for the promotion of social welfare, development, charity or research in the areas inclusive of, but not restricted to: health, relief, agriculture, education, industry, and the supply of amenities and services. NGOs are governed by Boards of Directors elected by members and are registered by the NGO Coordination Board. More generally there are many other organizations in Kenya than manifest the attributes of legal NGOs but have registered under other authorities and Acts of parliament, in particular not for profit companies and trusts. A number of well established 'NGOs' operate under their own individual Act of Parliament dating from the 1950's and others are exempt from registration due to their international and diplomatic status.
- NPO** Non-Profit Organisation. This refers to organisations which operate in the realm between the family and the state; they do not operate to generate profits that can be shared among its members or directors. They may operate commercial and income generating activities but surpluses are invested in their social purposes. This term generally refers to NGOs, Non Profit Companies and Trusts, intermediate level organizations between customer/donors and beneficiaries.

I A Brief History and Context of the Review

Prior to the 19th Century, Kenyans lived in communities, which were characterized by strong patterns of social ties and relations. People came together to promote mutual interests, pool resources, express ideas and participate in the governance of their communities as the communal structures afforded them the vehicles to do so. These structures included ethnic and kinship groups such as families, clans and lineages, as well as councils of elders and age groups.

Associational life is still deep rooted in Kenya. It forms the basis on which *Harambee* (self help) initiatives thrive. However, the term civil society is relatively recent and is often associated with quests for social transformation and the realization of social justice. From the early 1920's till 1963, Civil Society Organizations¹ (CSOs) played a prominent role in the struggle for independence from colonization.

Hence, colonial conditions worked to restrain growth of the sector. This was done to prevent interaction between the natives. Restrictions against social organizing accelerated during the emergency period (1952-1960). The restrictions aimed to prevent the spread of Mau Mau peasant rebellion, which organised against the state mode of rule and expropriation of land.² The post-colonial period and subsequent consolidation of state power saw a continuation of this trend.

Successive post-colonial governments constrained the space for CSOs by restricting the space for organisations that provided political forums for government critics. This approach is evident in the legislation that was passed to regulate registered associations, that is, the Societies Act, Chapter 108, Laws of Kenya. The Statute was passed in 1968 as an "Act of Parliament to make provision for the registration and control of societies". It gave wide discretion to the Registrar of Societies and sweeping powers to various government officials with respect to investigating, arresting, entering and searching the premises of any society. Further, where it is alleged that a society is an unlawful society, the burden of proving that it is a registered or exempted society or that it is not a society shall lie with the person charged.

The efficacy of this Act to provide an enabling legal framework for CSOs as a whole was however wanting as there was and continues to be extensive cooperation between the state and CSOs delivering development services. Since independence, the later have complemented and cooperated with government in the delivery of services. Hence, in 1990, the NGO Coordination Act No. 19 of 1990 was passed "to make provision for the registration and coordination of NGOs in Kenya and for connected purposes".

The context in which the Act was promulgated was, however, highly charged with mistrust and suspicions between the government and NGOs. After the government proposed and passed the NGO Coordination Act, NGOs reacted strongly to the law. The latter claimed that the law's provisions were not enabling but aimed at stifling and controlling the sector. A frenzied series of consultations in the

¹ The term Civil Society Organizations (CSOs) is used generally in Kenya to refer to the wide array of organizations that operate in the realm between the family and the state and are formed to promote the interests of their members or the public good. See the notes on Definition, p. 13.

² Berman, B. and Lonsdale, J. (1993). *Unhappy Valley: Conflict in Kenya and Africa* (Book Two), Violence and Ethnicity. Nairobi: Heinemann Kenya quoted in Kanyinga K., Mitullah W., Njagi S. "The Sector in Kenya: Size, Scope and Financing" Institute for Development Studies (IDS), Nairobi, 2007

sector resulted in proposed amendments, which were later effected as part of the law by the government.³

Many in the government and NGO sector later questioned the efficacy of having a law on NGOs in the absence of a national policy on NGOs. Where the law was silent or gave rise to confusion, there was no general framework of which to refer.⁴ In 1996, the NGO Coordination Board decided that there was need for a national policy on NGOs. The executive committee of the NGOs Council, the national umbrella body of NGOs also reaffirmed its commitment to the development of the policy. The NGO sector and GoK commenced the process of formulating a policy in late 2002.⁵ By May 2004, an NGO Sector Policy was agreed upon.

In the meantime, the sector slowly descended into disarray without a common voice/agenda particularly from November 2004 when the NGO Council started getting entangled in the politics of the day. This was followed by various efforts to rescue the Council, without success.⁶

It was not until July 2006, that Parliament adopted Sessional Paper No. 1 of 2006 on NGOs, which was aimed to enhance regulation of the sector amongst other things. The Sessional Paper calls for a new NGO law. It also:

- Recognizes NGOs' contribution to the economy;
- Emphasizes the government's commitment to engage the NGO sector in development and policy making;
- Expresses the Government's expectation that NGOs will operate more transparently;
- Gives a new, wider, definition of NGOs;
- Recognizes the role of NGO Council and NGO Coordination Board; and
- Proposes mechanisms for better regulation and coordination.

Some of the problems being faced by the sector today are as a result of issues that were never anticipated, for instance, leadership wrangles and warring factions of the NGO Council; declining standards and professionalism, largely due to the lack of an enabling regulatory and institutional framework for effective self-regulation; the exponential growth of the sector and the limited capacity of the NGO Coordination Board to effectively regulate the sector.

The answers to the challenges facing the sector lie in reforming the sector *in toto*. This includes reviewing the legislation informed by the lessons learnt from the implementation of the current law and more importantly, carrying out institutional reforms for a new culture to be nurtured in the sector.⁷

Sessional Paper No. 1, which is the NGO Policy anticipates and proposes a comprehensive review of legislation governing the operations of the NGOs sector:⁸ Though the Policy states that, "the new legislation will be based on this proposed policy", the government appreciates that the context in which the Policy was formulated has changed and CSOs are not happy that some of their inputs were ignored, or that additional content was introduced, in the final Sessional Paper.

³ Faith Kisinga "NGO Law in Kenya: The Process of Reviewing the NGO Act 1990 - A Step By Step Road Map" *International Journal for Not for Profit Law* Vol 1, Issue 4, Art 2.

⁴ Francis Angila 'NGO Sector Regulation in Kenya' Presentation made at the NGOs Week, September, 2009

⁵ Faith Kisinga "NGO Law in Kenya: The Process of Reviewing the NGO Act 1990 - A Step By Step Road Map"

⁶ Position Paper prepared by PEN for web based consultation on the NGO law review

⁷ Ibid

⁸ Sessional Paper No. 1, 2006, p. 15

II KEY ISSUES

During the past eight years, Poverty Eradication Network (PEN) has worked variously with the NGO Coordination Board, the ill-fated NGO Council(s), Civil Society Organization (CSO) regional networks, and a wide variety of not-for-profit organizations. PENs objective has been to strengthen civil society in Kenya and promote CSO development effectiveness.

Working in collaboration with the NGO Coordination Board, the International Centre for Not-for-Profit Law (ICNL) and the Charity Commission of England and Wales, PEN facilitated two workshops for national level CSO leaders (30th September, 2009 and 16th February 2010) in Nairobi. These were the first in a series of workshops, which are intended to cover several regions of the country. They are aimed to engage CSO leaders in the participatory review of the 1990 NGO Coordination Act and to generate consensus on the first draft of a framework document for wider consultations with CSOs.

Emerging from the two Nairobi workshops, were six critical issues, which participants felt will need to be addressed as a matter of priority during consultations on the law review. These issues, which are by no means exclusive, include:

- Fundamental Principles
- Definition and Inclusivity of NGOs
- Motivation and Value added by NGO Registration
- NGO Coordination Board Roles and Functions
- NGO Accountability and Transparency requirements
- Self-Regulation Provisions

These background notes have been prepared to provide the reader with useful material about the selected key issues, as well as some of the options that CSO members can consider, as they consult on the way forward.

The following tables give an outline of features that the new law ought to include in order to support a vibrant and accountable NGO sector, and relevant legal and policy provisions.

1. Fundamental Principles for the Protection of Civil Society Organizations

1.1. Protection of the Fundamental Freedom of Association

<i>Essential Features</i>	<i>Relevant Legal and Policy Provisions</i>
<p>It is important that the fundamental right to associate is recognized in the Constitution.</p> <p>Informal, unregistered organizations should be allowed to operate without formal legal status.</p>	<p>The Current Proposed Constitution of Kenya (draft of 23rd February 2010)⁹ provides everyone with the right to freedom of association, including: the right to “form, join or participate in the activities of an association of any kind”. It also provides that “a person shall not be compelled to join an association of any kind”.¹⁰</p> <p>The NGO Policy Paper¹¹ recognizes the provisions of international conventions and treaties governing the operations and activities of NGOs.</p>
<p>The law should recognize the right to set up and establish CSOs with legal personality, where desired. It should provide the basis for the existence of a variety of types of CSO.</p>	<p>The NGO Coordination Act No. 19 of 1990, the Trustees (Perpetual Succession) Act (Cap. 164, Laws of Kenya), the Companies Act, (Cap.486, Laws of Kenya) and the Societies Act, (Cap. 108, Laws of Kenya) provide CSOs with a variety of options for registration. A few exist under their own Act of Parliament dating from the colonial era.</p> <p>The NGO Policy Paper provides: ‘such legal and institutional frameworks will need to be harmonized (p.22).’</p>
<p>Constitutional rights to freedom of expression and other relevant fundamental rights should be recognized</p>	<p>The Proposed Constitution of Kenya (draft of 23rd February 2010)¹² provides everyone with the right to freedom of expression.¹³ It also includes the right to assembly, demonstration, picketing and petition.¹⁴</p>
<p>Right to associate should only be restricted within strict limits</p>	<p>The NGO Policy Paper provides: Any possible restrictions on the operations of any NGO will be those contained in or done under the authority of the law or those shown to be reasonably justifiable in a democratic society. NGOs will have recourse to the courts as and when necessary (p.22).</p>
<p>CSOs have a right to communication and cooperation with their affiliates and through any medium</p>	<p>The NGO Policy Paper provides that networking, collaboration, coordination and creation of intersectoral synergies within the NGO sector are most effectively achieved if there is a national NGOs body to facilitate such cooperation. The body for the achievement of this purpose shall remain the National Council of NGOs, which will be expected to create and maintain the necessary working relations in the sector (p. 20).</p>
<p>The basic right of CSOs to engage in advocacy and lobbying should be confirmed in substantive legislation. This</p>	<p>The definition of NGO in the NGO Coordination Act (sec. 2) is limited in terms of the scope of activities envisaged for NGOs; advocacy and public policy activities are not expressly included.</p>

⁹ Article 36(1)

¹⁰ Article 36(2)

¹¹ Sessional Paper No. 1 of 2006

¹² Article 36(1)

¹³ Article 33(1)

¹⁴ Article 37

<p>right can be limited by the state to nonviolent means, to encourage credibility of CSOs, and to restrict CSOs from engaging in political campaign activity on the part of particular parties or candidates.¹⁵</p>	<p>The NGO Policy Paper provides for a broader definition of NGO activities, which includes organizations that lobby or advocate on issues of public interest (p.17).</p>
<p>CSOs should be ensured reasonable access to government decision-making processes and information. To safeguard this right, CSOs should have standing to challenge public authorities in courts of law over access to government information and to the processes of policy decision-making.¹⁶</p> <p>The right of reasonable access to government decision making requires the government to engage with citizenry in ways that allow for ongoing input into decision-making and policy formulation.</p>	<p>The NGO Policy Paper provides:</p> <p>The government shall engage with NGOs on all matters of development and shall invite them to participate in policy making (p. 14).</p> <p>The government will involve NGOs in policy decision making on issues affecting them, particularly at the local levels, and every Ministry will designate officers to deal with matters relating to NGOs. The officers will work closely with each other and the NGOs Coordination Board(p. 25)</p>
<p>Penalties and fees should be reasonable</p>	<p>Section 16(1) The Board has the power to cancel or suspend a certificate if it is satisfied that the terms and conditions attached to the certificate have been violated or the organization has violated the Act.</p> <p>According to the NGO Coordination Rules:</p> <p>Rule17. (1) Where under section 16(1) of the NGO Coordination Act the Board is of the opinion that the registration of any organization should be cancelled, it shall send to the organization a notification of intended cancellation in Form 9 set out in the First Schedule taking every reasonable precaution to ensure fairness in the exercise of its discretion.</p> <p>Under Section 33(3,4), the Board has power to deregister an NGO where an official has been convicted of making, signing or uttering a false statement or declaration in support or request for exemption from payment of tax.</p>
<p>Options for the Way Forward:</p> <ul style="list-style-type: none"> • Organizations should be allowed to freely form networks • The right for NGOs to participate in policy formulation should be enshrined in the law. 	

¹⁵ *Toward an Enabling Legal Environment for Civil Society*, Statement of the Sixteenth Annual Johns Hopkins International Fellows in Philanthropy Conference Nairobi, Kenya, 2004.

¹⁶ Ibid

II KEY ISSUES

1. Fundamental Principles for the Protection of Civil Society Organizations

1.2 Registration must be supportive of the operations, and process of establishing civil society organizations.

<i>Essential Features</i>	<i>Relevant Legal and Policy Provisions</i>
<p>Procedures and criteria for registration should be publicly available, clear, and straightforward with limited discretion left to administrative officials.</p> <p>Registration procedures should be uniform wherever conducted.</p> <p>Governmental involvement in the establishment of a CSO, must be restricted to legitimacy issues e.g. determination of whether all formal requirements have been met.</p>	<p>The Specific Objectives of the NGO Policy Paper include: “To propose registration procedures, which are transparent, and which safeguard the freedom of association.” (p. 10)</p> <p>“NGOs shall be registered as per the provisions of the law.” (p.22)</p> <p>The NGO Coordination Act, section 10 provides information about the requirements and process of applying for registration.</p> <p>Upon the success of an application for registration, the NGO Coordination Board issues a certificate of registration. The law provides that a certificate of registration may contain such terms and conditions as the Board may prescribe. The terms and conditions are developed and reviewed by the NGO Coordination Board from time to time. Currently, they relate to issues of governance, areas of activity, submission of annual returns and tax exemptions.</p> <p>NGO Policy Paper (p. 28): NGOs must reach agreement with the NGO Coordination Board on a variety of issues (including capacity building and sustainability) before commencing activities.</p>
<p>Registration should not be refused if all requirements for registration are met.</p> <p>Reasons for rejection of registration must be clear</p>	<p>Section 14 of the NGO Coordination Act provides grounds for refusal of registration including: Proposed activities or procedures are not in the national interest.</p>
<p>Registered organizations may be required to present by-laws specifying the governance structure of the organization and the responsible officials.</p>	<p>Section 10(5), NGO Coordination Act: A certified copy of the proposed NGO’s constitution is required.</p>

<p>Registration should be in the hands of a body that is transparent in its dealings and independent of any undue government or other form of political interference or control.</p>	<p>NGO Policy Paper (p.19) provides: The NGO Coordination Board should operate without undue interference from the government ministries and departments.</p>
<p>The procedure must be quick or expeditious: The law must clearly state the maximum length of time it takes to consider an application for registration.</p>	<p>The law does not specify a time limit within which an application for registration should be processed.</p>
<p>Any refusal of registration should be subject to an independent procedure of review/appeal and the time period within which authorities must act should be given.</p>	<p>Section 19(1) of the NGO Coordination Act: Any organization which is aggrieved by a decision of the Board may within 60 days from the date of the decision, appeal to the Minister.</p> <p>The Minister shall issue a decision within 30 days from the date of the appeal.</p> <p>Section 19(3A) Gives NGOs the right to appeal to the High Court against the decision of the Minister. This must be done within 28 days of receiving the written decision.</p>
<p>Registration should not be subject to undue restrictions on the number of members or on minimum capital requirements</p>	<p>The law does not impose such undue restrictions.</p>
<p>Governmental authorities should maintain a registry of registered organizations, which should be publicly accessible and frequently updated.</p>	<p>Act 19 of 1990 and the NGO Policy Paper provides that the NGO Coordination Board shall maintain a register of NGOs.</p> <p>NGO Coordination Regulations (Rule 31) provide that the registry is open for public inspection.</p>
<p>Registration fees should not be prohibitive</p>	
<p><u>Options for the Way Forward</u></p> <ul style="list-style-type: none"> • The Act should offer guidelines for the formulation of terms and conditions attached to a certificate of registration • The Act should provide clear grounds for refusal of registration. • The law should specify a time limit within which an application for registration should be processed. 	

II KEY ISSUES

1. Fundamental Principles for the Protection of Civil Society Organizations	
<i>1.3 Financial sustainability</i>	
<i>Essential Features</i>	<i>Relevant Legal and Policy Provisions</i>
<p>CSOs have a right to seek and secure funding from any legal sources.</p> <p>CSOs should be permitted to compete for government funds in free and open competitions where specific guidelines have been established.</p>	<p>NGO Policy Paper (p.24) provides that NGOs may:</p> <ul style="list-style-type: none"> -Engage in all legally and acceptable fund raising activities. -Engage in competitive procurement activities
<p>Generally, CSOs should be exempt from income taxation so long as such income is used to support the basic purposes for which the organization was granted tax exemption.</p>	<p><i>Paragraph 10 of Schedule 1 of the Income Tax Act</i>, exempts charitable organizations from income tax and permits them to engage in economic activities provided that the profits are used to further their purposes.</p> <p><i>NGO Policy Paper(p. 25)</i> provides:</p> <p>The government may exempt NGOs from taxation</p>
<p>Special provisions should be made to allow income tax deductions for charitable contributions to public benefit organizations.</p>	<p><i>The Income Tax (Charitable Donations) Regulations published in June 2007</i>, allow persons who give cash donations to eligible civil society bodies to deduct the donation from their gross income before arriving at their taxable income.</p>
<p>The administration of the tax concessions (affecting the income and purchases of the organizations and those applicable to charitable contributions) should be:</p> <ul style="list-style-type: none"> • clear, • widely disseminated, • as automatic as possible, with limited discretion left to administrative officials, and • supported by an independent appeal procedure in case of disputes. 	<p>There is little reference to taxation issues in the NGO Coordination Act. However the NGO Coordination Regulations provide that when an NGO seeks exemption from tax, it should apply for exemptions through the Board to the Minister of Finance.</p> <p>Section 30(2) of the NGO Regulations states that the Board shall, on receipt of any application, forward it to the Minister of Finance together with its relevant recommendations.</p>

II KEY ISSUES

1. Fundamental Principles for the Protection of Civil Society Organizations

1.4 Good Governance and Integrity

<i>Essential Elements</i>	<i>Relevant Legal and Policy Provisions</i>
<p>The law should give CSOs a description of internal mechanisms of control.</p> <p>The law should prescribe minimum provisions which should be included in the governing documents of NGOs.</p>	<p>According to Schedule 2 of the NGO Coordination Regulations:</p> <p>The NGO Coordination Board ensures that NGOs adhere to certain statutory requirements at the time of registration by specifically including information in their constitutions regarding:</p> <ul style="list-style-type: none">• Their governance structure;• The purpose for which their funds may be used• Structure and management of the organization• The manner of amending their name, constitution and rules;• Quorums for and the dates for their general meetings; and• The manner of dissolution and disposal of property
<p>Methods of voluntary self regulation could be encouraged, through establishment of a listed code of standards, which umbrella organization/s should enforce.</p>	<p>NGO Policy Paper (p. 7) provides:</p> <p>The government recognizes that effective and efficient self-regulation is the basic foundation for an effective working NGOs sector.</p> <p>NGO Coordination Act</p> <p>24. (1) The NGO Council shall develop and adopt a code of conduct and such other regulations as may facilitate self-regulation by the Non-Governmental Organizations.</p>

II KEY ISSUES

2. Definition and Inclusivity of NGOs

2.1 Civil Society Organizations and Non-Governmental Organizations

The term “Civil Society Organization” (CSO) is used generally in Kenya to refer to the wide array of organizations, registered and unregistered, that operate in the realm between the family, the state and the market and are formed to promote the interests of their members, a portion of the public or the public at large. It includes a rich array of organizations including trade unions, trusts, foundations, faith-based and religious groups, community-based organizations, non-governmental organizations (NGOs), not-for-profit companies, cooperatives, social movements and networks.

The term “NGO” is used in Kenya to specifically refer to CSOs that are established for the public benefit, and which are registered by the NGO Coordination Board.¹⁷ Under the NGO Coordination Act No 19 of 1990, section 2:

Non-Governmental Organization” means a private voluntary grouping individuals or associations, not operated for profit or for other commercial purposes but which have organized themselves nationally or internationally for the benefit of the public at large and for the promotion of social welfare, development, charity or research in the areas inclusive of, but not restricted to, health, relief, agriculture, education, industry, and the supply of amenities and services.

Though NGOs are just a small part of the larger CSO sector, they are the most visible. Generally, there are two main types of CSOs recognized in Kenya: Organizations for the public benefit (NGOs) and membership organizations.

When the NGO Coordination Act became operational (June 15, 1992), all CSOs meeting the definition of “NGO” were expected to register themselves with the NGO Coordination Board,¹⁸ within six months. The registration period was later extended to February 15, 1993. However, many organizations that fit the definition of an NGO remain and continue to be registered under alternative laws. Though the Act was envisaged as a tool to provide an overarching, enabling legal framework for all CSOs that are organized for the public benefit, the other regulatory options remained available and some organizations have found it politically or functionally expedient to register under the other laws.

As a result, the function of registration and regulation of organizations that operate for the public benefit is spread across varied government agencies. The challenge today is that there is a great deal of inefficiency in the overlapping and inconsistent functions of these bodies.

2.2 Definition of Charitable Organizations and the Public Benefit

Generally, most of Kenya’s substantive laws codify the common law rules of England. This has implications for the manner in which NGOs are regulated in that common law focuses on the *purposes* of the organizations. Hence, common law permits the incorporation of various types of companies, societies, associations, etc. so

¹⁷ The NGO Coordination Board is a Government Agency which exists to register, co-ordinate and facilitate the work of all national and international NGOs operating in Kenya.

¹⁸ Section 25(1) and (2) NGO Regulations 1992, Subsection 2 provides: Upon registration under the Act, the organization referred to shall cease to operate under any other written law in Kenya or on the basis of any agreements with the Government as the case may be.

long as the purposes of the organization are deemed to be charitable.¹⁹ The term charitable has been defined in various ways, depending on what particular countries recognize as being activities serving the public benefit.

In Kenya, the term “public benefit” has not been expressly defined. Nonetheless, the definition of a charitable organization is found in the Income Tax Act²⁰. It is:

“an institution, body of persons, or irrevocable trust, of a public character established solely for the purposes of the relief of the poverty or distress of the public, or for the advancement of religion or education, established in Kenya; or whose regional headquarters is situated in Kenya, in so far as the Commissioner is satisfied that the income is to be expended either within Kenya or in circumstances in which the expenditure of that income is for purposes which result to the benefit of the residents of Kenya.”

The Commissioner of Income Tax has the discretion of determining, on a case by case basis, what is for the benefit of the residents of Kenya.

Under the NGO Coordination Act of 1990, NGOs are established for the benefit of the public at large and for the promotion of a variety of objectives. The Act of 1990 is the only legal framework which was specifically promulgated to regulate civil society organizations that are established for public benefit purposes.

One of the specific objectives of the NGO Policy is to provide an operational definition of NGOs. The Policy provides the following definition of NGO:

An NGO is a voluntary organization or grouping of individuals or organizations which is autonomous and not-for-profit sharing; operating in the voluntary sector; organized locally at the grassroots level, nationally, regionally or internationally for the purpose of enhancing the legitimate economic, social and/or cultural development or lobbying or advocating on issues of public interest or interest of a group of individuals or organizations; but shall not include Trade Unions, social clubs and entertainment sports clubs, political parties, private companies or faith propagating organizations.

Unlike the NGO Coordination Act, the term *public benefit* is absent in this definition. While the phrase *public interest* is used in the definition, it requires defining. However, by excluding membership based organizations (Trade Unions, social clubs and entertainment sports clubs, political parties, private companies or faith propagating organizations) from the definition of NGO, the Policy Paper implicitly suggests that the term NGO refers to public benefit organizations.

Options for the Way Forward

1. The reviewed law should contain reference to the term “public benefit”. The law should also refer to the principles of or guidelines for determining whether an activity is for the public benefit. The resulting definition of an organization for the public benefit should correspond with the definition of charity in the Income Tax Act.
2. All organizations established and operated for the public benefit should be regulated under one Act.

¹⁹ Stephan Klingelhofer and David Robinson “Law and Society in the South Pacific: Challenges and Opportunities, International Best Practices and Global Developments” ICNL, 2004, p. 5

²⁰ The First Schedule, Paragraph 10, of the Income Tax Act, Cap 470, Laws of Kenya

3. Motivation and Value Added by NGO Registration

The principle of the freedom of association allows all Kenyans to establish associations without necessarily registering them. People should be encouraged to associate around issues and problems that they try to solve for themselves or around interests and pursuits they wish to promote. However, once organizations apply for public funds or aspire to raise resources for public benefit purposes, checks and balances should be put in place to protect the public interest. Registration is one such mechanism and self-regulation is another.²¹

CSOs in Kenya are diverse and governed by a plethora of registration and regulation regimes. Available legal organizational forms of CSOs include: Non-Governmental Organizations, Companies Limited by Guarantee, Societies, Trusts and Self-Help Groups. The following table is a synopsis of the organizational forms, the purposes they can pursue and some of the merits or challenges posed by each type of registration.

Organizational Forms	Purpose of CSO	Motivation of registration	Challenges
(1) Non-Governmental Organizations (NGOs)	Public benefit and promotion of social welfare, development, humanitarian relief or research in the areas inclusive of, but not restricted to, health, relief, agriculture, education, industry, and the supply of amenities and services.	Upon registration, the NGO becomes a body corporate capable of carrying out everything a legal person can. Organizations that have received their income tax exemption certificate from Kenya Revenue Authority automatically become charitable and able to receive: - Remission from Customs and Excise Duty - VAT Remission - tax deductible donations	Requires a well informed governance body, committed to ensuring that the organization is effectively and properly run. Errant officials can put the organization's existence at risk as penalties can apply generally to the organization. Reporting and compliance with various requirements are quite high. Registration fees are high especially for small CSOs.
2) Companies limited by guarantee	Any legal purpose	Body corporate with capacity to operate as a legal person. Perpetual succession Liability of members is limited to a nominal amount Organizations that have received their income tax exemption certificate from Kenya Revenue Authority automatically become charitable and able to receive: - Remission from Customs and Excise Duty - VAT Remission - tax deductible donations	Registration is complicated and time consuming and requires competent technical and legal expertise to draw up the memorandum and articles of association. Governance and management requires knowledgeable persons. Time frame for registration of companies is similar to that of NGOs and both require clearance from the security intelligence services.

²¹ PEN 'Input for web-based consultations with CSOs' 2009

<p>3) Trusts</p>	<p>Religious, educational, literary, scientific, social, athletic, or charitable purposes</p>	<p>Registration requirements are few</p> <p>Trusts operate under minimum supervision</p> <p>Trusts are highly flexible and adaptable to circumstances.</p> <p>Organizations that have received their income tax exemption certificate from Kenya Revenue Authority automatically become charitable and able to receive:</p> <ul style="list-style-type: none"> - Remission from Customs and Excise Duty - VAT Remission - tax deductible donations 	<p>Trustees are personally liable in unincorporated trusts</p> <p>To own property like land, trustees have to apply to the Minister of Lands for a certificate of incorporation</p> <p>Trusts may also establish other corporate bodies.</p>
<p>4) Societies</p> <p>The definition specifically excludes trade unions, cooperatives, corporations, and certain other entities.</p> <p>Hence, political parties, self-help groups, neighbourhood associations and other charitable organizations can be registered as societies.</p>	<p>Any legal purpose</p>	<p>Societies generally operate under minimum supervision and can pursue any object as long as it is legal.</p> <p>Organizations that have received their income tax exemption certificate from Kenya Revenue Authority automatically become charitable and able to receive:</p> <ul style="list-style-type: none"> - Remission from Customs and Excise Duty - VAT Remission - tax deductible donations 	<p>Officers can be held personally liable</p> <p>Wide discretion of the Registrar of Societies and sweeping powers of government officials to investigate, arrest, enter and search the premises of any society.</p> <p>The law imposes heavy penalties for failure to comply with reporting requirements including fines and imprisonment.</p>
<p>5) Self-Help Groups</p> <p>These include <i>harambee</i> or self-help groups and community-based organizations (CBOs) such as neighborhood associations.</p>	<p>They advance the interests of their members and the immediate needs of the local communities in which they operate. Mainly found at the village and community level.</p>	<p>Provide social and political legitimacy to the groups</p> <p>Ease of registration procedure</p>	<p>Group cannot act as a legal person as registration does not confer legal identity</p>

Sessional Paper No. 1 of 2006 provides that the existing fragmented and uncoordinated legal and institutional framework gives NGOs multiple avenues for registration. This makes coordination difficult. The NGO Policy recommends that the overlapping legislative acts should be harmonized.

Under the NGO Coordination Act, it is illegal for any person to operate an NGO in Kenya without registration and a certificate under the NGO Coordination Act. In practice, however, many CSOs that fall within the definition of NGO have opted to legally register under alternative frameworks. In addition, tax benefits are generally available to CSOs which are organized for the public benefit, regardless of the legal framework under which they are registered.

This begs the question: If the key benefits for registering under the NGO Coordination Act, that is, legal identity and access to tax benefits can be gained by registering under other legal frameworks, what should be done to encourage CSOs that are established for the public benefit, to register under a harmonized legal framework? What will the framework entail?

Options for the Way Forward:

1. By virtue of the tasks they perform, CSOs that are operated for the benefit of the public at large or significant portions of it, are permitted certain privileges. In most countries, the difference between public benefit and other organizations is especially crucial for determining which organizations qualify to get tax benefits²² and which ones do not. This is also the case in Kenya. However, **the NGO Coordination Act will have to provide other incentives, in addition to tax benefits, if it is to accomplish its original objective of encouraging all public benefit CSOs to register themselves under a revised, harmonized framework.**
2. The regulatory framework for public benefit CSOs will require to be harmonized. The following options regarding the structure of the framework have been tendered by members of the sector:
 - a. Set up an ***Umbrella Framework*** where all CSOs that undertake work for the benefit of the public are registered. The implications of the framework are listed below.
This approach may:
 - Require other legislative frameworks to be modified accordingly.
 - Obligate CSOs to register anew under the framework in order to continue with their operations.
 - Have high cost implications especially as the NGO Coordination Board or new public benefit body will have to develop systems to accommodate and process the multitude of organizations that require registration.
 - Have legal repercussions as CSOs that are legally registered under alternative frameworks might challenge the revocation of their legitimacy
 - Require the registration agency to come up with new criteria for distinguishing public benefit CSOs. For instance, operational coverage/size, that is, the micro CBO registered at the local level vs. the more complex NGO registered at the national level.
 - b. Set up a ***Dual Framework*** where CSOs retain their legal registration status but need to acquire public benefit CSO status in order to operate as organizations for the public benefit.

Ideally, the law should provide the basis for the existence of a variety of CSOs. This option therefore allows organizations which are established or incorporated under other laws to apply for public benefit status, provided they satisfy the relevant criteria set out in the law for registration of organizations for the public benefit.

A direct link will therefore be made between legal status and recognition of public benefit status. Acquisition of the public benefit status will imply that the CSO is already in conformity with other legal and regulatory

²² Stephan Klingelhofer and David Robinson, p. 5

requirements. For example in South Africa, in order to become an approved Public Benefit Organization (PBO), an organization must be a civil society organization in the form of a Section 21 Company, a Trust, or an Association of Persons. Additionally, it must carry on one or more public benefit activities (PBAs) list in Part I of the Ninth Schedule to the Income Tax Act.

Implications: This approach will require:

- All CSOs that are doing public benefit work to register under the dual framework in order to receive tax benefits
- The public benefit agency to set up structures that operate in harmony with other CSO registration agencies
- Delegation, by KRA to the public benefit agency, of the power to grant charity or public benefit organization status.

4. NGO Coordination Board Roles and Functions

The legal significance of the public benefit organization status is to ensure public accountability. Authorities have a legitimate interest in ensuring that civil society organizations that claim to serve the public actually do so and that tax or other benefits are not wrongfully claimed or used.²³

Around the world, determination of public benefit status is the responsibility of specific agencies, such as the following:

Country/s	Determining and Supervisory Agency
European Countries Belgium, Portugal, and Denmark	Ministry with diversified portfolio e.g. in former socialist countries, the Ministry of Finance is actively involved
England and Wales	Charity Commission – a quasi-governmental agency under the Home Secretary with a great deal of independence
Kenya	The Commissioner of Income Tax – Kenya Revenue Authority (KRA).
Pakistan	A Non-Profit Organization (NPO) certification program run by Pakistan Centre for Philanthropy (PCP). Certification forms the basis for NPOs to get tax benefits from the Government.
Philippines	The Philippine Council for NGO Certification (PCNC) - a body consisting of broad representation including six of the Philippine’s largest national NGO networks. The government delegated to this body the authority to certify NGOs for tax benefit purposes.
SA	The Commissioner for the South African Revenue Service (SARS)
U.S.	National tax authorities or administrative agencies. They use the IRS Code, regulations issued by IRS, tax rulings and case law.

One of the specific objectives of the NGO Policy (p. 9) is to “provide a broad framework for legal and institutional arrangements to facilitate the operations of NGOs in Kenya”. Proposals have been made to set up a public benefit commission or agency to regulate organizations established for the public benefit.

A public benefit commission is generally established as an independent administrative body (quasi-government/ autonomous organ of the government) composed of representatives of the government, organizations established for the benefit of the public and the public. Ideally, it should:

- Have power and responsibility to grant public benefit status and exercise oversight of organizations for the public benefit (PBOs).
- It should also have power to apply administrative sanctions to PBOs that fail to carry out their purposes and activities in accordance with the law and to de-certify such PBOs after giving them notice and an opportunity to correct the problem.
- Maintain a website with a list of all certified PBOs

²³ Stephan Klingelhofer and David Robinson, op. cit.

- Carry out education and support programs for the sector, setting best practice guidelines, model documents, training courses, etc. in consultation with the sector and with NGO agencies that promote and enforce standards on their members.

Advantages of a public benefit commission

- It develops expertise and competence in dealing with PBOs by exclusive devotion to PBOs
- A commission combining both public and private members would do a better job of regulating the sector than pure governmental regulation or unfettered self-regulation.

The NGO Policy provides the NGOs Coordination Board with registration and oversight functions including:

- Registration and deregistration of NGOs
- Receiving and discussing reports of NGOs
- Monitoring and evaluation of NGO activities

The Role and Functions of the NGO Coordination Board listed in the NGO Coordination Act and the NGO Policy do not include the *determination of public benefit status*.

Key Options for the Way Forward

1. The NGO Coordination Act should **retain the basic functions** of the NGO Coordination Board regarding Registration, Maintenance of Registry, Generation and Dissemination of information on the sector.
2. The reviewed Act should **expand the existing functions** of the NGO Coordination Board to include those of a public benefit commission but ensure that adequate checks and balances are established e.g. appeal mechanisms and measures to safeguard independence.
3. Proposals on Safeguarding Independence
“The NGO Policy Paper provides that the NGO Coordination Board should operate without undue interference from the government ministries and departments”(p.19). To ensure this:
 - The Board should be funded from the Consolidated Fund
 - Board membership should be drawn from the sector (which should be the majority) as well as representatives from key ministries and other respectable Kenyans.
 - Selection criteria for appointment of members of the Board will have to be clear to avoid manipulation
 - An oversight body, to hold the NGO Board accountable can be set up.
4. The board should also play an arbitration and advisory role within the sector.
5. The NGO Coordination Board should be lean and efficient.
6. The NGO Coordination Act, which sets up the NGO Coordination Board as “a quasi-governmental agency, established to streamline the registration, coordination and regulation of NGOs” does not define the term “coordinate”. The NGO Policy paper does not define the term either. The reviewed Act should clarify the meaning of the word.

Examples of Public Benefit Commissions

1. Certification Commission in Moldova

It is consciously modeled on the Charity Commission of England and Wales. The commission was established through Moldovan law, to act as a professional decision-making authority, sufficiently independent from political influence.

It is responsible for certifying not-for-profit organizations – including both associations and foundations – as “public benefit” organizations.

The Commission consists of nine members, who are a mix of state and NGO representatives. The law requires the President, Parliament and Government each to appoint three members to the Commission. It also states that one of each group of three should represent an NGO.

Strategy and Objectives of the Commission

The main objective of the Certification Commission is to review and evaluate NGO applications for public benefit status.

Functions and Powers of the Commission

The Commission is empowered to engage in the following activities:

- To certify NGOs as public benefit organizations;

2. Charity Commission of England and Wales

The Charity Commission for England and Wales is established by law as the regulator and registrar of charities in England and Wales. The Commission’s aim is to provide the best possible regulation of these charities in order to increase charities’ efficiency and effectiveness and public confidence and trust in them. Most charities in England and Wales have to register with the Commission, which is responsible for maintaining the Register of Charities. Charities with yearly incomes over £10,000 must by law send the Commission their accounts and report every year within 10 months of the end of their year-end. These reports are publicly available and are useful in helping the commission identify areas where charities require assistance. The Commission also names charities that have seriously defaulted on these legal obligations on its **Defaulting Charities** finder facility. See www.charity-commission.gov.uk

- To issue the official state certificate recognizing public benefit status, or to decline the application for such a certificate;
- To maintain the Register of Public Benefit Organizations;
- To receive and examine petitions from natural persons and legal entities related to the competence of the Commission.

Weaknesses:

- The Commission does not have any ongoing supervisory role over PBOs. It is not clear from the law or from regulations that the Commission has the authority to suspend the public benefit status of an NGO that violates the law.
- The actual independence of the Commission is questionable as all nine Commissioners are appointed by state officials.
- The Commission has not prepared any detailed procedural regulations and the register of public benefit organizations is not accessible to the public.
- Though NGOs have the right, in law, to appeal any adverse decision of the Commission, in practice no appeal has been filed.

5. NGO Accountability and Transparency Requirements

NGOs operate for the benefit of the public, with public support. Therefore, they should be accessible and responsive to members of the public who express interest in the affairs of the organization. They should also comply with legal and regulatory requirements for reporting. In addition, NGOs can address the issue of accountability collectively, through establishing self-regulation mechanisms such as codes of conduct and certification schemes.

One of the specific objectives of the NGO Policy (p. 10) is to promote transparency, accountability and awareness among NGOs themselves, the government and other stakeholders involved in the sector.

<i>Essential Elements</i>	<i>Relevant Legal and Policy Provisions</i>
<p>Reporting requirements should be sensible, not unduly burdensome, and, where possible, be harmonized with reporting requirements from other public and private bodies.</p>	<p>NGO Coordination Act 24(4): The Board shall prescribe rules and procedures for audit of the accounts of Non-Governmental Organizations, which rules shall be submitted to the Board for ratification.</p> <p>The NGOs Regulations (1992)²⁴ and the NGO Coordination Act of 1990²⁵ clearly state that NGOs must submit their annual returns to the NGO Coordination Board within three months of the end of their financial year, in the prescribed format of Form 14, which is set out in the schedule to the Regulations.</p> <p>NGO Policy Paper (p.23): NGOs shall where necessary disclose their sources of funds and purposes for which the funds will be utilized to the NGOs Coordination Board.</p> <p>NGO Policy Paper (p.24), provides: NGOs shall</p> <p>iv. Follow prudent financial management practices and shall be required to avail such statements to their stakeholders for auditing purposes.</p>
<p>Government should establish procedures for receiving and storing required reports from CSOs,</p>	<p>The Minister may make rules prescribing the format of the reports of activities to be submitted by the Non-Governmental Organizations NGO Coordination Regulations 32(e)</p> <p>One of the functions of the NGO Board is to receive and</p>

²⁴ Rule 24

²⁵ Section 7(c)

	discuss the annual reports of the Non-Governmental Organizations; NGO Regulations 7(c)
Government must make the reports accessible to the public.	Act 19 of 1990 and the NGO Policy Paper provide that the NGO Coordination Board shall maintain a register of NGOs. NGO Coordination Regulations (Rule 31) provide that the registry is open for public inspection.

Options for the Way Forward

Accountability is the process by which a CSO holds itself openly responsible for what it believes, what it does and what it does not do in a way which shows it involving all concerned parties and actively responding to what it learns.

- NGOs (organizations for public benefit) should ensure that the communities they work with have access to information. NGO Policy Paper (p. 24) provides that NGOs “shall be required to avail such (financial) statements to their stakeholders for auditing purposes”.
- NGOs should design the right mechanisms to ensure implementation of accountability and transparency expectations.
- Government should inform NGOs about processes and procedures that they need to follow. NGO Policy Paper (p. 14) provides that “the government shall facilitate exchange of information and regular dialogue with NGOs and other stakeholders”.
- The provisions on accountability and transparency should be enforced.
- Penalties should be reasonable and uniformly applied especially where small NGOs are concerned.

6. SELF REGULATION

6.1 History

Kenya has a place in history. For the first time in Africa, and outside of professional organizations such as law societies, medical and accountant professions, a government expressly gave power to NGOs to regulate themselves. Self-Regulation, which was largely to be enforced through the NGO umbrella body – the NGO Council - was recognized and provided for in the NGO Law.

The Kenya NGO self-regulatory framework consists of various components including:

- The NGO Code of Conduct, where core values aimed at setting standards in the sector are expressed
- A Regulatory Committee of the NGO Council, which addresses complaints regarding members of the NGO Council. It functions through the use of varied sanctions and penalties.
- The General Assembly of the NGO Council

Weaknesses of the Kenya NGO Self-Regulation framework have been identified as follows:

- This framework is overwhelmingly reliant on the voluntary submission by NGOs to the self-regulatory mechanisms
- The decisions of the Regulatory Committee are subject to endorsement by a tribunal of the Council's General Assembly, which is made up of the 6000 + members of the NGO Council.
- Absence of an independent review body (outside the NGO Council) to provide checks and balances in cases where the self-regulatory mechanism fails.
- Lack of indemnity that would enable members of the regulatory committee to carry out their roles effectively.
- Absence of procedural rules or guidelines for dealing with complaints lodged with the Council against members

As a result, Kenyan NGOs have suffered a loss of confidence in their umbrella association's ability to enforce self-regulation.

6.2 Current Efforts to Promote Self Regulation

Between 2006 and 2009 a network of CSOs have been pursuing a process of developing sector-wide standards, building the capacity of CSOs to comply with the standards and establishing an institution – VIWANGO - to assess compliance with the standards. The initiative demonstrates that many CSOs appreciate the grave need to put their houses and the sector in order. Through this sector-wide initiative, CSOs are sending an important message to the government and all potential partners that they intend to conduct themselves in a professional, competent and transparent manner. The initiative will therefore lay the foundation for improved self-regulation of the sector.

6.3 KEY LEGAL AND POLICY PROVISIONS ON SELF-REGULATION

Summary

The Government recognizes self-regulation as the basic foundation for an effective NGO sector. However, the NGO Policy requires NGOs to become members of the NGO Council for effective self-regulation to take place. The Policy lists some of the NGO Council's responsibilities as enforcement of a Code of Conduct and support of initiatives aimed at self regulation. The NGO Coordination Act establishes the NGOs Council as a collective

forum for NGOs, with responsibility to advise the Board regarding the Code of Conduct. The NGO Policy mandates the NGO Coordination Board to oversee self-regulation and to develop and publish a code of conduct for the regulation of NGOs and their activities.

The Provisions in Detail

The NGO Coordination Act 1990

1. Section 23 and 24 of the NGO Coordination Act, 1990 provides for the establishment of a Kenya National Council of Voluntary Agencies, as a collective forum for NGOs. The Council is to develop and adopt a code of conduct and regulations to facilitate self regulation by NGOs on a variety of matters of national interest.

Through an amendment in the Statute Law (Miscellaneous Amendment Act) Bill, 2007, the Kenya National Council of Voluntary Agencies is substituted with the Non-Governmental Organization's Council. The council therefore no longer retains the word "national".

2. The Statute Law (Miscellaneous Amendment Act) Bill, 2007, which amended the NGO Coordination Act, 1990:

a. Deletes section 24(1) of the NGO Coordination Act which provides "The Council shall develop and adopt a code of conduct and such other regulations as may facilitate self-regulation by the Non-Governmental Organizations" and substitutes it with the following:

"The Council shall advise the Board with respect to the code of conduct"

b. Deletes paragraph 7(h) of the NGO Coordination Act, which provides that: The NGO Coordination Board shall "receive, discuss and approve the code of conduct prepared by the Council for self-regulation of the Non-Governmental Organizations and the activities in Kenya" and substitutes it with the following

"the NGO Coordination Board will develop and publish a code of conduct for the regulation of NGOs and their activities in Kenya"

The NGO Policy Paper Provisions on Self Regulation

1. The government recognizes that effective and efficient self-regulation is the basic foundation for an effective working NGOs sector (p.7).
2. The Paper provides for a National Council of NGOs, which NGOs should work under.
3. *"For the purpose of self-regulation and networking among the NGOs, NGOs shall be responsible to the NGOs Council."* (p.20)
4. *"Every NGO shall become a member of the NGOs Council after registration by the NGOs Coordination Board."*(p. 23)
5. *The NGOs Council will retain the key responsibility for enforcement of the Code of Conduct and self-regulation in the sector.* (p.18)
6. The Board shall ensure that self-regulation takes place in an effective manner (p. 15).
7. The NGOs Council will encourage the building of capacity within the NGO sector through:
 - a. Requiring NGO networks at all levels thus enabling NGOs to help each other and to create inter-sectoral synergies.
 - b. Supporting the initiatives of the NGOs Council members aimed at self-regulation of the NGOs sector

OPTIONS FOR THE WAY FORWARD

Generally, two options have been proposed:

1. Retain the NGO Council within the Act. If the sector chooses this option, it must learn from and address the many loopholes that have allowed the Council to become politicized, disintegrate and eventually undermine the NGO sector. It will have to determine ways in which to strengthen the NGO Council including ensuring an independent source of financing and that there is effective oversight of its governance. Actions will specifically include adopting the following proposals contained in the NGO Policy (Sessional Paper No 1 of 2006), that is:
 - a) The NGO Coordination Act of 1990 will need to be revised in order to formally establish the Regulatory Committee
 - b) The self-regulatory role of the NGOs Council and its members will be enhanced through strengthening the regulatory committee of the NGO Council. The committee will retain the key responsibility of enforcing the Code of Conduct.
 - c) The regulatory committee will be the first stage mediation/arbitration body on matters relating to the Code of Conduct.

Other proposals:

- d) An independent body for dispute resolution should be set up.
 - e) The roles of the NGO Council and the NGO Coordination Board, regarding self-regulation will need to be clearly demarcated and articulated.
2. Establish NGO Council/s outside the Act: Under this option, the revised law will embrace the principle of self regulation but omit specifying the mechanism through which it is exercised. NGOs will be allowed to establish self regulation bodies in their various sub-sectors. Ideally, the sector should be encouraged to form umbrella organizations which can promote self-regulatory goals and ethical standards for the furtherance of public confidence in the sector.

If the sector chooses this option, it will need to start building self-regulation mechanisms, in order to ensure that there is no void after the Act becomes operational. The merit of this option is that the NGO umbrella bodies are far less likely to become political since they are not embedded in the law and are organized and operated by NGOs themselves.

The self- regulation roles of the NGO umbrella/network bodies will need to be clearly defined, recognized and supported by the NGO Coordination Board.

EXAMPLES OF VOLUNTARY APPROACHES TO SELF-REGULATION

Generally, self-regulation initiatives fall into one of three categories:

- Aspirational codes of principles/ethics that signatories strive to achieve;
- Codes of conduct in which more defined standards are set;
- Certification schemes where compliance with clear standards is verified by a third party.

Regulatory System	Accreditation and Certification Programs or Clubs	Collective self-regulation	Voluntary Standards/Code of Conduct
Implementation Agency	Third Party Agency or Nonprofit/NGO association	Nonprofit/NGO association (may be mandated by government)	Nonprofit/NGO association
Scope and regulatory coverage	Limited to participants	National or sectoral	National or sectoral
Examples	Pakistan Centre for Philanthropy Maryland Association of Nonprofit Organizations: Standards of Excellence The Philippine Council for NGO Certification (PCNC)	Non Governmental Council Kenya	Code of Ethics of the Canadian Council for International Cooperation

An inherent weakness of self-regulatory mechanisms is their voluntary nature, though a number of incentives – some more persuasive than others – exist for NGOs to become involved in self-regulation initiatives.²⁶ Several models that aim to overcome this weakness are outlined below.

1. **PAKISTAN CENTRE FOR PHILANTHROPY (PCP)**

Background

The inadequacy of state regulation and voluntary adherence to codes of conduct created the way for a NPO certification regime developed by the Pakistan Centre for Philanthropy (PCP). PCP's NPO certification programme seeks to establish benchmarks and set standards in critical areas of internal governance, financial management, and programme delivery.

Certification is based on an objective and transparent system of professional evaluation of NPOs, done on a voluntary basis. If an NPO meets the required criteria, it is certified as a credible organisation. If it does not, it is

²⁶ Robert Lloyd and Lucy de Las Casas "NGO self-regulation: enforcing and balancing accountability" *Alliance Extra*, December 2005

then linked with specialised capacity building organisations that provide professional support to help build organisational capacity so that certification standards may be met.

PCP's certification also forms the basis for NPOs to get a tax exemption from the Government. PCP presented the idea to the government of Pakistan that it could act as a certification mechanism for NPOs seeking government tax benefits. PCP now has the status of an official agency to certify NGOs/NPOs applying for tax benefits such as tax exemption or donee status, which allows private givers or philanthropists to give tax deductible donations.

Concerns

(a) The mechanism should be widely acceptance and high levels of confidence in its objectivity are vital.

(b) The mechanism has to certify a sizeable number of NPOs in order to be viewed as successful. This requires huge financial inputs, without which it will have limited outreach and limited impact.

(c) Some civil society organizations claim that PCP – an independent agency - lacks ownership in the sector and have questioned the decision to allow PCP to exercise a purely government authority of granting tax concessions.

(d) Procedures developed are very detailed and may create undue burdens for small NPOs.

2. THE PHILIPPINE COUNCIL FOR NGO CERTIFICATION

The Philippines has a strong tradition of independent civil society, which is supported by the political culture of the state.

The Philippine Council for NGO Certification (PCNC), is a body consisting of broad representation including six of the Philippine's largest national NGO networks, private sector and a member from the Tax Authority. It provides the world's first example of government delegating to a civil society organization, authority to certify NGOs for tax benefit purposes.

PCNC approached the Department of Finance and signed an agreement, under which it was given the authority to certify NGOs applying for donee institution status²⁷ based on specific standards. The certification serves as a basis for the revenue department to grant donee institution status.

The goal of PCNC is not to regulate the kind of activities NGOs engage in. Rather, it is to ensure that NGOs meet minimum criteria for programme and financial management, governance and accountability.

PCNC also monitors NGOs with a Code of Conduct and can recommend withdrawal of registration and tax privileges from NGOs who fail to comply.

Concerns

- Numerous issues need to be addressed with this type of self-regulation mechanism including the degree of delegation of powers, manner of selection of representatives from the civil society sector, and how to ensure effective enforcement.
- To succeed, the agency needs to meet government requirements, be accepted by NGOs themselves, and be seen as a credible, independent body by the wider public.
- The mechanism has to certify a sizeable number of NPOs in order to be viewed as successful.
- Concerns have been raised as to whether the certification requirements discriminate against smaller NGOs.
- Has been slow to develop a sound and workable process of giving PBO status.

²⁷ A done institution is one which can receive donations that allow the donors the benefit to claim tax deductions or credits.

3. MARYLAND ASSOCIATION OF NONPROFIT ORGANIZATIONS – MARYLAND NONPROFITS

Maryland Nonprofits is a state-wide membership association of more than 1200 nonprofit organizations, representing all regions of Maryland State and all sectors of the nonprofit community. Through its program – the Initiative on Ethics and Accountability in the Nonprofit Sector - Maryland Nonprofits developed “The Standards for Excellence,” voluntary guidelines for ethical conduct by nonprofit organizations. The standards build on the foundation of local, state and federal laws and go even further. They provide benchmarks to determine how well an organization is fulfilling its obligations to its beneficiaries, to contributors, and to the public.

Maryland Nonprofits also provides a voluntary certification process of examining compliance with the Standards.

4. Code of Ethics of the Canadian Council for International Cooperation

The Canadian Council for International Co-operation (CCIC) comprises about 100 Canadian voluntary sector organizations. The Council was one of the first networks of civil society organizations in the world to adopt a code of ethics that included a collective statement of “Principles of Development” and a “Code of Conduct”. In 2009, the code was updated and is now known as the Code of Ethics and Operational Standards. This document more clearly outlines the ethical principles that CCIC and its Member Organizations must accept and promote. The Code of Ethics and Operational Standards is the core element of a broader ethics program that includes advice, learning events and resources to support CCIC and its Member Organizations understanding and improvement of development and operational practices. See www.ccic.ca/about/ethics.