

SIXTH DRAFT

ASSESSMENT/STRATEGY
DEMOCRACY AND GOVERNANCE
KENYA

January 31, 1996

Preliminary Draft
Do Not Circulate

Acronyms and Abbreviations

KANU	Kenya African National Union
FORD-K	Forum for the Restoration of Democracy--Kenya
FORD-A	Forum for the Restoration of Democracy--Asili
DP	Democratic Party
UNDA	United Democratic Alliance (opposition coalition)
PAC	Public Accounts Committee
PIC	Public Investments Committee
IPAR	Institute for Policy Analysis and Research
KIPPRA	Kenya Institute for Public Policy Research and Analysis
IEA	Institute for Economic Affairs
ICEG	International Center for Economic Growth
AERC	African Economic Research Consortium (regional)
ICJ	International Commission of Jurists
LSK	Law Society of Kenya
KHRC	Kenya Human Rights Commission
PLI	Public Law Institute
CCCC	Citizens ' Coalition for Constitutional Change
IED	Institute for Education in Democracy
CGD	Centre for Governance and Development
FIDA	International Federation of Women Lawyers
FAWE	Forum for African Women Educators
NCWK	National Council of Women of Kenya
NCCK	National Council of Churches of Kenya
CPK	Church of the Province of Kenya
PCEA	Presbyterian Church of East Africa
AAI	African-American Institute
IRI	International Republican Institute
IFES	International Foundation for Electoral Systems
NDI	National Democratic Institute
PCDC	Professionals Committee for Democratic Change

**Preliminary Draft
Do Not Circulate**

Table of Contents

I. Executive Summary	1
II. Assessment and Investment Opportunities	8
A. Legal and Constitutional Reform	9
B. Liberalizing the Electoral Environment	16
C. Reforming Electoral Administration	17
D. Political Parties	21
E. Civil Society	27
Women's Empowerment	33
F. Public Sector Institutions	35
Parliament	36
Judiciary	40
III. Strategy and Program	45
A. Promoting Legal and Constitutional Reform	47
B. Enhancing Protection of Citizens' Rights	50
C. Increase Capacity to Administer Free and Fair Elections	52
Strategy under Alternative Scenarios	58
Conclusions -- Institution-Building in Civil Society	59
IV. Proposed Strategy, On-going D/G Project and Management Scenarios	60

**Preliminary Draft
Do Not Circulate**

- V. Appendix 1: The Administration of Justice in Kenya
- Appendix 2: Brief note on the political historical context
- Appendix 3: Persons contacted

Preliminary Draft
Do Not Circulate

I. Executive Summary

Concern with democratic and accountable governance in Africa arises in the context of the gains made in economic liberalization in the past decade. Democracy and governance issues are felt to be directly related to the sustainability of the gains of economic liberalization, although the causal relationship is a complex and multi-faceted one. Kenya has made several advances in the economic sphere, in liberalizing product and factor markets and reducing the role of the state in economic enterprise. Politically, however, Kenya's transition from a one-party system exercising close control over both political and economic life, to a more competitive polity regulating a liberalised market economy, is proving difficult.

Democratic governments are characterized by institutions that are *responsive, efficient, and fair* in the way they carry out basic tasks. They take the needs and priorities of citizens into account, both in policy choice and in service delivery. They carry out community functions in a cost-effective, timely manner. They accord citizens equal respect under the law and resolve disputes according to impartial procedures. The overall goal of USAID's program in Kenya is to foster responsive, efficient and fair public institutions which will sustain the gains of economic liberalization.

USAID Kenya's Program on Democracy and Governance

Many of the projects USAID supports in Kenya are designed to enhance democratic governance. Some of these have been funded under a Democracy and Governance Project, which currently supports such activities as public interest litigation, journalist training programs, and an independent public policy research institute. All of these are designed to increase the constituency for responsive and effective public sector institutions.

Others take the form of special participatory management groups constituted under more conventional USAID programs in the areas of population and health, natural resource management, agriculture, and even feeder road construction. In these, Kenyans living in rural areas develop skills that help them take a more active role in deciding what they want for their communities and in organizing themselves to work toward common goals. Further, productive linkages to government policy-making agencies have been constructed and civil society advocacy efforts fostered in these arenas, especially in the population and health area and increasingly in the important agriculture and manufacturing sectors. USAID's strategy has explicitly incorporated elements of democratic participation, advocacy, and the pursuit of greater accountability centrally in the sectoral portfolio.

**Preliminary Draft
Do Not Circulate**

Still other initiatives, such as a recent co-sponsored workshop on court administration, and a parliamentary study tour, have come from the Mission's Human Resource Development and Administration program. Finally, State Department 116E funds have financed a wide-variety of civic education and human rights awareness projects. The current budget for the Democracy and Governance program, from 1994-1999 is \$7 million, of which about \$1.5 million has already been spent or earmarked.

The Mission is additionally concerned with the development of a strategy which will prevent decapitalisation of the major gains made in the field of population and health; Kenya is Africa's major success story in the precipitous decline in fertility attendant on USAID's "social marketing" strategy, as well as in reform in the policy area of health care finance.

Assessment Objectives and Methodology

In September-October 1995, USAID Kenya embarked on a review of its democracy and governance strategy. A three-person team spent five weeks eliciting Kenyan views about USAID's current directions in D/G, and potential alternative modes to support local efforts to build more effective and democratic public sector institutions. The team spoke with lawyers, judges, the clergy, civil servants, businessmen, members of parliament, journalists, and other professionals, and built on an extensive survey of "civil society" organizations undertaken a year previously. Their objective was to update the Kenya Mission's 1993 preliminary assessment of D/G needs and investment strategy, done three years ago just after Kenya's watershed "multi-party" elections, and to draw from this review a viable democracy and governance strategy. This report presents the findings of this review and proposes a strategy to guide USAID's investments in democracy and governance in Kenya over the next five to eight years.

The Search for Good Government: Interview Findings

Building public sector institutions in Kenya that are responsive, efficient, and fair has posed many challenges. Although not necessarily pessimistic about the country's fortunes over the long run, most of those interviewed during the preparation of this report indicated that the conditions under which they work are more difficult now that they were just before the last election, or immediately after it, in 1992-93. A summary of the major interview findings points particularly to the following trends over the last 24 months:

Selective application of laws restricting association, assembly, and speech have made it more difficult for citizens to participate in political life in 1994 and 1995 than during the immediate post-election period.

The efficiency of many government services, from maintenance of infrastructure to

**Preliminary Draft
Do Not Circulate**

legislative drafting and even public prosecution, continues to decline; the rising cost of doing business in Kenya, as a result of infrastructure problems, corruption, and policy ambiguity, deters new investment.

There is a continuing trend of exercise of partisan influence in some high-profile court cases.

In the face of another general election which must occur in the next 24 months, there is widespread belief that the Electoral Commission is not structurally independent of influence from the ruling party, and will not be able to run a free and fair election; and that the opposition parties are impotent, riven by factions and personalism with little programmatic vision for the future.

There is throughout society a growing intolerance of dissent, and a tolerance of violence, born of the frustration that attends discredited public institutions.

Many of those most concerned with the unfulfilled promises of that immediate post-election period point, however, to the advances that were made in some arenas -- a freer press, a consolidation of freedom of speech and opinion in the political realm, and recently a growing realism on the part of both civil society and political party actors that their task is a long-term one. Overall, there was a general consensus that Kenya's political climate is more encouraging now than in the latter half of the 1980s, but that reform will be a lengthier and more arduous process than originally assumed.

Investment Philosophy

In view of these trends, the review yielded guidelines for a USAID investment philosophy for pursuing democracy and governance in Kenya that stresses demand-side rather than supply-side investment, in a logically "prior" effort to build effective constituencies for more open, participatory, accountable, and fair public sector institutions. Given the refractory nature of some of Kenya's political institutions, (especially, the dominance of the executive agencies of government over the others) and the sheer weight of bureaucratic inertia, compounded by high levels of corruption, the team concluded that improvements in the functioning of such institutions were contingent on several important intervening factors.

The team saw desirable reforms as presently highly constrained by the political impasse over constitutional and legal reform issues; and further felt that any improvements which could be maneuvered, through adroit choices of institutions and individuals to work with, can only be sustained in the long run by the development of multiple and effective constituencies for such improvements. The team therefore recommends that USAID put much of its short-

**Preliminary Draft
Do Not Circulate**

term effort into building such effective constituencies for reform, and thus proposes a strategy that emphasizes "demand-side" approaches in the short run, except in those areas of activity where clear internal and external constituencies for reform already exist. It also proposes as a medium-to-long term strategy the gradual adoption of "supply-side" approaches, including more conventional training and program support, upon demonstration that constituencies-cies for improved performance exist.

The modes for building and demonstrating effective demand naturally interested the team as its focus on a "demand side" strategy began to emerge. The political organization of demand through multi-party politics on the one hand, and diplomatic efforts to exert external "effective demand" through conditioned assistance, on the other, are obvious modes upon which the earlier strategy in 1991/92 rested. Domestic actors have other strategies at their disposal, however. They can organize lobby or advocacy groups to place their views before the legislature, or to win hearings with executive branch officials through Ministerial policy papers or the Budget Steering Committee. They can seek redress for poor performance or unfair practices through the courts and through litigation for the removal of unjust laws. During the past few years, some donors have experimented with ways to facilitate serious and peaceful efforts to bring about change through investments in "civil society" and public interest law associations. Given the constraints under which public sector institutional reform appears presently to labor, and the decreasing ability of the US to exert financial leverage, this "civilsociety" strategy seems the most promising and realistic avenue for USAID to assist in the pursuit of democratic governance.

Assessment and Investment Opportunities

The report discusses prospects for USAID intervention in several issue and institutional arenas, including law and constitutional reform, public sector institutions (Parliament, the Judiciary, the Auditor-General, the Central Bureau of Statistics, the Elections Commission), political parties, information/media, civil society writ broadly, and particularly opportunities for enhancing the political participation of women. It considers the importance Kenyans accord various types of assistance in each area; opportunities and constraints; and the likely impact of interventions in each area, taking into account the present state of institutional capacity, incentives, and structural constraint. This portion of the assessment concludes that the strongest impact will come from a near-term strategy that focuses on some modest but strategic investments in the electoral arena (given the likelihood that this will strongly influence the environment for the longer-term strategy), providing the donor coordinating effort with a focus for building leverage into electoral assistance, and otherwise focusing on "civilsociety" efforts to establish a clear record and to systematize the civic education effort. Over the medium term, investments in a strategic mix of "civilsociety" efforts, including both advocacy efforts and the emerging institutes of policy analysis and information generation seem the most likely to contribute to the constituency-building, demand-creation strategy

**Preliminary Draft
Do Not Circulate**

being proposed. In addition, some modest assistance in the judicial sector, where there appears to be a nascent internal demand for reform (and where there is also a strong international, external demand that has organized and effective ties into Kenyan civil society), are recommended.

In the longer term, having created constituencies that can sustain the demand for more democratic and accountable government institutions, the strategy turns to the "supply side" and proposes some investments in public sector institutions, including the judiciary, possibly the Central Bureau of Statistics, and Parliament. In addition, a strategy for working on the incorporation of women into the political arena is recommended. As the long term is difficult to foresee, and much depends on the outcome of the near-term electoral process, the long-term strategy outlines several potential arenas for investment and their rationale rather than making strong recommendations.

The Major Recommendations

The review concluded that USAID should assign top priority to three objectives, during the next five years.

Promoting legal and constitutional reform is high on everyone's list of priorities. Colonial-era laws currently block the activities of community groups by imposing strict limits on association and assembly. They sharply restrict the activity of political parties. They constrain the effectiveness of economic liberalization. The Mission should:

- advocate temporary suspension in the enforcement of key laws that restrict political party activity, at first through quiet diplomacy, in coordination with other donors and the churches, then through conditions attached to elections assistance;
- strengthen constituencies for serious legal and constitutional reform, through support for NGO-based legal reform working groups;
- provide training to enhance legislative/constitutional drafting skills in the Attorney General's office, the political parties, and the NGO community;

Top priority should also be accorded **protection of citizens' legal rights**. Many Kenyans are concerned about growing lawlessness in their society. In some cases, arbitrariness lies with government. In other cases, party youthwings foment disrespect for the law. Declining trust in public institutions leads increasing numbers of ordinary citizens to resolve conflicts in the streets. The Mission should

**Preliminary Draft
Do Not Circulate**

- expand the flow of accurate information about instances of lawlessness, through support of NGO-based monitoring;
- support public interest litigation and para-legal assistance;
- make both the law and dispute resolution more transparent by assisting the production of law reports and providing continued support for magistrates' training.

A third high priority objective is to help build capacity to administer free and fair elections. Elections widely perceived to be unfair are potentially destabilizing and can seriously undermine social trust. Kenya faces an election within the next 24 months, and its current electoral commission is neither independent nor prepared. Pursuit of other high priority objectives may founder on a failed poll. The Mission should

- support a technical review of the tasks confronting the electoral commission, as requested by commission chair, Justice Chesoni;
- pending acceptance of temporary measures to enhance the fairness of the process, agree to support continuous registration and a civic education clearing house;
- assist NGO-based monitoring of the campaign period and the elections process; support a civic education clearing house;
- help build institutional capacity in the extensive, rural church network that hosts civic education;

The report concludes with some suggestions for managing the AID portfolio and with appendices dealing with the judicial system (a background paper on its structure and operation); a short historical note; and a list of persons contacted in the course of interviews.

**Preliminary Draft
Do Not Circulate**

II. Assessment & Investment Opportunities

This section examines the range of opportunities for USAID investment. It assesses the arenas in which USAID can most strategically invest in order to assist Kenyans to pursue self-sustaining democratic governance. The discussion focuses initially on the reform areas identified by most Kenyans as critical to the near and longer-term development of democracy and good governance. These can be summarized as **legal and constitutional reform and electoral reform**, with a wide range of institutional restructuring and reform conceived to be contingent on basic legal and constitutional revisions.

The discussion then assesses the capacity and inclination of two major organizational forces which are critical to advancing the reform agenda in a sustainable manner: **political parties and civil society**. The section then deals with the assessment of reformist potentials within major government institutions, including **parliament and the judiciary**.

The conclusions of the assessment are summarized in the following table.

Sector	Priority	Investment Potential	Risks/ Constraints
Constitutional Legal Reform	High	Medium	High
Electoral Reform	High	Medium	High
Political Parties	Low	Low	High
Civil Society	High	High	Low
Parliament	Low	Low	High
Judiciary	Medium	Medium	Medium

The table presents the following findings and conclusions. First, under "priorities" a major finding is that most Kenyans interviewed ranked constitutional reform and reforms of the legal and electoral environment as the highest priority issue. Second, as summarized under "investment potential", it became clear that the demand and pressure for reform in these high priority areas emanates largely from sources external to the government, and therefore

**Preliminary Draft
Do Not Circulate**

that investment involves supporting institutions and forces that can turn this into effective and sustainable demand for reform, rather than actual assistance to the government institutions at issue.

These high priority items also receive a high "risk or constraint" rating because donor investments in these areas may only yield substantial results in the medium or long term, depending upon the near-term political events in Kenya. In the following narrative constraints and risks will be identified and discussed for each of the above sectors.

A. Legal and constitutional reform

A clear majority of the civil society actors interviewed indicated that major constitutional and legal reform needed to be undertaken. Several efforts to initiate it through seminars and the production of proposed new draft constitutions have been mounted. Arguments for the priority of this set of issues include: 1) the obsolescence of some of the laws; 2) the way in which they constrain the economic liberalization toward which substantial progress has been made; 3) the degree to which elements of the Constitution produce structural distortions in the relationships between the branches of government meant to "check and balance" one another; and 4) the more emotive and social issue of "ownership" of the Constitution, which was negotiated and delivered to Kenyans at independence with very little feeling of participation and ownership, especially on the part of the generation of young political elites which has emerged in the multi-party era.

Obsolescence. Some of the laws earmarked for reform are simply not adequate for the changed conditions of a post-colonial state. The fact that many are obsolete is attested to by the Attorney General's own effort, launched two years ago, to deal with necessary reforms through the mounting of a series of Task Forces. From this a new Children's Bill has been tabled in the Assembly, and the AG is expecting further outputs from the Task Force dealing with the individual rights legislation any time now. One particularly egregious example is the Public Order Act. When read even cursorily, it is obvious that this legislation was framed at the time of the Mau Mau uprising in the late colonial period and was meant to deal with that emergency situation; it is not relevant to current problems, but remains on the books and is used selectively to hinder freedom of assembly through the requirements for persons wishing to meet in numbers greater than 10 to get permission from the District Commissioner.

Constraints on Economic Liberalization. Some laws constrain economic activity. For example, County

a

and Municipal Council by-laws permit the Councils to impose license fees on formal sector business activity, often duplicating central ministerial fees imposed by the Ministry of

**Preliminary Draft
Do Not Circulate**

Commerce and Industry. The laws also permit open the sector to bureaucratic harassment, and the licensing/imposition of fees, which otherwise constrain informal sector entrepreneurs. Such bylaws are quite unstandardized from one local authority to another and many of them are meant to raise revenues in the only ways permitted to the local authorities, given central government's monopoly of the most viable and cost-effective revenue sources. In the process they interfere with the expansion of business activities.

Another example might be local by-laws which mandate specific planting dates for specific crops. Taken in conjunction with the powers given to chiefs via the Chiefs' Authority Act to force farmers to plant "famine relief" crops, these can seriously distort the operation of market incentives to inform farmers' production decisions. This is not to say that these laws are systematically used in ways which constrain or distort economic activity -- merely that they can be, and that the erratic and selective enforcement of them, which tends to be a case of punishment for individuals' stepping out of line or earning the enmity of chiefs or local councils, dampens the enthusiasm for action which the economic liberalization is meant to stimulate. They are obsolete and counter-productive elements of the law which need to be rewritten or repealed.

Constitutional and Structural Imbalance. There is concern that the constitution concentrates too much power in the hands of the President, thereby undermining the capacity of the legislature and judiciary to perform effectively their checking and balancing role. The president appoints, without the need for legislative confirmation, the cabinet and the members of the key commissions which oversee government operations, including the Electoral Commission, the Judicial Service Commission and the Public Service Commission. The president has the power also to appoint a tribunal to investigate members of these Commissions in case of alleged incapacities to serve, and to recommend dismissal as well. Neither the power to appoint or dismiss is subject to parliamentary or other institutional control.

Thus, with respect the judiciary, the president has the power to appoint a tribunal to investigate judges and to recommend their removal to the Judicial Commission, the members of which are appointed by and serve at the discretion of the President. The legal sector NGOs argue that this discretion is partly responsible for interference in the judiciary in politically sensitive cases. The judiciary and the Attorney General do not have the autonomy or mandate required to protect rights guaranteed in the constitution. Thus, many of the provisions contained in the laws mentioned above, such as the Public Order Act, the Preservation of Public Security, can be employed in ways which violate rights of individuals contained in the constitution. In brief, the boundaries which normally help insulate officials from potential political interference are not constitutionally well-defined and protected.

Ownership. Finally, a major impetus behind the calls for constitutional reform is not just

**Preliminary Draft
Do Not Circulate**

the obsolescence of parts of the document and the structural imbalance that seems to be incorporated through excessive executive powers, but the issue of "ownership". There are constitution drafting exercises taking place all over the African continent based on this felt need -- the need to write a document that bears the imprint of local views and establishes a locally relevant and locally negotiated covenant, in place of documents that are seen to have been largely handed down from the final stages of the pre-independence negotiations and felt to have been heavily geared toward metropolitan needs for protecting their remaining investments in the newly-emergent nations. In a word, there is a need to establish ownership over the social covenant called "the Constitution". Kenya is no exception to this movement.

There is by no means complete uniformity on this issue, however, either in terms of the contents of a desirable constitution for Kenya or the need to completely overhaul and redraft, as opposed to revising the existing document. Both points of view have persuasive defenders. The political opposition to the current governing party tend to see the need for a complete overhaul of the document, and to assess current efforts to reform legislation by the AG through his "Task Force" strategy as insincere and as not addressing the basic "ownership" issue. On the other hand, pro-KANU advocates of legal and constitutional reform (and they are not few) tend to see the need to preserve the basic structure and improve the existing constitutional framework. They perceive the calls for a wholesale trashing of the existing covenant as an effort to politicize "ownership" and to threaten the communities who have identified with and accepted the existing order. They merely want the anomalies removed.

Reform proposals frequently mentioned generally focussed on strengthening the constitutional protection of human rights and providing for enforcement of a bill of rights; redesigning the governance of the Central Bank, the Public Service Commission, and the judiciary to instill greater independence; and granting greater decision-making powers to local government and parliament. These changes are considered important in order to limit abuse of power by *any* party that wins the presidency or a legislative majority.

As the DG team monitors the movement for constitutional reform, it should keep in mind that there are a number of different ways in which this can be approached, from a serious revision exercise to a constitutional convention a la the West African model, to a Constitutional Assembly such as Uganda's and Ethiopia's, or a more delegatory model wherein professionals with wide experience of constitution making are involved in producing a draft and organized local input and reaction to it is then solicited. The team should seek out the proponents of the major alternative approaches to constitutional reform and consider support to specific efforts very carefully, not committing itself irrevocably to one approach unless and until it becomes clear that approach is both feasible and the majority preference.

**Preliminary Draft
Do Not Circulate**

Support to constitutional reform can take many different forms: the funding of civil society groups advocating it (e.g. CCCC); the provision of legislative drafting skills that will be sorely needed in such an effort; the mounting of workshops, or provision of guest speakers (e.g., through USIS) on the technical requirements and the appropriate substantive contents of satisfactory constitutions.

Legal Reform. There is a clearer and more nearly unanimous need to repeal or redraft some of the laws referred to as the "repressive legislation" subset: the Public Order Act, the Chiefs' Authority Act, the Newspapers and Books Act, the Preservation of Public Security Act, and one or two others. A broad cross-section of Kenyans has complained publically and privately about these laws for decades.

The **Preservation of Public Security Act (Cap.57 of the Laws of Kenya)**, for example, confers broad emergency powers on the President, including powers of detention of persons without arrest, trial and conviction for an offense; restriction of movement of persons and compulsory movement of persons; censorship of communication of any information; control or prohibition of any procession, assembly, meeting, association, or society; trade and manufacture controls; etc. This should be viewed properly as a "war powers" Act, and clearly there is precedent for such emergency powers in time of war. These powers are nonetheless used in non-emergency situations -- specifically the detention of persons provision -- in violation of portions of the Constitution dealing with human rights.

The **Books and Newspapers Act (Cap 111 of the Laws of Kenya)** requires publishers to deliver copies of all material to the Government within 14 days of publication, or daily in the case of newspapers, and gives the police the right to enter premises where they suspect any publication contravening the Act is being undertaken, and to seize any such publications. This has been used to justify the impoundment of whole issues of the popular alternative press (Finance, Society, etc.) and the police have also then disabled press equipment, attempting to drive these publications out of existence through their printer.

The **Public Order Act (Cap 56 of the Laws of Kenya)**, framed initially in the early 1950s to deal with the Mau Mau rebellion in Central Province, requires that permits for public meetings or processions be acquired -- "5(2) No public meeting or public procession shall take place save under and accordance with the terms and conditions of a license in that behalf issued under this section, and no such meeting or procession shall be advertised or otherwise publicized unless such a license therefor has been issued. Clearly, this prohibits persons from calling the public to their meetings until after the issue of a permit, and the parties indicate that permits are frequently issued at the 11th hour. The spirit of the law is to ensure public order; the letter of the law is the total regulation of assembly, in apparent violation of the rights of assembly in the Constitution.

**Preliminary Draft
Do Not Circulate**

Other laws with widespread and vocal public advocacy for reform include the NGO and Societies' Acts, the Local Government Act, and above all others, the Chiefs' Authority Act, which gives chiefs (who are civil servants) almost unlimited powers to compel or prohibit activity and confiscate resources. It must be recognized that many if not all of these laws are similar to the laws of the neighboring countries. Some of these countries are now engaged in constitutional and legal reforms, but in some others these laws remain on the books, but are not used as repressively as the Kenyan Government has been perceived to use them. This is not an argument for reducing the priority of constitutional and legal reform, but a warning that while it may be a necessary component of political liberalization, it is by no means sufficient to one, let alone to a democratic transition. There are responsible Kenya voices that argue for careful revision of the existing legislation, rather than wholesale repeal or redrafting. The Attorney General's position appears to be the latter. There are also those who argue that reforming the laws will not touch the heart of the problem, which is an authoritarian political culture, the alteration of which requires behavioral and attitudinal change.

Investment Potential

There are multiple constituencies for legal and constitutional reform among members of Kenya's political and economic elite. Within the government itself, demand for change has been erratic. In January 1995, President Moi announced his willingness to initiate a review of the constitution, but he rescinded his offer later, and there has been no show of renewed interest in the subject. In the area of legal reform, in 1994, the Attorney General set up several task forces to consider changes in specific laws and solicited public participation, both by including clergy and other trusted individuals in some of the groups and by supporting trips to collect views and evidence. These task forces were briefly suspended, allegedly for lack of resources, then re-instated. Some have reported out and others will do so shortly. The task forces lack legitimacy in the eyes of many Kenyans interviewed, partly because the process is not transparent, but more importantly because they doubt that the regime has a genuine interest in law reform. Indeed, some view the task forces as an effort to preempt and coopt those who have such an interest.

Outside government, there is broad support for a review of Kenya's constitutional and legal framework from NGO's, businessmen, and church groups. It has assumed organizational expression in the form of the Citizens' Coalition for Constitutional Change (CCCC). The coalition represents a wide spectrum of major civil society organizations including the Protestant and Catholic Churches, legal and human rights organizations, policy institutes, women's activist NGOs, professional organizations, and elements of the trade union movement, among others. USAID has recently provided a grant to the CCCC to assist in the civic education effort.

**Preliminary Draft
Do Not Circulate**

The CCCC has published a model constitution entitled, *The Kenya We Want/Kenya Tuitakayo*, in 1994 and again in 1995, the full text of which was published in successive segments in one of the major national newspapers.

Representatives of several different groups participated in drafting the model constitution. In addition to members of a Core Committee from the Law Society of Kenya, the Kenya Human Rights Commission, and the International Commission of Jurists, the group included people from the Faculty of Law at the University of Nairobi, the Centre for Law and Research International (CLARION, now banned), the Release Political Prisoners (RPP) pressure group, Legal Education and Aid Project (LEAP), the African Academy of Political Science, Mazingira Institute, the Kenya Ex-Political Prisoners and Ex-Exiles Association, International Federation of Women Lawyers--Kenya section (FIDA), the National Council on the Status of Women, and the Council for the Development of Social Sciences Research in Africa (CODESRIA), based in Dakar. Many of these groups are considered strongly "pro-opposition".

The model constitution is basically designed to create a greater balance between the three branches of government by shifting powers to the legislature and judiciary, making them more independent of the executive branch, and strengthening their mandate to hold in check the powers of the presidency. Some of the highlights of the proposed constitution include

- establishment of an independent Human Rights Commission to monitor maladministration by public officers and violations of human rights;
- establishment of a Commission on Gender Equity rights;
- the admissibility in evidence of only those statements recorded in the presence of legal counsel in criminal cases in order to reduce the use of torture;
- introduction of jury trials for criminal offences to ensure that politically motivated cases have a less chance of being used to harass critics;
- appointments to the judiciary in which the president must act on the strict advice of a Judicial Service Commission;
- a required run-off election until a presidential candidate receives more than 50% of the vote;
- a significant reduction in the power of the president in the appointment of members of the Electoral Commission, Public Service Commission and the Judicial Service Commission in order to make these bodies more independent;

**Preliminary Draft
Do Not Circulate**

- the establishment of an Electoral commission with nominees for membership coming from the political parties and civic organizations, with nominations being subject to parliamentary approval;
- a requirement that major presidential appointments be confirmed by the parliament;
- more strict controls on the power of the president to declare a state of emergency;
- the outlawing of monopolies in the broadcast media;
- decentralization of greater powers to local government with local councils replacing many of the functions of the provincial administration.

In the absence of regime interest in constitutional reform, the primary strategy of the CCCC is to build grassroots popular pressure for reform. It is targeting major constituencies, identifying and relating the issues emanating from the sector to the task of constitutional reform. For example, in March 1995, the CCCC ran a workshop on labor and economic issues in conjunction with labor unions. It convened members of farmers' cooperative societies to discuss the constitution in connection with land issues. The meeting was broken up half way through the second day, perhaps in response to the considerable television coverage the gathering received.

The intention is to continue to build popular momentum for reform, culminating in the convening of a citizen's constitutional convention to produce a draft constitution. The group initially wanted to hold a constitutional convention before the election in the hope that it might result in the permanent adoption of some legal reform that would create a more open and fair election process, but there is presently recognition that undertaking a full and lengthy constitutional reform process in the pre-election period is not possible. Thus, the CCCC is advancing a "minimum package" reform agenda of 14 points for adoption before the election. This package includes continuous voter registration, extension of the length of time available for candidates to submit their nomination papers, agreement to allow private radio broadcasters to operate, repeal of the Societies Act, the NGOs Coordination Act, revocation of the legislation that requires licenses for political meetings, guarantees of Central Bank independence, and release of a schedule for constitutional reform.

Constraints and Risks

Currently, there are several constraints and risks attached to donor activity in this arena. Most important is the apparent lack of regime support for genuine constitutional and legal reform. Successful reform is dependent upon effective public support for reforms, the extent

**Preliminary Draft
Do Not Circulate**

to which constitutional and legal reform becomes a major campaign issue in the forthcoming election, and whether that election produces a ruling coalition favorable to reform.

Should regime-initiated constitutional and legal reform be forthcoming in the post election era, it will encounter a critical shortage of legislative drafting skills. Legislative drafting is a specialty only introduced in rudimentary fashion in the Kenya School of Law. NGOs and the Attorney General complain that they are handicapped by lack of experienced bill drafters; some of the Attorney General's proposals have lost on the floor of the Assembly because they contained basic drafting errors. In addition, many of the constitutional efforts underway in the region have been characterized more by enthusiasm than by technical expertise in appropriate strategies and formats for constitutions, as opposed to normal legislation. There is considerable potential for donor assistance in providing conceptual and comparative guidelines for constitution drafting, and for assisting in the clarification of what is constitutional and what is legislative.

Other donor activities. In addition to USAID funding the CCCC has also received support from the Friedrich Ebert Foundation. A portion of the CCCC's budget comes from domestic organizations, in particular, the Law Society of Kenya, the Kenya Human Rights Commission and the Kenya branch of the International Commission of Jurists, all three of which serve as "pass through" organizations for CCCC, which operates as a "project" of these in order to avoid the need (and unlikelihood) of registration of an NGO.

B. Liberalizing the Electoral Environment

In addition to constitutional and legal reform, most Kenyans interviewed indicated that significant liberalization would be required in electoral administration and the electoral environment to ensure an even playing field. This will involve revoking or suspending repressive legal constraints and curtailing abuses which currently prevent opposition parties from effectively campaigning, and which inhibit civil society organizations such as the CCCC in educating voters on the important issues.

Many respondents spoke of a **minimum package** of requirements to support fair and open electoral process for 1996/97. There was considerable consensus on the essential contents of the package.

- Repeal or suspension of the requirements that political meetings be licensed, and actual restraint of the police and the provincial administration from enforcing the requirement (a requirement which is contained in the Public Order Act);
- Provision of some minimally acceptable all-parties formula for equal access to the media, especially the broadcast media, together with cessation of the

**Preliminary Draft
Do Not Circulate**

harassment of the press;

- De-linkage of the provincial administration from the KANU campaign, in order to prohibit the former from underwriting and advancing the political campaign of the latter;
- Reform of the electoral commission itself, making it more independent, giving it broader powers, and including in its membership representation from a representative cross-section of society.

The parties other than KANU argue that they are restrained from the freedom of speech and assembly necessary to launching grassroots membership drives and orderly branch development. Numerous examples were cited by representatives of all three parties of provincial and district authorities breaking-up meetings that were actually in progress. They assert that there is a two-week requirement for meeting permits, whereas KANU generally can get them in two days. They speak of arbitrary cancellations of permits a day before the scheduled meeting, too late to call off supporters, and of permits being granted to opposition parties only for "inconvenient" hours of the day from the point of view of attracting significant numbers of people. Further, the opposition parties are denied access to the broadcast media. KANU is able to avail itself of the media.

While examples of meetings being disrupted or permits denied are frequently reported in the press, the parties seem not to have an organized system for cataloguing and publicizing these incidents. One claimed that they did so previously but had "grown tired" of it. This makes the sort of documentation on which representations to the GOK from the diplomatic cadre rests very random and unsatisfactory, an issue which came up during a briefing of the donor community, which feels itself inadequately grounded in "fact" and thus unable to draw firm lines in the sand which can be defended in putting pressure on the GOK to liberalize the electoral environment.

A newly tabled Political Parties Bill may further obstruct the competitive environment. This bill mandates a waiting period of 180 days after registration before a new party could begin operation; prohibits party funding from foreign organizations and from any NGOs (whether foreign or domestic); gives the registrar of parties access to party records; and mandates that non-party organizations which support party candidates or advocate a particular political agenda must register as political parties. Violation of these regulations is considered a criminal offence, with the offender subject to a sentence of up to two years. In addition the bill has now reportedly been amended to require parties running parliamentary candidates also to sponsor presidential contestants, in a bid to prevent opposition unification around a single candidate. The Bill has not yet been passed but the KANU majority means it is likely to be passed.

**Preliminary Draft
Do Not Circulate**

C. Reforming the Election Administration

The 1996/7 national elections are the short-term "critical event" in Kenya. A free and fair election process, in addition to improvements in the enabling conditions for party contestation, would help accomplish two major objectives. First, it will increase the opportunity for reformers to advance their agendas within one or more of the competing parties. Second, it would strengthen the legitimacy of the elected regime, which is quite likely to be a KANU majority once again. Unfortunately, most Kenyans interviewed indicated that the prognosis for a free and fair election was slim. They point to fundamental flaws concerning the credibility of the election process, flaws which seriously compromised the 1992 election.

The Electoral Commission and Process in 1992. The current concern among Kenyans over the conduct of the 1996/97 election arises from defects encountered in the 1992 election. The 1992 election experience was frustrating for the donor community and ultimately demoralizing for major portions of the electorate. The initial euphoria surrounding the advent of a new "multi-party" era dissipated a few months after the Repeal of Section IIA of the Constitution, which took place without any of the ancillary legislative changes necessary to facilitate open political competition. In particular, the repeal of IIA did not in itself address the need for an independent elections commission.

Independence of the Commission. The Elections Commission is a supervisory body, charged with the supervision of elections and related matters, established under the Kenyan Constitution, 1994, Section 41(1). The Commission has had a checkered history since independence. The actual running and supervision of elections was removed from its purview by the National Assembly and Presidential Elections Bill of 1969, which transferred these powers to the Office of a Superintendent of Elections under the Attorney General. The 1991 constitutional amendment repealing the "one-party state" produced a number of constitutional and legislative changes, including the return of the responsibility for elections to the Commission, but no delinkage of the commission from executive power. Further, the Commission had no previous experience in actually administering elections from the time of the removal of these responsibilities in 1969, which left it only with the responsibility for boundary review; the Provincial Administration through the Office of the President administered the elections.

Although intended to run as an independent body (the Constitution provides that "in the exercise of its functions ...the commission shall not be subject to the direction of any other person or authority") the Commission is by law headed by a Presidential appointee. The current incumbent was in 1992 widely perceived as beholden to the President on personal grounds. He supervised a team of 8 Commissioners also appointed by the President (one per province), later expanded to eleven to accommodate other constituencies. The President

**Preliminary Draft
Do Not Circulate**

has powers to suspend a Commissioner, and to confer powers and duties within the control of the Electoral Commission on any public officer or authority in discharging the duties of the Commission; "independence" of the Commission relates solely to the security of tenure of appointments, which run for a period of five years and cannot be arbitrarily rescinded but must be considered first by a Tribunal. The Commission's own view of its status is that it is not independent enough, and that legislative action (but not actual Constitutional amendment) would be required to insulate it from the potential for interference. This includes the need to establish it as a separate budget line rather than one under the National Assembly.

The Commission's efforts to reverse the perception of lack of independence in 1992 were unsatisfactory. It did not initially involve the parties or the relevant and interested civil society institutions in any systematic way. As the donors pressed the matter of both international and domestic observation onto the Commission, it finally did involve the parties in efforts to draw up codes of conduct for candidates, their agents, and domestic and international observers, principally on the urging of the IRI team that was involved in pre-election monitoring. This effort did not bear much fruit in terms of "civilizing" the campaign environment, and the dialog among the parties and the Commission has not been continued. Members of the NGO civic education/ monitoring community, on the other hand, have maintained contact with the Commission, through the subsequent by-elections and efforts at civic education.

Registration. Voter registration in 1992 was undertaken in an atmosphere of deep mistrust. There were allegations of systematic disenfranchisement of young voters and voters from the immigrant communities in the Rift Valley. Numbers were estimated at upwards of 2 million, but it is impossible to verify this, and it would have implied a 91% registration rate as the "norm". In fact, registration rates were not different from previous Kenyan elections, were indeed rather higher than in the discredited previous election (1988), and were not dissimilar from the overall levels and regional patterns in more credible earlier elections. Registration rates were affected by the opposition parties' initial decision to boycott the exercise, reversed toward the end of the registration period.

The allegations and clear lack of administrative cooperation in issuing national ID cards to young persons to allow them to register poisoned the atmosphere and discredited the Commission from the start. Although the Commission is not responsible for the issuance of ID cards, it also did not make strong public representations about the degree to which this hampered a credible registration effort. The perceived strategy of disenfranchisement resulted in an opposition partial boycott of the effort. Donor pressure on the opposition parties to rescind this boycott was heeded, but the registration process was not extended long enough to deal with the resultant flood of potential voters, nor was the issue of disenfranchisement through lack of IDs dealt with in any way. Several persons with whom

**Preliminary Draft
Do Not Circulate**

we spoke felt betrayed by the lack of follow-through from the donors, and intimated that they will not so easily be deflected from a boycott strategy this time if the same issue arises, which appears already to be the case. Given the subsequent unsatisfactory public display of the registers, the view of many observers, including an IRI monitoring team, was that the registration process was fatally flawed in this national election.

Level Playing-Field Concerns. The registers apart, the major general outcry in 1992 concerned the Commission's unwillingness even to attempt the creation of a "level playing field". The Commissioner construed his jurisdiction narrowly and refused to take action on level-playing field issues, especially the egregious use of state resources through the Provincial administration to harass opposition candidates and campaign in favor of government-approved candidates, in key areas falling in KANU's campaign strategy (Western and Eastern provinces, Kisii, and particularly Northeastern Province, where access was totally denied to the opposition).

The donor community made much of the complaints and frequently sought audience with the Commissioner to request that he enforce the sanctions written into the National Assembly and Presidential elections act dealing with level-playing field violations that occurred. The Commissioner argued these were matters for the courts and the public prosecutor, or the Office of the President, not for the Commission, whose mandate was to set the rules but with inadequate powers to enforce them. The Commissioner further claimed lack of jurisdiction and sanction over the skewed access to the media, which completely froze the opposition out until the three week period of the election campaign proper, and then only permitted the airing of 90-second spots and a few voter education efforts.

Logistics. The ultimate complicating factor was the Commission's lack of experience in the logistics of electoral administration. This presented a leverage opportunity for the donor community, in terms of the potential for conditioning provision of technical assistance and material inputs on agreements to establish the basic conditions for a free, fair and open competition. **Insufficient advantage was taken of this opportunity.**

Administrative incompetence also fostered an insurmountable level of mistrust and suspicion on the part of the electorate. Many mistakes that were made were perceived as deliberate manipulation. The domestic observers assessed the Commission's lack of administrative skill as "rigging". This perception invalidated the election results in the view of perhaps a majority of the population, which voted around 2:1 for the combined opposition parliamentary and presidential candidates. Whereas the donor community described the election as falling in the category of a "C-", in the view of a majority of Kenyans it was a complete failure. Logistical capability is critical to the mounting of a free and fair election, in the eyes of the electorate, as the recent, sad case in Tanzania demonstrates.

**Preliminary Draft
Do Not Circulate**

Investment Potential

All of the constraints experienced in the 1992 election are likely to recur as the Commission gears up for the 1996/97 elections. The composition of the Commission remains unchanged. The Commissioners have a five year term of office. Eleven of them were appointed in 1991 and will thus face "reappointment" next year. The composition of the Commission could currently be altered only at the behest of the President, and then only at the normal expiry of the term of office of the present incumbents. Alternatively, legislation might be introduced in Parliament altering the structure of the Commission. At present, and until after the election, this would require a majority in Parliament, and thus an agreement from the governing party.

It was evidently within the Chairman's view of his powers in 1992 to include a balanced representation from the political parties in the deliberation on certain procedures and issues during the course of the process. This remains possible; it seems unlikely to satisfy the much more vocal criticisms of leading political and civil society actors, who have written off the Commission under its present incumbency. The ongoing boundaries review is being watched with great suspicion by the opposition parties, who fear it will be used to create more "safe" KANU seats. The opposition has a strong case for the argument that the areas of greatest population density are underrepresented, and that all the (22) new seats should be allocated to these underrepresented areas. They tend, on the other hand, to undermine their own case by rejecting completely the results of the 1989 Census as "biased", "rigged" or "fraudulent" (in the team's view, incorrectly). There is further suspicion that the ongoing effort to issue new IDs is part of a plan to deny IDs to young people in specific target areas, which will prevent them from registering as voters, thus safeguarding or increasing the "KANU zones" in the Rift Valley, in particular. (KANU would like to regain lost territory in Nakuru, Kajiado and Narok, areas with worrisomely large Kikuyu populations -- in Nakuru, a majority).

Constraints and Risks This is an immediate, high priority, high risk area. It is possible the current Commission Chairman will retire, as he indicates he would prefer. Leadership in the critical stages of the process thus remains an unknown quantity. The boundaries review has already been launched and will clearly overtake the ability of any significant donor involvement, other than possible supply of modest technical assistance by UNDP.

Other donor strategies and assistance.

UNDP is already committed to providing assistance to the Commission in very general terms, beginning with assistance in producing maps of existing constituency boundaries. It envisions assisting with the design of a registration system and is committed to the provision of TA and four computers, as well as to the training of 10 senior Commission staff on

**Preliminary Draft
Do Not Circulate**

organizational and management skills, and data entry and management personnel on the design of a comprehensive and transparent data capture, analysis and dissemination system to deal with all elements of the electoral process. \$600,000 have been budgeted from UNDP funds, with no specific earmarking of this to sub-activities, and \$400,000 is expected to be from "cost-sharing" (other donors, in UNDP's parlance), over five years.

D. Political Parties

Parties in western democracies fulfill a second or third order function in representing citizen interest and providing the opportunity for input into political decision-making. They are primarily aggregative institutions. They aggregate the interests of coalitions of economic and social groups. These may have some degree of ideological or issue coherence, but they also have a strategic interest in acquiring power through increasing the size of the coalition rather than rectifying it. In brief, political parties are, at best, fluid coalitions in search of electoral majorities.

They have not always actually fulfilled this "best" model; they have, in the west, also been characterized by regional and sectarian identifications; in some western countries they still do. Even American parties have a "regionalist" history, tied to the regional differentiations in America's economic development. What they are not is one man shows; rather, they are vehicles for linking citizen groups and coalitions into state organs of power, and managing and structuring competition.

The re-emergence of a multi-party era in Africa starts from a very different context, one of strong personal "ownership" and ethnic recruitment to parties, rather than much discernible economic differentiation and aggregation. The parties in Kenya, including KANU, are ineffective vehicles for the articulation of citizen interests and the creation of issue-based coalitions. They are personalized. There is little commitment to the party by those elected under its auspices, except as a vehicle for attaining power. The very recent emergence of the current opposition parties and the fact that they have recruited a substantial number of former KANU leading lights, some of whom are clearly opportunistic in their loyalties, suggests that "multi-partyism" in Kenya is by no means a stable phenomenon yet.

Advent of the Multi-party Era Kenya has not always been a one-party state. It had two competitive parties in 1963. One was overwhelmed and collapsed into KANU in 1964, leaving a *de facto* one-party state. An effort at formation of an alternative party in 1966-69 (led by the same senior political leader who became leader of the opposition in 1992) was stopped through repressive action and political manipulations; Kenya's *de facto* one-party status was not to be challenged under the Kenyatta regime, any more than the Moi regime. Finally, in 1982 President Moi lobbied for the adoption of a constitutional amendment making Kenya a *de jure* one party state, and began to bring some of the main civil society

**Preliminary Draft
Do Not Circulate**

channels for alternative voice -- the women's and youth organizations, the trades union movement -- more closely under the control of the party. At the same time, he began increasingly to play a game of destabilization at KANU branch levels, to try to dislodge leaders not personally "loyal" to him and keep countervailing sources of power within the party from emerging.

Emergence of Parties. The present multi-party era in Kenya was ushered in abruptly by Presidential decisions taken in November of 1991. The abrupt reversal on multi-partyism led to a burst of activity and ambition on the part of those who had been agitating for it under the umbrella pressure group "FORD" (Forum for the Restoration of Democracy). FORD applied for registration as a party in December, 1991, soon after the repeal of the relevant legislation. Before the registrar acted on the application, a split developed in FORD's leadership and two factions emerged. The registration of the party was delayed, a delay which many felt was manipulated in order to foster schism; the Registrar (of Societies) pondered over whether to register one or the other faction, or both, and ultimately registered both, one as FORD-Asili ("original" FORD) and the other as FORD-Kenya.

This wrangle occupied much of the important pre-election period, with FORD-Kenya registered on October 10, 1992 and FORD-Asili registered on Oct. 15 -- just two and a half months before the election (whose date remained Pres. Moi's "secret" until the first week in November). Meanwhile, on January 18, 1992, the Democratic Party of Kenya (DP) was registered, under the leadership of a former Vice President and Minister for Finance. Following this, six other parties applied for and obtained registration, while others (most notably the Islamic Party of Kenya, based in the coast) were denied.

The schism in FORD, the original, unified opposition front, did more than weaken the opposition and focus it on internal rivalries; it also prevented the factions -- as they were unregistered -- from carrying out any significant organizational activities prior to the election. They thus reached the penultimate two weeks of the "pre-election" period without the infrastructure needed to carry a substantive electoral campaign to any productive conclusion.

Primaries. The four major parties held primaries in an atmosphere of extreme haste, confusion, and internal division. It was reported that FORD-A's primaries were least "interfered" with by the party leadership. In all cases, primaries were convened on the basis of no real control over the party "members"/supporters, and considerable amounts of infiltration by supporters of one party into another's primaries, in order to sow as much confusion as possible. The sorriest aspect of the primaries was the overturning of results, as the leadership at branch or national level reinstated candidates who had lost the primaries but who had personal ties to the leadership. Disillusionment with the parties generally began

**Preliminary Draft
Do Not Circulate**

to mount as these flawed primaries were in some cases repeated, and similar manipulations attended the repeats.

Party Electoral Outturn. The parties thus went into the electoral contest divided, with significantly disaffected sections and "defectors", and each utterly convinced of its overall superiority in numbers and likelihood of winning. They came out chastened by a KANU 100-seat parliamentary majority and a presidential victory of 500,000 over Pres. Moi's nearest rival. The outcome on a regional basis showed an extremely high degree of "bloc" voting, in terms both of the percentage victory of the favored presidential candidate on a constituency by constituency basis and the degree of consonance between the party of the presidential "victor" in that constituency and that of the parliamentary "victor". In the Luo (Nyanza), Kikuyu and Kalenjin areas, in over 85% of the constituencies the presidential choice of that region was supported by over 80% of the constituencies.

The subsequent dismay on the part of the parties opposed to KANU over the results, which put Pres. Moi and KANU back in a monopoly position in the unreformed constitutional setting, led to numerous election petitions. Twenty-two by-elections have been held on the basis of petitions as well as the defections or deaths of sitting parliamentarians. KANU has increased its majority by nine additional seats in these contests, with thirteen of them resulting in no change in the government/opposition profile.

Self-Assessment and Recent Trends. The parties put most of the blame for their poor outcome (despite a combined 65% popular vote) on a combination of the pre-election manipulations and harassment that prevented their campaigning effectively in the "swing" areas; and massive rigging during the casting of ballots and the counting process. (There is some difference in the perceptions of the international and domestic monitors about the degree and impact of this type of interference). There has been little acknowledgement that the division of the "anti-KANU" vote led to upwards of 21 parliamentary seats being lost to KANU, which won them on a minority vote. In the past 24 months, there has been a growing realization of this which has produced some tacit cooperation during by-elections among the opposition parties to support the candidate of the "lead" party in that region.

This cooperation is perceived as enough of a threat by KANU that it has employed very unsavory tactics in the most high-profile of these by-elections, e.g. Kisauni and Lugari. Two further by-elections were gazetted for Dec. 7, one in Siakago (where a Kenya National Congress MP defected to KANU) and one in Nyatike (where a FORD-K MP defected to KANU). Opposition unity appears to be unravelling again, as the DP has already announced a candidate in Siakago and FORD-A indicated it also would run one, which could easily split the vote and give the seat to KANU.

There has further been a perception that a major contributing factor to the

**Preliminary Draft
Do Not Circulate**

"underrepresentation" of parties other than KANU has to do with the skew in parliamentary districting, which over-represents the pastoral, northern areas and underrepresents Central Province and Nairobi significantly. This has become a key agenda item for the opposition parties presently. Whether they will develop a productive strategy for dealing with it is much less clear; their principal position thus far has been a thorough rejection of the results of the population census of 1989, without any convincing documentation of the reasons. The wholesale rejection of the census would, of course, leave the Elections Commission with no source of population data from which to devise a demarcation.

Investment Potential

The investment potential with respect to the political parties is very uncertain. The parties all have major long-term needs for institution-building, including KANU. They need to develop first and foremost a strategy for building a committed support base that contributes funding in support of local branches, however modestly. They need to understand the running and use of branch offices, including how to deflect the constant demands for financial and personal assistance and how to build instead an informational and advocacy role. They need to understand the uses of the media and the need for continuous data collection, analysis and dissemination; platform construction on the basis of constituency building, in turn resting on opinion sampling; press relations; and the like.

Unfortunately, the present situation does not appear favorable for productive assistance with this type of institution-building. The opposition parties insist they are unable to undertake the national leadership convocations and orderly renewal of officials which would be necessary at this point to restore a modicum of focus and purpose, and the constraint is primarily financial. They claim they have greatly diminished access to financial resources from the business community because of the government's aggressive and effective harassment of businesses known or suspected to be aiding opposition parties. Their "bottom line" is that the types of technical capacity we see as critical, and an area in which US support might be feasible, are not of immediate importance without the "prior" resolution of their twin problems of funding and the removal of the constraints on speech and assembly. They express the opinion that external funding for political parties is legitimate, pointing to KANU's previous support from the Hans Seidel Stiftung, and sidestepping the "ownership" problem raised by the team in these discussions.

Constraints and Risks

Although US "leverage" remains high based on our public stand in the 1992 elections process, and the more visionary and adroit leaders in the parties are willing to take any type of assistance they can get and turn it to some productive use, the present situation of growing factional division in the parties, KANU included, bodes ill for productive

**Preliminary Draft
Do Not Circulate**

investments.

FORD-K is approaching a leadership competition between its faction led by the current Chairman (who has perhaps a majority of the leadership support) and his rival, the oft-detained son of Jaramogi Oginga Odinga, who has declared his intention to run for the chairmanship in party elections to be held "soon". The outcome may well be a split of **FORD-K** into two parties; recent efforts to patch up the schism seem to have failed.

FORD-A, the creation of Kenneth Matiba and his lieutenant Martin Shikuku, professes itself at every level below this two-man leadership a party in deep trouble. Most of the seats the party won in western Kenya stemming from Shikuku's single-handed efforts have been undone as **KANU** has induced defections, leaving only Shikuku himself in the opposition in Kakamega district. There are capable and bright leaders in the party's areas of strength in Kiambu, Nairobi, Nakuru and Nyandarua, chafing at the total paralysis of party activity deriving from leadership failures.

DP, Mwai Kibaki's party, with major strength in the northern Kikuyu and Kikuyu-related areas, as well as in the "swing" areas of Kisii and Eastern Province, is at present the least divided, although it too has seen internal challenges to the leadership.

KANU is going through leadership wrangles in a good many branches, as well as at the top (as the succession struggle heats up) and in vital Kalenjin areas. The party's need to resolve these will make it difficult to organize a meeting among all of the parties in order to agree on "minimum package of reforms" for a more open and fair electoral process.

Safina, a party newly-created and engaged in a thus far futile effort to be registered, is led by renowned conservationist Richard Leakey; Paul Muite, the human rights lawyer leading the defence of Koigi wa Wamwere; and Wamwere himself, who has just been jailed for four years. The party is viewed as a fresh alternative for the disgruntled youth who are disillusioned with the other party hierarchies; for this reason, as well as Leakey's well-known organizational and fund-raising skills **KANU** seems determined to thwart its emergence.

Although parties in the western model of aggregative institutions which can engineer fluid, temporary coalitions/ majorities are important for enhancing the responsiveness of government, this is an exceptionally delicate area for donor intervention. The provision of technical assistance without evidence of party commitment to developing self-sustaining resources or resolving internal divisions seems likely to waste the bulk of the resources provided.

The provision of funding for parties to carry out explicitly political functions, e.g. national delegates conventions to elect leaders or hold primaries, raises the ownership issue squarely.

**Preliminary Draft
Do Not Circulate**

Donor funding of parties, even through a neutral, all-parties foundation or donor/government pool arrangement, (a constant refrain from the party officials we spoke with, not including KANU) will perpetuate fragmentation and remove the pressure for constituency building and responsiveness to grassroots concerns.

Indirect assistance may not be as delicate and difficult. Donor support for civil society organizations that are generating information and analysis on policy issues will contribute to the information base on which the parties can draw in formulating issue positions, when they decide it is in their interests to do so. We found several examples of this already underway or beginning now, including the "policy institutes" which have emerged (one, IPAR, with USAID funding), and which are carving out market niches for themselves -- basic research, data generation, and policy analysis -- which could provide significant resources for the parties to draw on.

Legal organizations are involved in drafting alternative legislation and in critiquing that presently tabled in the assembly, one of these providing an occasional "bills digest" which is distributed to the members of parliament, and which could serve as an invaluable aid to many, both on the KANU and the opposition side of the floor.

Workshops in which policy on sectoral topics, especially those relating to the economics of liberalization and structural adjustment, are demanded by parliamentarians of all stripes; the "policy institutes" and the professional associations -- medical, juridical, journalistic, financial -- are logical vehicles for the provision of such fora, from which parties can draw both material and the contacts to pursue pro bono (or paid) work on special issues of concern to them.

Workshops specifically addressed to party organization and functioning are difficult, partly because the very unfavorable climate at present inhibits KANU attendance, and partly because efforts to date through the US NGOs have proved not fully effective, according to some interviewees who have attended them.

Underlying all of these possible forms of assistance are reservations and concerns over the fact that many Kenyans interviewed, including some party members, feel a large number of the party leaders are not much interested in the long-term process of party institution-building, nor are they inclined to incorporate into their campaigns or agendas the kinds of public policy issues which need urgent attention within the larger public domain. There are definite exceptions to this generalization, where party members and MPs are seeking to raise the level public awareness on subjects of national interest, but these individuals are definitely in a minority.

E. Civil Society

**Preliminary Draft
Do Not Circulate**

Civil society comprises the welter of organizations and associations that link citizens to political space, both through direct linkages to public agencies (where civil society actors may have direct impact on policy) and less directly, through their aggregation by political parties in search of electoral majorities. Civil society in Kenya has considerable reach and density, and has begun to afford avenues for influence over policy of the first type, ie., through direct interaction with portions of the public sector institutions most critical to policy reform. It has had far less role in the development of explicit political constituencies and coalitions. This is not surprising at this early state in the evolution of a multi-party, pluralist polity under circumstances of great polarization and mistrust.

Civil society comprises a "leading-edge" sector in Kenya at present. A variety of organizations (NGOs) are advocating reform, mobilizing public awareness and participation on behalf of reform, generating information relevant to reform. The churches are pre-eminent among these (particularly their Peace and Justice Committees), as are the legal-sector NGO's of long standing and high reputation, including the Law Society of Kenya, ICJ/ FIDA, the Kenya Human Rights Commission, and the spin-off "projects" which they have sponsored. These organizations can be considered the core group: they have a membership that extends into the farthest reaches of both the public and private sectors, a tradition and network for dialogue with the relevant government agencies, and organizational infrastructure and resources.

Among the core group but relatively new are three or four emergent "policy institutes." These include the Institute for Policy Analysis and Research (IPAR), which USAID is funding; the Institute of Economic Affairs (IEA), the International Center for Economic Growth (ICEG) and the Kenya Institute for Policy Planning, Research and Analysis (KIPPR). These are all led by distinguished Kenyans and appear to have been carefully crafted to involve a significant audience with reasonable potential for dialogue with relevant public sector institutions.

Others of importance to AID's current portfolio and potentially important to a D/G strategy include: the Kenya Association of Manufacturers (KAM); one or two organizations in the area of civic education (IED, FIDA) and finally a well-institutionalized organization which has begun to engage in grassroots civic ed and empowerment in the urban squatter areas (Kituo cha Sheria, also originally a "child" of ICJ). There are others, especially the set of sectoral "lead agencies" that the AID portfolio works with and through, such as the Family Planning Association of Kenya, the NGO AIDs Consortium, and similar bodies in the agriculture and micro-enterprise spheres. Finally, there is the NGO Council itself, which is described more fully as to function and potential below.

Current Civil Society Foci. The reformist strategies being promoted by the advocacy NGOs

**Preliminary Draft
Do Not Circulate**

fall into four categories. First, the policy institutes have begun to generate research toward policy analysis and its dissemination. Through forums and personal contacts they are seeking to build a demand for this information among government officials, MPs, NGOs, business groups, and the political parties.

A second strategy involves the use of litigation to secure legal reform. Thus, the Public Law Institute, which is receiving USAID funding, is pursuing legal reform through public interest law. The cases it has contested so far include environmental concerns, land issues, and consumer rights. While public awareness of public interest law is still very low, the Institute has produced some results, particularly in motivating victims to seek legal redress, and in other instances forcing the government to backdown in cases where official abuses have been exposed to public view through the media. And while their lawyers may take some cases to the courts knowing full well that they will not receive a fair hearing, such activities do provide a forum for informing and shaping public opinion on major issues.

A third is being undertaken by several NGOs in the training of paralegals to serve in local communities where they can provide legal literacy education and encourage people to seek redress when their rights have been violated. Paralegals can also provide linkages to a network of legal services when such aid is required. These projects are still very limited in scale and are in a very early stage of development.

A fourth strategy, which is the dominant and most pervasive effort within the NGO advocacy community, involves the promotion of civic education programs. Many of the reformist NGOs, particularly the churches, but other secular civic organizations as well, are engaged in grassroots educational campaigns. The genesis of these efforts arose out of the 1992 general election, when many NGOs launched voter education campaigns. After the election a number of NGOs, particularly the Peace and Justice Commissions of the Protestant and Catholic Churches launched new initiatives in civic education. These programs are seeking to educate the public on the mechanics of multipartyism, including citizen rights and responsibilities in a democracy. Other non-Church NGOs have also initiated their own civic education efforts, and the field is now populated by a wide range of organizations, including women's organizations (League of Women Voters, FIDA) sensitizing women on their legal and human rights.

There is considerable variety and creativity in these civic education efforts. Innovative and interactive modes of communication have been utilized, including interactive drama, radio spots, music cassettes, and the creation of videos for widespread distribution to churches and other civic and community organizations.

In brief, the perceived need for civic education has inspired a wide range of groups to undertake some promising public education campaigns; just how promising however, has yet

**Preliminary Draft
Do Not Circulate**

to be determined. There have been very few evaluations of these efforts, and no before and after measures of the kinds of impacts generated by civic education activities. Recipients may report changes in knowledge and attitudes, but there is no clear indication concerning how this translates into changed behavior, particularly voting behavior and the individual or collective assertion of rights and responsibilities within the society at large.

Organizational Issues and Constraints

The structure and organization of the NGO community is of some importance in assessing the potential and constraints for productive investment in the sector. Donor dissatisfaction with the lack of transparency and accountability of donor-funded development projects grew throughout the 1980s. It resulted, by the late 1980s, in the redirection of an increasing portion of project funds through NGOs, where possible, or in the form of "direct payment" to suppliers. USAID, for example, now spends about 90% of the funds for its current portfolio through the NGO and private sector.

The GOK, faced with declining revenue both from internal sources and from external aid flows, began to perceive the need to get greater control over the NGO community. Presumably, this was both to control the funding, for constituency building purposes -- arguing that far too much of the projects funded through NGOs went to the same places that had historically been advantaged by the state and had already the best organizational and physical infrastructure -- and to curtail the threat of the growing NGO community as a source of "countervailing" power which was becoming visible in Nairobi.

The Office of the President decided on a strategy of drawing up legislation to regulate the affairs of the NGO community, putting them under the control of a Bureau in the Office of the President. The NGO Coordination Act was thus born of a quiet initiative which took the NGO community completely by surprise and resulted in a mobilization of civil society organizations quite unlike any that had taken place previously.

The NGO Coordination Act of 1990 altered the legal environment for non-governmental organizations in Kenya. The new act set up a special coordinating body to vet them and oversee NGO operations, called the NGO Board. The Board has 23 members, of whom 8 are appointed by the Government, 8 by the NGO Council, and 7 by the GOK from among the NGO community broadly. Membership of the NGO Council is compulsory; registration of NGOs under the Act is compulsory; and the Government in addition staffs an NGO Bureau, in the office of the President, which deals with the paperwork involved with registration and maintenance of a data base.

The NGO community struggled hard to prevent the passage of this legislation; it ultimately

**Preliminary Draft
Do Not Circulate**

settled for less than what its members considered minimally acceptable alterations in the bill, and many are still firmly convinced of the need to repeal the legislation. Nonetheless, important segments of civil society felt that compliance was better than operating in the shadow of the law and reversed their initial decisions to refuse to register under the new act. The legislation requires all NGOs to submit applications for registration, which are screened by the Board, with its minority NGO community representation.

Initially, registration was rather pro forma. Over 400 NGOs which had previously been registered under the Societies Act were submitted for registration afresh, under this Act. At present, around 437 NGOs have been registered. However, the strenuous fight the NGO community put up in the effort to defeat and the alter the legislation, and the fact that it had sufficient strength, organization and clout to engineer some degree of compromise, have simply underscored for the government that its fears are genuine -- the NGO community is a potential source of alternative voice, resource mobilization and allocation, and ultimately countervailing power as organizational capacity and constituencies increase.

Consequently, the present trend is toward the heavy-handed enforcement of the Government's majority on the Board to deny registration to new applicants. The NGO Council estimates that around 100 new applications have been submitted in recent months, of which only about 20 have been successful, with the reasons for rejection being given as "too broad a definition of purpose", security reasons, appeal to religious community, or "too large a budget for the capacity of the organization". This means a rate of rejection of around 80% obtains at present. In addition, the Council sees the likelihood of increased use of the Board to de-register existing organizations, the signal case being the de-registration in early 1995 of CLARION, an NGO with a research orientation which published a critical document on corruption in government.

Coverage/Distribution . A large number of new associations have neither roots in the rural areas nor established relationships with public sector actors. In addition, the "human rights" and legal sector NGO population is concentrated in Nairobi and is perceived as dominated by the Kikuyu, although this is an oversimplification. As a result of newness and urban origins, the NGO community still has a limited capacity to work with the country's rural majority, especially outside of Central Province. It is also viewed by the government as heavily partisan.

The churches, the Greenbelt movement, and the teachers along with some of the women's groups, have more extensive networks than others. The Kenyans the USAID team interviewed all said the churches were the best way to reach communities. They singled out the Catholic Church, because its internal structure allows it to speak more easily with a single voice and gives a certain uniformity to its procedures and activities--qualities sometimes lacking in the Protestant churches. Several legal-sector NGO's have developed

**Preliminary Draft
Do Not Circulate**

ties with the churches, offering their services as speakers and workshop organizers in return for invitations to church events that enable them to meet people.

Organizational Issues. Notwithstanding its density, and the length of time that important components of civil society have been in existence, it has strengths and weaknesses not unrelated to those found in the public sector. This remains a point of vulnerability, especially for the large number of newly emerging institutions without roots into the rural areas and without ties to public sector actors. There are problems of transparency and accountability which are not so different in civil society than in the public sector, and for which the accountability mechanisms that characterize the public sector, (e.g., the Auditor General's, the Public Accounts Committee), are non-existent so far in civil society. There are problems of ethnicization, of disarticulation from the constituencies for which civil society purports to speak, of organizational and management weakness, lack of focus, vulnerability to capture by client groups -- the whole panoply of organizational weaknesses found elsewhere, including Kenya's public sector institutions.

This set of issues needs to be considered carefully in a strategy focused on the promotion of creation of demand for democratic governance through civil society vehicles. It argues strongly that this is a long-term strategy, and that it will require considerable attention to the internal structure and workings of the particular actors in civil society chosen to carry the strategy. It suggests that such demand creation may need to go hand-in-hand with attention to the "supply side", as particular constituencies emerge that can and do exert effective demand for public accountability and responsiveness. It suggests that attention to the demand creation opportunities will have additional, hidden costs in the form of institution-building inputs, and that AID will need to marshal its resources carefully to avoid constructing a portfolio that is too broad and ambitious for the organizational capacity of the civil society vehicle driving it (or for the management capacity of the driver, USAID Kenya!).

Investment Potential

Investment potential in this sector is very favorable. Civil society, and particularly the major advocacy NGOs mentioned above, is currently the most dynamic sector in championing the cause for reform in Kenya. These NGOs interact through both informal and formal networks (NGO Council) and they have been successful in coalescing around common agendas, such as the Citizen's Coalition for Constitutional Change. While the horizontal linkages among themselves are quite strong, these linkages are confined primarily to the Nairobi area. Their vertical linkages down to the grassroots are much weaker. The exception is the Protestant and Catholic churches, which are deeply rooted in rural areas. Indeed, many of the secular advocacy NGOs are using church umbrellas and networks to convey their specific issue (e.g. constitutional reform) and more generic civic education

**Preliminary Draft
Do Not Circulate**

campaigns.

Given its high investment, a strategy based on creating constituencies and demand for political reform through support for civil society is a daunting proposal, given the sheer number of organizations and the need for informed choices about capacity, potential, and outreach of these. Two or three features of the NGO sector in Kenya make this task easier.

Internal Regulation of Civil Society. First, the NGO Council is beginning to play an internal regulatory function. It is establishing new standards for financial and organizational accountability, and it is attempting to monitor responsible fiscal behavior within the sector. It is also attempting to vet the emergence of new NGO 's, especially those seeking partnerships with bilateral donors, weeding out or at least providing advice on the capability of individual NGO 's. In this capacity, it will assist in the management of a donor civil society strategy.

Indeed, the Council is currently receive support under the USAID PVO Co-Financing Project II to strengthen the Council's institutional capacity which includes its regulatory role, enhancing its ability to provide management assistance, and expanding its efforts to develop networks within the sector.

Competition and Niche Development. Second, competition is beginning to produce a differentiation of function and focus, with the attendant complementarities that will allow donors to put together an "optimal" mix of organizations, instead of having to work with one institution that has some of the necessary objectives and skills but is ill-suited for others.

Internal Demand for Improved Organization and Management . Some elements of the NGO sector are also beginning to tackle the sector's own problems as well as pursuing the advocacy functions they are designed to serve. One group, Abantu (with international ties), is taking on some of the problems of personalism in the sector, working with groups on internal management. FIDA recently hired a consultant from Deloitte Touche to help overhaul its internal organization and develop an organizational strategy and management plan, and has been very pleased with the results. Two other civil society organizations have hired the same person and undertaken the same reorganization.

Constraints and Risks

Most donors are well aware of the constraints and risks of assistance channeled through the NGO sector.

- The legal restrictions on NGO activity mean that the impact of funds committed to NGOs can be limited by government in deciding to de-register a group or block

**Preliminary Draft
Do Not Circulate**

meetings called by an organization.

- Because a high proportion of NGOs are narrowly based in Nairobi and because officers are often Kikuyu, aid channeled through the NGOs is viewed by the current government as assistance to the opposition.
- Limited experience and poor accounting and control procedures place efficient use of donor funds at risk. The churches are not invulnerable to this problem.
- Within the NGO sector, there are also problems of organizational and management weakness, lack of focus, vulnerability to capture by client groups. Civil society mirrors the problems that afflict public institutions.

Effective work with civil society must allow for some institution-building or capacity-building within the sector itself.

Women's Empowerment

The empowerment of women is a key objective in the Mission's program and portfolio. Women's economic contribution and benefit are constrained by the economic privilege social institutions confer on men, most centrally in the form of control over land and inheritance. Inadequate attention to the rights and economic potential of women also has limited women's basic reproductive rights, educational access, the support and welfare of children, and women's access to credit and entry into the job market.

Women are well-organized in Kenya. There is a multitude of women's organizations. The oldest and most widespread, grassroots component of it is the local branch network of the national organization Maendeleo ya Wanawake. A second is the network of church-related groups that are either primarily or wholly women-oriented; the church is a major vehicle for female participation in the wider society in Kenya. A third component is the network of "self-help" (harambee) organizations that have played a major role in providing physical and social infrastructure for development in rural Kenya, and in which women play a dominant role. All of these--Maendeleo, the church women's network and the harambee groups--form the "old" network of women's associations.

In addition there are a host of new organizations with women's rights as their objective. They include the Kenya chapter of FIDA, the international women lawyers' association; the National Council of Women of Kenya (NCWK); the League of (Kenyan) Women Voters; the Center for Women in Politics; the Forum for African Women Educators (FAWE), an all-Africa assemblage of women education ministers and vice-chancellors (focusing on improving women's access to education in Africa); FemNet, an interregional organization

**Preliminary Draft
Do Not Circulate**

which provides training on gender-sensitization; the National Committee on the Status of Women; the Kenya Women's Finance Trust; and many others.

The earlier preoccupation with service delivery (legal aid, maternal and child health, etc.) has given way to a clear realization of the need to stop treating the symptoms and begin to deal with the underlying causes of these problems. The newer organizations thus emphasize advocacy and the effort to push the women's agenda in the political arenas in which decisions about land tenure, marriage and inheritance laws, access to education and credit and other elements critical to business entry are made.

Several factors constrain the ability to achieve measurable progress in the short term in the empowerment of women. These include the opposition of the church to some components of the advocacy agenda (particularly over family planning measures); the lack of grassroots ties among most of the newer organizations have, forcing them to use the church in reaching a grassroots network; limited awareness of rural women of their rights and of the relationship of rights to economic development; a disjuncture between the teaching styles and content of some Nairobi based groups and the perception by the grassroots women of their own actual problems and needs; and major internal conflicts, compounded by lack of organizational skills.

Some women's organizations are beginning to deal with these problems. For example, FIDA is trying to improve its links with the grassroots. It is running a pilot paralegal training program in Taita Taveta district based on a lengthy process of immersion in the community, incorporation of the local administration and attention to the problems the women give priority, instead of substitution of an agenda drafted in Nairobi. Although it is unlikely that this exercise will produce results very different from the standard run of issues one might expect, it does involve women from the beginning in the enterprise, providing a sense of ownership that is in itself empowering. The Institute for Education in Democracy (IED) also indicated it was looking for ways of beginning its gender sensitization workshops with greater local input, and has incorporated gender disaggregation into the reporting of results from the monitoring of by-elections.

There is one major advantage that many of the women's groups claim; they say that their activities are generally not taken as much of a threat as would be the case if they were not women. The relegation of the community to its second-class status, "just women's things", affords a degree of protection and some scope for maneuver that is not available to the human rights groups, for example.

Intervention Potential

There are several areas of possible intervention, some of which are part of the Mission

**Preliminary Draft
Do Not Circulate**

portfolio already.

Reproductive Rights and Economic and Political Empowerment. Intervention potential in support of the empowerment of women should be looked at from a broad perspective. A **major component in the empowerment of women, both economically and politically, is the significant drop in fertility and acceptance of family planning that has occurred in the past decade, which can be attributed to AID's many and innovative interventions in this field.** Smaller family sizes facilitate women's entry into the labor force, greater likelihood for improvements in the school attendance rate of female children, a reduced strain on the public sector budget for social welfare expenditure and improved quality of life for women. The gains made in this area and the underlying infrastructure that maintain them must thus be considered as a major component of the strategy for empowering women.

Creating awareness, information and legal/paralegal aid. Educating women on their rights is a high priority, although the USAID assessment team was concerned about the absence of ways to assess the impact of this kind of intervention and the limited geographic coverage of current education and paralegal programs. FIDA's intensive effort in this area is commendable and AID should do a serious evaluation of it for the lessons learned, both in terms of impact and methods.

Political Office. Finally, the explicit promotion of women's pursuit of political office is another possible component of an empowerment strategy. The rate of participation of women in Kenya's parliament is very low; six of 188 MPs are women, and only 19 women stood for election to parliament in 1992. NDI has had some recent experience in promoting women politicians, through the initiative of the Center for Education of Women in Democracy, which attempted to bring women together across party lines and chart out the needs of women as candidates. This initiative foundered on the hesitance of KANU to participate in an activity involving the other parties, and on the dominance of the women of one party. The initiative has been modified and a second effort is underway, involving workshops for women candidates and "staffers". This effort has a precarious hold on a cross section of candidates, including a good representation from KANU, this time oriented toward local council members. In addition, the Mission is supporting the initial effort which continues to be relevant to parliamentary candidates.

F. Public Sector Institutions

Reform of formal institutional structures usually occurs either from pressures generated from strong external constituencies or where internal constituencies of senior politicians and civil servants perceive the desirability of such changes. This section will examine two institutions which are critical to the performance of democracy and good governance: parliament and the judiciary.

**Preliminary Draft
Do Not Circulate**

Parliament

Parliament is the political institution which stands at the intersection of the pursuit of government responsiveness and efficiency. The effectiveness of a parliament can be judged along several dimensions. First, Members of parliament (MPs), should represent the citizenry and be a main vehicle for citizen input into the deliberations over public policy and the public purse. Second, MPs also need to be concerned about the broader national interest which transcends the particularistic and narrower interests of their specific constituency.

In order to do this, MPs need to understand the broader issues of the macro-economic environment in which public resource allocation is addressed, especially in the case of the on-going structural adjustment program Kenya is pursuing. They need to understand the functioning of the civil service. Above all they need to understand the structure of the budget, the processes by which it is formulated and revised, the relationship of the budgetary process to the expenditure and accountability systems, and the intervention points at which they, as the people's representatives, can have significant impact.

In 1993, a USAID DG assessment proposed several activities with parliament, including some induction courses (there were 105 newly elected members), workshops on the budgetary process, assistance in developing a legislative research service, physical equipment for the production of the record in a more timely manner, and parliamentary visits to the US (and possibly other western democracies) to observe the workings of other legislatures.

These proposals were based on the consideration that all members of parliament stood in need of these resources. The proposed assistance was offered on the assumption that some degree of comity and cross-party cooperation would be forthcoming in moving forward a legislative agenda. Indeed, there was initial speculation that a coalition government might be possible, since KANU, which gained the majority of seats, had a minority of the popular vote.

The hope for a more non-partisan, consensual movement within parliament proved to be illusory, as the KANU inner circle interpreted the constitutional provision that the winning presidential candidate should form a government "of his party" to mean a government including solely KANU. This effectively locked-out elected MPs in two populous regions from being represented in the Cabinet), for the first time in Kenya's history. Such an wholly unsatisfactory arrangement resulted in a clear division of Parliament into Government and Opposition, and a clear indication that coalition and consensus-building were not to be the order of the day. This has greatly constrained the degree to which Opposition members of parliament can have an effective impact in the normal course of parliamentary business, as

**Preliminary Draft
Do Not Circulate**

the majority party remained firm and has exercised effective party discipline.

Nonetheless, and quite to the consternation of many in the ruling party, standard Commonwealth parliamentary practice mandated that the Opposition be invested with the oversight functions of the Public Accounts and Public Investments Committees, acquiring a majority of seats on these committees. They have in this position been able to put a spotlight on the level and types of misappropriation that are systematically documented in the Auditor General's reports; however, their lack of ability to affect the content of the Government's legislative program and budget mean that the Auditor's output has more impact in apprising the public and donors of a lack of accountability than in improving the way the executive manages public monies. Needless to say, this has heightened the perception of Government that the Opposition is engaged in activities designed to score political points and external allies.

As a consequence of the above developments discussions and actions in parliament have assumed an antagonistic, government/ opposition divide and have inhibited it from considering reforms even in areas in which many members of KANU can see the sense to it. Apart from the hostile environment, lack of progress on reforms can be attributed to some structural elements within the existing parliamentary framework. These include;

- Standing Orders that give the Speaker complete control over the order of debate and recognition of speakers, as well as in determining what questions are legitimate and which not;
- the cost and cumbersome nature of the procedures for introducing Private Members' Bills (a mechanism some of the opposition have attempted recently to use, albeit it is not generally a major tool for moving a parliamentary agenda);
- the lack of resources available to parliamentarians to pursue factual information on which to ground contributions in debate, in questions to ministries;
- the reported lack of real policy/public interest or demand on the part of some members themselves, whom many in civil society portray as strictly parochial.

The priority to be accorded to assistance to Parliament, and the mechanisms for doing so, needs to be seen in the light of these rather considerable constraints on the type of improvements envisioned in the 1993 assessment.

Standing Orders. The Standing Orders of Parliament, most recently amended exactly two

**Preliminary Draft
Do Not Circulate**

months before the 1992 election, are based on British and Commonwealth practice. Complaints have been voiced about them previously, a central one being the degree to which they give the Speaker latitude to recognize or not recognize members wishing to contribute from the floor and to determine whether their contributions are in order.

For example, the Orders state that parliamentary questions, which are the standard method for enforcing accountability and transparency on government in a parliamentary system, "shall not be made the pretext for a debate"; rather, "a question shall be of a genuinely interrogative character, and its purpose shall be limited to seeking information or pressing for action." All very well in Britain's long-standing tradition (and honored as much there in the breach as in the practice) of parliamentary debate embedded within interrogatory questions; of questionable value in a polity in which the very institutions of governance are being questioned and remolded, and the tradition of debate is culturally central.

Some efforts to revise the standing orders have been launched; one review was done and the output never addressed publicly, and another is underway from on the behest of civil society organizations interested in constitutional reform at present.

Private Members' Bills. These are a vehicle for introduction in a Parliamentary system of matters not of common or public interest but generally relevant to specific persons or interests in an MP's constituency. Costs of their formulation and presentation are thus borne by the Member, whose promotion of the bill is assumed to be guided by strong electoral needs and rewards. The Opposition in Kenya has initiated efforts to use this mechanism to introduce bills relating to the more public domain, e.g., one such bill is presently being drafted to introduce a "minimum package" of legislative and administrative reforms to make possible an acceptable electoral environment.

The team could get no satisfactory information on either the cost of this type of effort (estimates ranged from KSh. 200,000, which is US \$4,000, to KSh.3-4,000,000, which is a hefty US \$60-80,000; costs are embodied in the research and drafting skills that have to be hired -- but which can also be donated on a pro bono basis -- and the costs of printing copies for all members on the standard paper, by the Government Printer; as well as some other deposits) nor its viability as a mechanism for increasing the ability of members to address public policy issues. It is our present understanding that only one such bill has ever actually been successful, the Hire Purchase Act in 1969, which gives little confidence that this avenue for increasing members' impact is viable.

Lack of information/research resources. Parliament is sadly lacking in any resources to assist members in understanding substantive issues. A library exists; the team did not visit or assess it. No research assistance of the type afforded American legislators, either at national or state level, exists; this is in part due to the different role of a Member in a

**Preliminary Draft
Do Not Circulate**

parliamentary system, where the drafting of legislation is the responsibility of the executive, while Parliamentary responsibility is one of scrutiny, debate, amendment, and the enforcement of accountability.

Nonetheless, these cannot be successfully pursued without access to information, and the team was told that information via the ministerial route (i.e., outside of the Parliamentary question function) is simply not possible for members of the opposition to acquire. The question of accessibility to KANU backbenchers was not broached, and the members of the press with whom we spoke made precisely the opposition observation, to the effect that information was no problem to acquire -- the civil service leaks like a sieve -- but was a major problem to disseminate. The conclusion the team reached was that parliamentarians do not have a strategy of information gathering directed at the technical officers who could supply it, and have not made the effort to build the type of contacts which the press has.

It seems clear that accountability can only be enforced, in the confines of Kenya's parliamentary system, if access to the information on which to base objections, either to policy directions or budgetary allocation, is enhanced. Even in the atmosphere of unproductive antagonism that obtains at present, the ability of Members to ask questions based on fact, which then becomes a part of the wider public pool of information, could exert pressure toward accountability.

Lack of Commitment/Interest. Nonetheless, impact of the supply of information to support improved legislative output and oversight is dependent on the demand for information and attendant commitment to use by its Members. Many leaders in civil society argued that many MPs are primarily oriented to meeting the needs of their limited constituency, and their interest in broader public policy issues is quite minimal. Therefore, MP demand for the kinds of information and technical services envisaged in the originally proposed USAID project is quite marginal. There are exceptions to this bleak portrait. Some MPs are seeking to raise the level of debate and attention to national issues, but they are a minority.

Investment Potential

At the moment, the team feels Parliament is not arena in which direct donor investment in an institution-building effort would yield significant results. There is support for improving performance from some people within its ranks, and there is growing external demand for a better-functioning legislature on the part of NGOs and others. However, at least in the pre-election era, significant pressure for reform is not emanating from within the institution itself.

Because of these constraints an indirect donor approach to parliament is more likely to be

**Preliminary Draft
Do Not Circulate**

more cost-effective in the short run, primarily through continued assistance to the policy institutes, such as IPAR and IEA, and to the "advocacy" NGOs, all of which are seeking to build relationships with reformist MPs. Aside from the Public Investment Committee and the Public Accounts Committee there are no functioning sectoral committees (health, environment, agriculture, etc.) where external constituencies such as the policy institutes and NGOs can contribute to policy discourse. One step USAID might take for very little cost would be to sponsor a team of parliamentarians to visit Uganda's National Resistance Council (NRC; parliament), which has working sectoral committees. The problem would be to interest the Speaker and some key influentials in parliament, particularly from the KANU side. Alternatively, a workshop on parliamentary systems with a regional attendance would perhaps serve the same function.

The Judiciary

The judiciary is at once exalted and lamented in Kenya. Its officers are generally respected. People are taking increasing numbers of matters to them for hearing and disposition. Much as in the United States, social and religious diversity has made the courts important arbiters of fundamental values, instead of or alongside community elders. Further, as one Kenyan observed, "The judiciary is an important link in buffering civil society."

At the same time, high levels of civil delay serve to frustrate litigants. Many businesses simply avoid the courts in commercial disputes because of the years it may take to have a case adjudicated. Some questionable decisions in high profile political cases (such as the recent Wamwere trial) along with incidents of corruption cases have brought disrepute to the courts as well. People worry that if courts become ineffective, then rule of law will collapse. They are also concerned that poor judicial procedure and training may interfere with their efforts to enhance the fairness of the country's institutions. A recent editorial in *The Daily Nation* applauded recent efforts by judges and magistrates to tackle some of these problems.

Although the court still earns people's respect, several problems have generated public concern during the past decade. One magistrate observed that, "there is a crisis of confidence in the judiciary, both in the country and within judicial ranks."

One problem is civil delay. There are currently over 40,000 cases pending in the High Court, and there are so many land disputes unresolved (approximately 29,000) that a special tribunal is being created to hear them. The average time between the date when a case is "at issue" and a decision is five years, but some cases have remained on the docket as long as 10 years. Clerks lose files frequently. Advocates call constantly for adjournments. Witnesses fail to appear on time. Civil delay dampens investment and leaves bitter family and community disputes to fester, unresolved.

**Preliminary Draft
Do Not Circulate**

A second problem is the quality of the court record. There are no court stenographers, and the judge keeps the official record of the trial, which means the process is slow and subject to error. In civil cases, there is no requirement that the advocates be able to review the judge's transcript until the end of the trial, at which point it is difficult for everyone to recall exactly what transpired. Although this arrangement results partly from resource constraints, it is also convenient for judges who are under political pressure; they simply adjust their notes accordingly. Having court reporters or a tape record of trials would improve the quality of the record, making appeals easier, increase the speed with which judges hear cases, and limit manipulation of court proceedings.

A third problem is the absence of law reports or an effective system for disseminating judges' decisions. In a common law jurisdiction, the "law" writ large comprises not only the statutes but also the interpretations and past decisions judges have offered. Without a record of appellate or High Court judgements, neither magistrates nor advocates really know what the law is. Moreover, publication of decisions helps open the courts to public scrutiny and mobilizes peer pressure for adherence to high standards of conduct. *The Kenya Law Reports* ended in 1980; the *Kenya Appeal Reports*, a personal project of former Chief Justice Hancox, ended in 1992, for want of resources.

Finally, there are more sensitive issues surrounding the independence of the courts. The record is mixed. One distinguished lawyer the USAID assessment team interviewed said that although the overall independence of the judiciary has declined since 1991, in his view, there are still some bold judges, and most cases are not clearly political. Others concurred. There are questionable decisions at the upper as well as the lower levels of the court, but most cases do not attract interference. The high profile trial of political dissident Wamwere Koigi was not an illustration of normal court conduct.

The NGO view is best summarized in the words of one person interviewed, who commented that, "Even if it is not independent, the court provides a safe forum for speech and that is important. The better the quality of the record and the faster the speed with which cases are handled, the greater the chances that justice will be done."

Investment Potential

There is both external and internal demand for enhanced court effectiveness right now.

External Demand The demand for improved judicial effectiveness in Kenya has several sources. Borrowing an idea from the American civil rights movement, some public interest lawyers and organizations in Kenya are pursuing litigation strategies to effect reform. They are challenging abuses of power or unjust practices in the courts. To work, however, these strategies require a court system that can create an accurate record and make its decisions

**Preliminary Draft
Do Not Circulate**

known. The quality of court reporting and the availability of law reports are both important, in consequence. Right now, "the NGOs are trying to obtain changes in environmental laws," commented one person, "but that is difficult because the court's record keeping collapsed in about 1982. As a result, the NGOs cannot get access to judges' decisions and thus cannot know what the law is."

Politicians and journalists expressed interest in court reform too. The high levels of delay, coupled with procedures that offer no guarantee that the court will adequately assess probable cause before agreeing to proceed with a case, create vulnerabilities that officials can exploit to harass people they do not like. Even when charges are frivolous and a case eventually must be dismissed for no evidence, the accused person must post bail or spend time in prison under remand. He or she must spend money for an advocate's assistance and for court fees. Those who are the target of such actions find their bank accounts depleted and their careers, side-lined. Journalists said that defense against frivolous sedition charges, which take considerable time to fight and are not always bailable, are a cause of self-censorship.

Internal Demand. The court is taking some steps to repair its frayed public image and enhance its own operations, within constraints.

- In late 1994, the Magistrates' Association revived, after eight years of dormancy. It has expanded its membership and renamed itself the Judges' and Magistrates' Association. Although technically registered as a welfare society, the group is taking an active role in assessing training needs and sponsoring workshops. It is also beginning to reach out to the bar, for the first time.
 - During the team's visit, the court tabled a judicial code of conduct for consideration. The code of conduct was designed by the Court of Appeal and a former Chief Justice.
 - With the assistance of the ICJ and USAID, the court has sponsored several workshops designed to bring prison officials, police, and prosecutors together with magistrates and judges in order to discuss ways to improve the effectiveness of the criminal justice system.
-
- The Registrars of the court have indicated considerable openness and interest in addressing problems of effectiveness. As the court administrators, equivalent to Clerk of Court in the U.S. system, the support of these people is essential to the success of reform.
 - The courts have recently adopted a system of monthly returns to assess the case loads

**Preliminary Draft
Do Not Circulate**

of individual judges. The Chief Justice has also created a commercial division of the High Court.

- One judge noted that "the climate is changing in the judiciary. The process of building support for change is proceeding. Two years ago, it would have been impossible to hold the workshop we are going to participate in this weekend" [a workshop on criminal procedure].

In summary, the Judiciary is a promising area for institutional investment, at least on a pilot basis. The efficiency and fairness of the courts are central both to settlement of contract disputes among businesses and to the success of a litigation strategy for opening up political participation. Many of the Kenyans interviewed indicated that donors should work with the courts to improve performance, even if the problem of executive branch influence, which affects certain parts of the court and certain types of cases, cannot be addressed at this time.

Constraints and Risks

Constraints. There are three main constraints that govern court reform. The first is the willingness of the Chief Justice to assume a leadership role. Court reform is difficult anywhere without the express backing and involvement of the Chief Justice. Chief Justice Majjid Cocker is a presidential appointee and has no real security of tenure in office, unlike his counterparts in neighboring countries. He indicated to the USAID assessment team that to provide assistance to the courts, a donor must work through the Attorney General.

The Chief Justice is considered "conservative," but officers of the court also say that he does not stand in the way of their efforts. In conversation with the USAID assessment team, he did speak of his own reform agenda and of areas in which the U.S. could be of assistance, but he indicated that unless his court could control and direct donor-assisted projects, he would prefer to survive on the funds the government allocates.

Until recently, the court had to work through the Office of the President to obtain permission to work with donors. For example, the Directorate of Personnel Management had to clear all training programs. The recent separation of the judiciary from the civil service means that the executive will not exercise such strong, direct control in the future. The Chief Justice and the registrars do say they need to keep the Office of the President informed, however, and informal permission still appears to be required. This system hampers projects that involve regional meetings, because the executive can deny permission for judges and magistrates to travel.

A second constraint lies in the sensitivity of judges and magistrates to problems of independence. Both corruption and political interference are recognized as problems by the judiciary as a whole. The current atmosphere does not permit open discussion of these

**Preliminary Draft
Do Not Circulate**

problems, however. The reform-minded judicial officers say that bringing the judges and magistrates together over the less-controversial (and very important) problems of administrative effectiveness may eventually build the trust necessary to tackle more difficult topics. It is also dangerous to address problems of undue influence openly in the current political environment.

A third constraint concerns the limited constitutional mandate of the courts with respect to the protection of human rights, a mandate which is less protective than is the case for judiciaries in neighboring Commonwealth countries. Section 84 of the constitution grants the authority to hear constitutional cases to the High Court, but it provides for no appeal. Thus, the Court of Appeal cannot enforce the rights laid out in the constitution. There are various forms of judicial review, to bring laws into compliance with the constitution, but again the powers of the court in this regard appear to be more limited than they are in the United States. In brief, without constitutional reform, the court will have to continue to enforce laws many would consider unjust.

Risks. The risks associated with donor assistance to the judiciary are relatively few, as long as the expectations are not overly broad. It is possible to work with the courts to reduce delay, improve the record, and make decisions more public. It is not possible to use the courts to change the law. Legal and constitutional reforms are separate endeavors.

Other Donor Strategies and Assistance

The Canadians are working with the Judges ' and Magistrates ' Association, instead of with the courts directly. The UNDP has included the judiciary in its own democracy and governance program, which aims to support improvements in court reporting. There were UNDP-financed consultants in the courts to assess needs in this area in early October 1995. It is not clear how much of the UNDP 's plans will materialize, because the program depends on other donors supplying a significant portion of the funding, under a UNDP umbrella.

USAID has quietly worked with the courts in the past. The USAID's Divisions of Human Resources and Development Assistance funded magistrates ' training in the late 1980s and has supported a successful workshop series during the past year. It has also provided computers to the Court of Appeal. USIS sent the court 's registrars to the United States on study tours, during the late 1980s.

Additional details on Kenya 's judicial system and guidelines for working with the courts appear in an appendix at the end of this report.

**Preliminary Draft
Do Not Circulate**

III. Strategy and Program

This section proposes a strategy and program for the Kenya Mission's democracy program over the next five to eight years, combining the priorities that flow from the assessment with information about investment potential in order to identify how USAID can most effectively promote democracy.

Highlights of the Proposed Strategy

To promote legal and constitutional reform

- advocate temporary suspension in the enforcement of key laws that restrict political party activity, at first through quiet diplomacy, in coordination with other donors and the churches, then through conditions attached to elections assistance
- strengthen constituencies for serious legal and constitutional reform after the elections, through support for NGO-based legal reform working groups
- provide training to enhance legislative/constitutional drafting skills in the Attorney General's office, the political parties, and the NGO community

To enhance protection of citizens' legal rights

- expand the flow of accurate information about instances of lawlessness, through support of NGO-based monitoring
- support public interest litigation and para-legal assistance
- make both the law and dispute resolution more transparent by assisting the production of law reports and providing continued support for magistrates' training.

To help build capacity to administer free and fair elections

- support a technical review of the tasks confronting the electoral commission, as requested by commission chair, Justice Chesoni
- pending acceptance of temporary measures to enhance the fairness of the process, agree to support continuous registration and a civic education clearing house
- assist NGO-based monitoring of the campaign period and the elections process
- help build the institutional capacity of the rural church network that hosts civic

**Preliminary Draft
Do Not Circulate**

Assumptions

The proposed strategy is based on certain assumptions about the likely course of events in Kenya during the next two years, and also includes measures to promote some elements of this scenario. Alternative scenarios and their implications for the strategy are considered at the end.

First, the strategy assumes that out of prudence the incumbent government agrees to suspend enforcement of certain laws restricting political party activity at the eleventh hour, 10 to 12 months from now. The elections are flawed, but not irretrievably so; another "C-" election is produced, with a more sophisticated approach to the tilting of the playing field (for example, the physical prevention of opposition candidates from presenting nomination papers is curbed in favor of more pecuniary methods). The opposition participates because of the temporary lifting of key clauses in the "repressive legislation." KANU wins a small majority in the legislature and captures the presidency, but with less than a majority. The government prior to the elections schedules a review of the laws and/or constitution, and perhaps initiates the process, because of pressure from the KANU moderates and younger generation and because President Moi is persuaded to make a last bid for an acceptable place in the history books.

If this scenario holds, then it is necessary to work with both government and civil society, before and after the elections. A sensible overhaul of the laws cannot take place if the government lacks the skills to participate and is not treated as a partner. A review initiated without government participation would be doomed to still-birth from the start. Accordingly, exclusive reliance on a civil society approach would increase polarization and shatter domestic efforts to produce dialogue. Working with the government does not mean doing the kinds of things aid donors usually do, however -- i.e., it does not mean assisting the appropriate public sector institution, such as the AG, without reference and real involvement of the other major stakeholders in the process. It means strengthening transparency and proceeding cautiously to build a law reform process that will produce respectable results.

Given the fluidity and uncertainty in Kenyan politics today, the best strategy is one that is flexible, not a mechanistic blueprint. The proposed approach requires modification if events unfold differently. A discussion of mid-course corrections required under alternate scenarios appears at the end of the chapter.

Finally, apart from events in Kenya, the strategy is built on the assumption of close cooperation between USAID, USIS and the Embassy, with all three working together as the Embassy Democracy and Governance Committee to support and implement the proposed

**Preliminary Draft
Do Not Circulate**

DG strategy. In this context, the implementing actor for the strategy will be referred to as the country team rather than simply USAID.

A. Promoting Legal and Constitutional Reform

Major barriers to civic engagement, political party competition, and the capacity to conduct free and fair elections are legal and constitutional. Legal and constitutional reform is thus a high priority objective.

What the country team can do to pursue this objective in the short run is different from what it can undertake in the longer term. Serious review and reform of the constitution, or even of major laws, is not feasible in the eighteen months prior to the election. In this period, the country team needs to help effect a suspension in the enforcement of laws that restrict political party competition, and to help build capacity inside and outside government for a serious review of the legal framework. It can also assist NGOs to build effective constituencies for reform.

In the medium term, the country team can continue to support capacity-building activities outside the executive and parliament. Whether it extends medium-term assistance to the Attorney General's Office and/or to parliament depends on government commitment to a serious review process in the post-election period.

Advocate Short-Term Suspension of Laws Restricting Party Competition

A serious overhaul of the laws and constitution takes time and considerable technical skill. Nonetheless, there is urgent need to remove certain laws that interfere with a free and fair election. Failure to do so is likely to trigger an opposition boycott and considerable election and post-election violence.

To provide "stop-gap" law reform, the country team should advocate repeal or temporary suspension in the enforcement of key laws that restrict political party activity. It should first approach the government through quiet diplomacy, in coordination with other donors and the churches. Subsequently, it should tie elections assistance to an agreement on this matter, on the grounds that failure to suspend enforcement of key provisions of the Public Order Act and the Political Parties Bill makes a level playing field impossible. For details on the proposed package, see the discussion under "Increasing Capacity to Administer Free and Fair Elections," below.

Strengthen Constituencies for a Serious Review

**Preliminary Draft
Do Not Circulate**

A second imperative is to strengthen constituencies for serious legal and constitutional reform through support for NGO-based legal reform working groups. The country team should support a series of workshops on legal and constitutional reform, beginning as soon as possible and continuing through the reform process. It should model these on the working groups the Westminster Foundation is already supporting at the Institute for Economic Affairs and should benefit from the wisdom accumulated from the World Bank-sponsored Taita Hills meeting, which brought together both KANU and opposition politicians to discuss technical issues in which they all professed interest, under the aegis of a clearly presidentially-approved effort.

The working groups should have several features. 1) They should be managed by local NGOs that hold relatively neutral political status, such as the Institute for Economic Affairs, IPAR, the Public Law Institute, or the International Center for Economic Growth. The ICJ might also be a sponsor, because its international status appears to overwhelm the more partisan affiliations of some of the projects under its umbrella. 2) The workshops should include participants from government, the Law Society, and the associations that have a direct, technical interest in the matter under discussion. 3) Where possible, two or more participants should come from other developing countries that have dealt with or are dealing with a similar problem. 4) Part of the U.S. contribution, either through the Mission or in cooperation with USIS, should be a resource person with technical expertise in the matter under discussion and support for a meeting facilitator.

Topics should be technical. The country team may wish to suggest some candidates:

- aspects of the legal framework for economic liberalization, including law to facilitate equity financing of companies, mechanisms for indirect regulation that keep the state out of a direct interventionist role,
- laws relating to registration of NGOs and societies, with a view to making the process of registration more transparent and supportive of the growth of civil society. The World Bank is completing a world wide study of these laws.
- electoral laws and their consequences, and the broader issue of parliamentary structure in terms of proportional representation, single member constituencies;
- the differences between constitution-drafting and legislative drafting (sponsored by IPAR and coordinate with The Ford Foundation, given their ongoing activities in this area)
- freedom of information acts (Thailand recently developed a Freedom of Information Act to establish stronger limits on use of Official Secrets legislation to keep

**Preliminary Draft
Do Not Circulate**

information about government activity out of the public domain)

Most effective constituency-building is likely to take place at the elite level. The impact of broad civic education on behalf of law and constitutional reform is as yet very unclear and is likely to generate small returns. That said, the country team may wish to finance experimental efforts to build a groundswell of support for serious reform, by continuing its backing for the Citizens' Coalition for Constitutional Reform (CCCC) and the Legal Resources Foundation.

Think-Tank Outreach

USAID should consider supporting outreach by the new "think tanks," including KIPPRA, in the technical aspects of legal and constitutional reform.

- **Workshops.** The Mission should consider supporting a series of workshops on law reform. These could be expanded to consider other aspects of current affairs, after the legal and constitutional reform has occurred or as part of a civil society-only strategy in the event of a flawed election.
- **Policy Studies.** The Mission should consider providing "indirect" research capacity to members of parliament, through the vehicle of independent think tanks. The research might include studies such as the one IPAR proposes on regional trade and trade barriers, one of its four core areas for near-term research. USAID has had experience in funding policy studies for KAM and through the Policy Analysis Matrix (this was on agricultural policy), both of which had some impact on both influencing policy, and more importantly, building some capacity in the domestic constituencies for lobbying for policy.
- **Data Generation, Analysis, and Presentation.** Both IPAR and KIPPRA intend to improve the data base on which public policy formulation and legal reform rest.

Help Build Technical Capacity for Legal and Constitutional Reform

In addition to technical knowledge, serious law reform requires legal drafting skills which are currently in extremely short supply in Kenya. The country team should support training for NGOs that participate in the legal reform working groups suggested above, as well as

**Preliminary Draft
Do Not Circulate**

for members of parliament or political parties (on a competitive basis), and three or four of the junior staff from the Attorney General's chambers, which has no senior experienced draftsman at present.

The country team can carry out this activity in one of two ways. It can subsidize a course on the topic at the School for Professional Services by providing an instructor and tuition grants to NGOs, MPs, and lawyers in the Attorney General's chambers. The course should be open to lawyers in private practice on a fee basis. Alternatively, it can send a team to attend existing legislative drafting programs abroad. This activity should start immediately and continue through the period leading up to a serious reform. Without putting these skills in place now, a snap review of either a subset of the laws or the Constitution more generally, called just after the elections, will produce poor results.

B. Enhancing Protection of Citizens' Legal Rights

Many Kenyans are concerned about growing lawlessness in their society and the government's apparent inability to redress this problem. In other cases, party youthwings foment disrespect for the law. Declining trust in public institutions leads increasing numbers of ordinary citizens to resolve conflicts in the streets. To enhance protection of citizens' legal rights, the country team should expand the flow of information, through monitoring; support public interest litigation and paralegal assistance that can empower the citizenry to advocate on behalf of its own interests; and increase the transparency of dispute resolution.

Expand the Flow of Accurate Information about Disrespect for the Law

The country team should consider expanding support for NGO-based monitoring human rights abuses beyond the immediate needs of the election, although the electoral process will be a critical and fertile ground for developing and honing both the skills and the organizational capacity to disseminate the output and turn it into effective demand. An important step in curbing disrespect for the law is to create an accurate record of abuses of power, including arbitrary rejection of NGO applications for registration; wrongly withholding ID cards or requiring individuals to apply for them in different places from their present residence; harassment of the press; and many more. The same NGOs that help observe the election process should be supported in their efforts to provide regular, accurate reports about lawlessness in rural Kenya. The churches are good candidates for this kind of activity, as is the Institute for Education in Democracy and the NGO Council, the latter two serving as potential candidates for the apex organization, but the church absolutely critical as the basis for the grassroots network of monitors.

Support Public Interest litigation and Paralegal Assistance

**Preliminary Draft
Do Not Circulate**

Public interest litigation is a slow way to win adherence to the law, but it creates a public record highly valued by pro-democracy advocates, it sends clear signals to those who abuse government power, and it puts respect for the law in the public spotlight. In some circumstances it can also win revision of "unjust" laws. The DG country team should consider two activities designed to support litigation strategies as a way to help build democracy.

Public Interest Litigation. For the past ten years, USAID has supported The Public Law Institute, which has struggled in the courts to curb violations of land law and promote consumer rights. It occasionally takes a higher profile "political" case. In a country where most lawyers cannot afford to take pro bono cases, and the few who can are stretched beyond the limits of human endurance by the lack of a public defender function in the face of growing social (and legal) disputes, the PLI's activities, along with those of Kituo cha Sheria and a few public-spirited advocates, have helped reduce problems of lawlessness. The assessment team recommends continuing and expanding this support.

Paralegal Project. With other donors, the country team should consider providing financial support for paralegals to monitor the issue of IDs and voter registration cards, and to help compile a record of abuses as well as successful performance, which is far too infrequently rewarded in the Kenyan context and is not as "rare" as the most sensational of the opposition press would have it; and take cases to the courts, where abuses are egregious. Organizational vehicles include Kituo Cha Sheria, the Legal Resources Foundation, and the Public Law Institute.

Enhance Transparency of Dispute Resolution

The country team can help enhance transparency in the courts and make the law more accessible to citizens in two very significant ways: by supporting the revival of law reports and by continuing its assistance to magistrate training. The Annex on the structure and functioning of Kenya's judiciary provides details underscoring the value of the activities outlined below and the impact that investment in them could have.

Law reports provide digests of court decisions in a form that makes them easily accessible to members of both the bench and the bar. In a common law jurisdiction, these opinions are an important part of the law itself, and they also add to the transparency of the courts, opening decisions to professional and public scrutiny.

Currently, there are no law reports published in Kenya. The conventional wisdom is that the best way to get hold of a judge's decision in a case is to go to the advocates involved, not to the courts. In 1994, Parliament passed the Council of Law Reporting Act, which establishes a Council to produce law reports. The Act has not been implemented, however.

**Preliminary Draft
Do Not Circulate**

The democracy team can contribute to the transparency of the judicial system by providing assistance to train law reporters for the court. Subsequently, it should provide some assistance for producing the reports (office equipment and management advice) and defraying the costs of publication during initial issue. These reports can be self-financing at a later stage.

The democracy team should consult with the American Bar Association in the U.S. and former Kenyan Chief Justice Hancox (now retired and living in England), who produced law reports on his own initiative, to establish general guidelines for this activity. It should give the Chief Justice latitude in identifying appropriate training opportunities and in organizing the project.

Magistrate Training has long been a component of the Kenya Mission's portfolio, although it has not attracted much attention. The country democracy team should continue its support for magistrate training and judicial workshops. It should give judicial officers, including the Registrars, considerable latitude in selecting topics for discussion, although it might suggest inclusion of sessions on civil delay reduction, writ of habeas corpus, liberalized discovery (in civil and criminal cases), bail, family and matrimonial cases, and juvenile cases. Insofar as possible, it should ask that 1) some sessions involve judges, magistrates, and members of the bar and 2) a U.S. trial court judge with pertinent expertise be allowed to attend, as a resource person. During the next two years, when some confidence-building is necessary, it is best to avoid especially controversial topics.

Because 40 percent of the magistrates are women, as are some of the High Court judges, it is possible to offer special sessions for women judicial officers, on topics they consider important for on-the-job effectiveness. The American Ambassador very recently indicated that the number of female magistrates and judges was a positive aspect of the judicial system, and one which the country team might build upon.

To date, this activity has been handled by Human Resources and Development Assistance (HRDA). The team recommends that HRDA remain the main center for magistrate training but that it coordinate closely with the Democracy and Governance program. The Mission should also coordinate closely with USIS, which has sent magistrates and registrars to the U.S. in the past. It should ask USIS to consider financing participation of court officers in meetings that involve judicial officers from other parts of Commonwealth Africa, such as Tanzania, where significant judicial reform is taking place.

C. Increase Capacity to Administer Free and Fair Elections

A central concern during the next 18 months is to ensure that the elections are sufficiently

**Preliminary Draft
Do Not Circulate**

free and fair to win opposition participation and to yield a result Kenyans will respect. If the registration process, the boundaries review, or the rules that govern campaigning are not minimally acceptable to the opposition, there is a high risk that the elections will be a flashpoint, leading to higher levels of violence and repression than exist now; and equally likely, to a boycott by the opposition, with the resulting election producing no legitimate institutional outcome on which constitutional and legal reform can be based.

Tight cooperation between the Kenya Mission and the Embassy is essential to the success of the strategy during the next 18 months. The assessment team is proposing a "package" to win concessions from the government on the handling of the elections. The Embassy is the appropriate institution to take the lead in negotiating certain elements, while USAID provides necessary technical skills (such as IFES assistance to the Electoral Commission) and inducements. The Embassy will clearly be the central actor, and both the phased electoral assistance that USAID envisions and the coordination of the wider donor D/G group -- which generally relies on US leadership by default and/or because of the difficulties of reaching internal consensus -- are dependent on a productive relationship whereby USAID supplies technical assistance and carrots that produce leverage, and the Embassy turns these into a program for pursuing the minimal package of reforms that it feels is appropriate, feasible and productive of a donor consensus.

USAID should play a modest role, beginning with development of a workplan and a feasibility study on the requirements of establishing a continuous registration process (already requested, and based on the Commission Chairman's very positive experience with a U.S. NGO in this area last time). Very careful monitoring of the conditions outlined below should then guide any further assistance:

- a preliminary assessment of the tasks facing the Electoral Commission in the management of the elections, and particularly a feasibility study of the costs and logistics of a continuous registration machinery, as requested by Justice Chesoni
- subsequently, a coordinated appeal from donors for adherence to certain criteria of fairness laid out in the preliminary assessment USAID finances--a list that will presumably include:

creation of an inter-party working group that meets regularly with the commission
 respect for the spirit of the law, regarding the issue of ID cards, voter
 registration, and
 the boundaries review

agreement to suspend enforcement of laws that require licenses for normal campaign activity; or agreement that licenses will be routinely granted if properly applied for,

**Preliminary Draft
 Do Not Circulate**

and not rescinded under any but the most compelling circumstances

Donor consistency and clarity on what constitutes minimally acceptable standards need to be established in detail as early in the process as possible. As an inducement, the country team should consider funding 1) the technical inputs for a continuous registration process and perhaps to providing other financial support for an election that will prove costly, 2) commitment to encourage electoral participation by the opposition parties and to work with all groups to devise a code of conduct for the campaign period, and 3) agreement to provide technical training in legislative drafting for three members of the Attorney General's staff, along with a similar offer of training to selected NGOs. It is a central tenet of the strategy that only by creating "temporary" carrots such as these can the leverage which USAID used to be able to command, on the basis of its portfolio and discretionary funding, be restored. Such a restoration of leverage, based on "temporary carrots", allows the periodic review and timely termination of assistance should the process appear to be unproductive.

Support for Feasibility Study and Development of Workplan

The democracy team should support development of a technical workplan, as it did in the last election through IFES, along with an assessment of the feasibility of a continuous registration process. The assessment should consider:

- the cost, logistical requirements, management and recurrent requirements for computerization and establishment of a continuous register;
- the political and administrative requirements for a successful registration in 1996, providing recommendations on the "minimum acceptable" conditions for an administratively competent performance;
- an overview of the costs, components, logistics, and training needs, working with the Chairman to identify those areas of administrative weakness from the 1992 election and begin a plan for redressing these;

On the basis of the study the democracy team should formulate a set of conditions (see above) and relate them to a phased provision of assistance for the election. They should seek cooperation from other donors through the donors' D/G group, which serves as a clearing house that can vet requests for assistance. The estimated cost for the study and workplan is \$75,000-\$150,000.

Monitoring to Enhance Transparency

Monitoring compliance with the minimum package of conditions is absolutely essential.

**Preliminary Draft
Do Not Circulate**

Deficiencies and infractions need to be identified and documented early on in order to take corrective action. Monitoring can also help the donor community distinguish between fact from fiction in the always overheated Nairobi rumor mills and give the Elections Commissioner -- if he wants it -- an independent source of evaluation of the various components of the electoral process.

With other donors, the country team should support a program that includes monitoring of:

- boundary review exercise; this needs to begin immediately, as the boundaries review is underway;
- the issue of ID cards; also underway;
- by-elections;
- registration of voters.

As soon as possible, this initial component of the program needs an assessment/proposal that:

- identifies groups involved in monitoring, looking primarily at the church and the church-related organizations and the legal organizations (ICJ/FIDA, PCDC), and indicates which groups should serve as the core;
- explores how much of the monitoring can take place on a voluntary basis;
- says what the data generation and retrieval system is;
- explains the kind of geographical coverage the organization(s) can deliver;
- assesses the real needs of the headquarters overhead for this activity is (estimated at about \$175,000 if properly designed)
- indicates outputs to be produced and the use that will be made of them
- outlines a proposed working relationship with the Electoral Commission.

The Institute for Education in Democracy (IED) has requested \$130,000 for 2 years for monitoring elections. They have produced some first rate material on all of the by-elections to date. In its current form, their proposal is inadequate, but it has potential. The British government has very recently signed an agreement for a substantial sum in support of

**Preliminary Draft
Do Not Circulate**

capacity building by IED, and other donors are interested in supporting its civic education initiatives.

Organize a Civic Education Clearing House

The democracy team should help launch a coordinated civic education program in connection with the election. Its contribution to the donor effort should be a workshop that helps Kenyan NGO 's organize themselves. It should invite the Elections Commission to present its view of election-specific needs and use the workshop as a "clearinghouse" of information on all the various organizations, what they want to do, what they are capable of doing, (i.e., materials development, videos, etc.), and what their reach and coverage is. USAID has recently given a 116e grant to a civic educator with experience in some of these activities and an intention to begin this process, and if the outcome is satisfactory further support should be considered.

There is a need to facilitate more systematic learning and sharing among those engaged in the sponsoring of civic education activities. There is also a need for more collective strategic planning in targeting recipient audiences, reducing duplication, assuring that education campaigns are having their desired effect, and that economies of scale are achieved in reaching the largest possible audience.

The Mission should invest part of its PVO Co-Financing funds to support a coordinating network to achieve these objectives; it has already committed funds to a capacity-building effort with the NGO Council. It should discuss with the NGO Council the feasibility of supporting the Council to establish a network and a data-base on civic education and to build up a central repository of the civic education materials currently being used, as well as to acquire materials used in the relevant regional context, including South Africa. This might a half-time or even full-time staff person/salary at the NGO Council, the communications and materials acquisition resources, overhead to the Council for use of its facilities, funding of network organizational meetings or workshops.

A learning and coordination network would engage in research and development, in terms of:

- evaluating on-going civic education programs
- designing and testing pilot civic education projects

It would also engage in strategic programming in terms of:

- identifying target audiences and areas

**Preliminary Draft
Do Not Circulate**

- determining organizational modes for scaling-up from pilot efforts.

What Makes Civic Education Work

Assessing the impact of civic education programs is not easy. Kenyans interviewed for this report offered several maxims.

- "Move from the concrete to the abstract. Civic education works best when it flows from community needs and issues, instead of a national or international agenda. Those engaged in civic education need to begin by working with the community to discover what its members consider important. Then they need to link efforts to think about these problems with more abstract messages. Start with land rights, sanitation problems, health, and move to the implications of the law or for elections."
- "The churches are generally the best vehicles for civic education. They lack material capacity, but they have extensive networks and they convene people regularly. ...Appropriate organizational vehicles vary across regions. Because of ethnic inter-mixing and high mobility, the poor areas of Nairobi often lack established community groups, and the church is the only effective network. In other areas, including Mombasa, there are more community groups that can serve as a base."
- "Civic education only works when people come voluntarily and listen."
- "In rural areas, people do not have much time to spare. It is often difficult to get the same group repeatedly because people have to attend to their farms and other affairs."
- "Civic education should also focus on character and leadership. It should challenge people to think what it means to be part of a decision making process, encourage them to listen to others before offering remarks of their own, etc. As part of the process, they need to work on leadership training, community organizing skills, and what it means to adhere to a democratic charter."
- "Be sensitive to cultural variation. In some parts of the country people believe that receiving a gift incurs an obligation. They are open to political manipulation because they think that money makes them beholden and they must reciprocate by voting as promised. Others feel less obligated and are willing to accept money, then vote as they wish. Civic education needs to engage these differences."
- "Those who work on these projects should match their appearances to the people with whom they want to communicate. They should take the Pope's willingness to wear local cloth during his visit as an example. A woman struggling to support her children in rural Kenya is not going

The NGO Council, Institute for Education and Democracy, and National Council of Churches of Kenya are prime candidates to assume a coordination role in the proposed

**Preliminary Draft
Do Not Circulate**

activity. Both the Institute of Education (IED) and the National Council of Churches of Kenya have extensive experience and on-going civic education campaigns underway. The NGO Council itself does not have any programs in this area, although its member organizations are currently involved in a wide range of civic education efforts. However, it is assuming a coordination leadership in the development of learning networks in various sectoral areas where NGO 's are active. Thus, a proposed civic education network would be quite consistent and supportive of its role as a catalyst and facilitator in the NGO community.

Help Enhance the Capacity of the Churches to Host Civic Education

Currently, most NGO 's in Kenya rely on the church networks to deliver civic education materials and host dramas and workshops that enhance legal literacy. The country team should leave funding of civic education materials to other donors, for the most part (they are eager to play this role). Instead, it should focus its assistance on helping churches develop the network. It should consider a series of small grants (disbursed at intervals) to help the churches finance the basic expenses associated with outreach. These might include limited purchase of equipment, salary support for Justice and Peace Commission liaisons with the NGO 's, and support for occasional workshops for the clergy (whose support is essential for the maintenance of the network).

USAID is able to provide assistance to churches provided the assistance is not used for the propagation of specific religious views. The NCKK would be a natural forum, except that its new chair is an evangelical considered unsupportive of democracy activism. The most effective vehicle would be a consortium of the Methodists, the Church of the Province of Kenya, the Presbyterians (PCEA), and the Catholic Justice and Peace Commission.

The Strategy Under Alternate Scenarios

The proposed strategy may require modification under alternate scenarios. The proposed program is premised on the view that the incumbent regime will agree to suspend enforcement of the laws that currently restrict political party activity, far enough before the election to permit reasonably open competition; and that although flawed, the elections will have enough legitimacy to win the respect of most Kenyans. Most likely, KANU will win a small majority of the seats in the legislature, although many MPs and the presidential victor may accede to office with less than a majority of the popular vote. There are two other main possibilities.

The Hang-Tough Scenario. The KANU hardliners may be less amenable to domestic and international opinion than anticipated. They may decide either to bid for more defections, collect a 2/3 majority, and return the country to a one-party system, or to resist all pressure

**Preliminary Draft
Do Not Circulate**

for anything that can remotely be described as a fair election.

A hang-tough approach by the regime would create greater polarization among contending forces in Kenya. Opposition parties would probably boycott the elections or boycott parliament after the election. The vote would be seen as illegitimate, and Kenya would enter a period of some instability and perhaps even violence.

If this scenario holds, the assessment team believes that it would be impossible for the U.S. to provide assistance to the government. Likewise, the team also believes that it would be unproductive for the IMF to persist if legal reform is not forthcoming, since legal barriers and lack of transparency now hamper the operation of structural adjustment programs. Under these conditions, the country team should pursue a "civil society" program that emphasizes civic education and NGO outreach to public institutions, i.e. policy workshops that can inform interested members of the parties and parliament.

Breakthrough Scenario. Alternatively, if opposition unity is constructed and maintained, the opposition could win either the presidency, a parliamentary majority, or both. This would open the way for reformers within the parties to gain positions of influence and to place a thorough review of the laws and constitution on the agenda.

There are three critical variables that affect this scenario. The first is unity among the opposition. Party leaders are currently meeting to discuss this option. One can speculate that it is in their self-interest, and possibly their mutual interest, to refrain from reaching such an agreement until the actual election date is announced. The second variable is the response that opposition unity would generate among voters. A Kikuyu opposition candidate could well send many dissatisfied voters back into the KANU camp. The third variable is the level of violence that would result from a serious political contest. Against a unified opposition, the regime would likely be tempted to use all of the resources at its disposal to win the election, sowing the seeds of social disorder.

The donors will need to send a loud, clear message to the regime that any electoral or governance-related assistance depends on the conduct of the election. All donors, including the World Bank, have an interest in preventing an electoral contest so violent or flawed that subsequent disruption scares investors and sends growth rates plunging.

Conclusion: Institution-Building in Civil Society

The proposed strategy works with government institutions largely through outreach from NGOs. The exception is limited assistance to the courts. To work effectively, this strategy requires institution-building on the part of NGOs. Most of the organizations the assessment team reviewed need technical assistance to enhance management skills, and

**Preliminary Draft
Do Not Circulate**

salary support for people with specialized research, drafting, or marketing talents. USAID is providing such support for IPAR. It should pursue measures to enhance the capacity of other groups that are central to the strategy, such as the NGO Council, the Institute for Education in Democracy, the Institute for Economic Affairs, and the organizations under the ICJ umbrella. Because of the central role they play in civic education, monitoring, and creating dialogue, this assistance should be extended to ecumenical church organizations as well as to more traditional recipients of assistance.

IV. Proposed Strategy, on-going DG Project and Management Implications

Mission has been supporting a range of activities in its ongoing DG project. Some of the activities are funded through Mission bilateral funds and others through 116e human rights grants. **A review of these activities indicates that they all have focused on strengthening civil society in ways which are consistent with the proposed DG strategy.** Several of the initiatives suggested in the strategy have had some useful preliminary work done through pilot efforts in this manner.

Most of the 116e activities are small grants which run from \$20,000 to \$30,000, although a few exceed this level. The grantees are primarily human rights NGOs and other civil society organizations. The activities focus on the production of materials on human rights and civic education, human rights monitoring, and various efforts to transmit this information to the public in order to enhance legal literacy and increase awareness of human, civil and political rights issues. Some of these efforts target women's rights issues as the primary area of concern.

In part, the Mission views the 116e fund as a means of providing seed money to innovative organizations and project ideas. Those among these efforts which prove to be effective can then be expanded with USAID or other bilateral funding. The emphasis in the current 116e portfolio is consistent with the strategy proposed by this assessment.

Briefly, the 116e portfolio at present comprises the following projects:

Education Center for Women in Democracy, \$24,000, to provide support to women political leaders who face special difficulties in their efforts to attain leadership positions, ie. through the electoral process. The grant is to fund workshops on women's civil and political rights and will focus on the six sitting women members of Parliament and approximately 50 women members of local authorities, as well as women leaders' campaign managers. It should be recognized that this activity is potentially competitive with the NDI-sponsored initiative focusing on the same issues, and that this is precisely the type of competition that has bedevilled the women's movement in Kenya in many areas over the past decade. The

**Preliminary Draft
Do Not Circulate**

Mission should develop an evaluation plan immediately for these activities and monitor them closely, making a choice between the two efforts at the end of the funding of this 116e grant, unless some productive "specialization" whereby ECWD focuses on certain areas and the NDI effort on others; or ECWD on Parliamentary candidates, and NDI on local councillors (this appeared to be the direction they were heading in when the team spoke to the NDI representative).

Agency for Development Education and Communication, \$23,000. Headed by Prof. Nicholas Wanjohi from the U of Nairobi, this grant is to begin to develop a coordinative mechanism for civic education and to devise an impact methodology for assessing the value of on-going civic education efforts. Given the emphasis in the 116e portfolio on civic education, the development of impact evaluation methods is critical at this point. The Mission should supplement this activity with outside expertise who have a strong comparative understanding of effective strategies and methodologies in the design of civil education programs. This activity would involve intensive work with the main civic education organizations prior to any productive US assistance, since the organizations are many and competitive. Two alternatives were suggested in the strategy: the use of this 116e vehicle to provide an overall coordinative mechanism, or the facilitation of the NGO Council to mount a full-scale "civic education" network. The outcome of the present 116e grant should assist the Mission in making a decision which route to follow.

In addition, the Mission has given a 116e grant to the Center for Research and Information on Civic Education, CRIC, and the initial field studies this organization has produced contain very useful "consumer surveys" of attitudes and knowledge across a wide spectrum of topics. This could serve as an excellent baseline for better focused civic education efforts.

League of Kenya Women Voters (LKWV), \$24,000, to establish an office at district level in one district and finance civic education and rural rights awareness workshops, targeting illiterate rural women. This organization may bear careful scrutiny as too much the creation of one person, who is in addition a politician; there is always thus the potential for its use as a political vehicle. USAID should avoid supporting individual politicians if the US is to maintain or re-establish its position of leverage vis-a-vis the GOK.

Nairobi Law Monthly Trust (NLMT), \$23,000, to support the publication of 5,000 copies per month of the publication, which was considered the best of the "alternative" press, and focuses on democracy and human rights issues, particularly rule of law and legal rights. The alternative press is an important component of civil society. Its willingness to take chances and to pursue issues it defines as of public importance, with zeal, serves two critical functions in Kenya. First, given the Government's monopoly control over the broadcast media, the ability to express dissident points of view in any public way is largely dependent on the alternative print media. Second, despite the "yellow journalistic" tendencies of the

**Preliminary Draft
Do Not Circulate**

latter (which are pronounced; some of the publications border on the ludicrous, though not this one), its very existence provides space for the mainstream press, primarily the Daily Nation, to present more hard-hitting and critical, albeit more careful, material than would otherwise be the case. The lack of an alternative press, whatever its faults, produces a type of self-censorship in Kenya which has been notable in recent years, particularly 1988-1992. The original D/G assessment found this to be a key in the ability to create democratic constituencies with any stability or sustainability.

Professionals Committee for Democratic Change (PCDC), \$23,900, to mount five workshops for journalists focusing on enhancing journalists' knowledge of the laws relating to journalism and their application in their day-to-day work. A manual on the law and journalism is also expected to come out of this.

Kenya Human Rights Commission (KHRC), \$20,000 to support a rights awareness program (RAP) involving the development of training manuals, interactive materials, drama, and posters. The project has developed a drama series entitled "You Be the Judge", with the first play having been "The Cut", dealing with issues of bribery and corruption. The play has been performed around Nairobi, including in the National Theatre, has attracted sponsorship from local firms and Canadian CIDA, and was seen by 1,200 people over a one month period. In addition, the grant financed the writing and performance of a play entitled "Diamino, a Community's Struggle for Justice", and the publication of a manual on paralegal training. The plays have been broadcast on national radio several times and the main human rights organizations have expressed satisfaction with the manuals.

Aside from the 116e activities, current D/G efforts consist of seven projects.

CCCC. A grant to the Kenya Human Rights Commission to support the CCCC is directed toward nurturing the coalition which has emerged in support of constitutional reform. The USAID funds for the CCCC are being used to implement a major civic education campaign to mobilize the support of strategic constituencies. The CCCC has identified various target constituencies (business, labor, farmers, etc.) and is tailoring its appeals for constitutional reform around issues vital to these particular groups. The grantee is a "project" of the Law Society, the ICJ and the Human Rights Commission, but has also recently expanded its steering committee to include a more varied spectrum of civil society. Funding is \$150,000.

AFIP. A second project supports the Association of Free and Independent Press (AFIP). This effort is designed to strengthen the "alternative" press and media by bringing a greater sense of collective and professional identity among practicing journalists. Workshop training is to be provided in analytical reporting and editorial writing and how to conduct opinion polls. AFIP has as a longer term goal the development of a trust that can provide a mutual defense perimeter of some sort, so that the independent and "alternative" press can provide

**Preliminary Draft
Do Not Circulate**

financial assistance to those of its members who periodically confront harassment, sometimes physical but increasingly of a financial sort.

One of the problems the alternative press has faced is the difficulty it has in working collectively -- these are individuals with differing ideas and editorial styles, frequently fiercely independent. Learning to work together on the mounting of workshops and other "service" oriented activities is an essential first step on the road to the more taxing job of creating viable protective institutions. The quality of journalism in the alternative press also needs to be greatly enhanced, which could well reduce the types of perceived harassment to which it falls prey; the workshops are in part designed to assist in this.

On the side of the "legal reform" initiatives, attention to reducing the use of sedition laws and to the crafting of viable and enforceable libel laws to replace them is a key issue. Funding is \$100,000.

Writer's Association of Kenya (WAK). A third project concerns the provision of a small USAID grant (\$18,000) to the Writer' Association of Kenya (WAK), and organization which seeks to promote exchange of ideas among Kenyan writers and maintain standards of literary excellence. WAK submitted a proposal to fund a collection of essays on democratization, through a seminar and subsequent selection and publication of the best efforts. The activity is designed to encourage writers to address more centrally issues of democracy and good governance. These writings might then be used in Kenyan universities and teacher training colleges.

PLI. A fourth project provides assistance to the Public Law Institute, which pursues public interest litigation in the areas of human rights, consumer rights, environment and land rights. It addresses these through the court cases, and, while not always winning favorable judgements, the courts do provide a public space where media coverage serves to educate the public on important issues. The courts are one of the few venues for airing major issues and achieving greater transparency, as other arenas, such as public hearings and environmental impact statements are not required by law.

As mentioned in the strategy section of the report, the Institute along with other legal NGOs supports the recommendation that USAID invest in improving court reporting and the production of law reports. Without accurate reports and a record of past legal decisions, the Institute finds it is difficult to mobilize a factual record in contesting and supporting cases against the government or private parties, such as companies who may be polluting the environment.

PLI has recently been selected as the implementing organization for a set of "democracy fellowships" which will bring 15 Kenyans to Marquette University for an intensive, six week

**Preliminary Draft
Do Not Circulate**

training session on democratic institutions, practices, negotiating strategies and the like.

FIDA is also supported currently in the Mission's civil society portfolio. The organization, similar to FIDA chapters elsewhere, initially focussed on legal aid clinics in Nairobi for women, which generally involve cases of spousal abuse and abandonment, property rights, land issues, and child support. In recent years, an increasingly heavy legal aid case-load has forced FIDA to rethink its approach. Under the guidance of a consultant, Helena Kithinji, from Deloitte-Touche, FIDA reoriented its mission from addressing primarily downstream cases, i.e. seeking redress for women whose rights have been violated, to proactive upstream advocacy efforts, to try to get at some of the root causes of women's problems rather than continually dealing with the symptoms. It still provides legal aid but primarily in training women to undertake their own cases, backed-up with psychological counseling and participation in women's support groups.

FIDA has also started a pilot effort outside of Nairobi, in Taita-Taveta district, using a civic education approach which focuses on empowering communities to identify and address issues which they feel important to their daily existence, and ensuring that women are participants, along with men, in this process. FIDA is planning to train paralegals who can serve as resource persons in this effort. Establishing a national paralegal network is featured as a major element of the proposed long-term strategy.

IPAR. A sixth D/G activity in the Mission's current strategy and project is provision of institutional support for the establishment of the Institute of Policy Analysis and Research (IPAR). The IPAR board includes distinguished Kenyan professionals from a wide range of backgrounds and a good mix of political hue, all of them "moderates", and none of whom currently serve in the government. IPAR's activities are meant to provide high quality domestic policy analysis that is fed into both the public sector institutions and the private sector.

Summary: All of these activities are directly consonant with the proposed strategy and with the reorientation that might be necessitated under differing political scenarios, particularly for the short and medium term, which emphasizes building effective demand for reform among important constituencies. One constituency which is missing from the equation is labor, and it is recommended that the Mission explore what can be done in integrating this sector into its D/G portfolio, since labor under any political configuration is traditionally a constituency important to the construction of democratic governance. The team did not have time to assess the potential for activity and investment in this sector, in part because, the AALC was not in the country at the time of the team's visit.

Management Implications

**Preliminary Draft
Do Not Circulate**

Finally, the many of the efforts listed above are short-term grants. This is particularly the case for 116e efforts. Some could show enough promise to merit longer term funding, and many may suggest additional lines of activity which are important in constructing the optimal mix of activities and institutions to pursue a productive D/G strategy in Kenya. **The Mission needs to be mindful of the management implications of these activities and to plan accordingly.**

An FSN Project Manager is presently handling all of the activities in this portfolio, and a waiver to hire a US-PSC Democracy Advisor is being awaited. Even when these resources are in place, the management of a D/G effort that comprises many grants and especially "seed bed" activities through 116e is daunting. The strategy proposed in this assessment emphasizes the need to incorporate substantive capacity building funding into all the civil society activities that are undertaken, so that these develop not just substantive expertise but organizational, advocacy, and strategy capacity of their own. How to assess the specific needs in terms of assistance of this type, locate the resources, provide them, and manage and monitor them, assuming little in the way of incremental resources will be available, is a challenge.

A possible allocation of responsibilities for the management of the D/G program as it evolves might be the following.

- 1.) Use the FSN to monitor closely the progress on the major activities, such as IPAR, and the relatively well-established groups in whose organizational capacity AID has some confidence based on experience (e.g., FIDA, ICJ, Human Rights Commission). This will give the FSN responsibility for the major elements of the portfolio not likely to present unusual problems and judgment calls, and provide a useful opportunity for skill development in the less risky elements of the program for the FSN.
- 2.) Use the US-PSC to monitor the "seed bed" activities under 116e and to identify new activities for funding under this program that would further the Mission's D/G strategy. This will involve a significant amount of canvassing the civil society networks, vetting organizations that submit proposals, and devising realistic and innovative organizational vehicles for pursuing a civil society enhancement strategy.
- 3.) Use an expanded D/G team chaired by the US-PSC to follow progress on overall SO achievement, needed replanning, issues arising, discussion of new activities and organizations, etc., with a few additional members added who have keen interest added to the core members of the team as presently constituted.
- 4.) Devise a systematic "D/G-portfolio interface monitoring" effort based on the core D/G team, which extracts from the ongoing efforts in the other sectors those issues which are

**Preliminary Draft
Do Not Circulate**

important to their success, relevant to D/G interventions, and either being addressed or possibly not being addressed in the D/G strategy at any point in time. These might include such issues as: local government restrictions on micro-entrepreneurs, both legal and extra-legal; the registration of community based organizations in natural resource protection; and the like.

5.) Finally, use the NGO Council to vet, monitor and develop an organizational assistance strategy for the capacity building component of each of the main activities. This assumes that an early element in the program is the provision of assistance to the NGO Council itself, in support of its efforts to develop the capacity to service the NGO community; and that AID is persuaded that this capacity is effectively and competently built in the Council. PVO-CoFi funding is already directed to the NGO Council in support of its capacity building; the focus should be on those aspects of the Council's capacity enhancement that will then allow the Mission to rely on the Council for some of the management aspects of its civil society program.

Appendix One

The Administration of Justice in Kenya

Prepared by Jennifer Widner, USAID Assessment Team/University of Michigan and Erastus Wamugo, International Commission of Jurists, Kenya Section

The body of this report explains why assistance to the administration of justice should be a Mission priority in Kenya. To summarize:

Effective courts are important both for economic growth and for protection of citizens' legal rights. If businesses cannot resolve contract disputes quickly, then the risks attached to investment increase. If land rights are insecure because of slow adjudication of disputes, then farmers do not invest in technologies that intensify cultivation or conserve natural resources. If citizens cannot seek timely remedy of abuses of state power, then the rule of law gradually wanes.

There is both external and internal demand for judicial reform, currently. There is broad support among the legal sector NGO 'S's for assistance to improve court reporting and to develop law reports, without which it is difficult to monitor decisions or pursue reform through a litigation strategy. Within the courts, there is support both from the registrars and the Chief Justice and from a rejuvenated Judges and Magistrates' Association.

There is need. Current practices, coupled with a growing case load, conspire to create levels of civil delay that are among the highest in Commonwealth Africa.

**Preliminary Draft
Do Not Circulate**

Currently, forty percent of the magistrates are women. It is possible to meet some of the Mission's obligations to "Women in Development" by working with women magistrates.

This briefing paper provides background information on the administration of justice in Kenya, along with guidelines for working with the judiciary and finding technical expertise in the United States.

The Organization of the Justice System in Kenya

Kenya shares a common law tradition with other parts of Anglophone Africa, England, the United States, Canada, and other countries, such as India. The "law" thus comprises statutes and precedent, created through the courts. The relevant body of precedent includes decisions made in other common law countries. Thus, judges in Kenya may refer to interpretations of similar laws by their counterparts in the United States or India, for example.

The Courts are modelled on a streamlined version of the English system, originally developed for India. This system differs slightly from the American model. In Kenya, as in most parts of Commonwealth Africa, there is no trial by jury, for example. To the extent that members of the public assist the judge in making a decision, they do so as "lay assessors," paid by the court (see below). The use of lay assessors in Kenya more closely resembles trial by jury than it does in neighboring Commonwealth jurisdictions, where assessors testify about the nature of customary law, should any such questions arise in a case.

The Structure of the Court System

The present court structure was created in 1967 with the enactment of the Judicature Act, the Magistrate's Courts Act, and the Kadhi's Court Act. Several parallel tribunals have been created since that time, to handle certain types of cases.

The District Magistrate's Courts. The Magistrate's Courts are the base of the court structure. They may be of the first, second, or third class and each court has original jurisdiction in the administrative district for which it was established. There are also Resident Magistrates' Courts ... The Chief Justice may extend the jurisdiction of a Magistrate's Court by publishing a notice in the official Gazette. The law currently provides for 250 magistrates.

**Preliminary Draft
Do Not Circulate**

1. District Magistrate 's Courts, Third Class (DMIII) have limited criminal and civil jurisdiction. They handle petty criminal offenses, for which the sentence is less than a year's imprisonment, not more than 6 strokes of the cane, or a fine not exceeding 5000 Kshs. These are mainly offenses charged under the Vagrancy Act, the Prisons Act, the Public Health Act, and the Chief's Authority Act. They also entertain civil claims under customary law or where the value of the case does not exceed 5000 Kshs.

Customary claims fall under several categories:

- land held under customary tenure
- marriage, divorce, dowry
- seduction or pregnancy of an unmarried girl or woman
- enticement of or adultery with a married woman
- matters affecting status, in particular the status of women
- matters of guardianship, custody, adoption, and legitimacy

Appeals from a DM III Court lie through the Resident Magistrate 's Court in criminal matters and through either the Resident Magistrate 's Court or the DM I Court in civil matters. In criminal matters, a further appeal lies to the High Court, with the leave of that Court.

2. District Magistrate 's Courts, Second Class (DM II) have limited criminal and civil jurisdiction. They handle criminal cases that carry prison sentences not exceeding 2 years, corporal punishment not exceeding 12 strokes of the cane, or a fine not exceeding Kshs. 10,000. Civil jurisdiction is similar to that of the DM III Courts, except that the DM II Court may handle cases of higher value. Appeal from the DM II Court, in both civil and criminal matters, is to the High Court.

3. District Magistrates ' Courts, First Class (DM I) have limited criminal and civil jurisdiction. They may hear criminal cases carrying a sentence of imprisonment up to 7 years, corporal punishment not exceeding 24 strokes of the cane, and fines not exceeding 25,000 Ksh. They may hear civil cases where the matter in dispute does not exceed 10,000 Kshs. The Chief Justice may enhance the jurisdiction of a Magistrate First Class in criminal matters with regard to certain offenses, under the Penal Code. There is appeal in both criminal and civil matters to the High Court. A second appeal lies to the Court of Appeal on matters of law only.

Resident Magistrates ' Courts. The Resident Magistrates' Courts have jurisdiction in criminal matters carrying sentences of less than seven years, a fine not exceeding 25,000 Kshs., or corporal punishment not exceeding 24 strokes of the cane. Resident Magistrates have civil jurisdiction in cases valued at less than 25,000 Kshs.

**Preliminary Draft
Do Not Circulate**

Kadhi's Court. The Kadhi's Court is established under Section 66 of the Constitution. It exercises jurisdiction in matters concerning personal status, marriage, divorce, and inheritance, where all parties are Muslim. It applies Muslim Law.

Appeal from the Kadhi's Court lies to the High Court.

The High Court. The High Court is created by Section 60 of the Constitution. It has unlimited jurisdiction in both civil and criminal matters. In addition, the High Court has jurisdiction to interpret any provision of the Constitution referred to it by a subordinate court under Section 84 of the Constitution. It is therefore vested with the power to enforce fundamental rights. The High Court may also sit as an election court, to hear election petitions. Finally, the High Court supervises the subordinate courts through powers of revision. In practice, the High Court hears mainly criminal matters involving capital offenses (murder, robbery with violence and attempted robbery with violence, treason, administration of oath to commit any offence punishable by death) and civil matters where the value of the case exceeds 25,000 Kshs.

Under current legislation, the High Court comprises 30 judges and the Chief Justice. In practice, the Court has been unable to recruit sufficient judges and is 3 short. In most cases, High Court judges sit alone. There are two exceptions. Two judges sit together to hear appeals of capital cases that carry a death penalty). When the High Court sits as an election court, a panel of three judges constitutes the bench. A special practice has also developed for constitutional matters, which are heard by two, or sometimes three judges.

Election Disputes

Jurisdiction to determine disputes arising out of elections lies with the High Court. There are no permanent election courts. When judges of the High Court hear election cases, they sit as a panel of three, selected by the Chief Justice.

There is no time limit within which an election petition must be heard. Section 22 of the National Assembly and Presidential Elections Act states that upon receipt of a petition the election court shall fix a trial date, if the petition is properly filed.

Section 44 (5) of the Constitution clearly states that the decision of the High Court on any election matter is final and is not subject to appeal. In *Kenneth Matiba v. Daniel Toroitich*

Court of Appeal. The highest court is the Court of Appeal. The Court of Appeal is created under Section 64 of the Constitution. Its jurisdiction is conferred by law, i.e., it does not enjoy general or inherent appellate power. The Court of Appeal consists of 8 judges and the Chief Justice. The Court of Appeal sits with three judges presiding. When

**Preliminary Draft
Do Not Circulate**

the court is requested to establish a precedent from conflicting decisions, then the Court sits as a five-judge panel. The Court of Appeal rides circuit, stopping at four stations.

Specialization. The Chief Justice has set up specialized divisions for handling certain types of cases. The High Court has a Commercial Division (created in 1994) and a Personal Injury Division, established in 1988 to streamline handling of automobile accident cases. The Nairobi Magistrates' Courts have criminal and civil divisions, housed separately. There is no specialization at court stations outside Nairobi.

The Appointment, Discipline, and Removal of Judges and Magistrates

Popular concern about the independence of the judiciary in Kenya has focused on the terms of selection, appointment, rotation, and tenure. It is not clear that these really do give rise to the problem of interference that exists in some parts of the system. The rules are similar to those in effect in countries where the judiciary is perceived to be more independent.

The main difference between the Kenyan system and many others is that in matters of appointment and discipline, members of the bar are excluded. Some argue that this exclusion pushes the bench closer to the executive, and that it weakens the importance of professional reputation as a means for maintaining ethical standards.

Judicial Service Commission. Section 68 of the Constitution provides for a Judicial Service Commission to 1) advise the President on the appointment of judge of the High Court and Court of Appeal, 2) appoint and discipline magistrates and court registrars; 3) oversee the general welfare of the judicial department. The members of the commission currently include the Chief Justice, the Attorney General; two persons drawn from the High Court and Court of Appeal; and the Chairman of the Public Service Commission. The composition of the Commission may be expanded shortly to include one or more practicing advocates.

Appointment and Tenure of Judges. The Chief Justice is appointed by the President. The constitution requires neither the involvement of a Judicial Service Commission nor confirmation by parliament.

Procedures for appointment vary for judges and magistrates. Judges of the High Court and Court of Appeal are appointed by the President on the advice of the Judicial Service Commission. Candidates must satisfy certain professional requirements as follows:

- One must be or have been a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or in the Republic of Ireland

**Preliminary Draft
Do Not Circulate**

or of a court having jurisdiction in appeals from such a court; or

- Be an advocate of the High Court of Kenya with not less than seven years' standing; or
- Have held professional qualifications set out in Section 12 (1) of the Advocates Act for an aggregate period of at least seven years.

Once appointed, judges can only be removed 1) on attainment of statutory retirement age; 2) on expiry of contractual period, if a judge was appointed on contract; or 3) for inability to perform the duties of a judge or for misbehavior. Where it is alleged a judge has misbehaved or is unable to perform judicial functions, the Chief Justice must present the complaint to the President, who must appoint a tribunal of five people to investigate. The tribunal decision is binding on the President. In practice, the tribunal system has not been used.

Appointment and Tenure of Magistrates. The Judicial Service Commission annually invites prospective candidates to apply for positions as magistrates and interviews those who submit applications. It appoints magistrates on the basis of this review. Magistrates are not required to have legal training; they need not be lawyers, although the younger ones often are.

The power to discipline and dismiss magistrates lies with the Judicial Service Commission. The Commission has delegated these powers to the Chief Justice, in accordance with section 68 (3) of the Constitution, however. Disciplinary proceedings thus take the form of a hearing, in which the magistrate accused of misconduct is represented by an advocate and the court is represented by an advocate as well.

Rotation and Transfer of Judges and Magistrates. Rotation and transfer of judges and magistrates is directed by the Chief Justice, exercising general administrative powers. There are no rules governing this exercise.

Contract Judges. Until very recently, Kenya's judicial corps included judges hired on contract, usually with support from the Overseas Development Administration (ODA). This system was a hold-over from the days when there were insufficient numbers of trained personnel to supply the courts, and the country borrowed judges from other Commonwealth jurisdictions, such as England, Jamaica, India, Sri Lanka, Ghana, and Uganda. This

arrangement is still in effect in some Commonwealth African countries, including Uganda, although it has been scaled back.

**Preliminary Draft
Do Not Circulate**

Because they serve on short-term contracts, which are subject to renewal, these judges are often assumed to exercise less independence than others. The actual record is quite mixed, however. In Kenya, contract judges have sometimes taken bold stands against the government. At other times, they have appeared to be subject to influence. Kenya has discontinued use of contract judges.

Lay Assessors. In Kenya, assessors are used only in murder trials and their opinions are not binding upon the trial judge. When an accused person is committed to the High Court for trial on a murder charge, the Registrar of the High Court writes to public bodies, such as civil service bodies, seeking the names of people who may serve on a panel of lay assessors. The prospective assessors are then interviewed by the trial judge in the presence of the prosecution and the defense counsel, to determine their suitability to serve. The prosecution and the defense are each entitled to object to any of the candidates. Upon being empanelled, the assessors are under the control of the trial judge in matters of discipline and removal.

The appointment of lay assessors is governed by the Criminal Procedure Code.

Judicial Pay and Allowances. The judiciary has recently been removed from the civil service, where it had long been under the supervision of the Directorate of Personnel Management in the Office of the President. This change in status permits an increase in the salary scale for judges and magistrates, including better government housing, although the new arrangements have not yet been gazetted. This reform may also bring greater independence over the long run. (It also means that the judiciary is now able to work with donors directly, instead of going through the Office of the President.)

Court Administration

Court administration is under the purview of the Chief Justice and Principal Judge, along with the registrars. The executive officers are the Registrars and Deputy Registrars, who hold positions equivalent to that of Clerk of Court in the United States. Registrars and Deputy Registrars are trained lawyers who have served as magistrates, in most cases.

Court Procedures. Common law countries vary in the degree to which court procedures can be changed by the court itself instead of through legislative action. In Kenya,

- Procedure in the Court of Appeal is regulated by the rules of that court made pursuant to the Appellate Jurisdiction Act.
- Procedure in the High Court and subordinate courts is governed by the Civil

**Preliminary Draft
Do Not Circulate**

Procedure Act and the Criminal Procedure Code.

- The Court of Appeals rules, the Election Petition rules, and the Civil Procedure rules are made by the Rules Committee established under Section 81 of the Civil Procedure Act.

The courts exercise their inherent powers to deal with administrative matters, as they arise.

Court Sessions The Judicature Act stipulates that Magistrates' Courts sit throughout the year, although each magistrate is entitled to 30 days of annual leave. The Judicature Act also determines the length and frequency of High Court sessions and Court of Appeal sessions. These courts sit during 40 weeks of the year, in three sessions. The Registrar of the Courts prepares the court calendars.

It is possible to apply for hearing of urgent matters that arise when the court is not in session. In the High Court, urgent civil applications are dealt with by the duty judge, who is appointed by the Chief Justice.

Assignment of Cases. In the High Court, civil matters are assigned by the duty judge in consultation with the Chief Justice, while criminal matters are assigned by the Deputy Registrar, in consultation with the Chief Justice. In the Court of Appeal, cases are assigned to judges by the Chief Justice in consultation with the Deputy registrar in charge of the Court of Appeal Registry. In subordinate courts, the senior-most magistrate acts as head of station and assigns both civil and criminal cases to magistrates, according to their jurisdiction. There are no rules governing the case assignment.

Case Flow. Civil delay is a serious problem in the Kenyan court system; criminal delay, somewhat less so. On average, a civil case takes five years to complete, while a criminal case takes from six months to a year. Some civil cases have been pending for as long as ten years, according to the Registrar's office. By comparison, civil delay averages about four years in neighboring Commonwealth countries, and criminal delay ranges from six months to a year in Zambia to four years in Tanzania and occasionally more in Uganda, where people were "lost" in the prison system while under remand.

In 1991, when the last audit was conducted, there were 40,597 civil cases pending before the High Court in Nairobi. On average, there are about 5,000 civil cases filed in the High Court each year (down from 6,000 earlier in the decade) and about 1,400 miscellaneous applications. During the last parliamentary election year, 92 election petitions were filed. Most likely, a similar number of petitions will require attention during the up-coming election.

**Preliminary Draft
Do Not Circulate**

On average, civil appeals take three to four years to process, while criminal appeals take less than one year. Delays in the preparation of the appeal record from the High Court may take as long as two years, however, and thus make the appeals process quite lengthy, even in criminal cases. On average, about 200 civil appeals and 96 criminal appeals are filed with the Court of Appeal each year.

There are no data on case flow in the magistrates' courts, although a British team recently carried out a review that may have generated estimates.

People cite several reasons for delay in the courts.

- Poorly conducted police investigations mean that sometimes charges are badly drafted and "the charge has to be mended in the courtroom."
- Police do not always make a good effort to get witnesses to court, causing unnecessary adjournments.
- Advocates ask for repeated adjournments.
- The case load has increased dramatically while the number of judges and magistrates has remained the same.

It is not clear whether there has been an analysis of case flow management and the contribution of the calendar system and other procedures to delay.

Court Fees. Court fees are established by law under the Judicature Act. The court charges for forms; services, such as taking the particulars of a plaint; filing a plaint or counterclaim or an election petition; hearing fees; applications for an order of mandamus, prohibition, certiorari or habeas corpus; service of documents; motions and chamber applications; etc. Most fees are fixed. Sliding scales, based on the value of the case, are established for filing civil plaints, suits for arrears of rent, and settling estates.

Currently, revenues from court fees remain with the court and comprise about half of the court's annual budget. The court fees were recently increased dramatically by the Chief Justice.

The Budget The Deputy Registrar of the High Court, Mr. William Ouko, is the person who must negotiate with the Treasury for funds, which he says begin to run out about half way through the year. Mr. Ouko is concerned that few people understand how courts work and what they require; for that reason, he recently took treasury officials on

**Preliminary Draft
Do Not Circulate**

a tour of courts throughout the country.

The government has asked the court to cut its budget and staff as its contribution to structural adjustment. Among the economies the court has recently enacted is reduction in the number of court-employed process servers. The court now encourages advocates to serve papers instead of using court-appointed servers.

The Legal Record

A clear, accurate, widely-disseminated record of court proceedings is important for at least three reasons. First, the record of a trial is the basis for appeals, and where the record is flawed, the right of appeal is effectively lost. Second, in common law jurisdictions, the law comprises both the statutes and precedent, as interpreted by the judge. Where judicial decisions are not available or do not circulate, then neither the bench nor the bar can develop a shared sense of what the law is. Third, dissemination of judges' decisions provides a means for lawyers and judges to monitor performance. It provides an opportunity for public scrutiny and mobilizes pressure for judges to maintain their public reputations for legal acumen and independence.

Court Reporting. In Kenya, as in neighboring common law countries, the judge's notes are the official record of a trial. Generally, the judge takes notes by hand, as the trial proceeds. There are no stenographers and there is no recording equipment.

In civil matters, evidence is recorded in writing in the form of a narrative, per the Civil Procedure Act. It may be recorded by the presiding judge or by another person under the supervision of the judge.

In criminal matters, evidence is recorded in writing. The Criminal Procedure Code stipulates that whenever a witness requests that his or her evidence be read back to him or her then this shall be done and in a language the witness understands. This practice is observed in the courts, currently.

It is not a practice in Kenyan courts for advocates or members of the public to tape record proceedings. There is no law preventing members of the public from keeping a separate record or to tape the proceedings, however, and in celebrated cases print media journalists have sometimes produced verbatim reports. In some cases judges and magistrates have ruled that members of the public, apart from journalists, should not take down notes, and in the Koigi wa Wamwere trial several human rights observers were barred from tape recording the proceedings by the presiding magistrate.

A member of the public may peruse a court file and any decision in it at no cost.

**Preliminary Draft
Do Not Circulate**

He or she may also apply to the Registrar to have a typed copy of the decision at a fee (currently 60 Kshs. per page). The Deputy Registrar indicated that advocates who want copies of the decision are similarly required to pay.¹ As with the Koigi wa Wamere trial, there are often long delays in obtaining a typed copy of a verdict, which can turn delay an appeal.

Indexing and Circulating Decisions. Currently, court decisions are largely unavailable to the public, by practice, not by law. Magistrates' decisions are maintained in the files but are neither indexed nor circulated. Decisions of judges of the High Court are made available to colleagues on request. The Deputy Registrar circulates judgements of the Court of Appeal among that Court's nine members, only. Neither High Court nor Court of Appeal decisions are indexed, making retrieval difficult.

Law Reports. Law reports offer digests of judges opinions in a form that makes them easily accessible to members of both the bench and the bar. Because judges in common law countries may draw on decisions of their colleagues in other common law jurisdictions, ability to make reference to law reports from England, the United States, and India is also helpful. For example, Tanzania's courts make extensive use of American constitutional opinion, because few constitutional cases were brought before the Tanzanian courts until the era of multi-party rule, and the justices now seek guidance elsewhere. Currently, there are no law reports published in Kenya. Law reports were issued earlier, in the following forms:

- Kenya Law Reports (KLR) - 1897-1956*
- East African Court of Appeal Reports - 1934-1956*
- East African Law Reports - 1957-1975*
- Kenya Law Reports (KLR) - 1976-1980*
- Kenya Appeal Reports (KAR) - 1982-1992²*

1

For the 500 plus page verdict in the Koigi wa Wamwere trial, fees for a copy of the decision would thus be a little over \$550.

2

The Kenya Appeal Reports were a project of former Chief Justice Allen Robin Winston Hancox, and they ended with Chief Justice Hancox's departure. They were printed in England, which made them quite expensive. The remaining copies sit in the office of the Deputy Registrar of the High Court.

**Preliminary Draft
Do Not Circulate**

Currently, the conventional wisdom is that the best way to get hold of a judge's decision in a case is to go to the advocates involved, not to the courts. In 1994, Parliament passed Council of Law Reporting Act, which establishes a Council to produce law reports. The Act has not been implemented, however.

Judges may gain access to Commonwealth decisions through law reports kept in the High Court Library, in Nairobi, but the only regular law reports are English. None from the African Commonwealth countries are available.

Information about Changes in Law or Procedure. Changes in law or procedure are gazetted. The Chief Justice also issues circulars on selected changes in procedure. These appear in *The Advocate*, a monthly publication of the Law Society of Kenya. These circulars have occasionally attracted criticism. Some have claimed that they curb the discretion of magistrates and judges.

Alternative Dispute Resolution

The Kenyan judiciary currently makes no formal provision for alternative dispute resolution. Mediation is not used, although in succession or inheritance cases, judges and magistrates do informally urge parties to settle cases out of court. In civil matters where parties have reached a settlement, the settlement can be recorded and pronounced as the judgement of the court.

Handling of Commercial and Constitutional Cases

Three types of cases are of special interest to USAID. Efficient and fair handling of commercial and land cases is important to economic growth. The handling of constitutional cases is important to protection of human rights.

Commercial Cases

The Chief Justice recently created a special commercial division of the High Court. The division is too new to have established a track record. Kenya has no formal system of commercial arbitration in place, although the system recognizes arbitration as a matter of contract between individuals. The Vice-Chairman of the Kenya Chapter of the Chartered Institute of Arbitrators estimates that about 100 arbitration cases are handled by its members each year (the Kenya chapter has 133 members).

The role of the courts in arbitration is undergoing change. Under the old Arbitration Act, an arbitration award has the same status as a High Court decree and is similarly enforceable. The High Court may remove an arbitrator for misconduct and set

**Preliminary Draft
Do Not Circulate**

aside awards procured through misconduct of the proceedings or misconduct on the part of the arbitrator. In 1994, Parliament passed a new Arbitration Act, which keeps much of the older legislation intact but adopts provisions of the UNCITRAL Model Law, in order to facilitate arbitration of international cases in Kenya. The new Act is not yet in force.

Land Cases

There are currently over 29,000 land cases pending in the Kenyan court system. These are occasionally very sensitive. (The Kituo cha Sheria firebombing was probably connected with the organization's efforts to litigate on behalf of the land interests of a poor community against some important, wealthy Kenyans.) The Chief Justice has just created a special land tribunal to handle the backlog.

Constitutional Cases

The bar has expressed great concern that there is currently no mechanism for appealing constitutional cases, especially rights cases. The High Court is the only court that can hear constitutional cases, in the court's interpretation of the Constitution. Considerable anguish and ink have been expended on this subject. The Kenyan courts have a form of judicial review, along the lines of the English courts, not the American. Even then the High Court has been unable to enforce civil liberties protected in the constitution, such as freedom of assembly and speech.

Advocates and the Court

In Kenya, people brought before any level of the court may be represented by counsel, by contrast with some neighboring countries, where lawyers are not permitted at the primary levels of the court. In cases of murder or treason, the court is obliged to provide representation where the accused cannot pay for an advocate's assistance. For other capital offenses, there is no such obligation.³

The Bar

Kenya has a unified bar, which has grown from about 350 members during the mid 1980's to 2000, today. Each year, 350 aspiring lawyers graduate from the Kenya School

3

Robbery with violence was added to the list of capital offenses without a corresponding extension of the right to counsel. The Law Society places high priority on correcting this omission.

**Preliminary Draft
Do Not Circulate**

of Law's one-year professional skills course. Those who enter private practice are regulated under The Advocates Act.

Paul Wamae, chair of the Law Society of Kenya, laments a decline in professional ethics and the quality of legal services during the past few years. He says that formal complaints against lawyers for malpractice or ethical violations are filed at the rate of about two per week, currently, whereas before they were much less common. Most of the complaints center on the use of clients' money. Prosecutors also complain that, "some lawyers are known to have extorted money from their clients to be used on bribing the magistrates and the prosecutors if necessary."

The Prosecution and the Police

In Kenya, prosecutors are essentially police officers, with a few months' extra training. Prosecutors are recruited from the top ranks of the graduating police academy class, and their preparation and school ties lie with the police, not with the bar. Except for their brief course at the Kenya School of Law, they have no legal training. Their background and status are sources of friction with the court, on occasion.

Police express frustration with what appears to be an attempt by judges to assess probable cause, within the procedural limits that exist. One report written by a police liaison to the courts complained that, "Some courts have insisted ...that exhibits be produced in court at the time of taking plea and cases have been dismissed for failure on the part of the police to do so. This kind of procedure is not in line with the known practice where exhibits are to be brought only when the case has gone to trial. This demand causes inconvenience to the police."

Police and prosecutors have several other grievances with the court, currently. They protest against the release of accused persons on bail, on the grounds that they cannot then protect the public. They complain that some judges and magistrates are lazy and that others set down too many cases for hearing in one day, with the result that "only one witness per case is sometimes heard." ("Getting witnesses to court repeatedly without their evidence being taken is in itself a big discouragement to would be witnesses.") They also accuse defense counsel of bribing clerks of the court to lose files and exhibits, in order to win their cases. Finally, they point to instances of corruption among the magistrates,

USAID/Republic of Kenya Office of Personnel Management.
"Towards Efficient and Effective Administration of Justice,"
Nairobi, April 13-24, 1995, p. 17.

**Preliminary Draft
Do Not Circulate**

who accept bribes from the defense.

Assistance to Improve the Administration of Justice

The British have been major providers of assistance to Kenya's courts in the past, although they have cut back considerably in the past year, as the system of contract judges has been phased out. The USAID Kenya Mission also has had some previous contact with the judiciary. It has provided computers to the Court of Appeal. It has also sponsored a series of training programs and workshops for judges and magistrates.

Locally, the ICJ has experience working with judges and magistrates as well as lawyers. In October 1995, it hosted a workshop on criminal procedure that was widely attended and generated insightful papers. The judiciary is still wary of reaching out to the bar, although it is beginning to do so, and for this reason USAID should think carefully before using a local legal sector NGO'S to host activities for the court.

Working with the Courts

It is helpful to respect some guidelines when working with the courts:

- The courts are not part of the executive branch, but what they do is of great interest to the executive and to senior politicians. They are politically sensitive, just as the Central Bank. They should be approached carefully and diplomatically.
- The courts are hierarchical. It is important that any program be negotiated with the Chief Justice. The current chief justice is conservative but interested in reform.
- The Registrars are the people who will carry out the logistical arrangements for any program. A strong rapport with the Registrars is important to the success of any program.
- In some court systems, it is helpful to work with judges and magistrates separately. Magistrates will often defer to judges and remain silent in discussions, if the two groups are combined. This pattern does not always hold, however, and in Uganda the two groups and the bar have been mixed at meetings, with excellent results. It is important to inquire first, however.
- One of the USAID-supported workshops this year was open to members of the press, which covered it regularly and in detail. Because some of the papers addressed the subjects of corruption and police investigation quite candidly, it appears that pressure was brought to close future meetings to the press. This is an instance in which the interest of the judiciary

**Preliminary Draft
Do Not Circulate**

in repairing its public image, by showing that it is addressing problems, conflicts with sensitivities of political authorities. In Uganda and Tanzania, the Chief Justices have invited press participation in meetings and briefings to good effect, but the climate is different in Kenya, and a USAID project in this area should defer to the judgement of court officers in the matter of publicity.

- Kenyans sometimes live on the laurels of the past and shun their neighbors. The courts look to the British for examples, not to Tanzania and Uganda (which have shown themselves to be much more reform-minded) or to the Americans. For the short term, there should be no effort to push American training or examples on the courts or to try to force regional meetings. Circulating information about developments in other countries to the registrars and key judges, is likely to change perceptions and make greater interaction possible over the medium and long term. So may participation of American judges in workshops, as resource people (not as trainers).

Sources of Expertise

The administration of justice is a technical field. If the Kenya Mission chooses to pursue the recommendations of the assessment team and decides to become involved in this area, it should either allow the courts to design their own projects or provide technical assistance from the United States to help at critical junctures.

Past experience with rule of law programs suggests some rules of thumb regarding choice of personnel:

- Judges are the people who can communicate most effectively with other judges. Although lawyers can be quite helpful in some aspects of court reform, such as law reporting, members of the bar have no experience in managing court systems or in sitting on the bench. Judges, not law professors and not lawyers, are the best trainers.
- U.S. *trial* court judges are more suited to work with High Court judges and magistrates than U.S. appellate court judges. Trial judges tend to have more hands-on acquaintance with the pressures of the courtroom and the problems of court management.
- If drawing from the ranks of state trial court judges, then it is important to consider the degree to which the systems are parallel. Some states in the U.S. have elected judges, while others grant security of tenure. Judges in Commonwealth Africa have security of tenure, on paper, at least, and they have a hard time understanding how elected judges can be independent.
- If an emphasis of assistance is delay reduction, then it is important to involve not only judges from

**Preliminary Draft
Do Not Circulate**

the U.S. and Africa but also registrars and their equivalents in the U.S. (Clerk of Court and Court Administrator). The Clerks of Court are the people who know how paper moves through the court system and what to do with employees who sell decisions.

- It is important that U.S. participants be well-briefed in advance both about the court system in Kenya and about the expectations the Mission and the Kenyan judges have of them. Information about African court systems is not abundantly available in the U.S., so the Mission needs to provide its own briefing materials.

The Global Bureau of USAID recently issued an RFP for assistance with rule of law programs. The Bureau is reviewing the bids now. Presumably, this project will enable the Mission to buy specialized services through the contractor the Global Bureau chooses.

Another effective way to reach experts is through the District of Columbia Superior Court. That court 1) is especially diverse, 2) has solved a serious civil delay problem within the past 5 years, 3) has experience with judicial training in Africa, and 4) deals with a greater variety of cases, because of its location, than most other trial courts. Its judges are appointed, not elected, and they are appointed by the president on the advice of a judicial services commission, much as Commonwealth African judges are. Contact the Honorable Nan R. Shuker, Presiding Judge of the Civil Division, Superior Court of the District of Columbia, 500 Indiana Avenue, NW, Washington, D.C. 20001 (Telephone: 202-879-1207. Fax: 202-879-7830).

There are other people who can be helpful because of their experience and technical skill. Two people at the U.S. Information Agency in Washington have experience in Africa with judges and lawyers. One is Ms. Charlotte Peterson. The other is Mr. Isaac Russell. Both can be reached at USIA, 301 4th Street, SW; Washington, D.C. 20547. Locally, Marianne Scott, the Cultural Affairs Officer at USIS, has established ties with lawyers and judges, especially the Judges and Magistrates Association.

If the Mission wants to assess the costs of changes in court reporting or computerization, then an important source of technical expertise is the National Center for State Courts, based in Williamsburg, Virginia. The NCSC has consultants who have assisted with computerization and automation in various types of court systems in the United States, Latin America, and eastern Europe.

Additional Background Materials

The USAID assessment team will provide copies of Ambassador Walker's report on the judiciary in Africa, which mentions Kenya, as well as Jennifer Widner's report on the USIA-funded U.S.-Africa Judicial Exchange and Gary Hansen's CDIE review of donor

**Preliminary Draft
Do Not Circulate**

funding of rule of law projects. In the Mission files (HRDA) already is the report of the USAID-funded seminar, "Towards Efficient and Effective Administration of Justice in Kenya." Nancy Gitau, in the Democracy and Governance Program, also has a copy of a Kenya Human Rights Commission report entitled, "The Dream of Judicial Security of Tenure and the Reality of Executive Involvement in Kenya's Judicial Process." The funding for this publication came from USAID, through its support of a series of papers the KHRC put out.

The Chief Justice:

**The Honorable Chief Justice Majjid Cocker
Law Courts of Kenya
Nairobi**

The Registrars: (October 1995)

**Jacob Ole Kipury
Registrar
High Court of Kenya**

**F. Simbiri-Jaoko (Mrs.)
Senior Deputy Registrar
High Court of Kenya**

**William Ouko
Principal Deputy Registrar
High Court of Kenya**

**Tom Luraga
Deputy Registrar
Court of Appeal**

**Preliminary Draft
Do Not Circulate**

Appendix Two

Political History and Context

Colonial Legacy. Kenya became a colony of Britain at the turn of the century and came to independence only in 1963, several years after the formal conclusion of a protracted nationalist struggle fought mainly in the central area of the country. The colonial legacy included a "command and control" type of polity with very little in the way of participatory structures until after the end of WWII, when African District Councils began to be given some responsibilities for service provision in the African areas, and for collecting the taxes to pay for these.

The nationalist movement, or Mau Mau, while pretty much confined to the areas of Kikuyu settlement in Central and Rift Valley areas, resulted in a policy of moving the population into enforced settlements in the affected areas. This greatly changed the settlement patterns and, ironically, magnified the potential for political interaction among the most disaffected and politically mobilized segment of the population. It also provoked strong reaction by the colonial government against political activity generally, which was allowed to take place only under very close and watchful eyes of the district administration, and on a local and not a national basis. Some activity was, of course, desired, to foster the spirit of identification with and legitimacy of the African District Councils; but nationally-oriented political organization was forbidden. The fragmentation and factionalism of Kenya's politics can be traced to this era.

In the economic sphere, the colony was run for the whole of the interwar period on the basis of meeting the demands, in both labor and output markets, of the settler community. The settlers were expected to develop an efficient agricultural economy, but were given substantial subsidies and protections at the outset. After the war an African yeoman peasantry began to be envisioned -- and ultimately constructed -- to inherit and carry forward this agricultural economy as the "winds of change" blew across Africa.

The reality of the settler model was more one of high cost, monopolistic agriculture based on a compulsory labor system that fostered some of the types of social dislocation underlying Kenya's present problems. These include families split into two or more places, with insufficient resources to develop the home plot commercially (and thus condemned to subsistence production), while a wage earner collects insufficient wages to provide the wherewithal to buy social services (health and education services), let alone invest in the home farm. The monopolistic character of the state marketing infrastructure, and its wont to subsidize higher cost producers at the expense of the subsistence sector, must be traced back not only to the "get rich quick" mentality of much of the post-independence inheritors of these economic institutions, but to their colonial roots.

**Preliminary Draft
Do Not Circulate**

Independence Political Economy. Several elements of the early independence period also contributed significantly to Kenya's present political configuration. One is the independence constitution, which was crafted to protect the "minority" tribes, so-called, of the north, Rift, and coast regions. These were seen as likely to be overwhelmed by the more populous, densely settled areas. They had accordingly thrown up a national collection of leaders and a party (KADU) to argue for their interests at the Lancaster House conference where the independence deal was brokered. These included at their pinnacle Daniel arap Moi, Kenya's current president.

The Lancaster House deal favored these "small tribes". It set up a regional system of governance. Most powers were delegated to regions, which had governors, and were coordinated by a weak central state. The populous groups, allied at that point in KANU, (the majority party under which Kenya actually came to self-governance and then to independence, led by Jomo Kenyatta), felt that this deal was imposed for reasons of "divide and rule" by the colonial power. It quickly marshalled the support to overturn it. KADU's members of Parliament crossed the floor the following year, and the party was folded into KANU, leaving the question of minority fears, rights and protections unaddressed. It is particularly these fears which have resurfaced in the "multi-party" era since 1991.

One-Party State? The issue of contestation between opposed tendencies was put to the test one further time, as a populist politician from the western part of the country launched a new political party with a distinctly socialist cast, the Kenya People's Union, or KPU, in 1966. Its motivation and message was that the Kenyatta regime by then was showing a clear penchant for venality and had abandoned its promises to the outlying regions. This effort was crushed in no uncertain terms; it was made clear that Kenya was to be a one-party state.

No alternative model coming out of the colonial experience to which all Kenyans had been subjected was at hand; the colonial model itself was quite authoritarian. Indeed, within the confines of the one-party state, a fair degree of competition and participation - certainly more than had been possible during the colonial period - was allowed to occur. As long as central control by the regime was not challenged, local politics were permitted - much as they had been during the post-WWII period of the African District Councils, and much as they are in evidence today. Indeed, during the first three elections after independence, more than half of the incumbent members of the Assembly were trounced and replaced, with only a tiny handful of Kenyatta's close cronies being held sacrosanct from the rigors of intra-party contestation.

Economic Expansion. On the economic side, the independence regime was lucky. Resources were abundant. Economic growth fuelled an expansionary state which had room for most of the relevant social groupings. It permitted the construction of a patron-client

**Preliminary Draft
Do Not Circulate**

based regime which was consonant with the locally-competitive but nationally controlled one-party state. As the economy expanded, everyone gained to some degree. The fact which was overlooked was the increase in regional disparities, as those with the lion's share of resources and markets already were those who were able to capitalize on the new opportunities, leaving outlying regions of the country -- and especially those same areas presently characterized as inhabited by the "minority tribes" very far behind. **Regional economic disparities, which fuel the present stalled political transition, are essentially the product of the policy choices made in the first post-independence decade.**

Economic Downturn. This happy situation was not to outlive the first independence government. The oil shocks of the mid and late 1970s hit Kenya as hard as most third-world non-oil producers. From a situation of agricultural growth and increasing real per capita incomes, especially in the smallholder sector, where levels of productivity appear to have increased dramatically, the economy took a downturn. The obvious initial symptom -- non-viable, over-protected import substitution industries -- was followed in the late 70s and early 80s by a stagnation of smallholder production and productivity, the real symptom that all was not well. The high population growth rate meant that real per capita incomes began to decline. By 1986 or early 1987, Kenyans were confronted with an economy that was clearly on the skids, and it had begun to become apparent to individuals and households, not just in the aggregate statistics. School enrollment rates began to drop, for the first time since independence, since parents could not afford fees for all of their children. Morbidity statistics began to rise again as health services deteriorated, greatly compounded by corruption in the drug distribution system and stagnation in the provision of clean water.

Political Implications and Consequences. The economic downturn began almost precisely at the same moment that Jomo Kenyatta, Kenya's first president, died. The reins of power passed over to his Vice President, Daniel arap Moi, in what turned out to be one of Africa's first peaceful and constitutional transitions from one regime to another. The Moi government was very nervous from the start about the possibility that attempts would be made to remove it forcibly and return the Kikuyu to center stage. The regime moved adroitly to shuffle the administrative infrastructure, to prevent centers of resistance and sabotage from within the civil service. New patronage lines were opened up and some of those from the Kenyatta regime gradually but effectively closed down. This resulted in an uncontrolled explosion of subordinate staff in the civil service, which had major negative impact on the productivity and morale of the formerly fairly responsible bureaucracy. The effects of this have hardly been addressed yet, let alone resolved, although the retrenchment efforts under structural adjustment have begun to deal with the budgetary implications (but not those related to the sad diminishment of management capacity and morale).

**Preliminary Draft
Do Not Circulate**

The Moi regime's strategy for building a solid political base involved reallocation of resources away from the central region of the country and out to the Rift Valley and western Kenya. A sense of alarm swept the hitherto favored communities, and the state security apparatus began to pick up evidence of subversive activities. In the early 80s disaffection especially among the student population was rife; state arrests and repressive actions increased. An abortive coup in 1982 -- which appeared in hindsight to have been actually only one of three "plots" in the making -- confirmed to the Moi government its worst fears. It precipitated a downward spiral of repression, arbitrary arrest, and the judicial hearings of obviously forced confessions which began the demoralization and discrediting of the judiciary. The Moi government has never forgotten nor forgiven this abortive coup, which it links clearly with the two communities currently in the "opposition" (12 persons from western Kenya, mostly from Nyanza, were ultimately hanged for treason as a result); Kenya's human rights record and the stature of its judiciary were irremediably damaged by the aftermath.

A series of nonviable economic decisions were made as well, to build coalitions throughout the Rift Valley and Western and Nyanza provinces: the proliferation of maize buying centers in the upper Rift Valley, the promulgation of tea and coffee in western Kenya, the development of state tea plantings around the forests, the development of hydroelectric power in the Upper Rift on the basis of exorbitantly costly commercial loans, and the Lake Basin Development Authority. These ventures, all aimed at reversing the growing regional disparities inherited from the colonial and Kenyatta regimes, were imposed on a shrinking economy. They caused both massive disaffection in the economic "core" regions (Central Province) and alarm in the multilateral and bilateral donor communities. Structural adjustment was the response of the latter; despair and a growing degree of civil violence and anomie the response of the former.

The 1988 Election. The last straw according to some analysts was the reversion to queue voting for the 1988 elections and the obvious "rigging" of this election. While the events associated with the coup and with allegations of subversion frightened the mainstream civil society forces, putting many of them "off" the most strident demands for reform, the rigging of the 1988 elections before their very eyes led to the development of active protest in areas that counted -- the church, the legal profession, the professional societies, the upper reaches of the civil service. From this point on, internal demand for political reform began to surface, in the form of political pressure groups (the original FORD) and the emergence of a virtual revolution in the established church (CPK, PCEA and ultimately Catholic).

External demand that was applied then in the form first of structural adjustment conditionalities (which had been taken less than seriously by Kenya to that point), and secondly of demands for a political opening, became "effective demand". The build up to

**Preliminary Draft
Do Not Circulate**

the 1991 CG meeting and the decision by Pres. Moi acceded to this combination of internal and external demand, albeit in very bad grace and saying from the beginning that he expected nothing good to come out of it, produced the change -- basically commanded by the President and acceded to by his party in parliament -- which led to the 1992 multi-party elections.

Post 1992 Election Trends

Post-election trends are disturbing. The initial year saw relatively open and free political activity, while the opposition parties pondered what to do and KANU forged on ahead to install a minority government on its interpretation of the constitutional provisions. Freedom of speech, which had almost disappeared in the period 1988-1991, returned; there is still a much more open national discourse in the press and in public and private arenas than during that period.

Open speech is one thing but its translation into effective political competition is another. **Party factionalism and organizational incompetence have been made manifest.** The parties have experienced a significant number of defections, based on opportunistic calculations or on extreme financial pressure from the regime, i.e. the calling in of loans and threats of bankruptcy. Twenty-two by-elections have been held, many of them occasioned by defections, others by successful petitions alleging electoral abuses. KANU has picked up nine additional seats in the by-elections. By-elections have been marred in many, though not all, cases by violence and electoral maladministration. The most recent by-election, in Kipipiri (Central Kenya, a strongly opposition area) resulted in an unusual accolade for the Electoral Commission's efforts, and with an embarrassing defeat for KANU. Two more critical by-elections are on the calendar as KANU attempts to roll up a 2/3 majority to permit it to stage-manage a constitutional reform process to its liking.

Other elements of democratization and good governance show equally little progress. The press in particular has been harassed unceasingly, with impoundments of issues of anti-government publications; sedition charges which tie up the publishers and editors for months and ultimately bankrupt them (after which charges are dropped; no sedition charge in connection with the press has actually resulted in a conviction); printing presses have been disabled on at least three occasions; businesses have been threatened with severe penalties if they advertise in the alternative press; and recently the senior political figures in the regime bought out the Standard, one of two remaining non-GOK controlled daily newspapers. Despite this level of repression, which is growing increasingly sophisticated and based on financial pressures rather than hooliganism, the alternative press remains alive and well, though extremely vulnerable.

Human rights violations have not ceased, although the incidence waxes and wanes

**Preliminary Draft
Do Not Circulate**

unpredictably. A human rights lawyer was recently picked up and held for some days, reportedly tortured, and only a week later brought to court. Refugees from neighboring countries are routinely arrested arbitrarily and abused before being forcibly deported, whether they are legally in the country or not.

Generally, the culture of fear and violence has been allowed to grow, with no senior official condemnation. Most important, there is fairly well-founded suspicion that the state itself was behind the initial incidents of "ethnic cleansing" which occurred in the Rift Valley before and during the 1992 election campaign, and which have recurred sporadically since then. These are thought to be the regime's way of demonstrating to the world that "multi-party" democracy does not work for Africa. Not surprisingly, this becomes a self-fulfilling prophecy, as the retribution of one community against others perceived to be interlopers, or perceived as responsible for offenses against the first, is initiated by the hot-heads (mostly unemployed youth), either with or without the provocation of surreptitious recruitment and payment. In the last few days (mid-October, 1995), battles between two ethnic communities have raged in the slums of Nairobi, with a clear "party" label to the conflict -- Nubians of KANU allegiance against Luos of FORD-Kenya. No doubt this conflict will further convince the regime of its correctness in criticizing multi-party politics.

The one brighter spot is the determination of civil society actors to press ahead with the development of effective organizations and advocacy strategies, and with the development of mechanisms for internal self-government in the sector. A critical mass of civil society institutions exists and Kenya's civil society organizations are beginning to supply technical assistance to the rest of the region. They are also beginning to see the need for and way toward organizational capacity building and strategy. Even in the year since the CDIE civil society study there has been considerable growth in capacity in the sector.

Since 1991 the NGO universe has organized an effective resistance to complete state control, and the compromise they reached produced a temporary abatement of the refusal to countenance NGOs. Now, however, it appears that up to 80% of the applications for registration of new NGOs are being rejected. This year there has been a firebombing of Kituo cha Sheria, a long-time grassroots mobilization group which has interested itself in land issues and in organization in the squatter communities in Nairobi and Mombasa, and is thought to have antagonised landlords in those areas.

Summary. Summing up the political context in which the presently stalled transition began, the following salient points need to be factored into our assessment and strategy formulation:

- Regional economic disparities fuel ethnic antagonisms in Kenya. These stem

**Preliminary Draft
Do Not Circulate**

from the colonial economic system and the independence settlement, and have grown since independence. The Moi government has been confronted by the need to deal with them in the context of a shrinking national pie, rather than the growing one of the Kenyatta years.

- Efforts at reallocation to redress these regional imbalances were in many cases economically misconceived and served to emphasize to the communities previously at the "core" of the regime (the Kikuyu-Embu-Meru) that their mistrust of Moi were well-founded; that the regime was out to "finish them" economically.
- The Moi government in turn came into power holding an extreme degree of mistrust of the "GEMA" group as having the intention of overthrowing them, which then translated itself into a reality in 1982 with the not one but two or more coup attempts, the pre-emptive one of which failed. (Ironically, the senior coup plotters who were apprehended were all from the western part of the country, which was the area in which the Moi government thought it was successfully building a viable alternative coalition. Participation from the western regions in the coup shook the regime to the core). The human rights situation took a nosedive at this point from which it has yet to recover, with deterioration in the police and the development of several virtual "private armies."
- The independence of several institutions previously able to check the executive was compromised -- e.g., the parliament (with election rigging), the judiciary; in 1988 the executive forced through parliament bills eliminating the independence of the executive branch's own "checks and balances", i.e. the Attorney General and the Auditor General; these changes were reversed after the November 1991 CG meeting at the time that multi-party politics was acceded to, but the institutions were effectively hobbled from playing any real autonomous "check and balance" role and are either discredited or disabled presently.
- On the positive side, the deterioration in state credibility, the pervasive spread of corruption and the perversion in the electoral process

**Preliminary Draft
Do Not Circulate**

produced a great spurt in the development of civil society. Donor largesse in Kenya, increasingly channeled to the NGO sector, has contributed to this. Civil society had developed what might be called a "critical mass" by the time of the 1992 election, and has now entered a phase of deepening, internal organization and self-governance.

**Preliminary Draft
Do Not Circulate**

Appendix Three: People Met

- The Hon. Oki Ooko-Ombaka, Director, Public Law Institute,
Othaya Road, Kileleshwa, P.O. Box 52011; Tel: 561437; Fax: 565926
- Mr. Erastus Wamugo, CCCC, Box 59743; Tel: 444765 and 442972
- Ms. Njeri Kabeberi, CCCC, Box 59743; Tel: 444765 and 442972
- Mr. Kivutha Kibwana, (formerly Dean, Nairobi University School
of Law), Tel: 565749 and 244634
- Mr. Nicholas Otieno, Civic Resource and Information Centre (CRIC),
P.O. Box 34201; Tel/fax: 713262
- Rev. Patrick Rukenya, Presbyterian Church of East Africa
P.O. Box 48268, Tel: 504417/8 Fax: 504442
- Mr. Gilbert Arum, Acting Chief Executive Officer, National Council
of NGOs; P.O. Box 48278 Tel: 560877, 562312, 562323 Fax: 568445
- Mr. Absalom Elkanah Odembo, National Council of NGOs (Board Member);
World Neighbors, Waumini House, Box 14728, Tel: 440614
- The Hon. Raila Odinga, FORD-Kenya, Member of Parliament for Langata,
East African Spectre, Box 78050; Tel: 336958/87; Fax: 226931/544357
- Bishop David M. Gitari, Dean of the Province (Nairobi), CPK,
Bishop's Road, Box 40502, Tel: 714752/3 and 714755; Fax: 714750
- Rev. Canon Gideon G. Ireri, Director, CPK Justice and Peace Commission
Bishop's Road, P.O. Box 40502, Tel: 716085, Fax: 71450
- The Hon. Agnes Ndeti, DP, Member of Parliament for Makeni,
- The Hon. Norman M. G. K. Nyagah, Member of Parliament for Gachoka
and Deputy Secy Genl, DP; P.O. Box 56395, Tel: 340044/333108/334153
- The Hon. Peter N. Ndwiiga, Member of Parliament for Runyenjes, and
Secretary for Public Policy and Political Affairs, DP, P.O. Box 56395,
Tel: 340044/333108/334153
- Mr. Ahmed Ogle, Org. Secy., DP, Box 56395, Tel: 340044/333108/334153
- Mr. Kibaki Muriithi, Democratic Foundation (DP), Box 56395
Tel: 340044/333108/334153

**Preliminary Draft
Do Not Circulate**

Mr. George Nyamweya, Advocate, DP, Box 56395; Tel: 340044/333108/334153

Mrs. Rose Waruhiu, Director, Democratic Foundation, and Acting Secy
Genl, DP; 10th Floor, Bruce House, Box 58042 Tel: 330868

Mr. John W. Kuria, Chief Executive, Kenya Association of Manufacturers,
(KAM), Peponi Road, P.O. Box 30225 ; Tel: 746006

Mr. Z. N. Kahura, Senior Exec Off, KAM, P.O. Box 30225, Tel: 746005

Ms. Jean Njeri Kamau, International Federation of Women Lawyers (FIDA),
Kindaruma Lane, off Ngong Road, P.O. Box 46324; Tel: 717169

Ms. Wanda Williams, National Democratic Institute, Tel: 724081/582631

Mr. Timothy K. Durgan, Kenya Export Development Support (KEDS),
P.O. Box 40312, Norfolk Towers, Kijabe Street; Tel: 221106 Fax: 220839

Mr. Migwe Kimemia, Export Policy Advisor/KEDS Project Manager,
Private Enterprise Office, USAID, P.O. Box 30261; Tel: 751643 ex. 2220

Mr. Paul C. Guenette, Chief of Party, KEDS, P.O. Box 40312, Norfolk
Towers, Kijabe Street, Tel: 221106 Fax: 220839

Mr. Christopher Mulei, Director, Centre for Governance and Development,
P.O. Box 18379, Daidai Road, South B, Nairobi; Tel: 553860 and 558862

The Hon. Dr. V. Omolo-Opere, Ford-Kenya, Member of Parliament for Mbita,
P.O. Box 34550, Nairobi; Tel: 512658

The Hon. Kamau Icharia, St. Andrew's Towers, P.O. Box 47528, Tel: 725852

Mr. Kimani wa Nyoike, P.O. Box 40301, Nairobi; Tel: 0150-20267 Fax: 0150-22507

Mr. Magayu K. Magayu, Lecturer, School of Journalism and Secy, Association
for a Free and Independent Press (AFIP), P.O. Box 57227 Tel: 336223/241888

The Hon. Njehu Gatabaki, FORD-Asili, Member of Parliament for Githunguri;
Publisher and Editor in Chief, Finance; P.O. Box 44094; Tel: 564572

Mr. Blamuel Njururi, Gen Manager, Oscar Publicity, Box 50932, Tel: 791768

Mr. Mburu Gitu, Co-ordinator, Rights Awareness Program, Legal Resources
Foundation, Waumini House Annex, 1st Floor, Box 67171, Tel: 447135

Mr. Alfred Ndambiri, Co-ordinator, Rights Awareness Program, LRF,
Waumini House Annex, 1st Floor, Box 67171, Nairobi; Tel: 447135

**Preliminary Draft
Do Not Circulate**

The Hon. Amos Wako, Attorney General, Republic of Kenya, Sheria House

Chief Justice Mr. Majjid Cockar, High Court of Kenya, Law Courts

Mr. Justice Z. R. Chesoni, Chairman, Electoral Commission, Anniversary Towers, University Way, Box 45371; Tel: 222072

The Hon. Prof. Peter Anyang' Nyong'o, FORD-Kenya, Member of Parliament for Kisumu Rural and Regional Adviser, Friedrich-Naumann Stiftung; Box 50684, Tel: 442321/446348/448357/445580

Mr. Joe B. Wanjui, Development Member, Africa and Middle East Region, Unilever, Barclays Plaza, Loita Street, Box 49201; Tel:337590;Fax:337577

Mr. James Karuga, former PS Treasury

Mr. Andrew Mullei, Director, ICEG Africa Office

Mr. Gibson Kamau Kuria, Advocate, Kamau Kuria Associates

Ms. Rose W. Waruinge, Waruinge & Waruinge Advocates, (FIDA), Agip House, 6th Floor, Box 72384, Tel: 330516 Fax: 224856

Mr. William Ouko, Principal Deputy Registrar, High Court of Kenya, Law Courts, Box 30041, Tel: 221221/216598 Fax: 333449

Mr. J.K. Waweru, Chief Exec, Kenya National Farmers ' Union (KNFU), Adamali House, Box 43148, Tel: 228894

Donor Community

Mr. Charles R. Bailey, Rep. for Eastern and Southern Africa, Ford Foundation, Silopark House, City Hall Way, Box 41081; Tel:222298 and 246584; Fax: 252830; e-mail: C.Bailey@Fordfound.Org

Mr. Jonathan Moyo, Ford Foundation, Box 41081, Tel: 222298/246584

Ms. Marguerite Garling, Program Officer for Human Rights and Social Justice, Ford Foundation, Silopark House, Tel: 222298 Fax: 252830

Ambassador Henning Kjeldgaard, Royal Danish Embassy, HFCK Building, Koinange Street, Box 40412, Tel: 331088/90 Fax: 334192

Ms. Anne Marie Rosenlund, First Secretary, Royal Danish Embassy HFCK Building, Koinange Street, Box 40412, Tel:331088/90 Fax:334192

Mr. Luke M. Wesonga, Asst Res Rep, UNDP, Kenyatta International Conference Centre, 24th Floor, Box 30218; Tel:228776-9;Fax:331897

**Preliminary Draft
Do Not Circulate**

Mr. James Donovan, Economist, Embassy of Sweden, International House,
Mama Ngina Street, Box 30600

Mr. Hajo Lanz, Friedrich Ebert Stiftung, Forest Road, Box 59947,
Tel: 748338/9 746992; Fax: 750329

Mr. John Lobsinger, Counsellor (Development), Canadian High Comm.,
Haile Selassie Street, Box 30481, Tel: 214804 Fax: 226987

Mr. Phil Evans, Social Development Adviser, British High Commission,
Bruce House, Box 30465, Tel: 335944 Fax: 340260

Lady Sally Healey, First Secretary, Political, British High Comm.,
Bruce House, Box 30465; Tel: 335944 Fax: 340260

Mr. Matthew Wyatt, Kenya Programme Manager, ODA, British High
Commission, Bruce House, Box 30465, Tel: 335944

Dr. Ralf Schroder, Head, Department for Economic Cooperation,
German Embassy, Williamson House, 4th Ngong Avenue, Box 30180
Tel: 712527

Mr. Wiepke van der Goot, Counsellor, European Union, Ragati Road,
Box 45119, Tel: 713020 Fax: 716481

Ms. Peninah Kariuki, International Monetary Fund

Mr. Anders Karlsson, Swedish Embassy, International House, Mama
Ngina Street, Box 30600; Tel: 229042

Ms. Lena Schildt-Herring, Swedish Embassy, International House,
Mama Ngina Street, Box 30600; Tel: 229042

Mr. Richard Anson, Chief of Operations, The World Bank, Hill Park
Building, Upper Hill Road, Box 30577; Tel: 714141

Mr. Arend Pieper, Netherlands Embassy, Uchumi House/City Center

Mr. Kiyoshi Sakai, Japanese Embassy

Mr/s. Leena Viljanen, Finnish Embassy

USAID Foreign Service Nationals

Mrs. Nancy Gitau

Ms. Wanjiku Karanja

Mr. Japheth Mukumbu

Mr. James Kigathi

**Preliminary Draft
Do Not Circulate**

Mr. Njuru Nganga
Mr. Victor Masbayi
Mr. Hudson Masambu (REDSO)
Mr. Joseph Ondigi
Mr. Migwe Kimemia
Mr. Stephen Ragama
Mr. Kombe Randu
Mrs. Nimo Ali
Mr. George Mugo

U.S. Government Personnel Interviewed

Ambassador Aurelia Erskine Brazeal; Tel: 334141

Mr. Timberlake Foster, Deputy Chief of Mission, US Embassy;
Tel:334141

Ms. Marilyn Jackson, Political Officer, US Embassy

Mr. Joe Young, Human Rights Officer, Political Section,
US Embassy

Mr. Steve McGann, Labor Officer, US Embassy

Ms. Marilyn Hulbert, Public Affairs Officer, USIS

Mr. Louis Segesvary, Press Officer, USIS

Mr. Isaac D. Russell, United States Information Service,
301 4th Street, SW; Washington, D.C. 20547; Tel: 202-619-5742

Mr. George Jones, Mission Director, USAID Kenya

Mr. Kiertisak Toh, Deputy Director, USAID Kenya

Ms. Lee Ann Ross, Program Officer, USAID Kenya

**Preliminary Draft
Do Not Circulate**